

Item No.20

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 30.08.2022

DELIVERED ON:30.08.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 868 of 2022

With

I.A. No.CAN 1 of 2022

With

I.A. No.CAN 2 of 2022

Vikas Nagelia

Vs.

Commissioner of Income Tax, Kolkata-II & Anr.

Appearance:-

Mr. Ananda Sen

Mr. R.C. Prusti

Mr. S. Das

Mr. B.K. Upadhyay

..... for the appellant.

Mr. Aryak Dutt

.... for the Union of India

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

Re: I.A. CAN 1 of 2022

1. This application has been filed to condone the delay of 71 days in filing the instant appeal.

2. We have heard Mr. Ananda Sen, learned counsel for the appellant. The notice on the respondents / department has been served and affidavit-of-service has been filed. We have directed Mr. Aryak Dutt, learned senior standing counsel to accept notice on behalf of the respondents as the issue involved in the appeal lies in a very narrow campus. The Ministry / department shall regularise his engagement.

3. We are satisfied with the reasons assigned in the affidavit filed in support of the application. The delay in filing the instant appeal is condoned.

4. The application being I.A. CAN 1 of 2022 is allowed.

Re: MAT 868 of 2022

5. This intra Court appeal at the instance of the writ petitioner is directed against the order dated 6th December, 2021 in W.P.A. No.4082 of 2021. In the said writ petition, the appellant had challenged the order passed by the Commissioner of Income Tax, Kolkata-II, Kolkata (CIT) dated 26th February 2013 under section 264 of the Income Tax Act, 1961 (hereinafter

referred to as the 'said Act'). The learned Single Bench was of the opinion that the writ petition was filed belatedly and the appellant was not vigilant and diligent of his rights and has slept over the matter and therefore, no relief can be granted and accordingly, the writ petition stood dismissed. The correctness of the said order is put to challenge in this appeal.

6. We have elaborately heard the learned Advocate appearing for the appellant and Mr. Aryak Dutt, learned senior standing counsel for the respondents/department, whom we had directed to accept notice on behalf of the respondents/department with a direction to the Ministry/department so as to regularise his engagement. Since the issue involved in this appeal lies in a very narrow campus, the appeal itself is taken up for disposal. The following dates and events would be relevant to examine the conduct of the appellant.

7. The assessment for the year 2009-2010 was completed by the assessing officer under section 143(3) of the said Act. Admittedly no appeal was filed before the first appellate authority against the said assessment order but the appellant chose to file a revision petition under section 264 of the said Act before the CIT. The said application was dismissed by an

order dated 26th February, 2013 on the ground that none appeared for the appellant when the petition was taken up for hearing on the adjourned date. The appellant being aggrieved by such order appears to have been advised to file an appeal before the Income Tax Appellate Tribunal, Kolkata and accordingly, an appeal was preferred sometime in the year 2013 and the appeal was entertained in ITA 2548/Kol/2013. On 25th September, 2014 the appeal was dismissed as withdrawn by recording the submission of the learned advocate for the appellant that the appellant had wrongly filed the appeal against the order passed by the CIT under section 264 of the said Act.

8. The case of the appellant is that he was not intimated about the dismissal of the appeal as having been withdrawn and that he has not given any instruction to withdraw the appeal. Later after having come to know about the same, a representation was addressed to the Registrar of the learned tribunal dated 18th December, 2020 requesting the Registrar of the learned tribunal to inform the status of the appeal filed by the appellant and also provide a certified copy of the order, if any, passed by the learned tribunal. The said representation was not attended to nor any reply was received by the appellant. It is the appellant's case that thereafter a server copy of the said order

was obtained from the website of the learned tribunal and the writ petition was filed before this Court on 4th February, 2022.

9. The question would be whether the above dates and events could be taken as if the appellant has slept over his rights and had not been diligent in prosecuting the matter. In our considered view, the appellant cannot be stated to be a habitual defaulter but nevertheless did not take active steps to follow up the matter with the consultants/Advocate, who was engaged to file the appeal before the tribunal. Though the appeal was presented against an order passed under section 264 of the said Act, such appeal was not maintainable and the registry of the learned tribunal had entertained the appeal and it was assigned as ITA 2548/Kol/2013. Therefore, the explanation offered by the appellant that he was under the belief that the appeal would be heard and decided on merits appears to be reasonable as the appeal was not returned by the registry of the learned tribunal on the ground of maintainability.

10. With regard to the averments that no instruction was given by the appellant to withdraw the appeal to the earlier consultant etc., are of self-serving statement of the appellant of which we cannot take any cognizance. Nevertheless, we are convinced that the conduct of the appellant cannot be stated to

be so bad to hold that he had slept over his rights. The appellant had been prosecuting the matter before a wrong forum. In any event, the appellant should not be left remediless and should not be non-suited even to avail the revisional remedy, more particularly when the appellant chose not to avail a statutory appeal before the first appellate authority against the assessment. Therefore, the only remedy available to the appellant is to file a revision petition under section 264 of the said Act, which was done by the appellant and such revisional application was made as early as on 5th March, 2012.

11. The revisional authority also has not dealt with the matter though it appears that the revisional authority had called for a report from the assessing officer on the grounds raised by the assessee. We also find from the order dated 26th February, 2013 passed by the revisional authority, the report called for from the assessing officer has been received by the revisional authority. Therefore, we are of the view that the revision ought to be heard and disposed of on merits. However, noting that the matter is a long pending matter and the appellant has been pursuing his remedy before a wrong forum and the appeal before the tribunal was withdrawn and the appellant would state that he never instructed his consultant to withdraw the appeal etc., we

are of the view that if the appellant requires one more opportunity to contest the revision petition on merits, he should be put on terms.

12. In terms of the assessment order dated 26th December, 2011, the net amount of tax payable is Rs. 28,76,710/-. It is not clear as to whether any recovery proceedings have been initiated against the appellant for recovery of the said tax, as computed by the assessing officer. However, in order to afford an opportunity to contest the matter on merits, we direct the appellant that the appellant shall deposit 15% of Rs. 28,76,710/- before the assessing officer within three weeks from the date of receipt of the server copy of this judgment and order. If such deposit is effected, the appellant is directed to file a petition before the Commissioner of Income Tax-II, Kolkata along with the receipt requesting the revisional application to be taken up on merits.

13. If such petition is filed, the revisional authority shall take into consideration the same and decide the revision petition filed under section 264 of the said Act on 5th March, 2012 on merits and in accordance with law. Consequently, the order dismissing the revision petition for default dated 26th February, 2013 stands set aside.

14. If the appellant fails to comply with the above condition within the time stipulated, the benefit of this judgment and order will not enure in favour of the appellant and the appeal will be dismissed automatically without reference to this Court.

15. With the aforesaid direction, the appeal and the connected application (I.A. No. CAN 2 of 2022) are disposed of.

16. There shall be no order as to costs.

17. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB (AR.C)