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ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 8766 OF 2024

CG Power And Industrial Solutions Ltd.
6th Floor, CG House, Dr. Annie Besant Road,
Worli, Mumbai – 400 030.

....Petitioner

V/s.

1. Assistant Commissioner of Income Tax,
Circle – 6(1)(1), Mumbai,
Room No. 504, 5th Floor, Aayakar Bhavan,
M.K. Road, Mumbai – 400 020.

2. The Chief Commissioner of Income Tax-3,
Mumbai, Room No. 351, 3rd Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

3. The Principal Chief Commissioner of
Income Tax, Mumbai,
Room No. 321, 3rd Floor, Aayakar Bhavan,
M.K. Road, Mumbai – 400 020.

4. The National Faceless Appellate Centre,
Delhi

5. The Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance, North Block,
Secretariat Building, New Delhi – 110 001.

6. Union of India,
Through Joint Secretary and Legal Adviser,
Branch Secretariat, Department of Legal
Affairs, Ministry of Law and Justice,
2nd Floor, Aayakar Bhavan, M.K. Road,
New Marine Lines, Mumbai – 400 020.

...Respondents

Mr. J.D. Mistri, Senior Advocate a/w Mr. Nitesh Joshi i/b Mr. Atul K. Jasani
for Petitioner.

Mr. Devang Vyas, Ld. ASG a/w Mr. Suresh Kumar, Mr. Sheelang Shah,
Ms.Vaibhavi Chowdary and Mr. Jalaj Prakash for Respondents

**CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 30th APRIL 2024**

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Since the pleadings in the petition are completed, we have, by consent, decided to dispose the petition at the admission stage itself.
2. Rule. Rule made returnable forthwith.
3. Petitioner is challenging an order dated 29th February 2024 passed by Respondent No.5 which is the Central Board of Direct Taxes (CBDT) rejecting petitioner's application under Section 119 of the Income Tax Act, 1961 (the Act) for condoning the delay in filing of revised return of income for the Assessment Years (A.Y.) 2015-16 to 2020-21.
4. Petitioner is a company incorporated on 28th April 1937. Respondent No.1 is the Assistant Commissioner of Income Tax, Circle – 6(1) (1), Mumbai being the Jurisdictional Assessing Officer (JAO), Respondent No.2 is the Chief Commissioner of Income Tax – 3, Mumbai, Respondent No.3 is the Principal Chief Commissioner of Income Tax, Mumbai, Respondent No.4 is the National Faceless Appellate Centre, Respondent No.5 as noted earlier is the CBDT and Respondent No.6 is the Union of India. The issues that arose for consideration in this petition, according to Petitioner, are as under :

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a. Whether the fundamental principle underlying the Income-tax Act is levy of tax on correct income earned by an assessee. When the earlier returns of income filed by petitioner for the assessment years 2015-16 to 2020-21 are admittedly based on original books of account which did not reflect the correct financial position, for the purposes of proper administration of the Act, Respondent No.5 ought to have exercised its powers under Section 119(1) of the Act and condoned the delay in filing of the revised returns in its case?

b. Whether petitioner is justified in urging genuine hardship if its application for condonation of delay in filing the revised returns of income is not allowed for the following reasons :

i. that its income for the aforesaid assessment years be brought to tax based on correct financial position as reflected in the recasted books of account.

ii. that for the assessment year 2018-19, petitioner has been made to undergo special audit of its accounts under section 142(2A) of the Act, in respect of its original books of account when admittedly, the said books of account would have no relevance after their recasting.

iii. that petitioner's claim for write off of debts/advances under section 36(1)(vii) of the Act or alternatively, as business loss under Sections 28 and 37 of the Act and further non-assessment of liabilities written back as per Section 41(1) of the Act has been denied in the draft assessment order dated 14.12.2023 passed for the assessment year 2021-22 inter alia on the basis that the recasted books of account had not been accepted by the CBDT.

iv. denial of petitioner's claim for carry forward and set off of unabsorbed depreciation and brought forward losses in the assessment order dated 27.02.2024 passed for the assessment year 2022-23 on the ground of pendency of the application at the relevant point of time before the Respondent No.5 for the earlier years.

v. such other hardships as may be faced by petitioner in the assessment/appellate proceedings for these and other years.

These irrefutably genuine hardships could be avoided if petitioner's application allowing filing of revised returns of income is allowed. That no prejudice would be caused to the Revenue by allowing these applications as, effectively, they will be able to assess its income based on the correct financial position.

