

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER

AND

SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

ITA NO. 4667/MUM/2023 (A.Y: 2017-18)

DCIT – 5(2)(1) Room No. 571, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai – 400020	v.	Aditya Birla Idea Payments Bank Limited {formerly known as Idea Mobile Commerce Services} Level – 18, Birla Aurora Towers Dr. Annie Besant Road, Worli Mumbai – 400030 PAN: AADCC2683H
(Appellant)		(Respondent)

CO NO. 16/MUM/2024

[ARISING OUT OF ITA NO. 4667/MUM/2023 (A.Y: 2017-18)]

Aditya Birla Idea Payments Bank Limited {formerly known as Idea Mobile Commerce Services} Level – 18, Birla Aurora Towers Dr. Annie Besant Road, Worli Mumbai – 400030 PAN: AADCC2683H	v.	DCIT – 5(2)(1) Room No. 571, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai – 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Ronak Doshi & Ms. Mahek Savala
Department Represented by	:	Shri Manoj Kumar Sinha
Date of conclusion of Hearing	:	15.05.2024
Date of Pronouncement	:	17.05.2024

ORDER

PER NARENDRA KUMAR BILLAIYA (AM)

1. ITA No. 4667/MUM/2023 and CO No. 16/MUM/2024 are appeal by the revenue and cross objection by the assessee are preferred against the order dated 30.10.2023 by National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] pertaining to A.Y.2017-18.
2. The appeal and the cross objection are disposed off by this common order for the sake of convenience and brevity.
3. The entire quarrel revolves around the levy of Penalty under section 270A of Income-tax Act, 1961 (in short "Act").
4. Since grounds taken in the cross objection go to the root of the matter we deem it fit to adjudicate it first.
5. The grounds raised by the assessee in its cross objection read as under: -

"CROSS-OBJECTION I:

1. *On the facts and circumstances of the case and in law, the cross objector says that the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre ["CIT(A), NFAC"] erred in upholding the action of the Deputy*

Commissioner of Income Tax- 5(2)(1) ("the AO") in issuance of penalty notice and passing of penalty order on a non-existent entity.

2. *The Cross-Objector prays that it be held on facts and circumstances of the case and in law, since Idea Mobile Commerce Service Limited has merged with Aditya Birla Idea Payments Bank Limited w.e.f. from August 01, 2016, no proceedings can be undertaken on a non-existent entity and thus, entire penalty proceedings are bad in law and/ or the penalty order passed on a non-existing entity is ab-initio void and bad in law.*

WITHOUT PREJUDICE,

CROSS-OBJECTION II:

1. *On the facts and circumstances of the case and in law, the cross objector says that the Learned CIT(A), NFAC erred in upholding the action of the AO in not granting immunity from penalty. The Cross-Objector states that it has substantively complied with all the conditions prescribed u/s 270AA of the Act.*

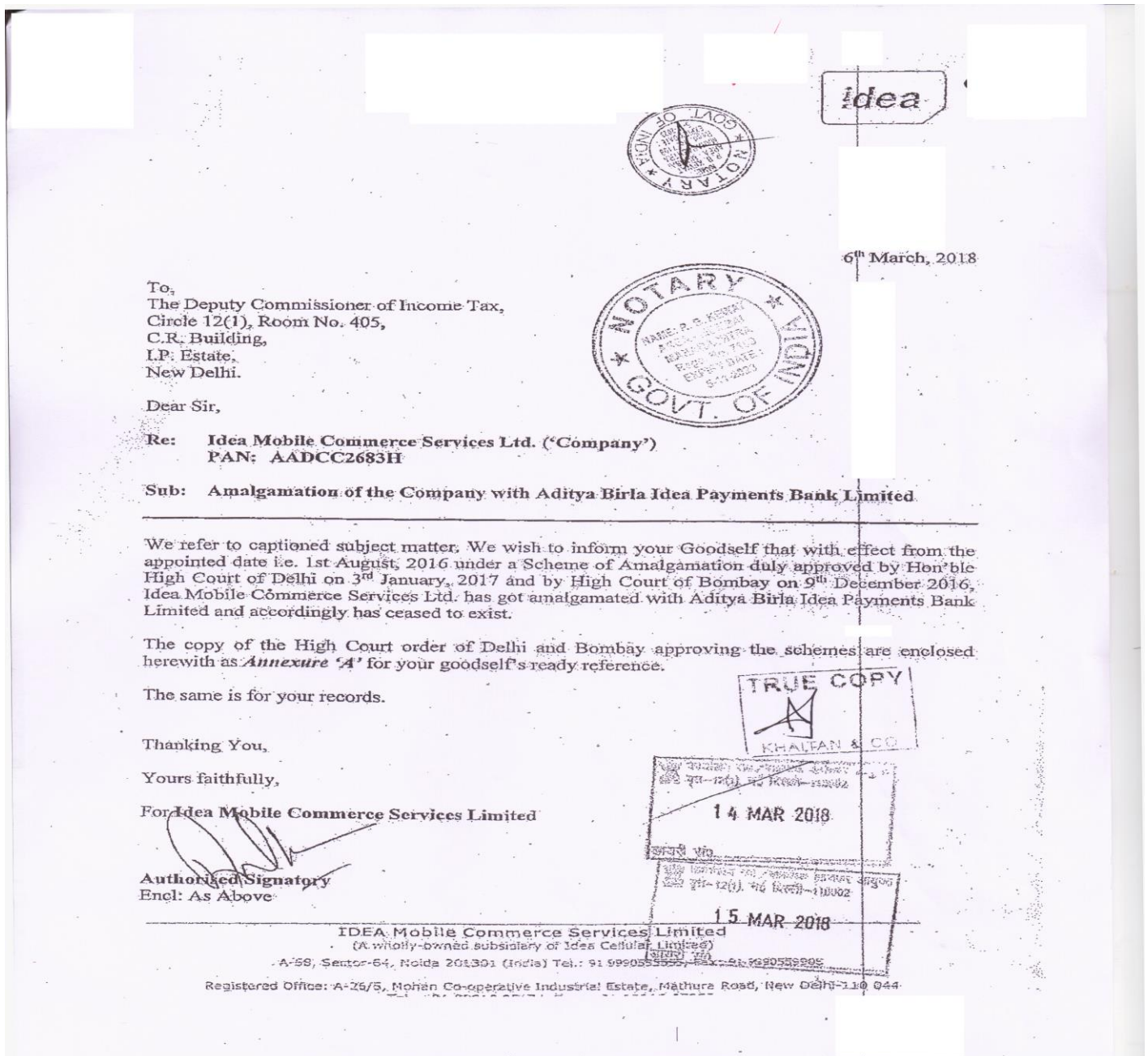
2. *The Cross-Objector prays that relief under the Act cannot be denied merely on account of a procedural lapse and thus immunity from penalty be granted.*

CROSS-OBJECTION III

The Cross objector prays leave to add to, amend and/or alter all or any of the above Cross-Objections.

6. It would be pertinent to understand the facts of the assessee. Idea Mobile Commerce Services Limited [hereinafter in short "IMCSL"] merged into Aditya Birla Idea Payments Bank Limited [hereinafter in short "ABIPBL"] effective from 22.02.2018 with appointed date 01.08.2016 pursuant to scheme of arrangement of order passed by the

Hon'ble Bombay High Court and Hon'ble Delhi High Court. The assessee fled its original return of income on 27.10.2017 declaring loss of ₹.58.90 crores. During the course of the scrutiny assessment proceedings, the assessee informed the Assessing Officer merger with ABIPBL. The letter reads as under: -



7. The assessee revised its return of income on 13.11.2018 declaring loss of ₹.17.69 crores, though the revised return was filed in the name of IMCSL due to some technical issue on e-filing portal. However, in the return itself in the business organization schedule the assessee explained the merger as under: -

Acknowledgement Number: 375277231131118						Assessment Year: 2017-18		
(b) If subsidiary Company, mention the details of the Holding Company								
Sl.No	PAN	Name of Holding Company	Address of Holding Company	City	State	Country	Pin Code / Zip Code	Percentage of shares held
1.	AAACB2100P	VODAFONE IDEA LIMITED (FORMERLY IDEA CELLULAR LIMITED)	SUMAN TOWER, PLOT NO. 18, SECTOR-11	GANDHINAGAR	GUJARAT	INDIA	382011	100
(c) If holding company, mention the details of the subsidiary companies.								
Sl.No	PAN	Name of subsidiary Holding Company	Address of Subsidiary Company	City	State	Country	Pin Code / Zip Code	Percentage of shares held
BUSINESS ORGANIZATION								
Sl.No	Business type	PAN	company Name	Address	City	State	Country	Pin Code / Zip Code
1.	AMALGAMATING	AADCC2683H	IDEA MOBILE COMMERCE SERVICES LIMITED	7 TH FLOOR, KONNECTUS BUILDING, BHAVBHUTI MARG, NEAR MINTO BRIDGE, CONNAUGHT PLACE	NEW DELHI	DELHI	INDIA	11001
2.	AMALGAMATED	AAOCA1840K	ADITYA BIRLA IDEA PAYMENTS BANK LIMITED	LEVEL 17 AND 18, BIRLA AURORA TOWER, DR. ANNIE BESANT ROAD, WORLI	MUMBAI	MAHARASHTRA	INDIA	400030
KEY PERSONS								
Particulars of Managing Director, Directors, Secretary and Principal Officers(s) who have held the office during the previous year and the details of eligible person who is verifying the return								

8. From the above it can be seen that PAN Numbers of both the amalgamating company and the amalgamated company are mentioned. In spite of the repetitive intimation the notices were issued in the name of IMCSL and assessment order dated 25.12.2019 was also framed in the name of IMCSL.

9. The impugned penalty notice dated 25.12.2019 is also issued in the name of IMCSL. While replying to the notice issued under section 274 of the Act the assessee specifically explained the merger of the assessee with ABIPBL. It has been specifically explained as **"It was pre-requisite of banking license issued by RBI that PPI business of IMCSL should be transferred to Aditya Birla Idea Payments Bank Limited ('ABIPBL'). Accordingly, Hon'ble High Court of Bombay vide its order dated 9 December 2016 and Hon'ble High Court of Delhi vide its order dated 3 January 2017 approved scheme of amalgamation of IMCSL with ABIPBL on going concern basis. Upon scheme being effective, entire undertaking of the IMCSL including all its assets, liabilities, reserve and surplus stood transferred and vested in ABIPBL with effect from the appointed date i.e. 01 August 2016 and the IMCSL was no**

longer in existence (copy of the Hon'ble High Court orders is already filed during the course of assessment proceedings)."

10. From the above it can be seen that on multiple occasions the assessee brought to the notice of the Assessing Officer the fact about amalgamation and the fact that the amalgamated company is ABIPBL.

11. A perusal of the assessment order show that the Assessing Officer was well aware of the fact of liquidation of the assessee in as much as in the first page of the assessment order the Assessing Officer has mentioned the following: -

"Shri Vijay Kumar V Iyer, Official Liquidator

M/s Aditya Birla Idea Payments Bank Ltd.

(Formerly known as Idea Mobile Services Ltd)

Deloitte Touche Tomatsu India LLP,

India Bulls Finance Centre, Tower 3, 27th Floor"

12. Thus it is a conclusive proof that the officer was well aware of the fact of the succession of the assessee with ABIPBL and yet chose to frame the assessment in the name of the erstwhile company and also issued Penalty notices in the name of a non-existing company.

13. In our understanding of the law, when assessee company was amalgamated with another company it lost its existence, therefore, any subsequent act done by the Assessing Officer in the name of the non-existing company would be without jurisdiction and deserves to be set-aside. We draw support from the decision of the Hon'ble Supreme Court in the case of Pr.CIT v. Maruti Suzuki India Ltd., [416 ITR 613]. The relevant findings of the Hon'ble Supreme Court read as under: -

"31.In this context, it is necessary to advert to the provisions of Section 170 which deal with succession to business otherwise than on death. Section 170 provides as follows:

"170. (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession,—

(a) the predecessor shall be assesseed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assesseed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly.

(3) When any sum payable under this section in respect of the income of such business or profession for the previous year in which the succession took place up to the date of succession or for the previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the 99[Assessing] Officer shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor and the successor shall be entitled to recover from the predecessor any sum so paid.

(4) Where any business or profession carried on by a Hindu undivided family is succeeded to, and simultaneously with the succession or after the succession there has been a partition of the joint family property between the members or groups of members, the tax due in respect of the income of the business or profession succeeded to, up to the date of succession, shall be assessed and recovered in the manner provided in section 171, but without prejudice to the provisions of this section. Explanation.—For the purposes of this section, "income" includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession"

Now, in the present case, learned Counsel appearing on behalf of the respondent submitted that SPIL ceased to be an eligible assessee in terms of the provisions of Section 144C read with clause (b) of sub section 15. Moreover, it has been urged that in consequence, the final assessment order dated 31 October 2016 was beyond limitation in terms of Section 153(1) read with Section 153 (4). For the purposes of the present proceeding, we do not consider it necessary to delve into that aspect of the matter having regard to the reasons which have weighed us in the earlier part of this judgment.

32. On behalf of the Revenue, reliance has been placed on the decision of this Court in Commissioner of Income Tax, Shillong v Jai Prakash Singh, (1996) 3 SCC 525 ("Jai Prakash Singh"). That was a case where the assessee did not file a return for three assessment years and died in the meantime. His son who was one of the legal representatives filed returns upon

*which the assessing officer issued notices under Section 142 (1) and Section 143 (2). These were complied with and no objections were raised to the assessment proceedings. The assessment order mentioned the names of all the legal representatives and the assessment was made in the status of an individual. In appeal, it was contended that the assessment proceedings were void as all the legal representatives were not given notice. In this backdrop, a two judge Bench of this Court held that the assessment proceedings were not null and void, and at the worst, that they were defective. In this context, reliance was placed on the decision of the Federal Court in *Chatturam v CIT*, (1947) 15 ITR 302 (FC) holding that the jurisdiction to assess and the liability to pay tax are not conditional on the validity of the notice : the liability to pay tax is founded in the charging sections and not in the machinery provisions to determine the amount of tax. Reliance was also placed on the decision in *Maharaja of Patiala v CIT*, (1943) 11 ITR 202 (Bombay) ("Maharaja of Patiala"). That was a case where two notices were issued after the death of the assessee in his name, requiring him to make a return of income. The notices were served upon the successor Maharaja and the assessment order was passed describing the assessee as "His Highness.late Maharaja of Patiala". The successor appealed against the assessment contending that since the notices were sent in the name of the Maharaja of Patiala and not to him as the legal representative of the Maharaja of Patiala, the assessments were illegal. The Bombay High Court held that the successor Maharaja was a legal representative of the deceased and while it would have been better to so describe him in the notice, the notice was not bad merely because it omitted to state that it was served in that capacity. Following these two decisions, this Court in *Jai Prakash Singh* held that an omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where the liability is created by a distinct substantive provision. The omission or defect may render the order irregular but not void or illegal. *Jai Prakash Singh* and the two decisions that it placed reliance upon were evidently based upon the specific facts. *Jai Prakash Singh* involved a situation where the return of income had been filed by one of the legal representatives to whom notices were issued under Section*

142(1) and 143(2). No objection was raised by the legal representative who had filed the return that a notice should also to be served to other legal representatives of the deceased assessee. No objection was raised before the assessing officer. Similarly, the decision in Maharaja of Patiala was a case where the notice had been served on the legal representative, the successor Maharaja and the Bombay High Court held that it was not void merely because it omitted to state that it was served in that capacity.

