**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 133 of 2012**

**With**

**TAX APPEAL NO. 134 of 2012**

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**SANKET ESTATE & FINANCE PVT LTD....Appellant(s)**

**Versus**

**COMMISSIONER OF INCOME TAX....Opponent(s)**

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Appearance:
MR VIJAY S RANJAN, ADVOCATE for the Appellant(s) No. 1
MS PAURAMI SHETH, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
**HONOURABLE MS JUSTICE SONIA GOKANI**

**Date : 04/12/2012**

**ORAL ORDER**

**(PER : HONOURABLE MS JUSTICE SONIA GOKANI)**

1. The appellant, aggrieved by the order of the Income Tax Appellate Tribunal dated 4.8.2006, filed the present appeal under Section 260A of the Income Tax Act (for short " the Act"), raising following substantial question of law for our consideration:-

> "Whether, on the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal was justified in dismissing the appeal preferred by the present appellant as not maintainable in view of the decision of the Income-Tax Appellate Tribunal, Delhi Bench, in the case of CIT vs. Multiplan India (P) Ltd. (1991) 38 ITD

320?"

2. It is the say of the appellant that he filed the appeal before the Income Tax Appellate Tribunal being ITA No.2963/AHD/2003 for the assessment year 1999-2000 yet another appeal being ITA No.2962/Ahd/2003 was filed by the petitioner for assessment year 1998-99. These appeals were legally competent and they were consolidated. Then they were required to be decided by the Tribunal in accordance with law on merits. Instead of relying on the decision of Income Tax Appellate Tribunal, Delhi Bench in the case of ***CIT vs. Multiplan India (P) Ltd.*** reported in **(1991) 38 ITD 320**, the Tribunal chose to dismiss the same summarily for want of prosecution.

3. Learned advocate Mr.Vijay Ranjan appearing for the appellant has fervently submitted before this Court that the order of the Tribunal is patently erroneous and in post 1987 period, the amendment in Rule 24 makes it incumbunt upon the Tribunal to decide the appeal on merits. He further urged that even in the absence of the appellant, the Tribunal cannot dismiss the appeal for default in prosecution. He also submitted that the impugned order of the Tribunal though is passed on 4.8.2006, these appeals are preferred on 10.2.2012, as the order impugned was never served upon the appellant. Only on obtaining a copy of the said

order on 12.12.2011, the present appeal came to be filed. He has taken us to the paper book indicating the communication addressed to the Tribunal. He sought to rely upon following decisions of the Apex Court:-

(a) ***Commissioner of Income-tax vs. S. Chenniappa Mudaliar*** in **[1069] 74 ITR 41(SC)**.

(b) ***Anil Kumar Agrahari vs. Commissioner of Income-Tax*** reported in **[2010] 323 ITR 260(MP)**.

(c) ***Tribhuwan kumar and others vs. Commisioner of Income-Tax and another*** reported in **[2007] 294 ITR 401(Raj)**.

(d) ***Rajendra Prasad Borah vs. Income-Tax Appellate Tribunal and others*** reported in **[2008] 302 ITR 243 (Gauhati)**.

5. Per contra, learned advocate Ms. Paurami Sheth appearing for the Revenue has contested this petition on the ground that delay in filing the appeal itself is vital for there being no sufficient grounds having been made out by the appellant.

6. She further urged that if the appellant was attempting to pursue his cause after 2008, he could have enquired about the pendency of the appeals. On having failed to so do it, this appeal itself is not maintainable.

7. Upon thus hearing both the sides, and on closely examining the

material on the record with the assistance of the learned counsels, this appeal is being decided answering the question in favour of the appellant assessee.

8. Undisputed facts as have emerged in this case of the appellant assessee, are that the appellant filed the return of income for the assessment year 1998-99 and 1999-2000 respectively on 30.11.1998 and 28.12.1999 along with audited Statement of Accounts and Tax Audit Report.

9. The Assessing Officer on scrutiny assessment in both the years, determined the total income by detailed adjudication.

10. Aggrieved by these assessments, the same were challenged before the CIT(Appeals), Mumbai, which partly allowed these appeals. Further aggrieved by the same, the appellant challenged these orders by preferring the appeals for the year 1998-99 and 1999-2000 being ITA NO.2962, 2963 AHD.2003.



11. The appeals for the assessment years 1998-99 and 1999 to 2000 were originally filed by the appellant assessee before the Mumbai Tribunal, which were eventually transferred to Ahmedabad.

12. One can note communication of the present appellant addressed to the Tribunal on 20.10.2008, 4.11.2008, 16.4.2009, 29.9.2009, 8.4.2010 and

25.10.2010.

13. It appears that at the time of hearing of appeals of assessment year 2001-02 and 2002-03, the Tribunal required information regarding the status of appeals for assessment years 1998-99, 1999-2000, since CIT(Appeals) relied upon earlier years for deciding subsequent years' appeals. Letter dated 25.10.2010 indicates that on enquiring from the Assistant Registrar, Ahmedabad the appeals were shown to have been transferred to Ahmedabad, which reached the Registry on 12.6.2006. Accordingly, the matter was requested to be fixed on 26.10.2010 with a further request to tag those later years' appeals with the earlier appeals of Assessment Years 1998-99 and 1999-2000.

14. Letter from Assistant Registrar to the Chief Commissioner of Income-Tax dated 9.8.2005 is indicative of transfer of ITA NO.2962 and 2963 for the assessment year 1998-99 and 1999-2000 respectively in the case of the present appellant to the Ahmedabad Bench.

15. Request for clubbing appeals on 27.10.2010 addressed to Vice-President also reiterates these facts. It appears from the communication dated 23.9.2011 addressed to the Assistant Registrar by the present appellant that oblivious of such transfer and dismisal *in limine* the appellants' case for the assessment year 2001-02, 2002-03 had been fixed

for hearing on 3.11.2011.

Both the appeals No.2962 and 2963, which were transferred from Mumbai were already decided on 4.8.2006. Copy of the order since was not available, this appeal could not be filed earlier. It appears that the copies had been supplied to the appellant in December, 2011.

16. The last communication from the appellant dated 20.12.2011 also reiterates these facts and thus the senario that emerges is that the Tribunal dismissed the appeals on account of non-appearance of the appellant's representative on 4.8.2006. These appeals of 1998-99, 1999-2000 which were transferred from Mumbai were followed by CIT(Appeals) in the subsequent years appeals of the very same assessee and those appeals of 2001-2002 and 2002 -2003 when were fixed for hearing before the Ahmedabad Bench, Appeals of 1998-99 and 1999-2000 were awaited since 2008. However, the order impugned is indicative that the notice was sent through RPAD which had been received back from the postal authority with a remark that it was not claimed and as none was present, the Tribunal decided it *ex parte* and dismissed the same for want of prosecution.

It would be apt to reproduce the order of the Tribunal as under:-

" These are appeals filed by the assessee and are directed against two separate orders of CIT(A) dated 28.01.2003 & 30.01.2003 for Asst. Years 1998-99 and 1999-2000 respectively.

2. Notice of hearing was sent through RPAD which has been received back from the postal authorities with the remark "N/C". However, none was present on behalf of assessee on the fixed date of hearing. Therefore, in the circumstances we presume that assessee is not interested in prosecuting its appeals. Hence we dismiss the appeals filed by the assessee in-limine for want of prosecution following the decision of Tribunal in the case of CIT vs. Multiplan India (P) Ltd. 38 ITD 320(Delhi)."

17. The question, therefore, would be as to whether the Tribunal was justified in so doing it. Apart from the facts that the present appellant continuously and persistently followed the said issue, it appears that these appeals came to be dismissed without the same being decided on merits.

18. It would be profitable, at this stage, to refer to Rules 19, 20 and 24 of the Income-Tax Rules, which read as follows:-

"Rules 19, 20 and 24 of the Income-tax ( Appellate Tribunal) Rules, 1963, read as thus:-

"19.(1) The Tribunal shall notify to the parties specifying the date and place of hearing of the appeal and send a copy of the memorandum of appeal to the respondent either before or with such notice.

(2) The issue of the notice referred to in sub-rule (1)

shall not by itself be deemed to mean that the appeal has been admitted.

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Rule 20. In an appeal under sub-section(1) of Section 253, in fixing the date for the respondent to appear and answer to the appeal, a reasonable time shall be allowed for the necessary communication with the Commissioner through the proper channel and for the issue of instructions to an authorised representative to appear and answer on behalf of the respondent.

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Rule 24. Where, on the day fixed for hearing or any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorized representative when the appeal is on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the *ex parte* order and restoring the appeal."

19. The Apex Court in the case of ***Commissioner of Income-tax vs. S. Chenniappa Mudaliar***(supra), prior to the amendment of Rule 24 ( 1946 Rules) was deciding this very question as to whether the Tribunal is bound to give proper reasons of question of fact as well as law on merits and whether it can dismiss the appeal on the default

of appearance. It was also deciding as to whether Rule 24 of 1946 Rules, which provided for dismissal of appeal for failure of appellant to appear is *ultra vires* as being in conflict with the provision of Section 33(4) of 1922 Act. It is answered in affirmation.

20. In the case of ***Rajendra Prasad Borah vs. Income-Tax Appellate Tribunal and others*** (supra), while interpreting Rule 24 of Income Tax Rules, 1963, Gauhati High Court has held that per se, it does not empower the Tribunal to dismiss the appeal for default in absence of appellant in the following words:-

> " After hearing learned counsel for the parties and on a perusal of the provisions of law referred to hereinabove, it is more than apparent that the course adopted by the learned Tribunal in disposing of the assessee's appeals in the manner as delineated in the impugned order, cannot be sustained. Apart from the fact that, section 254(earlier section 33) of the Act makes it incumbent on the learned Tribunal to dispose of the appeals on merits as has been enunciated by the apex court in CIT v. S. Chenniappa Mudaliar [1969] 74 ITR 41, rule 24 as it stands, per se does not empower the learned Tribunal to dismiss an appeal for default in the absence of the appellant. The learned Tribunal's reliance on the decision of the Income-tax Appellate Tribunal, Delhi, rendered in CIT vs. Multiplan India (P.) Ltd. [1991] 38 ITD 320, is apparently misplaced in the teeth of the decision of the apex court in CIT vs. S. Chenniappa Mudaliar [1969] 74 ITR 41."

21. In the case of ***Tribhuwan kumar and others vs.***

***Commisioner of Income-Tax and another*** (supra), the Rajasthan High Court while interpreting Rules 19,20 and 24 of 1963 Rules also examined the decision of Delhi Bench rendered in the case of CIT vs. Multiplan India (P) Ltd. (1991) 38 ITD 320 by holding thus:-

> "6. Having considered the aforesaid three provisions, we are unable to comprehend the view of the Tribunal that the assessee' s appeal was not maintainable in view of rules 19 and 20 of the Rules. Surely the appeal preferred by the assessee was competent under section 253 of the Income-tax Act. How, in the circumstances the Tribunal could hold that the assessee's appeal from the order of the Commissioner of Income-tax ( Appeals) was not maintainable when the appeal lay from the said order. The Tribunal misread and misapplied rules 19 and 20 of the Rules of 1963, in holding that the assessee's appeal was not maintainable. If for any reason, the assessee was not being represented on the date of hearing, the Tribunal could have proceeded for hearing of the appeal ex parte provided in rule 24 but that was not done. The appeal has not been heard on the merits and the Tribunal erroneously held that the assessee's appeal is not maintainable in law."

22. In the case of ***Anil Kumar Agrahari vs. Commissioner of Income-Tax*** (supra), the Madhya Pradesh High Court was examining the dismissal for non-prosecution of appeal by the Tribunal and it held categorically that the Tribunal could not have dismissed the appeal without going into the merits of the case, by rejecting the adjournment application filed by the counsel. And, the matter was

remanded back to the Tribunal for adjudication on merits. It also took note of decision rendered in ***Rajendra Prasad Borah vs. Income-Tax Appellate Tribunal and others*** (supra) as also the decision rendered by the Apex Court in ***Commissioner of Income-tax vs. S. Chenniappa Mudaliarl***(supra) so also the decision of the ***Tribhuwan kumar and others vs. Commisioner of Income-Tax and another*** (supra), and held that the Tribunal could not have dismissed the appeal without adverting to the merits of the case and on the line of the decisions of Gauhati and Rajasthan High Courts, it set aside the order of Tribunal dismissing the appeal for want of prosecution.

23. In the instant case, as could be noted from the order impugned, that the Tribunal has chosen to dismiss the appeal on the ground of non-prosecution. It also noted that RPAD was sent and the same had returned with the remark of the postal department as none having claimed the same. Instead of deciding the matter on merits, it chose to dismiss the same for want of prosecution and this order in our opinion is contrary to the provision of law.

24. When the Supreme Court decided the case of ***Commissioner of Income-tax vs. S. Chenniappa Mudaliar***(supra), no amendment in Rule in the Income-Tax Appellate Tribunal Rules was made as yet. Rule 24 of the Income Tax Rules, 1963 makes it abundantly clear that the Tribunal cannot dismiss the appeal without adverting to the merits. Even on the day on which the hearing is adjourned, the appellant chose not to appear in person or through an authorised representative. It is incumbent upon the Tribunal to dispose of the appeal on merits after hearing the respondent and afterwards if the appellant appears and satisfy the Tribunal, sufficient cause for its non-appearance on the date of hearing, the Tribunal can set aside the *ex parte* order and restore the appeal. However, reliance of the Tribunal on the decision of the Delhi Bench in the case of CIT vs. Multiplan India (P) Ltd. (supra) is erroneous and, therefore, requires to be set aside. In the instant case, it can be noted from the letters addressed by the present appellant to the Tribunal that it was awaiting transfer of both the appeals of 1998-99 and 1999-2000 since CIT (Appeals) had relied upon such orders of earlier years.

25. If the record of these appeals were necessary for proceedings with the appeals, which were pending of the year 2001 to 2002, 2002-03, in the instant case, it was a matter of transfer from Mumbai Bench to the

Ahmedabad Bench of these appeals and the present appellant has made out sufficient cause indicating from the material placed on record that it had never abandoned the cause. On the contrary, it had consistently pursued the matters as it was having a direct bearing on the appeals of subsequent years. Even otherwise, what is the requirement of the law is of adjudication on merit even when either side or both the sides choose not to contest. In view of the aforesaid, we are of the considered view that the Tribunal erred in dismissing the appeal only on the ground of non-prosecution without adverting to the merits of the matter and, therefore, we set aside the order impugned dated 4.8.2006 passed by the Tribunal and also remand the matter to the Tribunal to adjudicate the same on merits. Appeal is allowed accordingly.



**(AKIL KURESHI, J.)**

**(MS SONIA GOKANI, J.)**

**SUDHIR**