

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.2406/Mum/2021
(Assessment Year :2014-15)**

M/s. Reliance Infrastructure Ltd., Ground Floor, Reliance Centre 19, Walchand Hirchand Marg Ballard Estate Mumbai – 400 001	Vs.	ACIT 14(1)(2) Room No.455, Aaykar Bhavan M.K. Marg Mumbai-400020
PAN/GIR No.AACCR7446Q		
(Appellant)	..	(Respondent)

Assessee by	Shri Jitendra Sanghvi
Revenue by	Shri Prabhat Kumar Gupta
Date of Hearing	18/05/2022
Date of Pronouncement	23/05/2022

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.2406/Mum/2021 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre (NFAC), dated 29/11/2021 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 18/03/2019 by the Id. Dy. Commissioner of Income Tax- 14(3)(1), Mumbai (hereinafter referred to as Id. AO).

2. The assessee has raised the following grounds of appeal:-

“A. DISMISSAL OF APPEAL UNDER THE DIRECT TAX VIVAD SE VISHWAS ACT, 2020:

1. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter referred to as CIT(A)] erred in dismissing the appeal as withdrawn under the Direct Tax Vivad se Vishwas Act, 2020 (VSV) in respect of appeal no. CIT(A) 22, Mumbai/10020/2019-20 filed against the Assessment Order passed u/s. 143(3) rws 147 of the Act dated 18.03.2019.*

Your Appellant submits that the appeal no. CIT(A) 22, Mumbai/10020/2019-20 has been filed against the Assessment Order passed u/s. 143 rws 147 of the Act dated 18.03.2019 and that no dispute resolution under VSV was sought in respect of this appeal no. 10020/2019-20 and therefore the order of CIT(A) ought to be quashed.

2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in dismissing appeal no. CIT(A) 22, Mumbai/10020/2019-20 related to the order u/s. 143(3) rws 147 of the Act instead of appeal no. CIT(A) 22, Mumbai/10068/2018-19 related to order u/s. 143(3) rws 250 of the Act.*

Your Appellant submits that dispute resolution under VSV was sought in respect of appeal filed against the order u/s. 143(3) rws 250 of the Act for which final certificate in Form 5 bearing no. 33869700070421 dated 07.04.2021 was issued pursuant to which the CIT(A) order dated 05.12.2021 was passed dismissing the said appeal.

Your Appellant submits that the appeal no. CIT(A) 22, Mumbai/10020/2019-20 filed against the Assessment Order u/s. 143(3) rws 147 of the Act dated 18.03.2019 be decided on the facts and merits of the case.

Without prejudice to the above, our grounds on merit are as under:

B. RE-OPENING OF ASSESSMENT IS BAD IN LAW:

1. *On the facts and in the circumstances of the case and in law, the Learned Deputy Commissioner of Income Tax - 14(3)(1), Mumbai [hereinafter referred to as Assessing Officer] erred in re-opening the assessment u/s.147 of the Income-tax Act, 1961 ("the Act").*

The Appellant submits that the re-opening of the assessment u/s. 147 of the Act is bad-in-law, illegal and the same ought to be quashed.

2. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in reopening the assessment u/s. 147 of the Act on basis of details / evidences received from the Directorate of Revenue Intelligence,*

Mumbai ("DRI") without providing the same to the Appellant and without providing an opportunity for cross examination of the said information / party.

The Appellant submits that the reopening of assessment on the basis of details / evidences received from the DRI without providing the same to the Appellant and without providing an opportunity for cross examination of the said information / party is bad in law, illegal, void and the said order ought to be quashed.

C. PRINCIPLES OF NATURAL JUSTICE:

3. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in passing the re-assessment order u/s. 143(3) r.w.s. 147 of the Act without providing the details / evidences received from the DRI to the Appellant and without providing an opportunity for cross examination of the said information / party relied by the Assessing Officer, thereby passing the re-assessment order in violation of principle of natural justice.*

The Appellant submits that the re-assessment order u/s. 143(3) r.w.s. 147 of the Act passed is bad-in-law, illegal, void and the same ought to be quashed.

WITHOUT PREJUDICE TO THE ABOVE GROUNDS:

D. DISALLOWANCE OF SO-CALLED INFLATED COAL EXPENSES OF RS. 67,11,80,138:

4. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in disallowing the so-called inflated coal expenses of Rs. 67,11,80,138.*

The Appellant submits that the above disallowance is wrongly made and the same ought to be deleted.

5. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in disallowing the so-called inflated coal expenses of Rs. 67,11,80,138 without providing the details / evidences received from the DRI to the Appellant and without providing an opportunity for cross examination of the said information / party relied by the Assessing Officer.*

The Appellant submits that the above disallowance of so-called inflated coal expenses of Rs. 67,11,80,138 is wrongly made and the same ought to be deleted.

6. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in disallowing the so-called inflated coal expenses of Rs. 67,11,80,138 on the alleged ground that the Appellant has purchased coal at inflated price without appreciating the fact that the Appellant has purchased coal after taking quotations from various parties and thereafter purchased the coal at lowest price bid by vendors.*

The Appellant submits that the purchase of coal cost is not at inflated price and the above disallowance of so-called inflated coal expenses of Rs. 67,11,80,138 is wrongly made and the same ought to be deleted.

