Court No. - 34

Case :- WRIT TAX No. - 920 of 2013
Petitioner :- M/S Yogendra Prasad Santosh Kumar
Respondent :- Commissioner Of Income Tax, And Anohter
Counsel for Petitioner :- Krishna Agrawal,S.D. Singh
Counsel for Respondent :- R.K. Upadhyay

Hon'ble Sudhir Agarwal,J.

1. Heard Sri S.D. Singh, learned Senior Advocate assisted by Sri Krishna Agrawal, Advocate for petitioner and Sri R.K. Upadhyay, Advocate for respondents.

2. So far as relief no. 2, i.e., the order dated 28.01.2013 passed by Commissioner of Income Tax (Appeals-III), Lucknow *(hereinafter referred to as the CIT (Appeals)")* is concerned, Sri S.D. Singh, learned Senior Advocate, stated at the Bar that petitioner has already availed statutory alternative remedy of appeal and appeal has already been filed. In that view of the matter I do not find any justification to allow him to pursue this writ petition against order dated 28.01.2013, having availed statutory alternative remedy of appeal and this petition is now confined only to relief no. 1, i.e., the order dated 29.08.2013 passed by Commissioner of Income Tax, Gorakhpur *(hereinafter referred to as the "CIT").*

3. The relief No. 1 reads as under:

> *"(i) to issue a writ, order or direction in the nature of certiorari quashing the order dated 29.8.2013 passed under Section 154 of the Income Tax Act by the respondent no. 1 (Annexure-7)."*

4. The order dated 29.08.2013 has been passed under Section 154 of Income Tax Act, 1961 *(hereinafter referred to as the "Act, 1961")* holding its earlier order dated 26.03.2012, passed under Section 264, void ab initio, and accordingly cancelling the same.

5. The facts, in brief, giving rise to present dispute are as under.

6. The petitioner filed return of income in ITR-4 on 07.09.2009 declaring a total income of Rs. 81,000/-. His case was selected under scrutiny and thereafter assessment under Section 143(3) of Act, 1961 was made on a total income of Rs. 2,02,73,180/- vide order dated 26.12.2011. The petitioner filed appeal under Section 246 of Act, 1961 before CIT (Appeals), on 10.01.2012 (sent through courier on 07.01.2012). On 24.02.2012 he sent an application by post seeking withdrawal of his appeal against assessment order dated 26.12.2011. This application is said to have been received in the office of CIT (Appeals) on 27.02.2012. Thereafter on 28.02.2012 petitioner preferred revision under Section 264 of Act, 1961 stating that he has already waived his right of appeal and thus challenging assessment order dated 26.12.2011, in revision. In the memo of revision submitted by petitioner, he specifically said in para 4 that he filed appeal before CIT (Appeals) "which has been withdrawn". The Revisional Authority, i.e., CIT, Gorakhpur allowed revision partly vide order dated 26.03.2012 by deleting addition of Rs. 2,01,71,883/- made under Section 40A(3) of Act, 1961 but maintained rest of assessment order.

7. Petitioner's appeal, however, remain pending before CIT (Appeals). It appears that notice for hearing was issued thereon on 18.12.2012, fixing a date for hearing on which petitioner did not appear, but sought adjournment by a letter, sent by post. CIT (Appeals) declined to adjourn the matter and proceeded on appeal. He considered petitioner's withdrawal application and relying on Calcutta High Court's decision in **Bhartia Steel & Engineering Co. (P) Ltd. Vs. Income-Tax Officer, 1974(97) ITR 154 (Cal.)** and Apex Court's decisions in **CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria, 1967(66) ITR 443 (SC)** and **CIT Vs.**

B.N. Bhattachargee, 1979(118) ITR 461 (SC) wherein it is said that appeal once filed cannot be withdrawn, rejected withdrawal application. Then CIT (Appeals) proceeded on merits of appeal and negativing various grounds taken by appellants, dismissed the same and confirmed assessment order dated 26.12.2011 passed by Income Tax Officer, Ward-1(1), Gorakhpur. Subsequent thereto, CIT, Gorakhpur also passed order dated 29.08.2013, impugned in this appeal, cancelling/revoking his own earlier revisional order dated 26.03.2012.

8. Sri S.D. Singh, learned Senior Advocate appearing for petitioner-assessee contended that petitioner had waived his right of appeal by filing an application for withdrawal and, therefore, revision was rightly filed, since, in law, no appeal was pending at the time when revision was filed and, therefore, revisional order dated 26.03.2012 was validly passed. CIT, Gorakhpur has committed patent error of law in declaring the same void ab initio. He also contended that once appeal was sought to be withdrawn by petitioner, by way of waiver of his right of appeal, it was not open to CIT (Appeals) to reject petitioner's application seeking withdrawal of appeal. It also erred in law in proceeding to decide appeal on merits when assessment order, whereagainst appeal was filed, had already been partly set at naught by Revisional Authority in the revision preferred by petitioner under Section 264 and that order attained finality, having not been challenged by Revenue in any further proceedings. He contended that judicial precedents referred to by respondents-authorities for supporting impugned orders, have no application to the facts of this case. He placed reliance on a Single Judge decision of this Court in **R.R. Brick Factory Vs. The Commissioner of Sales Tax, 2004 NTN (Vol. 25) 945** wherein it has been held that an appeal can be allowed to

be withdrawn, provided there is no notice issued for enhancement of assessment or penalty.

9. Sri R.K. Upadhyay, learned counsel appearing for respondents, however, sought to argue that mere filing of an application for withdrawal of appeal does not mean that appeal stands withdrawn. In the present case, revision preferred by petitioner, when appeal pending, was not maintainable. The Revisional Authority committed a patent error in exercising revisional jurisdiction during pendency of appeal, though it was prohibited under Section 264(4) of Act, 1961 and, therefore, its order dated 26.03.2012 was wholly without jurisdiction. It, thus, has rightly been cancelled by means of impugned order dated 29.08.2013 (Annexure-7 to the writ petition).

10. In order to examine rival submissions vis a vis the the issue raised in this petition, first, this Court need to see, when a Revisional Authority is permitted to entertain a revision under Section 264(1) of Act, 1961. It reads as under:

> *"264. (1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit."*

11. Admittedly, Section 263 is not attracted and here Commissioner also has not called upon record on his own motion, of an order passed by authority, subordinate to him. Here assessee filed application invoking revisional jurisdiction of the CIT against

order passed by Assessing Authority. The limited scope of scrutiny available when revisional jurisdiction is invoked, is to make an inquiry or cause such inquiry to be made, subject to provisions of the Act and pass order thereon as he thinks fit which is not prejudicial to assessee. Sub-section (2) imposes one of the restriction on revisional power that it shall not be exercised if the order has been made more than one year previously. Sub-section (3) provides another limitation in the context of application to be filed by assessee for invoking revisional jurisdiction and says that such an application must be made within one year from the date on which the order in question was communicated or the date on which he otherwise came to know of it, which otherwise is earlier. Proviso of sub-section (3) of Section 264, however, empowers Commissioner to condone delay in filing application, if sufficient cause is shown by assessee. Sub-section (4), however, is a preventive clause deauthorizing Commissioner from revisional exercise of power in certain contingencies mentioned in Clauses (a), (b) and (c). Sub-Section (4) reads as under:

> *"(4) 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."

12. Clause (a) prevents revisional jurisdiction against an order, whereagainst appeal lies to Deputy Commissioner (Appeals) or Commissioner (Appeals) or to Tribunal. It says that either no such appeal has been made or the time within which such appeal could be filed has not expired. In other words if the order of subordinate authority is appealable before Deputy Commissioner or Commissioner or Tribunal and limitation to file appeal has not expired, then revisional power under Section 264(1) shall not be exercised.

13. Another contingency is in respect of a matter where an appeal lies to Commissioner (Appeals) or Appellate Tribunal and there the assessee has not waived his right of appeal. This contingency is not applicable in cases where appeal lies to Deputy Commissioner (Appeals).

14. Clauses (b) and (c) are also very differently worded. Clause (b) contemplates a situation where an appeal has been filed before Deputy Commissioner (Appeals) and it is pending thereat. If in such a case, the order required to be passed by Appellate Authority is pending, at this stage or during that period, revision under Section 264(1) shall not be admissible since the Commissioner in such matter shall not revise an order passed by subordinate authority.

15. Clause (c), however, applies to a situation where order of subordinate authority is made subject of an appeal before Commissioner (Appeals) or Appellate Tribunal and that itself is sufficient to debar Commissioner from exercising revisional jurisdiction under Section 264(1).

16. Sri S.D. Singh, learned Senior Advocate, submitted that waiver of right of appeal as contemplated under Clause (a) would include a situation where an appeal has been preferred but before it can be heard application for withdrawal is filed, which will have the effect of waiver of right of appeal by the assessee. He said that any other view would render this part of Clause (a) redundant. I am not satisfied with this logic. What is required to be waived is the right of appeal and not appeal. A right is exercised by performing. Right of appeal stands exercised by filing appeal. Once right is availed the question of its waiver shall not arise. This is fortified from the fact that Clause (c) deny Commissioner his revisional jurisdiction once appeal is filed.

17. However, in this particular case, the argument relating to waiver can be examined from another angle.

18. In order to appreciate above arguments I would like to consider, whether mere filing of a withdrawal application in an appeal per se amounts to withdrawal of appeal or waiver of right of appeal.

19. Learned counsel for the petitioner, in my view, is not correct in asserting that as soon as he filed application for withdrawal of appeal, it would result in a situation where the assessee can be said to have waived his right of appeal. This presumption is thoroughly misconceived. It pre-conceives a situation that as soon as an application for withdrawal is filed, the appeal is deemed withdrawn as if the authority concerned, where appeal is pending, has no otherwise power or right in respect of pending appeal. Interestingly, there is no provision under the Act, 1961, which contemplates such a situation. In fact there is no provision in Chapter 20 or elsewhere in of Act, 1961 and atleast none has been shown to this Court, conferring any right of withdrawal of appeal,

once filed by assessee, or authorizing Appellate Authority to allow withdrawal of appeal, either conditionally, or otherwise, or in any other manner.

20. In common law, the procedural statute, i.e., Code of Civil Procedure *(hereinafter referred to as the "C.P.C.")* contains certain provisions which allowed withdrawal of suit or appeal. Order XXIII C.P.C. deals with withdrawal of suit and Rule 1 thereof permits abandonment of suit entirely or part thereof. Order XXIII Rule 1 reads as under:

> ***"1. Withdrawal of suit of abandonment of part of claim.--****(1) At any time after, the institution of a suit, the plaintiff may as against all of any of the defendants abandon his suit or abandon a part of his claim:*
>
> *Provided that where the plaintiff is minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*
>
> *(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*
>
> *(3) Where the Court is satisfied.--*
>
> *(a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*
>
> *it may, on such terms as it thinks fit, grant the plaintiff*

permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Whether the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

21. The above provision, as also in the form as it stood in the statute book prior to 1976, has been considered by Special Full Bench (in the judgment of myself constituting majority view on this aspect) in **Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad and others, 2010 ADJ Page 1 (SFB)(LB)** and in paras 1028 to 1036 and 1044 the Court said:

"1028. ***M/s Hulas Rai Baij Nath (supra)*** *was a case with respect to the application of Order XXIII Rule 1 CPC. It was held that Order XXIII Rule 1(1) gives an unqualified right to a plaintiff to withdraw a suit. It also held that there is no provision in CPC which required the Court to refuse permission to withdraw the suit and to compel the plaintiff to proceed with it. However, if a set off has been claimed under*

Order 8, CPC or a counter claim has been filed the position may be different. We do not find any occasion to have application of the said authority to the facts of this case.....

1029. *We now come to the Division Bench decision of this Court in* ***Smt. Raisa Sultana Begam (supra).*** *This Court has held that there is no provision laying down procedure for withdrawing the suit, manner in which it can be withdrawn and the essential physical acts required to be done to constitute withdrawal, which can be in any form. The Court further held that withdrawing of suit needs no permission from the Court and since there is no provision allowing revocation of the withdrawal application, therefore, an application for withdrawal of suit becomes effective as soon as it is done i.e. by giving information to the Court. The Court's order thereon is no part of the act of withdrawal. On page 322, para 9 of the judgement, the Court observed:*

> *"The right to withdraw has been expressly conferred by rule 1(1); there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. As we said earlier, certain consequences arise from the withdrawal which prevent his revoking the withdrawal, the withdrawal is complete or effective as soon as it takes place, and, in any case, as soon as information of it is conveyed to the Court, and no order of the Court is required to effectuate it or even to recognize it."*

1030. *In* ***Smt. Raisa Sultana Begam (supra)****, Order 23,*

Rule 1, as was in the statute book prior to 1976, was under consideration, which read as under :

