* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 13.02.2018
Pronounced on: 20.02.2018

\+ **ITA 799/2005**

SALORA INTERNATIONAL LTD., N. DELHI
..... Appellant
Through: Mr. Salil Kapoor and Mr. Sumit Lalchandani, Advs.

versus

COMMISSIONER OF INCOME TAX NEW DELHI
..... Respondent
Through: Mr. Puneet Rai, Standing Counsel for Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The question of law which arises for decision in this appeal is:

> "*Whether on the facts and in the circumstances of the case and on the true interpretation of the provisions contained in Section 275 (1) (a) read with Section 254 (1) of the Income Tax Act, 1961 the ITAT was right in law in holding that the order passed by the Assessing Officer under Section 271 (1) (c) was within the period of limitation, prescribed in Section 275 (1) (a) of the Income Tax Act, 1961.*"

2. The facts are brief; the assessee is a limited company and for the relevant assessment year, i.e. AY 1989-90, it engaged itself in the

manufacture and sale of TV sets and their components. It filed a return declaring loss. The Deputy Commissioner, assessed loss at ₹4,61,38,973/-. The AO made a computation of the book profits of the appellant determining its liability at ₹1,42,112/- on the determining the book profits at ₹4,73,706/-. The assessee preferred an appeal to the Commissioner (Appeals) which was decided on 13.12.1993 partly allowing its contentions. The assessee accepted the decision - it had partly allowed the appeal but sustained some additions. This order was served on the assessee, on 21.01.1994. While so, the AO issued notice under Section 271 (1) (c) of the Act calling upon it to show cause why penalty should not be imposed for concealment of income. The assessee resisted the proceedings arguing, among other things, that penalty proceedings were barred in view of Section 275 (1) (a) of the Act as a valid penalty could be imposed within six months of the end of the month in which the order of the CIT (A) was received by the AO. It was argued that the CIT (A)'s order was made on 30.12.1993 and received on 21.01.1994 by the assessee; consequently the penalty proceedings could have culminated in a valid order by 31.07.1994. The initiation of penalty proceedings by notice of 12.08.1997 was without jurisdiction and therefore any order made pursuant to it was illegal. The AO rejected the assessee's argument and imposed a penalty of ₹12,74,680/- by an order of 25.11.1997. The assessee appealed to the CIT (A) who accepted its contentions and deleted the penalty imposed upon it. The CIT (A) allowed that appeal.

3. The revenue had contended in the assessee's penalty appeal before the CIT(A) that it had previously appealed against the deletion directed by the CIT(A) in the adjudicatory order to the ITAT soon after January 1994. After the appeal was filed, a decision was taken to withdraw it. The decision was communicated through letters dated 29.12.1995 and 04.01.1996. Leave was sought from the ITAT to withdraw the appeal. The order of the ITAT permitting the withdrawal was made on 31.03.1997. The revenue sought to urge that these circumstances negatived the assessee's contention with respect to limitation. Setting aside the penalty order, the CIT(A) in the penalty proceedings held as follows:

> *"8. The submissions and contentions of the Ld. AR in this regard carry weight that the order of the ITAT allowing withdrawal of the said appeal cannot be regarded as an order U/s 254(1) as the appeal filed by the Department was not an effective appeal. In this regard the position has been categorically clarified by the Hon'ble Supreme Court in the case of CIT v. B.N. Bhattacharjee that if an appeal is filed and not effectively pursued, and the same is withdrawn thereafter then it will cancel the effect of having been an appeal, which is the same as not preferring an appeal. Therefore, in this case, it cannot be said that an effective appeal had been filed by the Department before the ITAT, as very clearly the same was withdrawn by the Department. This situation would be covered squarely by the decision of the Hon'ble Supreme Court in the case of CIT v. B.N. Bhattacharjee, referred to above. Therefore, the submissions and contentions of the Ld. AR of the appellant-company that the penalty order was time barred carry weight. This order should have been passed within six months from the end of the month in which the order of the CIT(A) had been received, which in this case means the*

period expiring on 31st July 1994. I am constrained to observe that the penalty order has been passed only on 25.11.97. As discussed above, the appeal filed by the Department before the ITAT cannot be taken cognizance of as the said appeal was withdrawn by the Department. Therefore, the penalty order imposing a penalty of Rs.12,74,680/- is cancelled as the same has been passed beyond the limitation date."

