$~S-28

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 211/2020 & CM APPLs.32045-32047/2020

HL MALHOTRA AND COMPANY PVT. LTD. ..... Appellant

Through: Mr. Ajay Vohra, Sr. Advocate with
Mr. Aniket D. Agrawal, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE 12 1 NEW DELHI ..... Respondent

Through: Mr. Raghvendra Singh, Senior
Standing Counsel.

% Date of Decision: 22nd December, 2020

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

MANMOHAN, J: (Oral)

1. The petition has been heard by way of video conferencing.

2. On 17th December, 2020, this Court had admitted the appeal on the following question of law:-

> "*Whether the Tribunal erred in law in failing to adjudicate upon the admissibility and consider the additional evidence furnished by the appellant under Rule 29 of the ITAT Rules*?"

3. As learned standing counsel for the respondent, on the last date of hearing, had stated that this Court cannot decide the aforesaid issue without examining the record of the Tribunal in appellant's statutory appeal being

ITA No. 3613/Del/2015, we had summoned the said record.

RELEVANT FACTS

4. A perusal of the Tribunal record reveals that the appellant had filed an application for admission of additional evidence in terms of Rule 29 of the Income-Tax (Appellate Tribunal) Rules, 1963 (hereinafter referred to as the 'ITAT Rules') on 14th January, 2019 after serving a copy of the same on the counsel for the Revenue, i.e., prior to commencement of final hearing before the Tribunal. On 17th January, 2019, the Tribunal concluded its hearing in the said appeal. Thereafter, on 22nd January, 2019, the appellant filed its synopsis/written submissions. On 28th February, 2019, the Tribunal passed the impugned order without dealing with the application filed by the appellant for admission of additional evidence under Rule 29 of the ITAT rules.

5. After the impugned order had been passed by the Tribunal, the appellant preferred an application for rectification dated 8th May, 2019 under Section 254(2) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). The said application was heard and reserved for orders on 08th November, 2019. Thereafter, the matter was listed for clarification by the Tribunal and the order on the said application was again reserved on 09th October, 2020. However till date no order has been pronounced by the Tribunal on the application filed by the appellant under Section 254(2) of the Act.

6. In the present appeal, it has been averred that since the appellant was awaiting the final outcome of the aforesaid miscellaneous application filed before the Tribunal, the impugned order dated 28.02.2019 was not

challenged in appeal before this court within the prescribed period of limitation, and hence the present appeal is barred by limitation by 498 days.

ARGUMENTS ON BEHALF OF THE APPELLANT

7. Mr. Ajay Vohra, learned senior counsel for the appellant states that the appellant has been constrained to file the present appeal under Section 260A of the Act without waiting for a final order in the rectification application filed by it, as the appellant wishes to avail the benefit of waiver of interest and penalty under the amnesty scheme being '*Vivad se Vishwas Scheme'*, for which declarations have to be filed latest by 31st December, 2020.

8. Mr Ajay Vohra, learned senior counsel for appellant submits that the Tribunal erred in failing to adjudicate upon and consider the additional evidence furnished by the appellant under Rule 29 of the ITAT Rules before passing the impugned order. He further submits that the Tribunal erred in recording self-contradictory reasoning in the impugned order, inasmuch as, on the one hand, the Tribunal has recorded the failure on the part of the appellant to furnish necessary evidence following the order of the CIT(A), while on the other hand, failed to even consider the additional evidence furnished by the appellant.

ARGUMENTS ON BEHALF OF THE RESPONDENT

9. Per contra, Mr. Raghvendra Singh, learned senior standing counsel for the respondent submits that as the appellant's application for rectification under Section 254(2) of the Act is pending consideration, this Court should not condone the delay in the present case. He states that condonation of

delay in filing the appeal would amount to allowing the appellant to midway abandon its application under Section 254(2) of the Act. He submits that as the grounds urged by the appellant in support of the question framed by this Court are the same on which rectification application has been filed under Section 254(2) of the Act, it would not be proper for this Court to hear and decide the present appeal till the Tribunal decides the rectification application.

