

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

**BEFORE SHRI S.RIFAUH RAHMAN (ACCOUNTANT MEMBER) AND  
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.7611/MUM/2019  
(Assessment Year: 2011-12)**

Shabbirhusain Taiyebali  
Vankanerwala,  
91, Adamji Peerbhai Bldg,  
Room No. 31, Husaini Marg,  
Bhendi Bazaar,  
Mumbai – 400 003

CIT(Appeals)-28,  
Vs. Room No. 401, 4<sup>th</sup> Floor,  
Earnest House, Nariman Point,  
Mumbai – 400 021

**PAN No. ABPPV9727M**

**(Assessee)**

**(Revenue)**

Assessee by : Shri Huzefa M. Mala, A.R  
Revenue by : Shri B.K. Bagchi, D.R

Date of Hearing : 14/10/2021  
Date of pronouncement : 25/10/2021

**ORDER**

**PER RAVISH SOOD, J.M:**

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-28, Mumbai, dated 04.10.2019, which in turn arises from the order passed by the A.O u/s 144 of the Income-tax Act, 1961 (for short 'Act'), dated 26.03.2014 for A.Y. 2011-12. The assessee has assailed the impugned order on the following grounds before us:

- “1. The Ld. CIT(A) erred in confirming the action of Ld. A.O. by confirming order without providing proper opportunity of hearing to the appellant and thereby, violating the principles of natural justice. Hence, proper opportunity of hearing be given to the appellant.
2. The Ld. CIT(A) erred in confirming the action of Ld. A.O. in making addition of Rs.42,77,060/- being cash deposited in bank by treating the same as unexplained cash credit without appreciating the facts and circumstances of the

case. Hence, addition made u/s 68 of Rs.42,77,060/- is unjustified and the same may be deleted.

3. The Ld. CIT(A) erred in confirming the action of Ld. A.O. in making addition of Rs.1,50,00,000/- being addition on account of sale consideration in relation to transfer of immovable property without considering taxable capital gains taxable u/s 45 of the Income Tax Act, 1961. Hence, addition made u/s 45 of Rs.1,50,00,000/- is unjustified and the same may be deleted.
4. Interest and penalty be deleted or reduced proportionately.
5. The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal.”

2. Briefly stated, the assessee had filed his return of income for A.Y. 2011-12 on 29.03.2012, declaring an income of Rs.4,10,050/-. The case of the assessee was thereafter selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings as the assessee failed to comply with the notices issued by the A.O u/s 142(1) of the Act, therefore, the latter was constrained to proceed with and frame the assessment vide an ex-parte order u/s 144 of the Act. Observing, that the assessee had made a cash deposit of Rs.42,77,060/- in his savings bank a/c with Axis Bank Limited, the A.O called upon him to explain the nature and source of the aforesaid amount. Also, the A.O taking cognizance of the fact that the assessee had during the year in question sold an immovable property for a consideration of Rs.1.50 crores, thus, called upon him to furnish the requisite details as regards the source of the aforesaid investment. However, the assessee had failed to furnish any reply as regards the aforesaid details that were called upon by the AO. Accordingly, the A.O vide his order passed u/s 144 of the Act, dated 26.03.2014 assessed the income of the assessee at Rs.1,96,87,110/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, as the assessee despite having been afforded sufficient opportunity had failed to participate in the appellate proceedings, therefore, the CIT(A) held a conviction that the assessee appellant was not interested in pursuing the appeal any further. Backed by his aforesaid conviction, the CIT(A) being of the view that

there was nothing available on the record on the basis of which the additions made by the A.O could be held as erroneous, thus, upheld the same and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that the appeal had been disposed off by the CIT(A) without affording any opportunity of being heard to the assessee appellant. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that as the notices were issued at the old address of the assessee, therefore, the assessee who had shifted his office to a new address remained unaware of the fixation of the appeal. It was, thus, submitted by the Id. A.R that as the assessee had remained divested of an opportunity of being heard in the course of the proceedings before the CIT(A), therefore, the matter in all fairness may be restored to his file for re-adjudication with a direction that a sufficient opportunity of being heard be allowed to him in the course of the set-aside proceedings.

6. Per contra, the Id. Departmental Representative (for short 'D.R') did not raise any objection to the seeking of restoration of the appeal by the assessee's counsel.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the CIT(A) had disposed off the appeal by way of an ex-parte order, for the reason, that the assessee despite having been put to notice about the hearing of the appeal had failed to comply with the same. On a perusal of the order of the CIT(A), we find that he had in pith and substance dismissed the appeal of the assessee for non-prosecution and had failed to apply his mind to the issues which arose from the impugned order and were assailed by the assessee before him. Apart from that, we find substance in the claim of the Id.

A.R as regards the reasons due to which the assessee had failed to participate in the course of the proceedings before the CIT(A). Be that as it may, we are unable to persuade ourselves to accept the manner in which the appeal of the assessee had been disposed off by the CIT(A). In our considered view once an appeal is preferred before the CIT(A), it is obligatory on his part to dispose off the same on merits. We are of a strong conviction that it is not open for the CIT(A) to summarily dismiss the appeal on account of non-prosecution of the same by the assessee. Rather, a perusal of Sec.251(1)(a) and (b) as well as the "Explanation" to Sec. 251(2) of the Act, reveals, that the CIT(A) remains under a statutory obligation to apply his mind to all the issues which arises from the impugned order before him. As per the mandate of law the CIT(A) is not vested with any power to summarily dismiss the appeal for non-prosecution. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Prem Kumar Arjundas Luthra (HUF) (2017) 297 CTR 614 (Bom). In the aforementioned case the Hon'ble jurisdictional High Court had observed as under:

"8. 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 or direct the AO to make further inquiry and report the result of the same to him as found in Sec. 250 of the Act. Further, Sec. 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. Sec. 251(1)(a) and (h) 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-s. (2) of s. 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 s. 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 w.e.f. 1st June, 2001 the power of the CIT(A) to set aside the order of the AO and restore it to the AO for passing a fresh order stands withdrawn. Therefore, it would be noticed that the powers of the CIT(A) are co-terminus with that of the AO i.e. he can do all that A.O could do. Therefore, just as it is not open to the AO 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 s. 251(1)(a) and (b) and Explanation to Sec. 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.”

8. We, thus, not being persuaded to subscribe to the dismissal of the appeal by the CIT(A) for non-prosecution, therefore, “set-aside” the same to his file with a direction to dispose off the same on merits. Needless to say, the CIT(A) shall afford a reasonable opportunity of being heard to the assessee in the course of the de novo appellate proceedings. The grounds of appeal raised by the assessee before us are disposed off in terms of our aforesaid observations.

9. Resultantly, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 25.10.2021

Sd/-  
(S.Rifaur Rahman)  
ACCOUNTANT MEMBER

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

Mumbai;

Dated: 25.10.2021

PS: Rohit

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,  
//True Copy//

(Sr. Private Secretary)  
ITAT, Mumbai