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

% **Date of Decision: 17.02.2023**

+ **ITA 104/2023**

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr Sanjay Kumar, Senior Standing
Counsel with Ms Hemlata Rawat,
Adv.

versus

VICTORY REALTECH PVT. LTD.

..... Respondent

Through: None.

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.7971/2023

1. This is an application filed on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/revenue, there is a delay of 23 days.

2. For the reasons given in the application, the delay is condoned. The application is, accordingly, disposed of.

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3. This appeal concerns Assessment Year (AY) 2010-11, and is directed against the order dated 22.07.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

3.1 Via the impugned order, the Tribunal has allowed the Miscellaneous Application filed by the respondent/assessee, whereby recall of Tribunal's order dated 17.12.2018 was sought.

3.2 The Tribunal had passed the order in ITA no.5534/Del/2015. The appeal before the Tribunal had been preferred by the respondent/assessee.

3.3 A perusal of the order shows, that the stand of the respondent/assessee before the Tribunal was, that it had not received the notice of hearing on 17.12.2018, when the Tribunal disposed of its appeal.

4. It is in these circumstances, that the Tribunal having satisfied itself with the stand taken by the respondent/assessee i.e., it had not received notice of date of hearing fixed in the appeal, recalled its order dated 17.12.2018.

4.1 To be noted, on 17.12.2018, the Tribunal had dismissed the appeal for non-prosecution. It appears, that the Tribunal, while reaching this conclusion also made the following observations:

“...and in the absence of any objections from the side of learned DR...”

5. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, draws our attention to the internal communication dated 20.12.2022 addressed by the concerned departmental representative (DR) to the Additional Commissioner of Income Tax, and the affidavit appended thereto. The affidavit was evidently sworn by the concerned DR.

5.1 A perusal of the affidavit shows, that the DR has indicated that the observations made in paragraph 3 of the impugned order dated 22.07.2022, to the effect that he had not strongly opposed the submission made by the counsel for the respondent/assessee, were not an accurate record of the proceedings.

6. The argument advanced before us is, that the observations extracted from the impugned order above i.e., *“...that in the absence of any objections*

from the side of learned DR...”, which are made in paragraph 4 of the impugned order, flow from what is recorded in paragraph 3 of the impugned order.

7. In our view, if this was the correct position, as is contended before us by Mr Kumar, then the appellant/revenue should have moved an appropriate application before the Tribunal, for correction of the record.

7.1 It is well established, that if a party claims that the record of the Court does not reflect the correct position, then the aggrieved party is required to move the said forum. In the absence of such a step being taken, the appellate Court would naturally accept what is part of the record.

8. Besides this, according to us, in law and on merits, the Tribunal has taken a correct call. Once the Tribunal recorded, that the respondent/assessee did not have the notice of the date of hearing, it was well within its right to recall the order.

8.1 This issue has also been dealt with by us in the following matters:

(i) ***Cement Corporation of India Ltd. vs. Assistant Commissioner Income Tax Circle 5(2), New Delhi***, [W.P.(C) 1486/2023].

(ii) ***Pr. Commissioner of Income Tax (Central)-2 vs. Green Mark Infra Ltd*** [ITA 78/2023].

9. The appeal is, accordingly, dismissed, as no substantial question of law arises for consideration.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 17, 2023/pmc