

In The High Court at Calcutta
Special Jurisdiction (Income Tax)

Original Side

The Hon'ble Justice I. P. Mukerji

And

The Hon'ble Justice Kausik Chanda

I.T.A No. 28 of 2020

Anil Kumar Nevatia

...Appellant.

Versus

Income Tax Officer, Ward – 40(1), Kolkata & Ors.

...Respondents.

For the appellant : Mr. Jishnu Chowdhury, Advocate.

Mr. Bhaskar Sengupta, Advocate.

For the respondents : Mr. S.N. Dutta. Advocate.

Hearing concluded on : 15/12/2020.

Judgment on : 23/12/2020.

Kausik Chanda, J.:- This appeal under Section 260 A of the Income Tax Act, 1961 has been directed against an order dated September 06, 2019, passed by

the Income Tax Appellate Tribunal, “A” Bench Kolkata, in an application under Section 254(2) of the Income Tax Act, 1961 (“said Act” for short) being M.A No. 132/Kol/2019 in connection with I.T.A No. 1479/Kol/2017 for the Assessment Year 2009-2010.

2. The assessee filed the said application praying rectification of the order of the Tribunal passed on September 09, 2018. Admittedly, the said order of the Tribunal was served on the assessee on December 05, 2018, and the assessee filed the said application on June 03, 2019.

3. Tribunal held that there was a delay of 66 days in filing the said application by the assessee. Tribunal declined to entertain the said application being barred by limitation holding that the Income Tax Tribunal is a creature of statute and the Tribunal did not have any power to pass an order under Section 254(2) of the Act beyond a period of six months from the end of the month in which the order sought to be rectified was passed.

4. It was further held by the Tribunal that since the order was pronounced on September 09, 2018, in open court, it was to be presumed that the assessee had the knowledge of the order on the date of pronouncement of the order.

5. The assessee impugnes the said order of the Tribunal suggesting that the date of order is not relevant for the purpose of computing the period of limitation under Section 254 of the Income Tax Act, 1961, and it should be the date on which the order was served upon the assessee by the Tribunal. The

assessee by placing heavy reliance upon the judgment reported at **(2003) 6 SCC 186 (D. Saibaba -Versus- Bar Council of India)** argues that the words, as occurring in the Section 254(2) of the Act, “the end of the month in which the order was passed” should be construed as “the date when the copy of the order was served.” In the event the said order is not communicated due to laches of the Tribunal or for any reason whatsoever, the remedy against the said order may be lost and a delayed communication may adversely affect the right of a party to make an application by shortening the period of limitation.

6. The assessee further submits that it was held by the Supreme Court in **D. Saibaba** (Supra) that where literal construction or plain meaning may cause hardship, futility, absurdity or uncertainty, the Court may prefer purposive or contextual construction to arrive at a more just, reasonable and sensible result and, therefore, the starting point of limitation should be interpreted as the date of communication of the order, not from the date of the order as provided in Section 254(2) of the Act.

7. The assessee submits that the pronouncement of the order in the open court is not communication of the order and by itself cannot be the starting point for determining the period of limitation. The order has to be communicated to the parties affected by the said order so that the party adversely affected therefrom may know reasons and contents of the same and formulate grounds of attack before the appellate or higher forum.

8. The assessee points out that the judgment in **D. Saibaba** (Supra) was applied by Gujrat High Court in a case reported at **(2014) 364 ITR 16 (Guj) (Peterplast Synthetics P. Ltd. -Versus- Assistant Commissioner of Income Tax)** to the provision of 254 (2) of the said Act. It was held in the said judgment that the limitation period for an application for rectification of the order under Section 254(2) should be counted from the date of actual receipt of the order but not from the date of order.

9. According to the assessee, since the order of the Tribunal was served upon the assessee only on December 05, 2018, the application for rectification was within the time and the Tribunal ought not to have rejected the said application on the ground of limitation.

10. It is the contention of the Revenue before us that Section 254 of the Income Tax Act, 1961 is clear in its term and specific period of limitation prescribed by the statute cannot be otherwise interpreted or extended by this Court.

11. The Revenue draws the attention of the Court to Section 260A of the Income Tax Act, 1961 to indicate that for the purpose of filing an appeal under said section, the limitation period will start from the date on which the order appealed against is received by the assessee. The difference in phraseology in Sections 254(2) and 260A of the Act with regard to limitation should be presumed to indicate the different intention on the part of the legislature. The

legislature must be deemed to have intended what it has said and the Court should not presume that the legislature made something other than what it said.

12. The revenue further supports the view of the Tribunal that since the order was pronounced of the open Court, it has to be presumed that the assessee had knowledge of the order from said date and therefore, there is nothing wrong in order of the Tribunal in computing the period of limitation from the date of order.

13. The answer to the controversy can easily be traced to Section 268 of the Act, which has been glossed over by the parties before us as well as by the Tribunal below. Section 268 of the Income Tax Act reads as follows:

“Exclusion of time taken for copy.

268. In computing the period of limitation prescribed for an appeal or an application under this Act, the day on which the order complained of was served and, if the assessee was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order, shall be excluded.”

14. The said section has replaced Section 67-A of the Indian Income Tax Act, 1922. The said section provided as follows:-

“Section 67A. Computation of periods of limitation. —In computing the period of limitation prescribed for an appeal under this Act or for an application under section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded.”

15. A comparison of the aforesaid two sections makes it clear that by introducing Section 268, the legislature intended to introduce a different exclusion period in case the order complained of had been served upon the assessee.

16. Section 268 operates in two different scenarios:

- (a) when the copy of the order was served upon the assessee; and
- (b) when the copy of the order was not served with the notice of order.

In case of former, the time period between the date of the order and date of service of the order upon the assessee has to be excluded and in the latter case the time period spent in obtaining the certified copy of the order by the assessee is to be excluded.

17. In the present case, the order was passed on September 09, 2018, and the copy of order was admittedly served upon the assessee on December 05, 2018. Therefore, the Tribunal should have excluded the time period between

September 09, 2018, to December 05, 2018, in computing the period of limitation. The Tribunal was wrong in not applying the exclusion period in computing the period of limitation and rejecting the application being barred by limitation.

18. If Section 254(2) is read with Sections 254(3) and 268 of the Act and no hardship or unreasonableness can be found in the scheme of the Act. The Court need not make a violence to the words of Section 254(2) by substituting the word within “the end of the month in which the order was passed” by the word “the date on which the order was served”. Such interpretation is absolutely uncalled for when the application has been served upon an assessee in terms of Section 254(3) of the Act.

19. Since it is not necessary to interpret Section 254(2) differently to avoid hardship or absurdity or uncertainty, the judgment in **D. Saibaba** case has no applicability to the present case.

20. The controversy with regard to whether pronouncement of a judgment in open court amounts to communication of the order is much ado about nothing since the order complained of in this case was served upon the assessee in terms of Section 254(3) of the Act.

21. We are not inclined to agree with the reasoning of **Peterplast Synthetics P. Ltd.** (Supra) since the same was passed without considering Section 268 of

the Income Tax Act, 1961. However, we agree with the ultimate conclusion of the said judgment.

22. The appeal is, accordingly, allowed. The Tribunal below is directed to hear out the application under Section 254(2) taken out by the assessee on merit and dispose of the same within a period of six weeks from the date of communication of this order.

23. The Income Tax Appeal No. 28 of 2020 is allowed. There will be no order as to costs.

24. Urgent certified website copy of the judgment shall be supplied to the parties, if applied for, upon compliance with all requisite formalities.

(Kausik Chanda, J.)

I Agree.

(I.P. Mukerji, J.)