$~ 31

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

% ***Date of decision: 06.02.2023***

\+ **W.P.(C) 1486/2023**

CEMENT CORPORATION OF INDIA LTD ..... Petitioner
Through: Mr Gaurav Vig, Advocate.

versus

ASSISTANT COMMISSIONER INCOME TAX CIRLE 5(2) ,NEW DELHI ..... Respondent
Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Easha Kedian, Advocate.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 5567/2023

1. Allowed, subject to just exceptions.

W.P.(C) 1486/2023

2. Issue notice.

2.1 Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the respondent/revenue, accepts notice.

3. Since the matter involves the construction of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 [in short, "ITAT Rules"], Mr Kumar says that counter-affidavit would not be necessary. Thus, with the consent of counsel for the parties, the writ petition is taken up for hearing and final

disposal, at this stage, itself.

4. This writ petition seeks to lay a challenge to the order dated 07.09.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

4.1 *Via* the said order, the Tribunal has dismissed the Miscellaneous Application bearing no. 606/DEL/2018, whereby a prayer was made for recalling the order dated 24.01.2018 passed by the Tribunal.

4.2 The Tribunal, on 24.01.2018, dismissed the appeal preferred by the petitioner, on the ground of non-prosecution.

4.3 A perusal of the said order shows that the Tribunal noted that the petitioner had been served, and thus, no purpose would be served in issuing a fresh notice.

4.4 In the very same order i.e., the order dated 24.01.2018, the Tribunal also observes, that it would treat the appeal as not being admitted, and in this regard, the Tribunal has taken recourse to Rule 19 of the ITAT Rules.

5. It is the petitioner's assertion that the order dated 24.01.2018 was received by it on 05.02.2018. The petitioner also avers that the aforementioned miscellaneous application was filed on 24.09.2018; which, as noticed, was dismissed on 07.09.2022.

6. The reasoning of the Tribunal for rejecting the miscellaneous application is contained in paragraph 4 of the impugned order i.e., the order dated 07.09.2022.

6.1 For the sake of convenience, the same is extracted hereafter:

> *"4. We have heard the rival submissions and perused the records before us. From the record placed before us it is noticed that these Misc. applications were filed on 24.09.2018. The provisions of sub*

> *section (2) of section 254 stipulates the time limit for disposal of Misc. application filed at any time within 6 months from the end of the month*
> *in which the order was passed by the Tribunal under section 254(1) of the Act. It is noticed that the Tribunal had passed the order under section 254(1) of the Act on 24.01.2018 meaning thereby any Misc. application filed under section 254(2) of the Act with a view to rectify any mistake apparent from record is to be disposed of at any time within 6 months*
> *from the end of the month in which the order was passed i.e. before 31.07.2018. In the case of the assessee the Misc. applications were filed on 24th September, 2018 which is beyond the period of 6 months for disposal of the Misc. applications set out in the provisions of section 254(2) meaning thereby the Misc. applications should have been filed before 31st July, 2018. The assessee filed petition requesting for condonation of delay in filing Misc. applications. However, nowhere in the statute provides for condonation of delay in filing Misc. applications before the Tribunal under section 254(2) of the Act. Condonation of*
> *delay in filing Misc. applications by the Tribunal is beyond the powers of the Tribunal in the absence of any specific provision in the statute. In the circumstances the Misc. applications filed by the assessee are liable to be rejected."*

7. As would be evident, the Tribunal seems to have taken recourse to the provisions of Section 254 of the Act. The Tribunal has alluded to the fact that since rectification of mistake, apparent from the record, can be made within six months from the end of the month in which the concerned order was passed, the petitioner's application for recall of the order dated 24.01.2018 could not have been entertained.

7.1 In this context, the Tribunal has fixed two points i.e., the date on which the petitioner's miscellaneous application was filed i.e., 24.09.2018, and when the six-month period expired, commencing from the end of the month in which the order was passed i.e., 31.07.2018. Having noticed these dates, the Tribunal has concluded that under Section 254 of the Act, it had no power to condone the delay *qua* the application for recall of its order,

which was filed beyond six months.

8. In our view, the application moved by the petitioner was not stricto sensu, moved with a view to rectify a mistake apparent from the record, or even to amend any order. The petitioner simply sought a recall of the order dated 24.01.2018, whereby the appeal was dismissed for non-prosecution. Therefore, in our opinion, the said provision was not the most apposite provision for adjudicating the petitioner's application for recall of the order dated 24.01.2018, given the facts obtaining in the case. It appears, that the avenue available to the Tribunal (in the given fact situation) was the one contemplated in Rule 24 of the ITAT Rules.

8.1 For the sake of convenience, the same is extracted hereafter:

> *" [**Hearing of appeal ex parte for default by the appellant.***
> ***24.** 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 :*
> ***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.]"*

9. A perusal of the said Rule seems to plainly convey that if on the date fixed for hearing, or on any other date to which the hearing is adjourned, the appellant does not appear in person or through an authorized representative, when the appeal is called out for hearing, the Tribunal may dispose of the appeal on merits or otherwise, after hearing the respondent.

10. Furthermore, the proviso appended to the Rule indicates that where an appeal has been disposed of on merits, and the appellant appears thereafter,

the Tribunal shall set aside the *ex parte* order and restore the appeal, if it is satisfied that there was sufficient cause for his non-appearance. Although in the main part of Rule 24, the expression used is "*may*", when read with the proviso appended thereto, it leads to the conclusion that if the Tribunal chooses to dispose of the appeal on merits or otherwise, after hearing the respondent in the absence of the appellant, and the appellant, thereafter, appears and shows sufficient cause for not appearing on the date when the appeal is disposed of, the Tribunal is obliged, in law, to set aside the order passed and restore the appeal. As it appears from a perusal of the record, the Tribunal's attention does not seem to have been drawn towards Rule 24 of the ITAT Rules. Rule 24 of the ITAT Rules does not have the impediment of limitation, as is prescribed under Section 254 of the Act.

10.1. The Tribunal, as noted above, has, in our view, taken recourse to not the most apposite provision i.e., Section 254 of the Act, given the fact that limitation had kicked in. Under Section 254 of the Act, the Tribunal has the power to rectify mistakes which arise from acts of omission or commission- this power is *inter alia*, circumscribed by the period of limitation prescribed therein. [See ***Honda Siel Power Products Ltd. v Commissioner of Income Tax, Delhi***; (2007) 12 SCC 596]

10.2. Besides this, the Tribunal is also, in our opinion, vested with incidental and ancillary powers which can be exercised in situations such as the one presented before us today.

11. Having heard the learned counsel for the parties in some detail and examined the record, according to us, this matter may deserve a hearing on merits, for the following reason:

(i) The petitioner has been denied depreciation allowance, amounting to

Rs.53,31,982/- for the period in issue i.e., AY 2011-2012. According to the petitioner, the Commissioner of Income Tax (Appeals) ["CIT(A)"] had denied the depreciation allowance to the petitioner, on the ground that the subject plants had been closed, and the plant and machinery was held only for the purpose of selling the same, in pursuance of the scheme framed by the Board for Industrial and Financial Reconstruction (BIFR) constituted under the Sick Industrial Companies (Special Provisions) Act, 1985. However, the petitioner claims, that in the previous AYs i.e., AY 2003-2004 to AY 2010-2011 and in AY 2014-2015, depreciation claimed with respect to the very same block assets was sustained by the CIT(A).

12. Furthermore, in our view, while there was delay, the appellant seems to have furnished some reasons for explaining the delay. Broadly, the reasons given were that the notice of hearing issued by the Tribunal for the hearing on 24.01.2018 was misplaced, and did not reach the concerned officer of the petitioner, which according to the petitioner, was the primary cause for non-attendance on the said date. Furthermore, as per the petitioner, it was unaware of the passing of the dismissal order dated 24.01.2018, and only came to know about the same only on 05.02.2018. The petitioner also contends, that the inadvertent delay in filing the miscellaneous application was caused on account of the concerned persons in the Department being temporarily transferred to a plant outside Delhi, and some persons retiring during the relevant period.

13. Having regard to the aforesaid, in our opinion, the appeal deserves to be heard on merits.

13.1 Accordingly, the impugned order dated 07.09.2022 is set aside. The matter is remitted to the Tribunal for disposal of the petitioner's statutory

appeal on merits.

14. The Registry will dispatch a copy of the judgment passed today to the Tribunal *via* all modes, including e-mail.

15. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 6, 2023 / tr