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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1749 OF 2009

Sitaldas K.Motwani
Age-77 yrs., Occu : Business,
C/o.D.M.Harish & Co.,
Advocates, 305-309, Neelkanth,
98, Marine Drive,
Mumbai – 400 002. ..Petitioner

Versus

1. Director General of Income Tax
(International Taxation),
Drum Shaped Buildings,
New Delhi-110002.

2. Joint Director of Income Tax
(International Taxation),
Range (3), Mumbai.

3. Commissioner of Income Tax (Judicial)
Aayakar Bhawan, Churchgate,
Mumbai.

4. Union of India
Aayakar Bhawan, Churchgate,
Mumbai. ..Respondents

Mrs.Shobha Jagtiani with Ms.Beena Pillai i/b. D.M.Harish and Co. for petitioner.
Mr.Suresh Kumar for respondent.

CORAM :- V.C.DAGA &
J.P.DEVADHAR,JJ.
DATE : 15TH DECEMBER,2009

JUDGMENT (PER : V.C.DAGA,J.)

1. This petition is directed against the impugned order dated 24th February, 2009 passed by the Director General of Income Tax (International Taxation, New Delhi ("respondent No.1" for short) u/s.119(2)(b) of the Income Tax Act,1961 ("the Act" for short), whereby and whereunder, the prayer for condonation of delay in filing the return for claiming refund for the A.Y.2000-01 was rejected.

FACTUAL MATRIX

2. The undisputed factual matrix drawn from the impugned order are, that the Assessee, a Non-resident Indian settled in Hong Kong, is assessable to tax by the Joint Director of Income Tax (International Taxation), Range-3, Mumbai, falling under the jurisdiction of the D.I.T. (International Taxation), Mumbai. During the accounting year relevant to the A.Y.2000-01, he invested in the shares of Indian Companies and earned Short Term Capital Gains of Rs.2,09,05,250/-. The concerned bank with whom the assessee was maintaining his regular account, deducted the tax at source @ 30%.

3. The assessee filed his return of income for the first time for A.Y. 2000-01 claiming that the Short Term Capital Gains on sale of shares of Indian Companies qualify to be investment income u/s.115C of the Act, taxable at a flat rate of 20% and claimed a refund of Rs.20,78,871/-. Needless to mention that prior to filing this return on 24th September, 2003, the assessee did not file any return for any assessment year. The return of income for A.Y.2000-01 had become barred by limitation on 31st March, 2002 and therefore, the return was filed on 24th September, 2003 along with an application u/s.119(2)(b) for condonation of delay in filing of return and claiming refund.

4. Respondent No.1, offered an opportunity of being heard to the petitioner through his Advocate followed by liberty to circulate written submissions in support of the prayer for condonation of delay. In the written submissions filed on behalf of the assessee following grounds were pressed into service to seek condonation of delay in filing return of income:

(i) The assessee was not assessed to tax upto the A.Y.1999-2000 and for the relevant year after deduction of tax at source he was under bonafide belief that the return of income was not required to be filed. After realizing his mistake the assessee filed the return voluntarily claiming refund of Rs.20,78,821/- on 24th September, 2003 prior to the issue of any notices u/s.142/148 of the Act.

ii) The assessee has not filed the return for the sole purpose of claiming refund but under compelling legal obligation under the Income Tax Act,1961.

iii) If the return was not filed the assessee might have been penalized or prosecuted for concealment of income. Also, if the delay is not condoned the assessee will be deprived of his legitimate claim of refund. This can be considered has "genuine hardship" to the assessee for the purpose of application u/s.119(2)(b).

iv) Further in support of his claim for refund the assessee submitted that:

(a) Income of Rs.20,93,84,490/- is derived from shares in Indian companies which are specified assets u/s.115C(f) of the Act.

(b) The said shares are foreign exchange assets acquired or purchased from convertible foreign exchange through NRE Account;

(c) The assessee is an NRI as per the provisions of Section 115C(e) of the Act,1961.

5. The learned Counsel for the petitioner also placed reliance on the decision of the Income Tax Tribunal Bench Delhi in the case of Trishala Devi Jain Vs. DCIT vide order No.954 to 959 of 1989 dated 3rd August, 1990 and that the judgment of the Punjab & Haryana High Court in the case of CIT Vs. Sangya Jain 232 ITR 666.

IMPUGNED ORDER

6. The respondent No.1 was pleased to reject the prayer for condonation of delay in filing return of income relying on the CBDT Instruction No.13/2006 dated 22nd December, 2006, extensively quoted in the impugned order.

7. The Board Circular prescribes that at the time of considering the case u/s.119(2)(b) of the Act, it is necessary for the authorities to consider that the income declared and refund claimed are correct and genuine and that the case is of genuine hardship on merits and correctness of the refund claim. The respondent No.1, while considering the genuine hardship observed as under:

> In fact what is to be seen is as to whether there exist circumstances which genuinely prevented the assessee from filing his return of income within the time laid-down by the statute. Nothing has been brought on record to suggest that the assessee was prevented by some set of circumstances which prevented him from filing his return within time. The reasons of genuine hardship as put forward by the assessee have no bearing on assessee's failure to file the return within the due date, and in fact are only consequences of his failure to do so.

8. The respondent No.1, with regard to the correctness of the refund claim is concerned, observed that the income generated from the sale of assets cannot be said to be an income derived from assets. In this view of the matter, the prayer for condonation of delay came to be rejected by the impugned order.

9. Being aggrieved by the aforesaid order, the petitioner has invoked the extra ordinary writ jurisdiction of this Court under Article 226 of the Constitution of India.

RIVAL SUBMISSIONS:

10. Mrs.Shobha Jagtiani, learned Counsel appearing on behalf of the petitioner urged that the petitioner was under bonafide belief that since the tax has been deducted by the bank, he was not required to file income tax return in India, as such the petitioner has failed to file return in time. When the

return was filed, it was delayed by 18 months, therefore, the petitioner was required to move an application dated 25th February, 2004 u/s.119(2)(b) to seek condonation of delay in filing the return of income and claim refund.

11. Mrs.Jagtiani further urged that respondent No.1 has misconstrued and failed to realize that this was of genuine hardship as the assessee was not aware of the laws in India requiring him to file a return even where TDS deductions were made. She placed reliance on the judgment of the Gujarat High Court in the case of Gujarat Electric Co. Ltd. Vs. CIT 255 ITR 396. She also placed reliance on the judgment of the Madras High Court in the case of Seshammal (R) Vs. ITO (1999) 237 ITR 185 (Madras), to buttress her submission.

12. Per contra, Mr.Suresh Kumar tried to support the impugned order and prayed for dismissal of the petition.

CONSIDERATION

13. Having heard both the parties, we must observe that while considering the genuine hardship, respondent No.1 was not expected to consider a solitary ground as to whether the petitioner was prevented by any substantial cause from filing return within due time. Other factors detailed hereinbelow ought to have been taken into account.

14. The Apex Court, in the case of B.M.Malani Vs. CIT and Anr. (2008) 10 SCC 617, has explained the term "genuine" in following words:

> 16. The term "genuine" as per the New Collins concise English Dictionary is defined as under:
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> " 'Genuine' means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)".
>
> 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."

The Gujarat High Court in the case of Gujarat Electric Co. Ltd. Vs. CIT 255 ITR 396, was pleased to hold as under:

> "The Board was not justified in rejecting the claim for refund on the ground that a case of genuine hardship was not made out by the petitioner and delay in claiming the relief was not satisfactorily explained, more particularly when the returns could not be filed in time due to the ill health of the officer was looking after the taxation matters of the petitioner."

The Madras High Court in the case of Seshammal (R) Vs. ITO (1999) 237 ITR 185 (Madras), was pleased to observe as under:

> "This is hardly the manner in which the State is expected to deal with the citizens, who in their anxiety to comply with all the requirements of the Act pay monies as advance tax to the State, even though the monies were not actually required to be paid by them and thereafter seek refund of the monies so paid by mistake after the proceedings under the Act are dropped by the authorities concerned. The State is not entitled to plead the hypertechnical plea of limitation in such a situation to avoid return of the amounts. Section 119 of the Act vests ample power in the Board to render justice in such a situation. The Board has acted arbitrarily in rejecting the petitioner's request for refund."

15. The phrase "genuine hardship" used in Section 119(2)(b) should have been construed liberally even when the petitioner has complied with all the conditions mentioned in Circular dated 12th October, 1993. The Legislature has conferred the power to condone delay to enable the authorities to do substantive justice to the parties by disposing of the matters on merit. The expression "genuine" has received a liberal meaning in view of the law laid down by the Apex Court referred to hereinabove and while considering this aspect, the authorities are expected to bare in mind that ordinarily the applicant, applying for condonation of delay does not stand to benefit by lodging its claim late. Refusing to condone 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 delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. The approach of the authorities should be justice oriented so as to advance cause of justice. If refund is legitimately due to the applicant, mere delay should not defeat the claim for refund.

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. All that the authority has to see is that on the face of it the person applying for refund after condonation of delay has a case which needs consideration and which is not bound to fail by virtue of some apparent defect. At this stage, the authority is not expected to go deep into the niceties of law. While determining whether refund claim is correct and genuine, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.

17. Having said so, turning to the facts of the matter giving rise to the present petition, we are satisfied that respondent No.1 did not consider the prayer for condonation of delay in its proper perspective. As such, it needs consideration afresh.

18. In the result, we set aside the impugned order and remit the matter back to the respondent No.1 for consideration afresh, with the direction to decide the question of hardship as well as that of correctness and genuineness of the refund claim in the light of the observations made hereinabove. All other rival contentions on merits are kept open. Rule is made absolute in terms of this order with no order as to costs.

(J.P.DEVADHAR,J.) (V.C.DAGA,J.)