4. The revenue further appealed to the ITAT; the assessee relied upon Circular No. 367 dated 26.07.1983 issued by the CBDT and also some judicial authorities. The ITAT set aside the CIT(A)'s order, reasoning as follows:

> *"In the present case, the assessee did not file any appeal to the Tribunal against the order of the CIT(A). It was the department which filed an appeal to the Tribunal. Now, obviously the penalty is being imposed only with reference to the additions or disallowances that were sustained by the CIT(A) against which the assessee did not file any appeal to the Tribunal. The assessee's contention is that the appeal filed by the department having been withdrawn, it is as if no appeal was even filed against the order of the CIT(A). There is obviously no question of any penalty being levied with reference to the amounts deleted by the CIT(A). The department first filed an appeal against the relief granted by the CIT(A), but later withdrew the same. The assessee wants to take advantage of this by contending that the penalty order passed on 25.11.97 is beyond the time u/s 275(1)(a). We are unable to give effect to the contention of the assessee that the withdrawal of the appeal by the department would amount to the department not having filed any appeal. The judgment of the SC in the case of B.N. Bhattacharjee cited supra was rendered in a different contest. There the words that were interpreted were "preferred an appeal" appearing in the proviso to Section 254M(1) of the Act. It was held that mere institution*

followed by withdrawal of the appeal will cancel the effect and result in non-prosecution and obliteration of the appeal which is the same as not preferring an appeal. No doubt, these observations did not support the plea of the assessee before us, but the SC was not concerned with a period of limitation. The provisions relating to the filing of applications before the Settlement Commission which was constituted for speedy disposal of cases where searches have been conducted were being interpreted. The proviso, with which the SC was concerned prohibited an assessee from approaching the Settlement Commission where the ITO had preferred an appeal to the Tribunal in that case, the ITO first filed an appeal to the tribunal, but later withdrew the same and the contention before the SC was that the assessee cannot approach the Settlement Commission. It was in this context that the words "preferred an appeal" were interpreted to mean that where the appeal is withdrawn it would amount to not preferring an appeal at all. We are, however, concerned with a period of limitation which could be taken advantage of by an assessee, generally speaking by first preferring an appeal to the Tribunal and thereafter withdrawing the same and contending that no appeal was ever filed to the Tribunal in law and, therefore, even where the additions sustained by the CIT(A) had attained finality, the AO ought to have passed the penalty order within six months from the receipt of the order of the CIT(A). This despite the fact that factually the order of the CIT(A) was the subject matter of appeal before the Tribunal. Such an interpretation of the provision cannot be permitted. An interpretation which may give rise to mischief is to be avoided (see K.P. Varghese, 131 ITR 567). The ld. DR rightly contended that all that the provision required is that the order of the CIT(A) present case. What happens later is of no consequence. The withdrawal of the appeal in such a situation cannot amount to the department not filing an appeal at all since factually there was an appeal pending before the Tribunal. Though, it was permitted to withdrawn later by an order. In the

present case, there was an order passed by the Tribunal permitting the department to withdraw the appeal. This in our view is an order the power to pass which is traceale only to Section 254(1). The period of limitation in our opinion, available to the AO u/s 275(1)(a) is a period of six months from the date on which the order of the Tribunal permitting the withdrawal was received by the department. In this view of the matter, we are unable to agree with the assessee that the penalty order is beyond the period of limitation."

5. The assessee urges that the ITAT failed to appreciate that the mere filing of the appeal to the ITAT and its withdrawal was never made known to it and, therefore, that circumstance could not be said to constitute a valid "pending" proceeding. Learned counsel for the assessee relied upon the text of Section 275(1) and contended that since it imposed a limitation upon the power of the AO to inflict penalty, it ought to be given full effect. He also relied upon the judgment of the Supreme Court in *Commissioner of Income Tax v. B. N. Bhattacharjee* 118 ITR 461. It was submitted that neither was the pendency of the appeal to the ITAT notified nor was the withdrawal order communicated to the assessee - rather, it was kept in the dark. Since the revenue wished to inflict penalty on the disallowance amount sustained by the CIT(A), the starting point of limitation was from the date of receipt of the order, i.e. 06.01.1994. Since the six months period ended without any further proceedings, the imposition of penalty was clearly beyond the period prescribed by law.

6. Learned counsel for the revenue urges that the ITAT acted within its jurisdiction in distinguishing the rulings cited on behalf of

the ITAT and setting aside the ruling of the CIT(A). Whilst the general principle that withdrawal of an appeal results in the proceedings never having been initiated may apply, and may be correct, it cannot have universal application so as to defeat the intent of Parliament which mandated imposition of penalty. It was submitted that if the appeal had in fact been proceeded and decided on the merits, the period of limitation would have commenced only from the date of final order of the ITAT. Learned counsel also supported the ITAT's reasoning that the mischief sought to be avoided by liberal interpretation of the statute should be adopted rather than one which defeats the intent of the law that dictated the penalty once an addition is made.

7. As is apparent, the facts relating to the question of law formulated are narrow. The amounts added by the AO in the original adjudicatory order were modified. The partial success of the assessee's appeal meant that addition of some amounts was sustained. The order of the CIT(A) was received by the assessee in January 1994. It is not disputed that the AO had initiated penalty proceedings in the meanwhile. What the assessee complains however is that despite the CIT(A)'s order, the Revenue did not complete the penalty proceedings within the six month period mandated by Section 275.

8. The relevant provisions are Sections 254 (1) and 275 which are reproduced below:

"254.(1) The appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit."

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275(1) No order imposing a penalty under this chapter shall be passed-

(a) in a case where a relevant assessment or other order is the subject matter of an appeal to the Commissioner (Appeals) under Section 246 (Section 246A) or an appeal to the Appellate Tribunal under Section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later."

9. In this case, it is a matter of record that the revenue's appeal was never heard; no effective proceedings were held nor was any order made. Equally, the assessee was never notified about the filing of the appeal, its pendency or even its withdrawal. In *B.N. Bhattacharjee, (supra),* the Supreme Court was confronted with a case where the appeal to the ITAT was filed, and later withdrawn. These facts were sought to be put against the assessee to contend that an application could not be made to the Settlement Commission. The Court, therefore, had occasion to consider what was meant by "prefer an appeal". It was held that:

"32. Here the Department did file appeals and later withdrew them before the application for settlement was made. At the time the application before the Settlement

Commission was moved no departmental appeal was pending. Indeed, the documents in this case clearly point to the assumption by the C.I.T. and the assessee that if the Revenue withdrew its appeal the disentitlement in the proviso would disappear. Even so, when an appeal is filed by the I.T.O., does not the prohibition operate? This turns on the meaning of the words "preferred an appeal". "Preferred" is a word of dual import: its semantics depend on the scheme and the context; its import must help, not hamper, the object of the enactment even if liberty with language may be necessary.

33. There is good ground to think that an appeal means an effective appeal.1973 (31) STC 434. An appeal withdrawn is an appeal non est as judicial thinking suggests.1968 (21) STC 154; 1964 (52) ITR 780. Black's Law Dictionary gives the following meaning

"PREFER: To bring before; to prosecute; to try to proceed with. Thus, preferring an indictment signifies prosecuting or trying an indictment signifies prosecuting or trying an indictment.

To give advantage, priority, or privilege; to select for first payment, as to prefer one creditor over others."

