

OD-20

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

ITAT/233/2024
IA NO: GA/1/2024

VEDANSH TRADERS PRIVATE LIMITED
VS
INCOME TAX OFFICER, WARD - 13/1, KOLKATA

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 7th February, 2025

Appearance :
Mr. Ananda Sen, Adv.
...for appellant
Mr. Tilak Mitra, Adv.
Mr. Amit Sharma
...for respondents

The Court : This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 29th April, 2024, passed by the Income tax Appellate Tribunal, "SMC" Bench, Kolkata in I.T.A. No. 632/Kol/2023, for the assessment year 2011-12.

The assessee has raised the following substantial questions of law for consideration :-

- i) Whether on the facts and in the circumstances of the case Tribunal though in the preliminary portion of the order observed of having perused the record and order under appeal but very importantly failed

to appreciate and take into consideration extremely relevant issue that the CIT(A) had passed the appellate order in gross violation of the requirements contained in sections – 250 and 251 since it was but incumbent for the CIT(A) to decide the appeal on merit as law did not authorize the CIT(A) to dismiss the appeal for non-prosecution for which reason alone the said order was without jurisdiction and bad in law ?

- ii) Whether on the facts and in the circumstances of the case Tribunal ought to have considered that it is well settled position that jurisdictional infirmity goes to the root of the matter and vitiates the whole proceeding ?

We have heard Mr. Ananda Sen, learned counsel appearing for the appellant/assessee and Mr. Tilak Mitra, learned standing counsel appearing for the respondent/department.

The appellant/assessee filed its return of income for the assessment year under consideration namely, 2011-12 on 5th September, 2011 showing total income of Rs.4,63,130/-. The return was processed under Section 143(1) of the Act and subsequently the case was selected for scrutiny and notices under Section 143(2) and Section 142(1) were issued. In response to the notice, the assessee appeared before the Assessing Officer, produced books of accounts, bank statements and other relevant details and documents. The Assessing Officer completed the assessment by order dated 30th March, 2014 and disallowed the amount claimed as interest, administrative expenses, expenses

under Section 14A and disallowed the sundry balance written off. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals)-1, Kolkata [CIT(A)]. The assessee did not appear despite several notices issued by the appellate authority. The appellate authority after noting the grounds raised by the assessee in the memorandum of appeal dismissed the appeal on the ground that none appeared for the appellant/assessee. Thereafter, the appellant was not diligently filing the appeal before the Tribunal but belatedly filed the appeal and prayed for condonation of delay of 1288 days. Learned Tribunal by the impugned order dismissed the appeal on the point of limitation. Aggrieved by the same, the assessee has preferred the present appeal.

We have elaborately heard the learned Advocates for the parties. It is no doubt true that the appellant/assessee was not diligent in prosecuting the matter either before the first appellate authority or promptly filing an appeal before the learned Tribunal. However, the question which has arisen for consideration in this case is whether the first appellate authority could have dismissed the appeal on the ground that the appellant did not appear in the proceedings despite having noted the grounds of appeal as raised by the appellant before it.

Learned Counsel appearing for the appellant places reliance on the decision in the case of *Ratanchand Manoharmal vs. Income Tax Officer Non-Corporate Ward-17(2), Chennai*, (2021) 128 taxmann.com 243(Madras) and the decision in the case of *Commissioner of Income-tax(Central), Nagpur Vs.*

Premkumar Arjundas Luthra (HUF), (2016) 69 taxmann.com 407(Bombay), to support his argument that the appeal could have not been dismissed for non appearance but should have been decided on merits by the first appellate authority.

With regard to the delay in filing the appeal, learned counsel appearing for the appellant submitted that the appellant should not be non-suited on the said ground because the appellant had shown sufficient cause for not preferring the appeal within the period of limitation and much of the period was during the covid pandemic when there was a lockdown situation. In this regard learned Counsel appearing for the appellant places reliance on the decision of the Hon'ble Supreme Court in the case of *Aditya Khaitan & Ors. Vs. IL and FS Financial Services Limited*, 2023 Live Law (SC) 845 and the decision in the case of *Principal Commissioner of Income-tax Vs. Kalinga Metalics Ltd.* (2022) 141 taxmann.com 565 (Calcutta) and the order in *CMP. No.11768 of 2020 in TCA.SR. No.69025 of 2020, dated 7.1.2021 (High Court, Madras)*. Learned standing counsel for the department would submit that the conduct of the appellant should be considered and the appellant having not been diligent enough to prosecute the appeal petition either before the CIT(A) or before the Tribunal cannot be allowed to say that the Tribunal ought not to have dismissed the appeal on the ground of limitation. Section 251 of the Act deals with the power of the Joint Commissioner (Appeals) or the Commissioner (Appeals).

Sub-section 1 states that in disposing of an appeal, the Commissioner (Appeals) shall have the following powers –

- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;
- (bb) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commissioner abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;
- (b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary if so as either to enhance or to reduce the penalty;
- (c) in any other case, he may pass such orders in the appeal as he thinks fit.

Sub-section 2 of Section 251 states that the Joint Commissioner (Appeals) or the Commissioner (Appeals), as the case may be, shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation contained in Section 251 states that in disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

Thus, on a plain reading of the above provision indicates that the Commissioner (Appeals) should decide the appeal petition on merits. It is the submission of the learned senior standing counsel that in terms of Section 251(1)(c), the Commissioner (Appeals) can pass such orders as he thinks fit. Clause (c), in our opinion, should be read in conjunction with clause (a) and (b). This is so because the power vested with the Commissioner (Appeals) is co-terminus with that of the power of the assessing officer. In *Premkumar Arjundas Luthra (HUF)* the Division Bench of the High Court of Bombay while considering a similar issue pointed out that the powers of CIT(A) are co-terminus with that of the assessing officer i.e. he can do all that assessing officer could do. Therefore, just as it is not opened to the assessing officer to not complete the assessment by allowing the assessee to withdraw its return of income, it is not open to the assessee in appeal to withdraw and/or the CIT(A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. In the case of *Ratanchand Manoharmal (supra)* the Division Bench had interfered with the order passed by the Tribunal since the learned Tribunal had not decided one of the grounds which was raised before it, namely, that the CIT(A) could not have disposed of the appeal for want of prosecution. This

is one of the grounds which led to setting aside the order passed by the Tribunal and the matter remanded back to the Tribunal for fresh consideration

The Hon'ble Supreme Court in *Aditya Khaitan & Ors.* (supra) had taken note of the impact of the covid pandemic and observed that when the whole world is in grip of devastating pandemic, it could never have been said that the parties were slipping over their rights. In the instant case it is no doubt that the entire period was not covered during the pandemic but the part of the period was undoubtedly covered during the pandemic. It is also a fact that even thereafter there has been some delay in the matter. However, what is to be borne in mind is the settled legal principle that the facts of each case have to be considered before applying the legal principle as to how an application under Section 5 of the Limitation Act has to be decided. Ordinarily, a litigant does not stand to gain by either preferring an appeal belatedly or not appearing before the appellate forum. There may be cases where for certain mala fide reasons the appellant will avoid proceedings. However, in the instant case there is no such record to show that the appellant had deliberately lodged appeal belatedly before the Tribunal or that deliberately they did not appear before the CIT(A) for certain other collateral purposes. Therefore, apart from that, since the matter involves the tax liability, and the appellant's remedy before the CIT(A) is a very valuable remedy since the Commissioner's powers are co-terminus with that powers of the assessing officer, we deem it appropriate to restore the appeal to the CIT(A) for being decided on merits subject to the

condition that the appellant should not seek for any adjournment and should cooperate in the disposal of the appeal by the Commissioner.

For the above reasons, the appeal is allowed and the order passed by the learned Tribunal is set aside as well as the order passed by the CIT dated 16.10.2019 and the appeal stands restored to the file to be decided on merits in accordance with law.

In the light of the above, the subsequent questions of law are answered in favour of the assessee.

(T.S. SIVAGNANAM, C.J.)

(HIRANMAY BHATTACHARYYA, J.)