

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

**BEFORE SHRI OM PRAKASH KANT, AM
AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 582/Mum/2023
(Assessment Year: 2007-08)

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| Shripal Builders 18, Saheb Building, 195, D. N. Road, Fort, Mumbai-400001 | Vs. | ITO, 12(2)(3) Room No. 123 B/G, 1 st Floor, Aayakar Bhavan, M.k. Marg, Mumbai-400020 |
| PAN/GIR No. AATFS9508E | | |
| (Appellant) | : | (Respondent) |

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| Assessee by | : | Shri Subodh Ratnaparkhi |
| Revenue by | : | Shri. Paresh Deshpande |

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| Date of Hearing | : | 25.04.2023 |
| Date of Pronouncement | : | 20.07.2023 |

ORDER

PER KAVITHA RAJAGOPAL, J M:

This appeal has been filed by the assessee challenging the order of the Learned Commissioner of Income Tax (Appeals) [hereinafter “the Ld. CIT(A)”] passed order u/s 250 of the Income Tax Act,1961 [hereinafter “the Act”] to relevant the Assessment Year [hereinafter “the A.Y.”] 2007-08.

2. The assessee has challenged the following grounds;

1. *The Hon. CIT(A) erred in dismissing the appeal exparte, allegedly for non-compliance to appeal notices, inspite of*

- (i) Appellant attending the physical appeal proceedings before the Hon. CIT(A) on 08.05.2014, 20.3.2017, 14.03.2019, 23.07.2019 and 06.08.2019 and filing written submissions in support of the grounds of appeal.
- (ii) Appellant pointing out that the order u/s 263 dt. 01.03.2012, pursuant to which the order under appeal being order u/s 144 r.w.s 263 dt. 29.11.2012 was framed, no longer holds good as the appeal of the assessee against the said order u/s 263 dt. 01.03.2012 was allowed and the said order set aside by the Hon. ITAT Mumbai vide ITA No. 4067/Mum/2013 dt. 29.07.2015.
- (iii) In the faceless appeal proceedings, the appellant on 24.01.2023 had sought adjournment under the e-proceedings tab and the say of the Hon. CIT(A) about lack of response from the appellant was factually incorrect and
- (iv) Appellant was not aware of the other notices sent only on e-mail.
- and for the above reasons, the order dismissing the appeal was not justified and may kindly be over turned and set aside.
2. The Hon. CIT(A) erred in dismissing the appeal *ex parte* without deciding the grounds of appeal on merits and for this reason alone the order of the Hon. CIT(A) is not sustainable and may kindly be set aside as *bad-in-law*.
3. The Hon. CIT(A) erred in upholding the order of the Id AO sustaining addition of Rs.1,28,65,649/-, not appreciating that the order u/s 263 dt. 01.03.2012, was set aside by the Hon. ITAT Mumbai vide order no. ITA 4067/Mum/2013 dt. 29.07.2015 and therefore the order of the Id AO was required to be quashed and appeal allowed.
4. The Hon. CIT(A) erred in routinely upholding the disallowance of the deduction of Rs.1,28,65,649/- claimed u/s 801B(10) of the I. T. Act 1961, which act of the Hon. CIT(A) is not justified by law and hence the addition of Rs.1,28,65,649/- may please be deleted.

5. *The appellant craves leave to add, alter, amend and/or vary the above ground of appeal at any time before the decision of the appeal.*

3. The brief facts are that the assessee firm is engaged in the business of Construction of buildings and had filed its return of income for the year under consideration dated 03.09.2007 declaring the total income at ₹ Nil. The assessee's case was selected for the scrutiny and assessment order dated 17.11.2009 was passed u/s 143(3) of the Act where the Ld. AO assessed the total income at ₹ Nil. Further to this, the Ld. PCIT invoked Section 263 of the Act vide notice dated 12.01.2012 for the reason that the assessment order was erroneous in so far as it was prejudicial to the interest of the revenue thereby setting aside the assessment order for the reason that the Ld. AO had allowed the deduction claimed by the assessee u/s 80IB(10) amounting to ₹ 1,28,65,649/- without making any inquiry or verification. Subsequently, the Ld. AO vide order dated 29.11.2012 passed the assessment order u/s 144 r.w.s. 263 of the Act by disallowing the deduction claimed by the assessee u/s 80 IB (10) of the Act amounting to ₹ 1,28,65,649/-.

4. The assessee was in appeal before the Ld. CIT(A) challenging the assessment order passed u/s 144 r.w.s 263 of the Act who vide an exparte order had dismissed the appeal filed by the assessee.

5. Further, aggrieved the assessee is in appeal before us challenging the impugned order.

6. The Ld. Authorized Representative for the assessee [hereinafter the "Ld. AR"] contended that in an appeal before the Tribunal challenging the order u/s 263 of the Act.

the Tribunal vide order dated 01.03.2012 had allowed the appeal filed by the assessee setting aside the order of Ld. PCIT. The Ld. AR further stated that as the order u/s 263 of the Act has been set aside the consequential assessment order and the addition made thereby could not be sustained. The Ld. AR contended that the addition made by the Ld. AO upheld by the CIT(A) in consequence to the order passed u/s 263 of the IT Act ought to be deleted for the reason that the Tribunal has invalidated order passed u/s 263 of the Act.

7. The Ld. Departmental Representative for the revenue [hereinafter the Ld. DR] on the other hand had nothing to controvert the said facts.

8. We have heard the rival submission and perused the materials available on record. It is observed that the assessee had claimed deduction of ₹ 1,28,65,649/- u/s 80 IB (10) of the Act in its return of income declaring total income at ₹ Nil. The Ld. AO in the assessment order passed u/s 143(3) of the Act had allowed the said claim and assessed the total income of the assessee at ₹ Nil. The Ld. CIT set aside the assessment order on the ground that it was erroneous and prejudicial to the interest of the revenue and also the assessee in spite of the several notices did not appear before the Ld. CIT and remained *exparte*.

9. The assessee in its appeal before the Tribunal had contended that it had never received any notice u/s 263 of the Act and the Tribunal set aside the order of the Ld. CIT to give one more opportunity to the assessee vide order dated 29.07.2015 in ITA No. 4067/Mum/2013. It is also observed that the Ld. CIT(A) in appeal filed by the assessee

challenging the assessment order passed by the Ld. AO u/s 144 r.w.s. 263 of the Act had dismissed the appeal of the assessee vide an exparte order dated 01.02.2023. Since the Tribunal has set aside the exparte order passed by the CIT u/s 263 of the Act the consequential assessment order and the order of the First Appellate Authority will not sustain. We therefore, deem it fit to allow ground no. 1 raised by the assessee. Since we have not decided the issue on the merits of the case the same remains open. It is also observed that the assessee has repeatedly been non-compliant before the Ld. AO, the Ld. Ld. CIT and the Ld. CIT(A), We direct the assessee to cooperate in the set aside proceedings before the Ld. CIT.

10. In the result the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 20 .07.2023

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai;

Dated : 20.07.2023

Aniket Singh Rajput, Stenographer

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT,