

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA No.1987/Del/2016
Assessment Year: 2009-10

ACIT, Central Circle-14, New Delhi	Vs.	S.S. Con-Build Pvt. Ltd., Flat No.4, R.R. Apartment, 3-4, Manglapuri, Mehrauli, New Delhi
PAN: AAJCS7477F		
(Appellant)		(Respondent)

Assessee by	None
Department by	Mr. Javed Akhtar, CIT(DR)

Date of hearing	14.11.2024
Date of pronouncement	20.11.2024

ORDER

PER SATBEER SINGH GODARA, JM

This Revenue's appeal for assessment year 2009-10 is directed against the Commissioner of Income Tax (Appeals)-XXVI, [in short, the "CIT(A)"] New Delhi's order dated 07.01.2016 in case no.222/15-16, involving proceedings under section 254/143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Case called twice. None appears at the assessee's behest. It is accordingly proceeded *ex-parte*.

3. Learned CIT(DR), first of all, invites our attention to the Revenue's third substantive ground seeking to reverse the CIT(A)'s lower appellate discussion quashing the impugned second round assessment dated 11.06.2015 as not framed after obtaining due approval under section 153D of the Act as under:

"13. I have considered the legal claim of the appellant company, the comments of the AO on the issue submitted during appellate proceedings and the rejoinder of the appellant company on the same. The AO has contended that the approval u/s. 153D is not required as assessment proceedings had not been set aside or annulled and the Hon'ble ITAT had given a time period of 120 days with specific directions to verify certain matters and the assessment had not been set aside to be framed de-novo. The AO also placed reliance on circular no. 3 dated 12.03.2008 of CBDT which does not specify that it was required, further, it contended by the AO that the provisions of section 153D were applicable when assessment was framed for the first time or reassessment. The AO highlighted a situation wherein the CIT (A) passes an order u/s. 250 with the direction to allow the claim after verifying the evidence and in such a situation, the AO opined that there would be no need to take approval u/s. 153D as the directions of CIT (A) cannot be subjected to approval of Joint/Additional CIT. It was on similar analogy that the specific directions of Hon'ble ITAT or High Court to the AO would not require approval u/s. 153D. The AO, therefore, claimed that the assessment had not been set aside by the Hon'ble ITAT and only certain specific verifications were to be carried out. The AR, on the other hand, has contested the viewpoint of the AO as highlighted above, by submitting that the directions of the Hon'ble ITAT to frame the assessment as early as possible preferably within the specified time of 90 days was only recommendatory in nature as the AO took more than a year to frame the assessment. It was highlighted that the first notice u/s. 142(1) had been issued on 29.05.2014 and the order under consideration had been passed on 11.06.2015. The AR has contended that the AO's reliance on the circular no. 3 issued by CBDT dated 12.03.2008 was misplaced as the impugned order cannot be anything other than either the assessment or reassessment. The AR also highlighted the relevant

portion of the order of the Hon'ble ITAT dated 31.03.2014 to contend that assessment under appeal had been set aside to the file of the AO which meant that a fresh assessment had to be framed.

14. The critical issue in the given circumstances, as highlighted above, is that whether the Hon'ble ITAT's order had set aside the assessment or the AO had merely given an appeal effect to the order of the Hon'ble ITAT. It is quite apparent that in consequence of the order of the Hon'ble ITAT dated 31.03.2014, the demand against the appellant company, as confirmed by CIT (A) had been reduced to Nil in the demand and collection register of the AO. This means that the original order passed by the AO was set aside and in consequence thereof the demand against the assessee also become Nil. The order of assessment passed by the AO on 11.06.2015 led to creation of fresh demand against the assessee and the said order has been the subject matter of appeal before CIT (A). It is quite clear from the notice of demand u/s. 156 issued by the AO to the appellant company dated 11.06.2015 that the demand of Rs. 32,34,69,151/- had been raised in consequence of the assessment order and the assessee vide point no. 6 of the said notice was given an option to appeal against the assessment before the CIT (A)-26, New Delhi within 30 days of the said notice. If the contention of the AO that no fresh assessment or reassessment had been done then there would not have been any need to mention the right of the assessee to file appeal before the CIT (A). If the view of the AO is to be seen as correct then no appeal would be maintainable before the CIT (A) and the assessee would have to take alternative remedy to go to the Hon'ble High Court. This clearly shows that the Hon'ble ITAT vide their order dated 31.03.2014 had set aside the matter back to the file of the AO with specific directions to carry our investigations giving due opportunity to the assessee and then frame the assessment afresh. The matter had, therefore, been disposed off accordingly and the AO had to carry out the process of investigation as stipulated in the Income Tax Act by issuing notice u/s. 142(1) and frame the assessment u/s. 143(3)/ 153A. The Hon'ble High Court of Delhi in the case of Pr. CIT, Delhi vs. C P Financial Consumer Finance India P. Ltd. In ITA NO. 275/2015 has deliberated upon similar issue wherein the facts have been recorded as under: -

"(1). Briefly stated, the relevant facts are that the assessee had claimed a deduction of Rs. 48,38,636/- being the amount paid to Direct Selling Agents, as selling expenses, although, in its books the same had been considered as deferred revenue expenditure. AO had passed an assessment order dated 28th February, 2000 disallowing the assessee's claim in respect of commission paid to Direct Agents. In addition, the AO also disallowed an expenditure of Rs. 35,91,227/- incurred by the

assessee for purchase of software. The AO held that the nature of these expenses was capital and not revenue.

(il). The assessee appealed against the aforesaid additions/disallowances made by the AO before the CIT (A). However, the assessee was not successful and the CIT (A) confirmed the disallowance made by the AO. Aggrieved by the aforesaid decision, the assessee preferred an appeal before the Tribunal, being ITA No. 263/Del/2004. By an order dated 31.07.2009, the Tribunal remanded the matter to the AO to re-examine the nature of the expenditure pertaining to software and commission paid to direct selling agents.

(iii). On remand, the AO passed an order dated 20th January, 2010, allowing the expenditure incurred by the assessee on account of commission paid to direct selling agents and for purchase of software.

15. *It was contended before the Hon'ble Court by the revenue that the order dated 20.01.2010 by the AO was an administrative order. The appellant, on the other hand, contended before the court, on the basis of decision of Hon'ble Bombay High Court in the case of Caltex Oil Refining India P. Ltd. Vs. CIT, 2002 ITR 375, that the nature of order passed by the AO in consequence of the order of the tribunal was not administrative. The Hon'ble Bench, in para 12 of the order made the following observations: -*

(1). The contention that the order dated 20 January, 2010 was only an administrative Order, to give effect to the order dated 31 July, 2009 passed by the Tribunal is also without any merit. The AO, being an authority under the Act, performs the function as specified in the Act. The AO has the power to make an assessment under section 143 or 144 of the Act. It is the said assessment which is examined by the Appellate Authority. The Appellate Authority has power either confirm, reduce, enhance or set aside the assessment. In the event, the Appellate Authority remands the matter to the AO, the AO is required to commence proceedings in terms of the directions of the Appellate Authority. Such proceedings are not administrative but have to be conducted in accordance with the provisions of the Act and the order would be an order of assessment under section 143/144 of the Act. In Caltex Oil Refining (supra) a Division Bench of Bombay High Court had explained the above in the following words: -

"So far as the first submission, which relates to the nature of a order passed by the ITO in consequence of orders of the

appellate authorities with a view to giving effect to the direction contained therein, it is difficult to hold that such an order is an administrative order. The power of the ITO is to make assessment under section 143 or 144. It is that assessment which is the subject matter of appeal. The appellate authority, on a appeal against an order of assessment has power to confirm, reduce, enhance or annul the assessment or to set aside the assessment and refer the case back to the ITO for making a fresh assessment in accordance with the directions given by such authority (section 251). Evidently the effect of an appellate order is that the assessment either stands confirmed, reduced or enhanced or it stands annulled or set aside. In case of confirmation, reduction or enhancement the original order of assessment stands modified to the extent of the directions given by the appellate authority. In the case of annulment, the order becomes non est. In case an order is set aside, the authority has to start the entire process afresh and make a fresh order of assessment complying with the directions given by the appellate authority. It is, thus, clear that what remains as a final order after giving effect to the orders of the appellate authorities is an order of assessment u/s 143 or 144. It cannot be anything else."

(ii) We concur with the aforesaid view and are unable to accept that the AO's order dated 20th January, 2010 was only an administrative order to give effect to the order of the Tribunal. At this stage, it is also relevant to note that the order dated 20th January, 2010 was captioned as "Order u/s 254/250/147/143(3) of the Income Tax Act, 1961". It is, thus, apparent that the Order itself indicated that it was not an administrative order but an Assessment Order under Section 143(3) of the Act. In the circumstances, it is not be open for the Revenue to contend to the contrary."

16. *In view of the above detailed facts and circumstances of the case and the analysis of provisions of the Income Tax Act as well as the judicial pronouncements on the issue, it is unacceptable that the order under consideration passed by the AO was meant to give an appeal effect and was not in the category of assessment or reassessment. This being so, the mandatory requirement to take approval u/s 153D could not be dispensed with. In view of this, the order passed by the AO has to be quashed."*

4. Mr. Javed Akhtar, CIT(DR), vehemently submits that learned Assessing Officer's impugned second round assessment nowhere required the prescribed authority's section 153D approval once again, since dealing in remand proceedings only as per the tribunal's first round directions. He next contends that the CIT(A) first of all ought not to have quashed the impugned assessment for want of a valid section 153D approval since such an issue is only procedural in nature. And also that even if such an approval is required in second round proceedings, it is only a procedural defect than that vitiating the entire proceedings.

5. We have given our thoughtful consideration to the Revenue's forgoing vehement submissions on the issue of section 153D approval and find no merit therein. This is for the precise reason that as evident from the above extracted detailed discussion, learned Assessing Officer had framed nothing else but a second-round assessment vide order dated 11.06.2015 without getting it approved under section 153D of the Act. It would be indeed not out of the context to observe here that the CIT(A)'s lower appellate proceedings on this issue witnessed remand proceedings as

wherein the Assessing Officer had been very fair that his second-round assessment stood framed without section 153D approval.

6. This being the clinching case and in light of judicial precedents quoted in the lower appellate findings, we are of the considered view that any assessment; be it first round or otherwise framed under section 153A of the Act without getting approval under section 153D of Act, is not sustainable in law. The CIT(A)'s impugned lower appellate discussion quashing the second-round assessment herein stands upheld in very terms. Ordered accordingly.

7. All other pleadings on merits stand rendered academic.

8. This Revenue's appeal is dismissed in above terms.

Order pronounced in the open court on 20th November, 2024

**Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER**

**Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER**

Dated: 20th November, 2024.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi