(2013) 01 KL CK 0162

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 21307 of 2010 (K)

K.H. Traders APPELLANT

Vs

Commissioner of Income Tax and Others RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:
Income Tax Act, 1961 — Section 264, 264(4)

Citation : (2013) 351 ITR 1

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : T.M. Sreedharan, Smt. C.K. Sherin and V.P. Narayanan, for the Appellant; P.K.R. Menon, Government of India (Taxes), Jose Joseph for the Income-tax, for the Respondent

Judgement

Antony Dominic, J.—The petitioner is an assessee under the income tax Act. By exhibit P1, assessment for the year 2000-2001 was completed. Against that order, the petitioner filed an appeal with an application to condone the delay of 2 years, 10 months and 8 days. It appears that the petition to condone the delay was posted on three occasions and despite notice, the petitioner did not appear before the appellate authority. By order dated March 28, 2007, the appellate authority declined to condone the delay and dismissed the appeal. Subsequently, the petitioner filed exhibit P2 revision u/s 264 of the income tax Act. Along with the revision, the petitioner also filed an application to condone the delay of 4 years, 9 months and 29 days. The revisional authority rejected the revision by exhibit P6 order. In this order, the revisional authority has dealt with the maintainability of the revision, the tenability of the request for, condonation of delay and also the merits of the revision itself. On all these grounds, it has been decided against the petitioner. It is challenging this order, the writ petition is filed.

2. I heard the learned counsel for the petitioner and the learned standing counsel appearing for respondents.

3. In my view, if the maintainability of the revision is to be upheld, it is

unnecessary to examine the correctness of the findings of the revisional authority on the other two issues.

4. In so far as the finding on the maintainability of the revision is concerned, the finding has been arrived at on the basis of section 264(4) of the income tax Act.

5. Section 264(4) of the income tax Act reads thus:

The Commissioner shall not revise any order under this section in the following cases-

(a) where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals); or

(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal.

6. Reading of this provision shows that the power of revision can be exercised by the revisional authority only if the conditions specified in the section are satisfied.

7. Clause (c) states that where an order has been made the subject of an appeal, the Commissioner shall not revise the order. The question is whether exhibit P1 order has been subject to an appeal to the Commissioner (Appeals). As already stated, the petitioner had filed an appeal to the Commissioner (Appeals) with an application to condone the delay of 2 years, 10 months and 8 days. The Commissioner declined to condone the delay and on that basis, dismissed the appeal on March 28, 2007. The contention raised by the petitioner is dismissal of an appeal without condoning the delay is not dismissal of the appeal and, therefore, clause (c) does not stand in their way.

8. On the other hand, relying on the judgment of the apex court in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , the counsel for the Revenue contended that the petitioner had riot waived their right to file an appeal and the order dated March 28, 2007, dismissing the appeal without condoning the delay is an order in the appeal. Therefore, according to him, the remedy of revision was not available to the petitioner. In the judgment in Mela Ram''s case relied on by the Revenue, an appeal was dismissed without condoning the delay and the question was considered whether such an order is an order in the appeal. In this judgment, after referring to the conflicting judgments of various High Courts and the previous judgment of the apex court, the apex court finally concluded thus (page 614):

On the principles laid down in these decisions, it must be held that an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal.

In the light of this binding precedent, there is no escape from the conclusion that the order dated March 28, 2007, dismissing the appeal filed by the petitioner is an order in the appeal filed by the petitioner. Once it is so held as a necessary consequence, I must also hold that the petitioner has not waived his appellate right, to maintain an application for revision u/s 264 of the Act. If that be so, the finding of the revisional authority that in view of section 264(4), the revision filed by the petitioner was not maintainable, has to be upheld. If that be so, it is unnecessary to enter into the correctness of the other findings of the revisional authority, the writ petition, therefore, fails and it is dismissed.