

(1984) 03 BOM CK 0010

In the Bombay High Court

Case No : I. T. APPEAL NO. 6454 (BOM.) OF 1983

MECHNO-PLAST

APPELLANT

Vs

SIXTH Income Tax OFFICER.

RESPONDENT

Date of Decision : 19-03-1984

Acts Referred:

Citation : (1986) 17 ITD 786

Judgement

1. The assessee was served with a notice of demand by the ITO on completion of the assessment on 3-12-1982. The assessee was aggrieved by the order of the ITO. It filed an appeal before 1-1-1983. On 4-1-1983, it filed another memorandum of appeal before the AAC with a covering letter dated 3-1-1983 wherein it has been explained that as the only surviving partner in the firm had to suddenly go out of station on 31-12-1982, the pervious memorandum of appeal could not be signed by him. In the circumstances, the memorandum of appeal was signed by its constituted attorney Kabra Associates, chartered accountants. It was further stated in the letter that in compliance of rule 45(2) of the Income Tax Rules, 1962 (the Rules), a fresh memorandum of appeal and connected papers duly signed by the partner of the assessee-firm was being filed with a request that it may be taken on record in addition/substitution to the appeal papers already filed on 1-1-1983.

2. After hearing the assessee's representative, the AAC observed that there was no justification for the late submission of the appeal as the first memorandum of appeal was not properly signed and was not in order and the second memorandum of appeal was out of time for which there was no justification. He, therefore, dismissed both the memoranda of appeal.

3. The assessee is in appeal before the Tribunal on the ground that in the memorandum of appeal dated 3-1-1983 the assessee had removed the defect in the first memorandum of appeal. The removal of this defect related back to the original date of filing of the appeal, i.e., 1-1-1983 and, therefore, the appeal should have been admitted as in time. In support of his contention, the learned

counsel for the assessee relied on the Calcutta High Court decision in the case of Sheonath Singh Vs. Commissioner of Income Tax, West Bengal, and the Patna High Court decision in the case of Smt. Gouri Kumari Devi Vs. Commissioner of Income Tax, wherein both these High Courts have held that rectification of a defective memorandum of appeal related back to the date of the filing of the original memorandum of appeal. The learned counsel proceeded to admit that the original memorandum signed by a constitute attorney was defective as laid down in rule 45, but by the removal of the defect by the subsequent memorandum of appeal, the defect was removed and the appeal was in order and the relation back of the removal of the defect in the appeal was in time and in order and should have been admitted. Further, the learned counsel proceeded to argue that the AAC had not proceeded to deal with the assessee's explanation for the delay in the submission of the second memorandum of appeal and had summarily rejected it as unjustifiably belated.

4. On behalf of the revenue, the learned departmental representative has referred to the decision in the case of SPECIAL MANAGER, COURT OF WARDS, NARAIN DAS NARSINGHDAS Vs. COMMISSIONER OF Income Tax, U. P., and another decision of the Supreme Court in the case of Commissioner of Agricultural Income Tax, Bengal Vs. Sri Keshab Chandra Mandal, , wherein the learned Judges of the Supreme Court had held, that the memorandum of appeal signed by a wrong person was invalid. Further the learned departmental representative proceeded to state that the judicial dicta relied upon by the learned counsel for the assessee were with reference to the appeals before the Tribunal.

5. On rejoinder, the learned counsel for the assessee invited my attention to the provisions of rules 45 and 47 of the Rules which deal with the procedure for filing appeals before the AAC and before the Tribunal. By the provisions in rule 47, the procedure for filing of the appeal before the AAC has been adopted for filing the appeal before the Tribunal. Therefore, there was no material difference in the two procedures. Further reference was made to the Orissa High Court decision in the case of Additional Commissioner of Income Tax Vs. K. Padmalochan Sahu, , wherein the defect in the original memorandum of appeal before the AAC was removed by a subsequent, though belated, memorandum of appeal. The Orissa High Court had held that such subsequent submission of a proper memorandum of appeal was in order.

6. I have carefully considered the facts and circumstances of the case and the submissions of either side. The original memorandum of appeal filed on 1-1-1983 was within time. It was, however, invalid as having been signed by a wrong person, namely, a person other than the one provided in rule 45. As explained by the learned Judges of the Calcutta High Court in the case of Sheonath Singh (supra) it was obligatory for the AAC to have called upon the assessee to remove the defect. But without waiting for such requisition by the AAC the assessee, conscious of the invalidity of the first memorandum of appeal, filed the

subsequent memorandum within two days after removing the defect. The subsequent filing of a proper memorandum of appeal should relate back to the filing of the original memorandum as explained by the learned Judges of the Calcutta High Court in the case of Sheonath Singh (supra) and as held by the learned Judges of the Orissa High Court in the case of K. Padmalochan Sahu (supra). Therefore, in my opinion, the AAC was in error in rejecting the appeal in limine.

7. Even on merits the order of the AAC suffers from infirmity inasmuch as within two days of the filing of the original appeal the assessee has proceeded to file a subsequent memorandum of appeal complete in all respects with an explanation for the delay in the submission of the same. The AAC has summarily rejected the same without assigning any reasons why he found the assessee's explanation to be inadequate. The assessee appears to have acted with due diligence in filing a proper memorandum of appeal before the AAC and the AAC should have condoned the delay, if any, in filing the second memorandum of appeal. In either case, the order of the AAC is erroneous and requires to be reversed. The appeal is restored to the file of the AAC for disposal on merits.

8. In the result, the appeal is allowed.