

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.2366 & 2367/Mum/2023
(A.Ys. 2009-10 & 2017-18)**

Eversmile Properties P Ltd 75, Old Block Factory, Sector-I, Srishti Housing, Complex, Penkar Pada, Mira Road, Thane – 401004	Vs.	DCIT, Circle- 10(1)(2) Room No. 561, Aaykar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No:AAACE1576C		
Appellant	..	Respondent

Appellant by :	Ravi Ganatra
Respondent by :	Ajay Singh

Date of Hearing	09.10.2023
Date of Pronouncement	23.10.2023

आदेश / ORDER

Per Amarjit Singh (AM):

Both these appeals filed by the assessee are directed against the different order of NFAC for assessment year 2009-10 and AY. 2017-18. Since, common issue on identical facts are involved in these two cases, therefore, for the sake of convenience both these appeals are adjudicated together by taking ITA No. 2366/Mum/2023 as a lead case and its finding will be applied mutatis mutandis to the other appeal wherever it is applicable.

2. There was a delay of 132 days in filing this appeal and the assessee has filed an affidavit dated 03.10.2023 for condonation of

delay in filing the appeal. The assessee submitted that the Id. CIT(A) has passed the order u/s 250 of the Act on 23.12.2022 which was uploaded by the Id. CIT(A), however, due to oversight the assessee failed to take notice about the uploading of the order by the Id. CIT(A) and the order passed by the CIT(A) could be noticed only on 23.06.2023.

3. Heard both the sides and perused the material on record. After taking into account the facts reported by the assessee in the affidavit filed we consider that there appear to be bonafide reason for delay in filing the impugned appeal because of not noticing the appeal order uploaded by the Id. CIT(A), therefore, we condone the delay of 132 days in filing the appeal.

ITA No.2366/Mum/2023

- “1. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) erred in passing the ex-parte order.
2. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) erred in not granting proper opportunity of being heard.
3. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) erred in dismissing the appeal in limine.
4. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) erred in confirming the AO's action of making various additions/disallowance.
5. The appellant craves leave to add to, alter, amend, modify and /or delete all or any of the foregoing grounds of appeal

The appellant prays before the Hon'ble Tribunal to delete the additions/disallowance made by the AO and confirm by the Ld. CIT(A) and/ or any other relief as the Hon'ble Tribunal may deem fit.”

4. Fact in brief is that return of income declaring loss of Rs.103,89,726/- was filed on 11.01.2010. The case was reopened u/s 147 of the Act by issuing of notice u/s 148 dated 20.03.2016. The case was reopened on the basis that assessee had made development agreement with M/s Azure Tretownship Pvt. Ltd. and assessee was

entitled for 11% of the sale proceeds made by the said company in each years. Therefore, the assessing officer observed that assessee has not offered receipt of Rs.146,18,468/- from the said company for tax during the year under consideration. During the course of assessment the assessing officer stated that assessee has granted development rights on land admeasuring 68411 sq. mtr. to M/s Azure Tretownship Pvt. Ltd. in the Phase III of the development. Therefore, as per the agreement the assessee was entitled for 11% of the sale proceeds arising from sale of units constructed M/s Azure Tretownship Pvt. Ltd. Therefore, an amount of Rs.146,18,468/- was added to the total income of the assessee by treating it as revenue receipt during the year under consideration.

5. During the course of assessment proceedings the assessing officer has also made disallowance of interest expenses of Rs.51,87,402/- in respect of payment made to Urban Land Selling Authority on the ground that this payment was made to that authority during the Phase I & II of the development and the profit of such Phase has already been declared in the past year. The assessing officer has also disallowed an amount of Rs.40,15,700/- pertaining to payments made to the land owner in connection with conveyance of the land forming part of the project on the ground that this payment was pertained to Phase I & II of the project and same cannot be allowed under phase III of the project. The assessing officer has also disallowed an amount of Rs.967,340/- pertaining to work in progress relating to the project which was not pertained to Phase III of the project on the ground that this amount was pertained to Phase I & II of the project for which the assessee has already determined the profit in the earlier years. On similar ground AO has also disallowed architect fees of Rs.26,28,396/- and security services charges of Rs.30,16,787/- on the ground that same were related to Phase I & II of the project for which profit have already been

computed by the assessee in the earlier years. Accordingly, the assessment u/s 143(3) r.w.s 147 of the Act was finalised on 25.10.2016 and total income was determined at Rs.20,35,890/-.

6. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) had dismissed the appeal of the assessee for non prosecution holding that the assessee has not made any compliance to the notices issued during the course of appellate proceedings.

7. Heard both the sides and perused the material on record. The ld. Counsel submitted that the assessee could not made any compliance due to not keeping track with the electronic appellate proceedings held before the ld. CIT(A) and requested for giving more opportunity at the level of ld. CIT(A) to adjudicate the case of the assessee on merit. We consider that while disposing the appeal by the first appellate authority as contemplate u/s 250(6) of the Act., the ld. CIT(A) is required to state the points arising and the reason for the decision and decide the appeal on merit after considering the material available on record. Therefore, after considering the contention of the ld. Counsel and the provision of Sec. 250(6) of the Act we restore this case to the file of the ld. CIT(A) for deciding de novo on merit as directed above after affording an opportunity to the assessee. The assessee is directed to make compliance before the ld. CIT(A) without any failure. Therefore, the appeal filed by the assessee is allowed for statistical purposes.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

ITA No. 2367/Mum/2023

- “1. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of IncomeTax (Appeal) erred in passing the ex-parte order.*
2. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) erred in not granting proper opportunity of being heard.*

3. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of IncomeTax (Appeal) erred in dismissing the appeal in limine.*
4. *On the facts and in the circumstances of the case and in law, the Learned Commissioner of IncomeTax (Appeal) erred in confirming the AO's action of making various additions / disallowance.*
5. *The appellant craves leave to add to, alter, amend, modify and /or delete all or any of the foregoing grounds of appeal.*

The appellant prays before the Hon'ble Tribunal to delete the additions/ disallowance made by the AO and confirm by the Ld. CIT(A) and/ or any other relief as the Hon'ble Tribunal may deem fit.”

9. The assessee has filed an application for condonation of delay of 132 days in filing the appeal. Since the reason for delay in filing the appeal is similar to the application filed for condonation of the delay vide ITA No. 2366/Mum/2023 which has been adjudicated as supra in this order. Therefore, following the findings of ITA No. 2366/Mum/2023 the delay in filing this appeal is also condoned on the same reason has already been mentioned in this order.

Ground No. 1 to 5:

10. The ground of appeal filed in this case are similar to the ground of appeal which we have adjudicated vide ITA No. 2366/Mum/2023 as supra. Since, the issue involved in the ground of appeal are identical based on the similar facts, therefore applying the finding of ITA 2366/Mum/2023 these appeals of the assessee are also restored to the file of Id. CIT(A) for deciding on merit de novo after providing opportunity to the assessee. The assessee is directed to make compliance before the Id. CIT(A) without any failure in the set aside proceedings. Therefore, these grounds of appeal of the assessee are also allowed for statistical purposes.

11. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 23.10.2023

Sd/-
(Kuldip Singh)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 23.10.2023

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.