आयकर अपीलीय अधिकरण
गुवाहाटी पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
GUWAHATI BENCH AT KOLKATA

[वर्चुअल कोर्ट]
[Virtual Court]

श्री मनमोहन दास, न्यायिक सदस्य
एवं
श्री संजय अवस्थी, लेखा सदस्य
के समक्ष
Before
SRI MANOMOHAN DAS, JUDICIAL MEMBER
&
SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. No.: 130/GTY/2023
Assessment Year: 2017-18

DCIT, Circle-Shillong, Shillong.....Appellant

Vs.

The Meghalaya Cooperative Apex Bank Limited.....Respondent
[PAN: AAAAM 8227 G]

Appearances:

Department represented by: *Sanjay Jha, JCIT.*

Assessee represented by: *Parthasarathy Choudhury, FCA.*

Date of concluding the hearing : July 3rd, 2024
Date of pronouncing the order : August 29th, 2024

ORDER

Per Sanjay Awasthi, Accountant Member:

The present case has some unique facts which would require adjudication and thus, the same may be briefly mentioned. This is a Departmental appeal against the order of the Commissioner of Income Tax (Appeals)-NFAC, Delhi [hereinafter referred to as ld. 'CIT(A)'] challenging primarily the action of ld. CIT(A) in restoring or setting aside to the Assessing Officer (hereinafter referred to as ld. 'AO') for determination and quantification

on certain points of enhancement to income done by the Ld. AO. The issues on which such directions have been given to the ld. AO are as under:

a) Disallowance u/s 14A of the Income Tax Act, 1961 (in short the 'Act') of Rs. 1,32,35,130/-. For this issue a direction has been given to the ld. AO to recompute the disallowance as per Rule 8D(2)(ii) of the Income Tax Rules, 1962 after considering only those investments which resulted in exempt income.

b) Disallowance of Rs. 24,04,41,066/- u/s 40(a)(ia) of the Act. The findings of the ld. CIT(A) need to be extracted to appreciate his actions as under:

> *"7.2 I have perused the assessment order, grounds of appeal and submissions filed by the appellant. I find from the assessment order that the AO had made addition of Rs.24,04,41,066/- u/s 40(a)(ia) being 30% of the various expenses debited to Profit and Loss Account but no TDS was deducted. However, I find from the submission of the appellant that certain amounts were not liable for TDS but the same have been considered for disallowance. Further the cases covered by exemption u/s 10(26) and Form No.15G/15H were not considered by the AO since the appellant did not furnish the supporting evidences.*
>
> *In respect of salary expenses, I find that out of total expenses debited to profit and loss account of Rs.47,56,91,922/-, expenses of Rs.43,71,01,368/-, have been considered for disallowance. However the appellant has claimed that the amount of Rs.3,26,26,764/- is not liable for TDS. In respect of VRS expenses of Rs.2,09,54,538/-, the appellant has submitted that the same was already disallowed by the appellant and added in the business income in the computation of income. Further the appellant has claimed that the cases covered by the exemption u/s 10(26) are not considered by the AO. I find that the evidence for claiming exemption u/s 10(26) was not produced before the AO during the assessment proceedings. The same is also not produced during the appellate proceedings. However considering the facts of the case, the AO is directed to recompute the disallowance and also allow the exemption u/s 10(26) on production of supporting evidence by the appellant. Thus ground on this point is partly allowed.*
>
> *In respect of interest expenses, the appellant has claimed that interest on saving bank deposits is not liable for TDS and the cases covered by exemption u/s 10(26) and Form No.15G/15H have not been considered by the AO. I find that interest on saving bank account is not liable for TDS, hence disallowance needs to be recomputed. I find that the evidence for*

claiming exemption u/s 10(26) was not produced before the AO during the assessment proceedings. The same is also not produced during the appellate proceedings. However considering the facts of the case, the AO is directed to re-compute the disallowance and also allow the exemption u/s 10(26) and also consider the cases covered by form No.15H/15G on production of supporting evidence by the appellant. Thus ground on this point is partly allowed.

In respect of contract payments (194C), rent payments (1941) and professional payments (194J), the appellant has claimed that the AO has made the disallowance without verifying the facts since he allowed 50% adhoc relief of Rs.80,14,70,219/- out of total expenses of Rs.160,29,40,437/- liable for disallowance u/s 40(a)(ia). I find that the approach adopted by the AO is not correct. The AO should have considered only those expenses which were liable for TDS but no TDS was made by the appellant. The AO is therefore directed to re-compute the disallowance and restrict the disallowance to the expenses which are liable for TDS but no TDS is made and also considered the cases covered by the exemption u/s 10(26) and also consider the cases covered by form No.15H/15G on production of supporting evidence. Thus ground on this point is partly allowed.

