

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.1046/Kol/2016

(निर्धारण वर्ष / Assessment Years: 2011-12)

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.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCC3474A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri P. J. Pardiwala (Adv.)
Revenue by:	Shri H. N. Singh (DR)

सुनवाई की तारीख / Date of Hearing: 12/05/2022

घोषणा की तारीख /Date of Pronouncement: 01/07/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax(A)-16, Kolkata dated 30.03.2016 for the assessment year 2011-12.

2. At the outset, the Ld. AR submitted that the AO has made disallowance u/s 14A of the Income Tax Act, 1961 (hereinafter "the Act") r.w. Rule 8D of the Income Tax Rule, 1962 (hereinafter "the Rules"). However, he is not pressing this ground of appeal because of smallness of the amount. Therefore, this ground stands dismissed.

3. Coming to the second ground which is regarding disallowance of expenditure for earning exempt income as per section u/s 115JB of the Act, it noted that this issue is settled; and any disallowance made u/s 14A of the Act applying Rule 8D of the Rules cannot be made u/s



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115JB of the Act. Therefore, the addition made if any on this score is directed to be deleted.

4. Coming to the ground no. 3 which is against the action of the Ld. CIT(A) disallowing Provision for Leave encashment u/s 43B of the Act as well as adding the same u/s 115JB of the Act. We note that this issue is no longer res-integra after 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.] We note that the Hon'ble Supreme Court has upheld the constitutionality of Section 43B of the Act in Excide Industries (supra) and thereby reversing the action of Hon'ble Calcutta High Court. Therefore, this ground of the assessee stands dismissed.

5. Ground no. 5 is against the action of the Ld. CIT(A) confirming the action of the AO adding Rs.101,15,57,665/- which was the difference between the gross-billings as per Form 26AS and the "net income from advertising & commission" shown by the assessee in its books (audited), by ignoring the consistent method of accounting followed by it in similar business which is recognized by the institute of Chartered Accountant of India.

6. [An alternate ground (without prejudice to the above ground) has been raised, that is not allowing the deduction in respect of reimbursement of expenses and cost incurred by the assessee on behalf of its clients from gross amount of billing as adopted by the AO for arriving at taxable income without giving credit for TDS].

7. Facts on the aforesaid grounds as noted by AO is as under: -



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“On perusal of the 26-AS details pertaining to the assessee, it was noticed that as per the TDS credit availed by the assessee, the assessee company has received an amount of Rs.153,79,52,665/- as income during the year under consideration. However, on perusal of the books of account of the assessee, it was observed that the assessee had credited an income amounting to only Rs.51,86,18,000/-. The assessee was requested to reconcile and explain the difference and explain why the difference should not be treated as the concealed income of the assessee for the year under consideration.”

8. According to the AO despite given opportunity to the assessee, it failed to substantiate the difference between income as appearing in the TDS credit statement as per 26AS vis-à-vis income reported in the profit & loss account; and since the income as per the 26AS statement of the assessee was coming to Rs.153,79,52,665/- whereas the assessee had shown in its P & L account only at Rs.51,86,18,000/-, according to the AO, the assessee had understated its income to the tune of Rs.101,15,57,665/-. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the CIT(A) who took note of the assessee's submission as under: -

“In the course of appellate proceedings, the ARs of the appellant reiterated the explanations furnished at the time of assessment. It was submitted that the appellant was engaged in business of advertisement agency and rendered agency services. In pursuance of the advertisement agency agreement with its clients, the clients reimbursed various expenses which the appellant incurs on behalf of the said clients. According to the ARs the reimbursement is made at the actual and therefore the reimbursement obtained by the assessee does not



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contain any profit element. It is only the commission which the assessee charges to its clients that deserves to be treated as assessee's income. In support of this practice following consistently by the assessee it the assessee relied on the accounting policy and methods "followed for recognizing only the commission and service charges as its income, the AR of the assessee relied on the AS 9 by institute of Chartered Accountant issued referring to the said AS 9, the AR stated that in an agency relationship, the revenue is the amount of "commission" and not the cross inflow of cash which can be considered. The AR therefore submitted that the appellant raised invoice to its client which consisted of two parts.(i) One part being reimbursement claim in respect of and expenses incurred on account and on behalf of the clients and (ii) the second component being "commission" which the assessee is entitled to claim in its capacity and role of advertising agent. It was the explanation of the AR that the second component of the invoiced amount i.e. agency commission/service fee alone was considered by the appellant-as its income and this was credited to the profit & loss account (P/L a/c) of the appellant. The AR further explained that the gross invoice value was inclusive of reimbursement of expenses claimed. The AR further stated that in its P/L A/c the appellant did not debit the cost and expense which it had incurred on behalf of the clients nor any deduction therefore was claimed in arriving at taxable income. As a consequence, the component of reimbursement of cost and expenses shown in the invoice raised on the clients was not considered as appellant's income and therefore component of reimbursement was not credited to its P/L A/c as appellant's income/however at the time of payment of appellant's invoices, the clients deducted tax at source u/s 194C of the Act on the gross invoiced value, which inter alia included component of reimbursement of expense. According to the AR, the



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clients were deducting the tax from the gross invoiced value in view of the clarifications issued by CBDT in its Circular no. 715 dated 06.08.1995 in terms of which the tax was deductible u/s 194C even in respect of reimbursement component included in the invoiced value of the contractor. It was therefore the AR's contention that merely because the deductor (payer) deducted the tax from the component of reimbursement of expenses, such fact by itself did not mean that the reimbursement component was income of the appellant requiring its credit to the P & L A/c."

9. After considering the aforesaid submission of the Ld. AR of the assessee, the Ld. CIT(A) have upheld the action of AO by holding as under: -

"I have considered the submissions made on behalf of the appellant and also carefully gone through the remand reports furnished by the AO. On careful scrutiny of the AR's submissions I find that much emphasis has been placed in the submissions with regard to the method of accounting which the assessee followed for maintaining its accounts. It is the submission of the AR that in terms of AS 9, the assessee had accounted only the income component being commission and service fees which the assessee had charged to its clients. Relying in the AS 9 issued by ICAI, the ARs have claimed that where an agent obtains reimbursements of costs and expenses incurred on behalf of the principle then such reimbursements obtained does not represent income of the agent and correspondingly the costs and expenses incurred do not constitute expenditure of the agent. On due consideration of the AS 9, I have no quarrel with the fundamental accounting principle or accounting method. However the question to be decided in the present appeal is whether on the facts of the



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appellant's case it can be said that assessee had discharged the primary onus cast on the assessee to substantiate the explanations put forth.

I have no hesitation in agreeing with the proposition that reimbursement of expenses does not constitute income and therefore in case the client/customer deducts tax while reimbursing the expenditure amount, such fact in itself will not convert reimbursement into income. However, the material issue which needs to be considered is whether the assessee had brought on AO's record any sufficient material to substantiate its contention that the differential amount actually represented reimbursement of costs and expenses."

10. Thus, the Ld. CIT(A) confirmed the action of the AO. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is in appeal before us.

11. Assailing the action of the Ld. CIT(A), the Ld. Senior Advocate P. J. Pardiwala pointed out that assessee is an advertisement Agency. As per its contract with its client, the clients have to reimburse the expenditure incurred by it (assessee), as well as the commission for the agency which is the remuneration fixed for its services. And the assessee only booked the commission/remuneration it received as its income which is duly shown in P & L a/c whereas the "*reimbursed expenditure*" borne by the assessee on behalf of the client is not routed through the P & L A/c because it is not the income of the assessee. And this consistent accountancy practice the assessee has been following which is a recognized method of accountancy by the Institute of Chartered Accountants and followed by the Advertisement Agents. It was brought to our notice by Shri Pardiwala that the whole



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confusion happened because the clients of assessee had while making the payment to assessee had deducted tax at source (TDS) not only on the commission part which is the income of assessee, but also that of the reimbursement made of the expenses incurred by it for the clients photo-shoot etc at various location. Therefore, the AO taking note of the difference in the 26AS details pertaining to assessee and the TDS credit of the assessee, the AO concluded that assessee had received Rs.153,79,52,665/- as income during the year, but the assessee had shown only in its P & L account Rs.51,86,18,000/-. And according to AO assessee failed to reconcile/explain the difference. Therefore, he added it which action according to Ld. Sr. Counsel was erroneously confirmed by the Ld. CIT(A). It was brought to our attention by the Ld. Sr. Counsel that the main plank on which the Ld. CIT(A) has disallowed the claim of the assessee was the failure on the part of the assessee to prove with sufficient material/evidence that the amount shown as re-imburements were correspondingly expended by the assessee on account of the client. For showing that assessee in fact had produced all the documents/material to discharge its onus, the Ld. Sr. counsel drew our attention to page no. 41 of the paper book which documents the assessee had filed before AO i.e. detailed explanation regarding the accounting of commission and fees it had received from the clients. The Ld. Sr. counsel submitted that the assessee had brought to the notice of the AO that the assessee company was engaged in the business of advertisement agency and provided services to its clients in the nature of space releases, advertisement, film production, studio



