

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.1200/Kol/2016
(निर्धारण वर्ष / Assessment Years: 2008-09)

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& आयकर अपील सं/ I.T.A. No.1201/Kol/2016
(निर्धारण वर्ष / Assessment Years: 2010-11)

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आयकर अपील सं/ I.T.A. No.1199/Kol/2016
(निर्धारण वर्ष / Assessment Years: 2007-08)

Bates India Pvt. Ltd 2 nd Floor, Saberwal House, 55 B, Mirza Ghalib Street, Kolkata -700016.	बनाम / Vs.	The Dy. Commissioner of Income Tax, Circle-8, Kolkata, P7, Chowringhee Square, Kolkata-700069.
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Cross Objection No. 37/Kol/2016

Arising out of I.T.A. No.842/Kol/2016

(निर्धारण वर्ष / Assessment Years: 2006-07)

Bates India Pvt. Ltd 2 nd Floor, Saberwal House, 55 B, Mirza Ghalib Street, Kolkata -700016.	बनाम / Vs.	JCIT, (OSD), Circle-8(1) Kolkata.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCC3474A		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Ms. Aarti Visanji (Adv.)
Revenue by:	Shri Sanyam Joshi (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 18/05/2022

घोषणा की तारीख /Date of Pronouncement: 31/05/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals/cross objection preferred by the assessee against the order of the Ld. CIT(A)-16 respectively. First of all, we deal with the Cross Objection 37/Kol/2016 arising out of ITA. No.842/Kol/2016.



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2. At the outset, the Ld. AR of the assessee Ms. Aarti Visanji brought to our notice that the ITA. No.842/Kol/2016 (Department Appeal) for A.Y.2006-07 has been dismissed due to the low tax effect circular of CBDT and the CO No. 37/Kol/2016 was filed by assessee against the department appeal [ITA. No.842/Kol/2016] and since the CO of assessee was only supporting the action of the Ld. CIT(A) in deleting the director's remuneration which was disallowed by AO u/s 40A(2)(b) of the Income Tax Act, 1961 (hereinafter "the Act") and in the light of the fact that the departments appeal has been dismissed for A.Y.2006-07, the cross objection of assessee CO No.37/Kol/2016 has become infructuous. In the light of the aforesaid facts which could not be controverted and taking note that the CO was supporting the Ld. CIT(A's) actions and the revenue appeal having being dismissed, CO of assessee does not survive and therefore stands dismissed.

3. Coming to the A.Y.2007-08 & 2008-09, the assessee's appeals basically emanates from the action of the AO passing the rectification order u/s 154 of the Act, consequent to the disallowance of set off of loss consequent to *re-opening* of assessment u/s 147 of the Act for A.Y. 2006-07 and reassessment order passed pursuant to it.

4. According to the Ld. AR, the AO's actions of reopening the assessment for A.Y.2006-07 was challenged by the assessee before this Tribunal (ITA. No.1045/Kol/2016 for AY. 2006-07) which was allowed by the Tribunal by order dated 31.08.2021 wherein the Tribunal was pleased to quash the reassessment order for A.Y.2006-07 dated 24.03.2014 by holding as under: -



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“8. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted from the above reasons recorded that the complete details were available before the Assessing Officer during the course of original assessment proceedings and filed complete details in the revised return of income filed on 30.08.2008, after which the assessment was framed under section 143(3) of the Act. The AO framed the assessment under section 143(3) of the Act vide order dated 15.12.2008 and assessing officer allowed credit for the entire TDS claim by the assessee company in this return of income. Even, from the reasons recorded, it is clear that nothing new tangible has come to the hands of the AO as is clear from the reasons recorded therein and there is no whispered about any failure on the part of the assessee to disclose fully and truly any material fact necessary for its assessment for the relevant assessment year 2006-07. Hence, we are quashing the re-opening of assessment proceedings and this issue of jurisdiction of assessee’s appeal is allowed.”

5. According to the Ld. AR, since the additions/disallowance made by the AO for A.Y.2007-08 & 2008-09 u/s 154 of the Act was based on the action of the AO to have made additions/disallowance after reopening the assessment for A.Y.2006-07 u/s 147 of the Act and consequent passing of the re-assessment order dated 24.03.2014, which has been quashed by this Tribunal vide order dated 31.08.2021(supra), the foundation for passing rectification u/s 154 of the Act for AY.2007-08 & 2008-09 is non-existing in the eyes of law. In the light of the same, since the foundation for making the rectification for AY.2007-08 & 2008-09 has gone, consequent action of AO also falls. The aforesaid factual assertion made by the Ld. AR could not be controverted by Ld. Departmental representative. In the



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light of the aforesaid facts, we note that the additions/disallowance for A.Y.2007-08 & 2008-09 was consequent/after effect to the action of the AO's re-assessment order after reopening for A.Y.2006-07 which has been quashed by the Tribunal as noted (supra). Since the foundation for rectification u/s 154 of the Act for AY 2007-08 & 2008-09 has gone after quashing of the very re-opening, the reassessment order becomes non-est in the eyes of law. Therefore, the very basis/foundation of rectification order for u/s 154 of the Act AY.2007-08 & 2008-09 cannot survive; and in such a scenario, the impugned action of the Ld.CIT(A) is squarely covered by the legal maxim "*sublato fundamento credit opus*" meaning, in case a foundation is removed, the super structure falls. In *Badrinath vs Tamilnadu* AIR 2000 SC 3243, the Hon'ble Supreme Court has held that once the basis of proceeding is gone, all consequential orders and acts would fall on the ground automatically, which principle is applicable to judicial and quasi-judicial proceedings. Therefore, since the basis for the set off of losses for AY 2007-08 & 2008-09 are consequential to the action of the AO to re-assessment order dated 24.03.2014 pursuant to re-opening, and since it has been quashed by this Tribunal on 31.08.2021, the impugned action of AO u/s 154 of the Act cannot be sustained for A.Y.2007-08 & 2008-09; and consequently, the AO is directed to re-compute the set off of loss keeping the status qua ante of assessment before re-opening was resorted to for AY 2006-07. With the aforesaid direction, the appeal of



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assessee for A.Y.2007-08 & 2008-09 are allowed for statistical purposes.

6. Coming to the A.Y.2010-11, we note that the only grounds raised by the assessee is against the action of the Ld. CIT(A) confirming the action of the AO disallowing the provision of leave encashment u/s 43B(f) of the Act.

7. At the outset, the Ld. Departmental representative pointed out that this issue is covered in favor of the department by the decision of the Hon'ble Supreme Court in the case of UOI vs Excide Industries Ltd [Civil Appeal no 3545/2009, dated 24.04.2020 reported in 425 ITR 1]. In the light of the aforesaid decision of the Hon'ble Supreme Court, this issue is no longer res-integra. Therefore, the impugned action of the Ld. CIT(A) cannot be faulted since it is in line with the decision of the Hon'ble Supreme Court in the Excide Industries Ltd. (supra), therefore, we confirm the order of the Ld. CIT(A) and dismiss the appeal of the assessee for A.Y.2010-11.

In the result, the cross objection of assessee for A.Y.2006-07 and the appeal of assessee for A.Y.2007-08 & 2008-09 are allowed and the assessee's appeal for A.Y.2010-11 stands dismissed.

Order pronounced in the open court on this 31/05/2022

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 31/05/2022
Vijay Pal Singh, (Sr. PS)



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai