

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.07.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

and

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) Nos.361 to 363 of 2006

M.Loganathan .. Appellant in all these T.Cs.

versus

The Income Tax Officer

Ward I(1), Erode.

.. Respondent in all these T.Cs.

PRAYER: Tax Case (Appeal) Nos.361, 362 and 363 of 2006 are filed under Section 260A of the Income Tax Act, 1961 against the order dated 19.10.2005 in I.T.A.Nos.180, 181 and 182/MDS/2001.

For appellant in all these T.Cs. : Mr.Vivek Sriram

For respondent in all these T.Cs. : Mr.T.Ravikumar
Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The following are the substantial questions of law raised in these Tax Case Appeals raised by the assessee:

(i) Whether the order of First Appellate Authority dated 30.3.2000 dismissing the appeal as infructuous relying upon the letter of the authorized representative seeking permission to withdraw on the ground that the matter is pending before the Settlement Commission is sustainable in law?

- (ii) On a proper reading of Section 246A and Section 251 of the Income Tax Act, is not the Income Tax Appellate Tribunal is bound to consider the appeal on merits?
- (iii) Is not the order of the First Appellate Authority dated 30.3.2000 is vitiated by non-application of mind?

2. These appeals relate to the assessment year 1992-93, 1993-94 and 1996-97. It is seen from the facts projected, the assessee made a declaration under the Voluntary Disclosure Scheme, 1997, admitting an income of Rs.86,78,275/-. The declaration was rejected on the ground that the tax was not paid within three months. However, the contents of the disclosure was considered for passing assessment on the assessee. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income Tax (Appeals)-XII, Chennai. It is a matter of record that in the meantime, on 19.07.1999, the assessee moved the Settlement Commission under Section 245C of the Income Tax Act for settlement of the assessment relating to assessment years 1992-93, 1993-94, 1996-97 and 1997-98. It is an admitted fact that as on the date of filing of the petition before the Settlement Commission, the appeal before the Commissioner of Income Tax (Appeals) was very much alive for the assessment years 1992-93, 1993-94 and 1996-97. However, the Chartered Accountant representing the assessee filed a letter dated 23.3.2000 before the Commissioner of Income Tax (Appeals) which reads as follows:

" Sir,

Sub: Withdrawal of Appeal req. - regarding

Ref: M.Loganathan ITA Nos.306, 307 and 324/1999 2000 Asst. Year 96-97, 92-93 and 93-94 (GIR No.L.-1745/I(1)ERODE)

Since the above cases with further assessments for the year 94-95, 95-96 and 97-98 is to be taken up to the Settlement Commission, I request your Honour, to allow is to withdraw the above appeals

Sorry for the inconvenience caused in this regard.

Thanking you,

Sd/-

Chartered Accountant "

3. Based on the letter of withdrawal, by order dated 30.03.2000, the Commissioner of Income Tax (Appeals) dismissed the appeals as infructuous, observing as follows:

" As the appellant has requested, Vide his letter dated 23.3.2000 for withdrawal of the above appeals, the appeals are hereby solemnly affirm and sincerely state as follows: dismissed as infructuous. "

4. It is a matter of record that on 19.07.1999, the Settlement Commission passed an order that by reason of the withdrawal of the appeals after the date of filing of the application, the application itself was not maintainable with regard to the assessment years 1992-93, 1993-94 and 1996-97. Thus rejecting the petition for settlement for the aforementioned assessment year, the Settlement Commission proceeded with the settlement of the case relating to 1997-98 alone.

5. It is a matter of record that as against the order of the Settlement Commission, the assessee came on a writ petition before this Court. In the decision reported in [2008] 302 ITR 139 (M. Loganathan v. Government of India represented by Commissioner of Income-tax), this Court confirmed the order of the Settlement Commission that withdrawal of the appeal meant that there was no pending appeal proceedings before the tax authorities. In the light of the fact that the condition necessary for entering the application, viz., pendency of the appeal itself was not there, the application for settlement for the assessment years 1992-93, 1993-94 and 1996-97 could not be proceeded with. Thus, this Court confirmed the order of the Settlement Commission.

6. Learned counsel appearing for the appellant submitted that when this Court had passed an order in the writ petition filed challenging the order of the Settlement Commission, the assessee did not bring to the knowledge of this Court about the pendency of the Tax Case Appeal filed as against the order of the Tribunal dismissing the assessee's appeal filed against the withdrawal order.

7. It is a matter of record that faced with this situation of dismissal of the petition by the Settlement Commission, consequent on the withdrawal of the appeal, the assessee had no other option except to move the Income Tax Appellate Tribunal by way of an appeal. The Tribunal pointed out that the assessee as well as its representative were aware about the pending matters before the Settlement Commission and when the appellant withdrew the appeals, the Revenue had not objected to the same. The assessee had diligently, with full knowledge, authorised its counsel to withdraw the appeal. Thus holding, the Tribunal followed the decision of the Bombay High Court reported in [1963] 50 ITR 578 (Jagmohandas Gokaldas v. Commissioner of Wealth-tax) and dismissed the assessee's appeal. It observed that the assessee could withdraw the appeal with the permission of the appellate authority, if the other party does not object to the same. It pointed out that once an appeal is filed before an appellate authority, the same has to be disposed of on merits, since a duty is cast on the appellate authority to consider the case on merits in the interest of the assessee and one in larger interest to show as to whether the assessment had not been under-assessed, in which event, the enhancement of assessment had to be made. Referring to the provisions contained in Section 251(1), the Tribunal held that in view of sub clause (c) of sub section (1), the Commissioner of Income Tax (Appeals) shall have the power to pass such order in the appeal as are enumerated under sub clauses (a) and (b) therein; when the party seeks to withdraw an appeal and the other party does not object to such withdrawal, an order could be passed, permitting the withdrawal. Thus, the Tribunal held, there are enough provisions in Section 251(1)(c) with regard to any other case where the appellate authority

could pass an order in the appeal. When the withdrawal of the appeal was not out of undue influence and coercion, no cause of action arose for the assessee to file the appeal before the Tribunal. Aggrieved by this, the present appeals have been filed before this Court by the assessee.

8. Learned counsel appearing for the assessee placed reliance on the decision of the Apex Court reported in [1967] 66 ITR 443 (Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria), wherein the Apex Court held that when an assessee takes the assessment on appeal, he cannot withdraw the same. Thus, when the machinery of the Act has been activated, the assessee cannot prevent the appellate authority from settling the real income to be assessee. Thus, placing reliance on the law declared by the Apex Court as reported in [1967] 66 ITR 443 (Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria), learned counsel appearing for the assessee states that the Tribunal committed a serious error in holding that the withdrawal order passed by the Commissioner was sustainable.

9. Learned Standing Counsel appearing for the Revenue referred to the affidavit filed by the Chartered Accountant, which is extracted in the Tribunal's order in paragraph 16 and submitted that the Tribunal rightly came to the conclusion that when the withdrawal of the appeal by the assessee was not objected to by the Revenue, rightly, the Tribunal came to the conclusion that the appeal had to be dismissed as withdrawn.

10. We agree with the submissions made by the learned counsel appearing for the assessee, representing the appellant herein. Before going into the issue raised by the assessee herein, it is necessary that we extract the provisions relating to Section 251 dealing with the powers of the Commissioner of Appeals. The said Section reads as under:
" 251. Powers of the Appellate Assistant Commissioner or, as the case may be, the Deputy Commissioner (Appeals).--(1) In disposing of an appeal, the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall have the following powers--

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) and after making such further inquiry as may be necessary, and the Assessing Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.--In disposing of an appeal, the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) by the appellant. "

11. A reading of the above provision shows that the powers of the Commissioner extend not only to the subject matter of the appeal against the assessment, that in a given case, it is open to the Appellate Authority to even enhance the assessment. Thus, apart from confirming an assessment or granting relief to the assessee or cancelling the assessment, the first appellate authority has the power of an Assessing Officer to enhance the assessment which is under appeal before him. The Commissioner has the jurisdiction to examine all matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee and remand the case to the Assessing Officer to inquire into matters which were not the subject matter of appeal - vide [1958] 33 ITR 182 (Commissioner of Income-tax v. McMillan and Co.). The only restriction on the power while enhancement is that, the assessee must be given a reasonable opportunity of showing cause as against such assessment or reducing the amount of refund. Explanation appended to Section 251 is a further addition to the power given to the Commissioner as specified under sub section (1). A reading of the above-said Explanation shows that the authority of the Commissioner of Income Tax (Appeals) travels to any matter which may arise out of the proceedings, which is appealed against, notwithstanding the fact that such matter was not raised by an assessee before the Commissioner. The sum and substance is that when the entire assessment is before the Commissioner, the jurisdiction of the Commissioner is not restricted either by the grounds raised or limited by the assessment made and the authority of the Commissioner of Income Tax (Appeals) is co-terminus with that of the Assessing Officer to enhance the assessment too. Barring this, the Act does not contemplate a withdrawal of the appeal filed by an assessee.

12. In the decision reported in [1967] 66 ITR 443 (Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria), the Apex Court pointed out that the right of appeal under Section 31 under the 1922 Act, to which Section 25 of the 1961 Act is in pari materia, is given to the assessee alone as against an order of assessment. When the assessee does not choose to file an appeal, as far as the assessee is concerned, the order becomes final and the Revenue has the power of revisional assessment under Section 263 or 147, as the case may be. The Apex Court observed that the Appellate Assistant Commissioner is not an ordinary Court of appeal. "It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party..." In view of this peculiar situation, on the width of power of the Appellate Commissioner, the Apex Court pointed out:

" It is also well-established that an assessee having once filed an appeal cannot withdraw it. In other words, the Assessee having filed an appeal and brought the machinery of the Act into working, cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuses to appeal at the hearing, the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there has been an under-assessment, he can enhance the assessment (see Commissioner of Income-tax, Punjab v. Nawab Shah Nawaz Khan ([1938] 6 ITR 370). "

In the context of the above-said decision of the Apex Court, the decision reported in [1963] 50 ITR 578 (Jagmohandas Gokaldas v. Commissioner of Wealth-tax) needs to be seen.

13. Aggrieved on the valuation of the net wealth, the assessee in the said decision filed appeals before the Appellate Assistant Commissioner of Wealth Tax, who rejected the appeals. Against this, the assessee went on appeal before the Income Tax Appellate Tribunal. The Tribunal pointed out that under Section 24 Sub Section (6) of the Wealth Tax Act, the assessee can require the Tribunal to refer the question of the disputed value to the arbitration of two valuers. The assessee was called upon to indicate its intention to avail of this benefit. The assessee wrote a letter seeking permission of the Tribunal to withdraw the appeal. The Tribunal passed an order granting permission to withdraw the appeal. Thereafterwards, the assessee preferred two revision petitions before the Commissioner of Wealth Tax under Section 25(1) of the Wealth Tax Act, seeking revision of the order passed by the Appellate Assistant Commissioner and contended that the valuation of the shares adopted by the Wealth Tax Officer was on a wrong basis.

14. The Commissioner of Wealth Tax (Revision), however, rejected the petition summarily on the ground that the order sought for revision was a subject matter of appeal before the Tribunal; hence, he had no jurisdiction to deal with the same. On the revision by the assessee, the Bombay High Court held that the Commissioner was not justified in dismissing the revision application filed on the ground that the orders of the Wealth Tax Officer and the Appellate Authority were a subject matter of appeal before the Tribunal. In considering the withdrawal of the appeal before the Tribunal, the Bombay High Court held that in a Tax Appeal, the assessee could not, as a matter of right, withdraw the appeal; however there was nothing illegal in so doing with the permission of the Appellate Court. The Bombay High Court pointed out that as against an order of assessment, an assessee could file an appeal before the Appellate Assistant Commissioner and an assessee could test the validity of the Assistant Appellate Commissioner's order at the hands of the appellate authority, namely, the Tribunal, or give the validity of the order of assessment or that of the Appellate Assistant Commissioner decided at the hands of the Commissioner. In the background of the provision, it held that it is difficult to say that mere filing of a competent appeal without carrying the matter to a final decision would amount to a full exercise of that right. However, it is open to the assessee to waive the right of appeal before the expiry of the period of limitation and seek a revisional remedy. The Bombay High Court held that when the legislature permits the right of an assessee to waive a right of appeal prior to the period of limitation, it can reasonably be assumed that the legislature did not intend to prohibit the assessee from waiving his right of appeal when an appeal had been filed by the assessee, unless it can genuinely be said that in no case, if the appeal had been filed, the assessee could withdraw an appeal. The Bombay High Court held that if that be the true legal position, it would necessarily follow that once a competent appeal had been filed, it is not open to an assessee to waive a right of appeal.

15. In considering this issue, the Bombay High Court considered the decision reported in [1938] 6 ITR 370 (Commissioner of Income-tax v. Nawab Shah Nawaz Khan), a decision considered by the Apex Court in the decision reported in [1967] 66 ITR 443 (Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria) and pointed out that in the decision reported in [1938] 6 ITR 370 (Commissioner of Income-tax v. Nawab Shah Nawaz Khan) the assessee sought to withdraw the appeal after the appellate authority issued a notice of

enhancement of assessment. On a consideration of the decision reported in [1938] 6 ITR 370 (Commissioner of Income-tax v. Nawab Shah Nawaz Khan), the Bombay High Court viewed that the ratio deductible from the decision is that, after the filing of an appeal, the tax payer cannot, at his option or at his discretion, withdraw the appeal to the prejudice of the revenue.

16. On the facts of the case, the High Court held that the Chartered Accountant wrote a letter to the Registrar of the Tribunal, requesting him to obtain permission from the Tribunal to withdraw the appeal and on consideration of the application, the Tribunal granted the assessee the permission to withdraw the appeal. In the light of the above-said facts, the High Court held that the Commissioner of Wealth Tax was not justified in dismissing the Revision Application in limine.

17. As far as the present case is concerned, there is no dispute on the fact that the assessee had filed an appeal on time, challenging the merits of the assessment. If the Commissioner (Appeals) has to go into the merits of the assessment, certainly, all the enumerated powers would have been available to an appellate authority to consider the merits of the appeal, including those matters which were not specifically raised before the Commissioner. Given the well settled principle of law that a Tax Appeal before the hierarchy of authority is only a continuation of an assessment proceedings to arrive at the right income for correct demand to be made in accordance with law, once the machinery of the appeal jurisdiction is set in motion, there is no stopping of such machinery on any account, for the reason that once the appellate authority assumes jurisdiction, no other authority including the revisional authority, could touch the assessment.

18. The assessee herein sought for withdrawal of the appeal to go before the Settlement Commission, which dismissed the petition on the ground that there was no appeal pending a mandatory requirement as on the date of taking up a required application. Thus, on the question as to whether there could be withdrawal of the appeal by the assessee, the decision of the Apex Court reported in [1967] 66 ITR 443 (Commissioner of Income-tax v. Rai Bahadur Hardutroy Motilal Chamaria) gives the answer that once the machinery is set in motion, the assessee cannot withdraw the appeal. We do not find any justification to read into the provision under Section 251 as to the objection or no objection from the Revenue for such withdrawal.

19. Thus after filing an appeal, the tax payer could not, at his option or at his discretion, withdraw an appeal to the prejudice of the Revenue. In the light of the decision of the Apex Court, we do not think, the decision of the Bombay High Court would have a bearing to the case herein which was concerned with the withdrawal of the appeal before the Tribunal.

20. In considering the question as to the withdrawal of the appeal from the files of the Commissioner of Income Tax (Appeals), we do not think, the question of objection or no objection could play any role. Section 251 of the Income Tax Act deals with the powers of the Commissioner of Appeals as ranging from affirming, reducing, enhancing or annulling the assessment. Explanation to Section 251 reads further authority into the jurisdiction of the

Commissioner (Appeals) to consider and decide any matter arising out of the proceedings in which the order appealed against was passed notwithstanding the fact that such matter was not raised before the Commissioner (Appeals) by the assessee. Thus any reading of limitation on the jurisdiction of the Appellate Authority in the name of an objection or no objection is totally unwarranted, which, in essence, would only reduce the width of power of the Commissioner of Income Tax (Appeals) preserved under the said Explanation.

21. The Bombay High Court was concerned about the width of power of the Tribunal in permitting withdrawal of the appeal before the Tribunal at the instance of the appellant. In the background of the provisions as they stand and in the light of the law declared by the Apex Court, we hold that the Tribunal is not justified in its reasoning that the order passed by the First Appellate Authority allowing the withdrawal of the appeal was justifiable on facts as the Revenue had not objected to the same.

22. Section 245(2) states that when an application is proceeded with under Section 245D, until an order is passed under Section 245D(4), the Settlement Commission shall alone have the exclusive jurisdiction to exercise the power and perform the function of an Income Tax Authority under the Act in relation to the case. Under Section 245D(7), when the settlement becomes void as provided under Section 245D(6), the proceedings covered under the settlement application shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with and the Income-tax authority may complete the proceedings. Thus, even going by the above proceedings, if a contingency of the nature contemplated under Section 245D(6) is to arise, then the power of the Appellate Authority under Section 251 to enhance the assessment thus available, the question of considering the withdrawal with or without objection from the Revenue does not arise. The words "pass such orders thereon as it thinks fit" as appearing under Section 254(1), includes all powers except the power of enhancement, which is specifically conferred on the Commissioner of Income (Tax) Appeals) by Section 251 - Refer [1967] 63 ITR 232 (Hukumchand Mills Ltd. v. Commissioner of Income-tax).

23. Having regard to the reasoning that we have given, we have no hesitation in setting aside the order of the Tribunal and restoring the matter back to the file of the Commissioner of Income Tax (Appeals) for considering the assessment on merits and pass orders thereon in accordance with law, after giving the assessee an opportunity.

In the result, these Tax Case Appeals stand allowed. No costs.

Index: Yes / No
Internet: Yes / No

(C.V.,J.) (K.R.C.B.,J.)
18.07.2012

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To

1. The Income Tax Appellate Tribunal, Bench 'D', Chennai.
2. The Commissioner of Income Tax (Appeals)-XII, Chennai.
3. The Income Tax Officer, Ward I(1), Erode.

CHITRA VENKATARAMAN,J.
and
K.RAVICHANDRABAABU,J.

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of 2006

Dated: 18.07.2012