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work supervision, marketing consultancy services etc. It was brought to the notice of the AO that with the support of the details submitted in Form 3CD that the company had received “*commission and service fees*” which was shown in the P & L account and it was as its income as per the accounting policy followed by it over the previous years. It was brought to the notice of lower authorities that the revenue in respect of commission and service fees are accounted as follows (note 1.3 of schedule 14 to audit accounts) “*commission and service fees*” commission based on media release is recognized on the date of release in the media, commission on non-media jobs and service fees are recognized on completion of the job (refer page 41-42 of the P.B) and the AO was also shown the advertisement agency agreements with various clients from which it was explained to him that as per the agency agreements/contract between them, they (clients) were obliged to reimburse various expenses incurred by the company on behalf of the said clients at actual; and to prove the said averment the assessee produced the sample invoices raised by the company on clients for reimbursement of the expenditure incurred on their behalf as per the agreements. The assessee also brought to the notice of the AO sample invoices in respect of the expenses incurred at various location (Kolkata) for clients to demonstrate the fact of reimbursement at actual. The assessee also enclosed a chart containing the details of the client, the respective invoices raised by the assessee company during the year towards reimbursement on them and the media commission



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and fees along with invoice wise details of corresponding cost incurred by the assessee company on behalf of its clients as also the details of media commission and fee considered as income in its profit & loss account in accordance with the accounting policy consistently followed by company as above. (refer Page no. 42 of the P.B). And it was brought to the notice of the AO that the accounting treatment in the case of agencies contract as followed by the assessee was in consonance with the accounting standard [AS- 9 by Institute of Chartered Accountant of India] which state at para no. 4.1 “.....in an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables or cash or other consideration.” Accordingly it was brought to the notice of the AO that in its profit & loss account, neither the expenses incurred on behalf of its clients are shown as expenditure nor the reimbursement of the same by the clients is shown as its income; and only the media commission and fees received from the clients are routed through profit and loss account and is recognized as revenue/income of the company. Thus it was brought to the notice of the AO that the income of the company which was the media commission and fees in the year was to the tune of Rs.51,86,18,000/- (including in the income figure of Rs.52,97,82,000).

12. It was also brought to the notice of the AO that as per the Section 194C & 194J of the Act, the clients of the assessee company are legally obliged to withhold tax at source from amount payable to the assessee company because the expression used it is “any some paid” and brought to the notice of the AO, CBDT circular no. 715



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dated 6th August, 1995 (215 ITR ST) wherein it has been clarified by CBDT with the regard to the withholding of tax at source u/s 194C & 194J as under: -

“Question 30: Whether the deduction of tax at source under section 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses.?”

Answer: Section 194C and 194J refer to any sum paid. Obviously, reimbursement cannot be deducted out of the bill amount for the purpose of tax deduction at source.”

13. So according to the Ld. Sr. Counsel, it was explained by the assessee to the AO that the clients were legally obliged to deduct tax at source on both the components i.e (i) the expenditure incurred by the assessee company on their behalf which was reimbursed to the assessee company, [though the said amount does not form part of income of the assessee company for the reason stated aforesaid.] and (ii) on the commission & fee which is the income of the assessee. Thus it was contended by the Ld. Sr. counsel that despite bringing to the notice of the AO the aforesaid facts to explain the discrepancy between the income as per 26AS & the income shown by the assessee in its profit & loss account, the AO on the specious plea that assessee failed to reconcile/explain the difference between 26AS & the income shown by the assessee, brushed aside the documents/materials brought to his notice and made the huge addition of Rs.101 crore which was confirmed by Ld. CIT(A) on the same reason that the assessee failed to discharge the onus in respect of the difference in 26AS vis a vis the



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income shown in the profit & loss account of assessee. However, it was brought to our notice that assessee had filed before the AO albeit during the remand proceedings additional evidence which were filed before us i.e. the paper book no. 2 which contains 206 pages and in addition fifty six (56) boxes containing copies of the clients bill along with back to back paper invoices for the year under consideration, reconciliation chart, Form 26AS vis a vis bill raised and the list of vendors along with their addresses and amount of cost. It was also brought to our notice that the assessee had filed the statement showing details of invoices raised on clients for reimbursement of cost/expenses and commission and fees along with the details of vendors in respect of cost incurred against the same which is evident from page no. 132 to 678 wherein chart/computer printout is found placed therein which shows the details of commission income and reimbursement expenses have been given. From the aforesaid documents, the following details were brought to our notice (i) the clients name (ii) invoices number (iii) client bill amount (iv) vendors name (v) supplier cost and (vi) the income. We note that the paper book no. 2 along with additional evidence in fifty six (56) boxes were produced and filed before the AO/Ld. CIT(A) and after that only the AO has given the remand report placed at page no. 118 of the paper book. According to Ld. Sr. counsel, even after going through the remand report, the Ld. CIT(A) has not appreciated the facts supported by evidence about the treatment given by the assessee to recognize the



