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

**WRIT PETITION NO.2079 OF 2018**

Kishore Jagjivandas Tanna .... Petitioner
Vs.
Joint Director of Income-tax (Inv.),
Unit-I, New Delhi – 110 055 & Anr. .... Respondents

Mr. S.C. Tiwari with Ms Rutuja N. Pawar for the Petitioner.
None present for the Respondent.

**CORAM:** S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

**DATE :** SEPTEMBER 17, 2018

**P.C:**

1. On this writ petition, on the earlier occasion, we passed the following order:-

> *"1. Let the petitioner's advocate satisfy this court as to how the writ petition will lie for recovery of money even if that recovery is in terms of the order of this court. Our simple query is, if the order of this court, on which reliance is placed, is passed on 25th March, 2008 and that order is also capable of more than one interpretation, then, merely because the petitioner keeps on writing letters or raising a demand on the respondents in writing,*

> *would it save the bar of limitation, which is prescribed by the Limitation Act, 1963 for filing a suit for recovery of money. Merely because a writ petition is filed does not mean that this court can pass an order contrary to the scheme of the Limitation Act, 1963 and grant the relief. All the more when this writ petition is filed in the year 2018 and to be precise on 23rd July, 2018, a good 10 years after the right to recover that money accrued in favour of the petitioner.*
>
> *2. The petitioner's advocate says that she would consider this position in law and address the court on the next occasion. We place this matter for "passing orders" on 17th September, 2018."*

2. Today, when we heard Mr. Tiwari extensively, he would submit that a panchnama was drawn by the search authorities reflecting seizure of cash of Rs.4,99,900/-, copy of which is at Exhibit-A to the petition. That is dated 25-8-1987. An order under Section 132(5) was made by the Assessing Officer on 22-12-1987, but the aggrieved petitioner approached this Court by filing a Writ Petition, which Writ Petition bearing No.721 of 1988 impugned this order of 22-12-1987. That came to be disposed of with the following order and direction:-

> *"4. In the circumstances, rule is made absolute in terms of prayer clause-(a) and respondent no.1 is directed to issue a fresh Show Cause Notice to the petitioner under Rule 112-A of the Income Tax Rules 1962 within 12*

> *weeks from today. Alongwith the said notice the petitioner will also be furnished copies of all statements/documents which the income tax authorities would like to rely upon. Thereafter a final order under Section 132(5), as it then stood, will be passed within a further period of 8 weeks of the first date of hearing, after re-hearing the petitioner in accordance with law. It is made clear that if no notice under rule 112-A of the Income-tax Rules 1962 is issued within 12 weeks from today as directed, then the amount seized will be refunded to the petitioner with 6% simple interest from the date of the seizure till the date of return. Petition stands disposed off in the aforesaid terms."*

When this order was passed by this Court on 25-3-2008, all that the petitioner has done thereafter is to bring to the notice of the authorities this Court's order and direction. However, on 19-9-2008, he was informed by the Deputy Commissioner of Income Tax (Exhibit-D, Page 38) that the seized cash is not lying presently in the custody of the Commissioner of Income Tax-1, Mumbai. This fact was informed by letter of 8-9-2008. That is why the petitioner was requested to give information with regard to the seized cash so that the office expedites the matter. On 24-10-2008, identical reply was given by the Department to another communication of the petitioner of 19-9-2008. Thus, the petitioner was called upon to furnish information which would

be useful for the Revenue to locate the seized cash, including providing details such as names of various officers involved in the search action and assessment proceedings, etc.. The petitioner then writes a letter straightaway on 4-5-2009 and purports to inform the authority that at the time of seizure of the cash he was assessed with A-II Ward under a Permanent Account No.34-008-PV-1507. The petitioner then relies upon a Notice of Demand, copy of which is at Exhibit-G, Page 41. That is of 2-12-2009 and the Assessment Order is also dated 2-12-2009. That, according to the petitioner, enables him to obtain a credit for the sum of Rs.5,00,000/- which is nothing but the cash seized. The petitioner says that despite such an order, the cash has not been refunded and therefore purports to seek a rectification of the Assessment Order on 17-5-2010 vide Exhibit-H, Page 47. He then says that the refund can be granted with interest on his furnishing an Indemnity Bond. This was the request made on 22-9-2010. From that date till 5-7-2017 the petitioner does nothing but writes a letter straightaway on 5-7-2017. The copy of this letter at Exhibit-J, Page 50, makes an

interesting reading:-

*"From:*
*Kishore J Tanna*
*Tanna House, 2nd Floor,*
*11/A, Nathalal Parekh Marg,*
*MUMBAI-400 001.*

*Date: 5th July, 2017*

*To*
*The Deputy Commissioner of Income Tax*
*Ward 1(2)(1)*
*Mumbai*

*Re: Proceeding u/s 132(5) of I.T. Act, 1961.*
*Assessment Year 2008-09*
*Sub: Refund of Seized cash as per your letter*
*No.DCIT 1(2)/132(5)/2008-09*

*Dear Sir,*

*This request is in continuation of our previous letters dated 22.09.2010 [acknowledged on 23.09.10] & 17.05.2010 [Acknowledged on 20.05.2010].*

*I, Kishore J Tanna would like to draw your attention to your Letter No.DCIT 1(2)/132(5)/2008-09 dated 19th Sept., 2009 from the office of the Dy. Commissioner of Income-Tax 1(2), wherein you have confirmed that the assessment u/s 132(h) is completed and the seized cash shall be released. But to date I have not received any refund. As per the High Court Writ Petition, I am supposed to receive the seized cash along with simple interest @ 6% p.a. from the date of seizure to date of refund.*

*Accordingly, the interest from 25.08.1987 [date of seizure] to 05.07.2017 works out to Rs.897,683/-*

*[Calculation attached for your reference]*

*I, request you to refund the seized amount of Rs.499,900.00 along with the interest due thereon at the earliest.*

*I have attached copies of all the relevant documents for your reference and early expedition of my request.*

*Yours faithfully,*
*Sd/-*
*KISHORE J. TANNA*

*Encl: ….”*

3. The petitioner says that the reply to this, dated 11-10-2017, would constitute an admission of liability and therefore this second or subsequent writ petition, filed on 4-7-2018, on the same cause of action is maintainable and in any event so also assuming it is maintainable, it is not barred by delay and laches.

4. We are unable to agree with Mr. Tiwari for in this letter the Department says nothing new. It only says through its Income Tax Officer (Technical), addressed to the Deputy Commissioner of Income Tax (Headquarter), New Delhi, that the petitioner is pressing for refund of the cash seized and he

has submitted a copy of panchnama of the seized cash. That, according to this officer, would enable to search out the records and transfer the cash amount.

5. Pertinently, the petitioner knows that these details which he had provided prior as well have not resulted in the alleged admissible refund released or paid with interest. If the petitioner was supposed to receive this amount in terms of this Court's order within 12 weeks from 25-3-2008, failing which it was to earn simple interest at 6% from the date of seizure till the date of return, then, we would have expected such a petitioner to move this Court in execution proceedings so as to enforce the order. Chapter XXXIII of the Bombay High Court (Original Side) Rules is titled as “Rules for the Issue of Writs Under Article 226 of the Constitution Other Than Habeas Corpus”. There is a specific Rule therein, namely, Rule 647, which reads as under:-

> “**R.647. Execution of orders**. - Every order made under this Chapter shall be executed, as if it were a decree made in the exercise of the Ordinary Original Civil Jurisdiction of this Court.”

A bare perusal of this Rule would enable us to hold that every

order passed by this Court under Article 226 of the Constitution of India can be executed as if it were a decree made in the exercise of the Ordinary Original Civil Jurisdiction of this Court. Such step is not taken as well. The Revenue should not have been allowed to retain the amount. However, the petitioner's inaction from the date of this Court's order and the period stipulated therein coming to an end, till 4-7-2018, which is the date on which this second petition has been filed, is enough to dismiss the petition. It is neither maintainable, and assuming it is, the same is clearly barred by delay and laches. No assistance can be derived from the Assessment Order which, in any event, is dated 2-12-2009, or the communication at Page 50, dated 5-7-2017.

6. It is shocking and surprising that Mr. Tiwari would argue that there is no period of limitation prescribed by the Limitation Act, 1963 for bringing a Writ Petition to this Court. Hence, this petition, according to him is maintainable. However, he has no answer to our query as to how a second writ petition would lie when the cause of action is essentially the same. All

that Mr. Tiwari would argue is that after this Court's order an assessment is made and he relies upon a copy of the order in that behalf at pages 45-46 of the paper-book. He then relies on the letter, copy of which is at page 47 of the paper-book and says that this is an application for rectification of the mistake in the Assessment Order. This reads as under:-

> *"Date: 17th May, 2010*
>
> *To,*
> *The Deputy Commissioner of Income Tax*
> *Circle 1(2)*
> *Mumbai*
>
> *Dear Sir,*
>
> *Re:- Mr. Kishore J. Tanna*
>
> *Sub:- Rectification U/s. 154 of Assessment order passed U/s.143(3) rws 147 of the Income Tax Act*
>
> *This is in reference to above we on behalf of our client acknowledge the receipt of your above order and wish to state as under.*
>
> *While passing the order you have accepted the income returned by our client. However while giving credit for taxed paid you have not given the credit for cash amounting to Rs.5,00,000/= seized at the time of search. We wish to draw your kind attention to the letter dt. 19th September, 2009 written by you predecessor wherein he has confirmed that assessment U/s.132(h) is completed and seized cash is not to be retained (copy enclosed). The*

*assessment U/s.143(3) is subsequently completed and no addition is made hence the seized cash retained by the Department towards taxed paid should be considered as tax credit and be refunded to my client.*

*In view of above circumstances I request you to rectify your above order u/s.154 of Income Tax Act, 1961 by giving credit for taxes paid amounting to Rs.5,00,000/= and refund the amount alongwith interest immediately.*

*Thanking You,*

*Your's faithfully,*
*For Rajendra D. Joshi & Co.*
*Chartered Accountants*
*Sd/-*
*(R.D. Joshi)*
*Proprietor*

*Encl: 1. Copy of letter dated 19th September, 2009*
*2. Copy of Assessment order passed U/s.143(3)"*

Mr. Tiwari would argue that the above furnishes a fresh cause of action. Admittedly, no appeal is filed to challenge the Assessment Order dated 2-12-2009 even after no cognisance is taken of the request to rectify it. Mr. Tiwari would submit that it is the respondent-Department's fault and when it fails to comply with this Court's order and addresses a communication at page 51 dated 11-10-2017, we must not throw out this petition on technical grounds.

7. We are unable to agree with him. The Department in the Assessment Order expressly refers to this Court's earlier order in the petitioner's Writ Petition No.721 of 1988. Still it makes no order of refund. If this is an erroneous order and the Department failed to rectify it, then, the petitioner's remedy was to challenge it. He does nothing of this kind in the sense he neither avails of the remedies under the I.T. Act, 1961 nor moves any legal forum from September, 2010 to July, 2017. The Department's letter at page 51 is not the only document to be relied on to maintain a second writ petition. That must be read with all the prior communications and the Assessment Order. So read, it is apparent that what the Department says in 1987-88 is maintained even in 2009-10. Hence, there is no fresh cause of action. The order of this Court is not executed nor is the above Assessment Order challenged in Appeal. The appellate remedy is barred by limitation admittedly. This writ petition cannot be treated an Income Tax Appeal nor can it be entertained by allowing the petitioner to get over the period of limitation prescribed, for filing of an appeal, by the I.T. Act. Either way this

writ petition is not maintainable. All the more when we have made reference to the above provision in the Bombay High Court (Original Side) Rules.

8. In the light of the aforesaid discussion, no writ petition could have been brought by relying on the communication from the Revenue. We are unable to agree with the petitioner for the simple reason that this Court is not obliged to entertain belated and stale claims. The writ jurisdiction is not meant to confer benefit or enable litigants who sleep over their rights to derive an advantage for themselves. The writ jurisdiction is equitable and discretionary and if people like the petitioner, who is a businessman and prudent enough to know as to how monies, allegedly retained illegally, have to be recovered promptly and expeditiously. He does nothing despite a favourable order from this Court for more than a decade. Such a litigant does not deserve any relief in our discretionary and equitable jurisdiction. The jurisdiction is extraordinary as well. It is not meant to get over the bar prescribed in the Limitation Act, 1963 for bringing a suit either. This indirect and oblique way of

seeking a discretionary relief has to be discouraged. The writ petition is, therefore, dismissed on the ground of maintainability and delay and laches.

(B.P. COLABAWALLA, J.) (S.C. DHARMADHIKARI, J.)