IN THE HIGH COURT OF DELHI.

I.T.A.No.192 of 2004

Date of Decision:- May, 24, 2004

Commissioner of Income Tax.....Petitioner

Through: Mr.R.D.Jolly, Advocate.

Versus

M/s.Ansal Housing & Construction.....Respondent

Through: Mr.K.Sampath, Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR.JUSTICE BADAR DURREZ AHMED

i) Whether Reports of the local papers may be allowed to see the judgment?

ii) To be referred to the Reporter or not?

iii) Whether the judgment should be reported in Digest?

B.C.PATEL, C.J. (ORAL).

1. This appeal is preferred by the Revenue against the order whereby the application of the assessee for recalling an order passed ex parte, was allowed by the Income Tax Appellate Tribunal (for short hereafter referred to as "The Tribunal") on 10.9.2003 in MA No. 99/Del/2003 in ITA No. 2189/Del/97 for the assessment year 1993-94.

2. The assessee made out a case before the Tribunal, inter alia, requesting to recall the order on the ground that the said order was ex parte contending that the assessee could not remain present narrating grounds which were accepted by the Tribunal.

3. Learned counsel for Revenue raised a question that the Tribur has no power to review the entire order by placing reliance on a decision of Division Bench of this Court in J.N.Sahni v. Income Tax Appellate Tribunal and others reported in (2002) 257 ITR 16 wherein the Division Bench considered the decision of CIT v. Ramesh Chand Modi reported in (2001) 249 ITR 323 and while disagreeing observed as under:-

> "The Tribunal has merely the power to amend its order. While exercising the said power it cannot recall its order. The expression "amendment" must be assigned its true meaning. While an order of amendment is passed, the order remains but when an order is recalled it stands obliterated. It is well settled that what cannot be done directly, cannot be done indirectly. The review of its own order by the Tribunal is forbidden in law, it cannot be permitted to achieve the same object by exercising its power under sub-section (2) of Section 254. The Income Tax appellate Tribunal does not have an inherent power of review."

4. It is clear from the decision that while considering the rectification under Section 254(2) of the Income Tax Act, 1961, the Court was not called upon to examine the issue with regard to setting aside the ex parte order nor the Court was called upon to examine Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963. The said rule reads as under:-

> "Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:
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> Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal."

5. The Apex Court in the case of Commissioner of Income Tax, Madras v. S.Chenniappa Mudaliar reported in (1969) 74 ITR 41, considered the question but on different facts. In that case, the assessee, for the profits earned in transferring his entire holdings on 21st December, 1954, was, assessed for assessment year 1956-57 under Section 10(5A) of the Income Tax Act, 1922. The appeal against the order of assessment was dismissed and the assessee approached the Tribunal, where the appeal was dismissed for default of appearance on August 28, 1958, under Rule 24 of the Appellate Tribunal Rules, 1946. An application for restoration, filed five weeks thereafter was rejected. On rejection of a reference application by the Tribunal, the applicant, assessee approached the High Court and the High Court directed the Tribunal to state the case on two questions. The relevant question touching the issue is as under:-

> "Whether Rule 24 of the Appellate Tribunal Rules 1946, in so far as it enables the tribunal to dismiss an appeal for default of appearance is ultra vires?"

6. Under the Income Tax Act, 1922, the Rules were framed known as Appellate Tribunal Rules, 1946. Rule 24 thereof reads as under:-

> "Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or may hear it ex parte."

7. The said Rule was amended vide notification dated January 26, 1948 and it took the following shape:-

> "Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not

appear when the appeal is called on for hearing, Tribunal may dismiss the appeal for default."

8. In the case of Hukumchand Mills Ltd. v. Commissioner of Income Tax Central Bombay, 63 ITR 236 (AIR 1967 S.C.455), the word "thereon" in Section 33(4) came to be interpreted by the Apex Court pointing out that it restricts the jurisdiction of the Tribunal to the subject matter of the appeal and the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by Section 31 of the Act. In the case of CIT Madras (Supra) it was pointed out by the Court that the provisions contained in the Act about making a reference on questions of law to the High Court will be rendered nugatory, if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed for default without making any order thereon in accordance with Section 33(4) of the Income Tax Act, 1922. The Court pointed out that in so far as the questions of fact are concerned, the decision of the Tribunal is final and reference can be sought to the High Court only on the questions of law. The Court pointed out that advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed a proper order under Section 33(4) of the Income Tax Act, 1922. In view of this, it was pointed out that the Tribunal is bound to give a proper decision on questions of fact as well as law, which can only be done if the appeal is disposed of on merits and not dismissed owing to the absence of the appellant. The Apex Court pointed out that

"thus looking at the substantive provisions of the Act there is no escape from the conclusion that under Section 33(4) of the Act of 1922, the Appellate Tribunal has to dispose of the appeal on merits and cannot short circuit the same in dismissing it for default of appearance. The Court further pointed out as under:-

> "Now, although rule 24 provides for dismissal of an appeal for the failure of appellant to appear, the rules at the material time did not contain any provision for restoration of the appeal. Owing to this difficulty some of the High Courts had tried to find an inherent power in the Tribunal to set aside the order of dismissal [vide Shri Bhagwan Radha Kishen v. Commissioner of Income-tax (1952) 22 ITR 104 and Mangat Ram Kuthiala v. Commissioner of Income-tax (1960) 38 I.T.R.1). There is a conflict of opinion among the High Courts whether there is any inherent power to restore an appeal dismissed for default under the Civil Procedure Code (Mulla, civil Procedure Code, volume II, pages 1583, 1584). It is unnecessary to resolve that conflict in the present case. It is true that the Tribunal's powers in dealing with appeals are of the widest amplitude and have, in some case, been held similar to, and identical with the power of an appellate court under the Civil Procedure Code. Assuming that for the aforesaid reasons the Appellate Tribunal is competent to set aside an order dismissing an appeal for default in exercise of its inherent power there are serious difficulties in upholding the validity of rule 24. It clearly comes into conflict with sub-section (4) of section 33 and in the event of repugnancy between the substantive provisions of the Act and a rule it is the rule which must give way to the provisions of the Act. We would accordingly affirm the decision of the Special Bench of the High Court and hold that the answer to the question which was referred was rightly given in the affirmative."

9. Keeping the aforesaid aspects, it appears that the Rules have been amended and in Rule 24 of the Appellate Tribunal Rules, 1963 (reproduced hereinabove) where a specific provision is made that the Tribunal may dispose of the appeal on merits after hearing the respondent. However, if the appeal is disposed of in absence of the

appellant on merits, in view of the proviso, if he satisfies the Tribur that there was sufficient cause of his non-appearance, when the appeal was called on for hearing, the Tribunal may set aside the order and restore the appeal for disposal in accordance with law.

10. In the case of M/s.J.K.Synthetics Ltd. v. Collector of Central Excise reported in AIR 1996 S.C.3527 a somewhat similar situation arose. CEGAT considered the provisions of Rule 20, 21 and 41 of the CEGAT (Procedure) Rules, 1982. The Tribunal observed that the proviso to Rule 20 provided for restoration of an appeal dismissed in default on sufficient cause being shown, however, there was no such provision with respect to an appeal heard and disposed of ex parte in the absence of respondent under Rule 21. (M/s. J.K.Synthetics Ltd. was the respondent in the appeal before CEGAT). Relying upon the decision of the Apex Court in the case of Commissioner of Income Tax, Madras v. S.Chenniappa Mudaliar reported as (1969) 74 ITR 41 [AIR 1969 S.C.1069] it appears that the Tribunal decided the matter. It found that where a respondent had not availed of the opportunity to put forward his case, CEGAT was not absolved of its responsibility to decide. It held:-

> "Therefore, even if respondent was not present when the appeal was called for hearing, would not absolve the Tribunal from deciding the appeal on merits on the basis of material on record. That in fact the Tribunal did. The decision taken by the Tribunal in the absence of the respondent is not an ex parte decision or decree as understood under the Code of Civil Procedure or in a Civil Court and if it is a decision on merits, we fail to see how we can review or set aside the same. Recalling the order passed on merits would in fact amount to setting aside or reviewing an order decided on merits. In doing so, the Tribunal would be exercising a power which is not vested in it by law. We do not think that in such a situation Rule 41 of CEGAT (Procedure) Rules, 1982 could be pressed

into aid by the appellants in support of their request f recalling the order."

11. Before the Apex Court in the case of M/s.J.K.Synthetics Ltd. (supra) a case decided by the Apex Court in the case of Income Tax Officer, Cannore v. M.K.Mohammed Kunhi reported in 71 ITR 815 (AIR 1969 SC 430), was relied upon by Revenue, where the question related to the powers of the Income Tax Appellate Tribunal under Section 254 was examined. It was held that the Tax Appellate Tribunal had impliedly been granted the power of doing all such acts and employing such means as were essential and necessary to its ends. The statutory power carried with it the duty in proper cases to make such order for staying proceedings as would prevent the appeal, if successful, from being rendered nugatory.

12. In Grindlays Bank Ltd. v. Central Government Industrial Tribunal (1981) 2 SCR 341 (AIR 1981 SC 606), the Court examined Rule 22 of the Industrial Disputes (Central) Rules, 1957. Considering the Rule, the Apex Court pointed out in para 4 of M/s.J.K.Synthetics Ltd. (supra) that the Tribunal to proceed ex parte carried with it the power to enquire whether or not there was sufficient cause for the absence of a party at the hearing.

13. Although Rule 21 of the CEGAT Rules does not expressly state that an order on an appeal heard and disposed of ex parte can be set aside on sufficient cause being shown for the absence of the respondent, it does not mean that CEGAT has no power to do so.

14. In the present case, Rule 24 specifically provides for recalling the order made ex parte while in the case of S.Chenniappa Mudaliar (supra) though there was a provision for dismissal of an appeal for

failure to appear, at the same time there was no provision f restoration.

15. In the instant case, the Tribunal decided the appeal on merits and thereafter the Tribunal was approached for setting aside the ex parte order. The Rules framed under Section 255 of the Income Tax Act permits the Tribunal to set aside the order and to restore the matter for hearing in accordance with law. In the opinion of the Court in view of what we have stated hereinabove, there is no substantial question of law and, therefore, this appeal is required to be dismissed. Ordered accordingly.

CHIEF JUSTICE

BADAR DURREZ AHMED, J.

May 25, 2004
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