

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 2323 OF 2013

The Commissioner of Income Tax -5
Mumbai

.. Appellant

v/s.

M/s. Air India Ltd. Mumbai

..Respondent

Mr. Tejveer Singh for the appellant
Mr. Ashok Patil for the respondent

**CORAM : M.S. SANKLECHA &
B.P. COLABAWALLA, J.J.**

DATED : 6th JANUARY, 2016.

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 8th February, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2000-01.

2. This appeal raises the following questions of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal has erred in dismissing the M.As filed by the Department ?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal has erred in dismissing the M.As filed by the Department without appreciating the decision of the Tribunal in the case of DCIT Vs. Airport Authority of India (2013) 86 DTR 222 (Delhi-Tribunal), wherein it has been held that the order of the Tribunal dismissing Revenue appeal for want of COD approval was an order under rule 12 of ITAT Rules 1963 r.w.s. 255(5) and not an order as contemplated u/s 254(1) and therefore the limitation u/s 254(2) is not applicable to the said order?

3. The Respondent-Assessee is a public sector undertaking. The Appellant-Revenue had on 16th February, 2002 preferred an appeal to the Tribunal for the Assessment year 2000-01 from the order of the Commissioner of Income Tax(Appeals). The Tribunal by its order dated 6th November, 2007 dismissed the Appellant-Revenue's appeal as it had not obtained approval of the Committee on Disputes (COD) to prosecute a dispute with a public sector company which was required at the relevant time in view of the decision of the Supreme Court in ONGC v/s. CCE (2004) 6 SCC 437. However, liberty was granted to the Appellant-Revenue to apply for re-call of the order at a later stage if such approval of the COD is obtained later and such application for re-call is in accordance with law.

4. Thereafter on 17th February, 2011, the Supreme Court in Electronics Corporation of India Ltd. v/s. UOI 332 ITR 58 held that the approval of COD is no longer required to prosecute a dispute amongst the departments of the Government and Public Sector undertakings *inter se*.

5. Consequent to the above, in 2012 the Appellant-Revenue filed a miscellaneous application before the Tribunal for re-call of the order dated 6th November, 2007 dismissing its appeal. The Tribunal by the impugned order dated 8th February, 2013 dismissed the application for re-call of the order dated 6th November, 2007 as being beyond the period of limitation provided in Section 254(2) of the Act.

6. The grievance of the Revenue is that there is no occasion to apply Section 254(2) of the Act to its application for re-call of the order dated 6th November, 2007. This on the ground that the order dated 6th November, 2007 is not an order passed under Section 254(1) of the Act but an order under Section 225 of the Act read with Rule 12 of the Income Tax Appellate Tribunal Rules, 1963(ITAT Rules). Thus, it is the case of Revenue that no period of limitation much less the period of limitation of four years as provided in Section 254(2) of the Act

applies.

7. Before dealing with the grievance of the Appellant-Revenue, it must be pointed out that it is an agreed position between the parties that the issues arising herein stand covered against the Revenue and in favour of the Respondent-Assessee by the decision of this Court in Writ Petition No.11580 of 2013 (CIT v/s. Central Bank OF India), rendered on 23rd July, 2014. In the present facts also, Mr. Tejveer Singh the learned Counsel for the Revenue states that no application for obtaining the approval of COD had been filed by the Revenue at the time when the Revenue filed the appeal with the Tribunal or even thereafter. This is identical to the position in Central Bank of India (supra) where this Court has observed as under :-

“6. Mr. Suresh Kumar learned Counsel appearing for the revenue on instructions states that the Revenue had not made any application to obtain approval of the COD before it filed its appeal for A.Y. 1996-98 to the Tribunal. This inspite of the COD mechanism being very much in force at that time. The recall of its earlier orders in respect of ONGC by the Supreme Court in the case of ELECTRONICS CORPORATION OF INDIA LTD only does away with the practice in view of the changed circumstances. The necessity of obtaining approval from COD

which was in practice at the relevant time cannot be done away with on the ground that the Supreme Court has now held that the practice needs to be discontinued.”

However we are conscious that the above decision was rendered in the exercise of our writ jurisdiction where the conduct of a party also becomes a relevant factor and here we are dealing with a statutory appeal. Moreover the specific grievance made herein was not urged before us therein i. e. in Central Bank of India(supra). Therefore, we are independently examining the contentions urged on behalf of the Appellant-Revenue.

8. Before dealing with the grievance of the Revenue, it may be necessary to re-produce Rule 12 of the ITAT Rules which reads as under:-

R. 12. Rejection or amendment of memorandum of appeal – *The Tribunal may reject a memorandum of appeal, if it is not in the prescribed form or return it for being amended within such time as it may allow. On representation after such amendment, the memorandum shall be signed and dated by the officer competent to make an endorsement under rule 7.*

Rule 7 of the ITAT Rules reads as under :-

R. 7. Date of presentation of appeals – The Registrar, or as the case may be, the authorised officer, shall endorse on every memorandum of appeal the date on which it is presented or deemed to have been presented under rule 6 and shall sign the endorsement.

9. It would be noticed that the power under Rule 12 of ITAT Rules is to either reject a memorandum of appeal or return it for correction, if the memorandum of appeal is not in the prescribed form. It is only after the memorandum of appeal is put in the prescribed form, that it has to be re-presented for acceptance under Rule 7 of the ITAT Rules. In this case, we specifically asked Mr. Tejveer Singh, whether the appeal filed by the Revenue before the Tribunal was not in accordance with the prescribed form and he informed us that it was in the prescribed form. Therefore, on the aforesaid facts, no occasion to exercise powers under Rule 12 of the ITAT Rules can arise for either the rejection or return of the memorandum of appeal. This is in fact not done.

10. However, the Revenue while not disputing the above position yet urge that the order dated 6 November 2007 dismissing its appeal passed by the Tribunal purportedly under Section 252(1) of the Act is in effect and substance an order passed under Rule 12 of the ITAT

Rules. We are unable to understand how Rule 12 of the ITAT Rules can have any application, for simple reason that the sine quo non for its application is that the memorandum of appeal is not in the prescribed form. Admittedly in this case the memorandum of appeal is in the prescribed form. Therefore the appeal filed by the Revenue itself was listed for hearing on 6 November 2007 before a division Bench of the Tribunal leading to an order of even date under Section 254(1) of the Act. This order dated 6 November, 2007 is an appealable order under Section 260-A of the Act.

11. One more aspect which can not be lost sight of is that whenever an memorandum of appeal is rejected under Rule 12 of the ITAT Rules, then it has to be re-presented under Rule 7 of the ITAT Rules. In this case undisputedly no memorandum of appeal has been re-presented by the Revenue under Rule 7 of the ITAT Rules. This also is indicative of the fact that the order dated 6 November 2007 of the Tribunal has not been exercised under Rule 12 of the ITAT Rules but under Section 254(1) of the Act. Moreover the period from the date of rejection of the memorandum of appeal till the date of re-presentation after amending the memorandum of appeal would not be excluded while computing the period of limitation as provided under the Act for the

purposes of filing an appeal before the Tribunal. Therefore if the order dated 6 November 2007 was an order under Rule 12 of the ITAT Rules then not only there ought to have been a representation of the appeal on the part of the Appellant -Revenue but also an explanation for the period of the delay while computing the period of limitation for filing of the appeal after amending its memorandum of appeal. This has also not been done by the Appellant- Revenue. In the absence of such an application, the appellants before the Tribunal would be free in cases where the memorandum of appeal is rejected under Rule 12 of the ITAT Rules to file/ represent a competent appeal long after the period of limitation to file an appeal has expired from the order of the lower authority even after excluding the period when the appeal was first filed and rejected under Rule 12 of the ITAT Rules. This could never be the objective as it would result not only in stale issues being reactivated and disrupting finality acquired to quasi judicial orders by passage of time. Consequently, no fault can be found with the impugned order dated 8 February 2013 of the Tribunal rejecting the application for recall of the Order dated 6 November 2007 as being time barred.

12. The reliance by the Appellant-Revenue upon the decision of the

Delhi Bench of the Tribunal in Dy. CIT v/s. Airport Authority of India 86 DTR 222 to contend that Rule 12 of the ITAT Rules applies, does not advance its cause. This for the reason as pointed out herein above that in the present facts Rule 12 of the ITAT Rules has not been invoked while dismissing the Appellant-Revenue's appeal by order dated 6 November 2007. Moreover the reliance by the Delhi Bench of the Tribunal upon Order 41 Rule 19 of the Civil Procedure Code is inappropriate as it does not deal with the situation arising in the present facts. Order 41 Rule 3 of the Civil Procedure Code is similar to Rule 12 of the ITAT Rules and it has been adverted to by the Delhi Bench of the Tribunal, yet as pointed out above the same has not been invoked in this case while passing the order dated 6 November 2007 dismissing the appeal of the Revenue. It may be pointed out that in the present facts the appeal was rejected by the order dated 6 November 2007 and not the memorandum of appeal as was the basis of the decision of the Delhi bench of the Tribunal. The alternative hypothetical basis in the order of the Delhi Bench of the Tribunal that if the approval was granted by the COD after four years from the order of the Tribunal then the Tribunal would have recalled the order and in this case the Supreme Court order in Electronics Corporation (supra) has done away with such a requirement stands on the same footing, is,

in our view not correct. In any case whether such an application for recall of an order on the basis of the COD after four years from an order of the Tribunal dismissing the appeal is sustainable is not an issue arising for our consideration and therefore not being dealt with in these facts.

13. Be that as it may, we may point out that the issue as raised in question viz. inapplicability of Section 254(2) of the Act to the application for recall and the applicability of Rule 12 of ITAT Rules to such an application was not an issue urged by the Revenue before the Tribunal, thus not considered by the Tribunal. We specifically asked Mr. Tejveer Singh, whether the issue being urged before us was raised before the Tribunal and he answered in the negative. Therefore, the question as framed does not arise from the impugned order of the Tribunal. Thus as held by this Court in *Commissioner of Income Tax vs. Tata Chemicals Ltd.* 256 ITR 395 an appeal on an issue not urged before the Tribunal is not maintainable. However, we have expressed our view as it is a pure question of law and identical issues are likely to arise before the Tribunal.

14. In the above view, the questions as raised in the present appeal

do not give rise to any substantial question of law from the order of the Tribunal.

15. Accordingly, the appeal is dismissed. No order as to costs.

(B.P. COLABAWALLA, J.)

(M.S. SANKLECHA, J.)