7. *On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in disallowing the so-called inflated coal expenses of Rs. 67,11,80,138 without appreciating the fact that cost of coal is integral part for determining the tariff price and the cost of coal already recovered as part of tariff and credited to profit and loss account through tariff of electricity sold is offered to tax.*

The appellant submits that the disallowance of the above coal cost has resulted in taxing the recovery of coal cost without allowing the coal cost. The Assessing Officer therefore be directed to delete the above disallowance.

8. *Without prejudice to the above, the Assessing Officer be directed to exclude the amount of income offered for tax in respect of the above so-called inflated coal expenses while computing the total income of the Appellant.*

3. We have heard rival submissions and perused the materials available on record. At the outset, we find that the Id. CIT(A) NFAC had dismissed the appeal filed by the assessee as withdrawn on the premise that assessee had availed Vivad Se Vishwas Scheme and settled this tax dispute. To buttress this fact, the following chronology of events would be relevant:-

<u>Date</u>	<u>Particulars</u>
30/12/2016	Order passed u/s.143(3) of the Act. This order was appealed before the Id. CIT(A)
26/12/2017	Order passed by the Id. CIT(A). No appeal preferred by the assessee before this Tribunal against this Id. CIT(A) order
08/05/2018	Order giving effect to Id. CIT(A) was passed by Id. AO wherein the Id. AO treated the foreign exchange fluctuation loss as capital in nature in the sum of Rs.6,55,54,913/-. The assessee preferred again an appeal before the Id. CIT(A).

29/08/2018	Later the assessment of the assessee for the A.Y.2014-15 was sought to be reopened by issuance of notice u/s.148 of the Act.
18/03/2019	Order passed u/s.143(3) r.w.s.147 of the Act wherein the disallowance of inflated coal expenses of Rs.67,11,80,138/- was made by the Id. AO, among others. This order was appealed by the assessee before the Id. CIT(A)

3.1. Hence, from the aforesaid list of dates and gists, it could be seen that two appeals were pending before the Id. CIT(A) i.e. (i) appeal filed against the order giving effect to Id. CIT(A) dated 08/05/2018 and (ii) appeal against the order u/s.143(3) r.w.s. 147 of the Act passed by the Id. AO on 18/03/2019.

3.2. We find that assessee had availed Vivad Se Vishwas Scheme by filing an application in Form No.1 & 2 only in respect of first proceedings pending before the Id. CIT(A) i.e.143(3) r.w.s. 250 dated 08/05/2018. The only dispute pending in this proceeding was settled by the assessee under Vivad Se Vishwas Scheme for the A.Y.2014-15. This is very evident from Form No.1 enclosed in page 21 of the paper book filed by the assessee wherein the relevant Section 143(3) r.w.s. 250 dated 08/05/2018 has been clearly mentioned by the assessee under the column "Information relating to dispute" in PART B. Even the disputed figure of Rs.6,55,54,913/- being the treatment of foreign exchange fluctuation loss was clearly mentioned in Form No.1 filed by the assessee under Vivad Se Vishwas Scheme. Pursuant to receipt of Form No.3 from the competent authority, the assessee had duly paid the taxes thereon under VSV Scheme and Form No.5 has also been received from PCIT, Mumbai-6 by the assessee settling the tax arrears for A.Y.2014-15 in

respect of first proceeding before the Id. CIT(A) i.e. appeal against 143(3) r.w.s. 250 dated 08/05/2018.

3.3. However, the second appeal which was pending before the Id. CIT(A) against the order passed by the Id. AO u/s.143(3) r.w.s. 147 of the Act dated 18/03/2019 was never sought to be settled by the assessee under Vivad Se Vishwas Scheme. In this regard, the Id. AR rightly placed reliance on the CBDT Circular No.9/2020 dated 22/04/2020 which was a clarification issued under the provisions of Direct Tax Vivad Se Vishwas Act, 2020, wherein under Frequently Asked Questionnaire (FAQ) vide Question No.19, this aspect is clarified. The question no. 19 and the reply given by the CBDT is reproduced hereunder:-

“19. The assessment order under section 143(3) of the Act was passed in the case of an assessee for the assessment year 2015-16. The said assessment order is pending with ITAT. Subsequently another order under section 147/143(3) was passed for the same assessment year and that is pending with CIT (Appeals)? Could both or one of the orders be settled under Vivad se Vishwas?”

Ans. The appellant in this case has an option to settle either of the two appeals or both appeals for the same assessment year. If he decides to settle both appeals then he has to file only one declaration in Form No. 1. The disputed tax in this case would be the aggregate amount of disputed tax in both appeals.

3.4. The aforesaid CBDT Circular clearly enables the assessee to avail Vivad Se Vishwas Scheme to avail VSV only for one proceeding , even when two parallel proceedings were pending before appellate forums. Hence, we hold that the Id. CIT(A) grossly erred in dismissing the appeal of the assessee as withdrawn on the mistaken premise that assessee had availed Vivad Se Vishwas Scheme. In view of this, we deem it fit and appropriate to remand this appeal to the file of the Id. CIT(A) for denovo adjudication on merits. The assessee is at liberty to furnish additional evidences, if any, in support of this ground of appeal. Accordingly, the grounds raised by the assessee are allowed for statistical purposes.

4. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 23/05/2022 by way of proper mentioning in the notice board.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 23/05/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai