

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI**

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 1889/MUM/2019
Assessment Year: 2014-15**

Mr. Ismail Moshin Sham, 18, Lansdown House, Mahakavi Bhushan Marg, Mumbai - 400039 PAN: AAFPS0117D	Vs.	The Assistant Commissioner of Income Tax 17(2), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Rajiv Khandelwal (AR)

Revenue by : Shri Abi Rama Kartikiyen (DR)

Date of Hearing: 23/07/2019
Date of Pronouncement: 26/07/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 22.02.2019 passed by the Commissioner of Income Tax (Appeals)-28 (for short 'the CIT(A), Mumbai, for the assessment year 2014-15, whereby the Ld. CIT(A) has dismissed the appeal filed by the assessee against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. In the present case, the AO completed the assessment order u/s 143(3) of the Act determined the total income of the assessee at Rs. 90,81,08,050/- as against the return income declared by the assessee at Rs. 19,39,18,044/- after making addition of Rs. 9,43,41,060/- treating the sale consideration of shares in excess of fair market value calculated by the purchaser's valuer, under the head income from other sources u/s 56(2)(vii) of the Act and further making addition of Rs. 41,90,000/-

3. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

“1. The Commissioner of Income Tax (Appeals)-28, Mumbai (hereinafter referred to as the CIT (A) erred in framing an ex-parte order.

The appellant contends that on the facts and in the circumstances of the case and in law, the CIT (A) ought to framed an ex-parte order.

2. The CIT (A) erred in not deciding the following grounds of appeal on merits.

Ground No. 1: Addition on account of considering wrong source of Income of Rs. 9,43,41,060/-

Ground No. 2 : Addition of Rs. 41,90,000/- on account of wrongly considering the income under the head income from other Sources under section 56(2)(vii).”

4. At the outset, the Ld. counsel for the assessee submitted that the impugned order passed by the Ld. CIT (A) is bad in law as the same has been passed without affording a reasonable opportunity of being heard to the assessee. The Ld. counsel further pointed out that on the two dates of hearing, the assessee sought adjournment due to some unavoidable circumstances. That due to some unavoidable circumstances the assessee could not appear on the third date of hearing and the Ld. CIT (A) without issuing any notice dismissed the appeal without going into the merits of the case. The Ld. counsel further submitted that in view of the aforesaid facts, the assessee may be given an opportunity to present its case before the First Appellate Authority.

5. On the other hand, the Ld. Departmental Representative (DR) supporting the order passed by the Ld. CIT (A) submitted that since the assessee has failed to appear before the First Appellate Authority despite sufficient opportunities

afforded to the assessee, the Ld. CIT (A) has rightly dismissed the case for non-prosecution of the appeal.

6. We have heard the rival submissions and also perused the material on record. It is apparent from the impugned order that the ld. CIT(A) has dismissed the appeal of the assessee holding that the assessee is not interested in pursuing its case. Even if it is assumed that the assessee did not appear despite service of notice, the Ld. CIT(A) should have decided the appeal on merits taking into consideration the entire evidence on record in the light of the judgment of the Hon'ble Bombay High court in the case of CIT (Central) Nagpur vs. Premkumar Arjundas Luthra(HUF) 297 CTR 614 (Bom). In the said case, the Hon'ble High court has held that the law does not empower the CIT (A) to dismiss the appeal for non prosecution. The operative part of the judgment of the Hon'ble High court reads as under:-

“From the aforesaid provisions, it is very clear once an appeal is preferred before the CIT (A), then in disposing of the appeal, he is obliged to make such further inquiry that he thinks fit for direct the Assessing Officer to make further inquiry and report the result of the same to him as found in Section 250 (4) of the Act. Further Section 250(6) of the obliges the CIT (A) to dispose of an appeal in writing after stating the points for determination and then render a decision on each of the points which arise for consideration with reasons in support. Section 251(1)(a) and (b) of the Act provide that while disposing of appeal the CIT (A) would have the power to confirm, reduce, enhance or annul an assessment and/or penalty. Besides Explanation to sub- section (2) of Section 251 of the Act also makes it clear that while considering the appeal, the CIT (A) would be entitled to consider and decide any issue arising in the proceedings before him in appeal filed for its consideration, even if the issue is not raised by the appellant in its appeal before the CIT (A). Thus once an assessee files an appeal under Section 246A of the Act, it is not open to him as of right to withdraw or not press the appeal. In fact the CIT (A) is obliged to dispose of the appeal on merits. In fact with effect from 1st June, 2001 the power of the CIT (A) to set aside the order of the Assessing Officer and

restore it to the Assessing Officer for passing a fresh order stands withdrawn. Therefore, it would be noticed that the powers of the CIT (A) is co-terminus with that of the Assessing Officer i.e. he can do all that Assessing Officer could do. Therefore just as it is not open to the Assessing Officer to not complete the assessment by allowing the assessee to withdraw its return of income, it is not open to the assessee in appeal to withdraw and/or the CIT (A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. This is amply clear

from the Section 251(1)(a) and (b) and Explanation to Section 251 (2) of the Act which requires the CIT (A) to apply his mind to all issues which arise from the impugned order before him whether or not the same has been raised by the appellant before him. Accordingly, the law does not empower the CIT (A) to dismiss the appeal for non-prosecution as is evident from the provisions of Act.”

7. So in our considered opinion, the action of the ld. CIT(A) is contrary to the judgment of the Hon'ble High Court discussed above. Hence, in the light of the aforesaid judgment of the Hon'ble High Court, we set aside the ex-party order passed by the Ld. CIT (A) in the interest of justice and send the appeal back to the Ld. CIT (A) for deciding the same on merits after affording a reasonable opportunity of being heard to the appellant/assessee. However, we direct the appellant/assessee not to seek adjournments on frivolous grounds during the proceedings before the Ld. CIT(A).

In the result, appeal filed by the assessee for assessment year 2014-2015 is allowed for statistical purposes.

Order pronounced in the open court on 26th July, 2019.

Sd/-

Sd/-

(G. MANJUNATHA)

(RAM LAL NEGI)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 26/07/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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