

**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
[Before Shri Waseem Ahmed, AM & Shri K. Narasimha Chary, JM]

**I.T.A No. 1788/Kol/2013**  
**Assessment Year: 2008-09**

Ajoy Rudra (PAN: ADEPR2527G) Vs. Assistant Commissioner of Income-tax  
(Appellant) Circle-51, Kolkata. (Respondent)

Date of hearing: 05.10.2016  
Date of pronouncement: 21.10.2016

For the Appellant: Shri Alope Kr. Ghosh, Advocate  
For the Respondent: Shri Anand Kr. Singh, JCIT

**ORDER**

**Per Shri K. Narasimha Chary, JM:**

This appeal by assessee is arising out of order of CIT(A)-XXXII, Kolkata vide Appeal No. 194/ CIT(A)-XXXII/10-11/51/Kol dated 01.06.2012. Assessment was framed by Addl. CIT, Range-51, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2008-09 vide his order dated 31.12.2010.

2. Brief facts of the case are that the assessee is a wholesale dealer in consumer products and delivers goods to the customers in the market. For AY 2008-09 the return of income was filed on 03.10.2008 declaring the total income of Rs.25,95,554/- and the same was duly processed u/s. 143(1) of the Act. Subsequently, it was selected for scrutiny through CASS and after following the procedure established under law the AO assessed the income at Rs.2,93,796/- and in that process he made certain additions. Aggrieved by the additions, the assessee preferred appeal before the Ld. CIT(A). When the hearing was in progress in such an appeal on 29.05.2012 the AR of the assessee presented a letter paying to permit the assessee to withdraw the appeal. Since the assessee himself sought such a permission the Ld. CIT(A) recorded the same and dismissed the appeal as withdrawn.

3. However, subsequently, stating that the assessee was advised to approach the ITAT, this appeal is preferred by the assessee with a delay of 263 days on the following grounds:

*“1. For that under the facts and circumstances of the case the Ld. Appellate Authority failed and neglected to appreciate the facts and merit of the case and has allowed to withdraw the appeal as was filed by the petitioner on wrong advice of the authorised representative.*

*2. For that the Ld. Appellate Authority failed and neglected to consider the grounds of appeal and has simply allowed to withdraw the appeal without considering the facts and merit of the said appeal and the entire process of such withdrawal has been very much contrary to the views expressed by the Hon'ble Supreme Court wherein it has been*

*categorically stated that an assessee once filed an appeal, cannot withdraw the same on application and appellate authority cannot allow such withdrawals.*

*3. For that the Ld. Appellate Authority was absolutely wrong in dismissing the appeal without considering the facts and grounds of the appeal as has been agitated by the petitioner and should have considered the said grounds before dismissing the said appeal. The entire act of the Ld. Appellate Authority has been bad in law and the order is liable to be quashed.”*

4. It is the argument of the Ld. AR that the Ld. CIT(A) being a creature of statute is duty bound to adjudicate the just tax liability of the assessee and unlike the High Court the statutory body cannot have any jurisdiction to dismiss the matter for default or to permit the withdrawals and thereby withdrawing from the process of adjudication of the just tax. However, the Ld. DR submits that since the assessee himself asked for the withdrawal of the appeal it does not lie in the mouth of the assessee to say that the order of the Ld. CIT(A) allowing withdrawal of the appeal was without jurisdiction. The Ld. DR also resisted the prayer for condonation of the delay.

5. Basing on these facts the points that arise for our consideration are –

- (i) Whether there is any justification on the part of the assessee to seek condonation of the delay of 263 days in preferring this appeal?
- (ii) Whether the Ld. CIT(A) is justified in dismissing the appeal before him on the withdrawal of the same by the assessee?
- (iii) To what relief?

POINT No. 1

6. By way of an affidavit it is the contention of the assessee that having been served with the order in the appeal passed by the Ld. CIT(A) on 28.06.2012 he approached one Shri Anup Kr. Dutta, advocate for advice and handed over all the papers to him. However, all of a sudden the Ld. Advocate had fallen ill and was subsequently admitted into hospital. Ultimately, the Ld. Advocate succumbed to death on 25.10.2013. In these circumstances, according to assessee with great difficulties the papers were obtained from the family members of the said Advocate for pursuing the remedies and in that process the delay occurred. Medical record and death certificate of the Ld. Advocate are filed. The reason attributed by the assessee cannot be said to be unreasonable. Primarily, the assessee does not stand to gain by filing this appeal with any delay. Further, the medical record and the death certificate filed by the assessee lends any amount of support to his contention. It is the settled principles of law in *Collector of Land Acquisition vs Mst Katiji & Others* 167

*ITR 471 (SC)* that when the question of delivery of substantial justice is spitted against the technical consideration, the later must give way to the former and the adjudicating authorities cannot take a pedantic view while dealing with this sort of matters. While respectfully following the ratio of the above decision, we hold that it is a fit case to condone the delay and to receive the appeal for consideration on merits. Point no. 1 is answered in favour of the assessee.

