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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/140/2023
IA NO: GA/1/2023, GA/2/2023
M/S EXIMCORP INDIA PRIVATE LIMITED
VS
THE DEPUTY COMMISSIONER
OF INCOME TAX DCIT CIRCLE 5/2 KOLKATA

BEFORE:
THE HON'BLE THE CHIEF JUSTICE T. S. SIVAGNANAM
AND
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA
Date : 5TH JULY 2023.

*Appearance* :
*Mr. Arnab Chakraborty, Adv.*
*Mr. Aniket Chowdhury, Adv.*
*...for appellant*
*Ms. Smita Das De, Adv.*
*Mr. Prithu Dudhoria, Adv.*
*...for respondent*

The Court :- It appears that there is a delay of 270 days in filing the appeal. We have perused the affidavit filed in support of the petition and find sufficient cause has been shown for not preferring the appeal within the period of limitation. Hence, the application is allowed and the delay in filing the appeal is condoned.

This appeal has been filed by the assessee under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 30.03.2022 and the order dated 11.11.2022 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata (the Tribunal) in ITA/2582/Kol/2019 for the assessment year 2013-2014. The assessee has raised the following substantial questions of law for consideration:-

(a) Whether the Hon'ble Tribunal erred in disallowing the claimed deduction of commission paid to the stated HUFs amounting to Rs.11,79,995/- (Rupees Eleven Lakh Seventy Nine Thousand Ninety hundred and ninety Five only) under Section 137 of the Act?

(b) Whether the Hon'ble Tribunal has failed to take into consideration records, submissions and matters of relevance and instead proceeded to act on the basis of irrelevant considerations ?

(c) Whether the Hon'ble Tribunal has failed to decide the issues of dispute raised before it particularly inasmuch as inter alia, the principal issue of whether commission could be said to have been diverted from the Karta to his own HUF sought to be agitated in the said assessment order and said appellate orders, has not been addressed or discussed in the said impugned orders ?

(d) Whether the said impugned orders are arbitrary inasmuch as the Hon'ble Tribunal has concluded that the appellant failed to establish that service had been rendered by the HUF concerned without any preceding discussion that could lead to such conclusion particularly considering the averment of diversion of commission made in the said assessment order and said appellate order not being addressed/dealt with?

(e) Whether the said impugned order dated 30.03.2022 has been passed in violation of the principles of natural justice and is liable to be rendered void ab initio ?

Heard learned Counsel for either side.

The orders which are impugned in this appeal have been passed by the Tribunal dismissing the appeal filed by the assessee challenging the order passed by the Commissioner of Income Tax, Appeals 2, Kolkata CIT(A) dated 17.10.2019. From the impugned order we find that on the date of hearing of the appeal none appeared for the appellant and this aspect has been noted in page 3 of the order passed by the Tribunal dated 30.03.2022. The appellant/assessee had filed a miscellaneous application in MA No. 39/Kol/2020 to recall the order dated 30.03.2020 on the ground that the appellant/assessee did not receive notice of hearing sent by the learned Tribunal in relation to the appeal and, therefore, could not be present when the case was heard by the learned Tribunal. The learned Tribunal did not accept the contention raised by the appellant/assessee and by order dated 11.11.2022 the miscellaneous application was dismissed.

Challenging both the orders the appellant has filed the present appeal.

In our considered view since the learned Tribunal is the last fact finding authority in the hierarchy of the remedies provided to an assessee/department under the provisions of the Act, such right of appeal is a very valuable right and, therefore, the appellant can be granted one more opportunity to put forth their contention since the learned Tribunal has decided the matter on merits and agreed with the findings recorded by the CIT(A). Therefore, we are of the view that the matter can be heard on merits and a fresh decision can be taken by the learned Tribunal.

For the above reasons, the appeal is allowed and the orders impugned are set aside and the appeal stands restored to the file of the learned Tribunal to be heard and decided on merits afresh.

The appellant/assessee is directed to appear on the day when the appeal is listed before the learned Tribunal and no adjournment shall be sought for by the appellant and the appellant shall co-operate for early disposal of the appeal.

Consequently, the substantial questions of law which have been raised are left open.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH.