IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.22769 of 2023
and
W.M.P.Nos.22222 and 22223 of 2023

M/s.Ejaz Tanning Company,
Represented by its Partner
A.R.Imtiyaz Ahmed,
New No.15, Old No.98,
V.V.Koil Street, Periamet,
Chennai - 600 003. ... Petitioner

Vs.

1.The Assistant Registrar,
Income Tax Appellate Tribunal,
A-3, II Floor, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-4,
Chennai - 600 006. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records relating to the order dated 18.05.2022 passed by the first respondent u/s 254(2) of the Income

Tax Act, 1961 in M.P.No.47/Chny/2021 arising out of ITA.No.3039/Chny/2018 pertaining to the Assessment Year 2011-2012 on the file of the Income Tax Appellate Tribunal, 'A' Bench, Chennai and quash the same.

For Petitioner	:	Mr.Ravi Kannan
For Respondents	:	
For R2	:	Dr.B.Ramaswamy Senior Standing Counsel

ORDER

The petitioner has challenged the impugned order dated 18.05.2022 passed by the Tribunal in exercise of the powers under Section 254(2) of the Income Tax Act, 1961. Operative portion of the impugned order reads as under:-

> ***"5.After going through the petition as well as the arguments of Ld.Sr.DR, we are of the prima-facie opinion that it appears to be a case of wrong application of law which would require our interference under Section 254(2). Accordingly, the order dated 23.12.2020 stand recalled. The registry is directed to fix the appeal for fresh hearing before regular bench after intimating both the sides.***
>
> ***6.The petition stand allowed in terms of our above order."***

2. The specific case of the petitioner is that the petitioner was not issued with any notice before the impugned order dated 18.05.2022 was passed by the Income Tax Appellate Tribunal. Hence, the order has to go and at best, the case has to be remitted back to the Tribunal to pass a fresh order.

3. That apart, the learned counsel for the petitioner would submit that the earlier order dated 23.12.2020 passed by the Tribunal allowing the appeal filed by the petitioner cannot be re-called, as there is no error apparent on the face of the record. It is further submitted that at best, the respondents can appeal against the order dated 23.12.2020 allowing the petitioner's appeal.

4. It is therefore submitted that the aforesaid order was without any merits, as the order passed by the Tribunal in the first round was well reasoned and there was no error apparent on the face of record.

5. The learned counsel for the petitioner, on the other hand, would submit that the procedure under Rule 19 of the Income Tax (Appellate Tribunal) Rules, 1963 regarding listing of the Miscellaneous Petition in the cause list had gone un-noticed and therefore, the petitioner was unaware of the listing of the miscellaneous petition in M.P.No.47/CHNY/2021 moved by the respondents to recall the order dated 23.12.2020 in ITA.No.3039/CHNY/2018.

6. As far as proceedings under Section 254 of the Income Tax Act is concerned, Rule 34A of the Income Tax (Appellate Tribunal) Rules, 1963, contemplates the procedure for filing the application. The aforesaid Rule reads as under:

> 34A.(1)An application under Section 254(2) of the Act shall clearly and concisely state the mistake apparent from the record of which the rectification is sought.
>
> (2)Every application made under sub-rule (1) shall be triplicate and the procedure for filing of appeals in these rules will apply mutatis mutandis to such applications.
>
> The applicant shall also state whether any Miscellaneous Application under Section 254(2) was filed earlier before the Tribunal against the same

> order and if so, the face of such application. Copies of the orders passed by the Tribunal on such application shall also be filed before the Tribunal in triplicate along with the Miscellaneous Application.
>
> (3) The Bench which heard the matter giving rise to the application (unless the President, the Senior Vice-President, the Vice-President or the Senior Member present at the station otherwise directs) shall dispose it after giving both the parties to the application a reasonable opportunity of being heard.

7. There is a detailed procedure. As far as the procedure prescribed under Income Tax (Appellate Tribunal) Rules, 1963, Rule 19 has been framed under Sub-Section 5(255) of the Income Tax Act, 1961. The aforesaid rule reads as under:

"<u>Date and Place for hearing of appeal to be notified</u>.

> 19.(1) The Tribunal shall notify to the parties specifying the date and place of hearing of the appeal and send a copy of the memorandum of appeal to the respondent either before or with such notice.
>
> (2) The issue of the notice referred to in sub-rule (1) shall not by itself be deemed to mean that the appeal has been admitted.

8. The learned Senior Standing Counsel for the second respondent has today filed typed set of papers enclosing copies of the notices dated 06.04.2022 and 04.05.2022 fixing the date of personal hearing on

29.04.2022 (friday) respectively and on 06.05.2022 (friday) respectively in the Miscellaneous Petition.

9. Copies of the notices dated 06.04.2022 and 04.05.2022 although bears a signature of the officials of the Income Tax Appellate Tribunal stating that the notice has been issued, there are no records to substantiate that the notice was indeed dispatched and received by the petitioner.

10. The learned counsel for the petitioner has placed reliance on the following decisions:

(i) ***Commissioner of Income Tax*** Vs. ***Reliance Telecom Limited*** reported in (2022) 284 TAXMAN 517 (SC) and

(ii) ***Assistant Commissioner, Income Tax, Rajkot*** Vs. ***Saurashtra Kutch Stock Exchange Limited*** reported in (2008) 14 SCC 171.

11. That apart, it is submitted that after the petitioner came to know that again the appeal was listed for hearing, the petitioner has sent a representation dated 14.03.2023 to the first respondent informing that the petitioner does not remember as regards receipt of a copy of the order

and any notice of hearing was sent to the petitioner before the impugned order was passed.

12. Defending the impugned order, the learned Senior Standing Counsel for the second respondent submitted that the petitioner was issued with notice, as has been recorded in Paragraph 2 of the impugned order. However, the petitioner failed to appear and therefore, the impugned order came to be passed.

13. That apart, it is submitted that by re-calling the order passed on 23.12.2020, the Tribunal has not determined the issue finally. In fact, the case was directed to be listed for final hearing. In view of the pendency of the present writ petition, the Tribunal has deferred from passing the final order. It is submitted that no prejudice or harm will be caused to the petitioner by the impugned order. It is further submitted that the impugned order has been passed within four corners of law.

14. The learned Senior Standing Counsel for the second respondent has placed reliance on the following decisions:-

(i) ***Commissioner of Income-tax*** Vs. ***Paville Projects (P) Ltd*** reported in [2023] 149 taxmann.com 115 (SC);

(ii) ***CIT*** Vs. ***Durga Engineering and Foundry Works*** reported in [2000] 12 SCC 596;

(iii) ***Commissioner of Income Tax*** Vs. ***Reliance Telecom Limited*** reported in [2021] 133 taxman.com 41 (SC);

(iv) ***R.L.Traders*** Vs. ***Income Tax Officer***, reported in [2018] 100 taxmann.com 332 (SC);

(v) ***Anuradha Wadhwa*** Vs. ***Principal Commissioner of Income-tax*** reported in [2022] 142 taxmann.con 186 (SC);

(vi) ***Commissioner of Income-tax, Chennai*** Vs. ***Mohammed Meeran Shahul Hameed*** reported in [2021] 131 taxmann.com 94 (SC);

(vii) ***Commissioner of Income Tax, Chennai*** Vs. ***Sical Logistics Limited*** reported in [2021] 128 taxmann.com 370 (Mad);

(viii) ***CIT*** Vs. ***Sunil Kumar Goel*** reported in [2005] 274 ITR 53/144 Taxman 697 (Punj and Har) and

(ix) ***Bharat Petroleum Corporation Limited*** Vs. ***Income Tax Appellate Tribunal*** reported in [2013] 33 taxmann.com 499 (Bombay).

15. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the second respondent.

16. An Assessment order came to be passed on 31.12.2013 for the Assessment year 2011-2012. The Assessment was completed by determining the total taxable turn over of the petitioner as Rs.1,92,59,382/- by disallowing a sum of Rs.76,48,924/- which was borne by the petitioner towards traveling expenses, promotion/publicity expenses and commission payment.

17. The Assessment order was sought to be rectified by the Commissioner under Section 263 of the Income Tax Act, 1961. An Assessment order came to be passed on 19.12.2014 by the Commissioner under Section 263 of the Income Tax Act, 1961. Relevant portion of the order of the Commissioner reads as under:

> ***"5.1. As stated in para 2.4 above, the AO has allowed local agency commission of Rs.1,15,52,348/-on domestic sale of Rs.4,09,17,684/- which is 28.32 per cent of the domestic sale. The rate of foreign agency commission was only 1.47 per cent i.e., commission of Rs.64,33,064/- on export sale of Rs.43,84,87,431/-. The assessee has wrongly given the overall rate of commission to justify the high commission paid locally. No proper reason has been given to justify such excessive commission which is way beyond any fair and reasonable rate. The expense has not been established to have been laid out or extended wholly and exclusively for the purposes of business. Hence, the AO is directed to restrict local agency commission to 1.47 per cent of the domestic sale and add back the excess amount to the total income. As regards the other issues, the AO is directed to consider the explanation given by the assessee and obtain/verify the details furnished by it in respect of various issues discussed above after giving opportunity of hearing to the assessee and pass order thereafter as per law."***

18. Aggrieved by the same, the petitioner had filed an appeal before the Income Tax Appellate Tribunal in ITA No.389/Mds/2015, which came to be disposed by an order dated 29.05.2015. The petitioner's appeal was dismissed, thereby, the order of the Commissioner

dated 31.12.2013 passed under Section 263 of the Income Tax Act, 1961, was upheld.

19. The Assistant Commissioner, thereafter, gave effect to the order dated 19.12.2014 passed under Section 263 of the Income Tax Act, 1961 by an order dated 26.02.2016, pursuant to which, notice for demand under Section 156 of the Income Tax Act, 1961 was also issued to the petitioner.

20. Aggrieved by the same, the petitioner preferred an Appeal under Section 250 of the Income Tax Act, 1961 which culminated in an order dated 10.08.2017 in ITA No.75/CIT(A)-5/2016-17 of the Appellate Commissioner. The Appellate Commissioner had dismissed the appeal. A further appeal before the Appellate Tribunal in ITA No.2119/CHNY/2017 was curiously allowed by order dated 26.02.2018 by setting aside the order of the learned Commissioner of Income Tax (Appeals) and remitted the appeal back to the Commissioner for consideration afresh in accordance with law. Thus, the Appellate

Commissioner passed a fresh order dated 27.09.2018 in ITA No.75/CIT(A)-5/2016-2017.

21. In the second round, the Appellate Commissioner vide its order dated 27.09.2018, pursuant to order dated 26.02.2018 of the Income Tax Appellate Tribunal, passed an order on merits and dismissed the appeal of the petitioner.

22. Thus, the third round of Appeal came up before the Income Tax Appellate Tribunal in ITA No.3039/CHNY/2018 dated 23.12.2020. The Tribunal heard the case through VC. The Tribunal accepted the case of the petitioner that order dated 26.02.2016 of the second respondent giving effect to the order dated 19.12.2014 passed by the Commissioner under Section 263 of the Income Tax Act, 1961 was barred by law. Relevant portion of the order of the Tribunal dated 23.12.2020 reads as under:

> ***"3. The case was heard through video conferencing. The Id.AR submitted that although the assessee has taken various grounds in appeal, he pleaded that the order***

dated 26.02.2016 passed by the AO giving effect to the order passed u/s.263 dated 19.12.2014 is barred by limitation u/s.153(5) of the Act and hence pleaded to quash the order. Per contra, the Id.DR supported the order of the Id.AO.

4. We heard the rival submissions and gone through relevant orders/material. As per Sub-section (3) of Section 153 of the Act, an order of fresh assessment in pursuance of an order u/s.263 of the Act, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order u/s.263 of the Act is passed by the Commissioner. Therefore, the order giving effect to that order passed by the AO dated 26.02.2016 is clearly beyond the time limit allowed u/s.153(3) of the Act and hence the Id.AR's plea is sustained. The order of the AC dated 26.02.2016 is quashed."

23. It is, under these circumstances, the respondent had filed Miscellaneous Petition No.47/CHNY/2021 to re-call the order passed on 23.12.2020. The said order records that despite notices being served on the petitioner, the petitioner has not entered appearance.

24. The learned counsel for the respondent has submitted that notice was served, however, none appeared on behalf of the petitioner.

25. The learned counsel for the petitioner, on the other hand, would submit that no notice was actually sent to the petitioner or to the counsel for the petitioner before taking up the M.P.No.47/CHNY/2021 for hearing.

26. A reference may be made to Sections 3 and 4 of the Indian Contract Act, 1872. It deals with communication of the proposals and when communication is complete. They read as under:-

Section 3 of the Indian Contract Act	Section 4 of the Indian Contract Act
3.Communication, acceptance and revocation of proposals,-- The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.	4. Communication when complete.- The, communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete,-- as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the,

Section 3 of the Indian Contract Act	Section 4 of the Indian Contract Act
	knowledge, of the proposer. The communication of a revocation is complete,-- as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes. to his knowledge."

27. Thus, communication of information is deemed to be made by any act or omission of the party by which he intends to communicate such proposal, which has the effect of communicating it. Therefore, communication/intimation is complete when it comes to the knowledge of the person to whom it is made.

28. Mere posting of the date of hearing of the Miscellaneous Petition in the Cause List is not sufficient. A proper communication has to be sent to the parties regarding the date of hearing of the Miscellaneous Petition, once an appeal is disposed of. As per Sub-Clause 2 to

Rule 34A of the Income Tax (Appellate Tribunal) Rules, 1963, procedure for filing appeal under the Rules will apply *mutatis mutandis* to application under Section 254(2) of the Income Tax Act, 1961. Sub-Clause 3 to Rule 34A of the Income Tax (Appellate Tribunal) Rules, 1963 states that the Tribunal shall dispose the application after giving both the parties to the application a reasonable opportunity of being heard.

29. Rule 19(1) of the Income Tax (Appellate Tribunal) Rules, 1963, contemplates serving of a copy of the Miscellaneous Petition on the Assessee or on the counsel or authorized persons respectively. The Tribunal has to notify to the parties specifying the date and place of hearing of the appeal and send a copy of the memorandum of appeal to the respondent. Thus, application under Section 254(2) of the Income Tax Act, 1961, has to be communicated to the petitioner. In this case, it appears that the copy of the petition has not been sent to the petitioner.

30. Thus, mere dispatch of a notice is not sufficient. To hold that notice came to the knowledge of the petitioner, the notice should also

have been received by the person/assessee to whom it was addressed. There are no records to show the notice of intimation was received by the petitioner.

31. Considering the above, the impugned Order dated 18.05.2022 passed by the Income Tax Appellate Tribunal is set aside and the case is remitted back to the Income Tax Appellate Tribunal, to pass a fresh order after hearing the petitioner in M.P.No.47/Chny/21.

32. This Writ Petition is disposed of with the above observations. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

19.09.2023

Index: Yes/ No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal,
A-3, II Floor, Rajaji Bhavan,
Besant Nagar, Chennai - 600 090.

2.The Assistant Commissioner of Income Tax,
Non-Corporate Circle-4,
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