

## **Assessee can't either seek withdrawal of appeal or file revision petition when appeal was pending before CIT(A)**

**Summary – The High Court of Allahabad in a recent case of Yogendra Prasad Santosh Kumar, (the Assessee) held that where an application is filed seeking withdrawal of appeal but no order is passed by Commissioner (Appeals), appeal will remain pending and subsequent revision petition will not be maintainable.**

### **Facts**

- The assessee filed a return of income declaring total income of Rs. 81 thousand. The case was selected under scrutiny and an assessment was made on a total income of Rs. 2.03 crore. An appeal was filed by the assessee under section 246 before the Commissioner (Appeals). Subsequently, the assessee sent an application by post seeking withdrawal of his appeal.
- While the application was received in the office of Commissioner (Appeals), the assessee preferred a revision of assessment order stating that he had already waived his right of appeal. The Commissioner allowed revision partly by deleting addition of Rs. 2.02 crore made under section 40A(3) but maintained rest of the assessment order.
- On the other hand, a notice was issued for hearing of appeal before the Commissioner (Appeals) but the assessee did not appear. He sought adjournment. The Commissioner (Appeals) declined to adjourn the matter. He considered the assessee's withdrawal application and rejected the same. Further, the Commissioner (Appeals) proceeded on merits of appeal and negating various grounds taken by the assessee and dismissed the same. He confirmed assessment order dated 26-12-2011.
- Subsequently, the Commissioner also passed order cancelling/revoking his own earlier revisional order.
- On writ:

### **Held**

- There is no provision in Income tax Act which permits withdrawal of an appeal, once it is filed, and registered. 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, there is no provision in the statute permitting withdrawal thereof.
- In this particular case, however, the bar under section 264(4) would stand against petitioner, when he preferred revision before CIT in as much 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 Mere filing of an application seeking withdrawal of appeal would not have resulted as if the appeal stood withdrawn or deemed withdrawn unless an order is passed by Appellate Authority thereon for the reason that appellant could have always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 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.

- There is another aspect of the matter. Clause (a) of section 264(4) 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, Clauses (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.
- In view thereof, it is to be held that Commissioner committed a manifest error in exercising revisional power when petitioner's appeal was pending before Commissioner (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 more so in the light of judgment of Apex Court in *CIT v. Rai Bahadur Hardutroy Motilal Chamaria* [\[1967\] 66 ITR 443 \(SC\)](#), the appeal filed could not have been withdrawn.
- In view of above, the writ petition lacks merit and is to be dismissed.