

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA
BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.218/Kol/2023
Assessment Year: 2012-13

Palak Highrise Pvt. Ltd. C/o Jain Vinod K & Associates, 41A, A.J.C. Bose Road, Suite No. 613, 6 th floor, Kolkata-700017. (PAN: AAGCP1560M)	Vs.	Income Tax Officer, Ward- 10(1), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Vinod Jain, FCA
Respondent by : Shri Abhijit Kundu, CIT, DR

Date of Hearing : 04.01.2024
Date of Pronouncement : 10.01.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order no. ITBA/NFAC/S/250/2022-23/1049021919(1) dated 23.01.2023 passed against the assessment order by ITO, Ward-10(1), Kolkata u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 22.03.2015 for AY 2012-13.

2. Grounds taken by the assessee are reproduced as under:

- "1. The above order of Ld. CIT(A), NFAC dismissing the appeal without considering the facts is bad in law.*
- 2. The Ld. CIT(A), NFAC passed the order ex parte without considering the stated mednt of facts, grounds of appeal and relevant documents.*
- 3. The Ld. CIT(A), NFAC erred in denying the opportunity to the appellant against principal of natural justice. The appellant seek opportunity to present their case.*

4. that the appellant craves leave to modify alter or delete or add any ground of appeal and/or to adduce additional evidence during the course of hearing.”

3. Brief facts of the case as culled out from records are that assessee filed its return of income on 27.09.2012 reporting total income at Rs.1,476/-. Case of the assessee was selected for scrutiny through CASS for the reason “*to examine large share premium received*”. Ld. AO in the assessment order noted that assessee company had furnished the requisite details in response to notice u/s. 142(1) of the Act. Assessee had raised share capital of Rs.2,21,800/- (equity shares of Rs.1/- each) and share premium of Rs.12,16,78,200/- thus, totalling to Rs.12,19,00,000/- during the year under consideration.

3.1. In the course of assessment, Ld. AO issued summons u/s. 131 to the directors of the assessee for personal deposition which remained uncompleted. Ld. AO held that since identity as well as creditworthiness of the shareholders could not be established assessee had introduced its own undisclosed funds in the garb of subscription by shareholders. He thus, made the addition of Rs.12,19,00,000/- shown as share capital contribution by applying section 68 of the Act. Aggrieved, assessee went in appeal before the Ld. CIT(A). The order of Ld. CIT(A) runs into merely six lines whereby it is noted that notices were issued to the assessee and since assessee did not respond the appeal was dismissed. The said order by Ld. CIT(A) is reproduced as under:

“In this case notice for hearing has been issued to the appellant on 09.01.2021. Further, notices were issued to the appellant on 30.12.2022 and 10.01.2023. The appellant has not responded to these notices sent in 2022 & 2023. It is apparent that the appellant is not interested in pursuing the impugned appeal before me. On merits also there is nothing on record to support the issues raised in this appeal.”

3.2. Aggrieved, assessee is in appeal before the Tribunal.


4. In the course of hearing, Ld. Counsel for the assessee submitted that appeal before the Ld. CIT(A) was dismissed for want of prosecution instead of deciding it on merits. Ld. CIT(A) had observed that assessee has not produced anything. In the assessment order also it is noted by the Ld. AO that details were not furnished nor the directors of the assessee were produced for recording their statements because of which the addition was made. On confronting these facts to the Ld. Counsel for the assessee a paper book containing 42 pages were placed on record before the Tribunal claiming that papers contained in this paper book were filed before the Ld. AO. The index of the said paper book is reproduced as under:

LIST OF DOCUMENTS FILED		
Sl No.	PARTICULARS	PAGE NO
1	The copy of notice u/s.143(2) issued by the AO on 12.08.2013	1
2	The copy of reply in response to Notice u/s 143(2) by filed with A.O of the appellant	2
3	The copy of notice u/s.142(1) issued by the AO on 31.10.2014	3
4	The copy of reply in response to Notice u/s 142(1) filed with A.O by the appellant	4-5
5	Copy of Summon u/s.131 issued by AO on 20.02.2015	6
6	Copy of Audited Annual Accounts as on 31.03.2012	7-20
7	Details of Share applicants, name, address , Pan, no. of Equity shares, amount and mode of payment.	21-22
8	Copy of Bank statement from period during the F.Y.2011-12 relevant to A.Y.2012-13 of the appellant	23-27
9	Request to Stay of Demand Petition filed by the Appellant before AO	28
10	Details of Share applicants, name, address, no. of Equity shares.	29-30
11	Computation of Total Income as on 31.03.2012	31
12	Table of Dates	32-34
13	Copy of PAN card of the appellant	35
14	Copy of Form-2 filed by the appellant before ROC	36-42
	That the documents submitted herewith the certified true copies of the original documents	
	That the Company (Appellant) Documents submitted herewith as (Page No.1 to 42) were filed during the assessment proceedings and are the part of the assessment records before the AO.	

4.1. In order to avoid multiplicity of litigation, Bench finds it proper to call for a report from the Ld. AO on two aspects namely:

- (a) The AO was directed to certify whether these papers were filed by the assessee during the course of assessment proceedings or not for which a specific report be submitted.
- (b) The AO may submit his comments or remand report if he so desires.

4.2. In compliance to this direction, a report of the Ld. AO was placed on record dated 25.08.2023 wherein it is stated that documents submitted by the assessee are verified and found to be correct. The said report of the Ld. AO is reproduced for ease of reference:

	GOVERNMENT OF INDIA * भारत सरकार MINISTRY OF FINANCE * वित्त मंत्रालय DEPARTMENT OF REVENUE * राजस्व विभाग OFFICE OF THE INCOME TAX OFFICER * Ward-10(2) * KOLKATA AAYAKAR BHAWAN, ROOM NO. 3/78, P-7, CHOWRINGHEE SQUARE, KOLKATA-700069
	F.No.Ward-10(2)/Kol/MISC./2023-24/157 Dated: 25/08/2023

To,
The Commissioner of Income Tax-(DR) ITAT-2 & Admn.,
225-C, A. J. C. Bose Road,
Kolkata - 700020.

आयकर आयुक्त (आयकर अपीलिय अधिकरण) OFFICE OF THE CIT (ITAT) प्राप्त/RECEIVED 25 AUG 2023 CONTENTS NOT VERIFIED कोल बेंच, कोल. KOL BENCHES, KOL.

Sir,

Sub: Submission of factual report with respect to the documents submitted by the appellant M/s. Palak Highrise Pvt. Ltd. having PAN-AAGCP1560M for the A.Y.2012-13 vide ITA No.218/Kol/2023 before the Hon'ble ITAT & furnishing of relevant assessment records for the Assessment Year 2012-13 - matter reg.

Kindly refer to the above.

In the instant case, the documents submitted by the appellant has been verified and found to be correct. Assessment Folder of M/s. Palak Highrise Pvt. Ltd. [PAN-AAGCP1560M] for A.Y.2012-13 in one part is hereby furnished for your kind perusal and necessary action.

Yours faithfully,

Roshan

(Roshan Kumar)
Income Tax Officer,
Ward - 10(2), Kolkata
Dated: 25/08/2023

F.No.Ward-10(2)/Kol/MISC./2023-24/
Copy forwarded to:

1. The Jt. CIT, Range-11, Kolkata for kind information.

(Roshan Kumar)
Income Tax Officer,
Ward - 10(2), Kolkata

4.3. From these assertions and facts, we note that the documents and details were furnished in the course of assessment proceeding as confirmed by the Ld. AO in the report extracted above. Ld. CIT(A) has dismissed the appeal of the assessee for non-prosecution which is not in accordance with the provisions contained in section 250 of the Act. We further note that Ld. CIT(A) also passed the appellate order ex parte. According to Ld. AR, action of Ld. AO and Ld. CIT(A) is in gross violation of Natural Justice. Therefore, the Ld. AR pleads that the assessee did not get proper opportunity before the AO to represent his case. According to Ld. AR, by giving assessee an opportunity, he assures to participate and produce all the documents to represent his case properly before the AO. By citing the decision of Hon'ble Supreme Court in the case of Tin Box Company (supra), the assessee pleads that the matter may be remanded back to the AO since there was no proper opportunity to discharge the onus upon the assessee. We note that the Hon'ble Supreme Court in Tin Box Company, supra has held as under:

"It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :

"We will straightaway agree with the assessee's submission that the Income-tax Officer had not given to the assessee proper opportunity of being heard."

That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts. That order must be made after the assessee has been given a reasonable opportunity of setting out his case. We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

Two questions were placed before the High Court, of which the second question is not pressed. The first question reads thus :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite

of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?”

In our opinion, there can only be one answer to this question which is inherent in the question itself : in the negative and in favour of the assessee.

The appeals are allowed. The order under challenge is set aside. The assessment order, that of the Commissioner (Appeals) and of the Tribunal are also set aside. The matter shall now be remanded to the assessing authority for fresh consideration, as aforesaid.”

5. We also find that no effective cognizance of the submissions made by the assessee in the course of the assessment proceedings have been taken by the Ld. CIT(A) while disposing of the appeal. The Act provides for the powers of Commissioner (Appeal) u/s. 251 which adequately deals with the powers in disposing of the appeal by the Ld. CIT(A). The section is reproduced as under:

“Powers of the Commissioner (Appeals)

251. (1) In disposing off an appeal, the Commissioner (Appeals), shall have the following powers:

- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or*
- (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.*

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.”

6. Section 250 of the Act provides for procedure to be adopted while disposing of the appeal by the Ld. CIT(A). Sub-section (4) of section

250 of the Act provides that the Ld. CIT(A) 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). Further, sub-section (6) provides that the CIT(A) shall pass an order in writing and shall set the points for determination, the decision thereon and the reasons for the decision. The section is reproduced as under:

"250. Procedure in appeal

(1) The⁷ Deputy Commissioner (Appeals)]⁸ or, as the case may be, 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 the⁹ 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 authorised representative;

(b) the¹⁰ Assessing] Officer, either- in person or by a representative.

(3) The¹ Deputy Commissioner (Appeals)]² or, as the case may be, the Commissioner (Appeals)] shall have the power to adjourn the hearing of the appeal from time to time.

(4) The³ Deputy Commissioner (Appeals)]⁴ or, as the case may be, the Commissioner (Appeals)] may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the⁵ Assessing] Officer to make further inquiry and report the result of the same to the⁶ Deputy Commissioner (Appeals)]⁷ or, as the case may be, the Commissioner (Appeals)].

(5) The⁸ Deputy Commissioner (Appeals)]⁹ or, as the case may be, 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 the¹⁰ Deputy Commissioner (Appeals)]¹¹ or, as the case may be, the Commissioner (Appeals)] is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(6) The order of the¹² Deputy Commissioner (Appeals)]¹³ or, as the case may be, 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.

(7) On the disposal of the appeal, the¹⁴ Deputy Commissioner (Appeals)]¹⁵ or, as the case may be, the Commissioner (Appeals)] shall communicate the order passed by him to the assessee and to the¹⁶ Chief Commissioner or Commissioner].

7. Principles governing the exercise of powers by the First Appellate Authority are contemplated under sections 250 and 251 of the Act, breach of which has far reaching consequences on the administration of justice culminating in the litigant approaching the higher appellate

authority. It is required that the first appellate authority viz. CIT(A) will appreciate the evidence, consider the arguments and apply the law on the given set of facts and circumstances and arrive at findings.

8. Keeping in mind the provision of sections 250 and 251 of the Act and the decision of the Hon'ble Supreme Court in the case of Tin Box Ltd. (supra) referred as above it is incumbent upon the Ld. CIT(A) to pass a speaking order on the merits of the case by examining, verifying and analyzing the material on record. Since there are no meritorious finding given by the Ld. CIT(A) on the submissions made by the assessee and also considering the grounds raised by the assessee where the Ld. CIT(A) has passed an ex parte order without giving opportunity of being heard, we find it fit to remit the matter back to the file of the Ld. CIT(A) for his objective and meritorious observations and findings on the submissions made by the assessee. Needless to say the assessee be given reasonable opportunity of being heard and the assessee shall also be cooperating for the effective disposal of the appeal and will be at liberty to make further submissions as deem fit. Since the matter is restored to the file of Ld. CIT(A) for meritorious adjudication by passing a speaking order in terms of our observations made hereinabove, we are not expressing any views on the merits of the case so as to limit the appellate procedure before the Ld. CIT(A). The observations herein made by us in remanding the matter back to the file of Ld. CIT(A) will not impair or injure the case of the Revenue nor will it cause any prejudice to the defense/explanation of the assessee. Accordingly, we set aside the impugned order of the Ld. CIT(A) and restore the matter back to the file of the Ld. CIT(A) to decide afresh after affording reasonable opportunity of being heard to the assessee and the assessee is directed to be diligent in the appellate proceedings.

9. In the result, the appeal of assessee is allowed for statistical purpose.

Order is pronounced in the open court on 10th January, 2024

Sd/-
(Sonjoy Sarma)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 10th January, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi.
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata