

Brij Lal Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Aug-20-1996

Reported in : (1996)59ITD1(Delhi)

Appellant : Brij Lal

Respondent : Assistant Commissioner of

Judgement :

1. The assessee has filed an application praying for restoration of the above captioned appeal decided ex parte vide out order dated 16-11-1993.
2. It has been stated in the application that the said appeal was decided without the representation by the assessee's counsel to whom the notice of hearing was delivered but the same got misplaced in his office. It has further been stated that the counsel was busy in the marriage arrangement of his daughter and the date of hearing could not be noted in his diary. The assessee has enclosed a certificate from his counsel, Shri Santosh Kumar Gupta, Advocate, to the above effect. It has also been submitted that in a similar matter in the assessee's brother's case, the appeal was heard and the similar addition was deleted by this Tribunal. A copy of the said order is also enclosed.
3. At the time of hearing of this Misc. Application, none appeared on behalf of the assessee. It appears that the assessee is not interested in pursuing the matter. In view of this, we decline to accede to the request of the assessee and, accordingly, the Misc. Application is dismissed.

4. In the result, the Misc. Application, filed by the assessee, is dismissed.

5. I have perused the order passed by my learned Brother, the Judicial Member, but find myself in dis-agreement with him on various grounds which are being discussed as under : A perusal of the record shows that the Misc. Application was filed on 11th January, 1994 primarily on the ground that the order in appeal was passed by the Bench ex parte without hearing the assessee on the ground that the counsel remained absent despite notice sent by Registered post. The Misc. Application was fixed for hearing on a number of occasions beginning April 1994 but adjourned on one ground or the other, but most of these being the absence of the assessee or his counsel. However, on the last date of hearing, viz., 17-2-1995 when the matter was called for hearing there was nobody present on behalf of the assessee and the matter was proceeded with ex parte after hearing the learned Departmental Representative.

6. My learned Brother, the Judicial Member, has in para 2 of the order discussed the facts stated in the application, but in para 3 of the order, he has rejected the application on the sole ground that the non-appearance on the part of the assessee denoted that he was not interested in pursuing the matter. In my opinion, this does not appear to be the correct approach as even in respect of an ex parte disposal the Tribunal was obliged to consider dis-passionately the contents of the misc. application and the evidence furnished vis-a-vis the non-appearance on a particular date before the Tribunal. The Tribunal could not assume that the non-appearance reflected the lack of interest on the part of the assessee in pursuing the misc. application.

7. On the merits of the case the stand of the assessee is that notice for hearing had been received and delivered to the counsel, but it was misplaced at his end as during the same period he was busy in the marriage of his daughter and the hearing could not be noted in the diary. In support of the aforesaid submissions the assessee has filed the certificate of his counsel, namely, Shri Satish Kumar Goel, wherein he has reiterated and re-confirmed the facts stated in the miscellaneous application. After going through the contents of the said certificate I am of the view that interests of justice would be fully met in case an opportunity of

hearing is allowed to the assessee in respect of the appeal which had been disposed of earlier on ex parte basis. In this view of the matter I would recall the ex parte order passed by the Tribunal on 16th November, 1993 and direct that the appeal be re-fixed for hearing in the normal course for an adjudication on merits after giving a reasonable opportunity of being heard to the parties.

1. As there has been a difference of opinion between the members who heard the present misc. application, the same is required to be resolved by the Third Member to be nominated by the Hon'ble President of the Tribunal. The following points of difference are referred :- "1. Whether on the facts and in the circumstances of the case and in accordance with the provisions of law the Tribunal could dismiss the miscellaneous application filed by the assessee only on the ground that he failed to appear on the date of hearing and this meant that he was not interested in 'pursuing the matter'?

2. If the answer to the aforesaid is in the negative then whether on the facts of the case the ex parte order passed on 16-11-1993 was required to be recalled for a hearing de novo in the light of the reasons advanced by the assessee for non-appearance on the said date ?"