Thus it may mean 'prosecute' or effectively pursue a proceeding or merely institute it. Purposefully interpreted, preferring an appeal means more than formally filing it but effectively pursuing it. If a party retreats before the contest begins it is as good as not having entered the fray. After all, Chapter XIXA is geared to promotion of settlement and creation of road-blocs in reasonable compositions. The teleological method of interpretation leads us to the view that early withdrawal of the I.T.O's appeal removes the bar of the Proviso."

10. In *A.V. Sreenivasalu Naidu v. CIT* 1948 (16) ITR 341 (Mad), a similar reasoning was adopted by the High Court, which held as follows:

> *The order is made the subject of an appeal only when it is the subject-matter of an effective appeal. If the appeal is not admitted and is disposed of on the ground that it was filed after the prescribed time, the order could not be said to be the subject of an appeal. Section 33 also supports the said view. Under Section 33 (1) an assessee can prefer an appeal within 60 days and Sub-section (2-A) empowers the Tribunal to admit an appeal even after 60 days if it is satisfied that there was sufficient cause for not presenting it within the period. This clearly indicates that till such order was made, the appeal was not admitted and, therefore, it must be treated as not having been legally on the file of the Tribunal.*
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> *Decided cases also support my view. In Baya Reddi v Gopala Rao (1933) 66 M.L.J. 486 : I.L.R. 57, Mad. 741 a question arose as regards the construction of the words " There has been an appeal " within the meaning of Article 182 (2) of the Indian Limitation Act. The words " There has been an appeal " are obviously wider in scope than the words " the subject of an appeal." Even, so, Madhavan Nair, J., (as he then was) held that where an appeal memorandum presented to the High Court, was rejected as being out of time, there was no appeal to the Court within the meaning of Article 182 (2). The learned Judge accepted the argument that as the appeal to the High Court was not admitted as having been filed out of time, it should not be held that there has been an appeal against the decree of the appellate Court. In the present case the Appellate Tribunal refused to excuse the delay and did not admit the appeal."*

11. A plain and textual reading of Section 275(1A) clarifies that the expiry of six months prescribed is to be reckoned "*from the date of completion of proceedings or from the end of the month in which the*

order of the CIT(A) or as the case may be the appellate tribunal is received." If the logic of the provision is kept in mind, it is obviously an adjudicatory "order" which culminates in "the proceedings" (i.e. an order that determines *inter alia* the rights of the parties finally) that is to be deemed a *terminus quo* for the completion of penalty proceedings. Any other interpretation would inject a great deal of uncertainty because in either case of maintainability of an appeal preferred by either the revenue or the assessee, in the eventuality of withdrawal of that appeal, without an adjudicatory order, the period of limitation would be deemed to subsist. The law abhors uncertainty. Therefore, the dependence of the period of the limitation upon whether an order becomes final at the instance of one party, i.e. that filing and prosecution or withdrawal of an appeal (by one party or the other) would be, in the opinion of the Court one such event which leaves the legal position inchoate and unsatisfactory. Instead, an interpretation that permits certainty should be adopted. Viewed as such, the CIT's order provided a fixed date from which to reckon the end of the period of limitation–some time in early July 1994. The absence of an appeal by the assessee (against the CIT(A)'s appellate adjudicatory order) meant that at least with respect to the amount that it had accepted in the adjudicatory order as an addition, the penalty proceedings survived. As far as the other issue was concerned, perhaps there was no occasion for a further penalty proceeding given that the issue might have been rendered debatable, even in the eventuality of an order favouring the revenue. In other words, as far as deletion was concerned, the assessee definitely was not aggrieved.

12. In these given circumstances, it was incumbent upon the revenue to complete the penalty proceedings and pass order within the six months period. It did not. Its reliance upon the crutches of a non-appeal, which is what its effort at appeal to the ITAT eventually became in the present case, could not have been legitimately upheld as was done by the impugned order. For these reasons, the question of law is answered in favour of the assessee and against the revenue. The appeal is consequently allowed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

FEBRUARY 20, 2018

HIGH COURT OF DELHI
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