* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

+ Writ Petition Nos.29176 and 29177 of 2017

% 21-9-2017

D.S. Karunakar Reddy, Flat No.302,
Srilakshmi Nilayam, Rajeev Nagar, Hyderabad
... Petitioner

Vs.

$ 1. The Income Tax Appellate Tribunal,
"A" Bench, Hyderabad Benches, 5th Floor,
CGO Towers, Kavadiguda, Secunderabad-80

2. Commissioner of Income Tax (Appeals) 4,
3rd Floor, Annexe, Aayakar Bhavan,
Basheer Bagh, Hyderabad-04

3. Deputy Commissioner of Income Tax,
Range 6(1), I.T. Towers, A.C. Guards,
Masab Tank, Hyderabad-28

4. Tax Recovery Officer-6, 'C' Block, 5th Floor,
I.T. Towers, A.C. Guards, Masab Tank, Hyderabad-28
... Respondents

! Counsel for the Petitioner: Mr. R.V. Eswar,
Senior Counsel, representing
Mr. A.V. Raghu Ram

Counsel for Respondents 1 to 4: Ms. M.Kiranmayee,
Senior Standing Counsel

< Gist:

> Head Note:

? Cases referred:
Nil.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
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Writ Petition Nos.29176 and 29177 of 2017

Common Order: (per V.Ramasubramanian, J.)

The petitioner has come up with these writ petitions, challenging – (i) the dismissal by the Income Tax Appellate Tribunal of a statutory appeal for non-prosecution and (ii) the dismissal of a miscellaneous application for restoration of a miscellaneous application filed in an appeal already disposed of by the Tribunal.

2. Heard Mr. R.V. Eswar, learned Senior Counsel appearing for the petitioner and Ms. M.Kiranmayee, learned Senior Standing Counsel for the respondents.

3. As against an order of assessment dated 31-12-2009 passed under Section 158BC read with Section 143(3) of the Act, in relation to the Assessment Year 2008-09, the petitioner filed a statutory appeal before the Commissioner of Income Tax (Appeals). The First Appellate Authority dismissed the appeal by an order dated 07-3-2011 *in limine* without going into the merits, on the ground that the petitioner had not remitted the tax due even on the income returned by him as mandated by Section 249(4).

4. Therefore, the petitioner filed a second appeal before the Tribunal. The Tribunal allowed the appeal by an order dated 16-9-2011, after finding that the petitioner had complied with the provisions of Section 249(4), much before

the dismissal of the appeal by the First Appellate Authority. Since the First Appellate Authority did not decide the appeal on merits, the Tribunal remanded the matter back to the First Appellate Authority. While doing so, the Tribunal also issued a direction to the First Appellate Authority to decide the merits of the appeal after verification of the TDS submitted by the petitioner.

5. Aggrieved by such a further direction issued by the Income Tax Appellate Tribunal, the petitioner filed a miscellaneous application in M.A.No.113/Hyd/2015 on 07-9-2015, which was within four years. When the said miscellaneous application was pending, the First Appellate Authority took up the appeal which came back to him upon remand and decided the same, by going into the questions that were specifically directed by the Tribunal to be gone into.

6. Therefore, the petitioner filed a fresh appeal to the Tribunal as against the order passed by the First Appellate Authority on 29-9-2015 after remand. This appeal was numbered as I.T.A.4/Hyd/2016.

7. Unfortunately, without seeking the appeal I.T.A. No.4/2016 to be tagged along with M.A.No.113/2015, the petitioner sought withdrawal of M.A.No.113/2015. This was on the premise that the miscellaneous application had virtually become infructuous, as the order of remand had worked itself out. The Tribunal by an order dated 29-01-2016, dismissed M.A.No.113/2015.

8. Thereafter, I.T.A.No.4/2016 came up for hearing. As calamities normally strike in succession, I.T.A.No.4/2016 was dismissed for non-prosecution.

9. Therefore, as against the dismissal of I.T.A. No.4/2016 for non-prosecution, the petitioner has come up with the writ petition W.P.No.29177 of 2017.

10. The petitioner in the meantime also moved another application in M.A.No.57/Hyd/2016 before the Tribunal for restoration of M.A.No.113/2015 on the ground that the first application had not become infructuous. But the Tribunal dismissed the application on the ground that there is no provision for entertaining the miscellaneous application for restoration of a miscellaneous application dismissed as withdrawn/infructuous. As against the said order, the petitioner has come up with the writ petition W.P.No.29176 of 2017.

11. The respondents have raised a preliminary objection to the maintainability of both these writ petitions, on the ground that there is a statutory alternative remedy of appeal under Section 260A of the Income Tax Act, 1961. Another ground on which the respondents oppose the maintainability of the writ petitions is that as against the order dismissing I.T.A.No.4/2016 for default, the Tribunal itself has given liberty to move a miscellaneous petition in terms of the proviso to Rule 24.

12. We do not want to go into the question whether an appeal under Section 260A alone would lie as against the order of the Tribunal dismissing an appeal for non-prosecution. The learned Senior Counsel for the petitioner is prepared to go back to the Tribunal with a miscellaneous application for restoration, since the Tribunal itself has given that liberty to the petitioner. Therefore, W.P.No.29176 of 2017 is allowed to be withdrawn, with liberty to the petitioner to move an application before the Tribunal for restoration of I.T.A. No.4/2016 dismissed for non-prosecution. We make it clear that if the petitioner files an application for restoration within two weeks from the date of receipt of a copy of this order, the Tribunal shall not stand on technicalities but shall restore the appeal for hearing on merits. This observation, we are compelled to make in view of the mandatory provision of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, which does not permit an appeal to be dismissed for non-prosecution, but mandates an appeal to be dismissed only on merits.

13. Coming to the second writ petition W.P.No.29177 of 2017, this case poses no difficulty with regard to maintainability. The petitioner cannot go back to the Tribunal with yet another miscellaneous application. The first miscellaneous application was dismissed on the ground that it has become infructuous and that it was sought to be withdrawn. The miscellaneous application for restoration of

the first miscellaneous application was dismissed as not maintainable. An appeal under Section 260A may not be maintainable, as against such an order, since an appeal under the said Section can arise only out of the order passed in an appeal. An order passed in a miscellaneous application and that too for restoration of an earlier miscellaneous application filed after the disposal of the regular appeal, cannot be treated as an order on an appeal so as to come within the purview of Section 260A.

14. Having disposed of the issue relating to maintainability, let us now go to the manner in which miscellaneous application was disposed of. The facts narrated by us in the preceding portion of this order would show that the petitioner was aggrieved in their first appeal before the Tribunal viz., I.T.A.No.402/2011, only about the manner in which the CIT (Appeals) dismissed the appeal. Therefore, while allowing I.T.A.No.402/2011, the Tribunal could not have made any observation except sending the matter back to the CIT (Appeals) for a disposal on merits. Since the Tribunal made extra observations, the petitioner was compelled to file M.A.No.113/2015 within the period of four years permitted by law.

15. But by the time M.A.No.113/2015 could be taken up for hearing, the CIT (Appeals) had disposed of the main appeal pursuant to the order of remand. Therefore, the petitioner was under a *bona fide* wrong impression that the

miscellaneous application had become infructuous. Accordingly, they filed a memo seeking withdrawal/dismissal as infructuous.

16. After they woke up to the reality, the petitioner filed the miscellaneous application for the restoration of the miscellaneous application.

17. In effect, the petitioner did not have an adjudication in M.A.No.113/2015. All that the petitioner now wants is only an adjudication in M.A.No.113/2015. This adjudication cannot be denied to the petitioner, in view of the circumstances narrated above. Therefore, W.P.No.29177 of 2017 is allowed, the order of the Tribunal in M.A.No.57/2016 is set aside and M.A.No.113/2015 shall stand restored. The Tribunal may take up M.A.No.113/2015 along with I.T.A.No.4/2016 and dispose it of in accordance with law. The miscellaneous petitions, if any, pending in these writ petitions shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

ABHINAND KUMAR SHAVILI, J.

21st September, 2017.
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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

<u>Writ Petition Nos.29176 and 29177 of 2017</u>
(per VRS, J.)

21st September, 2017.
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