

OD-22

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/168/2022
IA No.: GA/1/2022, GA/2/2022
PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-2, KOLKATA
VS.
SMT. JAYASHREE JAYAKAR MOHANKA

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 31st October, 2022

Appearance :
Mr. Prithu Dudhoria, Adv.
... for appellant
Mr. Pratyush Jhunhunwalla, Adv.
... for respondent

The Court : We have heard Mr. Prithu Dudhoria, learned standing Counsel appearing for the appellant/revenue and Mr. Pratyush Jhunhunwalla, learned Counsel for the respondent/assessee.

There is a delay of 1132 days in filing the appeal. Though there is no proper explanation given by the revenue for the inordinate delay in filing the appeal, since we are inclined to consider as to whether substantial questions of law arise for consideration in this appeal we exercise discretion and accordingly condone the delay in filing the appeal. The application being GA/1/2022 is allowed.

ITAT/168/2022

This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 11th February, 2019, passed by the Income Tax Appellate Tribunal, Kolkata “D” Bench, Kolkata passed on 6.12.2019 in C.O. Nos.82/Kol/2018 in I.T.A. Nos. 1344/Kol/2018 for the assessment year 2005-06.

The revenue has raised the following substantial questions of law for consideration :-

- i) Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal is right in law and fact in cancelling the penalty levied under section 271(1)(c) of the Income Tax Act, 1961 ?
- ii) Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal is right in law and fact in holding that the notices under section 274 of the Income Tax Act, 1961 are not in accordance with law ?

We have heard Mr. Prithu Dudhoria, learned standing Counsel appearing for the appellant/revenue and Mr. Pratyush Jhunjhunwalla, learned Counsel for the respondent/assessee.

The order passed by the learned Tribunal has to be confirmed for two reasons, firstly, the order of assessment, which was subject matter of challenge before this Court at the instance of the revenue in the case of Principal Commissioner of Income Tax Central-2, Kolkata vs. Jayashree Jayakar Mohankar in ITAT 75 of 2022, was dismissed by judgment dated 25th July, 2022. If that be the case, whether it would automatically result in setting aside

the order of penalty imposed on the assessee. This issue was considered and answered by the Hon'ble Supreme Court in the case of K.C. Builders & Anr. vs. Assistant Commissioner of Income Tax, (2004) 265 ITR 562, wherein the Hon'ble Supreme Court held that where additions made in the assessment order on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and therefore in such a case no penalty can survive and the same is liable to be cancelled. The additions made in the assessment order have not been set aside and the order having been confirmed by this Court in ITAT 75 of 2022, penalty proceedings cannot survive. That apart, the Hon'ble Supreme Court had examined the factual position and found that the notice issued under section 274 of the Act was defective and in this regard also noted the decision in the case of CIT vs. Manjunatha Cotton and Ginning Factory, (2013) 359 ITR 565 and allowed the assessee's appeal and dismissed the revenue's appeal.

Thus, we find that there is no question of law, much less substantial question of law, arising for consideration in this appeal.

Accordingly, the appeal is dismissed.

The stay application GA/2/2022 also stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)