In these circumstances, whether it is incumbent on Respondent No.5 to allow Petitioner's application?

c. Whether Respondent No.5 is justified in holding that finality attached to the recasted books of account under Section 130 of the Companies Act, 2013 is not relevant insofar as the Income-tax Act is concerned?

d. Whether in the impugned order dated 29.02.2024 Respondent No.5 erred in relying upon the findings given by it in the earlier orders dated 15.12.2022, 29.12.2022 and 25.01.2023? It has completely overlooked the statement made by the Ld. ASG before the Hon'ble Court on instructions that the orders impugned in Writ

Petition (L) No. 4041 of the 2023 be quashed and set-aside for denovo consideration after both the parties to the petition had explained the facts of the case and the issues arising in the petition. This is because there is no merit in the stand earlier taken by the CBDT. Otherwise, there would be no occasion for him to himself urge for quashing and setting aside of the earlier orders for reconsideration. It failed to appreciate that in support of its petition, petitioner had raised various contentions and the observations as made by this Hon'ble Court that they have not made on any observations on the merits of the matter is in the context that they had not adjudicated on the grounds as raised by Petitioner.

e. Whether Respondent No.5 was justified in relying upon the fact that the proceeding before the Serious Fraud Investigation Office (the SFIO) and the Enforcement Directorate (the ED), appeals pending before the National Company Law Appellate Tribunal (the NCLAT) and the other civil suits pending against the erstwhile promoter and his group companies to deny petitioner's applications for condonation of delay in filing of revised returns of income for the assessment years 2015-16 to 2020-21?

f. Whether Respondent No.5 erred in proceeding on the basis that they have to not only verify the fulfillment of the conditions in Section 119 of the Act but also the genuineness and validity of the claims contained in the revised returns of income which exercise can only be carried out by Respondent No.1 when making an assessment of petitioner's income chargeable to tax? That such exercise has also been carried out on a random basis and findings given in the impugned order in a most casual and cursory manner without proper application of mind.

5. Around 2018 petitioner was contemplating raising of funds by way of loan from a consortium of international lenders. One of the conditions stipulated by them was that petitioner's statutory audit ought to be carried out by an internationally known and recognized Chartered Accountant firm. Though petitioner's audit for Financial Year (F.Y.) 2017-18 was to be carried out by one Chaturvedi and Shah, Chartered Accountants, they expressed their inability to do the audit and therefore petitioner, in view of their resignation, appointed one K.K.Mankeshwar and Co., Chartered Accountants as statutory auditor. For A.Y. 2018-19 petitioner also

appointed SRBC and Co. LLP as statutory auditor. SRBC and Co. LLP was appointed for a tenure of five years from F.Y. 2018-19 to F.Y. 2022-23. For F.Y. 2018-19 the statutory audit was jointly carried out by K.K. Mankeshwar and Co. and SRBC and Co. LLP and thereafter solely by SRBC and Co. LLP upto 2022-23.

6. The resignation of Chaturvedi and Shah was informed to the Registrar of the Companies (the ROC) and the reasons for the resignation of the firm was also indicated. Since the resignation by the statutory auditors happened before completing their term an enquiry was conducted under Section 206(1) of the Companies Act, 2013 (the Companies Act) by the ROC wherein a detailed inspection under Section 206(5) of the Companies Act was directed into the books of account and records of petitioner. An inspection report dated 23rd September 2019 was given by Regional Director, Ministry of Corporate Affairs (MCA), Government of India, and the same was filed with the Stock Exchange by petitioner. In the report there were reference made to unauthorised and undisclosed transactions. In the report the recommendations has been made to invoke the provisions of Section 130 of the Companies Act for recasting of books of account and consequently, the financial statements. Acting on this report, the MCA, Government of India filed an application before the National Company Law Tribunal, Mumbai (NCLT) under Section 130 of the Companies Act for restatement of petitioner's books of account. There were 18 respondents to

the application. Respondent No. 17 was the Principal Chief Commissioner of Income Tax, Mumbai (PCCIT), Respondent No.3 herein. The application came to be heard and order dated 5th March 2020 came to be passed by which the NCLT was pleased to grant permission to applicant, i.e., MCA for reopening of the books of account and recasting of financial statements of Respondent No.1, i.e., petitioner herein and its subsidiary companies for past five years. The operative part of the order reads as under :

ORDER

I. The present Petition has been filed by the Petitioner against the Respondent seeking relief under section 130 of the Companies Act, 2013 which is reproduced below :

"130. Re-opening of accounts on court's or Tribunal's orders -

(1) A company shall not reopen its books of account and not recast its financial statement, unless an application in this order is made by the Central Govt., the Income Tax Authorities, the Securities and Exchange Board, any other statutory regularity body or anorthosite or any person concern, and an order is made by a Court or competent jurisdiction or the Tribunal to the effect that -

i. The relevant earlier account were prepared in fraudulent manner; or;

ii. the affairs of the company were mis-managed during the relevant period, casting a doubt on the reliability of the financial statement :

Provided that the Court or the Tribunal, as the case may be, shall give notice to the Central Govt, the Income-tax Authorities, the Securities and Exchange Board or any other statutory regulatory body or authority sanction and shall take into consideration the representation, if any, made by that Govt. or the authorities, Security and exchange Board or the Body or Authority concerned before passing any order under this Section.

(2) Without prejudice to the provision contained in this Act, the accounts so revised or recast under sub-section (1) shall be final.

(3) No order shall be made under sub-section (1) in respect of reopening of books of account relating to a period earlier than 8 financial years immediately preceding the current financial year. Provided that where a direction has been issued by the, Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period."

II. As per Section 130 Companies Act, 2013 Sub section (2) of the Companies Act, 2013 there shall be a doubt that the financial statements of the company were prepared during the period when there was a mismanagement. The point to be remembered here is that even a doubt on the fairness of financial statements is enough for this tribunal to order for re-opening and recasting of the financial statements.

III. The allegations made against the Respondent No. 2 (Mr. Gautam Thapar) in particular and other contesting respondents are very serious in nature. As it could be understood the seriousness with which the Union of India, Ministry of Corporate Affairs (UoI, MCA) i.e. the Applicant is pursuing this matter speaks volumes about the alleged irregularities that have been reported by the company itself in their letter dated 19.08.2019 to the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE).

IV. A detailed hearing had taken place in the above matter, the concern of the Government is that whatever irregularities have been reported, the same have to be investigated very deeply and seriously. From the beginning whenever this matter was posted before this Bench we were not very much impressed by the submissions made by the present and past management of the company. In order to bring out the truth whether any irregularities are committed or not, whether the Respondent No.1 Company's self-declaration on the alleged irregularities are correct or not, can be ascertained only when the entire affairs of the Company are investigated by the Government or its agencies.

V. As it could be understood from the submissions made by the parties while at the time of hearing that there is an internal fight between Respondent No.2 & the present management which is at the helm of affairs and it is in this context, it appears that the Respondent No.2 had been removed as the Chairman of the Board of Respondent No. 1 Company. The reason for the internal fight is yet to be established but however, the complainant in the whole episode is none other than the existing management. When there are serious differences existing between two parties, there are provisions in the Companies Act to seek a proper remedy under the law. But in a strange manner the present management had gone to the stock exchanges and declared about the so called irregularities purported to have taken place in the Respondent No. 1 Company. While this being the position, Government machinery cannot be used by either of the conflicting parties to settle their scores and instead a fair and impartial inquiry be allowed to be conducted by the government agencies to know the real facts.

VI. Evidently the existing management had caused an inquiry into the matter through a Legal firm and also an Auditor's firm and the Vaish Report was released. Having seen the seriousness of the matter this Bench also is conscious of the fact that the Securities and Exchange Board of India (SEBI) is conducting inquiry into the matter independently. The representatives of the Government who appeared in this matter assured this Bench that no inquiry report of

any private party, be it is present or future, shall influence their investigation nor will it have any bearing on the ongoing efforts of bringing out the real facts. In this scenario the re-opening of accounts at this point of time is what the Applicant is praying for in the present application. We are of the considerate view, after hearing all the parties concerned, that the permission is hereby accorded to the Applicant for re-opening of the books of accounts and recasting of the financial statements of the Respondent No. 1 Company and its subsidiary Companies for the past 5 (five) years.

VII. The Vaish Report as put forth by the present management of the Respondent No. 1 Company shall not be the sole basis for concluding that fraud or irregularities have been committed, unless, corroborated with the inspection/investigation report of an independent government agency on the facts and circumstances of the case.

VIII. As per the Order No. 01/116/2016-CL-II(WR) dated 06.11.2019, Government of India has already ordered for investigation by SFIO. Accordingly, this Bench hereby orders that while conducting investigation of the affairs of the Respondent No. 1 Company and its subsidiary companies, it should not base itself solely on the Vaish Report as has been done by the RD while conducting inspection. The investigating agency should also look into the involvement of Ex-Chairman, Directors, Key Managerial Persons (KMPs) and other staff of the Respondent No. 1 Company and its subsidiary companies who were involved in committing fraud or irregularities, irrespective of the fact, whether they ceased to be involved in the affairs of the Respondent No. 1 Company or its subsidiary companies, or still continuing. The report of the investigating agency be also considered while submitting the recasted accounts for suitable orders of this Bench.

IX. Finally, we would like to conclude that based on the outcome of investigating Agency's Report due action be initiated against the erring/defaulting individuals found involved in fraud and irregularities committed by them while conducting the affairs of the Respondent No. 1 Company and its subsidiary companies.

X. We hereby allow the prayer and order reopening of the books of account and re-casting of financial statements of CG Power and Industrial Solutions Limited and its subsidiary companies for 5 (Five) years ended as on 31st March 2019.

XI. The Company Petition is allowed.

(emphasis supplied)

7. What stands out from this order is the PCCIT did not even appear when the application was heard by the NCLT let alone filing any objections.

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8. Subsequently, applicant, i.e., the MCA filed an application to the NCLT to take on record the recast/restated financial statements of petitioner and its subsidiaries. The MCA had appointed Kalyaniwala & Mistry, LLP to reopen and recast the books of accounts of petitioner and its subsidiaries for a period of five years as ended on 31st March 2019. Similarly, CNK Associates, LLP was appointed by the MCA to audit recasted books of account of petitioner and its subsidiaries for a period of five years as ended on 31st March 2019. The applications came to be filed since both the Chartered Accountant firms completed their assignment and furnished the restated accounts for FY. 2014-15 to FY. 2018-19. Duly audited financial statements alongwith relevant audit report were also submitted by MCA to NCLT. The NCLT has recorded in its order dated 26th October 2021, while taking the restated standalone and consolidated financial statements, that neither respondent nor any of the Indian subsidiaries of petitioner have raised or communicated any objection to the said restated financial statements. This is very important because Respondent No. 17 was the PCCIT.

9. The operative part of the said order dated 26th October 2021 reads as under :

ORDER

36. Accordingly, we order the following restated financial statements to be taken on record under Section 130 of the Companies Act, 2013 so that the same may be treated as final :
a. restated standalone and consolidated financial statements of CG Power and Industrial Solutions Limited for the financial years from Financial Year 2014-2015 to Financial Year 2018-2019;

b. restated financial statements of CG-PPI Adhesive Products Limited, CG Power Solutions Limited and CG Power Equipments Limited for the financial years from Financial Year 2014-2015 to Financial Year 2018-2019; and

c. restated financial statements of Crompton Greaves Consumer Electricals Limited for the the Financial Year 2014-2015.

37. The jurisdictional Registrar of Companies of each of the aforesaid companies are directed to take the above restated financial statements on record. The respective companies are also directed to make the above restated financial statements available on their respective websites along with a copy of this order.

No order as to costs.

(emphasis supplied)

10. Relying on this order, petitioner filed applications on 3rd November 2021 and 3rd March 2022 with the CBDT for condonation of delay under Section 119(2)(b) of the Act in filing the revised returns of income for A.Y 2015-16 to 2020-21. These applications were rejected by the CBDT vide orders dated 15th December 2022, 29th December 2022 and 25th January 2023. Against the said order petitioner preferred a Writ Petition being Writ Petition No. 4014/2023. The court disposed the petition by an order dated 1st November 2023 where the operative part reads as under :

(a) The impugned orders dated 15th February 2022, 29th December 2022 and 25th January 2023 are hereby quashed and set aside.

(b) The matter is remanded to CBDT for denovo hearing.

(c) Within four weeks from today, if the petitioner wishes to file any further documents or submissions, the petitioner may do so.

(d) CBDT shall give a personal hearing to the petitioner and notice whereof shall be communicated at least seven working days in advance.

(e) Personal hearing shall be given by the members of CBDT with

the minimum quorum present as prescribed in law.

(f) If after the personal hearing, the petitioner wishes to file any written submissions to record what transpired during the personal hearing, the petitioner may do so within five working days of the conclusion of the personal hearing.

(g) The order to be passed by the CBDT and signed by the members, who heard the petitioner shall be a reasoned order dealing with all submissions of the petitioner and shall be passed on or before 29th February 2024.

