

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and
Ms. Kavitha Rajagopal, Judicial Member

**ITA No. 559/Coch/2023
& SA No. 120/Coch/2023**
(Assessment Year: 2012-13)

Esatto Builders Pvt. Ltd. 29/229 A5, 229 A6, JP Complex Near Civil Station, Quilandy Kozhikode 673305 [PAN: AACCE2371D]	vs.	Asst. CIT, Circle - 2(1) Kozhikode 673001
(Appellant)		(Respondent)

Appellant by:	Shri Jestin Mathew, Advocate
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	14.02.2024
Date of Pronouncement:	26.03.2024

ORDER

Per: Sanjay Arora, AM

This is an Appeal by the Assessee directed against the Order dated 15.05.2023 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], dismissing the assessee's appeal contesting its assessment under section 143(3) of Income Tax Act, 1961 ("the Act") dated 30.03.2015 for Assessment Year (AY) 2012-13. The assessee has also filed a Stay Application (SA) *qua* its instant appeal.

2. At the outset Shri Mathew, the learned counsel for the assessee, would, in pursuance of Ground No. 7.1 of its Grounds of Appeal (GoA), submit that though the impugned order mentions of opportunity for hearing having been provided to the assessee, it did not receive any of the notices of hearing, so that there was no effective grant of opportunity of hearing. The impugned order is thus passed in

contravention of the principles of natural justice. The same be accordingly set aside for being decided afresh upon hearing the assessee. That apart, it is not a proper order inasmuch as it is an *in limini* dismissal of the assessee's appeal. On the Bench enquiring as to how, then, was the impugned order received by the assessee, he explained it to be at the assessee's business address, which though had since been closed, adverting to para 7 of the statement of facts before the Tribunal. Smt. Devi, the Id. Sr. DR, would, on the other hand, submit that in the absence of communication of the fact of closure of office and providing an alternate address, the assessee could not plead denial of proper opportunity of hearing, being an unsubstantiated claim, and to therefore no effect. The assessee's conduct has clearly not been responsible, deserving of any indulgence. She, however, could not answer as to if the impugned order satisfied the mandate of sec. 250(6) of the Act.

3. We have heard the parties, and perused the material on record.

3.1 Without doubt, the assessee's conduct and assertions do not inspire confidence. It speaks of closure of office, oblivious of the fact that the address specified in Form 35, i.e., the memo of appeal before the first appellate authority, for communication, is not its office address, but of its counsel, M/s. Raghunath Associates, Advocates (at Lakshmi Building, Kannur Road, Calicut). The presumption, unless rebutted with evidence, would only be that the notices dated 24.12.2020, 31.10.2022 and 11.01.2023, issued by the office of the Id. CIT(A), had been served at the said address, and that therefore there has been grant of proper opportunity of hearing in passing the impugned order, as required u/s. 250(1). There is, further, nothing to show of the information as to the closure of its office having been communicated to the Revenue, or otherwise a change in its address in its PAN database, effected. On the contrary, the Board Resolution dated 02.07.2023 (copy of record) authorizing Shri Dijin T.V. for filing the appeal before the Tribunal, which is on its letter-head (copy on record), bears the same address as appears in the

assessment order; Form 35; and the impugned order, i.e., it's office address. The address in F/36 dated 13.07.2023, as well as in the stay petitions before the Tribunal and the Hon'ble High Court, is also the same. The plea is thus not tenable; rather found false on facts. We accordingly dismiss assessee's Gd. 7.1.

3.2 The foregoing mis-statement being noticed at the time of dictation, the appeal was released for confronting the afore-said facts, as observed, to the assessee. Shri Mathew, on being queried in the matter in the ensuing proceedings, would concede to the statement as to the closure of office of the assessee at the relevant time, as stated in the statement of facts (SoF) before the Tribunal, to be wrong, expressing regret for the same, and sought permission for revising the same. The plea is misplaced. The question is not of a misstatement in the SOF – though true and by itself deplorable, but of the plea made on that basis. While it removes the very basis of the assessee's Gd. 7.1 before us, it shows that the assessee had deliberately chosen not to appear before the first appellate authority and, further, had, regardless, chosen to misrepresent before us.

3.3 The second limb of the assessee's argument is that the impugned order is an *in limini* dismissal of it's appeal. The operative part of the said order reads as under: -

'5. In the instance of the case the appellant failed to make any submissions in support of grounds of appeal, this gives rise to an undisputable conclusion that the assessee has got nothing more to say in this regard. I have gone through the record before me and based on the record I have decided to adjudicate the issue on the merits of the case. In the instant case the AO has rightly assessed an income of Rs 1,88,38,176/- under the head "disallowance of depreciation" amounting to Rs. 1,79,338/-, "unexplained credits" amounting to Rs.36,06,592/-, "Long term borrowings amounting to Rs. 13,78,662/-, "Claim of non-existent loans amounting to Rs.51,16,310/-, "inflated liabilities claimed" amounting to Rs. 75,64,200/-, "interest disallowance" amounting to Rs.4,33,088/-, "disallowance" amounting to Rs. 64,210/- and "disallowed u/s 40(a)(ia)" amounting to Rs 28,096/-. Since the appellant failed to substantiate appellant's claim and addition made by the Assessing Officer of Rs. 1,83,70,496/- is hereby confirmed.'

3.4 The same cannot by any means be regarded as meeting the pre-requisites of an order under, or otherwise in terms of section 250(6) of the Act, which reads as under:

Procedure in appeal.

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 – 5

(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.

Even assuming, as stated, and not unreasonably, that the assessee has nothing more to say in the matter, i.e., other than that stated before the Assessing Officer (AO), there is no reference thereto in his order, much less anything to show its consideration by him. This, a mandatory requirement, becomes all the more incumbent in view of the assessee's Ground 1.2 before him stating of absence of any pre-assessment notice resulting in several defects in the assessment order. The assessee's returned income of Rs.4.68 lakhs has been assessed at Rs.188.38 lakhs, i.e., at an increase by 40 times thereof. While that by itself is no indicator of the merits of the assessment, it surely calls for circumspection in the extreme before confirming the same. The assessee has filed a 51 page paper-book before us. It does not, as required by the Rules, bear a certificate to the effect that the said documents were before the Revenue authorities. Even ignoring the material dated July, 2023, i.e., procured subsequent to the impugned order, there is clearly material dated prior to 30.03.2015, viz., Annexures A-3, A-6, A-8 and A-11, and which, therefore, being prior to the last date of hearing in the assessment proceedings, i.e., 22.12.2014, should have been considered by him. It could certainly be that the same had been produced before the AO. Only if he had called for the assessment record, he would have been able to know of the materials furnished in the assessment proceedings, extremely relevant to understanding the assessee's case, and its consideration by the assessing authority, called into question before him.

3.5 Inasmuch as the impugned order does not qualify to be an order u/s. 250(6) of the Act, we consider it fit and proper under the circumstances to, setting it aside, restore the matter back to the file of the first appellate authority, who shall adjudicate afresh in accordance with law upon affording the assessee a reasonable opportunity of hearing, who shall furnish it's addresses, both real and virtual, thereto, i.e., where there is a change therein from that registered with the Revenue. Further, the matter being already long delayed; the Id. CIT(A) deciding the appeal *after over 8 years* of it's institution, this shall be done expeditiously, preferably within a period of 3 months of the receipt of this order by his office. In the event of non-cooperation by the assessee before him, he is at liberty to draw inference/s as admissible under law. Further, in view of the recalcitrant attitude by the assessee in the proceedings before the first appellate authority, as indeed false representation before us, we, as pronounced in the open court after hearing the parties, consider it proper to impose a cost of Rs. 25,000 (INR twenty five thousand) on the assessee, who shall deposit the same with the Prime Minister's National Relief Fund by, as communicated, February 28, 2024. We make it clear that our interference with the impugned order is subject to the assessee paying the said cost, duly filing it's receipt with the Revenue.

3.6 We decide accordingly.

4. In the result, the assessee's appeal is disposed on the foregoing terms, and it's stay petition dismissed as unfruitful.

Order pronounced on March 26, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-

(Kavitha Rajagopal)
Judicial Member

(Sanjay Arora)
Accountant Member

Cochin, Dated: March 26, 2024

n.p.