

(2010) 10 GUJ CK 0101

In the Gujarat High Court

Case No : Special Civil Appin. No. 8544 of 2010

Devendra G. Pasale

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-10-2010

Acts Referred:

Income Tax (Appellate Tribunal) Rules, 1963 — Rule 24

Citation : (2010) 236 CTR 227 : (2011) 3 GLH 609 : (2011) 335 ITR 263 :
(2011) 333 ITR 263

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : S.N., Bhoomi M. Thakore and Swati Soparkar, for the Appellant; K.M. Parikh, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—Rule. Mr. K.M. Parikh learned standing counsel for the Respondent-Revenue waives service of rule on behalf of the Respondents.

2. Having regard to the controversy involved in the petition, which lies in a very narrow compass, the matter is taken up for final hearing today.

3. This petition challenges consolidated order dt. 19th March, 2010 made by the Tribunal in MA Nos. 405, 406, 407, 408 and 409/Ahd/2009 and seeks restoration of the appeals being ITA Nos. 3394, 3395, 3396, 3397 and 3398/Ahd/2008 preferred by the Petitioner to the file of the Tribunal.

4. Assessments had been framed in the case of the Petitioner for asst. yrs. 2000-01, 2001-02, 2002-03, 2003-04 and 2005-06 u/s 153A r/w Section 143(3) of the IT Act, 1961 (the Act). The Petitioner preferred appeals before the CIT(A), who vide consolidated order dt. 13th March, 2008 dismissed the appeals. The order of the CIT(A) came to be served on the Petitioner on 2nd July, 2008. The Petitioner preferred separate appeals before the Tribunal on 13th Oct. 2008, after delay of 43 days in each of the appeals. The Petitioner was informed by the

Registry of the Tribunal to file applications for condonation of the delay caused in filing the appeals. However, according to the Petitioner, the Petitioner did not submit such applications as it is the consistent practice in proceedings before the Tribunal to file such applications at the time of or immediately before the date of hearing.

5. Subsequently, the Petitioner made application for early hearing on 21st May, 2009. Vide registered notice dt. 10th July, 2009 the Petitioner was informed that the appeals were fixed for hearing on 26th Oct., 2009. In the meanwhile, the chartered accountant of the Petitioner received notices for hearing of the appeals in other cases, which were fixed at the Baroda camp scheduled between 3rd Nov., 2009 and 13th Nov., 2009. The Authorized Representative on behalf of the Petitioner, therefore, filed an application on 12th Oct. 2009 requesting the Tribunal to accommodate the hearing of the Petitioner's appeals at the camp at Baroda. It is the case of the Petitioner that the Petitioner did not receive any communication in response to the application filed for transfer of the hearing of the Petitioner's appeals and that the Petitioner was under a bona fide belief that a further notice, as per the request made by the Petitioner, would be issued and that at the time of hearing the plea for condonation of delay would be made. However, on 26th Oct., 2009 the Tribunal dismissed all the appeals preferred by the Petitioner on the ground that no sufficient cause for condoning the delay had been shown by the Petitioner.

6. On receiving the order passed by the Tribunal, the Petitioner filed MA Nos. 405, 406, 407, 408 and 409/Ahd/2009 on 10th Nov., 2009 in all the appeals being ITA Nos. 3394, 3395, 3396, 3397 and 3398/Ahd/2008 respectively, u/s 254(2) of the Act before the Tribunal for setting aside the ex parte order dt. 26th Oct. 2009. The Petitioner's chartered accountant Mr. Mukund Bakshi also filed an affidavit in support of the applications wherein a detailed explanation for the delay was given. The Tribunal, vide the impugned order dt. 19th March, 2010, summarily rejected the miscellaneous applications. Being aggrieved, the Petitioner has moved the present petition challenging the said order and seeking restoration of his appeals.

7. On behalf of the Petitioner, Mr. S.N. Soparkar, learned senior advocate invited attention to the provisions of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 (the Rules) to submit that sufficient cause had been made out for non-appearance of the Appellant-Petitioner and as such the Tribunal was not justified in rejecting the applications made by the Petitioner for setting aside the ex parte order and restoring the appeals. It was submitted that the Petitioner was under a genuine belief that his request to transfer the case to Baroda camp would be granted and that a further notice would be issued and that at the time of hearing, the plea for condonation of delay would be submitted. Inviting attention to the order made by the Tribunal, it was submitted that the reasons assigned by the Tribunal for rejecting the applications made by the Petitioner are not germane in as much as while considering an application under Rule 24 of the

Rules all that the Tribunal is required to see is as to whether the sufficient cause has been made out for nonappearance on the part of the Appellant.

8. On behalf of the Revenue, Mr. K.M. Parikh, learned standing counsel, has placed reliance upon the averments made in the affidavit-in-reply filed on behalf of the Respondent to submit that no sufficient cause has been made out on the part of the Petitioner and as such the Tribunal was justified in rejecting the applications.

9. The Tribunal in the impugned order has held thus:

5. On consideration of the rival submissions of the parties, we are of the view that there is no mistake apparent on record. The record reveals that the Assessee filed application for taking up the appeals at Baroda camp. In the application it was mentioned that the next date of hearing is 26th Oct., 2009. It would show that the Assessee was aware of the next date of hearing fixed for hearing of the appeals. This application was rejected by the Hon'ble Vice President. The record further reveals that prior to that the Assessee was intimated about a year back about the defect in the appeal papers because the Assessee has not filed any petition for condonation of delay. The Assessee despite aware of the fact that appeals are time barred, did not prefer to move any application for condonation of delay in the matter. The affidavit of Shri Mukund Bakshi, chartered accountant is filed in support of the miscellaneous applications. However, the record reveals that there is no power of attorney of Shri Mukund Bakshi, chartered accountant filed on record to show that he even represented the Assessee in the present appeals. There is an application filed by Shri Mehul K. Patel, advocate seeking adjournment of earlier date of hearing. It would, therefore, show that Shri Mukund Bakshi, chartered accountant has no concern with the appeals already decided and was not authorized to appear in the appeals. The affidavit of Shri Mukund Bakshi, chartered accountant would be of no relevance. No facts are explained about non-appearance on the date of hearing or not moving petition for condonation of delay in affidavit.

6. Considering the above discussions, we find that the Tribunal in its wisdom, considering the facts available on record and particularly when there was no material on record to explain the delay in filing of the appeals, was justified in dismissing the appeals of the Assessee being time barred. The succeeding Bench has no power to review earlier order of the Tribunal. In this view of the matter, there is no mistake apparent on record. All the miscellaneous applications are accordingly dismissed.

10. Before advertng to the facts of the case, it may be pertinent to refer to the provisions of Rule 24 of the Rules which read thus:

24. Hearing of appeal ex parte for default of the Appellant.--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.

11. On a plain reading of the findings recorded by the Tribunal, it is apparent that the Tribunal has treated the applications made by the Petitioner as applications u/s 254 of the Act and not under Rule 24 of the Rules and has approached the issue accordingly. However, though the Petitioner has described the applications as having been made u/s 254 of the Act, possibly because Rule 24 of the Rules does not prescribe the mode and manner of making applications, the fact that the same had been made under Rule 24 of the Rules is apparent when one looks at the communication dt. 10th Nov. 2009. along with which the applications in question had been submitted to the Tribunal wherein the Petitioner has specifically requested the Tribunal to consider its applications sympathetically in the interest of justice and to restore the appeals in terms of Rule 24 of the Rules for the reasons mentioned in the said applications. A bare reading of the impugned order of the Tribunal indicates that the Tribunal has rejected the applications on grounds, which are not germane while considering applications under Rule 24 of the Rules. As to whether the appeals were time barred and as to whether the Petitioner had moved any application for condonation of delay in the matter are not considerations which have any relevance to an application under Rule 24 of the Rules. On a plain reading of the provisions of Rule 24 of the Rules it is apparent that while considering an application made thereunder, all that is required is that the Tribunal should be satisfied that there was sufficient cause for non-appearance on the part of the Appellant when the appeals were called out for hearing. If it is so satisfied, the Tribunal is required to make an order setting aside the ex pane order and restoring the appeals.

12. In the facts of the present case, it is apparent that the Tribunal, instead of examining the issue from the angle as to whether there was sufficient cause for non-appearance of the Appellant when the appeals were called out for hearing, has digressed and taken into account irrelevant facts, viz., the applications for condonation of delay had not been filed; there was no power of attorney of Shri Mukund Bakshi, chartered accountant; that there was no apparent error on record; etc. The Tribunal has also brushed aside the explanation given for nonappearance when the appeals were called out for hearing by observing that no facts are explained about non-appearance on the date of hearing, whereas the Petitioner has in fact explained the reason for nonappearance. Thus, it appears that the Tribunal has not bothered to read the averments made in the application, since the aforesaid finding recorded by the Tribunal is contrary to the record.

13. Examining the applications made by the Petitioner under Rule 24 of the Rules

on merits, it is apparent that the Petitioner had requested the Tribunal to fix the matter on an early date, pursuant to which the appeals had been fixed for hearing on 26th Oct., 2009. However, in the light of the fact that there was a camp Scheduled at Baroda between 3rd Nov., 2009 and 13th Nov., 2009 the Authorized Representative on behalf of the Petitioner had filed an application before the Tribunal on 12th Oct., 2009 requesting the Tribunal to accommodate the hearing of the Petitioner's appeals at the camp at Baroda. It appears that when the appeals came up for hearing on 26th Oct., 2009 the application for hearing the Petitioner's appeals at the camp at Baroda had escaped the attention of the Tribunal, which is apparent from the fact that there is no reference to the same in the order dt. 26th Oct., 2009 made by the Tribunal. In the impugned order made subsequently the Tribunal has recorded that the said application was rejected by the Vice President. However, it appears that the Petitioner was never intimated about the rejection of his application. Thus, when the Petitioner had made application for taking up the matter at the camp to be held at Baroda, it is apparent that the Petitioner was entertaining a bona fide belief that his matter would be taken up at the Baroda camp. In the circumstances, it is apparent that there was sufficient cause for non-appearance on the part of the Petitioner on the date when the appeals were fixed for hearing which facts are also borne out from the applications made under Rule 24 of the Rules. The Tribunal, unfortunately, has adopted very hyper technical approach in the matter and has rejected the applications on totally irrelevant grounds. In the circumstances, the Tribunal was not justified in rejecting the applications made by the Petitioner for setting aside the ex parte order and restoring the appeals and as such, the impugned order of the Tribunal cannot be sustained.

14. For the foregoing reasons the petition succeeds and is accordingly allowed. The impugned order dt. 19th March, 2010 (at Annex. A to the petition) is hereby quashed and set aside. MA Nos. 405, 406, 407, 408 and 409/Ahd/2009 are hereby allowed. The ex parte order dt. 26th Oct., 2009 made by the Tribunal is set aside and the appeals being ITA Nos. 3394, 3395, 3396, 3397 and 3398/Ahd/2008 are hereby restored to the file of the Tribunal. Rule is made absolute accordingly, with no order as to costs.