

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"F" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.5711/Mum./2011**  
**(Assessment Year : 2008-09)**

Shri Hitesh S. Bhagat  
14-A, Jayant Villa, C.S. Rane Marg  
Worli Naka, Mumbai 400 013  
PAN – ADIPB1557C

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-18(1), Mumbai

.....Respondent

Assessee by : None  
Revenue by : Ms. Vranda U. Matkarni

Date of Hearing – 07/11/2022

Date of Order – 13/12/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 03/06/2011, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-29, Mumbai, [*learned CIT(A)*], for the assessment year 2008-09.

2. The present appeal is listed for hearing before us pursuant to the directions of the Hon'ble Bombay High Court given in assessee's appeal being ITA no.325 & 326 of 2015, vide order dated 08/11/2017. When this appeal was called for hearing, neither anyone appeared on behalf of the assessee nor

there is any application seeking adjournment either, despite service of notice. From the perusal of the record, we find that this appeal was listed for hearing on various occasions, however, no one appeared on behalf of the assessee. Therefore, we proceed to dispose off the appeal ex-parte qua the assessee after hearing the learned Departmental Representative ("*learned D.R.*") and as per the material available on record.

3. During the hearing, the learned D.R., at the outset, submitted that the assessee has opted for the settlement of its tax dispute for the year under consideration under the Direct Tax Vivad Se Vishwas Scheme, 2020 ("*VSV Scheme*"). In this regard, the learned D.R. placed on record Form no.5, issued by the Designated Authority under the VSV Scheme. From the perusal of Form no.5, we find that the tax dispute regarding tax arrears amounting to Rs.31,37,215, is fully and finally settled under the VSV Scheme for the assessment year 2008-09. However, we notice that the dispute pertains to assessee's appeal being ITA no.10/Mum./2020. During the hearing, the learned D.R. furnished a copy of e-mail dated 04/11/2022, received from the Income Tax Officer, Ward-27(1)(1), wherein it has been stated that the assessee has opted for settlement of tax dispute under VSV Scheme in respect of assessment years 2007-08 and 2008-09. Since the appeal number mentioned in the aforesaid Form no.5, is different from the appeal under consideration, the learned D.R. sought time to furnish report of the Assessing Officer in this regard. Vide letter dated 01/12/2022, filed through the Office of the learned D.R., the Assessing Officer has submitted as under:-

"No.Sr.AR/ITAT/F Bench/2022-23/229

Dated : 01.12.2022

To,

The Sr. AR, ITAT-2,  
F-Bench  
Mumbai

Madam

Sub: Set aside appeal in the case of Late Shri Hitesh S Bhagat in ITA No. 5711/M/2011 for A.Y. 2008-09-reg.

Ref.: Your office letter No. Sr.AR/ITAT/F Bench/HSB/2022-23 dated 07.11.2022

Kindly refer to the above.

2. You, in para 5 of your above referred letter, have asked clarification regarding what happened to ITA No. 5711/M/2011 and how one more appeal in ITA No. 10/M/2020 has been filed by the department. In this regard, the detailed facts are discussed hereunder.

2.1 An assessment order u/s 143(3) of the Act dated 07.12.2010 was passed wherein the total income of the assessee was determined at Rs. 2,58,09,820/- which was also the returned income of the assessee. However, during the course of assessment proceedings, the AO changed the head of income for a sum of Rs. 1,34,62,716/- as STCG (Short Term Capital Gain) against business income i.e. the claim of the assessee.

2.2. Aggrieved by the order, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) vide order dated 03.06.2011 partly allowed the appeal of the assessee.

2.3. Aggrieved by the order of the Ld. CIT(A), the assessee filed the appeal before the Hon'ble ITAT, Mumbai. The Hon'ble tribunal vide order dated 15.05.2013 dismissed the appeal of the assessee (ITA No. 5711/M/2011).

2.4. The assessee further filed the appeal before the Hon'ble Bombay High Court who vide order dated 08.11.2017 set aside the order of Hon'ble ITAT, Mumbai and restored the matter to the file of Hon'ble ITAT, Mumbai. Therefore, the appeal ITA No. 5711/M/2011 before Hon'ble ITAT, Mumbai is the outcome of this process.

3. Now, coming to another appeal filed by the Revenue for A.Y. 2008-09, before the Hon'ble ITAT, Mumbai i.e. ITA No. 10/M/2020. The series of events are discussed hereunder:

3.1. Meanwhile, the process discussed in para 2 and its sub-paras above was in progress, an information was received by the AO from DIT(I&CI), Delhi.

*Consequently, the case was reopened and the income of the assessee remained unchanged and was reassessed at Rs.2,58,09,820/- vide assessment order u/s 143(3) r.w.s. 147 dated 14.03.2016. The AO following the order of Hon'ble ITAT, Mumbai in the case, treated STCG of Rs. 1,34,612,716/- as Business Income.*

*3.2. Aggrieved by the order of the AO, the assessee filed the appeal before the Ld. CIT(A) who vide order dated 18.10.2019 allowed the appeal of the assessee.*

*3.3. Aggrieved by the order of Ld. CIT(A), Revenue filed the appeal before Hon'ble ITAT, Mumbai vide appeal No. ITA No. 10/M/2020 which is pending before Hon'ble Tribunal.*

*4. Meanwhile, the assessee opted for Vivad se Vishwas Scheme against ITA No.10/M/2020. Consequently, Form 5 was issued to the assessee.*

*5. In view of the above, it is requested that the above facts, clarifying the points sought vide para 5 of your above referred letter, may be taken on record for further necessary action.*

*Yours faithfully,  
Sd/-  
(Sangeeta)  
ITO-27(1)(1), Mumbai"*

4. From the perusal of the aforesaid letter filed by the Assessing Officer, it is evident that the disputed amount in the appeal mentioned in Form no.5, issued under the VSV Scheme as well as the present appeal is the same, and in respect of which the assessee has paid the disputed tax arrears as per the full and final settlement reached under VSV Scheme. It cannot be disputed that when the matter is resolved under VSV Scheme, the related appeal needs to be withdrawn. However, we find that in the present case, no such application is available on record. Since the settlement has arrived in respect of disputed tax for the year under consideration, therefore, we hold that the present appeal is liable to be dismissed in view of Form no.5, dated 24/02/2021, issued under VSV Scheme.

5. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 13/12/2022

**Sd/-**  
**S. RIFAUR RAHMAN**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 13/12/2022**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai