

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF JULY, 2018

BEFORE

THE HON'BLE MR.JUSTICE B. VEERAPPA

WRIT PETITION NO.25553/2018 (T-IT)

Between:

Sri. Muninaga Reddy
S/o. Muniswamy Reddy
Aged about 68 years
Residing at No.45, 3rd B Main
4th Cross, 3rd Block, Kalyan Nagar
Bengaluru-560043.

...Petitioner

(By Smt. Vani. H, Advocate)

And:

The Assistant Commissioner of Income Tax
Circle 6(1), Room No.732
BMTC Building, 80 Feet Road,
6th Block, Koramanagala
Bengaluru-560095.

...Respondent

(By Sri.K.V.Aravind, Advocate)

This writ petition is filed under Articles 226 and 227 of the Constitution of India to set aside the impugned order dated 21.6.2017 relating to assessment year 2007-08 by the appellate tribunal vide Annex-E and etc.,

This writ petition coming on for *preliminary hearing in 'B' group* this day, the court made the following:

ORDER

The present writ petition is filed for a writ of certiorari to quash the order dated 21.6.2017 made in Misc.Petition No.24/Bang/2017 arising out of ITA No.860/Bang/2012 dated 13.01.2015 relating to the assessment year 2007-08 passed by the Income Tax Appellate Tribunal and for a writ of mandamus directing the respondent-Income Tax Appellate Tribunal to consider the Misc. Petition on merits.

2. It is the case of the petitioner that on 24.12.2009 the respondent concluded the assessment under the provisions of Section 143(3) of Income Tax Act, 1961(for short "Act") assessing the income of the petitioner at Rs.1,14,93,587/- by taking the entire income of the petitioner as the income from business though a part of it was declared as income from other source, thereby the income was assessed at a higher rate. On 28.4.2009, the petitioner was served demand

notice under a printed form I.T.N.S.29 indicating the issue of notice under Section 274 read with Section 271 of the Act and also issued intimation of penalty proceedings under the provisions of Section 271 of the Act. Therefore, the petitioner filed an appeal before the Commissioner of Income Tax(Appeals) raising various contentions. The Income-Tax Authority(Appeals) by an order dated 2.3.2012 dismissed the appeal confirming levy of penalty without appreciating the explanation offered by the petitioner.

3. Therefore, the petitioner was forced to file an appeal in ITA.No.860/12 before the Income Tax Appellate Tribunal, Bengaluru Bench "B". The Tribunal considering the entire material on record by an order dated 13.1.2015 allowed the appeal in part for the year 2007-08 for statistical purposes and dismissed the appeal for the year 2006-07. Therefore, the petitioner was constrained to file Misc.Petition under Section

254(2) of the Act on 30.12.2016. The Income Tax Appellate Tribunal by the impugned order dated 21.6.2017 dismissed the Misc. Petition as barred by limitation. Hence, the present petition is filed.

4. I have heard the learned counsel for the parties.

5. Smt.Vani, learned counsel for the petitioner contended that the impugned order passed by the Appellate Tribunal dismissing the petition on the ground of limitation is illegal, arbitrary and liable to be quashed. She further contended that the Tribunal ought to have applied the law laid down by this Court in the case of **Commissioner of Income Tax and another .vs. Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565** wherein the Division Bench of this Court has specifically held that notice under Section 274 should specifically state the grounds mentioned in Section 271(1)(c) i.e. whether it is for the

concealment of income or furnishing of inaccurate particulars of income. The notice sent in a printed form without mentioning the grounds would not satisfy the requirement of law and as such the Tribunal ought to have decided the miscellaneous petition on merits instead of dismissing only on technicality. Therefore, she sought to allow the writ petition.

6. In support of her contention, she has sought to rely on the dictum of this Court in the case of ***Practice Strategic Communications India Private Limited .vs. C.S.T., Domlur, reported in 2016(45) S.T.R. 47(Kar.)*** wherein this Court while considering the appeal under the provisions of Section 85 of the Finance Act, has condoned the delay and directed the authorities concerned to decide the case on merits.

7. Per contra, Sri.K.V. Aravind, learned counsel for respondent sought to justify the impugned order passed by the Tribunal holding that the Misc.petition is

barred by limitation and contended that in view of the provisions of Section 254(2) of Act, the Tribunal may at any time within six months from the end of month in which the order was passed with a view to rectify 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, after affording reasonable opportunity of hearing to the assessee. Admittedly, in the present case, the mis.petition was filed after 11 months 17 days. Therefore, the Tribunal has no jurisdiction to go beyond six months and as such sought to dismiss the writ petition.

8. Having given my anxious consideration to the arguments advanced by the learned counsel for the parties, it is an undisputed fact that the respondent exercising powers under Section 143 sub-section(3) of the Act by an order dated 24.2.2009 determined the

income of the assessee at Rs.1,14,93,587/-. Thereafter, the said order was subject-matter of appeal before the Commissioner of Income Tax who after considering the arguments of both the parties, by an order dated 2.3.2012 dismissed the appeal on merits. The same was reaffirmed by the Income Tax Appellate Tribunal on 13.1.2015. The petitioner filed Misc.Petition in ITA.No.860/Bang/2012 on 30.12.2016 to review the order passed by the ITAT mainly on the ground that the petitioner was under the impression that the appeal was partly allowed by the Appellate Tribunal; the petitioner did not realize that substantial relief was not granted by the Tribunal and only a consequential order was passed following the order of the respondent herein. The petitioner having realized that he is entitled for substantial relief especially in view of the dictum of the Division Bench of this Court in the case of ***Commissioner of Income Tax and another .vs. Manjunatha Cotton and Ginning Factory reported***

in (2013) 359 ITR 565 of this Court to the effect that the notice under Section 274 should specifically state the grounds mentioned in Section 271(1)(c) i.e. whether it is for the concealment of income or furnishing of inaccurate particulars of income and mere notice sent in a printed form without mentioning the grounds would not satisfy the requirement of law, filed the Misc. Petition under Section 254(2) of the Act before the Tribunal to rectify the mistake by reviewing the order dated 13.1.2015 made in ITA.No.860/Bang/2012.

9. It is also not in dispute that the Tribunal proceeded to dismiss the misc.petition mainly on the ground that the Tribunal cannot condone the delay of more than six months in view of the provisions of Section 254(2) of the Act and proceeded to dismiss the application. It is also not in dispute that during the process, there was a delay of 11 months 17 days. After deducting the time stipulated under Section 254(2) of

the Act about 4 months 10 days would be the delay. The appellant has explained the delay in filing the Misc. Petition. Though under the provisions of Section 254 the Tribunal cannot go beyond the provisions of the said Section, the fact remains that the petitioner has substantiated that injustice is being done by not following the Division Bench decision of this Court. Therefore, in order to do substantial justice, this Court exercising the power under Articles 226 and 227 of the Constitution of India can condone the delay as held by the Division Bench of this Court in the case of ***Practice Strategic Communications India Private Limited .vs. C.S.T., Domlur, reported in 2016(45) S.T.R. 47(Kar.)*** wherein this Court at Paragraph (11) has held as under:-

11. In view of the above referred decision of this Court, if this Court finds that the authority has passed the order without jurisdiction or has exercised the power in excess of the jurisdiction or by over-stepping or crossing the limit of jurisdiction or that there is failure of justice, or it has resulted in gross injustice, it would be a case falling under the exceptional category of exercising the power

under Article 226 of the Constitution and to interfere with the order of the original authority or the appellate authority, as the case may be. In order to find out as to whether the case is fit for exercising of the power under Article 226 of the Constitution, we may record that as per the decision of the Delhi High Court, Rule 5, on the basis of which the original authority has passed the order for levying of tax is held to be ultra vires to Section 67 of the Act. Further, the matter may fall in the realm of correct interpretation of Section 67 as to whether the expenses reimbursed by the consumer to the service provider, can be included for the purpose of computation of the service tax or not. We do not propose to express any further view on the said aspects in view of the order which we may pass herein after, but suffice it to observe that in view of the decision of the Delhi High Court, there was a strong case on merits on the part of the petitioner to be considered by the taxing authority. Unfortunately the decision of the Delhi High Court though was specifically brought to the notice of the original authority in the reply to the show cause notice, in the impugned order of the original authority, there is no reference whatsoever. Under these circumstances, we find that the case may fall in the exceptional category for exercise of the power under Article 226 of the Constitution.

10. In view of the dictum of the Division Bench of this Court stated supra, the petitioner has made out a case that his case falls under exceptional category for exercising power under Articles 226 and 227 of the Constitution of India to interfere with the order passed

by the Tribunal dismissing the Misc. Petition only on the ground of delay.

11. In view of the aforesaid reasons, the writ petition is allowed. The impugned order passed by the Income Tax Appellate Tribunal dismissing the Misc. Petition on the ground of delay is hereby quashed. The delay occurred in filing the Misc. Petition is condoned and the matter is remanded to the Income Tax Appellate Tribunal, Bengaluru, to decide the Misc. Petition. No.24/Bang/2017 on merits strictly in accordance with observations made by the Division Bench of this Court stated supra and in accordance with law.

**SD/-
JUDGE**

*alb/-