10. He further submits that the appellant's application for production of additional evidence before the Tribunal was not maintainable as the conditions precedent mentioned in Rule 29 of the ITAT Rules are not attracted to the facts of the present case. In support of his submission, he relies upon the judgment of the Rajasthan High Court in ***Commissioner of Income Tax vs. Rao Raja Hanut Singh, 2001 252 ITR 528*** Raj, wherein it has been held as under:-

> *"Thus, the only question which at best can be said to be raised for consideration before this court is whether for allowance or disallowance of a request for additional evidence to be produced before the Income-tax Appellate Tribunal is a question of law.*
>
> *Having given our thoughtful consideration, we are of the opinion that the law is well settled by a catena of decisions of the Supreme Court that production of additional evidence at the appellate stage is not matter of right to the litigating party but within the discretion of the court which is to be exercised judiciously. The question whether the discretion has been exercised judiciously or not cannot obviously be ordinarily a question of law unless it can be disputed or found that in exercising that discretion, the Tribunal has ignored some well settled legal principles in the matter of exercise of such discretion or has acted so grossly or arbitrarily that no authority trained and disposed to adjudicate the rights of the litigating parties as a judicial or quasi-judicial Tribunal would exercise such discretion in that manner."*

11. He lastly contends that the additional evidence filed by the appellant vide application dated 14th January, 2019, had in all probability, been considered by the Tribunal. In support of his contention, he refers to the Index of Additional Documents mentioned in the application for admission of additional evidence and points out that the additional documents mentioned therein had been referred in the written submissions filed by the appellant with the Tribunal after the conclusion of the hearing on 22nd January, 2019. He states that the Tribunal would surely have examined and taken into account the written submissions filed by the appellant before passing the impugned order.

REJOINDER ARGUMENTS

12. In rejoinder, learned senior counsel for the appellant states that it is the appellant's case that neither the appellant's application for additional documents nor the synopsis filed by the appellant had been considered by the Tribunal before passing the impugned order.

13. As far as condonation of delay is concerned, he submits that this Court has been adopting a liberal approach on the ground that the procedure is handmaid of justice and the Court must always promote the cause of substantial justice.

COURT'S REASONING

THE DELAY IN FILING THE APPEAL IS CONDONED AS IT IS SETTLED LAW THAT IN THE ABSENCE OF ANYTHING SHOWING MALA FIDE OR DELIBERATE DELAY AS A DILATORY TACTIC, THE COURT SHOULD NORMALLY CONDONE THE DELAY AS THE INTENT OF THE COURT IS ALWAYS TO PROMOTE SUBSTANTIAL JUSTICE

14. He lastly submits that the scope of Sections 254(2) and 260A of the Act are entirely different and therefore the appeal and rectification

application are separate and independent remedies.

15. Having heard learned counsel for the parties, this Court is of the view that the delay in filing the present appeal is liable to be condoned as the appellant had within the limitation period prescribed under Section 254(2), filed the rectification application on 8th May, 2019. In the said application for rectification order had been reserved by the Tribunal on 8th November, 2019 and thereafter again on 9th October, 2020. However, as no order has been pronounced till date and the last date for filing the declaration under the amnesty scheme being *Vivad se Vishwas Scheme* (under which the appellant may get waiver of penalty and interest) is 31st December, 2020, the appellant, in order to avoid being prejudiced, has filed the present appeal.

16. It is settled law that in the absence of anything showing *mala fide* or deliberate delay as a dilatory tactic, the court should normally condone the delay as the intent of the court is always to promote substantial justice. [***See: Collector, Land Acquisition, Anantnag & Anr v. Mst. Katiji and Others (1987) 2 SCC 107 & N. Balakrishnan Vs. M. Krishnamurthy: 1998 (7) SCC 123***].

17. Consequently, the delay in filing the appeal is condoned.

SCOPE OF SECTIONS 254(2) AND 260A OF THE ACT ARE ENTIRELY DIFFERENT AND IT CANNOT BE SAID IN LAW THAT THEY ARE PARALLEL OR MUTUALLY EXCLUSIVE PROCEEDINGS

18. This Court is also in agreement with the submission of learned senior counsel for the appellant that the scope of Sections 254(2) and 260A of the Act are entirely different and it cannot be said in law that they are parallel or mutually exclusive proceedings, i.e., if a party invokes Section 254(2), it is

barred in law from invoking Section 260A of the Act.

19. Normally speaking this Court would not entertain an appeal under Section 260A of the Act if an application for rectification under Section 254(2) of the Act is pending consideration as there is some overlap and if the order is recalled by the Tribunal, then the initial appeal would become infructuous. But in the present case, as the last date for availing the benefit of amnesty scheme being '*Vivad se Vishwas Scheme'* is 31st December, 2020 and despite all efforts, the Tribunal is not deciding the application for rectification under Section 254(2) of the Act and learned counsel for respondent has stoutly opposed passing of any order in the present appeal to expedite disposal of the application filed by the appellant under section 254(2) before the Tribunal, this Court is of the opinion that if the present appeal is not entertained, it would gravely prejudice the appellant.

THIS COURT IS OF THE VIEW THAT IT CANNOT SECOND GUESS WHAT ORDER THE TRIBUNAL WOULD PASS AS IT IS NOT FOR THIS COURT BUT FOR THE TRIBUNAL TO DECIDE THE SAID APPLICATION.

20. As far as the argument that the appellant's application under Rule 29 of ITAT Rules is liable to be dismissed as the conditions mentioned therein are not attracted, this Court is of the view that it cannot second guess what order the Tribunal would pass as it is not for this Court but for the Tribunal to decide the said application. In fact, it has been so held by the Supreme Court in the case of ***Jyotsna Suri Vs. ITAT; 179 CTR 265 (SC)***. Accordingly, the respondent reliance on the judgment of the Rajasthan High Court in ***CIT vs. Rao Raja Hanut Singh*** (supra) is misconceived on facts.

TO HOLD THAT THE ADDITIONAL EVIDENCE FILED BY THE APPELLANT HAD BEEN CONSIDERED BY THE TRIBUNAL WOULD BE TO PRESUME AND ASSUME CERTAIN FACTS WHICH ARE NOT APPARENT FROM THE RECORD.

21. This Court is not impressed by the submission of learned standing counsel for the respondent that the additional evidence filed by the appellant had in all probability been considered by the Tribunal. In the impugned order passed by the Tribunal, there is no reference to either the additional documents placed on record by the appellant or to the written submissions/synopsis filed by the appellant. To hold that the additional evidence filed by the appellant had been considered by the Tribunal would be to presume and assume certain facts which are not apparent from the record.

AS THE APPELLANT HAD ADMITTEDLY FILED AN APPLICATION FOR ADMISSION OF ADDITIONAL EVIDENCE IN TERMS OF RULE 29 OF THE ITAT RULES PRIOR TO THE DATE OF FINAL HEARING, IT WAS INCUMBENT UPON THE TRIBUNAL TO CONSIDER THE SAID APPLICATION BEFORE PROCEEDING AHEAD WITH THE FINAL HEARING

22. This Court is further of the opinion that as the appellant had admittedly filed an application for admission of additional evidence in terms of Rule 29 of the ITAT Rules prior to the date of final hearing, it was incumbent upon the Tribunal to consider the said application before proceeding ahead with the final hearing.

23. The Supreme Court in the case of ***Jyotsna Suri Vs. ITAT*** (supra) set aside the order of the High Court and remanded the matter back to the file of the Tribunal to decide the application under Rule 29 of ITAT Rules and

thereafter to dispose of the appeal on merits. The relevant observations of the Apex Court are reproduced hereinbelow:-

> *"The Tribunal has disposed of the appeal by its order of 3rd Jan., 1997, without considering the pending application under Rule 29 of the ITAT Rules, 1963, for adducing additional evidence. Obviously, that application was required to be disposed of first before the Tribunal heard the appeal on merits. The appellant also undertakes to withdraw the pending application before the Tribunal for making a reference under Section 256(1) of the IT Act for the above purpose. In view thereof, we direct that the Tribunal should first dispose of the application under Rule 29 on merits and thereafter proceed to dispose of the appeal on merits. The order dated 3-1-1997, is, therefore, set aside and the matter is remitted to the Tribunal for disposal on merit in accordance with law. The order of the High Court is set aside as above and the appeal is disposed of accordingly.*

RELIEF

24. For the aforesaid reasons, the present appeal is allowed and the order of the Tribunal dated 28th February, 2019 is set aside; the appeal of the appellant is restored to the file of the Tribunal for *de novo* hearing in accordance with the judgment of the Supreme Court in ***Jyotsna Suri Vs. ITAT*** (supra).

25. However, this Court clarifies that it has not expressed any opinion on the merits of the application to be filed by the appellant under the amnesty scheme being '*Vivad se Vishwas Scheme'*.

26. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

27. The original record of ITAT requisitioned vide order dated 17th December, 2020 be sent back.

MANMOHAN, J

SANJEEV NARULA, J

DECEMBER 22, 2020
KA