

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 7163 of 2019**=====

DOLPHIN METAL (INDIA) LTD THROUGH DIPAK BHAGAT

Versus

INCOME TAX OFFICER, WARD 1(4)

=====

Appearance:

ADITYA A GUPTA(7875) for the Petitioner(s) No. 1

MOHIT A GUPTA(8967) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

**HONOURABLE MR. JUSTICE ILESH J. VORA****Date : 16/02/2021****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

*“(A) Your Lordships be pleased to issue writ of certiorari or any other writ, direction, order in the nature of certiorari to quash and set aside the order dated 31.07.2018 passed by the Hon'ble Tribunal in Case No.M.A No.157/2017 arising out of ITA No.1263/2011, which is annexed at Annexure A to this petition in the interest of justice.*

*(B) Your Lordships be pleased to issue writ of certiorari or any other writ, direction, order in the nature of certiorari to quash and set aside the order dated 12.12.2014 passed by the Hon'ble Tribunal in the ITA No.1263 of 2011 which is annexed at Annexure B to this petition and further to restore the appeal to the file of the Tribunal in the interest of justice.*

*(C) Your Lordships be pleased to stay the operation and implementation of the impugned order dated 12.12.2014 passed by the Hon'ble Tribunal in the ITA No.1263 of 2011 at Annexure B to this petition pending admission, hearing and final disposal of this petition in the interest of justice.*

*(D) Your Lordships be pleased to stay the*

*operation and implementation of demand notice.”*

2. We need not delve much into the facts of this litigation as our order dated 02.02.2021 would make the picture abundantly clear. The order dated 02.02.2021 passed by this Court reads as under:

*“1. It appears that the respondent has not been served with the notice issued by this Court. However, with a view to understand the controversy involved in the present litigation, we have heard Mr. Mohit Gupta, the learned counsel appearing for the writ applicant for some time.*

*2. It appears that the writ applicant preferred a miscellaneous application under Section 254 of the Income Tax Act, 1961. The said application came to be rejected by the Tribunal by the impugned order on the ground that the same was time barred. While rejecting the application, the Tribunal observed in Para-3.1 as under;*

*“3.1 Further, we have noticed that the assessee has filed this Miscellaneous Application dated 22.05.2017 on 23.05.2017 against the above cited order dated 12.12.2014. In this respect we find that w.e.f. From 1.6.2016 the time limit for filing application for rectifying any mistake apparent from the record is at any time within six month from the end of the month in which the order was passed. However, the assessee has filed the Miscellaneous Application dated 22.05.2017 beyond the time limit prescribed in the Act. After considering the above facts and the clear provision of section 254(2) of the Act we do not find any merit in the request of the assessee for condonation of delay in filing the above cited Miscellaneous Application. Accordingly, the Miscellaneous Application of the assessee stands dismissed.”*

*3. Thus, it appears that the order, dismissing the appeal for non-prosecution, was passed by the Appellate Tribunal on 12.12.2014, whereas the Miscellaneous Application was filed on 23<sup>rd</sup> May, 2017. The Appellate Tribunal took the view that with effect from 1<sup>st</sup> June, 2016, the period of limitation, during which the*

rectification application can be filed, is six months. Prior to the amendment, it was four years. The argument is that the new law of limitation which came into force with effect from 1<sup>st</sup> June, 2016, providing for a shorter period, cannot extinguish a vested right of action. In other words, the amendment has been made effective virtually in case of the assessee with retrospective effect. Though the amendment does not show that it is applicable with retrospective effect, however, the existing right has been extinguished with retrospective effect in case of the assessee.

4. In the aforesaid context, strong reliance has been placed on the decision of the Supreme Court in the case of *M./P. Steel Corporation vs. Commissioner of Central Excise*, reported in (2015) 7 SCC 58 and a Division Bench of the Madhya Pradesh High Court in the case of *District Central Co-op. Banik Ltd. vs. Union of India*, reported in (2017) 398 ITR 161 (MP). The Madhya Pradesh High Court has relied upon the decision of the Supreme Court in the case of *M.P. Steel Corporation (supra)*.

5. We have thought fit to pass this short order so that the respondent can respond to the same on the next date of hearing.

6. Let fresh notice be issued to the respondent for final disposal, returnable on 9<sup>th</sup> February, 2021. The respondent shall be served directly through E-mail.

