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

\+ W.P.(C) 12116/2021

MEDEOR HOSPITAL LIMITED ..... Petitioner
Through : Mr. Ved Jain & Mr. Nishchay Kantoor, Advocates

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-04 & ORS. ..... Respondents
Through : Mr. Abhishek Maratha, Senior Standing counsel for the Revenue.

Reserved On: 17th October, 2022
% Date of Decision: 28th October, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed by the petitioner challenging the action of respondent No.1 in partially settling dispute relating to penalty for Assessment Year 2014-15 pending before the Income Tax Act Tribunal (for short 'ITAT') under the Vivad Se Vishwas Scheme (for short 'VSV Scheme') without settling the dispute relating to quantum appeal for Assessment Year 2014-15 pending before the Commissioner of Income Tax (Appeals) [(for short 'CIT(A)'].

ARGUMENTS ON BEHALF OF THE PETITIONER

2. Learned counsel for the petitioner stated that respondent No.1 erred in holding that petitioner was ineligible to settle the quantum appeal for Assessment Year 2014-15 pending before CIT(A) on the grounds that (i) appeal had been filed before CIT(A) after limitation period for filing the appeal had expired, (ii) FAQ-59 did not cover the case of the petitioner and (iii) an order under Section 249(3) condoning delay was necessary for eligibility under VSV Act. The relevant portion of the impugned order dated 23rd January, 2021 is reproduced hereinbelow:-

> *"CREDIT IN FORM 3 HAS BEEN GIVEN PROVISIONALLY ON THE BASIS OF OLTAS DATA. AO SHOULD ENSURE CONSUMPTIOIN OF ALL CHALLAS AGAINST CORRECT DEMANDS IMMEDIATELY. In this case penalty u/s 271(1)(c) of Rs.74290830/- was imposed which was confirmed by CIT(A) and appeal against the same is pending in ITAT. In respect of quantum, the AO passed order on 22.12.2016, as per Form-35. It was served on 23.06.2017 and appeal was filed on 24.05.2019, which is late appeal. FAQ 59 does not cover assesssee's case. Therefore, only penalty appeal is being settled on payment of 25% of penalty amount. Form 3 has been issued accordingly."*

3. Learned counsel for the petitioner submitted that the respondent No.1 erred in not appreciating that in terms of the Section 2(1)(a)(i) read with Section 2(1)(b) read with Section 2(1)(n) of the VSV Act, the only requirement for being eligible to settle a dispute under the VSV Scheme was that the appeal should be "*pending*" before an appellate forum which includes CIT(A) and ITAT. He pointed out that there was no requirement that the appeal should be filed in time or that the appeal should have been '*admitted*' before the specified date. He further submitted that there was no requirement that there had to be a formal

order of condonation of delay before the assessee could avail the benefit of the VSV Scheme.

4. In support of his submission, learned counsel for the petitioner relied on the judgment of this Court in the case of ***Shyam Sunder Sethi vs. PCIT in W.P.(C) 2291/2021*** dated 3rd March 2021, wherein it has been held that *"An appeal would be "pending" in the context of Section 2(1)(a) of the 2020 Act when it is first filed till its disposal. Section 2(1)(a) of the 2020 Act does not stipulate that the appeal should be admitted before the specified date, it only adverts to its pendency"*.

5. He further submitted that in any event in the present case the delay in filing the appeal had been condoned by CIT(A), NFAC vide letter dated 20th July, 2021 and the appeal had been admitted. According to him, in such circumstances, appeal against assessment order dated 22nd December, 2016 ought to be considered to have been has been filed on time i.e. by 21st January, 2017 (before specified date 31st January, 2020) as it is settled law that condonation of delay whenever is accepted by the appellate authority, the same would relate back to the original date of filing of the appeal, as if the appeal had been filed within the time prescribed under the Statute.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

6. *Per contra*, learned counsel for the respondents stated that as the assessment order dated 22nd December, 2016 had been served upon the petitioner on 23rd June, 2017, the limitation of thirty days prescribed in the Income Tax Act, 1961 (for short 'Act, 1961') for filing an appeal under Section 246A of the Act, 1961, before the CIT(A) had expired on 22nd July, 2017.

