

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"RAJKOT" BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER  
& SMT. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 1248/Rjt/2010  
(निर्धारण वर्ष / Assessment Years : 2005-06)

<b>Digjam Limited</b> (Formerly Birla VXL Limited) Aerodrome Road, Jamnagar	<b>बनाम/ Vs.</b>	<b>The Asstt. Comm of Income Tax</b> Circle – 2, Jamnagar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACKPS0126P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / <b>Appellant by</b>	Shri Vimal Desai, A.R.
प्रत्यर्थी की ओर से / <b>Respondent by :</b>	Shri M. N. Mourya, CIT.D.R.

सुनवाई की तारीख / <b>Date of Hearing</b>	05/03/2020
घोषणा की तारीख / <b>Date of Pronouncement</b>	18/03/2020

आदेश/O R D E R

**PER WASEEM AHMED - AM:**

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals), Jamnagar (CIT(A) in short) dated 07/09/2010 relevant to Assessment Year (AY) 2005-06.

2. The Assessee has raised following grounds of appeal:

- "1. *The assessment order u/s. 143(3) is bad in law.*
2. *The learned CIT(A) has erred in law as well as on facts in holding that the assessment order passed by the A.O. merges with the order of the CIT u/s. 264.*
3. *The learned CIT(A) has erred in law as well as on facts of the case in holding that the appeal before him has become in-competent because the assessment order cannot be adjudicated by him in appeal after the same has merged with the order u/s. 264 passed by the CIT and that the only course of action available to the assessee is to agitate grounds arising from the assessment order which are taken in this appeal and were not subject matter of proceedings u/s. 264 before the High Court.*
4. *The learned CIT(A) failed to appreciate that it is section 264(4)(a) which prohibits the CIT from revising an order u/s 264 if an appeal against the order lies to the CIT(A) and the assessee has not waived his right of appeal and there is no provision u/s. 246A imposing similar prohibition on CIT(A) to the effect that the CIT(A) shall not adjudicate appeal against an order where the order has been made subject matter of revision proceedings u/s. 264. The CIT(A) has seriously erred in applying provisions of section 264(4) conversely*
5. *The appellant ought not to have been taxed in respect of transfer of capital assets being land and depreciable assets of its undertaking known as OCM Division of the appellant company to OCM India Limited since, pursuant to the Scheme of Arrangement duly approved by the Hon'ble High Courts of Gujarat as well as Punjab & Haryana, the said Division was vested as a going concern in OCM India Limited.*
6. *The learned CIT(A) ought to have decided on merits the following disallowances / additions made by the A.O.:*
  - > *Rs. 60,66,537/- u/s. 43B in respect of payments made during the period 1.4.2004 to 31.10.2005 out of pre-existing liability brought forward from earlier years,*
  - > *Rs. 14,36,449/- u/s. 40A(2)(a) out of interest,*
  - > *Rs. 12,14,759/- out of Repairs to Plant & Machinery considering it as capital expenditure.*
  - > *Rs. 3,00,000/- on lump sum basis out of various business expenses.*
  - > *Rs. 8,80,800/- out of Long Term Capital Loss on sale of Land at Joka, Kolkatta."*

3. The interconnected issue raised by the assessee in ground No. 1 to 4 is that the Ld. CIT (A) erred in not adjudicating the appeal filed by the assessee on the reasoning that the issue has been decided by the Ld. CIT under section 264 of the Act.

4. The facts in brief as culled out from the order of the authorities below are that the assessee is a public limited company and engaged in the business of Manufacturing and trading of wollen, worsted fabrics, readymade garment and job work. The assessment for the year under consideration was made by the AO under section 143(3) of the Act dated 31<sup>st</sup> December 2007 after making certain additions/disallowances to the total income of the assessee.

5. The assessee against the assessment order preferred an appeal to the Ld. CIT (A) dated 29<sup>th</sup> January 2008 within the time specified under the provisions of section 249 of the Act.

6. The assessee subsequently without withdrawing the appeal filed before the learned CIT (A) as discussed above also filed the revisionary application under section 264 of the Act to the Commissioner of Income Tax dated 31<sup>st</sup> December 2008 within the time as specified under section 264 of the Act. However the Ld. CIT under section 264 of the Act vide order dated 30<sup>th</sup> March 2010 dismissed the application filed by the assessee for the revision of the order framed under section 143(3) of the Act by the AO vide order dated 30<sup>th</sup> March 2010.