1. This Miscellaneous Application has come up before me for my opinion as a Third Member under section 255(4) of the Income-tax Act, 1961 as the Members who heard the Miscellaneous Application originally could not agree. They referred the following points of difference :- "1. Whether, on the facts and in the circumstances of the case and in accordance with the provisions of law the Tribunal could dismiss the miscellaneous application filed by the assessee only on the ground that he failed to appear on the date of hearing and this meant that he was not interested in 'pursuing the matter'?

2. If the answer to the aforesaid is in the negative then whether on the facts of the case the ex parte order passed on 16-11-1993 was required to be recalled for a hearing de novo in the light of the reasons advanced by the assessee for non-appearance on the said date ?"

2. The assessee is an HUF for the assessment year 1990-91, return of income was filed on 27-8-1990 declaring total income at Rs. 3,780. In the assessment made under section 143(3) on 28-12-1990, the Assessing Officer made an addition of Rs. 12,000 towards low withdrawals for house expenses. Aggrieved by the same, the assessee preferred an appeal before the DCIT (Appeals). The DCIT (Appeals) sustained the impugned addition. Not satisfied with the order of the DCIT (Appeals), the assessee preferred an appeal before the Tribunal. Notice of hearing fixing the date of hearing on 11-11-1993 was sent to the assessee by Registered Post A.D. on 11-11-1993, none was present on behalf of the assessee. After hearing the Departmental Representative and after perusing the papers filed before it, the Tribunal by its order dated 16-11-1993 dismissed the appeal of the assessee by observing as under :- "3. At the time of hearing, the assessee and his counsel remained absent despite notice sent by registered post.

4. We have perused the order of the DCIT(A). We do not find any justification to interfere in the order of the DCIT(A) and dismiss the appeal." 3. After the receipt of the Tribunal's order dated 16-11-1993, the assessee preferred a Miscellaneous Application for restoration of the appeal urging that the appeal was decided without representation by his counsel to whom the notice of hearing was delivered, that the notice of hearing got misplaced in the office of the counsel, that the counsel was busy in the marriage arrangements of his daughter and that the date of hearing could not be noted in his diary. A certificate from Shri Satish K. Goel, Advocate, Karnal dated 5-1-1994 was also enclosed.

Accordingly, it was prayed that the assessee may be given a chance of personal hearing by restoring the appeal for fresh adjudication. In the said application, it was further submitted that in a similar matter in his brother's case, viz., Shri Sunder Lal, Karnal, an appeal was heard and similar addition of Rs. 12,000 was deleted by the Tribunal vide order dated 4-10-1993 in ITA No. 8299 (Del)/91 for the assessment year 1990-91. A copy of the said order of the Tribunal was also enclosed.

Notice of hearing fixing the hearing of the said Miscellaneous Application on 17-2-1995 was sent to the assessee by Registered Post A.D. This time also, none was

present on behalf of the assessee. The Miscellaneous Application was heard by the Tribunal ex parte on 17-2-1995 wherein Shri M.K. Jha, Departmental Representative, appeared on behalf of the Revenue. The learned Judicial Member, Shri R.K. Gupta, passed an order dismissing the Miscellaneous Application by observing as under :- "3. At the time of hearing of this Miscellaneous Application, none appeared on behalf of the assessee. It appears that the assessee is not interested in pursuing the matter. In view of this, we decline to accede to the request of the assessee and, accordingly, the Miscellaneous Application is dismissed.

4. In the result, the Miscellaneous Application filed by the assessee is dismissed."

4. The learned Accountant Member, Shri R.M. Mehta, passed a dissenting order dated 13-6-1995. In that order, the learned Accountant Member observed that, in his opinion, this does not appear to be the correct approach as even in respect of an ex parte disposal, the Tribunal was obliged to consider dispassionately the contents of the Miscellaneous Application and the evidence furnished vis-a-vis non-appearance on a particular date before the Tribunal and that the Tribunal could not assume that the non-appearance reflected lack of interest on the part of the assessee in pursuing the Miscellaneous Application. On merits, after going through the Miscellaneous Application and the certificate of Shri S.K. Goel, the learned Accountant Member opined that interests of justice would be fully met in case an opportunity of hearing was allowed to the assessee in respect of the appeal which had been disposed of earlier on ex parte basis. In that view of the matter, he recalled the ex parte order, passed by the Tribunal on 16-11-1993 and directed that the appeal be refixed for hearing in the normal course.

5. Notice of hearing dated 25-7-1996 fixing the hearing on 19-8-1996 before the Third Member was issued to the assessee by Registered Post A.D. At the time of hearing, none was present on behalf of the assessee. I proceeded to hear the matter ex parte and heard the Departmental Representative, Shri Vimal Shah. After the hearing was over, a telegram has been received requesting for adjournment on the ground that the assessee's counsel was unable to attend. Since the matter was heard fully, the said application for adjournment was filed.

6. The arguments of the Departmental Representative were to the following effect :- The assessee has done a that trick here by not appearing before the Tribunal in the appeal, in the Miscellaneous Application and even before the Third Member also. According to section 254(1), the Tribunal shall give an opportunity of being heard to both the parties. Adequate opportunity was given by the Tribunal in hearing of the appeal before the Tribunal. As none was present on behalf of the assessee, the appeal was decided by the Tribunal on merits on 16-11-1993. Even for the hearing of the Miscellaneous Application also, none was present on behalf of the assessee. The learned Judicial Member is perfectly justified in dismissing the Miscellaneous Application by concluding that the assessee was not interested in pursuing the matter.

7. I have considered the matter and gone through the record. Rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963, as it stood prior to its substitution with effect from 1-8-1987, empowered the Tribunal to dismiss an appeal for the appellant's default. The said Rule was declared ultra vires by the Hon'ble Madras High Court in S. Chenniappa Mudaliar v. CIT [1964] 53 ITR 323 (SB). The said judgment was affirmed by the Hon'ble Supreme Court in the case of CIT v. S. Chenniappa Mudaliar [1969] 74 ITR 41. The Hon'ble Supreme Court held that Rule 24 of the Appellate Tribunal Rules, 1946, as amended in 1948, in so far as it enables the dismissal of an appeal before the Income-tax Appellate Tribunal for default of appearance of the appellant, clearly comes into conflict with section 33(4) of the Indian Income-tax Act, 1922 and is, therefore, ultra vires. Later on, the said Rule 24 was substituted with effect from 1-8-1987. Under the so substituted rule 24, there is no provision for dismissal of an appeal for appellant's default. The said Rule with effect from 1-8-1987 empowers the Tribunal to dispose of the appeal on merits after hearing the respondent where the appellant does not appear either in person or through an authorised representative.

Even in the absence of the appellant, the Tribunal is expected to go into the matter itself, apply its mind and thereafter give its decision. It has to record reason in support of its decision. An adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty under section 259 and for the Supreme Court to hear an appeal filed under section 261. Section 254(1) itself

indicates by the use of the word 'thereon' that the decision should relate to the subject-matter of the appeal. Proviso to Rule 24 provides for the restoration of the appeal when the appellant satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing.

8. I am of the opinion that what applies to the appeal before the Tribunal equally applies to the Miscellaneous Application before the Tribunal. The Tribunal is expected to go into the Miscellaneous Application itself, apply its mind and give its decision thereon. The learned Accountant Member expressed his view in similar terms when he stated that "the Judicial Member has rejected the application on the sole ground that the non-appearance on the part of the assessee denoted that he was not interested in pursuing the matter". In my opinion, this does not appear to be the correct approach as even in respect of an ex parte disposal, the Tribunal was obliged to consider dispassionately the contents of the Misc. Application and the evidence furnished vis-a-vis the non-appearance on a particular date before the Tribunal.

I hold that on the facts and in the circumstances of the case, the Tribunal cannot dismiss the Miscellaneous Application filed by the assessee only on the ground that he failed to appear on the date of hearing. This is my opinion with reference to Question No. 1, referred to me. Therefore, I agree with the view expressed by the learned Accountant Member.

9. In view of my opinion on Question No. 1, Question No. 2 does not arise.

10. The matter will now go before the regular Bench for decision according to majority opinion.

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