7. He further stated that the petitioner had preferred an appeal under Section 246A of the Act, 1961 before the CIT(A) challenging the penalty order, which

was dismissed. Thereafter, the petitioner preferred an appeal under Section 253 of the Act, 1961, before the ITAT which was pending adjudication as on 31st January, 2020.

8. He also stated that the petitioner filed an appeal against the assessment order dated 22nd December, 2016 before the CIT(A) on 24th May, 2019 i.e. after a delay of about two years from the date of expiry of limitation on 22nd July, 2017, along with an application seeking condonation of delay in filing the said appeal.

9. He stated that the petitioner opted for VSV Scheme and filed a declaration under VSV Act, 2020 on 18th December, 2020, to settle the pending disputes before the CIT(A) in quantum appeal and ITAT in penalty appeal.

10. He contended that though the designated authority, in view of the VSV Act, 2020 allowed the settlement of the penalty as the penalty appeal was pending on the prescribed date i.e. on 31st January, 2020, yet the designated authority, in view of FAQ-59 issued by CBDT vide Circular No.21/2020 namely F.NO.IT(A)/1/2020-TPL dated 4th December, 2020, rejected the declaration of the petitioner qua the quantum appeal. The FAQ-59 in CBDT Circular No.21/2020 dated 4th December, 2020 is reproduced hereinbelow:-

> *"Q-59. Whether the taxpayer in whose case the time limit for filing of appeal has expired before 31 Jan 2020 but an application for condonation of delay has been filed is eligible?*
>
> *Ans. If the time limit for filing appeal expired during the period from 1st April 2019 to 31 at Jan. 2020 (both dates included in the period), and the application for condonation is filed before the date of issue of this circular, and appeal is admitted by the appellate authority before the date of filing of the declaration, such appeal will be deemed to be pending as on 31st Jan 2020."*

11. Learned counsel for the respondents stated that according to the designated authority the claim of the petitioner with regard to the quantum appeal did not fulfil the condition prescribed by the FAQ-59 in the following manner:-

> *"If conditions stated below are cumulatively satisfied, such appeal is deemed to be pending as on Specified Date and is eligible to opt for DTVSV Scheme:*
>
> *i)* ***Time limit to file appeal expired between 1 April 2019 to 31 January 2020****: and*
> *ii) Application for condonation of delay is filed before 4 December, 2020: and*
> *iii)* ***Appeal is admitted by appellate forum before the date of declaration****"*

REJOINDER ARGUMENTS

12. In rejoinder, learned counsel for the petitioner submitted that FAQ-59 of Circular issued by CBDT to extent it contemplated '*admission*' of appeal before filing of declaration as a condition precedent for appeal to be treated 'pending' and to be eligible for settlement under the VSV Act was contrary to provision of VSV Act.

COURT'S REASONING

IT IS SETTLED LAW THAT WHEN A SECTION CONTEMPLATES PENDENCY OF AN APPEAL THERE IS NO NEED TO INTRODUCE THE QUALIFICATION THAT IT SHOULD BE VALID OR COMPETENT.

13. Having heard learned counsel for the parties, this Court is of the view that the primary issue that arises for consideration in the present proceeding is as to what is the meaning of the word '*pending*' in Section 2(1)(a) of the VSV Act.

14. Section 2(1)(a) and Section 2(1)(n) of the VSV Act are reproduced hereinbelow:-

> *"2(1) In this Act, unless the context otherwise requires—*
>
> *(a)* ***"appellant" means—***
>
> *(i)* ***a person in whose case an appeal*** *or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by both****, before an appellate forum and such appeal or petition is <u>pending</u> as on the specified date****….*
>
> *xxx xxx xxx*
>
> *(n)* ***"specified date" means the 31st day of January, 2020****;*
>
> (emphasis supplied)

15. In the opinion of this Court, when a section contemplates pendency of an appeal, what is required is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. In ***Raja Kulkarni v. The State of Bombay*** reported in ***AIR 1954 SC 73***, the Supreme Court has held that *"whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g. when it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court"*.

16. To the same effect is the law laid down by the judgments of the Supreme Court in the cases of ***Tirupati Balaji Developers (P) Ltd. v. State of Bihar & Ors.*** reported in ***(2004) 5 SCC 1*** and ***Commr. of Income Tax, Rajkot Versus Shatrusailya Digvijaysingh Jadeja, (2005) 7 SCC 294***. In the said cases, it has

been held that an appeal does not cease to be an appeal though irregular and incompetent.

17. The Gujarat High Court in ***Tushar Agro Chemicals vs. The Principal Commissioner of Income Tax-1, 2021 (7) TMI 1267*** has also held as under:-

> *"11. In view of the aforestated legal position, there remains no shadow of doubt that appeal could be said to be pending, even if the delay occurred in filing the same was not condoned and even if it was allegedly irregular or incompetent. In the instant case therefore also, the Respondent could not have rejected the Declaration Form of the Petitioner filed under the said Act merely on the ground that the appeal was not valid or competent, as the delay occurred in filing the Appeal was not condoned by the Appellate Authority….."*

CBDT CANNOT ISSUE CIRCULARS ADVERSE TO THE ASSESSEE. THE FAQ NO.59 TO THE EXTENT IT CONTEMPLATES ADMISSION OF APPEAL AS A CONDITION PRECEDENT IN ORDER TO BE ELIGIBLE FOR SETTLEMENT UNDER THE VSV ACT IS CONTRARY TO LAW.

18. Though Section 10 of the VSV Act gives power to the CBDT to issue directions, yet this Court is of the view that the said Section is similar to Section 119 of the Act, 1961. Consequently, the CBDT under Section 10 of VSV Act cannot issue circulars adverse to the assessee.

19. In fact, the Supreme Court in ***UCO Bank, Calcutta vs. Commissioner of Income Tax, W.B., (1999) 4 SCC 599*** while interpreting Section 119 of the Act, 1961 has held as under:-

> *"9. xxx xxx xxx*
>
> *Under sub-section (2) of Section 119, without prejudice to the generality of the Board's power set out in sub-section (1), a specific power is given to the Board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general or special orders in respect of any class of incomes or class of cases setting forth directions or instructions, not being prejudicial to assessees, as the guidelines, principles or*

procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under Section 119 of the Income Tax Act which are binding on the authorities in the administration of the Act. ***Under Section 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee****. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manner as laid down in Section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities."*

(emphasis supplied)

20. It is also settled law that when the Supreme Court or High Court declare the law on a question arising for consideration, then the view expressed by the Supreme Court or the High Court has to be given effect to and not the circular issued by the CBDT. The Supreme Court in ***Commissioner of Central Excise, Bolpur vs. Ratan Melting & Wire Industries, (2008) 13 SCC 1*** has held as under:-

"7. ***Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court****. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their*

> *understanding of the statutory provisions. They are not binding upon the court.* ***It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.****"*
>
> (emphasis supplied)

21. Consequently, the FAQ No.59 of Circular No.21/2020 dated 4th December, 2020 issued by CBDT to the extent it contemplates admission of appeal before filing of declaration as a condition precedent in order for the appeal to be treated as pending and to be eligible for settlement under the VSV Act is contrary to law.

RELIEF

22. Keeping in view the aforesaid, the Forms 3 dated 23rd January, 2021 and 12th February, 2021 attached as Annexures P-16 and P-21 as well as the FAQ No.59 of Circular No.21/2020 dated 4th December, 2020 issued by CBDT to the extent mentioned hereinabove are quashed and respondent No.1 is directed to treat the appeal filed against the assessment order under Section 143(3) for assessment year 2014-15 before CIT(A) on 24th May, 2019 as pending as on 31st January, 2020. The respondents are also directed to issue revised Forms 3 by settling both the appeals against the assessment order for assessment year 2014-15 (i.e. quantum appeal pending before CIT(A) and the appeal against levy of penalty pending before ITAT) in accordance with the provisions of VSV Act within eight weeks.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

OCTOBER 28, 2022
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