In view of the above discussion, the ground raised by the appellant is partly allowed subject to production of supporting evidence before AO for cases covered by exemption u/s 10(26) and cases covered by form No.15H/15G."

c) The addition of Rs. 1,95,86,292/- was made u/s 36(i)(viia) of the Act. For this issue also the ld. CIT(A) has directed the AO to recompute the additional deduction under this Section after due verification.

3. To appreciate the Department's contention, only those issues have been mentioned above in which some directions have been given to the AO for assessing the correct quantum of relief/amounts on the basis of detailed findings in favour of the assessee given in the body of the order itself.

3.1. In light of this, the grounds of appeal raised by the Department need to be extracted:

"i) On the facts of the case and in law, whether the Ld. CIT(A) is empowered to partly restore certain issues to the file of AO and direct the AO to re-compute the disallowance and also allow the exemption u/s 10(26) and also consider the cases covered by form No 15H/15G subject to production of supporting evidence before AO for cases covered by exemption u/s 10(26).

ii) On the facts of the case and in law whether the AO is duty-bound to follow the direction of the Ld. CIT(A) if the direction is not in accordance with the Act or the CIT(A) is not empowered to issue such direction under the Act.

iii) On the facts of the case and in law, whether the Ld. CIT(A) exceeded the limits of power, statutorily bestowed u/s 251(1)(a)….. Section 251 of the Act empowers Ld. CIT(A) to confirm, reduce, enhance or annul the assessment but cannot refer back to AO for adjudication.

iv) That the appellant craves leave to add, alter, amend and /or modify the grounds taken herein"

4. Before us, the ld. D/R supported the ld. CIT(A)'s actions in principle saying that there could be no obvious fault in the logic adopted by him. On the issue of whether such remanding back or setting aside was permissible, he requested the Bench to take a suitable view.

4.1. The ld. A/R argued at length about the merit in the ld. CIT(A)'s actions and took considerable pains to establish the *bona fides* of the decision in favour of the assessee regarding the points on which the matter has been remanded back/set aside to the AO.

4.2. We have carefully considered the arguments of the ld. D/R as well as ld. A/R and have also perused the findings of the ld. CIT(A). While it is clear that the Department has not really challenged the case on the merit inherent in the action of the ld. CIT(A), but has raised a legal issue whether the remanding back to the file of the ld. AO in the manner in which it has been done, could be legally tenable or not. For adjudicating on this, the provisions of Section 251(1) of the Act deserve to be recapitulated as under:

"251. (1) In disposing of 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;

(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."

4.3. Special emphasis needs to be placed on the amendment to Section 251(1a) of the Act, vide the Finance Act, 2001 with effect from 01.06.2001, and the same deserves to be highlighted and reproduced as under:

"The portion beginning with the words "or he may set aside" and ending with the words "on the basis of such fresh assessment;" omitted by the Finance Act, 2001, w.e.f. 1-6-2001."

4.4. It is clear from a reading of the Section as it stands now and after comparing it with the language of the section as it stood prior to the amendment, it is clear that the word "set aside" has been deliberately omitted indicating the legislators' intention to take away such powers from the ld. CIT(A). A look at judicial precedence in this matter supports the view that the interpretation of Section 251(1a) of the Act cannot permit a ld. CIT(A) in using language or giving directions in such a manner that the action is tantamount to setting aside. Thus, the portion extracted *(supra)* from the ld. CIT(A)'s order makes it clear that instead of a clear-cut quantification of the amounts at his level he has broadly decided the matter in favour of the assessee but has left the nitty-gritty to the assessing officer. It is felt that such action is not permissible after the amendment to the Section 251(1) of the Act *(supra)*. Considerable strength is drawn from the case of *Arun Kumar Bose vs. ITO* reported in *[2023] 458 ITR 32 (Calcutta)* wherein the Hon'ble Calcutta High Court has held that the ld. CIT(A) cannot set aside or remand back any matter to the ld. AO. The following extracts from the said order are necessary at this stage:

"■ Section 251 deals with the powers of the Commissioner (Appeals). Sub-section (1) states that in disposing of an appeal the Commissioner (Appeals) shall have the powers as enumerated in clauses (a), (aa), (b), (c). Insofar as the case on hand, clause (a) of section 251(1) should be relevant, which

states in an appeal against the order of assessment the Commissioner (Appeals) may confirm, reduce, enhance or annul the assessment. On a reading of the Finance Act, 2001 (Circular No. 14 of 2001) the Commissioner of Appeals had no power to remand the matter back to the Assessing Officer for fresh assessment in accordance with the direction given by the Commissioner (Appeals) after making such further enquiry as may be necessary. Though such power was conferred on the Commissioner (Appeals), the said provision stood omitted by the Finance Act, 2001. In the explanatory notes on the provisions relating to direct taxes, the powers of the Commissioner (Appeals) has been dealt with. [Para 3]

■ *In the light of the above statutory embargo, the Commissioner could not have remanded the matter back to the Assessing Officer after having decided the case in favour of the assessee in its entirety. [Para 4]*

■ *The revenue points out that in the findings recorded by the Commissioner (Appeals), the expression 'prima facie' has been used which shows that the Commissioner (Appeals) had wanted a fresh exercise to be done by the Assessing Officer and, therefore, it would have been well open to the Commissioner (Appeals) to call for a remand report and thereafter to enquiry into the matter and proceed to take decision. Therefore, it is the submission that the case should be remanded back to Commissioner (Appeals) to undertake such an exercise. [Para 5]*

■ *Though in the order passed by the Commissioner (Appeals), the word 'prima facie' has been used, from a cumulative reading of an order passed by the Commissioner (Appeals) it is found that the case has been discussed on merits and thereafter a finding has been recorded that the Assessing Officer was not justified in making the addition and there was a positive direction to delete the addition. If such is the finding, mere use of the word 'prima facie' could not make prima facie view as the Commissioner (Appeals) has discussed the matter elaborately taking into the consideration the factual position. Before the Tribunal, the assessee had specifically raised the ground that the Commissioner (Appeals) exceeded the limits of powers statutorily bestowed as per section 251(1)(a) and grossly erred in law in restoring the case to the Assessing Officer for action in terms of the order dated 23-11-2011 passed by the Commissioner (Appeals). Though, such a specific ground raised by the appellant before the Tribunal and noted by the Tribunal in the impugned order, this aspect has not been dealt with by the Tribunal. Thus, not only the Commissioner (Appeals) committed an error of law by remanding the matter to the Assessing Officer for a fresh consideration after having held in favour of the assessee, the Tribunal also did not deal with the said issue. In the light of the statutory embargo, the order of remand passed by the Commissioner (Appeals) is not tenable in law and consequently, the same is required to be set aside as well as the order passed by the Tribunal. [Para 6]*

…….

4.5. Furthermore, in another case before the Hon'ble Kerala High Court in the case of *CIT vs. P. Premkumar* reported in *[2018] 404 ITR 275 (Kerala)* it has been held as under:

> *"The Scope of Appeal & The Powers of Appellate Authority*
>
> ■ *Section 251 spells out the powers of the Commissioner (Appeals). [Para 29]*
>
> ■ *The provision empowers the appellate authority, in an appeal against an order of assessment, to confirm, reduce, enhance, or annul the assessment. Under the amended section 251, the Appellate Commissioner may confirm, reduce, enhance, or annul the assessment, but he could not refer the case back to the Assessing Officer for making a fresh assessment; nor can he direct the Officer to decide in accordance with his directions. [Para 47]"*

5. Considering the discussion above and the persuasive value of the judgements of the two High Courts discussed *(supra)* it is held that the ld. CIT(A) should have quantified the amounts at his level without resorting to any remanding back as has been done in the body of the impugned order. We, accordingly set aside the matter to the file of the ld. CIT(A) to clearly quantify the relief that he intended to give to the assessee and admit any fresh evidence, if so required, under Rule 46A of the Rules and thereby pass a speaking order.

6. In the result, the appeal of the Revenue is allowed.

Order pronounced on 29th August, 2024 under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-	*Sd/-*
[**Manomohan Das**]	[**Sanjay Awasthi**]
Judicial Member	Accountant Member

Dated: 29.08.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***DCIT, Circle-Shillong, Shillong.***
2. ***The Meghalaya Cooperative Apex Bank Limited, Apex Bank Compound M G Road, Shillong, Meghalaya, 793001.***
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Guwahati Bench, Guwahati.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata