

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]
ORIGINAL SIDE

ITA No. 29 of 2010
G.A. No. 200 OF 2010

COMMISSIONER OF INCOME TAX, KOLKATA, XIX

Versus

M/s. GOLDEN CORPORATION SERVICES

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

A n d

The Hon'ble JUSTICE ARINDAM SINHA

Date : 8th May, 2015.

For Appellant : Mr. P. Dudhoria, Advocate
For Respondent : Mr. Avra Mazumder, Adv.

The Court : The subject matter of challenge in the appeal is a judgment and order dated 12th June, 2009 pertaining to the assessment year 2005-06. The appeal was presented on 28th January, 2010 with an application for condonation of delay of 79 days.

The appellant does not appear to have taken any step thereafter. On 5th March, 2010 the matter was in the list. The appellant was not represented. The

matter was adjourned sine die. It was, however, recorded that the acknowledgement due card had not come back. On what basis the aforesaid information was recorded in the order dated 5th March, 2010 is not clear because it does not appear that anyone appeared on behalf of the appellant. The appellant admittedly did not take any step. There is no Affidavit-of-Service before us to show that any service was sought to be effected soon after the appeal along with application for condonation of delay was filed. If nothing was sought to be served, the acknowledgement card could not have been awaited. The matter thereafter was listed on 9th April, 2015 when no one appeared for the appellant.

The learned Advocate for the respondent-assessee was, however, present and he was requested to give a notice. On 16th April, 2015 both the learned Advocates for the appellant and the respondent appeared and the matter was adjourned thereafter from time to time and has today been listed under the heading 'For Orders'.

Mr. Avra Mazumder, learned Advocate appearing for the assessee-respondent submitted that the appeal was filed after expiry of the prescribed period of limitation, but no copy of the application for condonation of delay was served. He submitted that, in any event, the appeal is not maintainable because the tax effect is less than Rs.10 lacs. He in support of his submission also relied on a judgment in the case of CIT vs. Ranka and Ranka, reported in (2013) 352 ITR 0121. He also cited a Division Bench judgment dated 3rd May, 2011 of this

Court in the case of CIT vs. Ceramic Decorator (P) Ltd. passed in ITAT No. 83 of 2011, wherein the following views were taken:-

“ At the very outset, Mr. Nizamuddin, the learned Advocate appearing for the appellant, points out that the tax effect of the present appeal is less than Rs.10 lakh and this does not come within the exception as pointed out in CBDT Instruction No.3 of 2011 dated 9th February, 2011.

In view of the aforesaid fact, we find that this appeal has been filed by violating the Instructions issued by the CBDT, which was binding upon the appellant in view of the provisions contained in Section 268A of the Income Tax Act. We, thus, dismiss the appeal on that ground alone.”

Mr. P. Dudhuria, learned Advocate appearing for the appellant-revenue submitted that Gujrat High Court in the case of CIT vs. Shambhubhai Mahadev Ahir (Tax Appeal No.2213 of 2010 dated 12th September, 2012) opined that the earlier view expressed by a Division Bench of Gujrat High Court in the case of Suresh Chandra Durgaprosad Khatod holding that the instructions of 2011 would also apply to pending appeals required reconsideration and the matter was referred to a larger Bench.

Mr. J.P. Khaitan, learned senior Advocate volunteered his services and drew our attention to the views expressed by the larger Bench wherein it was held that the instructions of 2011 did not apply to pending appeals.

We have tried to ascertain the views of the learned senior Advocates present before us in the Court. Mr. N. K. Poddar, learned senior Advocate submitted that the consistent view is that the instructions issued by CBDT are applicable to the pending appeals. Any other meaning, according to him, would be contrary to the object sought to be achieved. He in support of his submission drew our attention to the national policy incorporated in the order of the Karnataka High Court. From the National Policy, it appears that the revenue has been instructed not to press matters where the stakes are not high. The policy also contemplates withdrawal of pending cases, which reads as follows:-

“ All pending cases involving the Government has to be reviewed with the intention of filtering frivolous and vexatious matters from the meritorious one. Panels have to be set up to implement categorization, review such cases, to identify cases, which can be withdrawn. These include cases which are covered by decisions of courts and the cases which are found without merit. Such cases have to be withdrawn. This must be done in a time bound fashion”.

Mr. Khaitan, learned senior Advocate opined that in deciding the issue sight cannot be lost of the fact that the appeal was competent on the day it was presented. Mr. M.P. Agarwal, learned Advocate in the panel of the revenue also endorsed the views of Mr. Khaitan.

We have considered the rival submissions. It is well settled that subsequent events can be taken note of by the Court both for the purpose of doing justice between the parties and for the purpose of shortening the litigation. Reference, in this regard, may be made to the judgment of the Apex Court in the case of *Pasupuleti Venkateswarh vs. The Motor & General Traders* reported in (1975) 1 SCC 770, wherein the following views were expressed:-

“ We feel the submissions are devoid of substance. First about the jurisdiction and propriety vis-à-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally, clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the Tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial

justice – subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the Trial Court. if the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion the events as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict in view of the inhibition written into section 10(3) (iii) itself. We are not disposed of disturb this approach in law or finding of fact”.

In the case of Commissioner of Central Excise vs. Mysore Electrical Industries Ltd., reported in (2006) 12 SCC 448, a contention was raised on behalf of the assessee that a beneficial circular in excise matters has to be applied retrospectively and an oppressive circular has to be applied prospectively. The

aforesaid contention appears to have been accepted by the Apex Court expressly or impliedly by the following views appearing in paragraph-15 of the judgment which read as follows:-

“15. In the instant case, the assessee had filed a classification list effective from 1-3-1993, classifying the single panel circuit-breakers under Heading 85.35 and claiming concessional rate of duty at 5% under Notification No. 52/93 dated 28.2.1993. The said classification list was approved by the jurisdictional Assistant Commissioner on 10.6.1993. Thereafter, the assessee cleared the said goods in accordance with the approved classification list. When this approved classification was proposed to be revised to reclassify the single panel circuit-breakers under Heading 85.37 of the Tariff Act, such reclassification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification. In the instant case, the show-cause notice was communicated to the assessee only on 31.12.1993. Therefore, as rightly urged by the learned counsel for the respondent, the reclassification can take effect only from 27.4.1994 and accordingly the differential duty can be demanded only from that date”.

There are weighty reasons why one can say that the instruction of 2011 is also applicable to the pending appeal. But, in the case before us a final opinion on the question is not essential

because the appeal, in this case filed in the year 2010, was a still born appeal because it was barred by limitation. The appellant did not even serve a copy of the application under Section 5 of the Limitation Act for condonation of delay. The matter appeared before us as indicated earlier on 9th April, 2015. Till then no steps were taken. The appellant as a matter of fact woke up after Mr. Mazumder was requested by this Court on 9th April, 2015 to give a notice to the learned Advocate for the appellant. Thereafter, copy of the application for condonation has been served upon him.

We have considered the grounds for condonation. The ground in substance is that the appellant did not pursue the matter seriously. There is no allegation far less any proof of the fact that the appellant was prevented by any cause far less sufficient cause from preferring the appeal within the prescribed period of limitation. There is as such no reason why the delay should be condoned. The application for condonation of delay is therefore dismissed.

Consequently, the appeal stands automatically dismissed.

The question raised by Mr. Mazumder may, however, be considered in an appropriate case in future.

(GIRISH CHANDRA GUPTA,J.)

(ARINDAM SINHA, J.)