IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 30TH DAY OF JANUARY 2017

PRESENT

THE HON'BLE DR. JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

I.T.A.No. 100138 OF 2015
C/w.
I.T.A.Nos. 100110 OF 2015, 100136 OF 2015, 100137 OF 2015 AND 100140 OF 2015

BETWEEN:

1. THE PRINCIPAL COMMISSIONER OF INCOME TAX(CENTRAL), C. R. BUILDING QUEENS ROAD, BENGALURU.

2. ACIT, CENTRAL CIRCLE -2 BELAGAVI.

... APPELLANTS (COMMON)

(BY SRI.Y. V. RAVIRAJ, ADV.,)

AND:

MR. ABDUL ZAHID M.
PROP. SMSK MINERAL TRADING CO.
NO. 310/A, SMSK PLAZA, HOSPET.

... RESPONDENT (COMMON)

(BY SRI.H. R. KAMBIYAVAR & S. PARTHASARATHI, ADVS.,)

ITA NO.100138/2015 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI, IN ITA NO.319/PNJ/2014, DATED 24.03.2015 FOR THE ASSESSEMENT YEAR 2009-10 AND CONFIRM THE ORDER PASSED BY THE COMMISSIONER OF INCOME TAX(APPEALS)-VI, BENGALURU.

ITA NO.100110/2015 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI, IN ITA NO.316/PNJ/2014, DATED 24.03.2015 FOR THE ASSESSEMENT YEAR 2005-06 AND CONFIRM THE ORDER PASSED BY THE COMMISSIONER OF INCOME TAX(APPEALS)-VI, BENGALURU.

ITA NO.100136/2015 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI, IN ITA NO.317/PNJ/2014, DATED 24.03.2015 FOR THE ASSESSEMENT YEAR 2007-08 AND CONFIRM THE ORDER PASSED BY THE COMMISSIONER OF INCOME TAX(APPEALS)-VI, BENGALURU.

ITA NO.100137/2015 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI, IN ITA NO.318/PNJ/2014, DATED 24.03.2015 FOR THE ASSESSEMENT YEAR 2008-09 AND CONFIRM THE ORDER

PASSED BY THE COMMISSIONER OF INCOME TAX(APPEALS)-VI, BENGALURU.

ITA NO.100140/2015 IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI, IN ITA NO.320/PNJ/2014, DATED 24.03.2015 FOR THE ASSESSEMENT YEAR 2011-12 AND CONFIRM THE ORDER PASSED BY THE COMMISSIONER OF INCOME TAX(APPEALS)-VI, BENGALURU.

THESE APPEALS COMING ON FOR ORDERS THIS DAY, **Dr.VINEET KOTHARI. J,** DELIVERED THE FOLLOWING:

COMMON JUDGMENT

Mr. Y. V. Raviraj, Advocate for appellants
Mr. H. R. Kambiyavar & S. Parthasarthi,
Advocates for respondent

COMMON JUDGMENT

1. These appeals have been filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act', for short), aggrieved by the order passed by the learned Income Tax Appellate Tribunal, Panaji Bench, Panaji (hereinafter referred to as 'the Tribunal', for short) on 24.03.2015, whereby in terms of Section 249(4)(a) of the Act,

the learned Tribunal, relying upon the decision of the Division Bench of this Court in the case of *Commissioner of Income Tax-III Vs. K. Satish Kumar Singh* reported in (2012) 209 TAXMAN 502 Kar, held that in view of the admitted tax liability of the assessee having been paid by the assessee, although belatedly and not at the point of time of filing of the said appeal, the said appeal deserves to be decided on merits.

2. In the present case, the learned Commissioner of Income Tax (Appeals)-VI, Bengaluru ['hereinafter referred to as the 'CIT(A)', for short] dismissed the appeal of the assessee on 28.02.2014. When the said appeal was filed before the learned CIT(A) on 26.04.2013 for A.Y.2005-06 to 2011-12, the admitted tax liability was not paid by the assessee at that point of time. However, that came to be later on paid by him on 10.02.2014. The Tribunal set aside the said dismissal order and held as under:

> *"9. We have heard rival contentions of both the parties. It is quite clear from perusal of Section*

249(4) (a) of the Act that unless assessee pays the tax due on the income returned by him, the CIT(A) is not vested with any power to entertain the appeal. In the present case, at the time of filing of appeal before the CIT(A), assessee had not paid the tax due on the income returned by him and thus no fault can be found with the order of the CIT(A) in dismissing the appeal of the assessee in-limine. However, the position sought to be canvassed by the assessee is that after the order of the CIT(A), he has paid the requisite tax due on the income returned by him and therefore the CIT(A) ought to entertain and admit assessee's appeal for adjudication on merits. The revenue has opposed the said prayer on the ground that payment of admitted tax subsequent to the order of the CIT(A) dismissing the appeal, cannot be a ground for setting – aside the order of the CIT(A). On this aspect, in our view, the judgment of the Hon'ble Karnataka High Court in the case of K. Satish Kumar Singh (supra) clearly covers the controversy. As per the Hon'ble High Court, after the dismissal of the appeal by the CIT(A) on account of a default under Section 249(4)(a) of the Act, if the assessee pays the admitted tax, the CIT(A) ought to recall the earlier *order dismissing the appeal in-limine and to consider the appeal on merits.*

10. Considering the judgment of the Hon'ble Karnataka High Court in the case of K. Satish Kumar Singh (supra), we deed it fit and proper to set-aside the impugned order of the CIT(A) with directions to consider the plea of the assessee of having paid the tax due on the returned income and upon his being satisfied that the requirement of Section 249(4)(a) of the Act has been complied with, he shall admit and dispose-off the appeal on merits. Needless to say that the CIT(A) shall allow a reasonable opportunity to the assessee of being heard and thereafter he shall pass an appropriate order in accordance with law.

11. The facts of I.T.A No.316/PNJ/2014 are similar to the facts of I.T.A.Nos.317 to 320/PNJ/2014. Therefore, our view in former part of this order shall apply mutatis mutandis for all the appeals i.e., I.T.A.Nos.317 to 320/PNJ/2014.

12. In the result, the appeals of the assessee are allowed for statistical purposes, as above."

3. The learned counsel for the Revenue Mr. Y. V. Raviraj, fairly submitted that the admitted tax liability was deposited by the petitioner-assessee before the dismissal of the appeal itself by the learned CIT(A) on 28.02.2014, and the admitted tax liability was paid by the assessee before that on 10.02.2014 and therefore, in terms of the Division Bench decision of this Court in the case of *Commissioner of Income Tax-III Vs. K. Satish Kumar Singh* (supra), the order impugned cannot be justifiably assailed.

4. The learned counsel for the assessee also supported the said impugned order of the learned Tribunal.

5. Heard the learned counsel on both sides.

6. The provision of Section 249 of the Act are quoted below for ready reference:

> ***" 249.Form of appeal and limitation.-***
> *(1) Every appeal under this Chapter shall be in the prescribed form and shall be verified in the prescribed manner and shall, in case of an appeal made to the Commissioner*

(Appeals) on or after the 1st day of October, 1998, irrespective of the date of initiation of the assessment proceedings relating thereto be accompanied by a fee of,—

(i) where the total income of the assessee as computed by the Assessing Officer in the case to which the appeal relates is one hundred thousand rupees or less, two hundred fifty rupees;

(ii) (ii) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than one hundred thousand rupees but not more than two hundred thousand rupees, five hundred rupees;

(iii) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one thousand rupees;

(iv) where the subject matter of an appeal is not covered under clauses (i), (ii) and (iii), two hundred fifty rupees.

(2) The appeal shall be presented within thirty days of the following date, that is to say,—

(a) where the appeal is under section 248, the date of payment of the tax, or

(b) where the appeal relates to any assessment or penalty, the date of service of the notice of demand relating to the assessment or penalty:

Provided *that, where an application has been made under section 146 for reopening an assessment, the period from the date on which the application is made to the date on which the order passed on the application is served on the assessee shall be excluded, or*

(c) *in any other case, the date on which intimation of the order sought to be appealed against is served.*

(2A) Notwithstanding anything contained in sub-section (2), where an order has been made under section 201 on or after the 1st day of October, 1998 but before the 1st day of June, 2000 and the assessee in default has not presented any appeal within the time specified in that sub-section, he may present such appeal before the 1st day of July, 2000.

(3) The Commissioner (Appeals)] may admit an appeal after the expiration of the said period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(4) No appeal under this Chapter shall be admitted unless at the time of filing of the appeal,—

(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

(b) *where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him:*

Provided *that, in a case falling under clause (b) and on an application made by the appellant in this behalf, the Commissioner (Appeals) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause."*

7. The Division Bench of this Court in *Commissioner of Income Tax-III Vs. K. Satish Kumar Singh* (supra), after referring to the decision of the Hon'ble Supreme Court in the case of *Vijay Prakash D. Mehta and Another Vs. Collector of Customs* (1989) 175 ITR 540 has held as under:

"The Apex Court in the case of Vijay Prakash D. Mehta v. Collector of Customs MANU/SC/0570/1988: (1989) 175 ITR 540 dealing with the similar provisions under the

Customs Act has held that the right of appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial adjudications. The right of appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself, following the rules of natural justice, would be violative of any right, constitutional or statutory without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it upon fulfillment of those conditions that the right becomes vested in, and exercisable by, the appellant. If discretion is vested, then there is an obligation to act judicially and properly. The purpose of such restriction is to act in terrorem to make the people comply with the provisions of law. Therefore, the object of stipulating conditions such as demand of admitted tax is a condition precedent for entertaining the appeals and admitting the appeals is to see that the appellant obeys the law, Though the right of *appeal is conferred under a statute, the said right is subjected to the restrictions imposed under the very same statue. There cannot be any absolute right de hors the provisions of the statue. Therefore, in the instant case, the statue has conferred a right of appeal. It also in unequivocal terms expressly has stated that in cases where the assessee files a return and admits the liability to pay tax on the income returned, unless he pays the said admitted tax due on the income returned, he may not exercise the statutory right of appeal. As is clear from Clause (b) of Sub-section (4) of Section 249 of the Act in all cases falling under Sub-Section (4) of Section 249, no discretion is vested with the Appellate Authority. Therefore, in cases falling under clause (a) of Sub-Section (4) of Section 249 of the Act, if the said condition is not fulfilled by the assessee, the appeal shall not be admitted and the only order that can be passes is dismissal of the appeal in limine. Keeping in mind, the object with which these provisions are introduced, once the assessee* *realises his obligations under the Statute, the purpose with which these provision in terrorem are introduced under the Act, obeys the statutory obligations, pays the tax, then he may not be denied the right of appeal which the Statute has provided to him. In the absence of any express words circumscribing the powers of the Tribunal, the Tribunal has the ample power to recall its earlier order dismissing the appeal in limine and to hear the appeal on merits. If the admitted tax had been paid, the Appellate Authority ought to have admitted the appeal and hear the appeal on merits. Of course, while recalling the order, it is open to the authority to find out whether the said application is made bona fide, is there any unreasonable delay in approaching the Tribunal and other matters. But once the conduct of the assessee is not such as to disentitle him to exercise his right of appeal by obeying the law, that is by depositing the admitted tax liability, the Appellate Authority should be liberal in entertaining these applications and hear the* *appeal on merits and pass appropriate orders, in accordance with law. In the light of what we have stated, the order passed by the Tribunal cannot be found* fault with. Accordingly, the appeal is dismissed."

8. Since the learned Tribunal by the order impugned before this Court has followed the decision of the Division Bench of this Court and has held that in view of the admitted tax liability paid by the assessee later on, the dismissal of the appeal on the ground of non-payment of the admitted tax liability at the point of time of filing of the said appeal was not justified and the appeals were thus restored on the file of learned CIT(A) for considering the said appeals on merits in terms of the judgment of the Division Bench of this Court, with which we respectfully agree. We do not find any substantial question of law arising in the present appeal of the Revenue and therefore, the impugned order of the learned Tribunal deserves to be upheld.

9. The appeals of the Revenue are accordingly dismissed. No costs.

Sd/-
JUDGE

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