2. Petition disposed.

3. We clarify we have not made any observation on the merits of the matter.

11. Following this, supplementary documents and written submissions were filed by petitioner and personal hearing was also granted to petitioner. By an order dated 29th February 2024, that is impugned in this petition, petitioner's application for condonation of delay was once again rejected on grounds which we find difficult to accept. The CBDT admits that the PCCIT had not even resisted the application that was filed by the MCA under Section 130 of the Companies Act but has taken a strange stand that since no reply or reaction of the department was filed before the NCLT, the department has not indicated or conveyed that it accepts the recasted financial statements. The CBDT rejected the condonation application on the following grounds :

a) The petitioner's claim of the finality of Books of account upon passage of the NCLT order is not found tenable in view of proceedings pending before SFIO, ED, CBI and NCLAT;

b) The recast Books of Account as submitted before the NCLT need to be examined for its veracity of the genuineness and correctness of the claim of the petitioner as per the Income-tax Act, 1961;

c) A holistic view needs to be taken due to the complexity of unauthorized transactions, the complicity of the former key

managerial personnel and its impact on the assessment as well as appellate proceedings of the AYs 2015-16 to 2020-21 and the subsequent AYs;

d) The new management having bid for the applicant company through an open process is logically expected to carry out due diligence of the enterprise so as to factor in all legal and financial encumbrances associated with the deal. The petitioner cannot take advantage of the omissions and commissions done by erstwhile management by invoking the exceptional executive powers of the Board which are reserved for cases of genuine hardship only;

e) The applicant company is a 'going concern' and the condonation petition need to be viewed holistically by analyzing the impact of recast financials on the tax incidence of future AYs;

f) The additional submissions made by the petitioner claiming to reduce the carry forward of losses are found to be misleading. The petitioner has in effect deferred losses to a future date thereby reducing the tax incidence of future AYs and at the same time claiming a massive refund for years under review;

g) The claims and counter-claims (including suits for recovery of various dues) by the petitioner and the erstwhile management against each other are pending before various statutory authorities and civil courts. The outcomes of these proceedings will impact the entries made in the recast Books of Account. The veracity of the recast Books of Account for tax purposes, therefore, still remains contested before various authorities.

12. As regards point (a) is concerned, the NCLT, while ordering recast of accounts vide order dated 5th March 2020, has in fact kept the rights of the Government to continue with the proceedings pending before the SFIO, ED and CBI. As regards point (b) is concerned unless the Income Tax Department permits filing of the ROI based on recasted books of accounts, it will not be able to examine the veracity or the genuineness and correctness of the claim of petitioner. So also for point (c) that unless the ROI based on recasted books of account are allowed to be filed, the Income Tax Department will not be able to examine the complicity of the former key managerial personnel and its impact on the assessment as well as other

proceedings. As regards point (d) is concerned frankly it is non justiciable. The CBDT has not appreciated the import of the expression “genuine hardship”. As regards point (e), (f) and (g) are concerned once again unless the ROI based on recasted books of account are allowed to be filed, the Income Tax Department will not be able to examine.

13. “Genuine Hardship” used in Section 119(2)(b) of the Act came for consideration in *K.S. Bilawala vs. Principal Commissioner of Income Tax*¹ where the court observed that the phrase “genuine hardship” should be considered liberally. Respondent should also keep in mind, while considering an application of this nature, that the power to condone the delay has been conferred to enable the authorities to do substantial justice to the parties by disposing the matters on merits. Paragraph No. 4.1 to 6 of *K.S. Bilawala* (supra) read as under :

4.1 There cannot be a straight jacket formula to determine what is genuine hardship. In our view, certainly the fact that an assessee feels he has paid more tax than what he was liable to pay will certainly cause hardship and that will be certainly a ‘genuine hardship’. This Court in Optra Health Pvt. Ltd. v. Addl. CIT (HQ) [Writ Petition No. 15544 of 2023 dated 19-12-2023], in paragraphs No. 9 and 10 held as under:

“9. While considering the genuine hardship, the PCCIT was not expected to consider a solitary ground as to whether the assessee was prevented by any substantial cause from filing the corrections within a due time. Other factors also ought to have been taken into account. The phrase “genuine hardship” used in Section 119(2)(b) of the Act should have been construed liberally. The Legislature has conferred the power to condone the delay to enable the authorities to do substantial justice to the parties by disposing the matters on merits. The expression ‘genuine’ has received a liberal meaning in view of the law laid down by the Apex Court and while considering this aspect, the authorities are expected to bear in mind that

¹ (2024) 158 taxmann.com 658 (Bombay)

*ordinarily the applicant, applying for condonation of delay, does not stand to benefit by lodging erroneous returns. Refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate action. xxxxxxxxxx A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. The approach of authority should be justice-oriented so as to advance cause of justice. If the case of an applicant is genuine, mere delay should not defeat the claim. We find support for this view in *Sitaldas K. Motwani v. Director General of Income-tax (International Taxation)*, New Delhi 2010/87 taxmann.com (Bom.),*

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“16. The term ‘genuine’ as per the New Collins Concise English Dictionary is defined as under:

‘Genuine’ means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)’.

17. *****

18. The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind.....” (p. 624).

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16. Whether the refund claim is correct and genuine, the authority must satisfy itself that the applicant has a prima facie correct and genuine claim, does not mean that the authority should examine the merits of the refund claim closely and come to a conclusion that the applicant's claim is bound to succeed. This would amount to prejudging the case on merits. xxxxxxxxxx At this stag, the authority is not expected to go deep into the niceties of law. xxxxxxxxxx

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23. In light of the aforesaid discussion, we are of the opinion that an acceptable explanation was offered by the petitioner and a case of genuine hardship was made out. The refusal by the CBDT to condone the delay was a result of adoption of an unduly restrictive approach. The CBDT appears to have proceeded on the basis that the delay was deliberate, when from explanation offered by the petitioner, it is clear that the delay was neither deliberate, nor on account of culpable negligence or any mala fides. xxxxxxxxxx

Consistent with the provisions of Section 119(2)(b) of the said Act, the concerned I.T.O. or the Assessing Officer would have to consider the Return of Income and deal with the same on merits and in accordance with law.”

5. Therefore, the phrase ‘genuine hardship’ used in Section 119(2)(b) of the Act should be considered liberally. Respondent should keep in mind, while considering an application of this nature, that the power to condone the delay has been conferred to enable the authorities to do substantial justice to the parties by disposing the matters on merits. While considering these aspects, the authorities are expected to bear in mind that no applicant stand to benefit by lodging delayed returns. Refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when the delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

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14. Strangely in the impugned order the CBDT has not even bothered to discuss why according to them there was no genuine hardship.

15. We agree with Mr. Mistri that once the ROI based on these recasted accounts are allowed to be filed and taken on record can the assessment order be passed. Only after examining those accounts as filed and assessment under Section 143(3) of the Act or return is processed under Section 143(1) can the department even think of reopening of assessment.

16. Ld. ASG reiterated what was submitted in the impugned order dated 29th February 2024.

In view of what we have recorded above, we are unable to accept the submissions made by the Ld. ASG.

17. It is also required to mention that by a letter dated 8th February 2022 the Assistant Commissioner of Income Tax – 6(1)(1), Mumbai (ACIT) had informed the Principal Commissioner of Income Tax – 6, Mumbai (PCIT) that the company's case is covered by and in compliance to the Circular No. 9 of 2015 dated 9th June 2015. The ACIT has correctly recorded as under :

a. The Company's case is covered by and in compliance to the Circular No. 9 of 2015 dated 09.06.2015, which provides guidelines to deal with the applications for condonation of filing refund claim and carry forward of losses under Section 119(2)(b) of the Act. Further, six years from the end of the assessment year viz. AY 2017-18 for which such application/claim for refund/loss is made has not lapsed. This condition is also satisfied by the Company.

b. The books of accounts of the Company have been statutorily restated by MCA appointed auditors. Therefore, in order to disclose true and fair position of taxable income it is imperative to re-compute the correct taxable income for AY 2017-18 based on the restated books of accounts, and make appropriate disclosures in the income tax return form.

c. Allowing the Company to file revised return of income based on the restated books of accounts will entail the Company to claim correct refund and/or carry forward the business loss for AY 2017-18.

d. Without revised return of income based on the restated books of accounts the Company will be subject to assessment proceedings on its erstwhile return which does not display true and fair position and such an assessment may be prejudicial to the interest of the revenue.

e. The restatement of books of accounts of the Company was completed in September 2021. By this time, the due date for filing revised return of income for AY 2017-18 has already lapsed. So, it is not possible for the Company to revise its return based on the restated books of accounts.

f. It has been seen from the Company's past record that it is regular in filing of returns and has never defaulted in past.

g. There are no undisputed tax demands outstanding from the Company.

h. No search, survey or investigations are pending for the company for any assessment year, for escaping any income.

i. The Company has always co-operated during the assessment proceedings and at no point of time the assessment was done u/s 144 or penalty for non-compliance of any notice was levied on the Company.

(emphasis supplied)

The ACIT has also recorded that as per materials available on record, submissions made by the company and in the interest of the Revenue to assess the correct income, the company's petition is a genuine case for condoning the delay in filing revised returns of income based on the restated books of account for A.Y. 2017-18.

18. The PCIT in his communication dated 16th February 2022 addressed to the Chief Commissioner of Income Tax – 3, Mumbai (CCIT) has also recommended that the condonation of delay application filed by petitioner should be allowed. In fact, he has certified that “assessee's petition is a genuine case for condonation of delay in filing ITRs for A.Y. 2017-18.” Paragraph Nos. 4 and 5 of the communication dated 16th February 2022 read as under :

4. In the instant case, the books of account was restated and re-audited by auditors appointed by the MCA due to certain irregularities done by the assessee company, hence, it is imperative that assessee entity disclose true and fair facts before the income-tax authorities based on the restated and audited books of account.

5. Considering the facts of the case and the factual report by the JAO, assessee's petition is a genuine case for condonation of delay in filing ITRs for A.Y. 2017-18.

(emphasis supplied)

19. The PCCIT in his letter dated 24th February 2022 and 1st March 2022 addressed to the CBDT has also recommended that it is a fit case for condonation of delay. Paragraph Nos.4 and 5 of the said letter read as under :

4. The Pr. CIT-6, Mumbai vide letter dated 16.02.2023 has opined that considering the facts and factual reports of the JAO, the assessee petition for both the years is genuine for condonation of delay in filing Revised Income Tax Returns. However, without prejudice to the above, I am also directed to forward a copy of the factual report in the prescribed format furnished by the PCIT-6, Mumbai, for your kind perusal. Further the CCIT-3, Mumbai also concurs with the findings of the jurisdictional PCIT.

5. In view of the above, I am directed to endorse the comments of CCIT-3, Mumbai that this is a fit case for condonation of delay.

(emphasis supplied)

20. Strangely, the Deputy Commissioner of Income Tax (O.S.D.) on instructions from a Member (TPS of CBDT), by a letter dated 23rd June 2022 addressed to the PCCIT called upon the PCCIT to do the following :

7. The report on the above inquires, along with Pr. CCIT, Mumbai's comments/recommendations may kindly be sent by 9th July 2022 so that the application of the petitioner can be processed further.

21. In response the PCIT in his communication dated 8th July 2022 to the PCCIT forwarded a letter dated 6th July 2022 that has been received from the ACIT. In the letter from the ACIT, the stand taken earlier that delay be condoned so that tax implication can be ascertained thereafter was reiterated. Paragraph Nos.2.1, 2.2 and 2.3 of the letter dated 8th July 2022 read as under :

2.1 In this context, I am enclosing herewith the report of the ACIT

Circle 6(1)(1), Mumbai on the captioned matter and the covering letter of the Addl. CIT Rg. 6(1), Mumbai.

2.2 In para 3(i) the Hon'ble CBDT has stated that The field authorities have not examined in detail the various tax implications of recasting of books of accounts which have paramount importance in the matter of consideration of application of the petitioner for condonation of delay. It is unclear whether any enquiries were carried out in these cases either prior to assessments or during assessments.

2.3 In this context, it may kindly be noted that the re-casted books of accounts have not been made available to the Department by the assessee or by the NCLT after passing of the NCLT order dated 05.03.2020. The tax implication of the re-casted books of accounts can only be found if the assessee files the return of income in pursuance of the re-casted books of accounts which in turn is dependent on the Hon'ble CBDT condoning the delay u/s.119(2)(b) of the Act. Further, a suo moto examination of the re-casted books of accounts by the Principal CIT is not possible because the sum involved is more than ₹ 10 lakhs. According to Para 5 of CBDT Circular No.9/2015 dated 09.06.2015 [Copy enclosed], the power of acceptance/rejection of the application within the monetary limits delegated to the Pr. CCIT/CCIT/Pr. CIT/CIT are subject to certain conditions. Para 5 of the circular reads as under :

"5. The powers of acceptance/rejection of the application within the monetary limits delegated to the Pr. CCsIT/CCsIT/Pr. CsIT/CsIT in case of such claims will be subject to hollowing conditions:

i. At the time of considering the case under Section 119(2)(b), it shall be ensured that the income/loss declared and/or refund claimed is correct and genuine and also that the case is of genuine hardship on merits.

ii. The Pr. CCIT/CCIT/Pr. CIT/CIT dealing with the case shall be empowered to direct the jurisdictional assessing officer to make necessary inquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim."

(emphasis supplied)

22. This letter has been forwarded by the PCCIT to the CBDT vide letter dated 14th July 2022. The PCCIT has forwarded a letter to the CBDT with his recommendations. By a letter dated 2nd December 2022 the PCCIT strangely advised that the condonation of delay application be rejected.

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This appears to have been made on the prompting made by the Board because by a letter dated 30th November 2022 the Board called upon the PCCIT to submit once again the specific comments/recommendations on the merits of petitioner's application with reference to Board Circular No. 9 of 2015 dated 9th June 2015 governing condonation of delay under Section 119(2)(b) of the Act. There is no explanation whatsoever why there was a change in the stand taken from what was taken earlier.

23. We fail to understand when the order under Section 130(2) of the Companies Act has been passed by the NCLT to recast the accounts on an application filed by the MCA, Government of India and the accounts have been recasted and accepted by the NCLT and also filed with the RoC under the Ministry of Corporate affairs, how could the Income Tax Department raise such frivolous objections that the delay in filing the returns of Income based on the recasted accounts should not be even condoned.

24. In the circumstances, the Rule is made absolute in terms of prayer clauses – (a), (b) and (c) which read as under :

a. this Hon'ble Court may be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under article 226 of the Constitution of India, calling for the records of the present case and after examining the legality and validity thereof quash and set-aside the impugned order dated 29.02.2024 (being Exhibit 'III' hereto);

b. this Hon'ble Court may be further pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under article 226 of the Constitution of India directing the Respondent Nos. 1 to 5 to allow

the Petitioner to file revised returns of income and revised computations of income prepared in accordance with/based on the re-casted/revised books of account and financial statements for assessment years 2015-16 to 2020-21 and to assess the Petitioner's income chargeable to tax based on the same;

c. this Hon'ble Court may be further pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under article 226 of Constitution of India directing the Respondents Nos. 1 and 4 to assess the Petitioner's income in the assessment/appellate proceedings based on the re-casted/revised books of account and financial statements;

25. Petitioner shall file physical returns of income based on books of account, revised/recasted under Section 130(2) of the Companies Act, 2013, as taken on record by the NCLT for A.Y. 2015-16 to A.Y. 2020-21 before the JAO within 30 days from the date this order is uploaded.

On or before 28th February 2025 the A.O. shall frame assessments in accordance with law considering the revised returns of income filed based on recasted/revised books of account for A.Y. 2015-16 to A.Y. 2020-21.

26. In view of what is recorded above, any assessment order passed under Section 143(3) or 144(C) of the Act for any of the years for which recasted/revised accounts have been filed will not survive. So also consequential notices, if any, issued or orders, if any, passed.

27. We clarify that accepting returns of income on recasted accounts will not absolve anybody from any action that may be taken on the basis of earlier accounts based on investigation which are on going. If after

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investigation, if these recasted accounts are required to be relooked or reworked, the company shall not raise issue of limitation for a period of three years from the date on which the assessment order is passed.

28. In view of the peculiar facts and circumstances of this case, the time to calculate the period provided in Section 149 of the Act will commence from the date the assessment orders are passed for each of the five assessment years.

29. It was submitted on behalf of the Revenue that in view of the appeals which are filed by Mr. Gautam Thapar and Mr. Madhav Acharya against the NCLT's order dated 26th October 2021 in the NCLAT, in the event the NCLAT reverses the order passed by NCLT on 26th October 2021, the time permissible for reopening of assessment on the returns originally filed should be extended. We are not making any observations on this. Suffice to say it is open to the Revenue, to take all such steps as advised in accordance with law. Any affected party will take such defence as available in law.

The investigation initiated by the Government of India through SFIO into the affairs of petitioner/company and its subsidiary companies shall proceed in accordance with law.

We have expressed no opinion there on.

All rights and contentions of parties with respect thereto are expressively kept open.

30. In view of the above order, by consent the pending assessment proceedings for A.Y. 2021-22 and 2022-23 shall not be proceeded with until the assessment orders are passed for the A.Y. 2020-21 and 2021-22.

31. Petition disposed.

(DR. NEELA GOKHALE, J.)

(K.R. SHRIRAM, J.)