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income (commission & fee) excluding the reimbursement of expenses which practice the assessee has consistently followed by it as per AS-9 from the inception of its business and only this year, the AO has taken an adverse view against the assessee. Whereas it has been accepted in the earlier years as well as in subsequent years. Accordingly, the Ld. Senior Counsel on the principle of consistency and in the light of the supporting evidence material/reconciliation submitted that the addition may be deleted in the light of the aforesaid facts.

14. Per contra, the Ld. CIT-DR submitted that the assessee failed to produce the documents before the AO to substantiate its claim and could not be reconcile the difference between the 26AS and the income shown in the profit & loss accounts. According to the Ld. CIT-DR, the assessee is into various business including booking spaces in print media as well as electronic media. According to him, there is no TDS requirement for certain events. Therefore, the AO had to properly inquire in respect of the claims made by assessee even in respect of the expenses which assessee claimed as reimbursement. However according to him, the assessee failed to adduce material/evidence to substantiate that assessee has shown only correct income and has correctly not shown the expenses which it incurred on behalf of the clients even during the assessment proceedings as well as the appellate proceedings. Therefore, the Ld. CIT(A) had no other alternative but to reiterate the addition made by AO against the assessee. According to



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the Ld. DR, the impugned order of the Ld. CIT(A) may be confirmed and we need not interfere with the order of Ld. CIT(A).

15. We have heard both the parties and perused the record. We note that the AO taking note of the difference found between the income as appearing in the TDS credit statement (as well as the 26AS vis-à-vis) and the income returned in the profit & loss account was of the opinion that the assessee had under-stated its income by Rs.101 crores. According to the AO, the assessee failed to reconcile/explain the difference before him. So according to him, he had no other alternative but to make the addition. On appeal, the Ld. CIT(A) also confirmed the same by observing that even though he agrees with the contention of assessee that reimbursement of expenses does not constitute income and therefore even if the customers/client had deducted the tax while reimbursing such expenditure (amount), such fact in itself (ie. TDS deducted in the companies of reimbursement) will not convert reimbursement into income. However, according to Ld. CIT(A), the assessee failed to bring on record sufficient material to substantiate its contentions that the difference amount (Rs.101 crore) actually represented reimbursement of cost & expenses incurred by assessee on behalf of its client. Thus the main reason/sole reason to confirm disallowance of Rs.101,15,57,665/- (differential amount balance 26AS & income shown by assessee in its P & L account) was the failure attributed to assessee in bringing sufficient material to discharge its burden to prove the reimbursement claim of assessee. However going through the voluminous paper book running into 821 page and fifty six



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(56) boxes of material brought to our notice [*which were produced before the AO albeit during remand proceeds & before the Ld. CIT(A)*] we cannot countenance such a reason on the part of Ld. CIT(A). We note that during assessment proceedings, assessee filed reconciliation in respect of difference in amount of Rs.101 crores but could not produce all the material before AO which led to the addition of Rs.101,15,57,665/-. However, we note that during the first appellate proceedings before the Ld. CIT(A), the assessee infact had produced all material to support even the expenditure (reimbursement) before the Ld. CIT(A) as well as before the AO (remand proceedings) Thus, we find force in the contention of Ld. Sr. counsel that assessee discharged the burden of proving the reimbursement of expenses to the tune of Rs.101,15,57,665/-. In this context the Ld. Senior counsel Shri P. J. Pardiwala, pain-stakingly took us through the documents before the AO during the assessment proceedings as well as during remand proceedings and the facts were explained to AO/Ld. CIT(A) and the details regarding the various business and the treatment given to income recognition were brought to the notice of the AO as well as the Ld. CIT(A). But according to him, the same was not appreciated by both the authorities. It was also brought to our notice that in this year only such an addition/disallowance has been made on this issue and in earlier years as well as subsequent years the accounting practice/treatment given by the assessee in recognizing its income by the very same method has been accepted by the department. Therefore, according to the Ld. Senior counsel, the facts permeating in the earlier



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years being consistent/identical; and since there was no change in the facts or law as per the principle of consistency, the AO/Ld. CIT(A) ought not to have taken different view. And for that proposition, he relied upon the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT [193 ITR 321, 329 (SC)]. We find that the assessee has been consistently following the same accounting policy for recognizing the income as per AS-9 and the consistent practice of assessee has been disturbed in this assessment year only; and in earlier years & subsequent years, the AO/CIT(A) have upheld such treatment of assessee showing only the commission & fees for the services (*And not showing the reimbursed amount expended by assessee on behalf of its client*). And in this back drop, when the AO/CIT(A) has not brought any new facts or change in law in this assessment year, on this issue, we are of the opinion that the principle of consistency ought to have been applied. And before us, the Ld DR, could not point out any change in neither facts nor law to take a different stand. So in such a scenario, we find force in the contention of Ld. Senior Counsel in respect of his plea of principle of consistency on this issue.

16. Further, we note that the assessee had filed before us voluminous paper book which contains the audited account for the year ending on 31st March, 2011. We note that the assessee had replied to the AO during the original assessment proceedings along with annexures which is running to 660 pages (refer page no. 41 to 678 of the paper book) we also note that the assessee had given explanation



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regarding accounting of commission and fees which is found placed page no. 41 & 42 of the paper book.

17. In order to buttress the submissions that the assessee had filed copy of agreements with various clients, viz M/s. Amu Pvt. Ltd, ICICI Bank etc (refer page no. 41 to 159 of the paper book), we note that the assessee had filed documents showing details of invoices of the clients in respect of the reimbursement of cost/expenses and commission and fees along with the details of vendors for cost incurred against the same which is found placed at page no.133 to 678 of the paper book which contains all the details including the clients name, invoices number, bill amount vendor name, supplier cost and income. We note that the assessee had filed the statement showing the client wise, billing, corresponding cost, incurred against each clients; and the commission income earned as reflected in the profit and loss account which is found placed at page no. 705 & 706 of the paper book. We also note that the assessee had filed the statement showing gross revenue earned from each division, the cost of production and media cost incurred and the resultant commission and service fees as on 31st March, 2011 which is found placed at page 707 of the paper book. We also have gone through the remand report of the AO which is found placed at page 118 of the paper book-2. We also note that during the assessment proceedings as directed by Ld. CIT(A), the assessee had filed 56 boxes containing copies of clients bills along with “*back to back*” invoice bills for relevant financial year 2010-11



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(refer letter placed at page 48 PB-2 forwarding the same to AO); and we note the reconciliation of form 26AS vis a vis bill raised by the assessee and the income of the assessee which is found placed at page 2 of the paper book -2. We find list of vendors along with their addresses and amount of cost is found placed at page 3 to 5 of the paper book-2. Our attention was drawn by the Ld. Sr. Counsel to page 32 to 47 of the paper book-2 wherein the reconciliation between amount as per the details filed by vendor in response to the notice u/s 133(6) by AO and amount shown by assessee in its books are found placed therein. Copy of ledger of the six vendors as called for by AO is also found placed at page no. 49 to 81 of the paper book-2. We also take note of the sample copy of bills raised on clients which is found placed at page no. 82 to 117 of the paper book-2. The assessee's reply to the remand report have been seen placed at page no. 121 to 220 of the paper book-2; and assessee had filed before AO during remand proceedings the details of client wise billing, related cost, and commission [refer chart placed at page 182 to 201 PB-2] and other documents which the Ld Sr Counsel has drawn our attention and which we have noted at para 11 to 13 (supra) which substantiate the fact that assessee had discharged its burden albeit during remand proceedings about the reimbursement of expenditure given to the assessee by its clients on which also TDS was deducted to the tune of Rs 101 crores.. Therefore the Ld CIT(A) erred in appreciating the facts in the light of the documents produced and the reconciliation provided by assessee in respect of Rs 101 crores. And since the assessee has



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discharged the burden of proving the reimbursement of expenses to the tune of Rs.101,15,57,665/-, and since no infirmity could be pointed by the lower authorities or Ld. DR regarding the evidence adduced by the assessee as discussed (supra), the addition made on this ground deserves to be deleted and we order accordingly.

18. Ground no. 5 is against the action of Ld. CIT(A) in upholding the AO's omission of not quantifying the capital loss amounting to Rs.16,62,345/- and not allowing the same to be carried forward for future set off. On this ground, we note that the assessee had raised ground no. (vii) before the Ld CIT(A), which was not adjudicated by him by erroneously terming it as consequential and dismissed the same. We find that the Ld. CIT(A) has not applied his mind while adjudicating this issue. So we set aside this issue back to Ld. CIT(A) to decide on merits in accordance to law.

19. Ground No. 6 & 7 are consequential and ground no 8 & 9 are general in nature. So no need of adjudication on these grounds.

20. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 01/07/2022.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 01/07/2022.
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//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**