ORISSA HIGH COURT, CUTTACK

W.P.(C) No.2487 of 2019

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Rabindra Kumar Mohanty ..... Petitioner

Versus

The Registrar, Income Tax Appellate Tribunal, Cuttack Bench, Cuttack ..... Opp. party

For Petitioner : *M/s. Rudra Prasad Kar, A.N.Ray & N.Panda*

For Opp. party : *M/s. T.K.Satapathy*

Date of hearing: 13.02.2020 Date of Judgment: 18.03.2020

PRESENT:

THE HONOURABLE MR. JUSTICE C.R.DASH
AND
THE HONOURABLE MR. JUSTICE S.K.PANIGRAHI

S.K.Panigrahi, J. The petitioner is an Individual engaged in the business of arrangement of trucks for transportation of materials of different parties. The Assessing Officer, vide assessment order dated 30.06.2014, added Rs. 72,23,004/- towards undisclosed transportation receipt and Rs. 2,23,885/- in the shape of TDS towards excess of assets over liabilities to the total income of the petitioner for the Assessment Year 2009-10. Being aggrieved, the petitioner approached the Commissioner of Income Tax (Appeals) – 2, Bhubaneswar, which vide its order dated 22.2.2016 in I.T. Appeal

No.0288/2015-16, partly allowed the appeal of the petitioner herein i.e. it conformed the addition of the undisclosed transportation receipt of Rs. 72,23,004/- to the income while waived of the addition

of Rs.2,23,885 in the shape of TDS towards excess of assets over liabilities. Being aggrieved by the order dated 22.02.2016 of the CIT (A)–2, Bhubaneswar, the petitioner approached the Income Tax Appellate Tribunal (hereinafter called "the Tribunal"), Cuttack Bench, Cuttack vide ITA No. 300/CTK/2016 for the assessment year 2009-

10. The Ld. Tribunal issued notice for hearing on 06.07.2017 and on the said date, the authorised representative of the petitioner filed an adjournment application and the case was placed for hearing on

30.08.2017 accordingly. However, on 30.08.2017 neither the petitioner nor his authorised representative or his counsel were present. The Tribunal, therefore, dismissed the appeal for want of prosecution. The petitioner preferred an appeal by way of filing W.P.(C) No.2487 of 2019 before this Court even though no restoration application was filed before the Ld. Tribunal.

2. The principal question of law which arises for consideration in the present appeal, as to whether the Income Tax Appellate Tribunal has the power to dismiss the appeal for want of prosecution or not.

3. Heard Mr. R.P. Kar, learned counsel for the petitioner and Mr. T.K. Satapathy, learned counsel for the opposite party.

4. Learned counsel for the petitioner submitted that even if the petitioner was not present before the Tribunal when the appeal was taken up for hearing, it could not have been dismissed for want of prosecution as Section 254 (1) of the Income Tax Act, 1961 (for short, "the Act") enjoins upon the Tribunal to pass such orders thereon as it thinks fit after giving an opportunity of being heard to both the parties. Thus, there is no power vested in the Tribunal to dismiss the appeal for want of prosecution even if the appellant therein has not appeared when the appeal was taken up for hearing.

> "**Section 254(1) of the Income Tax Act, 1961 –** Provides that "the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

5. Learned counsel for the petitioner further submitted that Rule 24 of the 1963 Rules does not give power to the Ld. Tribunal to dismiss the appeal for want of prosecution. The said Rule articulates that, where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent.

> "**Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963** – Provides that "where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called 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 non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex-parte order and restoring the appeal."

6. On the conjoint reading of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal as it thinks fit after giving both the parties an opportunity of being heard. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the Petitioner is not present when the appeal is taken up for hearing.

7. The Supreme Court of India had confronted with such a question in ***The Commissioner of Income-Tax, Madras vs. S. Chenniappa Mudaliar, Madurai 1969 (1) SCC 591,*** wherein it considered the provisions of Section 33 of the erstwhile Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:-

> "Section 33 (4) of the Income Tax Act, 1922 "33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."
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> Rule 24 of the Appellate Tribunal Rules, 1946 - " Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex-parte."

In the said case the High Court of Madras held that under Section 33 (4), the Tribunal was bound to dispose of the appeal on merits, whether the Petitioner was present or not. The language of Section 33(4) and in particular the use of the word “thereon” signifies that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned had failed to appear. The position becomes quite simple when it is pointed that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of Section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under Section 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal

is disposed of on the merits and not dismissed owing to the absence of the appellant. This position of law was affirmed by the Apex Court.

8. The said principle was also affirmed by the Supreme Court in ***Balaji Steels Re-rolling Mills v. CCE [2014 (16) SCC 360]*** and similar line of judgments rendered by different High Courts, like - ***Bharat Petroleum Corporation Limited Vs ITAT, Mumbai [2013 SCC online BOM 1385: (2013) 359 ITR 271); CIT v. H S Akodia [(1966) 61 ITR 50 (MP)]; M X De Nornha & Sons v. CIT [(1950) 18 ITR 928 (All)]; Mangat Ram Kuthalia v. CIT [(1960) 38 ITR 1 (Pun)]; Ganesh Vs. CCE, Salem-I, Madras High Court [2019 (365) ELT 301 (Mad.)]; N.S. Mohan v. The ITAT & Anr in W.P. No. 8126 of 2018***.

9. In yet another land mark judgment rendered by the Full Bench of Madras High Court in ***State of Tamil Nadu v. Arulmurugan & Co., [(1982) 51 STC 381]*** wherein it was held that the appellate authorities perform precisely the same functions as the assessing authority. The said Bench expressed the view that a tax appeal is a rehearing of the entire assessment and it cannot be equated to adversary proceedings in appeal in civil cases. In fact, the assessing authority is not the taxpayer's "opponent". Procedurally speaking, in a tax appeal, the appellate authority is very much committed to the assessment process. Similar views have been taken by the Supreme Court in line of cases like ***State of Orissa v. Babu Lal Chappolia***

[(1966) 18 STC 17 (SC)], CAGIT v. V N Narayan [(1972) 83 ITR 453 (SC)], S N Swarnnamal v. CED [(1973) 88 ITR 366 (Mad.)].

10. Article 265 of the Constitution mandates that no tax can be collected except by authority of law. Appellate proceedings are also laws in strict sense of the term, which are required to be followed before tax can legally be collected. Similarly, the provisions of law are required to be followed even if the tax payer does not participate in the proceedings. No assessing authority can refuse to assess the tax fairly and legally, merely because the tax payer is not participating in the proceeding. Hence, dismissal of appeals by ITAT for non-persecution is wholly illegal and unjustified.

11. If we see this issue through the prism of the Principles of natural justice, an appellate authority is required to afford an opportunity to be heard to the appellant. It has been held in plethora of cases that "right to natural justice" is a personal right, either a person can waive it or a person may not avail it. Merely because a person is not availing his right of natural justice, it cannot be a ground of refusal to perform statutory duty of deciding appeal by the Tribunal.

12. Applying the principles laid down in the aforesaid cases to the facts of the present case, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on

merits even if the appellant or its counsel was not present when the appeal was taken up for hearing.

13. In view of the above analysis, the Rules and the provisions of the Act would pave way for the Tribunal to reconsider its decision. The writ petition is allowed and we direct the Tribunal to restore the appeal and decide the appeal on merit after giving both the parties an opportunity of being heard.

The writ petition is accordingly disposed of. No order as to cost.

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S.K. Panigrahi, J.

C.R. Dash, J. I agree.

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C.R. Dash, J.

High Court of Orissa, Cuttack
Dated 18th March, 2020/bns