33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Entertainment on 2 November 2017. The decision in Spice Entertainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Entertainment.

34. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."

14. The strong contention of the Ld. DR that the PAN number of the alleged non-existing company was still in use does not hold any water in the light of the decision of the Hon'ble Jurisdictional High Court of Bombay in the case of CLSA India (P.) Ltd., v. DCIT [149 taxmann.com 380]. The relevant findings read as under: -

"3. It is stated that the factum of the amalgamation was already within the knowledge of the revenue as is reflected from the order of assessment dated 16th December, 2017 for the assessment year 2015-16 which show M/s. CLSA India Pvt. Ltd. as the successor of M/s. Laysin BPO Pvt. Ltd.. It is further stated that even for the assessment year 2016-17, return was filed by the Petitioner in which the factum of the amalgamation of Laysin BPO Pvt. Ltd. was reflected. For the assessment year 2017-18, the Petitioner states that it filed a response to e-verification, informing the Respondents yet again regarding the non-existence of the entity on account of its merger with the Petitioner herein.

4. Be that as it may, it is thus clear that the notice under section 148 of the Act which forms the basis for reassessment proceedings was issued in the name of a non-existent entity and despite the fact that the Respondents had the knowledge regarding the non-existence of the said entity and despite having been informed, the order of assessment was passed in the name of the Petitioner while at the same time, mentioning the name of the assessee as Laysin BPO Pvt. Ltd.

5. This is clearly untenable in view of the Apex Court judgment in Saraswati Industrial Syndicate Ltd. v. CIT [1990] 53 Taxman 92/186 ITR 278 wherein the following principles were formulated:

"5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or

reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

In the case of Spice Entertainment Ltd. v. CST 2012 (280) ELT 43 (Delhi) a Division Bench of the Delhi High Court held that once the factum of amalgamation of a company had been brought to the notice of the A.O., despite which the proceedings are continued and an order of assessment passed in the name of non-existence company, the order of assessment would not be merely be a procedural defect but would render it void.

6. Recently, the Apex Court in the case of Pr. CIT v. Maruti Suzuki India Ltd. [2019] 107 taxmann.com 375/265 Taxman 515/416 ITR 613 reiterated the aforementioned principles and held as under:

"33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Entertainment on 2 November 2017. The decision in Spice Entertainment has been followed in the case of the respondent whifel dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Entertainment.

7. The stand of the revenue that the reassessment was justified in view of the fact that the PAN in the name of the non-existent entity had remained active does not create an exception in favour of the revenue to dilute in any manner the principles enunciated hereinabove."

15. Considering the facts of the case in totality, in the light of the judicial decisions discussed hereinabove, we are of the considered view that the Assessing Officer grossly erred in framing the Penalty order in the name of a non-existing company and deserve to be set-aside for want of jurisdiction. Cross objection No. 1 is allowed. Since Cross Objection No. 2 is not being pressed the same is dismissed.

16. In the result, cross objection is partly allowed.

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17. Since we have quashed the Penalty order being passed on non-existing entity, we do not find it necessary to dwell into the merits of the case. The appeal of the revenue is accordingly, dismissed.

18. In the result, appeal filed by the revenue is dismissed.

19. To sum-up, appeal filed by the revenue is dismissed and cross objection filed by the assessee is partly allowed.

Order pronounced in the open court on 17th May, 2024.

Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Mumbai / Dated 17.05.2024
Giridhar, Sr.PS

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum