

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B': NEW DELHI**

**BEFORE,
SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No.2147/Del/2017
(ASSESSMENT YEAR 2012-13)**

Corporate International Financial Service Ltd., D-6/6032/2, Vasant Kunj, Delhi-110 070 PAN-AAACS 4742A (Appellant)	Vs.	Income Tax Officer, Ward-6(3), New Delhi. (Respondent)
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Appellant By	None
Respondent by	Ms. Yagya Saini Kakkar, CIT-DR

ORDER

PER ANADEE NATH MISSHRA, AM:

(A) This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-35, New Delhi ["Ld. CIT(A)", for short], dated 01.03.2017 for Assessment Year 2012-13. Grounds taken in this appeal of Assessee are as under:

"1. That the order of the Learned C.I.T. Appeal-35 in dismissing appeal of the assessee without giving sufficient opportunity of being heard is totally wrong, bad in law and needs to be quashed. The CIT (Appeal) disposed off the appeal in a hurry.

2. *That the order of the Learned ITO in making addition of Rs.22,23,00,000/- u/s 68 by treating the share application money raised by the assessee during the F.Y. 2011- 12 as unexplained credit in spite of the fact that the assessee established source of investment, proved identity, genuineness and creditworthiness of the investor companies is totally wrong, bad in law and needs to be quashed.*

3. *That the Learned ITO erred on facts and on law in making the impugned addition of Rs.22,23,00,000/- being the amount of investment made by nine shareholders ignoring the fact that all the nine shareholders have filed confirmation of investment made by them, their PAN, Copy of their income tax return, Balance Sheet, Bank Statements in response to enquiry made by him u/s 133(6). All the nine investor companies are genuine legal entities and are duly registered with the ROC. In spite of the fact that the assessee fulfilled all the requirements of Section 68 and the case is fully covered with the Supreme Court judgment of CIT Vs. Orissa Corporation and Lovely Exports Pvt. Ltd., the AO made the addition. The addition made is totally wrong, bad in law and needs to be quashed.*

4. *That the assessee prays permission to add, delete or amend one or more grounds of appeal.*

5. *That the assessee assures unstinted co-operation in all proceedings before your goodself."*

(B) The assessee filed return of income on 29.09.2012 declaring income of Rs.12,06,210/-. Vide assessment order dated 30.03.2015 passed u/s 143(3) of the Income Tax Act, 1961; an addition of Rs.22,23,00,000/- was made by the Assessing Officer u/s 68 of Income Tax Act and the total income was assessed at Rs.22,35,06,210/-. The assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 01.03.2017; the Ld. CIT(A) dismissed the assessee's appeal. The present appeal before us was

filed by the assessee against the aforesaid impugned appellate order dated 01.03.2017.

(B.1) In the course of appellate proceedings in Income Tax Appellate Tribunal (“ITAT”, for short), notices for hearings fixed on 07.02.2022, 29.11.2021 and 20.09.2021 were sent to the appellant assessee; but these were received back un-served with the postal remarks “*Left*”. Notice of hearing fixed on 06.04.2022 was served with the help of Revenue Authorities. Vide letter dated 28.02.2022 of Jt. Commissioner of Income Tax (OSD); it has been informed that the notice of hearing fixed on 06.04.2022 in ITAT was served on 25.02.2022. The relevant portion of the aforesaid letter F. No. DCIT/CC-04 Misc/2021-22/630 dated 28.02.2022 is reproduced as under:

“To,

*Assistant Registrar,
Income Tax Appellate Tribunal,
10th & 11th Floor, Loknayak Bhawan,
Khan Market, New Delhi-110003.*

Sir/Madam,

Subject: Notice to the parties of the date fixed for the hearing of an appeal under Income-tax Act, 1961 in the case Corporate International Financial Service Ltd. - reg.

Kindly refer to the above mentioned subject.

2. *In this regard your office is informed that this office has in receipt of notice dated 07.02.2022 for DASTI service to the Corporate International Financial Service Ltd for the hearing of an appeal ITA 2147/DEL/2017 as it has not been served at address D-06/6032, Vasant Kunj, Delhi by your office. Accordingly, this office has deputed an official on 14.02.2022 for service of this notice on the said address but the said premise found closed.*

2. *Further, this office has made an enquiry and found another address of the said company that is F.No-1001, Sector-B, PKT-01, Vasant Kunj, New Delhi -110070 and has made DASTI service of the said notice on 25.02.2022. Receiving/acknowledgement of the said notice is enclosed herewith for your kind information please. Therefore, your office may update the address of the said assessee accordingly.*

Encl: As above.

Yours Sincerely,

Sd/-

(Diwakar Singh)

Jt. Commissioner of Income Tax (OSD)

(B.2) At the time of hearing before us on 06.04.2022, none was present on behalf of the assessee. In the absence of any representation from the assessee's side, we have heard the Ld. Commissioner of Income Tax, Departmental Representative ("CIT-DR", for short). She relied on the orders of the Assessing Officer and the Ld. CIT(A).

(C) We have perused the materials on record. We have heard the Ld. CIT-DR. We find from the perusal of the impugned appellate order dated 01.03.2017 of Ld. CIT(A) that the Ld. CIT(A) dismissed the assessee's appeal *in limine* , taking adverse view of non-

compliance with notices of hearing issued by office of the Ld. CIT(A). She has recorded in her impugned order that hearings were fixed on 21.07.2016, 09.12.2016, 03.01.2017, 02.02.2017 and 20.02.2017. The Ld. CIT(A) has further recorded that either there was non-appearance from the assessee's side or adjournment was requested. The Ld. CIT(A) dismissed the assessee's appeal *in limine* on account of non-appearance, stating that non-appearance by the assessee gave an impression that the assessee was not interested in present this appeal. The Ld. CIT(A) did not decide the assessee's appeal on merits, and dismissed the appeal *in limine*.

(C.1) The relevant provisions under I.T. Act regarding procedure in appeal, and powers of the Commissioner [Appeals] are contained in Sections 250 and 251 of I.T. Act, which are reproduced below for ready reference:

“250. (1) The Commissioner (Appeals) shall fix a day and place for the hearing of the appeal, and shall give notice of the same to the appellant and to the Assessing Officer against whose order the appeal is preferred.

(2) The following shall have the right to be heard at the hearing of the appeal—

(a) the appellant either in person or by an authorized representative;

(b) *the Assessing Officer, either in person or by a representative.*

(3) *The Commissioner (Appeals) shall have the power to adjourn the hearing of the appeal from time to time.*

(4) *The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals).*

(5) *The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the form of appeal was not willful or unreasonable.*

(6) *The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.*

[(6A) In every appeal, the Commissioner (Appeals), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed before him under sub-section (1) of section 246A

(7) *On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the assessee and to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.*

251. (1) *In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—*

(a) *In appeal against an order of assessment, may confirm, reduce, enhance or annual the assessment*

(aa) *In appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates*

under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) In an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) In any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.—In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant. ”

(C.1.1) A perusal of the above provisions of law 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 her 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(l)(a) and (b) of I.T. Act and the further perusal of Explanation of Section

251(2) of I.T. Act shows that the Ld. CIT(A) was required to apply her mind to all the issues which arose from the impugned order before her, whether or not these issues had been raised by the Assessee before her. Also, Section 251(l)(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. For this provisions of law to take effect, the Ld. CIT(A) was requested to ensure due application of mind, instead of dismissing the appeal in limine. In view of the foregoing, we are of the view that the Ld. CIT(A) erred in dismissing the appeal in limine for non-prosecution of appeal and that she was required to dispose of the appeal on merits.

(C.1.2) Moreover, 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, the Ld. CIT(A) in this case, can halt this machinery by ignoring the procedure in appeal prescribed U/s 250 of I.T. Act and 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.

(C.2) Further, 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 vs. Kanpur Coal Syndicate 53 ITR 225 (SC) in which it was held that the first appellate authority, the Ld. CIT(A) in the case before us, has plenary powers in disposing off an appeal; that the scope of her power is co-terminus with that of the ITO, that she 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 Hon'ble Apex Court's decisions in the cases of CIT vs. Rai Bahadur Hardutroy Motilal

Chamaria 66 ITR 443 (SC) and CIT vs. B.N. Bhattachargee 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 underassessment, 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, not open for Ld. CIT(A) to not pass order on merits by dismissing the appeal in limine, whether on account of non-prosecution of appeal by the Assessee or due to the Assessee seeking to withdraw the appeal or if the assessee does not press the appeal. When the Commissioner (Appeals) dismisses the appeal of assessee in limine 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 in

limine 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; it is amply clear that Ld. CIT(A) was in error in dismissing the 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 vs. Premkumar Arjundas Luthra (HUF) [2016] 240 taxman 133 for the proposition that Ld. CIT(A) is required to apply her mind to all issues which arise from impugned order before her whether or not same had been raised by appellant before her; and further, 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 dear that while considering the appeal, the CTT(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 CTT(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 CTT(A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. This is amply clear from the Section 251(l)(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."

(C.2.1) In view of the foregoing, we hold that the Ld. CIT(A) erred in dismissing the appeal of the Assessee *in limine* for non-prosecution of appeal by assessee. We set aside the impugned order of the Ld. CIT(A) and we direct the Ld. CIT(A) to pass *denovo* order as per law, in accordance with Sections 250 and 251 of I.T. Act.

(D) In the result, the assessee's appeal is partly allowed for statistical purposes.

This order was already pronounced orally on 06.04.2022 in Open Court, in the presence of CIT-DR, after conclusion of the hearing. This written order is now signed today on 07.04.2022.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

Dated: 07.04.2022

Pk

Sd/-

(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI