

IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'F' : NEW DELHI)

**BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 2172/Del/2022 , A.Y. 2012-13

ITA No. 2173/Del/2022, A.Y. 2013-14

ITA No. 2174/Del/2022, A.Y. 2014-15

ITA No. 2175/Del/2022, A.Y. 2015-16

ITA No. 2176/Del/2022, A.Y. 2016-17

ITA No. 2177/Del/2022, A.Y. 2011-12

Ramesh Yadav, 1207, 12 th Floor, Migsun Homez Sector-14, Kaushambi, Ghaziabad-201010	Vs.	ACIT, Central Circle-14, New Delhi
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Assessee by	None
Revenue by	Shri T. Kipgen, CIT DR

Date of hearing:	11.04.2023
Date of Pronouncement:	25.04.2023

ORDER

Per Anubhav Sharma, JM :

Heard and perused the record.

2. None has appeared for the assessee in spite of notices issued of hearing for today. The record shows amongst other grounds, assessee has raised ground no. 1 to 5 which arise out of dismissal of the appeal by Ld. CIT(A) *in limine* for

non-appearance of appellant. Ld. CIT DR submitted that sufficient notices were issued to the assessee.

3. The impugned order of Ld. CIT(A) in all the assessment years show that Ld. CIT(A) has although mentioned of issuance of notice but the fact of service of notice is not coming up from the order. Further, the Ld. CIT(A) has not considered the ground raised on merits.

4. The Bench is of considered opinion that Section 250(6) of the Income Tax Act 1961, makes it obligatory upon the Ld. First Appellate Authority to decide the appeal on merits. Reliance in this regard can be placed on the coordinate bench decision in **Corporate International Financial Services Ltd. vs. ITO- 6(3), New Delhi, ITA No. 2147/Del/2017** order dated 07.04.2022 the relevant portion is reproduced below :-

“(C.1) The relevant provisions under I.T. Act regarding procedure in appeal, and powers of the Commissioner [Appeals] are contained in Sections 250 and 251 of I.T. Act, which are reproduced below for ready reference:

“250. (1) 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 the 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 authorized representative; (b) the Assessing Officer, either in person or by a representative.

(3) The Commissioner (Appeals) shall have the power to adjourn the hearing of the appeal from time to time.

(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) 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 the Commissioner (Appeals) is satisfied that the omission of that ground from the form of appeal was not willful or unreasonable.

(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) In every appeal, the Commissioner (Appeals), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed before him under sub-section (1) of section 246A

(7) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the assessee and to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

251. (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers— (a) In appeal against an order of assessment, may confirm, reduce, enhance or annul the assessment

(aa) In appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(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) In any other case, he may pass such orders in the appeal as he thinks fit.

(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. ”

(C.1.1) A perusal of the above provisions of law shows that U/s 250(6) of I.T. Act the Ld. CIT(A) was obliged to dispose of the appeal in writing after stating the points for determination and to then pass an order on "each of the points which arose for consideration"; and the Ld. CIT(A) was further obliged to state the reasons for her decision on each such points which arose for determination. Thus, the Ld. CIT(A) was duty bound to dispose of the appeal on merits. Moreover, the perusal of Section 251(l)(a) and (b) of I.T. Act and the further perusal of Explanation of Section 251(2) of I.T. Act shows that the Ld. CIT(A) was required to apply her mind to all the issues which arose from the impugned order before her, whether or not these issues had been raised by the Assessee before her. Also, Section 251(l)(a) of I.T. Act provides that while disposing of an appeal against Assessment Order, Commissioner (Appeals) shall have the power to confirm, reduce, enhance or annul the assessment. For this provisions of law to take effect, the Ld. CIT(A) was requested to ensure due application of mind, instead of dismissing the appeal in limine. In view of the foregoing, we are of the view that the Ld. CIT(A) erred in dismissing the appeal in limine for non-prosecution of appeal and that she was required to dispose of the appeal on merits.

(C.1.2) Moreover, 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 withdrawing the appeal, or by not pressing the appeal, or by nonprosecution of the appeal; nor the first appellate authority, the Ld. CIT(A) in this case, can halt this machinery by ignoring the procedure in appeal prescribed U/s 250 of I.T. Act and powers of Commissioner (Appeals) prescribed U/s 251 of I.T. Act. CIT(A). The first appellate authority cannot dismiss assessee's appeal in limine for non- prosecution 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.

(C.2) Further, it is well-settled that powers of Ld. CIT(A) are coterminus with powers of the Assessing Officer. Useful reference may be made to order of Apex Court decision in CIT vs. Kanpur Coal Syndicate 53 ITR 225 (SC) in which it was held that the first appellate authority, the Ld. CIT(A) in the case before us, has plenary powers in disposing off an appeal; that the scope of her power is co-terminus with that of the ITO, that she 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 Hon'ble Apex Court's decisions in

the cases of CIT vs. Rai Bahadur Hardtroy Motilal ITA No.2147/Del/2017 Corporate International Finance Service Ltd. vs. ITO Page 10 of 13 Chamaria 66 ITR 443 (SC) and CIT vs. B.N. Bhattacharjee 118 ITR 461 (SC) 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 underassessment, 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, not open for Ld. CIT(A) to not pass order on merits by dismissing the appeal in limine, whether on account of non-prosecution of appeal by the Assessee or due to the Assessee seeking to withdraw the appeal or if the assessee does not press the appeal. When the Commissioner (Appeals) dismisses the appeal of assessee in limine 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 limine for non-prosecution of appeal before the first appellate authority; 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, as is well settled. In view of the foregoing discussion; it is amply clear that Ld. CIT(A) was in error in dismissing the 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 vs. Premkumar Arjundas Luthra (HUF) [2016] 240 taxman 133 for the proposition that Ld. CIT(A) is required to apply her mind to all issues which arise from impugned order before her whether or not same had been raised by appellant before her; and further, 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(l)(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 dear that while considering the appeal, the CTT(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 CTT(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 CTT(A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. This is amply dear from the Section 251(l)(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."

(C.2.1) In view of the foregoing, we hold that the Ld. CIT(A) erred in dismissing the appeal of the Assessee in limine for nonprosecution of appeal by assessee. We set aside the impugned order of the Ld. CIT(A) and we direct the Ld. CIT(A) to pass denovo order as per law, in accordance with Sections 250 and 251 of I.T. Act."

5. Consequently, Bench is inclined to allow the grounds no. 1 to 5 in favour of the assessee. Appeal is allowed for statistical purposes. The issues on merits are restored to the files of Ld. CIT(A), to re-hear and decide on merits.

Order pronounced in the open court on 25th April, 2023.

**Sd/-
(G.S.PANNU)
PRESIDENT**

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Date:- 25.04.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI