

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Restoration Application No. 134 of 2012
Miscellaneous Application No. 1702 of 2012
In
Income Tax Appeal No. 64 of 2005

Commissioner of Income tax
..... Appellant

Versus

Rajendra Aggarwal
..... Respondent

And

Restoration Application No. 132 of 2012
Miscellaneous Application No. 1704 of 2012
In
Income Tax Appeal No. 65 of 2005

Commissioner of Income tax
..... Appellant

Versus

Rajendra Aggarwal
..... Respondent

And

Restoration Application No. 133 of 2012
Miscellaneous Application No. 1703 of 2012
In
Income Tax Appeal No. 66 of 2005

Commissioner of Income tax
..... Appellant

Versus

Rajendra Aggarwal

.....

Respondent

Mr. H.M. Bhatia, Standing Counsel for the appellant.
 Mr. P.R. Mullick, Advocate for the respondent / applicant.

JUDGMENT

Coram : **Hon'ble Barin Ghosh, C. J.**
Hon'ble U.C. Dhyani, J.

BARIN GHOSH, C.J. (Oral)

Some reasons have been furnished for condoning four years and four months' delay in filing the application for recalling the ex parte order passed by this court. The reasons, thus furnished, are though not very much convincing, but having regard to the fact that it is stated that, there are only two persons available and, one of them was a heart patient and the other was suffering from mental disorder, we allow the application for condonation of delay in preferring said application. We have considered the application for recalling the order passed by this court whereby, this court has allowed the appeal preferred against the order of the Tribunal. The learned counsel submitted that the order of this court is erroneous and, accordingly, the same is required to be recalled and, thereafter, the matter has to be decided in the light of the Law governing the subject.

2. The facts to which there appears to be no dispute are that in respect of a particular assessment year, the Assessing Officer asked the Valuation Officer to make valuation of a building, which was used by the applicant / assessee, as a Mall. The Valuation Officer submitted a report and, there indicated that, the cost of construction of the building in question is more than what has been disclosed in the returns filed by the assessee. The Assessing Officer accepted the report, after giving a copy of the report to the assessee and, upon giving him an opportunity of hearing on the report. In consequence thereof, the difference was added as additional investment in the said building and, consequently, the same became additional income of the assessee, for that particular assessment year, namely Assessment Year 1997-98. The same principle was applied in relation to other assessment years also. The assessee went before the appellate authority and, lost in respect of the matter, as discussed above, in all appeals, except in one. The matter was then taken up before the Tribunal by the assessee, in the appeals it lost and, by the revenue in the appeal it lost. The Tribunal held in favour of the assessee only on the basis of the ratio of the judgment of the Hon'ble Supreme Court rendered in the case of *Amiya Bala Paul vs. Commissioner of Income Tax, Shillong*, reported in (2003) 6 Supreme Court Cases 342. In that case, the Hon'ble Court held that, while exercising power under Sections 131 and 133(6) of the Income Tax Act, the Assessing Officer

had no power to take recourse to Section 55A of the said Act. While dealing with the subject, the Hon'ble Supreme Court had no occasion to consider the scope and effect of Section 142A of the said Act, as that Section was not in the Statute when the said judgment was rendered. At this juncture, it is to be taken note of that, while Sections 131 and 133 are contained in Chapter 13 of the Income Tax Act, delineating appointment and control of Income Tax authorities, their jurisdiction, their power and those pertaining to disclosure of information; Section 144A is contained in Chapter 14, whereby procedure for assessment has been prescribed. A look at Section 142A would make it absolutely clear that, if for the purpose of making an assessment or re-assessment under the Income Tax Act, an estimate of a value of investment referred to in Section 69 of the Act is require to be made, the Assessing Officer is authorized to require the Valuation Officer to make an estimate of such value and, report the same to him. In view of the language used in Section 142A, we have no hesitation in concluding that when power is exercised under Section 142A, exercise of such power cannot be held to be incompetent on the basis of the Law laid down by the Hon'ble Supreme Court in *Amiya Bala Paul* (Supra). In the circumstances, the first contention of the applicant to the effect that the order of this court holding that the order of the Tribunal is incorrect, in view of *Amiya Bala Paul*, is not sustainable.

3. The next contention of the applicant is that all the assessments were concluded before 30th September 2004 and, accordingly, in terms of the Proviso contained in Section 142A, the provisions contained in Section 142A could not be applied in relation to the assessments, being the subject matter of dispute. There is no dispute that the original assessments were made on or before 30th September 2004. There is also no dispute that the matter reached the Tribunal on or before 30th September 2004. At the same time, the judgment of the Tribunal was also rendered before 30th September 2004. However, the fact remains, within the period of limitation, an appeal against the judgment of the Tribunal was preferred before this court. The question in such circumstances is, whether, could it be said that the assessment was made before 30th September 2004. The learned counsel appearing in support of the application submitted that the Hon'ble High Court of Delhi, Hon'ble Allahabad High Court and the Hon'ble Kerala High Court have held that, assessment made, as provided in the Proviso to Section 142A, must be deemed to be the original assessment and, not continuation thereof in the appeal, either before the appellate authority or before the Tribunal or before the High Court. We are not in a position to accept those views in the absence of good reasons in support thereof. We have not been able to locate any good reason for, in Law, an appeal is continuation of the

original proceeding and, accordingly, when the appeal is decided, the order passed by the authority, against whose order appeal has been preferred, stands merged in the order of the appellate court. Then there is no existence of the original order, in Law. In the event, assessment was made before 30th September 2004, and the time to prefer an appeal had not expired before 30th September 2004, and an appeal had been preferred within time by which such appeal could be filed, it could not be said that the assessment was made before 30th September 2004. It can only be said that the assessments was made on the date when the appeal was decided. In the event, the assessment was made before 30th September 2004, and time to file appeal against the assessment was available, even after 30th September 2004, but the appeal was not filed within time so allowed, then it could be said that the assessment has been made and, accordingly, that may be a ground for contending that the court shall not exercise its discretion to allow an application for condonation of delay in preferring the appeal. The same logic applies when an appeal from the order of an appellate authority is to be preferred before the Tribunal, as well as, when an appeal has to be preferred before the High Court against the order of the Tribunal. That being the philosophy known in Law, we are unable to follow the judgments of the Hon'ble courts referred to above and, hold that in the instant case, the assessment was not made before 30th September 2004.

4. The learned counsel lastly contended that the matter is a fit case for remand, inasmuch as, the Tribunal has not gone into the question, whether, the valuation, as was made, was properly made, which was one of the grounds taken in the appeal. We think there is some substance in the said contention and, accordingly, we recall the order and, remit back the matter to the Tribunal for the purpose of consideration of other aspects raised in the appeals by the parties, except the one concluded hereby read with the correct pronouncement made in the recalled order pertaining to the scope, ambit, applicability of Section 142A of the Act in relation to the case of the assessee.

(U.C. Dhyani, J.)

(Barin Ghosh, C.J.)

25.04.2012

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