

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, KOLKATA
[Before Shri Sanjay Garg, Judicial Member & Shri Girish Agrawal, Accountant Member]**I.T.A. No. 2656/Kol/2019**
Assessment Year: 2009-10

M/s. Kolkata West International City Pvt. Ltd. (PAN: AACCK4887A)	Vs.	Deputy Commissioner of Income-tax, Circle-11(1), Kolkata.
Appellant		Respondent

Date of Hearing	28.03.2022
Date of Pronouncement	18.05.2022
For the Appellant	Shri Punit Agarwal & Sm. Khushaboo Rai
For the Respondent	Smt. Ranu Biswas, Addl. CIT, DR

ORDER**Per Girish Agrawal, Accountant Member:**

This is an appeal preferred by the assessee against the order of Ld. CIT(A)-4, Kolkata dated 31.10.2019 for AY 2009-10 in appeal No. 1871/CIT(A)-4/14-15 against the assessment order passed by DCIT, Circle-11(1), Kolkata u/s.263/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 30.01.2015.

2. Ground no. 1 and 2 of the appeal of the assessee is against the action of the Ld. CIT(A) in passing ex parte order without giving the proper opportunity of being heard to the assessee.

3. Ground no. 3 of the appeal of the assessee is against the action of Ld. CIT(A) in confirming the ad-hoc disallowance of a sum of Rs.55,05,750/- being 75% of the Security Expenses of Rs.73,41,000/- claimed for the year.

4. Briefly stated, facts of the case are that the original assessment order passed in this case by the AO on 19.12.2011 against the return of income filed by the assessee on 24.09.2009 declaring total income of Rs.1,15,94,328/-. The AO in the original assessment noted that the assessee claimed provision for leave encashment and provision for gratuity which has been considered by him as disallowable u/s. 43B following the decision of Hon’ble Calcutta High Court in the case of Exide Industries Ltd. Vs. Union of India (2007) 292 ITR 470 (Cal). Thereafter, the AO also noted from the accounts that various expenses in

the nature of brokerage & commission, travelling, electricity charges, property development expenses, printing & stationery, gifts, communication expenses, legal & professional charges, service & maintenance charges, security charges, MYSAP Implementation charges, consultancy charges, miscellaneous expenses etc. which have been debited to the P&L Account and claimed as revenue expenditure which have been dealt with by the AO separately and allowed some of the expenses fully and some of the expenses partly except dealing with the Security Expenses.

5. Subsequently, CIT-IV, Kolkata exercised its revisionary power u/s. 263 of the Act and directed the AO to reassess the income of the assessee vide order dated 13.03.2014 passed u/s. 263 of the Act, which is as under:

OFFICE OF THE COMMISSIONER OF INCOME TAX, KOL-IV, P-7, CHOWRINGHEE SQUARE, KOLKATA-69.	
1. Name of the assessee & address.	M/s. Kolkata West International City Pvt. Ltd. 55 & 55/1, Chowringhee Square, Kolkata - 700 071.
2. Assessment year.	2009-10
3. PAN. No.	AABCK3422E
4. Date of order.	13-03-2014

ORDER U/S.263 OF THE I.T.ACT,1961.

In this case assessment order completed on 09-12-2011. Subsequently on examination of assessment records it was noticed that in the earlier year i.e. A.Y-2007-08 the assessee company had claimed various expenses out of which the Assessing Officer disallowed 75% for preceding year in 2007-08 and allowed only 25% to the assessee. In the current year the assessee claimed similar expenses amounting to Rs. 73,41,000/-, but in the current year the A.O did not follow the same disallowance. Since the nature of the business was remained the same during the previous year, therefore, the same methodology could have been adopted for the aforesaid expenditure.

A notice U/s 263 was issued in response to which Shri A. K. Tulsyan, A.R of the assessee appeared and submitted written reply. In the submission the assessee submitted that the addition made by the A.O. in earlier year was already deleted by Id. CIT(A).

After considering the entire case the assessment is being set aside to the table of the Assessing Officer with the direction to have a fresh look into the matter. The assessing officer must ensure for that any disallowance which is required to be made should be based on merit and the disallowance should not be made on ad-hoc basis. As such disallowance which will made must stand the test of appeal. The stands of the department taken before the ITAT is also to be considered while computing the assessment proceedings. With the above remarks the assessment is being set aside.

(D. N. Mishra)
Commissioner of Income Tax: Kol-IV,
Kolkata.

Dated : 13-03-2014

M. No. CIT.Kol-IV/ 263/2013-14/ 792)
Copy to
1. M/s. Kolkata West International City Pvt. Ltd
2. J. C.I.T, Range-11, Kolkata.
3. DCIT, Cir.-11, Kolkata.

(Sanjib Kr. Paul)
DCIT, Hqrs.4, Kol.
For CIT-IV, Kolkata.

6. Consequent to the order passed u/s. 263 of the Act the assessee filed appeal before ITAT vide ITA No. 1094/Kol/2014. In the meantime, the AO framed consequential assessment u/s. 263/143(3) dated 30.01.2015 determining total income at Rs.1,15,94,330/- inter alia, making ad-hoc disallowance of a sum of Rs.55,05,750/- being 75% of the Security Expenses of Rs.73,41,000/- without taking into consideration the order of Ld. CIT(A) for AY 2007-08 in assessee's own case who had deleted the ad-hoc disallowance made @ 75% of the total security expenses of Rs.34,72,000/- against which Department had preferred an appeal before the Hon'ble ITAT, Kolkata and the decision was pending.

7. Aggrieved, the assessee preferred an appeal before the First Appellate Authority, who vide his ex parte order without going into the merits of the case dismissed the appeal of the assessee. Aggrieved against the said order, the assessee is in appeal before us.

8. At the time of hearing, the Ld. Counsel for the assessee though argued before the bench that the order of the Ld. CIT(A) should be set aside as the same is a cryptic and non-speaking order which has been passed without going into the merits of the case and without affording reasonable opportunity of being heard to the assessee. The issue is covered in favour of the assessee vide its own case being ITA Nos. 2157 & 2158/Kol/2013 for AYs. 2007-08 and 2009-10 dated 05.10.2016. Before us, the Ld. AR of the assessee also submits that the impugned order of the Ld. CIT(A) is dated 31.10.2019. The order of the Coordinate bench of this Tribunal (supra) in the case of the assessee itself for the AY 2009-10 and 2007-08 against the assessment order u/s. 143(3) was pronounced on 05.10.2016 deleting, inter alia, the additions made in respect of Security Expenses. This order of the Tribunal was available to the Ld. CIT(A) while disposing of the appeal before him against the assessment order passed u/s. 143(3)/263 of the Act. However, no follow up and no cognizance was taken by the Ld. CIT(A) in respect of the orders of the coordinate bench of ITAT, Kolkata in assessee's own case (supra). He also submitted before the AO that the decision of the Hon'ble ITAT is awaited. This explanation of the assessee was found untenable by the AO who proceeded to make disallowance as made in the earlier year @ 75% of Rs.73,41,000/- amounting to Rs.55,05,750/-. He also submitted that the Ld. CIT(A) dismissed the appeal of the assessee merely on non-prosecution, even though the order of the coordinate bench of ITAT, Kolkata was available. Ld. Counsel also referred to the

provisions of section 250 of the Act which contains 'Procedure in Appeal' to be followed by the ld. CIT(A) while disposing of the appeal.

9. Per contra, the Ld. DR heavily relied on the order of the Ld. CIT(A) and urged before the bench not to interfere with the order of the Ld. CIT(A) and the same may be confirmed as assessee failed to attend the hearings despite several opportunities given by the authority.

10. We have heard rival submissions and gone through the facts and circumstances of the case. We find that the appeal of the assessee is against the action of Ld. CIT(A) in confirming the ad-hoc disallowance of a sum of Rs.55,05,750/- being 75% of the Security Expenses of Rs.73,41,000/- claimed for the year. The Ld. CIT(A) dismissed the appeal of the assessee merely on non-prosecution.

11. Before we advert to the facts and law involved in this appeal before us, it is worth apprising ourselves on the law governing the issue raised. Ld. Counsel has referred to section 250 of the Act containing 'Procedure in Appeal'. Section 250 of the Act is reproduced as under:

“250. Procedure in appeal

(1) The⁷ Deputy Commissioner (Appeals)]⁸ or, as the case may be, 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 the⁹ 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 authorised representative;

(b) the¹⁰ Assessing] Officer, either- in person or by a representative.

(3) The¹ Deputy Commissioner (Appeals)]² or, as the case may be, the Commissioner (Appeals)] shall have the power to adjourn the hearing of the appeal from time to time.

(4) The³ Deputy Commissioner (Appeals)]⁴ or, as the case may be, the Commissioner (Appeals)] may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the⁵ Assessing] Officer to make further inquiry and report the result of the same to the⁶ Deputy Commissioner (Appeals)]⁷ or, as the case may be, the Commissioner (Appeals)].

(5) The⁸ Deputy Commissioner (Appeals)]⁹ or, as the case may be, 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 the¹⁰ Deputy Commissioner (Appeals)]¹¹ or, as the case may be, the Commissioner (Appeals)] is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(6) The order of the¹² Deputy Commissioner (Appeals)]¹³ or, as the case may be, 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.

(7) On the disposal of the appeal, the¹⁴ Deputy Commissioner (Appeals)]¹⁵ or, as the case may be, the Commissioner (Appeals)] shall communicate the order passed by him to the assessee and to the¹⁶ Chief Commissioner or Commissioner].

12. From the sub-section (4) of section 250, we note that before disposing the appeal, Ld. CIT(A) may make such inquiry as he thinks fit or direct the AO to make further inquiry and report the result of the same to Ld. CIT(A). Further, sub-section (6) requires that disposal of appeal shall be in writing and shall state the points for determination to arrive at a decision thereon and most importantly the reasons for the decision. The fact of appeal by department in assessee's own case on the same issue pending before the ITAT is on record as noted by the AO in his order which ought to have been inquired upon by the Ld. CIT(A). Principles governing the exercise of powers by the First Appellate Authority are contemplated under sections 250 and 251 of the Act, breach of which has far reaching consequences on the administration of justice culminating in the litigant approaching the higher appellate authority. It is required that the first appellate authority viz. CIT(A) will appreciate the evidence, consider the arguments and apply the law on the given set of facts and circumstances and arrive at findings.

13. The Ld. CIT(A) ought to have disposed of the appeal of the assessee by a speaking order after affording reasonable opportunity of being heard to the assessee and by following the 'procedure in appeal' defined in section 250 of the Act. Without doing so, the Ld. CIT(A) cannot dismiss the appeal of the assessee on the ground of non-appearance. For this proposition, we draw our strength from the decision of Hon'ble Mumbai High court in the case of CIT Vs. Premkumar Arjundas Luthra (HUF) (2016) 69 taxmann.com 407 (Bombay) wherein the Hon'ble High Court has observed as under:

"7. An appeal is filed with the CIT(A) from appealable orders listed in Section 246A of the Act. We find that the procedure in appeal before the CIT(A) and the powers of the CIT(A) are governed by Sections 250 and 251 of the Act respectively. The relevant provisions for consideration are as under:—

'Procedure in appeal

250 (1)

(2)

(3)

(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)

(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)

(7)

Powers of the Commissioner (Appeals)

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

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.

(aa)

(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)

(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.'

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 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."*

14. We also find that the coordinate bench of Delhi Tribunal followed the above order of Hon'ble Bombay High court in the case of Ms. Swati Pawa Vs. DCIT reported in (2019) 103 taxmann.com 300 (Delhi-Trib.) wherein it has been held as under:

"4.2 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 on merits, in a summary manner, 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 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 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 in a summary manner; 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. 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."

15. Though the Id. CIT(A) failed to follow the procedure in appeal as enunciated u/s. 250 of the Act for which the matter could have been remanded back to the file of Ld. CIT(A). However, since the matter is covered by the decision of the coordinate bench of ITAT, Kolkata in assessee's own case (supra), we are inclined to dispose it of by taking into cognizance the said order brought on record by the Ld. Counsel of the assessee.

16. We, thus find that the issue of 'Security Expenses' was dealt by the coordinate bench of this Tribunal while disposing of the appeal filed by the department in assessee's own case (supra) wherein it was considered as under:

"2. The first issue to be decided in these appalls is as to whether the Ld. CIT(A) is justified in deleting the disallowance of expenses, made on account of Travelling & Conveyance, Brokerage & Commission, Advertisement, Publicity & Marketing, legal & Professional charges, service, maintenance charges, rent, rates & taxes, security expenses, consultancy charges and miscellaneous expenses, in the facts and circumstances of the case. (emphasis by us)

2.8.1. We find that out of the total expenses incurred of Rs.48,16,12,000/-, a sum of Rs.31,22,58,000/- was transferred by assessee to work in progress and Rs.11,86,10,000/- being expenses not related to project development was debited in profit and loss account and balance sum of Rs.5,07,44,000/- was transferred to fixed assets by way of capitalization. These facts are not in dispute before us. We find that the expenditure incurred towards advertisement, marketing, publicity expenses, printing and stationery, brokerage, commission, car hire charges, legal and professional charges etc. fall under the head General Administrative Costs which should not be included in the project cost as per the guidance noted supra. However, we find that the assessee had erroneously claimed insurance as a revenue expenditure instead of allocating the same to project costs as per the guidance note. To that extent, the argument of the Ld. DR is well appreciated. We find that the other expenditures incurred by the assessee supra are squarely to the allowed as revenue in nature as they are not related to project cost. Hence, we find that the Ld. CIT(A) had rightly granted relief by deleting the disallowance made on that count. The decision rendered herein for the AY 2007-08 would apply with equal force for the AY 2009-10 also except with variance in figures. Accordingly, the ground no. 1 raised by the revenue for the AYs 2007-08 and 2009-10 is partly allowed."

17. Thus, following the decision of the coordinate bench of ITAT, Kolkata in assessee's own case cited supra, we find it fit to delete the addition of ad-hoc disallowance in respect

of “Security Expenses” disallowed for a sum of Rs.55,05,750/- being 75% of the Security Expenses of Rs.73,41,000/- claimed for the year.

18. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 18th May, 2022.

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 18.05.2022

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant– M/s. Kolkata West International City Pvt. Ltd. Vichitra, Salap Junction, Unit No. 27 & 28, C/o Kolkata West International City Pvt. Ltd. , NH-6, Howrah, Amta Road, And Bombay road Crossing, Howrah-711403.
2. Respondent – DCIT, Circle-11(1), Kolkata.
3. CIT(A)-4, Kolkata. (sent through e-mail).
4. CIT , Kolkata.
5. DR, ITAT, Kolkata, (sent through e-mail).

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata