

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 12503 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

R G GURJAR....Petitioner(s)

Versus

INCOME TAX OFFICER....Respondent(s)

Appearance:

NIYATI N VAIDYA, ADVOCATE for the Petitioner(s) No. 1

MR KM PARIKH, ADVOCATE for the Respondent(s) No. 1

CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 27/04/2016

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Rule. Mr. K.M. Parikh, learned senior standing counsel, waives service of notice of rule on behalf of the respondent. Having regard to the controversy involved in the present case, the matter was taken up for final hearing yesterday, that is, on 26th April, 2016.

2. By this petition under Article 226 of the Constitution of India, the petitioner seeks a direction to the respondent Income tax Officer to forthwith give appeal effect and consequential net refund after adjustment of any outstanding demands along with interest.

3. The facts stated briefly are that the petitioner which is assessed in the status of a firm, filed its return of income on 28.10.2005 for assessment year 2005-06 on a total income of Rs.3,27,280/-, on which, according to the petitioner, there was a refund due of Rs.1,80,174/-. The assessment came to be finalised by an order dated 17.12.2007 passed under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") on a total income of Rs.35,85,700/-. The petitioner carried the matter in appeal before the Commissioner of Income Tax (Appeals) who, vide order dated 19.11.2008 granted relief by reducing the addition to the extent of Rs.10,01,019/-. Thereafter, the petitioner moved a rectification application before the Commissioner (Appeals) on 30.12.2008 to modify the above order on certain apparent mistakes of law which was also followed by several

reminders. Since the rectification application was not being decided, the petitioner preferred second appeal against the order of Commissioner (Appeals). Thereafter, by an order dated 5.9.2013, the Commissioner (Appeals) rectified his earlier order dated 19.11.2008 whereby he reduced the balance addition sustained in the first appeal. In view of the fact that no grievance survived in respect of assessment year 2005-06, the petitioner withdrew the appeal preferred by it against the order dated 19.11.2008 passed by the Commissioner (Appeals). The petitioner, thereafter, requested the respondent to give effect to the order dated 5.9.2013 passed by the Commissioner (Appeals) on the rectification application. The request was reiterated by forwarding several letters in this regard. However, since the respondent did not pass any order giving effect to the order of the Commissioner (Appeals), the petitioner has approached this court seeking the relief noted hereinabove.

4. Ms. Niyati Vaidya, learned advocate for the petitioner invited the attention of the court to various circulars issued by the Central Board of Direct Taxes for prompt action in the matter of giving effect to the appellate orders, to submit that the respondent herein is duty bound to give effect to the order passed by the Commissioner (Appeals). Reference was also made to the Citizen's Charter, 2014 (Annexure-K to the petition) to point out that the respondent was required to give effect to the appellate order within a period of one month from the date of such order. It was pointed out that against the order dated 5.9.2013 passed by the Commissioner (Appeals), the department has preferred an appeal before the Tribunal; however, no stay has been granted by the Tribunal and hence,

the respondent is duty bound to comply with the order passed by the Commissioner (Appeals) and give effect to it. It was, accordingly, urged that the petition deserves to be allowed by granting the reliefs as prayed for.

5. Opposing the petition, Mr. K. M. Parikh, learned senior standing counsel for the respondent placed reliance upon the averments made in the affidavit-in-reply filed on behalf of the respondent, wherein, the stand taken by the respondent is that the department has preferred an appeal against the order dated 5.9.2013 passed by the Commissioner (Appeals) and hence, it cannot be said that the said order has become final and conclusive and that the petitioner cannot insist upon the revenue to immediately give effect to the order dated 5.9.2013. It is further the case of the respondent that against the order passed by the Commissioner (Appeals), the petitioner had availed of two remedies; one by filing an appeal before the Tribunal being ITA No.3170/Ahd/2010 and another by filing the rectification application under section 154 of the Act. According to the respondent, since the Tribunal has dismissed the appeal by an order dated 10.1.2014 as withdrawn, the income of the petitioner would be assessed at Rs.25,84,681/- and no refund will be due to the petitioner and that on the contrary, a demand of Rs.5,79,824/- will arise. It is further the case of the respondent that a demand of Rs.2,03,007/- is also outstanding for assessment year 2006-07 against the petitioner and that the petitioner firm has been discontinued with effect from assessment year 2008-09. According to the respondent, in view of the fact that in the case of the petitioner, a demand of Rs.5,79,824/- is to arise and a demand of Rs.2,03,007/- is outstanding for assessment

year 2006-07, it cannot be said that the petitioner is entitled to refund of the amount as claimed in the petition. It is also the case of the respondent that the order dated 5.9.2013 has not attained finality in the eye of law as the department's appeal against the said order is pending before the Tribunal and that in view of the fact that the appeal against the order dated 19.11.2008 had been withdrawn by the assessee, such order has become final for all purposes and is in operation. It is in the light of the above stand adopted by him that the respondent has not given effect to the order dated 19.11.2008 passed by the Commissioner (Appeals). The learned counsel, accordingly, urged that the petition being devoid of merits deserves to be dismissed.

6. The facts are not in dispute. By an order dated 19.11.2008, the Commissioner (Appeals) partly allowed the appeal preferred by the petitioner by restricting the addition made by the Assessing Officer under section 40(a)(ia) to Rs.18,60,931/- and deleting the balance amount. On 30.12.2008, the petitioner moved a rectification application before the Commissioner (Appeals) to rectify the earlier order passed by him. Several reminders were forwarded to the Commissioner (Appeals) for passing an order on the rectification application; however, there was considerable delay in deciding the same. In these circumstances, despite the pendency of the rectification application, the petitioner moved an appeal before the Tribunal against the order dated 19.11.2008 passed by the Commissioner (Appeals). However, during the pendency of the appeal, the Commissioner (Appeals) by an order dated 5.9.2013 rectified the earlier order and directed the Assessing Officer to allow the expenditure

which was earlier disallowed under section 40(a)(ia) of the Act where the TDS deducted was deposited with the Government before due date of filing return under section 139(1) of the Act. In view of the fact that the grievance voiced by the petitioner in the appeal preferred before the Tribunal no longer survived, the petitioner sought permission to withdraw the appeal and, accordingly, by an order dated 10.1.2014 the Tribunal dismissed the appeal as withdrawn. It appears that against the order dated 5.9.2013 passed by the Commissioner (Appeals), the department has preferred an appeal before the Tribunal which is still pending adjudication.

7. In the light of the order dated 5.9.2013 passed by the Commissioner (Appeals), the petitioner requested the respondent to give effect to the said order. However, the respondent has, in the light of the stand referred to hereinabove, not given effect to the said order nor has he responded to the communications addressed to him by the petitioner for giving effect to the said order.

8. Section 154(4) of the Act provides that a rectification has to be effected by an order in writing by the authority concerned. Not only that, the authority concerned has to give effect to the order by calculating afresh the amount of tax payable as per the rectified order and the amount of tax paid, if any. Sub-section (5) thereof provides that where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deductor, the Assessing Officer shall make any refund which may be due to such assessee or to the deductor. Section 245 of the Act provides for set off of refund against tax payable

and provides for adjustment of refund against demand. The section requires previous intimation to the assessee of the proposed action for adjustment.

9. In the present case, pursuant to the order dated 19.11.2008, the respondent has neither given effect to such order as contemplated under sub-section (5) of section 154 nor has he made any adjustment after prior intimation to the petitioner under section 245 of the Act. The reason for non-compliance with the mandate of the provisions of sub-section (5) of section 154 of the Act is nothing but an adamant attitude of the respondent, which is clearly reflected from the contentions raised in the affidavit in reply wherein it has been contended that since the petitioner preferred an appeal before the Tribunal against the order dated 19.11.2008 passed by the Commissioner (Appeals) and thereafter withdrew the same, the order dated 19.11.2008 has become final for all purposes and shall be in operation, clearly disregarding the order dated 5.9.2013 passed by the Commissioner (Appeals) on the rectification application filed by the petitioner under section 154 of the Act. Besides, a clearly contradictory stand has been taken by the respondent in the affidavit-in-reply, wherein, on the one hand it is stated that the order dated 19.11.2008 has attained finality and is in operation, whereas on the other hand, it is stated that since the rectification order dated 5.9.2013 is subject-matter of challenge before the Tribunal, it cannot be given effect to at this stage. Essentially the stand of the respondent is that one way or the other, the order dated 5.9.2013 passed by the Commissioner (Appeals) is not required to be given effect to.

10. In the opinion of this court, while not giving effect to the order dated 5.9.2013 passed by the Commissioner (Appeals), the respondent appears to have lost sight of all the statutory provisions and the guidelines issued by the Board from time to time which oblige him to give effect to the order dated 5.9.2013 passed by the Commissioner (Appeals). It may be that the respondent is aggrieved by the order passed by the Commissioner (Appeals) and may have preferred an appeal before the Tribunal; nonetheless, as on date, such order is in operation as the same has not been stayed by the Tribunal or any other court of competent jurisdiction. Under the circumstances, the respondent is statutorily bound to give effect to the said order.

11. Moreover, it is difficult to understand the adamant approach adopted by the respondent in not giving effect to the order passed by the Commissioner (Appeals) when he is duly empowered by the provisions of section 245 of the Act to adjust the refund against other pending dues. In fact, the petitioner has implored the respondent to adjust the refund amount against other dues, but to give effect to the rectification order. The requests made by the petitioner, however, have fallen on deaf ears as the respondent has granted himself a stay against the order passed by the Commissioner (Appeals) and refused to give effect to the same.

12. It is settled legal position that a writ of mandamus can be granted in a case where there is a statutory duty imposed upon the officer concerned and there is failure on the part of the officer to discharge the statutory obligation. No court can

permit any statutory authority to frustrate the statutory requirements of any provision. The respondent being statutorily bound to comply with the provisions of sub-section (5) of section 154 of the Act, in the opinion of this court, cannot refuse to give effect to the order passed by the Commissioner (Appeals). The stand adopted by the respondent in the affidavit-in-reply and as urged before this court is thoroughly misconceived and contrary to the provisions of law. Under the circumstances, the petition deserves to be allowed by issuing the directions as prayed for therein.

13. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The respondent is directed to forthwith give effect to the order dated 5.9.2013 passed by the Commissioner (Appeals) and grant consequential refund along with interest, after adjustment of any outstanding dues. Having regard to the fact that the petitioner was required to approach this court on account of the inaction on the part of the respondent in not complying with the statutory duty cast upon him, costs are quantified at Rs.10,000/- (Rupees ten thousand). Rule is made absolute accordingly.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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