

suresh

13&18-ITXA-493.2015.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.493 OF 2015

Vijay Vishin Meghani,
Flat No.1, 1st Floor, Atur Terraces,
19, Cuffe Parade, Mumbai-400 005. Appellant

- Versus -

The Deputy Commissioner of Income
Tax Circle – 23(2), C-11, Room No.108,
Aaykar Bhavan, M.K. Road,
Mumbai-400 020. Respondent

AND

INCOME TAX APPEAL NO.508 OF 2015

Vijay Vishin Meghani,
Flat No.1, 1st Floor, Atur Terraces,
19, Cuffe Parade, Mumbai-400 005. Appellant

- Versus - सत्यमेव जयते

The Assistant Commissioner of Income
Tax Circle – 23(2), C-11, Room No.108,
Aaykar Bhavan, M.K. Road,
Mumbai-400 020. Respondent

Mr. Soli Dastur, Senior Advocate with Mr. Harsh Kothari
i/by Mr. Vipul Joshi for the Appellant in both Appeals.

Mr. Arvind Pinto for the Respondent in both Appeals.

suresh

13&18-ITXA-493.2015.doc

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : SEPTEMBER 19, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. These two appeals arise out of the Tribunal's order refusing to condone the delay. The delay was in bringing the appeals to the Tribunal. The delay, as far as Income Tax Appeal No.508 of 2015 is concerned, computed by the Tribunal/Registry is of 2984 days. Similar is the position with regard to Income Tax Appeal No.493 of 2015 for the Assessment Year 1996-97 before us.

2. In the prior assessment year of 1994-95, Income Tax Appeal No.5418 and for the subsequent year 1996-97 Income Tax Appeal No.5419, both of 2011, were filed by an individual assessee in the Income Tax Appellate Tribunal, Bench at Mumbai.

3. The application seeking condonation of delay in both appeals, was taken up by the Tribunal together. Meaning

suresh

13&18-ITXA-493.2015.doc

thereby, the application for condonation of delay in both the appeals is disposed of by this common order dated 20-8-2014.

4. After hearing both sides and perusing the order of the Tribunal, we find that the questions, which can be termed as substantial questions of law arising out of this order, can be formulated as under:-

(A) *Was the Tribunal justified on facts and circumstances and in law in dismissing the two appeals as barred by limitation?*

(B) *Whether the discretion vesting in the Tribunal has been exercised by it reasonably and in accordance with the settled legal principles enabling condonation of delay in filing of statutory appeals?*

5. With the consent of both sides, we dispose of these appeals finally by the present order.

6. Mr. Dastur, learned Senior Counsel appearing on behalf of the appellant, would submit that both the appeals were filed by the assessee against two separate orders of the Commissioner of Income Tax (Appeals), dated 1-2-2000. In both

suresh

13&18-ITXA-493.2015.doc

the orders, the assessee was aggrieved by the decision of the Commissioner in rejecting the deduction claimed under Section 80-O of the Income Tax Act, 1961 ("the I.T. Act, 1960" for short).

7. Mr. Dastur would submit that true it is that the delay of 2984 days, in that sense is enormous but capable of being condoned. If there was sufficient cause shown for the condonation of delay, then, the Tribunal should have applied the well-settled principles in consideration of the application. The well-settled principles are: if the cause shown or the explanation given is true, reasonable and *bona fide*, then, whether the delay should be condoned and liberally and even if not unconditionally but by imposing such conditions which are just and which would enable the assessee to have an adjudication of the issue on merits. Mr. Dastur would submit that one of the principles which have been carved out in numerous decisions of the Hon'ble Supreme Court on the point is that if the litigant has acted under legal advice *bona fide*, and that is mistaken, ordinarily he should not be penalised. If a

