

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**
(Through web-based video conferencing platform)

**BEFORE SHRI N.K. CHOUDHRY, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**I.T.A. No. 224/VIZ/2019
(Asst. Year :2014-15)**

M/s. Sri Venkateswara
Constructions, D.No. 26-32-1/2,
Old Gajuwaka, Chaitanyanagar,
Visakhapatnam.

Vs. ACIT, Circle-5(1),
Visakhapatnam.

PAN No. AAIFS 3393 N
(Appellant)

(Respondent)

Assessee by : None.

Department by : Smt.Suman Malik, Sr.DR

Date of hearing : 29/04/2021.

Date of pronouncement : 05/05/2021.

ORDER

PER D.S. SUNDER SINGH, ACCOUNTANT MEMBER

This appeal has been preferred by the assessee against the order dated 12/03/2019 impugned herein passed by the Id.Commissioner of Income Tax (Appeals)-9 [for short, "Id.Commissioner"], Hyderabad u/sec. 250(6) of the Income Tax Act, 1961 (hereinafter referred to as "Act") for the A.Y. 2014-15.

2. In this case, the assessee has filed the return of income on 30/09/2014 admitting total income Rs. 1,66,52,590/- and the

assessment was completed on total income of Rs. 3,93,89,250/-. Against the order of the AO, the assessee went on appeal before the Id. Commissioner and the Id. Commissioner dismissed the appeal of the assessee for non-prosecution. The relevant part of the order of the Id. Commissioner is extracted herein below:-

"3 Aggrieved by the order of the A O the appellant filed the present appeal before the undersigned. I have carefully considered the information available on record. It is seen from the record that 'opportunities were given to the appellant through hearing notice u/s.250 on different dates which were not made use of by the appellant. In response to the above notices issued by the department, the appellant neither appeared before undersigned nor submitted any written submissions except filing the adjournment. As it is assessee's appeal, assessee should have, pleaded for adjudication. But the appellant had not shown any interest in prosecuting the appeal despite several notices issued. Therefore, it is elucidated that the appellant either not interested in prosecuting the appeal or no information/evidences to produce before the undersigned. Therefore, I do 'not find any reason to interfere with the order of the AO and accordingly, the order of the Assessing Officer is hereby confirmed and grounds raised by the appellant."

3. Against the order of the Id. Commissioner, the assessee filed an appeal before this Tribunal and placed the written submissions with regard to merits of the assessee's case.

4. We have heard Id.DR and gone through the *ex parte* order passed by the Id. Commissioner for non-prosecution without considering the merits of the case. Though, the Id. Commissioner is permitted to pass the *ex parte* order but the same should be on merits. In the instant case, the Id. Commissioner passed the order without considering the merits. The ITAT, Delhi Bench in the case of *Pawan Kumar Singhal Vs. ACIT* [(2019) 108

taxmann.com 548 (Delhi – Trib.) held after considering the decisions of the various High Courts and Hon'ble Supreme Court that the Id. Commissioner is required to pass the order on merits stating the points for determination, decision thereon and reasons for decision. For the sake of clarity and convenience, we extract para 4.2 &5 of the order which reads as under:-

"4.2 Further, a perusal of the statutory provisions reproduced already in foregoing paragraph (4.1.1), shows that U/s 250(6) of I.T. Act the Ld. CIT(A) was obliged to dispose of the appeal in writing after stating the points for determination and to then pass an order on each of the points which arose for consideration; and the Ld. CIT(A) was further obliged to state the reasons for his decision on each such points which arose for determination. Thus, the Ld. CIT(A) was duty bound to dispose of the appeal on merits. Moreover, the perusal of Section 251(1)(a) and (b) of I.T. Act and the further perusal of Explanation to Section 251(2) of I.T. Act shows that the Ld. CIT(A) was required to apply his mind to all the issues which arose from the impugned order before him, whether or not these issues had been raised by the Assessee before him. Also, Section 251(1)(a) of I.T. Act provides that while disposing of an appeal against Assessment Order, Commissioner (Appeals) shall have the power to confirm, reduce, enhance or annul the assessment. Similarly, the section 251(1) (b) provides that in disposing of an appeal against an order imposing a penalty, Commissioner (Appeals) may confirm or cancel such orders or vary it so as to either to enhance or to reduce the penalty. On cumulative consideration the provisions U/s 250(6) read with sections 250(4), 250(5), 251(1)(a), 251(1)(b) and Explanation of Section 251(2) of I.T. Act , we come to the conclusion that the Ld. CIT(A) is not empowered to dismiss the appeal for non-prosecution of appeal and is obliged to dispose of the appeal on merits. Once the Assessee files an appeal U/s 246A of I.T. Act, the Assessee sets in motion the machinery designed for disposal of the appeal under Sections 250 and 251 of I.T. Act. If the appeal filed by the assessee fulfils the requirements of maintainability and admissibility prescribed under Sections 246, 246A, 248 and 249 of I.T. Act; neither the Assessee can stop the further working of that machinery as a matter of right by withdrawing the appeal, or by not pressing the appeal, or by non-prosecution of the appeal; nor the first appellate authority, CIT(A)

in this case, can halt this machinery by ignoring either the procedure in appeal prescribed U/s 250 of I.T. Act or powers of Commissioner (Appeals) prescribed U/s 251 of I.T Act. CIT(A), the first appellate authority, cannot dismiss assessee's appeal in limine for non- prosecution without deciding the appeal on merits through an order in writing, stating the points of determination in the appeal, the decision thereon and the reason for the decision. It is well-settled that powers of Ld. CIT(A) are co-terminus with powers of the Assessing Officer. Useful reference may be made to order of Apex Court decision in CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC) in which it was held that AAC has plenary powers in disposing off an appeal; that the scope of his power is co-terminus with that of the ITO, that he can do what the ITO can do and also direct him to do what he failed to do. In this context, useful reference may also be made to Apex Court's decisions in the cases of CIT v. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 and CIT v.B.N.Bhattachargee [1979] 118 ITR 461 (SC) for the proposition that an assessee having once filed an appeal, cannot withdraw it and even if the assessee refuses to appear at the hearing, the first appellate authority can proceed with the enquiry and if he finds that there has been an under-assessment, he can enhance the assessment. Just as, once the assessment proceedings are set in motion, it is not open to the Assessing Officer to not complete the Assessment Proceedings by allowing the Assessee to withdraw Return of Income; it is similarly, by analogy, not open for Ld. CIT(A) to not pass order on merits on account of non-prosecution of appeal by the Assessee or if the Assessee seeks to withdraw the appeal or if the assessee does not press the appeal. When the Commissioner (Appeals) dismisses the appeal of assessee for non-prosecution of appeal by the assessee; in effect, indirectly it leads to same results as withdrawal of appeal by assessee. When the assessee is not permitted to withdraw the appeal filed before the first appellate authority, the first appellate authority is duty bound to not allow a situation to arise, through dismissal of appeal for non-prosecution of appeal before the first appellate authority; in which, in effect, indirectly the same results are obtained as arise from withdrawal of appeal by the assessee. What cannot be permitted in law to be done directly, cannot be permitted to be done indirectly either, as is well settled. In view of the foregoing discussion; and on careful perusal of Section 250(6) r.w.s. 250(4), 250(5), 251(1)(a), 251(1)(b) and Explanation to Section 251(2) of I.T. Act; it is amply clear that Ld. CIT(A) has no power to dismiss appeal in limine for non-prosecution of appeal by the assessee. We draw support from order of Hon'ble Bombay High Court in the case

of CIT v. Premkumar Arjundas Luthra (HUF) [2016] 69 taxmann.com 407/240 Taxman 133 for the propositions that Ld. CIT(A) is required to apply his mind to all issues which arise from impugned order before him whether or not same had been raised by appellant before him; and that CIT(A) is obliged to dispose of the appeal on merits. In this case, it was held as under:

"8..... 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 or 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 Act 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 the 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 the Act."

5. As already noted in foregoing paragraph (4.1) of this order, the Ld.DR did not express any objection to the prayer made on behalf of the assessee for setting aside the order of the Ld. CIT(A) with a direction to Ld.CIT(A) to pass fresh order. In view of the foregoing; we set aside the impugned order of the Ld.CIT(A) and restore the matter to the file of the Ld.CIT(A) with the direction to pass fresh order on admissibility and maintainability of the appeal filed by the assessee before the Ld.CIT(A), after giving due consideration to e-filed documents and other attachments submitted by the assessee at the time of e-filing of appeal. We expressly hold that e-filed documents and other attachments, as well as other information submitted by the assessee at the time of e-filing of appeal before the Ld.CIT(A) must be treated as part of the record of the Ld.CIT(A) and must receive proper consideration at the end of the Ld. CIT(A). If the Ld.CIT(A) is satisfied about admissibility and maintainability of the appeal filed by the assessee before the Ld.CIT(A); then the Ld.CIT(A) is further directed to pass order on merits; stating the points for determination; the decision thereon, and reasons for the decision. Needless to say, the Ld.CIT(A) is required to adhere to principles of natural justice as well as to statutory provisions before he passes fresh order(s) as directed herein above; with particular reference to sections 249, 250 and 251 of the I.T. Act reproduced already in foregoing paragraph (4.1.1) of this order.

5. In the instant case, there is no dispute that the Id.Commissioner has confirmed the order of the AO for non-prosecution without considering the merits. Therefore, in the interest of justice, we consider it is appropriate to remand the matter back to the file of the Id. Commissioner to decide the appeal on merits. Accordingly, appeal of the assessee is allowed for statistical purpose.

6. In the result, appeal filed by the assessee stands allowed for statistical purpose.

Order Pronounced in open Court on this 05th day of May, 2021.

Sd/-
(N.K. CHOUDHRY)
Judicial Member

sd/-
(D.S. SUNDER SINGH)
Accountant Member

Dated: 05th May, 2021.

vr/-

Copy to:

1. The Assessee- M/s. Sri Venkateswara Constructions, D.No. 26-32-1/2, Old Gajuwaka, Chaitanyanatgar, Visakhapatnam.
2. The Revenue -ACIT, Circle-5(1), Visakhapatnam.
3. The Pr.CIT-2, Visakhapatnam.
4. The CIT(A)-9, Hyderabad.
5. The D.R., Visakhapatnam.
6. Guard file.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.