7. Mr. Gupta, the learned counsel, shall furnish one set of his entire paper-book at the earliest to Ms. Mauna Bhatt, the learned senior standing counsel who would be appearing for the respondent as the matter is from Ahmedabad."

3. Mr. M. R. Bhatt, the learned Senior Counsel assisted by Mrs. Mauna M. Bhatt, the learned Sr. Standing Counsel has appeared on behalf of the Revenue.

4. Mr. Bhatt with his usual fairness has pointed out two important aspects of the matter. According to Mr. Bhatt, even otherwise, the Appellate Tribunal could not have dismissed the

appeal for non-prosecution. On the issue of limitation also, we have the able assistance of Mr. Bhatt. Mr. Bhatt has fairly submitted that the impugned order passed by the Appellate Tribunal is not sustainable in law. Mr. Bhatt brought to our notice the decision of this High Court in the case of **Sanket Estate & Finance Pvt. Ltd. Vs. Commissioner of Income Tax [Tax Appeal No.133/2012 with Tax Appeal No.134/2012, reported in 32 Taxmann.com 342]**.

5. In the Tax Appeal No.133/2012, the following substantial question of law was raised for the consideration of the Court :

*"Whether on the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal was justified in dismissing the appeal preferred by the present appellant as not maintainable in view of the decision of the Income Tax Appellate Tribunal, Delhi Bench, in the case of CIT Vs. Multipan India (P) Ltd. (1991) 38 ITD 320?"*

6. A Coordinate Bench while allowing the Tax Appeals filed by the assessee and answering the substantial question of law in favour of the assessee and against the revenue, held as under:

*"18. It would be profitable, at this stage, to refer to Rules 19, 20 and 24 of the Income-Tax Rules, which read as follows:"*

*Rules 19, 20 and 24 of the Income tax ( Appellate Tribunal) Rules, 1963, read as thus:"*

*"19.(1) The Tribunal shall notify to the parties specifying the date and place of hearing of the appeal and send a copy of the memorandum of appeal to the respondent either before or with such notice.*

*(2) The issue of the notice referred to in subrule*

(1) shall not by itself be deemed to mean that the appeal has been admitted.

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Rule 20. In an appeal under subsection(1) of Section 253, in fixing the date for the respondent to appear and answer to the appeal, a reasonable time shall be allowed for the necessary communication with the Commissioner through the proper channel and for the issue of instructions to an authorised representative to appear and answer on behalf of the respondent.

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Rule 24. Where, on the day fixed for hearing or any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorized representative when the appeal is on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his nonappearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal.

19. The Apex Court in the case of Commissioner of Income-tax vs. S. Chenniappa Mudaliar (supra), prior to the amendment of Rule 24 (1946 Rules) was deciding this very question as to whether the Tribunal is bound to give proper reasons of question of fact as well as law on merits and whether it can dismiss the appeal on the default of appearance. It was also deciding as to whether Rule 24 of 1946 Rules, which provided for dismissal of appeal for failure of appellant to appear is ultra vires as being in conflict with the provision of Section 33(4) of 1922 Act. It is answered in affirmation.

20. In the case of Rajendra Prasad Borah vs. Income Tax Appellate Tribunal and others (supra), while interpreting Rule 24 of Income Tax Rules, 1963, Gauhati High Court has held that per se, it does not empower the Tribunal to dismiss the appeal for default in absence of appellant in the following words.

"After hearing learned counsel for the

parties and on a perusal of the provisions of law referred to hereinabove, it is more than apparent that the course adopted by the learned Tribunal in disposing of the assessee's appeals in the manner as delineated in the impugned order, cannot be sustained. Apart from the fact that, section 254(earlier section 33) of the Act makes it incumbent on the learned Tribunal to dispose of the appeals on merits as has been enunciated by the apex court in CIT v. S. Chenniappa Mudaliar [1969] 74 ITR 41, rule 24 as it stands, per se does not empower the learned Tribunal to dismiss an appeal for default in the absence of the appellant. The learned Tribunal's reliance on the decision of the Incometax Appellate Tribunal, Delhi, rendered in CIT vs. Multiplan India (P.) Ltd. [1991] 38 ITD 320, is apparently misplaced in the teeth of the decision of the apex court in CIT vs. S. Chenniappa Mudaliar [1969] 74 ITR 41."

21. In the case of Tribhuwan kumar and others vs. Commisioner of IncomeTax and another (supra), the Rajasthan High Court while interpreting Rules 19,20 and 24 of 1963 Rules also examined the decision of Delhi Bench rendered in the case of CIT vs. Multiplan India (P) Ltd. (1991) 38 ITD 320 by holding thus:"

"6. Having considered the aforesaid three provisions, we are unable to comprehend the view of the Tribunal that the assessee's appeal was not maintainable in view of rules 19 and 20 of the Rules. Surely the appeal preferred by the assessee was competent under section 253 of the Incometax Act. How, in the circumstances the Tribunal could hold that the assessee's appeal from the order of the Commissioner of Incometax (Appeals) was not maintainable when the appeal lay from the said order. The Tribunal misread and misapplied rules 19 and 20 of the Rules of 1963, in holding that the assessee's appeal was not maintainable. If for any reason, the assessee was not being represented on the date of hearing, the Tribunal could have proceeded for hearing of the appeal ex parte provided in rule 24 but that was not done. The appeal has not been heard on the merits and the Tribunal erroneously held that the assessee's appeal is not maintainable in

law.”

22. In the case of Anil Kumar Agrahari vs. Commissioner of IncomeTax (supra), the Madhya Pradesh High Court was examining the dismissal for non-prosecution of appeal by the Tribunal and it held categorically that the Tribunal could not have dismissed the appeal without going into the merits of the case, by rejecting the adjournment application filed by the counsel. And, the matter was remanded back to the Tribunal for adjudication on merits. It also took note of decision rendered in Rajendra Prasad Borah vs. IncomeTax Appellate Tribunal and others (supra) as also the decision rendered by the Apex Court in Commissioner of Income-tax vs. S. Chenniappa Mudaliar (supra) so also the decision of the Tribhuwan kumar and others vs. Commissioner of IncomeTax and another (supra), and held that the Tribunal could not have dismissed the appeal without adverting to the merits of the case and on the line of the decisions of Gauhati and Rajasthan High Courts, it set aside the order of Tribunal dismissing the appeal for want of prosecution.

23. In the instant case, as could be noted from the order impugned, that the Tribunal has chosen to dismiss the appeal on the ground of nonprosecution. It also noted that RPAD was sent and the same had returned with the remark of the postal department as none having claimed the same. Instead of deciding the matter on merits, it chose to dismiss the same for want of prosecution and this order in our opinion is contrary to the provision of law.

24. When the Supreme Court decided the case of Commissioner of Incometax vs. S. Chenniappa Mudaliar (supra), no amendment in Rule in the IncomeTax Appellate Tribunal Rules was made as yet. Rule 24 of the Income Tax Rules, 1963 makes it abundantly clear that the Tribunal cannot dismiss the appeal without adverting to the merits. Even on the day on which the hearing is adjourned, the appellant chose not to appear in person or through an authorised representative. It is incumbent upon the Tribunal to dispose of the appeal on merits after hearing the respondent and afterwards if the appellant appears and satisfy the Tribunal, sufficient cause for its nonappearance on the date of hearing, the Tribunal can set aside the ex parte order and restore the appeal. However, reliance of the Tribunal on the decision of the Delhi Bench in the case of CIT vs. Multiplan India (P) Ltd. (supra) is erroneous and,

*therefore, requires to be set aside. In the instant case, it can be noted from the letters addressed by the present appellant to the Tribunal that it was awaiting transfer of both the appeals of 199899 and 19992000 since CIT (Appeals) had relied upon such orders of earlier years."*

7. In view of the aforesaid decision, the order passed by the Income Tax Appellate Tribunal, Ahmedabad "B" Bench, Ahmedabad, dated 31.07.2018 declining to condone the delay and restore the appeal to its original file is hereby quashed and set aside. The order passed by the Appellate Tribunal dated 12.12.2014 dismissing the appeal for non-prosecution is also quashed and set aside. The original IT Appeal No.1263/AHD/2011 for A.Y. 2006-07 is ordered to be restored to its original file. The Appellate Tribunal shall fix the hearing of this appeal and dispose of the same in accordance with law. We expect the writ applicant this time to fully cooperate in the expeditious disposal of the appeal.
8. With the above, present writ application stands disposed of.

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**(J. B. PARDIWALA, J)**

**(ILESH J. VORA, J)**

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