IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2018

CORAM

The HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
AND
The HON'BLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.8126 of 2018

N.S.Mohan .. Petitioner

Vs.

1 The Income Tax Appellate Tribunal
A-3, II Floor, Rajaji Bhavan
Besant Nagar, Chennai - 90.

2 The Commissioner of Income Tax Authority
Office of the Income Tax Officer
Business Ward XIII (4)
121, M.G.Road, Nungambakkam High Road
Chennai - 600 034. .. Respondents

PRAYER: Petition under Article 226 of the Constitution of India for issuance of a writ of Certiorarified Mandamus to call for the records of the order of the first respondent dated 20.6.2017 and quash the same and remit the matter to the first respondent, consequently directing the first respondent to pass just and appropriate orders on the merits of the appeal of the petitioner in I.T.A.No.2070/Mds/2015 in respect of the assessment year 2009-10.

For Petitioner : Ms.Rema Smrithi V.K.

For Respondents : Mr.J.Narayanasamy
Standing Counsel

ORDER
(Made by Ms.Indira Banerjee, Chief Justice)

In this writ petition, the petitioner has challenged an order dated 20.6.2017 passed by the Income Tax Appellate Tribunal 'C' Bench, Chennai, dismissing the appeal, being I.T.A.No.2070/Mds/2015, for the assessment year 2009-2010, on the ground that none had appeared on behalf of the assessee, nor any adjournment application filed on their behalf. The short question involved in this writ petition is whether the appeal could have been dismissed on the ground of default.

2. Section 254(1) of the Income Tax Act, 1961, hereinafter referred to as "the 1961 Act", provides that the Appellate Tribunal might, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

3. Sub-section (2) of Section 254 of the 1961 Act provides as follows:

> "Section 254. Orders of Appellate Tribunal.
>
> (1) ****
>
> (1A) ****
>
> (2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer :
>
> Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :
>
> Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees."

4. Rules 24 and 25 of the Income Tax (Appellate Tribunal) Rules, 1963, hereinafter referred to as "the 1963 Rules", provides as follows:

> "Rule 24. Hearing of appeal ex parte for default by the appellant. Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may

dispose of the appeal on merits after hearing the respondent :

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal.

Rule 25. Hearing of appeal ex parte for default by the respondent. Where, on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant appears and the respondent does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the appellant:

Provided that where an appeal has been disposed of as provided above and the respondent appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restore the appeal."

5. The aforesaid Rules cast an obligation on the Tribunal to dispose of an appeal on merits irrespective of whether the appellant appears or not.

6. The learned counsel appearing on behalf of the petitioner has cited a Full Bench decision of the Supreme Court in Commissioner of Income Tax, Madras v. S.Chenniappa Mudaliar, reported in AIR 1969 SC 1068, where the Supreme Court held that Rule 24 of the 1963 Rules, which provided for dismissal of an appeal for the failure of the appellant to appear, did not contain any provision for restoration of the appeal and that Rule 24 of 1963 Rules is in conflict with Sub-section 4 of Section 33 of the 1961 Act, which requires the Appellate Tribunal to dispose of an appeal on merits.

7. It is true that Rule 24 of the 1963 Rules has subsequently been amended with effect from 1.8.1987 by the

Income Tax (Appellate Tribunal) Amendment Rules, 1987. The proviso enables the Tribunal to restore an appeal if the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non appearance when the appeal was called on. The proviso enables the Tribunal to recall an ex parte order, but not an order passed on merits, as the substantive part of Rule 24 casts an obligation on the Tribunal to dispose of the appeal on merits after hearing the respondent, if the appellant does not appear.

8. The learned counsel appearing on behalf of the department submits that an appeal may have been filed for which the prescribed period of limitation would be 120 days and a writ petition cannot be filed to avoid the limitation prescribed by statute.

9. An appeal lies only on a substantial question of law under Section 260A of the Income Tax, 1961. Whether an appeal would be entertained or not would depend on the satisfaction of the High Court that there was not just a question of law, but a substantial question of law. This is not a case where there is an automatic appeal provision available. It cannot be said that the petitioner had an equally efficacious alternative remedy.

10. Article 226 of the Constitution of India does not impose any limitation on the power of the High Court to issue writs, even when there is an alternative remedy. Where there is an efficacious alternative remedy this Court refrains from exercising its extra ordinary jurisdiction. This Court would not reject an application under Article 226 of the Constitution of India, where the remedy, if any, of appeal is uncertain as in the case of an appeal under Section 260A of the 1961 Act which depends on the subjective satisfaction of the Division Bench of the High Court, of existence of a substantial question of law.

11. In any case, there are at least 3 exceptions to the rule of alternative remedy. A writ application might be entertained where the order is in violation of principles of natural justice, where the order has been passed under a law which is ultra vires or is otherwise without jurisdiction or in case of an order which is perverse. The order impugned is patently repugnant to Section 254 of the 1961 Act read with Rule 24 of the 1963 Rules.

12. The writ petition is allowed and the impugned order cannot be sustained and the same is set aside. The learned

Tribunal is directed to consider the matter on merits and take a fresh decision in accordance with law, preferably within 45 days from the date of communication of this order. Consequently, W.M.P.No.10105 of 2018 is closed.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

sasi

To:

1 The Assistant Registrar
Income Tax Appellate Tribunal
A-3, II Floor, Rajaji Bhavan
Besant Nagar, Chennai - 90.

2 The Commissioner of Income Tax Authority
Office of the Income Tax Officer
Business Ward XIII (4)
121, M.G.Road, Nungambakkam High Road
Chennai - 600 034.

+1 CC to Mr.J.Narayanasamy, Advocate sr 28500.
+1 CC to Ms.Rema Smrithi V.K., Advocate sr 27991.

W.P.No.8126 of 2018

SJ(CO)
SP(15/05/2018)