POINT No. 2

7. In so far as the facts leading to the dismissal of the appeal by the Ld. CIT(A) are concerned absolutely there is no dispute. The assessee does not deny to have filed a letter dated 29.05.2012 by his AR seeking permission to withdraw the appeal. However, now it is the contention of the assessee that such withdrawal letter was presented on the mistaken advice of the counsel.

8. It is the argument of the Ld. AR of the assessee that the assessee had a meritorious case before the ld. CIT(A) but while laboring under a wrong advice by his counsel the assessee thought it necessary to present a petition seeking withdrawal. It is his further argument that even if the assessee seeks withdrawal of the matter, still it is incumbent upon the Ld. CIT(A) to proceed further on the merits of the matter and to reach a just tax liability of the assessee instead of dismissing the appeal as withdrawn.

9. Ld. Counsel for the assessee placed reliance on a decision reported in *Bhartia Steel & Engineering co. Pvt. Ltd. Vs. ITO (1974) 97 ITR 154 (Cal)* wherein the jurisdictional High Court while following the decision of the Court of Appeal in *King Vs. Income-tax Special Commissioners (1936)1 KB 487* and also the decision of the Hon'ble Supreme Court in *CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443* was pleased to observe as follows:

*“On behalf of the respondents it is urged that as the company itself asked for the withdrawal of the appeal, it does not lie in the mouth of the company to say that the order of the Appellate Tribunal allowing withdrawal of the appeal was without jurisdiction. The company made the application under the circumstances stated herein above. It is true that it was on the prayer of the company that the Appellate Tribunal allowed the appeal to be withdrawn and dismissed the same for non-prosecution but the question is whether the assessee is estopped by its conduct from challenging the jurisdiction of the Appellate Tribunal. It is a well-established principle of law that jurisdiction cannot be conferred by consent of parties. If, under the Income-tax Act, the Tribunal had to dispose of the appeal on merits and had no power to allow withdrawal of the appeal on the prayer of the company, in my view, it is no argument that such withdrawal having been allowed on the prayer of the company itself the order of the Tribunal, though invalid, will have to be upheld as valid. There is no estoppel against a statute and an order which is invalid on the ground of want of jurisdiction cannot become valid by consent. In my opinion, the company is not precluded from challenging the jurisdiction of the Tribunal in allowing it to withdraw the appeal. The said order is a void order.”*

10. Further reliance is placed on a decision of a Coordinate Bench of this Tribunal in J. K. Barooah Vs. ITO (1989) 31 ITD 7 (Gau) wherein while following the decision of the Hon'ble jurisdictional High Court in Bhartia Steel & Engg. Co. (P) Ltd. Vs. ITO (1974) 97 ITR 154 (Cal) it was observed that once an assessee has filed an appeal against an assessment order, the assessee sets the judicial machinery in motion and cannot be allowed to withdraw the appeal and the appellate authority has to dispose of the matter on merits without allowing such appeal to be withdrawn.

11. The observation of the Hon'ble jurisdictional High Court extracted supra, clearly negatives the contention of the Ld. DR that when the appeal was dismissed as withdrawn at the instance of the assessee, it is not open for the assessee to take a turnaround and to contend that the dismissal of the appeal by the Ld. CIT(A) is without any jurisdiction. While respectfully following the judicial reasoning delineated above, we hold that it is a fit case to set aside the matter to the file of the Ld. CIT(A) to give a fresh disposal thereof according to law after affording reasonable opportunity of being heard to the assessee. We order accordingly.

12. In the result, the appeal of assessee is allowed for statistical purposes.

Order is pronounced in the open court on 21.10.2016 .

Sd/-

(Waseem Ahmed)  
Accountant Member

Sd/-

(K. Narasimha Chary)  
Judicial Member

Dated : 21<sup>st</sup> October, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Shri Ajoy Rudra, 10/12, Atal Behari Sarkar Road, P.O. Naihati, Dist. 24 Parganas (N)-743165
2. Respondent –ACIT, Circle-51, Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.