

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 275/Kol/2023
Assessment Year: 2013-14
I.T.A. No. 276/Kol/2023
Assessment Year: 2014-15
I.T.A. No. 277/Kol/2023
Assessment Year: 2018-19

The Cricket Association of Bengal Dr. B.C. Roy Club House Eden Gardens Kolkata - 700021 [PAN : AAATC3781G]	Vs	Deputy Commissioner of Income-tax, Circle-1(1), Exemption, Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri J.P. Khaitan, Sr. Counsel & Shri P. Jhunjhunwala, Advocate
Revenue by :	Shri Abhijit Kundu, CIT D/R

सुनवाई की तारीख/Date of Hearing : 17/08/2023
घोषणा की तारीख /Date of Pronouncement: 21/08/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

All these appeals filed by the assessee are, directed against separate but identical orders of the National Faceless Appeal Centre (hereinafter the 'Id. CIT(A)'), passed u/s 250 of the Income-tax Act, 1961 (hereinafter 'the Act'), dt. 07/03/2023, for Assessment Year 2013-14, 2014-15 and 2018-19.

2. The grounds of appeal for all these appeals are common and, therefore, for the purpose of adjudication, we take up the appeal for Assessment Year 2013-14. The grounds of appeal for Assessment Year 2013-14, are as under:-

"1.0 For that dismissal of the appeal by the Ld. CIT (Appeals) as withdrawn for pursuing revision petition u/s 264 was erroneous.

2.0 For that the appeal filed before the Ld. CIT (Appeals) could not in law or in fact be withdrawn or dismissed as such.

3.0 For that the Ld. CIT(Appeals) should have adjudicated the grounds of appeal on merits. The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing."

3. Facts in brief are that the assessee is a trust registered under section 12A of the Act. It filed its return of income on 28/09/2013 for Assessment Year 2013-14 disclosing Nil income. Assessment was framed u/s 143(3) of the Act on 22/01/2016. Thereafter the case was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act dt. 04/11/2019. Re-assessment proceedings were carried out and the Id. Assessing Officer after considering the submissions of the assessee came to a conclusion that the association is involved in the activity of rendering services in relation to trade, commerce or business, receipt from which constitute a substantial portion of the gross receipt and, therefore, the assessee is hit by the proviso to sub-Section (15) of Section 2 of the Act r.w.s. 13(8) of the Act as a result, benefit of exemption u/s 11 of the Act was rejected and the excess of income over expenditure at Rs.18,86,14,986/- was assessed as taxable income in the hands of the assessee as an association of persons at the maximum marginal rate. Similar type of proceedings were also carried out for Assessment Year 2014-15 and Assessment Year 2018-19 and the benefit of exemption Section 11 of the Act was denied and the income over expenditure

assessed as income of an association of person taxable at maximum marginal rate.

4. Aggrieved the assessee preferred appeal before the Id. CIT(A) raising the legal grounds challenging the validity of the assessment order and also raising grounds on merit challenging the addition made on account of denial of exemption u/s 11 of the Act. During the course of pendency of the appeal before the Id. CIT(A), assessee *suo moto* uploaded written request on 22/03/2023, for priority disposal of the appeals. Again on 02/03/2023, assessee filed an application before the Id. CIT(A) stating to withdraw the appeals on the ground that the assessee wants to opt for option u/s 264 of the Act. It was also submitted in the said application that without withdrawal of these appeals the assessee's petition u/s 264 of the Act cannot be entertained. The said application is appearing at para 5.1. of the impugned order. In the said application it is also stated that since the application u/s 264 of the Act is barred by time on 31/03/2023, the assessee has no other option than to withdraw these appeals to continue the proceedings u/s 264 of the Act. Based on this request made by the assessee, the Id. CIT(A) dismissed the appeal of the assessee as withdrawn. Similar applications were also filed by the assessee for Assessment Year 2014-15 and 2018-19. Those appeals were also dismissed as withdrawn by the Id. CIT(A) on the same ground.

5. Subsequent to the dismissal of the appeals by the Id. CIT(A), assessee participated in the proceedings before the Id. Commissioner of

Income Tax (Exemption) [hereinafter the Id. CIT(E)] u/s 264 of the Act raising similar grounds as were raised before the Id. CIT(A). During the course of proceedings u/s 264 of the Act, assessee again requested to withdraw the application u/s 264 of the Act and be allowed to pursue the appeal before the Id. CIT(A). However, the said request of the assessee was not accepted by the Id. CIT(E) and after giving detailed finding and considering all the submissions made by the assessee and the settled judicial precedents, the Id. CIT(E), held that no revision is called for in the order of the Assessing Officer for all the three assessment years.

