

आयकर अपीलीय अधिकरण, 'बी' (एस एम सी) न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' (SMC) BENCH, CHENNAI**

श्री महावीर सिंह, उपाध्यक्ष के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT

आयकर अपील सं./ITA No.: **773/CHNY/2023**
निर्धारण वर्ष/Assessment Year: 2013-14

Shri P. Krishnamurthy,
2/75, Tindivanam Pondi Road,
Thiruchitrambalam,
Vanur,
Villupuram – 605 111.

The Income Tax Officer,
Vs. Ward 2,
Villupuram.

PAN: AWZPK 9804D
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri S. Sridhar, Advocate
: Shri G.Suresh, JCIT

सुनवाई की तारीख/Date of Hearing : 01.01.2024
घोषणा की तारीख/Date of Pronouncement : 07.02.2024

आदेश /ORDER

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in Order No.ITBA/NFAC/S/250/2023-24/1053901646(1) dated 23.06.2023. The assessment order was passed by the Income Tax Officer, Ward-2, Villupuram for the assessment year 2013-14 u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 24.03.2016.

2. The only issue in this appeal of assessee is as regards to the order of CIT(A) dismissing the appeal as not-maintainable as the assessee has already availed alternative remedy u/s.264 of the Act against the assessment order.

3. Brief facts are that the assessee filed his return of income for the relevant assessment year 2013-14 on 04.08.2013 online. The return of income was processed u/s.143(1) of the Act and subsequently, taken up for scrutiny assessment by issuing notice u/s.143(2) of the Act. The AO framed assessment u/s.143(3) of the Act vide order dated 24.03.2016. The AO made addition of unexplained investment u/s.69 of the Act and also addition of bank interest. The assessee instead of filing of appeal before CIT(A) against this assessment order, preferred revision petition u/s.264 of the Act dated 11.06.2016 and the revision petition was considered by PCIT and dismissed vide order dated 28.03.2018 in C.No.9127/2/PCIT/PDY/264/2017-18.

4. Consequent to dismissal of revision petition by PCIT dated 28.03.2018, the assessee preferred appeal before CIT(A) in Form No.35 on 05.08.2018 with a delay of almost 2½ years. The

assessee before CIT(A) explained the cause of delay and the CIT(A) noted the same in para 2 as under:-

2.0 As per the details available on record, the order was served on 24.03.2016 and appeal was filed on 05.08.2018, vide Form No.35, well outside the time limit prescribed u/s. 249(2)(b) of the Act. In this regard, the explained the cause of delay as under

The Appellant instead of filing the appeal preferred revision petition u/s 264 of the Act on 11.06.2016 and the said revision petition was considered and dismissed in the order passed by the PCIT, Pondicherry in C.No.9127/2/PCIT/PDY/264/2017-18 dated 28.03. 2018. In the light of the decision of Jurisdictional High Court reported in 250 ITR 187 and followed by the Jurisdictional Bench of the Income Tax Appellate Tribunal in the case of M/s Premier Distilleries Ltd. in ITA.No.3185/2016 dated 14.06.2018, the present appeal is being preferred with a prayer for admission of the appeal by condoning the technical delay for adjudication of the issues arising from the assessment order on merits.

4.1 After considering the submissions of the assessee, the CIT(A) dismissed the appeal of assessee as not-maintainable, as the assessee has already taken recourse u/s.264 of the Act and once the assessee has opted alternative remedy, relying on the decision of Hon'ble Orissa High Court in the case of Orissa Rural Housing Development Corporation Ltd., vs. ACIT reported in (2012) 343 ITR 316, dismissed the appeal as not-maintainable by observing in para 3.0 as under:-

3.0 I have considered the submissions of the assessee. The assessee preferred to take recourse u/s 264 of the Act and filed an application to the PCIT, Pondicherry who admittedly dismissed the petition vide order C.No.9127/2/PCIT/PDYI264/2017-18 dated 28.03.2018. The assessee was

therefore legally barred from agitating the same issue u/s 246A. In the case M/s Orissa Rural Housing Development Corpn Ltd(2012) 204 Taxman 673, it was held that remedy available to an assessee u/s 264 was an alternative remedy ,who does not want to avail remedy by way of an appeal and assessee was not permitted to pursue both remedies either simultaneously or one after another. Since the assessee already availed the remedy u/s 264, the present appeal is not maintainable. The appeal is therefore dismissed.

Aggrieved, now assessee is in appeal before the Tribunal.

5. Before me, the Id. counsel for the assessee relied on the decision of Hon'ble High Court of Madras in the case of CIT vs. D. Lakshminarayanapathi reported in (2001) 250 ITR 187, wherein the Hon'ble Madras High Court has held that invoking the revisional jurisdiction does not constitute a bar for filing of appeal before Appellate Assistant Commissioner (AAC). The Id. counsel for the assessee assailed the order by arguing that the CIT(A) has relied on the decision of Hon'ble Orissa High Court, which is a non-jurisdictional High Court and now, he is relying on the decision of Jurisdictional High Court. The Id. counsel also relied on the Co-ordinate Bench decision in the case of Premier Distilleries Ltd., vs. DCIT in ITA No.3185/CHNY/2016, order dated 14.06.2018, wherein exactly on identical facts, the Tribunal held that when the assessee is invoking revisional jurisdiction u/s.264 of the Act, it cannot constitute a bar for invoking the appellate jurisdiction and hence, the

appeal before CIT(A), in case revision petition is dismissed u/s.264 of the Act, is maintainable. In view of the above, the Id. counsel stated that the order of CIT(A) be set aside and CIT(A) be directed to consider the condonation petition as well as decide the issue on merits.

6. On the other hand, the Id. Senior DR argued that once the assessee is availing alternative remedy, the issue is fully covered by the decision of Hon'ble Orissa High Court in the case of Orissa Rural Housing Development Corporation Ltd., *supra* and even the provisions of the Act bars from filing of these appeals. The Id. Senior DR relied on CBDT circular No.229 dated 09.08.1977, wherein creation of new appellate authority namely Commissioner (Appeals) is defined and vide this circular, the CBDT has clarified 'Other provisions' under para 27.6 as under:-

27.6 Other provisions - The Finance (No. 2) Act, 1977 has amended a number of other provisions of, and made a few new provisions in, the Income-tax Act to provide for the appointment, jurisdiction, functions and powers of the Commissioners of Income-tax (Appeals), the procedure to be followed in appeals filed before them, and other related matters. These provisions are briefly indicated below :

Section 2(16A) - Definition of Commissioner (Appeals).

Section 116(c) - Inclusion of Commissioner of Income-tax (Appeals) as an income-tax authority.

Section 117(1) - Appointment of Commissioner (Appeals).

Section 119 - Board not to issue instructions, etc., so as to interfere with the discretion of the Commissioner (Appeals) in exercise of his appellate functions.

Section 121A - Jurisdiction of Commissioners (Appeals).

Sections 125 and 125A - Appellate jurisdiction of Commissioner of Income-tax excluded in cases where assessment functions of the Income-tax Officer are assigned to the Inspecting Assistant Commissioner.

Section 126 - Board may empower Commissioners (Appeals) to perform such functions in respect of such area or of such classes of persons or of such classes of income as may be specified by the Board by notification in the Official Gazette.

Sections 131, 133 and 134 - Commissioners (Appeals) to have the same powers as Appellate Assistant Commissioners in regard to discovery, production of evidence, etc.; to call for information; and to inspect registers of companies.

Section 154 - Rectification of mistakes by Commissioners (Appeals).

Sections 177(2), 189(2), 271, 271A and 272A - Commissioners (Appeals) to have the same powers as Appellate Assistant Commissioners in regard to imposition of penalty.

Section 245 - Commissioners (Appeals) authorised to set off refund against tax remaining payable.

Section 245A - Inclusion of Commissioner (Appeals) as an income-tax authority for purposes of Chapter XIXA relating to settlement of cases.

Sections 247 to 251 - Provisions relating to appeal by partner or person denying liability to deduct tax ; form of appeal and limitation; procedure in appeal; and powers of Appellate Assistant Commissioners in disposing of appeals to apply in relation to appeals before Commissioners (Appeals).

Section 253 - Appeals against orders passed by Commissioners (Appeals) to lie to the Appellate Tribunal, and departmental appeals to the Tribunal against such orders to be authorised by the Commissioner of Income-tax.

Section 264 - Commissioners of Income-tax not to revise any order under that section in cases where an appeal lies against the order to the Commissioner (Appeals) but has not been made and the time within which such appeal may be made has not expired, or the assessee has not waived his right of appeal, or the order has been made the subject of an appeal to the Commissioner (Appeals).

Section 267 - Amendment of assessment in pursuance of orders passed in appeal by Commissioners (Appeals).

Sections 274 and 275 - Procedure for imposing penalty and bar of limitation for imposing penalties by Commissioners (Appeals).

Section 287 - Publication of information respecting any penalty imposed on a person prohibited until time for presenting an appeal to Commissioner (Appeals) has expired without an appeal having been presented or the appeal, if presented, has been disposed of.

Section 295 - Board empowered to frame rules specifying the circumstances in which, the conditions subject to which and the manner in which the Commissioner (Appeals) may permit an appellant to produce evidence which he did not produce or he was not allowed to produce before the Income-tax Officer.

In view of the above, the Id. Senior DR argued that the provisions of section 264 of the Act itself bars filing of appeal and the conditions mentioned in the provisions of section 264(4)(a) of the Act. He argued that once the provision itself does not permit for filing of alternative remedy, the assessee cannot file appeal before CIT(A) after availing the remedy u/s.264 of the Act.

7. I have heard rival contentions and gone through facts and circumstances of the case. I noted that the assessee has waived his right of appeal in this case by filing revision petition u/s.264 of the Act vide letter dated 11.06.2016 wherein he narrated as under:-

“I am submitting the Petition u/s 264 of the I.T.Act 1961 in duplicate. The fees for Rs.500/- was paid on 22.04.16 and the challan is enclosed in the paper book page no:9. I am waving my right of appeal.

Kindly Acknowledgement the Petition u/s 264 of the I.T.Act 1961 and oblige.”

No doubt, the assessee vide letter dated 11.06.2016 has waived his right of appeal but Hon'ble Madras High Court in the case of CIT vs. D. Lakshminarayanapathi, *supra* has considered this issue and held that the provisions dealing with appellate jurisdiction do not bar an appellant from invoking the appellate jurisdiction for filing of appeal before CIT(A), even though the assessee had invoked revisional jurisdiction u/s.264 of the Act. The Hon'ble Madras High Court considered this issue and held as under:-

1. Though there is no limitation on the exercise of the appellate power in the statute on the ground that the assessee had invoked the revisional power unsuccessfully, it is contended for the Revenue that such a limitation should be read into the provision dealing with appeals under the Income-tax Act. There is no provision in the Act in express terms, which supports the arguments so advanced by the Revenue. It is not disputed that the provisions dealing with the appellate authorities do not bar an appellant from invoking the jurisdiction, if he had invoked revisional jurisdiction, even though for invoking revisional jurisdiction, it is a pre-condition that the appellate jurisdiction should not have been invoked.

2. The argument advanced before us is that by inferential reasoning we should hold that if there is a limitation on exercise of revisional power a similar limitation should be read into the exercise of the appellate power. It does not require any authority to hold that it is not the province of the court to rewrite the law on the ground that the provision should have been worded in a different manner in order to make it seemingly consistent with some other provision. Moreover, it is wholly unnecessary for Parliament to impose the same kind of restriction for invoking different kinds of jurisdiction. It is open to the law-maker to provide more than one remedy to the aggrieved party and so long as such remedies are available, the aggrieved parties can certainly invoke them.

3. The Tribunal has rightly held that the assessee, notwithstanding his unsuccessful effort at having the order revised, could still file an appeal as invoking the revisional jurisdiction could not constitute a bar to the filing of an appeal. It is for the Legislature to impose such a bar if it considers it necessary to do so.

4. We, therefore, find no error in the order of the Tribunal. We answer the question as to "whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the Appellate Assistant Commissioner was justified in entertaining the assessee's appeal against the assessment even though the Commissioner of Income-tax had passed an order under Section 264 against the assessee and holding that the provisions of Section 154 were applicable and a revision was not barred by limitation" in favour of the assessee and against the Revenue. No costs.

As the issue is covered by jurisdictional High Court, respectfully following the same, I set aside the order of CIT(A) holding the assessee's appeal as not-maintainable and direct him to re-decide the appeal as per law on merits. In term of the above, appeal of the assessee is allowed for statistical purposes.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 7th February, 2024 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 7th February, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|-------------------------|--------------------------|---------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त /CIT |
| 4. विभागीय प्रतिनिधि/DR | 5. गार्ड फाईल/GF. | |