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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11.12.2020

+ **W.P.(C) 9467/2020**

M/S KALRA PAPERS PRIVATE LIMITED. ... Petitioner
Through: Mr. Salil Kapoor, Advocate
with Mr. Sumit Lalchandani
and Ms. Ananya Kapoor,
Advocates.

Versus

INCOME TAX OFFICER ... Respondent
Through: Mr. Shailendra Singh, Senior
Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral)

CM APPL. 30441/2020 (For exemption)

1. Exemption allowed, subject to just exceptions.
2. The application is disposed of.

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3. The present petition under Article 226 of the Constitution of India is directed against the order dated 06th November, 2020 [*hereinafter referred to as the 'Impugned Order'*] passed by the Income Tax Appellate Tribunal [*hereinafter referred to as 'ITAT'*] dismissing the Petitioner's miscellaneous application bearing M.A. No. 742/DEL/2018 [*hereinafter referred to as 'Miscellaneous Application'*] for recall of *ex-parte* final order dated 24th July, 2018, allowing Revenue's appeal being ITA No. 2297/DEL/2014 for Assessment Year 2009-10.

4. For the year under consideration, the Petitioner filed its Return of Income [hereinafter referred to as '**ROI**'] on 31st March, 2010. Based on the survey under Section 133A of the Income Tax Act, 1961 [hereinafter referred to as '**the Act**'] and other materials, an assessment order dated 28th December, 2011 was framed under Section 143(3) of the Act, making additions to Petitioner's income. Aggrieved by the said order, the Petitioner filed an appeal before the Commissioner of Income Tax (Appeal) [hereinafter referred to as '**CIT(A)**']. The said appeal was decided by the CIT(A) in favour of the Petitioner, and the additions made by the Assessing Officer were deleted. The Revenue, thereafter, preferred an appeal before the ITAT on 15th April, 2014 bearing ITA No. 2297/DEL/2014. The said appeal was heard *ex-parte* on 5th July, 2018, and finally allowed in favour of the Revenue *vide* order dated 24th July, 2018.

5. Aggrieved with the aforesaid *ex-parte* order, on 3rd December, 2018, the Petitioner filed the Miscellaneous Application before the ITAT, under Section 254(2) of the Act, read with Rule 25 of the Income Tax (Appellate Tribunal) Rules, 1963 [hereinafter referred to as the '**ITAT Rules**'] seeking setting aside of the *ex-parte* order and restoration of the appeal. Whilst the above Miscellaneous Application was pending, the Petitioner also filed an appeal under Section 260A of the Act before this High Court (being ITA No. 113/2019) and assailed the order dated 24th July, 2018. However, as the M.A. No. 742/DEL/2018 was still pending before the ITAT, this Court *vide* order dated 05th February, 2019, disposed of the said appeal, granting liberty to the Petitioner to approach this Court in the event the Miscellaneous Application was not accepted by the Tribunal.

6. Thereafter, the ITAT rejected the Miscellaneous Application *vide* the Impugned Order, relevant portion whereof reads as under:

“3. During the course of his argument, the counsel referred to Rule 25 of the ITAT Rules and vehemently stated that it has been specifically provided that where an appeal has been disposed of ex-parte and if later on the appellant/ respondent satisfies the Tribunal that there was sufficient cause for his non-appearance, the Tribunal can set aside the ex parte order and restore the appeal.

4. Drawing support from the aforementioned Rule 25, the counsel stated that on the date of hearing the then arguing counsel was not well and therefore could not appear for the reason of illness.

5. We have given thoughtful consideration to the contentions made by the counsel. Facts on record shows that this appeal was first listed for hearing on 20.06.2016 thereafter frequent adjournments were taken and most of the time it was from the assessee’s side. The appeal was finally heard on 5.7.2018 ex parte because more than two years had elapsed since the first date of hearing. It is not the case where the appeal was listed for the first time and the assessee was not aware.

6. The only argument of the counsel was in relation to the ex parte order whereas the Tribunal has not decided in limine but has decided by a well-reasoned order of 15 pages. The counsel could not point out any factual error in the order of the Tribunal.

7. Even, if the order was ex parte, the same is well reasoned and has considered all the material available on record. As no factual error has been pointed out, we do not find any reason to recall the order. Accordingly, the Miscellaneous application file by the assessee is dismissed.

8. In the result, the miscellaneous application filed by the assessee is accordingly dismissed.”

7. Mr. Salil Kapoor, learned counsel for the Petitioner, submits that the impugned order is unjust, illegal, bad in law, and contrary to principles of natural justice. He submits the Petitioner had sufficient reasons and reasonable cause for non-appearance on 05th July, 2018. He claims that the same is disclosed and explained in the affidavit dated 03rd December, 2018, filed by the Director of the Petitioner-company along with the Miscellaneous Application. In the said affidavit, it was specifically stated that the non-appearance was on account of illness of the counsel. The Tribunal,

unfortunately, while dismissing the Miscellaneous Application, failed to consider the same. As regards the observation of the Tribunal regarding the failure of the counsel to point out any factual error in the final order, Mr. Kapoor argues that the same is completely unwarranted and contrary to Rule 25 of the ITAT Rules. The Petitioner is only required to show that there existed sufficient cause for non-appearance. The merits or demerits of the order passed by the Tribunal were not required to be examined at that stage. He submits that the approach of the Tribunal is contrary to the judgments of several High Courts dealing with the scope and ambit of Rules 24 and 25 of the ITAT Rules.