suresh

13&18-ITXA-493.2015.doc

litigant approaches a professional and who advises him to take a course of action, as in the instant case, then, the *bona fides* of the professional are not to be tested. If the litigant has acted on such advice, then, because that advice was erroneous or mistaken, does not mean that either the professional or the litigant has any ulterior motive. This by itself is not a deliberate or intentional act and for which the litigant should be punished. Mr. Dastur brought to our notice several paragraphs in the initial order of the Tribunal which would indicate, according to him, that the professional, namely, a Chartered Accountant in this case, has been severely criticised and by using strong language. The Tribunal has not expressed itself in a manner befitting a judicial body or authority. The Tribunal should not have departed from the principles of sobriety, restraint and reserve in criticising the conduct of those who are not before the Court or the Tribunal. This elementary principle should have guided the Tribunal throughout. It is no good that later on such harsh, strong and adverse remarks are deleted. The damage is already done.

8. On the other hand, Mr. Pinto, appearing for the

suresh

13&18-ITXA-493.2015.doc

Revenue, would support the conclusion of the Tribunal in refusing to condone the delay. He would submit that eventually this is a discretion vesting in the Tribunal and if it is exercised fairly, reasonably and in accordance with law, then, this Court should not interfere with the same merely because another view is possible. He would, therefore, submit that the appeals be dismissed.

9. For properly appreciating the rival contentions, the first thing that we would have to do is to peruse the application which was filed seeking condonation of the delay. It is clear that the assessee also relied upon the written submissions and the compilation of Judgments, setting out the settled principles/reiterating them.

10. It is clear from the record that the assessee had filed an application supported by an affidavit. He stated that the order of the Commissioner of Income Tax (Appeals) was received for the Assessment Year 1994-95 on 20-3-2003. The last date for filing the appeal before the Tribunal was 19-5-2003.

suresh

13&18-ITXA-493.2015.doc

However, for the reasons beyond the control of the assessee, the appeal is filed on 20-7-2011. There is a delay of 2984 days in filing the appeal, but for the cause or reasons set out in his personal affidavit, the delay be condoned.

11. In the personal affidavit, it is stated by the assessee that he is a citizen of India, aged about 58 years and retired from service in January, 2003. He had received the copy of the order of the Commissioner of Income Tax (Appeals) on 20-3-2003. He states that during material period he was employed with a German Bank as a Mumbai Representative. He was rendering his services from India to a foreign employer. He, therefore, claimed a deduction under Section 80-O of the I.T. Act, 1961 and with respect to the salary earned by him from the employer. The claim for deduction under Section 80-O was disallowed by the Assessing Officer for the Assessment Year 1993-94 and confirmed by the Commissioner of Income Tax (Appeals). Against this order of the Commissioner, the assessee preferred an appeal before the Tribunal. That appeal was filed after consulting a Chartered Accountant. It is stated that the

suresh

13&18-ITXA-493.2015.doc

Chartered Accountants M/s. Rajesh Rajeev & Associates were handling the income tax affairs and matters from 1997 to November, 2006. They had substantially discontinued their tax practice with individuals and started to practice with only corporate clients. Thereafter, one Sunil Chaudhari took over the taxation affairs of the assessee. In April 2007, Mr. Chaudhari unfortunately expired in a road accident and thereafter M/s. P.A. Dhanbhoora & Company were handling the taxation work from May, 2007 till February, 2011. The assessee specifically stated that being in full time employment with the Bank and not well-versed with the income tax laws, he completely relied upon his Chartered Accountants for attending to his tax matters, including the regular income tax assessment and appeal matters and advising him in that regard. Since the Assessing Officer passed the assessment order for the Assessment Years 1994-95 and 1996-97 on 25-3-1997 and 25-3-1999, respectively, denying that claim, the appeal was filed before the Commissioner of Income Tax (Appeals) on 9-4-1997 and 29-4-1999, respectively. When these two appeals were

suresh

13&18-ITXA-493.2015.doc

dismissed by the Commissioner of Income Tax (Appeals), M/s. Rajesh Rajeev & Associates advised the assessee not to file further appeals before the Tribunal for both the years to avoid multiplicity of litigation as the issue of Section 80-O involved in the assessment years in question was identical to the one involved in the appeal before the Tribunal for the Assessment Year 1993-94. It was then pending before the Tribunal. The assessee stated in his affidavit that he was further advised by the Chartered Accountants that after adjudication of the appeal for the Assessment Year 1993-94 he could move a rectification application before the Assessing Officer to bring his assessment order in conformity with the decision of the Tribunal. The assessee stated that on 29-6-2006, the Tribunal restored the matter back to the file of the Assessing Officer for the Assessment Year 1993-94 to examine the issue of allowability of deduction under Section 80-O of the I.T. Act, 1961. Thereafter, the Assessing Officer passed an order on 19-2-2009 allowing the claim under that section of the I.T. Act, 1961.

12. The order giving effect to the Tribunal's order was

suresh

13&18-ITXA-493.2015.doc

received by him sometime in May, 2009. That is how he first preferred a rectification application to the Assessing Officer to rectify his order for the Assessment Year 1994-95 and Assessment Year 1996-97. This application was made on 15-7-2009. After continuous follow-up with the Department and also seeking information under the Right to Information Act, 2005, finally, this rectification application was rejected by the Assessing Officer on 14-5-2010. That is why the matter was again taken up by the assessee with his Chartered Accountants who advised him earlier to prefer the rectification application. On 18-4-2011, the assessee received a written advise from his Chartered Accountant mentioning in the communication in that behalf that the view or approach of the Assessing Officer/Income Tax Department was incorrect. They advised the assessee to follow up the matter with the Department. Thereafter, the assessee consulted another Chartered Accountant Mr. Yatin K. Desai, who, after perusing the record, advised him to file appeals before the Tribunal against the initial orders of the Commissioner of Income Tax (Appeals) dated 1-3-2000 and

suresh

13&18-ITXA-493.2015.doc

together therewith an application for condonation of delay.

13. It is in these circumstances that the assessee stated on oath that he acted *bona fide* under the advice from his Chartered Accountants and there is no negligence nor any deliberate or intentional act on his part.

14. The assessee did not rest here. He supported this application with an affidavit of one Chandrashekhar, son of S.A. Yogeshwar, a practicing Chartered Accountant and Managing Partner of M/s. Rajesh Rajeev & Associates. The affidavit of the said Chandrashekhar confirmed that the assessee indeed was a client of this Chartered Accountancy firm from 1997 to 2006. From paragraphs 3 to 6 of the affidavit dated 22-8-2013, filed by this Chartered Accountant, it is confirmed that the advice as aforesaid was given and professionally to the assessee. The assessee acting on the same did not file the appeal but the rectification application. It is that endorsement from the assessee's then Chartered Accountants which, according to the assessee, enabled him to seek condonation of delay. Every single

suresh

13&18-ITXA-493.2015.doc

aspect of the matter was highlighted, including the legal principles. The Tribunal, curiously, in its order, unmindful of these legal principles and which enable a liberal view to be taken of the lapse on the part of the litigant like the assessee, proceeded to pass a 20-page order. In that 20 page order, what we find is that there is a reference made to several decisions of the Hon'ble Supreme Court brought to its notice by the assessee's Senior Advocate, the explanations and reasons furnished by the assessee on affidavit and supported by his Chartered Accountants. The Tribunal, then, in para 8 of the order under appeal highlighted the lethargic steps adopted by the Revenue in the instant case. The Tribunal holds that the assessee has simply put the responsibility for the delay on the Revenue. When this kind of averments are made, according to the Tribunal, it is normally expected that the Revenue should verify the compilation/assessment record to find out the veracity of such explanation. It is unfortunate that the Revenue did not care to verify the record to find out the veracity of the submissions. Importantly, the Tribunal finds that the Revenue

suresh

13&18-ITXA-493.2015.doc

has not chosen to counter the averments made on affidavit by the assessee and his Chartered Accountant by furnishing any counter affidavit/explanation. The criticism of the Departmental representative's conduct is also to be found in para 8.

15. Thus, we find that the Tribunal, out of sheer desperation and frustration and agitated by the fact that the Revenue is not opposing the request for condonation of delay, turned its attention towards the assessee's Chartered Accountant. It is unfortunate that thereafter paragraphs after paragraphs are devoted to how a Chartered Accountant ought to conduct himself and while advising litigants in tax matters. How a Chartered Accountant, as a professional, should be aware that legal proceedings should be filed in time and if there are adverse orders, how proper advice should be given. It is very unfortunate that the Tribunal has, apart from seeking to advice professionals, blamed not only individual Chartered Accountants but equally the Institute of Chartered Accountants of India. It is unfortunate that Courts of law or Tribunals, which are the last fact finding authorities in this case, adopted this course.

suresh

13&18-ITXA-493.2015.doc

16. In paragraph 11 of the order under appeal, a reference is made to a decision of the Allahabad High Court in the case of ***Sri Krishna Vs. CIT*** {142 ITR 618 (All)}. While it is true that statements made on affidavit remaining uncontroverted must not be accepted as true and reliable, it is clear that in the absence of contemporaneous record or any attempt to falsify the statements on oath, the Tribunal has no business to rely on the principle emerging from this decision. In the instant case, the Tribunal found that the Revenue officials, assuming that they are lax, have not opposed the condonation of delay. They have not filed any counter affidavit denying any factual statements made by either the assessee or the Chartered Accountant. They have not denied the fact that there was a rectification application filed and preceding the rectification application indeed some time was consumed in serving the orders of the Department on the assessee. It is not that the rectification application was not disposed of with promptitude but after the assessee was compelled to move an application under the Right to Information Act, it is finally on 14-5-2010

suresh

13&18-ITXA-493.2015.doc

that the application came to be disposed of.

17. In the circumstances and a perusal of the whole order does not indicate that the Tribunal terms the conduct of the assessee to be the sole factor responsible for the delay. The conduct is not termed as negligent, callous and lacking in *bona fides* either. In para 12 of the order under challenge, we find that the Tribunal holds that the assessee failed to show that there was sufficient cause. How that cause is not sufficient has been explained by the Tribunal in the earlier paragraphs. However, the explanation which the assessee provided was an advise from his Chartered Accountant. That is why the paragraphs are devoted to the conduct of the professional. The advice given is not only termed as wrong/absurd but the assessee is faulted for blindly accepting such an advice. He is termed as an imprudent man and who failed to verify the correctness of the advice given or apply his mind to it. Thus, the behaviour of the assessee, according to the Tribunal, is beyond the comprehension of human conduct and probabilities.

suresh

13&18-ITXA-493.2015.doc

18. We do not see how these are relevant principles.

19. Way back in the year 1979, in a decision reported in AIR 1979 SC 1666 {*M/s. Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and others*}, the Hon'ble Supreme Court has held that a legal advice tendered by a professional and the litigant acting upon it one way or the other could be a sufficient cause to seek condonation of delay and coupled with the other circumstances and factors for applying liberal principles and then said delay can be condoned. Eventually, an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in *bona fides*. These are, therefore, some of the relevant factors. Those factors should therefore necessarily go into an adjudication of the present nature.

20. In *Nirmala Devi* (supra), the Hon'ble Supreme

suresh

13&18-ITXA-493.2015.doc

Court held as under:-

"5. The Accident Claims Tribunal pronounced its award on September, 15, 1976, after making the necessary computations and deductions. The appeal had to be filed on or before January 19, 1977 but was actually filed 30 days later. Counsel for the petitioner is stated to have made the mistake in the calculation of the period of limitation. He had intimated the parties accordingly with the result that the petitioner was misled into instituting appeal late. The High Court took the view that the lawyer's ignorance about the law was no ground for condonation of delay. Reliance was placed on some decisions of the Punjab High Court and there was reference also to a ruling of the Supreme Court in AIR 1972 SC 749. The conclusion was couched in these words:

"The Assistant Divisional Manager of the Company-appellant is not an illiterate or so ignorant person who could not calculate the period of limitation. Such like appeals are filed by such companies daily. The facts of this case clearly show, as observed earlier, that the mistake is not bona fide and the appellant has failed to show sufficient cause to condone the delay."

6. We are not able to agree with this reasoning. A company relies on its Legal Adviser and the Manager's expertise is in company management and not in law. There is no particular reason why when a company or other person retains a lawyer to advise it or him on legal affairs reliance should not be placed on such counsel. Of course, if there is gross delay too patent even for layman or if there is incomprehensible indifference the shield of legal opinion may still be vulnerable. The correct legal position has been explained with reference to the Supreme Court decision in a judgment of one of us in AIR 1971

suresh

13&18-ITXA-493.2015.doc

Ker. 211 (at p. 215):

"The law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. The High Court unfortunately never considered the matter from this angle. If it had, it would have seen quite clearly that there was no attempt to avoid the Limitation Act but rather to follow it albeit on a wrong reading of the situation."

"The High Court took the view that Mr. Raizada being an Advocate of 34 years' standing could not possibly make the mistake in view of the clear provisions on the subject of appeals existing under Section 39(1) of the Punjab Courts Act and therefore, his advice to file the appeal before the District Court would not come to the rescue of the appellant under Sec. 5 of the Limitation Act. The Supreme Court upset this approach."

"I am of the view that legal advice given by the members of the legal profession may sometimes be wrong even as pronouncement on questions of law by courts are some times wrong. An amount of latitude is expected in such cases for, to err is human and lay men, as litigants are, may legitimately lean on expert counsel in legal as in other departments, without probing the professional competence of the advice. The court must of course, see whether, in such cases there

suresh

13&18-ITXA-493.2015.doc

is any taint of mala fides or element of recklessness or ruse. If neither is present, legal advice honestly sought and actually given, must be treated as sufficient cause when an application under Section 5 of the Limitation Act is being considered. The State has not acted improperly in relying on its legal advisers."

7. We have clarified the legal position regarding the propriety and reasonableness of companies and other persons relying upon legal opinion in the matter of computation of limitation since it is a problem which may arise frequently. If Legal Adviser's opinions are to be subjected by company managers to further legal scrutiny of their own, an impossible situation may arise. Indeed Government, a large litigant in this country, may find itself in difficulty. That is the reason why we have chosen to explain at this length the application of Section 5 vis-a-vis counsel's mistake."

The above sums up the approach of a Court rendering justice according to law.

21. We find from paragraph 13 of the order, but for this relevant factors and tests, everything else has been brought into the adjudication by the Tribunal. The Tribunal though aware of these principles but possibly carried away by the fact that the delay of 2984 days is incapable of condonation. That is not how a matter of this nature should be approached. In the process the

suresh

13&18-ITXA-493.2015.doc

Tribunal went about blaming the assessee and the professionals and equally the Department. To our mind, therefore, the Tribunal's order does not meet the requirement set out in law. The Tribunal has completely misdirected itself and has taken into account factors, tests and considerations which have no bearing or nexus with the issue at hand. The Tribunal, therefore, has erred in law and on facts in refusing to condone the delay. The explanation placed on affidavit was not contested nor we find that from such explanation can we arrive at the conclusion that the assessee was at fault, he intentionally and deliberately delayed the matter and has no *bona fide* or reasonable explanation for the delay in filing the proceedings. The position is quite otherwise.

22. In the light of the above discussion, we allow both the appeals. We condone the delay of 2984 days in filing the appeals but on the condition of payment of costs, quantified totally at Rs.50,000/-. Meaning thereby, Rs.25,000/- plus Rs.25,000/- in both appeals. The costs to be paid in one set to the respondents within a period of eight weeks from today. On

suresh

13&18-ITXA-493.2015.doc

proof of payment of costs, the Tribunal shall restore the appeals of the assessee to its file for adjudication and disposal on merits. We clarify that all contentions as far as merits of the claim are kept open. We have not expressed any opinion on the same.

23. The appeals are allowed in the aforesaid terms and accordingly stand disposed of.

(PRAKASH D. NAIK, J.)

(S.C. DHARMADHIKARI, J.)