6.1 Subsequently, the appeal which was filed before the Ld. CIT (A) dated 29<sup>th</sup> January 2008 against the assessment order was also dismissed by the Ld. CIT (A) by observing that the appeal filed before him is not maintainable on the reasons as given under:

- i. The order of the AO has been merged with the order of the Ld. CIT under section 264 of the Act. Therefore, there cannot be any appeal before him (the learned CIT (A)) against the revision order passed by the Ld. CIT under section 264 of the Act in pursuance to the provisions of section 246A of the Act.

- ii. The assessee has waived its right for the appeal before him (the learned CIT (A)) as provided under the provisions of section 264 of the Act.

In view of the above, the Ld. CIT (A) dismissed the appeal filed by the assessee without adjudicating the issue raised before him on merit.

7. Against the order of the Ld. CIT (A) dated 7<sup>th</sup> September 2010 the assessee is in appeal before us.

8. The Ld. AR before us submitted that the assessee has not waived his right for filing the appeal before the Ld. CIT(A) against the order of the assessment dated 31<sup>st</sup> December 2007. As such the assessee first preferred the appeal to the Ld. CIT(A) dated 29<sup>th</sup> January 2008 against the impugned assessment order which was pending before him till 31<sup>st</sup> December 2008. But in the meantime the assessee has made a revision application under section 264 of the Act dated 31<sup>st</sup> December 2008 which was dismissed by the Commissioner of Income Tax on merit vide order dated 30<sup>th</sup> March 2010 before the disposal of the appeal pending before the Ld. CIT(A). However the Ld. AR contended that the Ld. CIT under section 264 of the Act has no power to pass the order once the appeal has been preferred by the assessee before the Ld. CIT (A) as per the provisions of section 264(4)(c) of the Act.

9. The learned AR in support his contention relied on the judgment Hon'ble Allahabad High Court in the case of Yogendra Parsad Santosh Kumar Vs. Commissioner of Income Tax reported in 44 taxmann.com 299.

10. On the contrary, the Ld. DR claimed that the order of the AO has been merged with the order of the Ld. CIT under section 264 of the Act. Therefore there cannot be any appeal before the Ld. CIT (A) against the impugned assessment order.

11. We have heard the rival contentions of both the parties and perused the materials available on record. Before we go to the specific issue, we find pertinent to note certain relevant dates which are necessary for deciding the issue on hand:

- i. Date of assessment order 31<sup>st</sup> December 2007
- ii. Date of filing the appeal before the Ld. CIT (A) 29<sup>th</sup> of January 2008
- iii. Date of filing the revisionary application under section 264 of the Act 31<sup>st</sup> of December 2008
- iv. Date of the order under section 264 of the Act 30<sup>h</sup> of March 2010.
- v. Date of the order of the Ld. CIT (A) dismissing the appeal of the assessee on the reasoning that it is not maintainable as the order of the AO got merged with the order of the Ld. CIT under section 264 of the Act 7<sup>th</sup> September 2010.

11.1 Admittedly, the appeal to the Ld. CIT (A) against the impugned assessment order was preferred by the assessee within the period of 30 days as discussed above. Similarly, the assessee also filed the revisionary application under section 264 of the Act within a period of almost in one year but within the period as specified under section 264 of the Act. The revisionary application was dismissed by the Ld. CIT under section 264 of the Act.

12. Now, the 1<sup>st</sup> issue arises for our consideration whether the order passed under section 264 of the Act was a valid order.

13. An application made for the revision under section 264 of the Act can be disposed of by the Ld. Commissioner of income tax subject to the following conditions:

*(4) The Commissioner shall not revise any order under this section in the following cases—*

*(a) where an appeal against the order lies to the <sup>56</sup>[Deputy Commissioner (Appeals)] <sup>57</sup>[or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which*

*such appeal may be made has not expired, or, in the case of an appeal<sup>58</sup>[to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or*

*(b) where the order is pending on an appeal before the<sup>59</sup>[Deputy Commissioner (Appeals)]; or*

*(c) where the order<sup>60</sup> has been made the subject of an appeal<sup>61</sup>[to the Commissioner (Appeals) or] to the Appellate Tribunal*

14. In the present facts and circumstances, the conditions specified under clause (c) as discussed above is applicable to the dispute on hand. The clause (c) of the provision restricts the power of the Commissioner of Income Tax to revise the order if any appeal has been preferred before the Ld. CIT(A). Undisputedly, in the present case the appeal has already been preferred to the Ld. CIT(A). However, the Ld. CIT has passed the order under section 264 of the Act. Thus it is transpired that the order passed by the Ld. CIT under section 264 of the Act is against the provisions of law as discussed above.

15. At this juncture, we also find pertinent to refer the provisions of section 246A of the Act which reads as under:

***Appealable orders before Commissioner (Appeals).***

***246A.*** (1) Any assessee or any deductor or any collector aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against—

*(a) an order passed by a Joint Commissioner under clause (ii) of sub-section (3) of [section 115VP](#) or an order against the assessee where the assessee denies his liability to be assessed under this Act or an intimation under sub-section (1) or sub-section (1B) of [section 143](#) or sub-section (1) of [section 200A](#) or sub-section (1) of [section 206CB](#), where the assessee or the deductor or the collector objects to the making of adjustments, or any order of assessment under sub-section (3) of [section 143](#) except an order passed in pursuance of directions of the Dispute Resolution Panel or an order referred to in sub-section (12) of [section 144BA](#) or [section 144](#), to the income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;*

*(aa) an order of assessment under sub-section (3) of [section 115WE](#) or [section 115WF](#), where the assessee, being an employer objects to the value of fringe benefits assessed;*

*(ab) an order of assessment or reassessment under [section 115WG](#);*

*(b) an order of assessment, reassessment or recomputation under [section 147](#) except an order passed in pursuance of directions of the Dispute Resolution*

Panel or an order referred to in sub-section (12) of [section 144BA](#) or [section 150](#);

(ba) an order of assessment or reassessment under [section 153A](#) except an order passed in pursuance of directions of the Dispute Resolution Panel or an order referred to in sub-section (12) of [section 144BA](#);

(bb) an order <sup>66</sup>[made] under sub-section (3) of [section 92CD](#);

(c) an order made under [section 154](#) or [section 155](#) having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assessee under either of the said sections except an order referred to in sub-section (12) of [section 144BA](#);

(d) an order made under [section 163](#) treating the assessee as the agent of a non-resident;

(e) an order made under sub-section (2) or sub-section (3) of [section 170](#);

(f) an order made under [section 171](#);

(g) an order made under clause (b) of sub-section (1) or under sub-section (2) or sub-section (3) or sub-section (5) of [section 185](#) in respect of an assessment for the assessment year commencing on or before the 1st day of April, 1992;

(h) an order cancelling the registration of a firm under sub-section (1) or under sub-section (2) of [section 186](#) in respect of any assessment for the assessment year commencing on or before the 1st day of April, 1992 or any earlier assessment year;

(ha) an order made under [section 201](#);

(hb) an order made under sub-section (6A) of [section 206C](#);

(i) an order made under [section 237](#);

(j) an order imposing a penalty under—

(A) [section 221](#); or

(B) [section 271](#), [section 271A](#), [section 271AAA](#), [section 271AAB](#), [section 271F](#), [section 271FB](#), [section 272AA](#) or [section 272BB](#);

(C) [section 272](#), [section 272B](#) or [section 273](#), as they stood immediately before the 1st day of April, 1989, in respect of an assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment years;

(ja) an order of imposing or enhancing penalty under sub-section (1A) of [section 275](#);

(k) an order of assessment made by an Assessing Officer under clause (c) of [section 158BC](#), in respect of search initiated under [section 132](#) or books of account, other documents or any assets requisitioned under [section 132A](#) on or after the 1st day of January, 1997;

(l) an order imposing a penalty under sub-section (2) of [section 158BFA](#);

(m) an order imposing a penalty under [section 271B](#) or [section 271BB](#);

(n) an order made by a Deputy Commissioner imposing a penalty under [section 271C](#), [section 271CA](#), [section 271D](#) or [section 271E](#);

(o) an order made by a Deputy Commissioner or a Deputy Director imposing a penalty under [section 272A](#);

(p) an order made by a Deputy Commissioner imposing a penalty under [section 272AA](#);

(q) an order imposing a penalty under Chapter XXI;

(r) an order made by an Assessing Officer other than a Deputy Commissioner under the provisions of this Act in the case of such person or class of persons, as the Board may, having regard to the nature of the cases, the complexities involved and other relevant considerations, direct.

*Explanation.*—For the purposes of this sub-section, where on or after the 1st day of October, 1998, the post of Deputy Commissioner has been redesignated as Joint Commissioner and the post of Deputy Director has been redesignated as Joint Director, the references in this sub-section for "Deputy Commissioner" and "Deputy Director" shall be substituted by "Joint Commissioner" and "Joint Director" respectively.

(1A) Every appeal filed by an assessee in default against an order under [section 201](#) on or after the 1st day of October, 1998 but before the 1st day of June, 2000 shall be deemed to have been filed under this section.

(1B) Every appeal filed by an assessee in default against an order under sub-section (6A) of [section 206C](#) on or after the 1st day of April, 2007 but before the 1st day of June, 2007 shall be deemed to have been filed under this section.

(2) Notwithstanding anything contained in sub-section (1) of [section 246](#), every appeal under this Act which is pending immediately before the appointed day, before the Deputy Commissioner (Appeals) and any matter arising out of or connected with such appeals and which is so pending shall stand transferred on that date to the Commissioner (Appeals) and the Commissioner (Appeals) may proceed with such appeal or matter from the stage at which it was on that day :

**Provided** that the appellant may demand that before proceeding further with the appeal or matter, the previous proceeding or any part thereof be reopened or that he be re-heard.

*Explanation.*—For the purposes of this section, "appointed day" means the day appointed by the Central Government by notification in the Official Gazette.

On perusal of the above provisions, it is revealed that there is no restriction imposed upon the Ld. CIT (A), like in the provisions of section 264 of the Act, for not deciding the issue against the assessment order in a situation where the assessee has made a revisionary application under section 264 of the Act.

16. We also find that the Hon'ble Allahabad High Court in the identical facts and circumstances has decided the issue in favor of the assessee in the case of Yogendra Parsad Santosh Kumar Vs. Commissioner of Income Tax reported in 44 taxmann.com 299.



16.1 The facts in the above case are like this. The AO completed the assessment under section 143(3) of the Act by order dated 26/12/2011. The assessee preferred an appeal before the Ld. CIT(A) against such assessment order on 10-01-2012. The assessee further filed an application before the CIT(A) for withdrawal of appeal file against the order of the AO. Thereafter the assessee on 28-02-2012 filed a revisionary application before the Ld. CIT under section 264 of the Act by stating that he has already waived his right of appeal before the Ld. CIT-A. Accordingly the Ld. CIT partly deleted the addition made by the AO. However the Ld. CIT(A) reject the withdrawal application of the assessee and decided the matter on merit against the assessee.

16.2 For better understanding, the relevant finding of the Hon'ble Allahabad High Court is reproduced as under:

*“There is no provision in Income tax Act which permits withdrawal of an appeal, once it is filed, and registered. Once right of appeal is exhausted, by party concerned, and the appeal is filed before appropriate Appellate Authority, who after receiving same has registered it, there is no provision in the statute permitting withdrawal thereof*

*In this particular case, however, the bar under section 264(4) would stand against petitioner, when he preferred revision before CIT in as much as he had already exhausted his right of appeal and that was actually pending before Appellate Authority. Mere filing of an application seeking withdrawal of appeal would not have resulted as if the appeal stood withdrawn or deemed withdrawn unless an order is passed by Appellate Authority thereon for the reason that appellant could have always requested Appellate Authority not to pass any order on his withdrawal application. Since he does not press it and he could have proceeded with his appeal. In the eyes of law, appeal continued to remain pending even if application was filed by petitioner seeking withdrawal of appeal. On the date when revision was filed by petitioner or when CIT passed order on petitioner's revision, petitioner's appeal, as a matter of fact, was pending before Appellate Authority. Hence the Revisional Authority was barred from revising order of Assessing Authority by virtue of sub-section (4) of section 264.*

*There is another aspect of the matter. Clause (a) of section 264(4) talks of a situation where assessee has not waived his right of appeal. When appeal is filed, the right of appeal stands waived and exhausted by assessee, hence question of waiver of right of appeal thereafter would not arise. Moreover, Clauses (b) and (c) also makes a distinction in respect of an appeal preferred before Commissioner (Appeals) or Appellate Tribunal vis-a-vis appeal preferred before Deputy Commissioner (Appeals). For an appeal preferred before Deputy Commissioner (Appeals), Clause (b) says that if an order on appeal is pending but when an appeal is preferred before Commissioner (Appeals) or Appellate Tribunal, Clause (c) contemplates that the order has been made subject of*

*appeal, meaning thereby mere filing of appeal against assessment order is sufficient to attract clause (c) and thereafter power of revision shall stand lost and cannot be invoked.*

*In view thereof, it is to be held that Commissioner committed a manifest error in exercising revisional power when petitioner's appeal was pending before Commissioner (Appeals). The revisional order, therefore, was wholly without jurisdiction. That being so, it has rightly been recalled. The Appellate Authority has rightly proceeded to decide appeal in view of the fact that petitioner did not press his application for withdrawal of appeal and more so in the light of judgment of Apex Court in CIT v. Rai Bahadur Hardtroy Motilal Chamaria [\[1967\] 66 ITR 443 \(SC\)](#), the appeal filed could not have been withdrawn*

17. The learned DR before us at the time of hearing has not brought any iota of evidence suggesting that the appeal before the Ld. CIT(A) was not pending either at the time of filing the revisionary application or passing the revisionary order under section 264 of the Act. Thus as a matter of fact the appeal of the assessee was pending before the Ld. CIT(A) during the relevant time when the matter was decided by the Ld. CIT under section 264 of the Act. In the light of the above discussion the Ld. CIT under section 264 has exceeded his jurisdiction by passing the order which is not sustainable in the eyes of law.

18. Now coming to the facts of the case relied by the Ld. CIT (A) in his order in case of CIT Vs. Eurasia Publishing house (p) ltd. reported in 232 ITR 381.

19. The facts of the case are like this. In this case the assessee filed a rectification application dated 12-06-1970 to the AO under section 154 of the Act which was rejected by him by order dated 21-12-1970.

20. The assessee preferred revision petition dated 17-12-1970 before the Ld. CIT under section 264 of the Act against the original assessment order pass by the AO under section 143(3) of the Act. The revision petition dismissed by Ld. CIT vide order dated 28-03-1972.

21. The assessee further filed an appeal dated 04-jan 1971 before the Ld. CIT(A) against the order framed by the AO dated 21-12-1970. The Ld. CIT

allowed the appeal of the assessee vide order dated 22-02-1973. Thereafter the Ld. CIT(A) revised its order under section 154 of the Act, after filing a rectification application by the ITO and invited the attention of the Ld. CIT(A) on fact that the Ld. CIT rejected the revision petition of the assessee. Therefore the Ld. CIT(A) could not have exercised his appellate jurisdiction.

22. In the above case it was decided that the order of the AO has been merged with the order of the Ld. CIT under section 264 of the Act. As such there was no question on the validity of the order passed by the Ld. CIT under section 264 of the Act. Thus the facts of the case referred by the Ld. CIT (A) in his order is distinguishable from the present facts of the case. Accordingly, in our humble and considered opinion the principles laid down by the Hon'ble Delhi High Court in the case of CIT Vs. Eurasia Publishing house (p) Ltd (*supra*) are not applicable in the present facts of the case. Accordingly, we are not inclined to place our reliance on such judgment.

Before parting, we also note that the assessee is a limited company and has the support of the professionals. Therefore it is not expected from such company to move the appeal before the learned CIT (A) and also make application for the revision under section 264 of the Act simultaneously which is unwanted under the provisions of law. Thus the question arises whether the assessee has done so intentionally or due to negligence. Whatever is the case, the assessee has acted negligently therefore in our considered view some cost should be imposed upon the assessee. Accordingly we direct the assessee to deposit a sum of ₹40,000 to the income tax office before the commencement of the proceedings before the learned CIT (A) for its negligent approach.

23. In view of the above and after considering the facts in totality, we set aside the finding of the Ld. CIT(A) and direct him to admit the appeal filed by the assessee and decide the issue afresh as per the provisions of law on merit. It is also pertinent to note that the assessee shall cooperate during the appellate proceedings before the Ld. CIT(A) and file the necessary supporting

documents in support of its contention. Hence the ground of appeal of the assessee is partly allowed for the statistical purposes.

24. In the result the appeal of the assessee is partly allowed for the statistical purposes.

**This Order pronounced in Open Court 18/03/2020**

Sd/-  
(MADHUMITA ROY)  
JUDICIAL MEMBER  
Ahmedabad: Dated 18/03/2020

Sd/-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER

*True Copy*

*S. K. SINHA*

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By ORDER

Deputy/Asstt.Registrar  
ITAT, Rajkot