Fit For Publication

Sd/- **Sd/-**
(AM) **(JM)**

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'ए' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" A " BENCH, AHMEDABAD

सर्वश्री मुकुल कुमार श्रावत, न्यायिक सदस्य **एवं** श्री ए.के.गरोडिया, लेखा सदस्य के समक्ष ।

BEFORE SHRI MUKUL Kr.SHRAWAT, JUDICIAL MEMBER AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

MA Nos.72 and 73/Ahd/2012

(In I.T.A. Nos.498 & 497/Ahd/2003)
(**निर्धारण वर्ष** / Assessment Year : 1997-98)

M/s.Agni Briquette Pvt.Ltd. Gujarat Saw Mill Compound Rajshree Talkies Road Anand	**बनाम**/ Vs.	The ACIT Circle-2 Anand
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAJCA 8398 R		
(अपीलार्थी /**Applicant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Applicant by** :	Shri J.P.Shah
प्रत्यर्थी की ओर से/**Respondent by** :	Shri P.L.Kureel

सुनवाई की तारीख / **Date of Hearing** : **20/4/2012**
घोषणा की तारीख /**Date of Pronouncement** : **15/6/12**

आदेश / O R D E R

PER SHRI MUKUL Kr. SHRAWAT, JUDICIAL MEMBER :

These two miscellaneous petitions have been filed on 4.4.2012 pertaining to Assessment Year 1997-98 arising from a consolidated order of the Tribunal; as mentioned in the nomenclature hereinabove; dated 23/02/2007. The referred two appeals have been filed against the orders

of Learned CIT(Appeals)-V, Baroda respectively 22.11.2002 and 20.11.2002 passed for the A.Y. 1997-98 as recorded by the Respected Co-ordinate Bench in the impugned order. Due to non-appearance on the part of the appellant, the Respected Co-ordinate Bench had thought it justifiable to dismiss both the appeals *ex-parte* following two precedents, namely (i) Hon'ble Madhya Pradesh High Court's decision in the case of Estate of Late Tukojirao Holkar vs. CWT [1997] (223 ITR 480) and (ii) Hon''ble Delhi Tribunal's decision in the case of Multiplan (India) P.Ltd. (38 ITD 320). However, the short-prayer through these two Miscellaneous Applications is to reinstate the said two appeals by recalling the said order of the Tribunal.

3. At the outset, before we proceed to decide the merits of the petition, we have noticed that the Registry has marked that these tow petitions are **time-barred by 1 year 1 month and 10 days**. The order of the Tribunal is dated 23.2.2007, however, the impugned petitions have been filed on 4.4.2012.

4. In respect of the delay in filing of the miscellaneous petition, ld.AR Mr.J.P.Shah has stated that the applicant had enquired from ITAT Website about the status of appeal and came to know that the ITAT "A" Bench Ahmedabad on 23/02/2007 has dismissed both the appeals. Thereafter on 19.9.2011, the applicant had requested the Registrar, ITAT to give a certified copy of the order and the evidence of service of notice. In response to the said letter, the Registry of ITAT vide letter dated 18/11/2011 asked the assessee to deposit the requisite fees for obtaining

certified copy of the order. On submitting the challan, a certified copy of the order have been provided to the assessee on 18/11/2011. Mr.Shah has informed that the business of the company was closed down and the said Unit was in the possession of the Gujarat State Financial Corporation. The notice which was sent to the assessee returned back by the postal authority with the remarks "left". Since the date of hearing was not in the notice of the appellant, hence, no one was present on the date of hearing fixed on 23/2/2007. Revenue Department had already attached the property of the Directors and initiated recovery proceedings. According to the applicant, therefore, the said ITAT order dated 23/2/2007 for both the appeals was received on 19.11.2011. Thereafter, the Miscellaneous Application was moved on 4.4.2012, hence within the prescribed period. In support, certain paras of Miscellaneous Petitions are referred before us, reproduced for ready reference:-

> *"4. The Applicant thereafter wrote letter to The Deputy Registrar, ITAT, Ahmedabad on 19/09/2011 and requested to give the certified copy of the Order and evidence of notice served to the them. In response to this letter, the Registrar of ITAT, Ahmedabad, vide letter dated 18/11/2011, asked the Appellant to deposit fees of Rs.40/- through challan for obtaining certified copy of the ex-parte order as well as evidences. On submitting the challan, the Applicant was given certified copy of order and evidences personally on 18/11/2011. In the said evidence, Your Honour will notice that since business of the Company was closed and the Unit was in possession of Gujarat State Financial Corporation, the notice sent to the Applicant was returned back to the sender by the postal authority with a remark "left". As a result, the Applicant could not remain present before the Hon.Bench in the hearing fixed on 23/02/2007. The said envelope with the remark marked 'left' is enclosed herewith marked ANNEXURE-C (collectively). Meantime, the Department attached*

the personal property of the Directors and initiated recovery proceedings against the property of the Directors and against the company to whom the said property was sold. Finally, in view of day to day harassment of the Department the Applicant has filed a writ Petition No.3910/2012 before the High Court of Gujarat which is pending. The Applicant was therefore continuously involved in this and hence could not approach your Honour earlier for reinstatement of the Appeal. An affidavit in support of the above is enclosed herewith marked ANNEXURE-D.

5. The Applicant has therefore received the ITAT Order dated 23/02/2007 on 19/11/2011 only. In the aforesaid circumstances, the Applicant requests Your Honour to condone the delay in filing this Miscellaneous Application and humbly prays that, under the above stated facts and circumstances of the case and in the interest of substantial justice, the above stated ex-parte order passed by the Hon'ble Tribunal on 23/02/2007, may be kindly recalled and the matter be decided afresh after granting the Applicant, a proper and adequate opportunity of being heard and for which act of kindness the Applicant for ever shall remain grateful to your Honours."

4.1. The ld.AR has referred a Writ Petition (civil) 528 of 2002 of the Hon'ble Supreme Court of India in the case of D.Saibaba vs. Bar Council of India & Anr. (2003) 6 SCC 186, date of judgement 6/5/2003 for the legal proposition that a decision can be said to be communicated. He has raised a question which was before the Hon'ble Court that how can a person aggrieved be expected to exercise the right conferred by any provisions of law unless the order is communicated to or is known to him either actually or constructively? Ld.AR has pleaded that the words "the date of that order", therefore must be construed as the date of communication or knowledge, as held in the said order of the Hon'ble Court. Ld.DR has also placed reliance on Vekatadri Traders Ltd. vs.

CIT (2001) 248 ITR 0681 (Mad.) for the legal proposition that the delay which is required to be explained is the period from the date on which the order sought to be revised had come to the knowledge of the assessee. If the cause of justice requires that a liberal view be taken, then a liberal view would indeed be warranted while considering the question of condoning the delay. An another order of Hon'ble Madaras High Court pronounced in the case of O.A.O.A.M. Muthiah Chettiar vs. CIT (1951) 019 ITR 0402(Mad.) for the legal proposition that an application filed before a Commissioner be not treated barred by limitation if the relief sought could not be obtained under any other provisions of the Act and, therefore the application for the issue of a writ of mandamus was held as maintainable. Reliance has also been placed on Petlad Bulakhidas Mills Co.Ltd. vs. Raj Singh (1959) 037 ITR 0264 (Bombay) to describe the expression "order"; i.e. an order of which the party has constructive notice. Limitation should not be computed from a date earlier than that on which the assessee actually knew of the order or had an opportunity of knowing of the order. The ld.AR has also drawn our attention on the sequence of the dates as follows:-

25.01.2007	Notice of hearing by the Tribunal came back unserved with the remark "Left".
23.02.2007	Tribunal dismissed the appeal of the assessee by order dated 23.02.2007
07.05.2007	The above dismissal order of the Tribunal came back unserved with the remark "Left".
29.09.2008	The office of the Tribunal sent the order to Asst.C.I.T., Baroda for service on assessee.
26.07.2011	Assessee writes to the Assessing Officer that the Tribunal's appeal is pending; Annexure-B in M.A.
Sept. 2011	From Tribunal's website it is know that the assessee's

	appeal is dismissed by the Tribunal.
19.09.2011	Assessee applies for the certified copy of the order of the Tribunal, copy of the evidence of service of notice and service of above order.
18.11.2011	The office of the Tribunal asked the assessee to deposit the amount of rs.40/- for getting the above copies.
19.11.2011	Assessee gets the above copies.
04.04.2012	Assessee files Miscellaneous Application.

5. From the side of the Revenue, ld.Sr.DR Mr.P.L.Kureel has placed reliance on the language of Statute and argued that the Appellate Tribunal may at any time within four years from the date of the order can rectify the mistake. There is no mandate prescribed to condone the delay if a miscellaneous application has been filed after the expiry of 4 years from the date of the order. The Act has thus clearly used the terminology "date of the order" and not used the terminology "date of service of order". There should not be any stretching of the language of the Act. When an order has been signed by the Members of the Tribunal, then that is the date of the order which shall be taken into account for computing the time period as prescribed u/s.254(2) of the I.T.Act.

5.1. In response, ld.AR in his rejoinder has again referred the decision of D.Saibaba vs. Bar Council of India & Anr. (supra) that where the law provides a remedy to a person, then the provision to be so construed in the case of ambiguity so as to make availing of the remedy practicable and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision negatory is

to be avoided. The process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised so as to give throb to a sinking heart, he has concluded.

6. We have heard both the sides at some length. We have carefully perused the precedents cited but found to be not applicable. We find no force in this miscellaneous petition primarily because of the reason that the Statute do not authorize us to entertain any petition which has been filed u/s.254(2) at any time beyond four years form the date of the order. For ready reference; the relevant Section is reproduced below:-

> **Section 254 (2)**:- The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment if the mistake is brought to its notice by the assessee or the [Assessing Officer:]

6.1. If we compare the words of the provisions of section 254(2) of the I.T.Act with few other like nature provisions of this very Act where a time period is prescribed in filing of an appeal, then we have noticed that in those provisions, the Statute has clearly mandated the date of service as the date for calculating the time period prescribed. In Section 249; relevant provision for appeals before the Learned CIT(Appeals) the limitation for filing an appeal is prescribed as per Section 249(2); reproduced below:-

> **Section 249 (2)** :- The appeal shall be presented within thirty days of the following date, that is to say,—

> [(a) where the appeal is under section 248, the date of payment of the tax, or]
>
> (b) where the appeal relates to any assessment or penalty, the date of service of the notice of demand relating to the assessment or penalty:
>
> **[Provided** that, where an application has been made under section 146 for reopening an assessment, the period from the date on which the application is made to the date on which the order passed on the application is served on the assessee shall be excluded, or]
>
> (c) in any other case, the date on which intimation of the order sought to be appealed against is served.

6.2. It is worth noting that Section 249(2) has specifically directed that for the purpose of calculating 30 days the date to be taken into account is the **date of service** of the notice of demand or in other cases **date on which the order is served**. As against that, u/s.254(2), the Statute has chosen not to compute the period of limitation from the date when an ITAT order is served, but the Statute has chosen to compute the time within four years from the date of the order.

6.3. Even for the purpose of filing an appeal to the Appellate Tribunal the period prescribed is 60 days from the date of **communication** of the order as per section 253(3); reproduced below:-

> **Section 253(3)** :- Every appeal under sub-section (1) or sub-section (2) shall be filed within sixty days of the date on which the order sought to be appealed against is communicated to the assessee or to the Commissioner, as the case may be :

7. On reading of these parallel sections, therefore it is evident that the Statute has either mentioned that the date on which the order sought to be appealed should be the **date of communication**, or the **date when the order is served or the date of service of the notice of demand**. However, the Statute has not given any such indication while drafting the language of section 254(2) of the I.T.Act rather it has plainly mentioned, without any ambiguity, that the Appellate Tribunal may at any time within four years from the date of the order shall make such amendment if the mistake is brought to its notice by the assessee. The purpose of usage of such language appears to be that vide section 254(2A) an appeal is otherwise to be decided by the Tribunal within a period of four years by the end of the Financial Year in which such appeal is filed u/s.253(1) of the I.T.Act. Thereafter, another four years has further been granted for filing a petition u/s.254(2) by the Statute. If within the said long period of "**eight years**" an appellant is not vigilant about the fate of its appeal, then such an appellant cannot be termed as a serious litigant interested in getting an appeal finalized within a reasonable period. In the present case, the appeal in respect of the ITA No.497/Ahd/2003 was filed on 6/2/2003. Likewise, the appeal in respect of ITA No.498/Ahd/2003 was filed on 6/2/2003. Both these appeals remained pending uptill February-2007 and then on 23/02/2007 these appeals were decided *ex-parte* by the impugned orders by the Respected Co-ordinate Bench. Meaning thereby the appellant has never enquired in the said four years between 2003 to 2007 about the fate of his appeals although those were filed in the year 2003. After the lapse of 8 years,

undisputedly a long gap, now this assessee is seeking a favourable decision which may tantamount to re-writing the Statute.

8. An another feature of the Statue is worth to mention that vide section 253(5) of the I.T.Act the Appellate Tribunal has been given power to admit an appeal after the expiry of the relevant period, if satisfied that there is sufficient cause for not presenting it within that period. Relevant section is reproduced below:-

> **Section 253(5)** :- The appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not present it within that period.

Somehow, this Tribunal is not enshrined with such judicial power in respect of a miscellaneous petition filed u/s.254(2) of the I.T.Act. If we are not given that power, then it is not expected from us to exercise such power which is not provided in the Act.

9. As far as this judicial forum, i.e. Income Tax Appellate Tribunal is concerned, our jurisdiction is simply to interpret and follow the Statute. There is no scope for us to import any word into the Statute which is not there. Such importation would be nothing but to amend the Statute. Even if there is a *casus-omissus*, the defect can be remedied through a legislation by the Hon'ble Legislatures and not by a judicial interpretation. We therefore hold that the condonation as sought through these petitions is beyond our jurisdiction, hence rejected.

10. **In the result, both the miscellaneous applications are hereby dismissed.**

Sd/-	**Sd/-**
(ए.के.गरोडिया)	(मुकुल कुमार श्रावत)
लेखा सदस्य	न्यायिक सदस्य
(A.K. GARODIA)	**(MUKUL Kr. SHRAWAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 15/ 06 /2012

टी.सी.नायर, व.नि.स./ T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Applicant.
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-V, Baroda
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad