

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 19th February, 2021.**

+ **W.P.(C) 2229/2021**

PRADEEP KUMAR JINDAL **Petitioner**

Through: Mr.Piyush Kaushik, Adv.

versus

**PRINCIPAL COMMISSIONER OF INCOME TAX -7,
NEW DELHI**

..... **Respondent**

Through: Mr.Kunal Sharma, Ms.Zehra Khan
and Mr.Shubhendu Bhattacharyya,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. The petition impugns, (a) the order dated 23rd December, 2020 of the Income Tax Appellate Tribunal (ITAT), New Delhi, of dismissal of M.A. No. 118/DEL/18 filed by the writ petitioner in ITA No. 3844/DEL/2013 for Assessment Year 2008-09; as well as, (b) the order dated 10th December, 2015 of dismissal of ITA No. 3844/DEL/2013; and, seeks adjudication on merits of ITA No. 3844/DEL/2013.

2. We have heard the counsel for the petitioner and the counsel for the respondent appearing on advance notice.

3. Considering the nature of the controversy, the need to call for a counter affidavit is not felt.

4. The petitioner preferred ITA No. 3844/DEL/2013 aforesaid before the ITAT, for Assessment Year 2008-09. However the petitioner failed to

appear, when the said appeal was listed on 9th December, 2015 and the ITAT, vide impugned order dated 10th December, 2015, recording that on earlier occasion also when the appeal was listed, adjournment was sought on behalf of the petitioner and that the petitioner did not appear to be interested in pursuing the appeal, and referring *inter alia* to **Commissioner of Income Tax (Central) Vs. B. N. Bhattacharjee** [1979] 118 ITR 461, holding that the appeal does not mean mere filing of memo of the appeal but effectively pursuing the same, dismissed the appeal for non-prosecution.

5. The petitioner, in or about March, 2017, filed an application for recall of the order dated 10th December, 2015 of dismissal for non-prosecution of ITA No. 3844/DEL/2013 aforesaid. The said application was dismissed by the ITAT vide order dated 7th February, 2018, recording/reasoning, (i) that the petitioner had filed its return declaring total income of Rs.17,72,070/-; (ii) that the Assessing Officer made addition to the extent of Rs.9,78,25,000/-; (iii) that the appeal preferred by the petitioner was dismissed by the Commissioner of Income Tax (Appeals); (iv) that the petitioner preferred appeal to the ITAT on 17th June, 2013 but which was dismissed in *limine* vide order dated 10th December, 2015; (v) it was the case of the petitioner in the subject application, that the petitioner, between 8th December, 2015 and 10th December, 2015 was ill and hence could not appear when the appeal was listed on 10th December, 2015; (vi) that the petitioner, in effect was seeking rectification of the order dated 10th December, 2015; (vii) that under Section 254(2) of the Income Tax Act, the petitioner has time period of four years to apply for restoration of the appeal, on providing sufficient reasons for non-appearance; (viii)

however Section 254(2) had been amended with effect from 1st June, 2016 and after amendment, any miscellaneous application had to be filed within six months from the date of the order; (ix) though as on the date of the order dated 10th December, 2015, the petitioner had time period of four years to file an application under Section 254(2) of the Income Tax Act, for restoration of the appeal, however vide amendment w.e.f 1st June, 2016, the said period of four years was reduced to six months; and, (x) thus application for restoration of the appeal dismissed on 10th December, 2015 had to be filed within six months and the application was barred by time. Resultantly, the said application was dismissed.

6. The petitioner, instead of preferring remedies against the aforesaid order dated 7th February, 2018, on 26th February, 2018, filed another application being M.A. No. 118/DEL/18 aforesaid, for recall of the order dated 7th February, 2018. The said application has been dismissed vide the impugned order dated 23rd December, 2020, reasoning that the subject second application was not maintainable and the order dated 7th February, 2018, which was a speaking order, could not be reviewed as the purport of the petitioner was.

7. The net result of the aforesaid is, that the appeal preferred by the petitioner before the ITAT, remained to be decided on merits.

8. A Division Bench of this Court of which one of us (Justice Sanjeev Narula) was a member, in ***Golden Times Services (P) Ltd. Vs. Deputy Commissioner of Income Tax*** (2020) 422 ITR 102 has held, (i) that Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 requires the ITAT to dispose of the appeal on merits, after hearing the respondent and ITAT cannot dismiss an appeal solely on account of non-appearance of the

appellant; (ii) adjudication on merits of the case, by the ITAT, is essential for the High Court to hear an appeal; and, (iii) the proviso to Rule 24 enables the appellant, who was not present at the time when the appeal was disposed of, to apply to the ITAT for setting aside of the *ex parte* order and for restoring the appeal for hearing.

9. In the present case, admittedly, there is no adjudication by the ITAT on merits. In our opinion, the order dated 10th December, 2015 of the ITAT, dismissing the appeal of the petitioner for non-prosecution and not on merits, as the ITAT was required to do notwithstanding the non-appearance of the petitioner when the appeal was called for hearing, is violative of Rule 24 *supra* and thus void. Though the petitioner applied as aforesaid to the ITAT, not once but twice, for hearing of his appeal on merits but the ITAT refused to correct the illegality committed. In the circumstances, notwithstanding the delay on the part of the petitioner in impugning the order dated 10th December, 2015, the same has but to be quashed and cannot be sustained.

10. We are unable to agree with the contention of the counsel for the respondent, that the action of the ITAT, of dismissing the appeal for non-prosecution instead of on merits and of refusal to restore the same notwithstanding applications of the petitioner, is merely an irregularity.

11. We have enquired from the counsels, whether the Rules aforesaid provide for any limitation for applying under the proviso to Rule 24, for setting aside/recall of an *ex parte* order albeit on merits. The counsels are unanimous, that for making an application under the proviso to Rule 24, no limitation is provided.

12. Even otherwise, the first application aforesaid of the petitioner, filed

in or about March, 2017, for restoration of the appeal dismissed for non-prosecution on 10th December, 2015, was within three years and the ITAT erred in dismissing the same invoking the amendment to Section 254(2) requiring application thereunder to be filed within six months and in not going into the sufficiency of the reasons given by the petitioner for non-appearance.

13. Thus the need for us to go into the question of, whether amendment of Section 254(2) of the Income Tax Act w.e.f 1st June, 2016, is prospective or retrospective, does not arise inasmuch as the application filed by the petitioner in March, 2017, also invoking, Rule 24 of the ITAT Rules, was within time and could not have been dismissed applying the provisions of limitation applicable to Section 254(2) of the Act; rather, we entertain doubt whether in the face of the specific provision in the Rules, an application for setting aside of an *ex-parte* order would at all lie under Section 254(2) of the Act. However, the need for us to adjudicate finally on the said aspect is also not felt in the facts of the present case.

14. We have however enquired, how ***B. N. Bhattacharjee*** supra relied upon by the ITAT, held to the contrary.

15. We are informed that at that time, Rule 24 supra of the ITAT Rules did not exist.

16. However a perusal of ***B. N. Bhattacharjee*** supra shows that the observation therein relied upon by the Tribunal was not in the context in which the same was applied by the ITAT.

17. In view of the aforesaid, the petition is allowed. The ITA No. 3844/DEL/2013 preferred by the petitioner before the ITAT is ordered to be restored to its original position, as immediately before 10th December, 2015

and the ITAT is requested to take up the same for hearing on 15th March, 2021 or on any other date which may be convenient to the ITAT.

18. The petition is disposed of.

RAJIV SAHAI ENDLAW, J

SANJEEV NARULA, J

FEBRUARY 19, 2021
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