<u>आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI SANJAY ARORA, AM AND SHRI PAWAN SINGH, JM

आयकर अपील सं./I.T.A. No. 4849/Mum/2013

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

Late Suresh M. Parekh through legal heir Smt. Bhavna Suresh Parekh (Wife) A/002, A-Wing, Shiv Sagar Palace, Plot No. 68, Tilak Nagar, Chembur, Mumbai-400 089	**<u>बनाम</u>**/ Vs.	ITO-13(3)(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAWPP 6687 L		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	None
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Mohd. Rizwan

सुनवाई की तारीख / **Date of Hearing**	:	18.5.2016
घोषणा की तारीख / **Date of Pronouncement**	:	31.5.2016

<u>आदेश / O R D E R</u>

<u>Per Sanjay Arora, A. M.:</u>

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-24, Mumbai ('CIT(A)' for short) dated 21.3.2013, dismissing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 16.12.2010.

2. None appeared for and on behalf of the assessee appellant when her appeal was called out for hearing, nor is there any adjournment application on record. This, despite service of notice of hearing in-as-much as the same, sent per registered post (RPAD), has not been received back unserved. Even on the last two dates as well, i.e., to which dates the hearing was adjourned, being 09.11.2015 and 21.4.2015, none had appeared on behalf of the assessee even as she has appointed a legal representative to represent her. Under the circumstances, it is only considered proper to proceed with the hearing of the appeal and dispose the same after hearing the respondent.

3. At the outset, it was brought to our notice by the ld. Departmental Representative (DR), that the impugned order is also an *ex parte* order, i.e., *qua* the assessee-appellant. The ld. CIT(A) was constrained to pass such an order in view of the several opportunities for hearing (eleven in number), none responded (or responded to by seeking another date of hearing) to by the assessee (from 25.10.2011 to 18.3.2013), as noted by him at para 4 of its order. Further, the ld. DR would draw our attention to para 4.2 of the impugned order whereby the ld. CIT(A) states that in view of the assessee not furnishing any further information or advancing any argument, i.e., absence of additional information available on record in support of her case, he was constrained to concur with the Assessing Officer (A.O.).

4. We have heard the party before us, and perused the material on record. Even as observed during hearing, we are not inclined to agree with the ld. CIT(A); the assessee may not have furnished any further information, but her case deserves to be decided on merits, and should not constrain the appellate authority to take a view in the matter necessarily in agreement with that by the assessing authority. That is, he is obliged to decide the appeal on merits, of-course on the basis of the information and the material on record. We, accordingly, take each of the nine additions/disallowances being impugned by the assessee per her grounds of appeal, as noted at para 4.1 of the impugned order, separately, as follows:

4.1 It is seen from the grounds of appeal raised by the assessee that there are as many as 11 grounds of appeal filed objecting to the assessment made by the Assessing Officer. The additions made by the Assessing Officer have been discussed in the assessment order from para No. 3 to 6 of the assessment order. As mentioned earlier, during the assessment proceedings, the assessee or his authorized representative had filed only partial information in response to the queries raised by the Assessing Officer. Considering the submissions made and arguments advanced at the time of assessment proceedings the Assessing Officer has made the following additions:-

a) Out of Transportation, C & F charges & Ware housing charges	Rs.4,30,385
b) Out of Travelling	Rs. 78,513
c) Out of Telephone	Rs. 21,728
d) U/s. 14A r.w.r. 8D	Rs. 22,402
e) Car Loan Interest	Rs. 61,130
f) Car depreciation	Rs.1,28,432
g) Out of Motor Car exps.	Rs. 6,860
h) LTCG treated as Income from other sources As discussed in para 5	Rs.1,20,000
	Rs.8,69,450

a) Disallowance u/s.40(a)(ia) - Rs.4,30,385/-:

The said disallowance is on account of (non) deduction of tax at source (TDS) on contractual payments, which the assessee was obliged to u/s. 194C of the Act, as listed at para 3 of the assessment order. The non-deduction of tax at source is not in dispute. So, however, the Hon'ble Delhi High Court in *CIT vs. Ansal Landmark Township Pvt Ltd* [(2015) 377 ITR 635 (Delhi), has clarified that the amendment by way of insertion of second *proviso* to section 40(a)(ia) by Finance Act, 2012 w.e.f. 01.4.2013 is clarificatory and, thus, retrospective in nature. The same bears reference to the first *proviso* to section 201(1), also inserted by Finance Act, 2012, w.e.f. 01.7.2012, which therefore is also to be read retrospectively. Section 201 deals with the consequence of the failure to deduct or to pay tax, with the relevant provision providing for the satisfaction of the certain conditions by the assessee whereby it, despite having not deducted the whole or part of any tax shall not deemed to be in

default, i.e., provides for an exception, to which, as afore-stated, reference is made in to section 40(a)(ia). The Tribunal, as in the case of *Mahindra Navistar Automotives Limited vs. Dy. CIT* (in ITA Nos. 3324 & 4645/Mum/2013 dated 13.5.2016) has considered the said amendment as being only an attempt by the Legislature to operationalize and implement the decision by the Hon'ble Apex Court in *Hindustan Coca Cola Beverages Pvt. Ltd. vs. CIT* [2007] 293 ITR 226 (SC), whereby it stands held that TDS being only one of the modes for payment of tax, and which does not in any manner detract from the liability to tax of the deductee-payee, where the same (tax) has been paid by him (payee) it shall operate to save the assessee-payer from deducting the same or for being considered in default for that reason.

We, accordingly, only consider it fit and proper under the circumstances that in view of the foregoing, the matter with regard to the disallowance u/s. 40(a)(ia) to be restored back to the file of the A.O. to allow an opportunity to meet its case with reference to the amended law. The A.O. shall decide the same *qua* each separate default of the assessee in complying with the provision of Chapter VII-B, i.e., *qua* each payer separately, by issuing the definite findings of fact, per a speaking order.

b) Disallowance of travel expenditure – Rs.78,513/-

The same were disallowed in the absence of the assessee furnishing vouchers for the same, so that the A.O. allowed the expenditure, claimed at Rs.1,92,541/-, to the extent the vouchers were produced. The assessee has also not furnished any explanation towards non-furnishing of the vouchers. Under the circumstances, we confirm the disallowance.

c) Disallowance of telephone expenditure and motor car expenditure at Rs.21,728/- and Rs.6,860/- respectively. The same were disallowed at 1/5th of the expenditure claimed in-as-much as the personal user of the said assets could not be denied. We find no infirmity therein and, accordingly, confirm the same.

d) Disallowance u/s.14A – Rs.22,402/-

The same has been made applying Rule 8D in respect of the assessee's exempt income at Rs.8,40,297/-. The assessee's only explanation with regard thereto is that the disallowance *qua* interest component (Rs.1,30,072/-) be not made in-as-much as the assessee has not paid any interest. This was considered as not acceptable in-as-much as the assessee had paid interest to a firm in which he is a partner. We find no merit in the assessee' argument in-as-much as the firm and the partner are separate persons, with the interest paid by one to another being taxable. We, accordingly, confirm the disallowance.

e) Car loan interest (Rs.61,130/-) and depreciation thereon (Rs.1,28,432/-)

The same were disallowed as car had not been shown as a business asset by the assessee. In our view, if the ownership of the car is not in dispute, the car expenses having been already allowed by the A.O., so that the user for business purposes is accepted, there is no question of disallowance of interest on car loan or depreciation on car, save to the extent of $1/5^{th}$, i.e., to which extent the Revenue considers its user as being for personal or for other than business purposes. We, accordingly, only consider it proper that the matter is restored back to the file of the A.O. to allow the assessee one final opportunity to present her case with regard to the ownership of the car, which appears to be so in-as-much as she has also availed a car loan for the same. We may though clarify that the onus to prove her case would be squarely on the assessee, and for which the A.O. shall be obliged to give her a reasonable opportunity, deciding per a speaking order in accordance with law. We decide accordingly.

f) Long Term Capital Gain (LTCG), returned at Rs.(-)2,45,125/-, assessed as income from other source u/s. 56 at Rs.1,20,000/-.

The assessee's claim arises, as stated by her representative, on account of receipt of Rs.5 lacs from the seller on the redemption of advance paid thereto for purchase of flat in 1995-1996 at Rs.3,80,000/-. The assessee treating it as a capital

asset claimed indexation benefit thereon, resulting in the said loss, which was rejected by the A.O. in-as-much as the assessee had itself shown the amount paid as an advance and, further, not entered into in agreement (for the purchase of flat).

It is rather inconceivable that an amount is paid toward booking of a residential unit without any written document, bearing explicit stipulations with regard to various aspects, viz. period for which it is valid; the total cost of the flat along with payment plan; the construction specifications as well as by when it would be complete, etc. What does the receipt state? The payment of Rs.3.80 lacs during 1995-96 as being for the purchase of a flat, and the receipt of Rs.5 lacs from the recipient of the advance would in any case need to be established by the assessee as a fact. How did the 'assessee' and the 'builder' reflect the same in their books of account on the payment/receipt in 1995-96 would be very relevant? The advance, where so, carries certain rights therewith, and where not lapsing by time, is a subsisting capital asset. We, accordingly, agree with the assessee in principle, who though would have to substantiate her case. Subject to the same, we allow the assessee's claim, i.e., in principle. We decide accordingly, and the A.O. shall decide as per law, per a speaking order, issuing definite findings of fact, taking our findings/observations into account and allowing a reasonable opportunity of hearing to the assessee.

5. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on May 31, 2016

Sd/-	Sd/-
(Pawan Singh)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 31.05.2016
व.नि.स./Roshani, Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**