> ***"1.*** *(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*
>
> *(2) Where the Court is satisfied-*
>
> *(a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*
>
> *it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of suit or such part of a claim.*
>
> *(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*
>
> *(4)Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."*

1031. *The Division Bench, while taking the view as noted above, disagreed with otherwise view taken by the Hon'ble Madras, Bombay and Calcutta High Court, and in an earlier*

Division Bench of this Court; in ***Mukkammal Vs. Kalimuthu Pillay 15 Ind Cas 852 (Mad)****;* ***Lakshmana Pillai Vs. Appalwar Alwar Ayyangar (supra); Yeshwant Govardhan Vs. Totaram Avasu AIR 1958 Bom. 28; Raj Kumari Devi Vs. Nirtya Kali Debi (1910) 7 Ind Cas 892 (Cal)****;* *and* ***Ram Bharos Lall Vs. Gopee Beebee (1874) 6 NWP 66*** *respectively. We find, with great respect, difficult to subscribe the view taken in* ***Smt. Raisa Sultana Begam (supra).*** *In our view, if the Court was unable to agree with the earlier Division Bench judgement in* ***Ram Bharos Lall (supra)****, the matter ought to have been referred to the Larger Bench. It is true that the right of the plaintiff to withdraw suit is absolute as observed by the Apex Court in* ***M/s Hulas Rai Baij Nath (supra)*** *and once an application is made by the plaintiff and pressed before the Court, the Court cannot refuse such withdrawal unless there is a case of counter claim, set off etc. It would not mean that as soon as an application informing the Court is moved by the plaintiff that he intends to withdraw the suit or that an oral information is given, the effect would be that the suit would stand withdrawn.*

1032*. So long as a suit is not instituted by presenting a plaint to the Court, the plaint remains the property of the litigant and would not result in any legal consequence, if he does not present it to the Court, but when the plaint is presented before a competent Court of jurisdiction and a suit is ordered to be registered in accordance with rules, the plaint would become the property of the Court and it would result in certain legal consequences, i.e., pendency of a suit or a case before a Court*

of law. The said legal consequences cannot be nullified without any order of the Court by the litigant simply by orally or in writing informing the Court that he intends to withdraw the suit. It is true that under Order 23 Rule 1, as it stood before 1976 amendment, there was no provision requiring any specific order to be passed by the Court allowing the plaintiff to withdraw his suit but considering the entire procedure of institution of a suit, it cannot be doubted that a suit, duly instituted, and registered in a Court of law cannot stand withdrawn without any order of the Court. In this regard, it would be appropriate to have the procedure of filing of suit in C.P.C., as it was prior to its amendment in 1976.

1033. *Order IV Rule 1 (Allahabad amendment) provides for institution of suit and reads as under :*

> ***"1.*** *(1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for goods cause shown allows time to filing such copies.*
>
> *(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceeding when the processes applied for."*

1034. *The manner of registration of suit was provided in Rule 2 Order IV and reads as under :*

> ***"2. [S. 58]*** *The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries*

shall be numbered in every year according to the order in which the plaints are admitted."

1035. *Once a suit is duly instituted, the Court would pass order issuing summons to the defendants to appear and answer the plaint. Such summons, vide Order V Rule 3, are required to be signed by the Judge or such officer as he appointed, and also the seal of the Court. A suit once duly instituted and registered in the Court would not struck off from the record of the Court on the mere communication by the plaintiff orally or in writing that he intends to withdraw unless an order is passed by the Court to the said effect, which would have the legal consequence of bringing the proceedings set in motion by instituting the suit, to a halt. Mere absence of any provision permitting withdrawal of the application filed by a plaintiff for withdrawing the suit does not mean that no such power is vested in the plaintiff. So long as an order is not passed by the Court, if the plaintiff informs the Court by moving an application that he intends to withdraw the application for withdrawal of suit, he can always request or inform the Court that he does not want to press the application and the same may be dismissed as not pressed or withdrawn. It is only where the plaintiff press his application before the Court requiring it to pass the order for withdrawal of the Suit, the Court would pass the said order in accordance with law since it cannot compel a plaintiff to pursue a suit though he want to withdraw the same. It would thus be wholly unjust to hold that once an application to withdraw the suit is filed by a plaintiff, he cannot withdraw the same and the suit would stand dismissed*

as withdrawn. This would have serious and drastic consequences in as much as he cannot file a fresh suit on the same cause of action.

1036. *Moreover, the existence of a provision i.e. Rule 1(3), empowering the Court to consider as to whether the plaintiff should be saddled with the liability of payment of cost or not also contemplates that an application for withdrawal of suit by itself would not result in any consequences whatsoever unless the Court has applied its mind regarding the cost. If what has been held in* ***Smt. Raisa Sultana Begam (supra)*** *is taken to be correct, it would mean that there would be no occasion for the Court to apply its mind on the question of cost under Rule 1(3) since the suit would stand dismissed as withdrawn as soon as the plaintiff informs the Court about his decision for withdrawal of the suit either orally or in writing. This is nothing but making Rule 3 (1) redundant. The earlier judgement of this Court in* ***Raja Shumsher Bahadoor Vs. Mirja Mahomed Ali (1867) Agra H.C.R. 158*** *wherein this view was taken that the withdrawal must be regarded as terminating automatically the proceedings in the suit involving the suit's immediate dismissal was not found to be correct subsequently by the Division Bench in* ***Ram Bharos Lall****. We, therefore, find it appropriate in the entire facts and circumstances to take a different view and have no hesitation in holding though with great respect to the Bench, that the law laid down in* ***Smt. Raisa Sultana Begam (supra)*** *is not correct. In our view, the law laid down in* ***Ram Bharos Lall (supra)****,* ***Mukkammal Vs. Kalimuthu Pillay (supra)****,* ***Raj***

Kumari Devi Vs. Nirtya Kali Debi (supra) *and* ***Yeshwant Govardhan Vs. Totaram (supra)*** *lay down the correct law. We also find that a Division Bench of Orissa High Court in* ***Prema Chanda Barik Vs. Prafulla Kumar Mohanty AIR 1988 Orissa 33*** *has also taken the same view and did not find itself agreeable with the Division Bench decision in* ***Smt. Raisa Sultana Begam (supra)****. In fact, a Division Bench of Calcutta High Court in* ***Rameswar Sarkar Vs. State of West Bengal and others AIR 1986 Cal. 19*** *has gone slightly further by observing that where there is no provision under the Code providing for withdrawal of application for withdrawal of suit, Section 151 C.P.C. would apply."*

"1044. *Since we have taken a view that the suit did not stand abandoned or withdrawn as soon as the application was made, the question of estoppel as argued by Sri Siddiqui is not attracted and, therefore, the Apex Court's decision in Deewan Singh (supra), Jai Narain (supra), Anuj Garg (supra) and Barkat Ali (supra) would have no application and lend no support to the plaintiffs (Suit-4) and defendants (Suit-5).*"

22. I also find that subsequently the Apex Court also took a similar view in **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others, 2011(2) SCC 705** which has been followed by another Single Judge in **M/s Auto Oil Company Majhola Devi Vs. Indian Oil Corporation Ltd. and others, 2011 (5) ADJ 800.** All these authorities have also been referred to in this Court's order dated 27.02.2013 passed in **Recall Application No. 82136 of 2011 in Second Appeal No. 841 of 1983, Smt. Kanteshwari Tewari Vs. Badri Prasad and others,** where in para 26 of the judgment the

Court said:

> "26. I find that this part of judgment is no longer a good law inasmuch as the Division Bench judgement in **Raisa Sultan Begam (supra)** has already been overruled by this Court in the majority decision in **Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad and others 2010 ADJ Page 1 (SFB) (LB)** and this has been referred to and followed by another Single Judge of this Court in **M/s Auto Oil Company Majhola Devi Vs. Indian Oil Corporation Ltd. and others, 2011 (5) ADJ 800.** The Hon'ble Single Judge has found that recently even the Apex Court has taken a similar view in **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others, 2011(2) SCC 705** reversing a decision of this Court. The view taken by this Court that once an application to withdraw the suit is filed there is no occasion to file a further withdrawal application to withdraw the earlier application, has been negatived by Apex Court observing that an application praying for withdrawal of withdrawal application was maintainable."

23. Now coming back to the provisions in Act, 1961. Here I find that there is no provision which permits withdrawal of an appeal, once it is filed, and registered. In other words, once right of appeal is exhausted, by party concerned, and the appeal is filed before appropriate Appellate Authority, who after receiving same has registered it, I find no provision in the statute permitting withdrawal thereof. It is perhaps in this context of the matter that a three Judge Bench of Apex Court in **CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (supra)** said:

> *"**It is also well established that an assessee having once filed an appeal cannot withdraw it**. In other words, the*

assessee having filed an appeal and brought the machinery of the Act into working cannot prevent the Appellate Assistant Commissioner from ascertaining and settling the real sum to be assessed, by intimation of his withdrawal of the appeal."

(emphasis added)

24. Sri S.D. Singh, learned Senior Advocate, however drew my attention to another Single Judge judgment of this Court in **R.R. Brick Factory Vs. The Commissioner of Sales Tax (supra),** which has arisen from the proceedings under U.P. Trade Tax Act, 1948, wherein this Court has said that once an application for withdrawal of appeal is preferred, the Appellate Authority has to pass some order on such application and unless that is done, the appeal itself should not have been decided on merits.

25. Here also I find that proviso to Section 9(3)(b) of U.P. Sales Tax Act entitles an appellant to apply for withdrawal of his appeal and it is in that view of the matter, aforesaid judgment has been given, and, the Court said:

".... under the proviso the Appellate Authority has not been given jurisdiction to allow the appeal when there was already an application to withdraw the appeal by the appellant. In any view of the matter the order allowing the appeal against the wishes of the appellant cannot be sustained even by invoking the said proviso."

26. In this particular case, however, the bar under Section 264(4) of Act, 1961 would stand against petitioner, when he preferred revision before CIT inasmuch as he had already exhausted his right of appeal and that was actually pending before Appellate Authority. Mere filing of an application seeking withdrawal of appeal would not have resulted as if the appeal stood withdrawn or deemed withdrawn unless an order is passed by Appellate

Authority thereon for the reason that appellant could have always requested Appellate Authority not to pass any order on his withdrawal application since he does not press it and he could have the proceeded with his appeal. In the eyes of law, appeal continued to remain pending even if application was filed by petitioner seeking withdrawal of appeal. On the date when revision was filed by petitioner or when CIT passed order on petitioner's revision, petitioner's appeal, as a matter of fact, was pending before Appellate Authority. Hence the Revisional Authority was barred from revising order of Assessing Authority by virtue of sub-section (4) of Section 264 of Act, 1961.

27. There is another aspect of the matter. Clause (a) talks of a situation where assessee has not waived his right of appeal. When appeal is filed, the right of appeal stands availed and exhausted by assessee, hence question of waiver of right of appeal thereafter would not arise. Moreover, Clause (b) and (c) also makes a distinction in respect of an appeal preferred before Commissioner (Appeals) or Appellate Tribunal vis-a-vis appeal preferred before Deputy Commissioner (Appeals). For an appeal preferred before Deputy Commissioner (Appeals), Clause (b) says that if an order on appeal is pending but when an appeal is preferred before Commissioner (Appeals) or Appellate Tribunal, Clause (c) contemplates that the order has been made subject of appeal, meaning thereby mere filing of appeal against assessment order is sufficient to attract Clause (c) and thereafter power of revision shall stand lost and cannot be invoked.

28. In view thereof, I am clearly of the view that CIT committed a manifest error in exercising revisional power when petitioner's appeal was pending before CIT (Appeals). The revisional order, therefore, was wholly without jurisdiction. That being so, it has

rightly been recalled. The Appellate Authority has rightly proceeded to decide appeal in view of the fact that petitioner did not press his application for withdrawal of appeal and moreso in the light of judgment of Apex Court **CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (supra),** the appeal filed could not have been withdrawn.

29. In view of above, the writ petition lacks merit. Dismissed. Interim order, if any, stands vacated. However, there shall be no order as to costs.

Order Date :- 21.02.2014
AK

Court No. - 34

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Respondent :- Commissioner Of Income Tax, And Anohter
Counsel for Petitioner :- Krishna Agrawal,S.D. Singh
Counsel for Respondent :- R.K. Upadhyay

Hon'ble Sudhir Agarwal,J.

1. Sri S.D. Singh, learned Senior Advocate assisted by Sri Krishna Agrawal, Advocate, stated at the outset that he does not want to press this application and it may be dismissed as such.

2. The application is accordingly rejected as not pressed.

Order Date :- 21.02.2014
AK-(Appl. No. 374646 of 2013)