8. Mr. Kapoor also strongly urges that the Petitioner is interested to take recourse to the amnesty scheme 'Vivad Se Vishwas 2020'. He states that in the event the Court were to allow the present petition and restore the appeal to its original number, Petitioner undertakes to apply under the said scheme. He submits that the entire endeavour is to put a quietus to the present dispute and that the Petitioner has every intention to settle the outstanding dues by taking benefit of the afore-noted scheme.

9. Mr. Shailendra Singh, learned senior standing counsel for the Revenue, on the other hand, strongly opposes the petition. He submits that the conduct of the Petitioner exhibits casualness and does not deserve any sympathy. He claims that the Petitioner had been continuously absent during the course of hearing, preceding the ex-parte hearing held on 05th July, 2018. In these circumstances, the Tribunal was justified in deciding the appeal on merits. He argues that since the ITAT has passed a well-reasoned order after considering all the material on-record and the contentions advanced in the appeal, the Petitioner can avail of its remedy by filing an appeal under Section 260A of the Act and assail the said decision on merits.

10. We have carefully perused the record and considered the contentions urged by the learned counsel for the parties, who have been heard at length. The facts of the present case are not in controversy. On 24th July, 2018, the Tribunal decided the appeal of the Revenue on merits and *ex-parte*, as there was no presence on behalf of the Petitioner. Thereafter, on 03rd December, 2018, the Petitioner filed the Miscellaneous Application under Section 254(2) of the Act read with Rule 25 of the ITAT Rules, wherein explanations were provided for such non-appearance. It was accompanied by an affidavit of the Director of the Petitioner-company dated 03rd December, 2018, stating that the non-appearance was on account of the illness of the counsel. The Petitioner had also filed an affidavit dated 26th October, 2020 of one Mr. Neeraj Bansal, a senior partner of M/s Bansal Neeraj & Associates Chartered Accountants, which were the authorized representatives of the Petitioner-company before the assessment and appellate authorities. It was explained that Mr. Nitin Goel, partner at M/s Bansal Neeraj & Associates Chartered Accountants, was looking after the appeal proceedings. He suddenly fell ill on account of dengue fever and was, therefore, unable to attend the office for 15 days. In these circumstances, he could not pass on the instructions to his office or to Mr. Neeraj Bansal to attend the proceedings before the ITAT. To our mind, the Miscellaneous Application and affidavits filed in support thereof discloses sufficient cause for non-appearance. The Tribunal, has inappropriately rejected the Miscellaneous Application, without examining the merits of the said submissions. Paras 5 and 6 of the Impugned Order, as reproduced above, reveal that the Tribunal dismissed the Miscellaneous Application merely on the ground that the Petitioner had sought frequent adjournments before the matter was finally heard on 05th July, 2018. In this regard, it was also pointed out that the Miscellaneous Application was filed without much

delay. In fact, as already noted, the Petitioner had also preferred an appeal under Section 260A of the Act before this Court, which was disposed of in the terms stated earlier. Thus, it cannot be said that the Petitioner has shown laxity in pursuing the said litigation. The presumption of disinterest against the Petitioner is speculative. The other factor that prevailed upon the Tribunal was the lapse of time since the first date of hearing. However, the Tribunal ignored the fact that Petitioner had approached the Tribunal in December 2018, and thus, the time gap of 2 years between the first date of hearing and the date of decision cannot be a compelling measure. In our view, these factors ought not to be viewed in isolation, without taking into consideration the sufficiency of reasons for non-appearance. The Petitioner had given a sufficient and cogent explanation for non-appearance of its Representative, which, however, the Tribunal has failed to take into account. Besides, in para 6 of the Impugned Order, the Tribunal also went into the question of merits of the *ex-parte* decision, by delving into the correctness of order. This also was an erroneous yardstick for deciding the Miscellaneous Application. The Tribunal has failed to appreciate that the Petitioner was seeking the recall of the order dated 24th July, 2018 and restoration of the appeal, and not the rectification of any mistake apparent on record. The merits of the case could not have been gone into at the stage of deciding an application under Rule 25 of the ITAT Rules. Rules 24 and 25 of the ITAT Rules enable the Tribunal to restore the appeal, if a party appears afterwards and satisfies the Tribunal that there was a sufficient cause for its non-appearance when the appeal was taken-up for hearing. The proviso to Rule 25 deals with the situation where the Tribunal has passed an *ex-parte* order, due to non-appearance of the Respondent, even though the order was passed on merits. Thus, we are of the opinion that the reasoning given in para 6 of the Impugned Order is beyond the scope and ambit of Rules 25 of the ITAT Rules.

11. We are satisfied that the assessee was prevented by sufficient cause from appearing before the ITAT when the appeal was taken up for hearing. Further, the Tribunal has taken into consideration such reasons which were not germane for deciding the Miscellaneous Application. The sufficiency of the cause, which was the only factor to be examined, has been ignored by the Tribunal. If sufficient cause is shown, the Tribunal is obligated to consider the same and make an order setting aside the ex-parte order, irrespective of the fact that the final order decided the appeal on merits.

12. We are also persuaded to allow the petition, in view of the undertaking given by the Petitioner that it would apply under the 'Vivad Se Vishwas' Scheme in the event the appeal is restored to its original number. The Petitioner's undertaking is taken on record and it shall be held bound by the same.

13. Having regard to the aforesaid facts and circumstances, the present petition is allowed. The order dated 06th November, 2020 passed in M.A No.742/DEL/2018 and order dated 24th July, 2018 in ITA No. 2297/DEL/2014 are set aside. The appeal of the Revenue, before the ITAT, is restored to its original number - ITA No. 2297/DEL/2014.

SANJEEV NARULA, J

MANMOHAN, J

DECEMBER 11, 2020

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