6. Aggrieved, the assessee filed a writ petition before the Hon'ble Jurisdictional High Court challenging the order passed u/s 264 of the Act, dt. 30/03/2023. During the course of hearing before the Hon'ble Court, it was submitted by the assessee that the order of the Id. CIT(A) dismissing the assessee's appeal as withdrawn has been challenged before the ITAT, vide ITA No. 275, 276 and 277/Kol/2023. Considering this fact that the appeals against the order of the Id. CIT(A) is pending, the Hon'ble Court vide order sheet dated 25/07/2023, gave the following directions to this Tribunal for disposing of the pending appeals in accordance with law and on its merit within the month of August, 2023, observing as follows:-

“By this writ petition, petitioner has challenged the impugned order dated 30th March, 2023 passed under Section 264 of the Income Tax Act, 1961 relating to assessment year 2013-14. It is a very peculiar case where the assessee petitioner itself filed revision application under Section 264 of the Act before the Commissioner of Income Tax against the impugned

assessment order during the pendency of the statutory appeal filed by the petitioner before the CIT(Appeals) against the same impugned assessment order.

Mr. Khaitan, learned senior advocate appearing for the petitioner submits that the petitioner is aggrieved by refusal on the part of the Commissioner to allow it to withdraw the revision application which was refused and impugned order was passed. It appears from record that the statutory appeal before the CIT(Appeals) against the same assessment order which petitioner wanted to withdraw the CIT (Appeals) allowed the same and after order of the CIT (Appeals) allowing withdrawal of the appeal in question the aforesaid impugned order under Section 264 of the Act was passed. Mr. Khaitan also submits that after the order of the CIT (Appeals) allowing the petitioner to withdraw the appeal, petitioner had filed an application under Section 154 of the Act and appeal was also filed before the Tribunal being ITA 275/Kol/2023 dated 28th March, 2023 against allowing the petitioner to withdraw its appeal and which is still pending.

The fact remains that in the eye of law appeal is not alive before the CIT (Appeals) on date and that the Commissioner passed order under Section 264 of the Act after withdrawal of appeal by the petitioner which was filed before the CIT (Appeals) though against the order of withdrawal, appeal before the ITAT was pending. Unless the order of withdrawal of appeal by the petitioner granted by the CIT (Appeals) is set aside by the Tribunal and CIT (Appeals) is asked to hear the appeal on merit, the appeal before the CIT (Appeals) at present has no existence. In such complicated circumstances created by the petitioner itself, I am not inclined to interfere with the impugned order under Section 264 of the Income Tax Act, 1961 at this stage and the issues deserve final adjudication upon exchange of affidavits and subject to the final outcome of the pending appeal before the ITAT. Mr. Khaitan, learned senior advocate submits that the next date of hearing of the appeal in question is fixed on 12th September, 2023. Considering the peculiar facts and circumstances of the case learned ITAT is requested to consider and dispose of the pending appeal in question in accordance with law and on its own merit within the month of August, 2023.

It is clarified that this Court has not gone into the merit of the pending appeal in question before the ITAT and the same shall be decided strictly in accordance with law.

Let the respondents file affidavit-in-opposition within ten weeks from date; Petitioner to file reply thereto, if any, within two weeks thereafter. List this matter for final hearing in the monthly list of November, 2023.

No coercive action for recovery shall be taken on the basis of final order if passed during the pendency of the writ petition in the penalty proceeding in question."

6. In pursuance to the directions of the Hon'ble Jurisdictional High Court, these appeals were taken up for hearing. The assessee has taken the ground that the Id. CIT(A) has erred in dismissing the appeals of the assessee as withdrawn because the appeals filed before the Id. CIT(A)

could not in law or on facts be dismissed and the Id. CIT(A) ought to have adjudicated the appeals and grounds raised therein on merits.

7. The Id. Senior Counsel for the assessee, stated that the Id. CIT(A) cannot dismiss the assessee's appeal as withdrawn and ought to have adjudicated the issues on merits. For this proposition reliance was placed on the judgement of the Hon'ble Supreme Court in the case of *CIT vs. Rai Bahadur Hardutroy Motilal Chamaria* reported in 1968 AIR 153, wherein the Hon'ble Court has held that "*.....if Assessee having filed an appeal and brought the machinery of the Act into working, cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the, real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appeal at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there, has been an under-assessment, he can enhance the assessment...*"

Reference was also made to the judgement of the Hon'ble Madras High Court in the case of *M. Loganathan vs. ITO* reported in [2013] 350 ITR 373 (Mad.) and held that "*...There is no justification to read into the provision under section 251 as to the objection or no objection from the revenue for such withdrawal.*"

Reference was also made to the judgement of the Hon'ble High Court of Bombay in the case of *CIT vs. Premkumar Arjundas Luthra (HUF)* reported in [2016] 69 taxmann.com 407 (Bom.) and the decision of the 'SMC' Bench of ITAT Mumbai in the case of *M/s. Deekay Gears vs. ACIT* in ITA No. 2366/Mum/2018; AY 2009-10, order dt. 16/01/2019.

7.1. The crux of the arguments of the ld. Senior counsel for the assessee is that, due to wrong advice, assessee went in for filing a petition u/s 264 of the Act and right course was to proceed by contesting the grounds of appeal before the ld. CIT(A). He also submitted that even though the assessee has filed a withdrawal application, the ld. CIT(A), ought to have dealt with the issues on merits and in view of the judgements referred hereinabove this action of the ld. CIT(A) of dismissing the appeal of the assessee as withdrawn, is liable to be set aside and directions may be given for adjudicating the issues on merits.

8. On the other hand, the ld. D/R, stated that the assessee has *suo-moto* requested for withdrawal of the appeals and thus moved a petition for revision of assessment orders in question u/s 264 of the Act raising similar grounds and even this issue of withdrawal has been dealt by the ld. CIT(E) because during the course of revisionary proceedings the assessee again requested to withdraw the application u/s 264 of the Act and appear before the ld. CIT(A) for contesting the issues. It is like blowing hot and cold by the assessee and the ultimate intention of the assessee is to get the benefit either before the ld. CIT(A) or before the ld. CIT(E). Since the assessee has failed to get any relief before the ld. CIT(E), now, the assessee is pleading that the ld. CIT(A) erred in dismissing the appeals as withdrawn. Had the ld. CIT(E) granted relief to assessee, then assessee would have not pressed the instant appeals.

He thus prayed that the impugned orders dismissing the assessee's appeals, may be confirmed.

9. We have heard rival contentions and perused the material placed before us. We observe that the assessee has been denied exemption u/s 11 of the Act for AYs 2013-14, 2014-15 and 2018-19 and aggrieved with the said action of the Id. AO, grounds of appeal challenging the validity of the assessment proceedings as well as the additions made, were raised before the Id. CIT(A). During the course of pendency of the appeal before the Id. CIT(A), the assessee *suo-moto* requested to withdraw the appeal because it wanted to opt for the window of Section 264 of the Act and since the same was getting time barred, on assessee's request the Id. CIT(A) dismissed the appeal as withdrawn.

10. In the decisions referred to by the Id. Senior counsel for the assessee, there is no such issue where the assessee in order to apply for the petition u/s 264 of the Act, has withdrawn the appeal pending before the Id. CIT(A).

10.1. In the case of *Rai Bahadur Hardutroy Motilal Chamaria (supra)*, the issue was that assessee filed the appeal before the appellate Asst. Commissioner and then withdrew the appeal without quoting any reason and such application of the assessee was with an intention to stop the appellate proceedings. Hon'ble Court found that the machinery of the act was set into motion the moment when the assessee filed the appeal and then complete assessment records of the assessee were open before the learned appellate Asst. Commissioner and in case

of any issues which the Assessing Officer had not noticed and prejudice may have been caused to the revenue then under such circumstances the appellate Asst. Commissioner has to carry out the proceedings for ascertaining and settling the real sum to be assessed. However, in the instant case the facts are different and it is a case where the proceedings have just been shifted from Id. CIT(A) to Id. CIT(E) and similar grounds have been raised in the petition u/s 264 of the Act and, therefore, the judgement of the Hon'ble Supreme Court (*supra*) is not applicable in the case of the assessee.

10.2. Similar are the facts in the case of *M. Loganathan (supra)*, wherein the assessee made a declaration under the Voluntary Disclosure Scheme, 1997, but declaration was rejected on the ground that the tax was not paid within three months. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income Tax (Appeals)-XII, Chennai and in the meantime, the assessee moved to the Settlement Commission under Section 245C of the Income Tax Act for settlement of the assessment and thus the assessee wanted to reduce its tax liability. This fact is also missing in the instant appeal and, therefore, the same is not applicable in the case of the assessee.

10.3. So far as the remaining two decisions are concerned i.e., *CIT vs. Premkumar Arjundas Luthra (HUF)* reported in [2016] 69 taxmann.com 407 (Bom.) and *M/s. Deekay Gears vs. ACIT in ITA No. 2366/Mum/2018; AY 2009-10, order dt. 16/01/2019*, in both these cases the Id. CIT(A) dismissed the assessee's appeal *in limine* without dealing with the merits of the

case and since this is also not the fact of the instant case before us, these two decisions are also not applicable as the facts are distinguishable.

11. Before proceeding ahead we would like to go through the provisions of Section 251 of the Act, which read as follows:-

*“Powers of the ⁶³[***] ⁶⁴[Joint Commissioner (Appeals) or the]⁶⁵[Commissioner (Appeals)].*

⁶⁶ 251. (1) In disposing of an appeal, the ⁶³[***]⁶⁵[Commissioner (Appeals)] shall have the following powers –

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or ⁶⁷annul the assessment ⁶⁸[***];

⁶⁹[(aa) in an 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.

⁷⁰ [(1A) In disposing of an appeal, the Joint Commissioner (Appeals) shall have the following powers –

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or ⁶⁷annul 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 ⁷¹[***] ⁷²[Joint Commissioner (Appeals) or the]⁷³[Commissioner (Appeals)] ⁷⁴[, as the case may be,] 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 ⁷⁴[***] ⁷⁵[Joint Commissioner (Appeals) or the]⁷⁶[Commissioner (Appeals)], may consider and decide ⁷⁷any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the ⁷⁴[***] ⁷⁵[Joint Commissioner (Appeals) or the]⁷⁶[Commissioner (Appeals)] ⁷⁵[, as the case may be,] by the appellant.”*

12. Now, as per the provisions of section 251 of the Act, the Id. CIT(A) has the power to *confirm, reduce, enhance or annul the assessment* as provided in Section 251(1A)(a) of the Act and Clause (c) of the Section 251(1A)(c) of the Act provides that *in any other case, he may pass such orders in the appeal as he thinks fit.*

13. Now in the instant appeals, we notice that the assessee after filing the appeal before the Id. CIT(A) moved an application for withdrawal of the appeals stating the reason that it wants to file a petition u/s 264 of the Act. This application of the assessee was towards adopting an alternative remedy provided under the Act by way of Section 264. Now if, the Id. CIT(A) had refused to accept such application, then also assessee would have been aggrieved for not having been given the recourse for section 264 of the Act. The Id. CIT(A) in this case dismissed the appeal has withdrawn considering the application of the assessee opting for an alternative remedy and the issues raised before him will again be the subject matter of adjudication before the Id. CIT(E).

14. We further notice that in the order u/s 264 of the Act, Id. CIT(E) has referred to the judgement of the Hon'ble Jurisdictional High Court in the case of *Vikas Nagelia vs. CIT* reported in [2022] 145 taxmann.com 317 (Cal.), wherein the Hon'ble Court held as under:-

"10. With regard to the averments that no instruction was given by the appellant to withdraw the appeal to the earlier consultant etc., are of self-serving statement of the appellant of which we cannot take any cognizance. Nevertheless, we are convinced that the conduct of the appellant cannot be stated to be so bad to hold that he had slept over his rights. The appellant had been prosecuting the matter before a wrong

forum. In any event, the appellant should not be left remediless and should not be non-suited even to avail the revisional remedy, more particularly when the appellant chose not to avail a statutory appeal before the first appellate authority against the assessment. Therefore, the only remedy available to the appellant is to file a revision petition under section 264 of the said Act, which was done by the appellant and such revisional application was made as early as on 5th March, 2012."

14.1. Now, on going through the above judgement, we notice that the assessee should not be left remediless. In this case had the assessee been able to get any relief in the proceedings u/s 264 of the Act, then the instant appeal must have been withdrawn or not pressed by the assessee but because the assessee did not get any relief in the proceedings u/s 264 of the Act, this action of the assessee is like taking chance again before the Id. CIT(A). The issues which were raised before the Id. CIT(A), had been raised before the Id. CIT(E) and the same has been decided against the assessee. Now the order u/s 264 of the Act, is the subject matter of the appeal before the Hon'ble Jurisdictional High Court.

15. Under these given facts and circumstances, we are of the considered view that the application made by the assessee for withdrawal of appeal before the Id. CIT(A), was a conscious effort towards getting relief by taking recourse to Section 264 of the Act and the Id. CIT(A) has just acted within the four corners of law in order to provide remedy to the assessee, for which it is eligible, u/s 264 of the Act, and he gave the assessee a way for doing the same because without doing so proceedings u/s 264 of the Act could not be initiated in terms of provision of Section 264(4)(b) of the Act. Therefore, by doing so the

Id. CIT(A) has acted well within the powers provided u/s 250 of the Act. In view of the above discussion, we fail to find any infirmity in the action of the Id. CIT(A) dismissing the appeals of the assessee has withdrawn and not dealing with the merits of the case in pursuance to the application for withdrawal filed by the assessee to take recourse u/s 264 of the Act and uphold the same. Thus all the grounds of appeal commonly raised for Assessment Year 2013-14, 2014-15 and 2018-19 are dismissed.

16. In the result, all these appeals filed by the assessee for Assessment Year 2013-14, 2014-15 and 2018-19 are dismissed.

Order pronounced in the Court on 21st August, 2023 at Kolkata.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 21/08/2023

SC S.P.

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त/अपील (/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata