IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1004 OF 2014
IN
INCOME TAX APPEAL (LODG) NO.874 OF 2014

Somerset Place Co-operative Housing Society Ltd. ...Applicant.

In the matter between

Somerset Place Co-operative Housing Society Ltd. ...Appellant
V/s.
Income Tax Officer 16(2)(1). ...Respondents.

Ms.A.Vissanji i/b. Mr.S.J.Mehta, for the Applicant.

Mr.Ashok Kotangle with Mr.Arjun Nagarajan, for Respondents.

CORAM: M.S.SANKLECHA, &
G.S. KULKARNI, JJ.

Reserved On : 30th January,2015.

Pronounced on: 13th February,2015

ORDER:- (Per G.S.Kulkarni, J.)

1. The applicant has taken out this Notice of Motion seeking condonation of delay of about five years (1825 days) in filing an appeal under Section 260A of the Income Tax Act,1961 (for short "the Act") against the order dated 31.10.2008 passed by the Income Tax Appellate Tribunal (for short "Tribunal") for the Assessment Year 2003-04.

2. The Tribunal's order was received by the applicant on 26.11.2008. The plea of the applicant before the Tribunal was interalia in regard to the principle of mutuality in regard to transfer fees received by the applicant. The Tribunal following the decision of the Special Bench in the Case of "***Walkeshwar Triveni Co-operative Housing Society Ltd. Vs. ITO, (267 ITR (AT) 86)***" *had* dismissed the appeal preferred by the applicants. The applicant states that as their claim was rejected by three Authorities viz. the Assessing Officer, Commissioner of Income Tax (Appeals) as also the Tribunal and there was no judgment of the jurisdictional High Court favouring the applicant, the Officer bearers of the applicant decided not to carry the matter further.

3. However in the applicant's own case for the Assessment Year 2007-08, the Tribunal, by an order dated 11.1.2013 held in favour of the applicant by following the judgment of this court in the case of "*Sind Co-operative Housing Society Ltd., (317 ITR 47)*" and the decision in the case of "*Mittal Premises Co-operative Society Ltd., (320 ITR 414)*" which was delivered in the meantime. The applicant, therefore, filed a Miscellaneous Application on 3.5.2013 before the Tribunal for the Assessment year 2003-04 praying for setting aside the order dated 31.10.2008 on the ground that the Tribunal should follow the decisions in the case of "*Sind Co-operative Housing Society Ltd.*" (supra) and "*Mittal Premises Co-operative Society Ltd.*" (supra) and rectify its decision dated

31.10.2008. By an order dated 7.2.2014, this Miscellaneous Application came to be rejected by the Tribunal. The applicant, therefore, decided to prefer this appeal under Section 260A of the Income Tax Act,1961 to assail the judgment dated 31.10.2008 passed by the Tribunal for the Assessment year 2003-04. The last date to file the appeal was 24.4.2009 and the same came to be filed by the applicants on 29.4.2014 after a delay of about five years which is sought to be condoned by this Notice of Motion.

4. Learned Counsel for the applicant submits that the applicant has set out sufficient cause to seek condonation of delay in filing the appeal under Section 260A of the Act. It is submitted that after the Tribunal had passed orders dated 31.10.2008, the applicant bonafide believed that as three Authorities had decided against them, the matter need not be pursued further. It is submitted that however in view of the decision of this Court in the case of "***Sind Co-operative Housing Society Ltd.***" (supra) and "***Mittal Co-operative Society Ltd.***" (supra), as applied in the applicant's own case, the Tribunal by its order dated 11.1.2013 had held in favour of the applicant for the Assessment year 2007-08, and therefore, the applicant decided to pursue the proceedings for the Assessment Year 2003-04. The applicant, therefore, filed Miscellaneous Application on 3.5.2013 seeking rectification of the order dated 31.10.2008 which however came to be rejected and thereafter decided to file the appeal in question. It is submitted that the applicant has thus a sufficient cause for condonation of delay

as the law came to be settled in the case of "***Sind Co-operative Housing Society Ltd.***" (supra) and "***Mittal Co-operative Society Ltd.***" (supra), which was not the position when the Tribunal rejected the appeal of the applicant by an order dated 31.10.2008. It is submitted that in view of this subsequent development in law, the applicant become entitled to pursue its appeal against the order dated 31.10.2008 passed by the Tribunal by seeking condonation of delay in filing the appeal. In support of this submission, the learned Counsel for the applicant has relied on the following decisions:-

(I) Commissioner of Income Tax Vs. Sothia Mining and Manufacturing Corporation Ltd., (186 ITR 182);

(II) Karamchand Premchand Pvt. Ltd. Vs. Commissioner of Income Tax, Gujarat, (101 ITR 46);

(III) Prem Chand Bansal and Sons Vs. Income Tax Officer, (237 ITR 65) (Delhi);

(IV) Collector, Land Acquisition Vs. MST.Katiji & Ors., (167 ITR 471) (SC);

(V) N.Balakrishnan Vs. M.Krishnamurthy, ((1998)7 SCC 123).

5. Learned Counsel for the respondent-revenue has made submissions to oppose the notice of motion. Learned Counsel for the respondent submits that the applicant had taken a conscious decision not to pursue the proceedings after the Tribunal had passed the order dated 31.10.2008 dismissing the appeal of the applicants. He submits that only because subsequent decisions were rendered in

the case of "***Sind Co-operative Housing Society Ltd.***" (supra) and "***Mittal Co-operative Society Ltd.***" (supra) followed in appellant's own case by the Tribunal, ipso facto would not entitle the applicant to reopen the issue as concluded by the order dated 31.10.2008 which sought to be appealed by the applicant after a lapse of five years. It is submitted that if the applicant was of the opinion that there was no decision of the Jurisdictional High Court, it was more a reason for the applicant to pursue the matter and the applicant ought not to have accepted the decision of the Tribunal.

6. Having considered the rival submissions, the issue which falls for our consideration is whether the applicant has shown sufficient cause so as to become entitled for condonation of delay of five years in preferring the appeal against the order dated 31.10.2008 passed by the Tribunal. Admittedly at the relevant time the applicant had accepted the orders passed by the Tribunal on the ground that three Authorities have decided against it. The applicant was completely conscious of the fact that there was no decision of the Jurisdictional High Court in regard to the said issue. This was more a reason for the applicant to pursue the proceedings. The applicant, however, accepted the orders passed by the Tribunal and decided not to pursue the proceedings. In the meantime this Court had decided the same in favour of the applicant in the case of "***Sind Co-operative Housing Society Ltd.***" (supra) and "***Mittal Co-operative Society Ltd.***" (supra). The Tribunal applying the law laid down in these decisions decided in

favour of the applicant by an order dated 11.1.2013 passed for the Assessment Year 2007-08. In our opinion the Tribunal deciding in favour of the applicant for the subsequent years, applying the decisions of this Court, would not enure to the benefit of the applicant to reopen the issue concluded by the Orders dated 31.10.2008 passed by the Tribunal and accepted by the applicant. The delay is inordinate.

7. We are of the opinion that the reasons as shown by the applicant cannot fall within the parameters of sufficient cause so as to confer a benefit of condonation to the applicant. This is for the reason that the applicant had taken a well considered decision not to move further proceedings against the order dated 31.10.2008. Applying the test of a prudent litigant it cannot be held that once the applicant by his own volition had decided to accept a judicial order, the applicant can at any time assail the same may be for the reason that subsequently new decisions are rendered on that issue. Section 5 of the Limitation Act cannot be stretched to bring about a situation of unsettling judicial decisions which stood accepted by the parties. If the contention of the applicant is accepted, it would create a situation of chaos and unsettling various orders passed from time to time by the Tribunal as accepted by the parties. The legislative mandate in stipulating a limitation to file an appeal within the prescribed limitation cannot be permitted to be defeated when a litigant has taken a decision not to pursue further proceedings. A new ruling is no ground for reviewing a previous judgment. If

this is permitted, the inevitable consequence is confusion, chaos, uncertainty and inconvenience as then no orders can ever attain finality though accepted by parties.

8. We now refer to the decisions as relied upon on behalf of the applicant. Even while referring to the decisions cited by the applicant, we cannot help reiterating that each application for condonation of delay has to be judged on its own facts and circumstances. At the highest guidelines for condonation of delay could be discerned for each decision of Courts.

9. The decision in the "***Commissioner of Income Tax Vs. Sothia Mining and Manufacturing Corporation Ltd.***" (supra), the same arose out of an order passed by the Tribunal which had condoned the delay in filing the appeal by the respondent. The Tribunal had condoned the delay on the ground that there was a decision of the Supreme Court on the controversy raised and because of the said decision the Assessee had found that it had good reason to prefer an appeal. This decision does not refer to the period of delay except for the fact that the delay was condoned in view of the decision of the Supreme Court which was available when the order was passed by the Assessing Officer. The Tribunal had merely agreed with the discretion exercised by the Appellate Assistant Commissioner in condoning the delay. The High Court did not interfere with the decision of the Tribunal.

10. As regards the decision in the case of "***Karamchand Premchand Pvt. Ltd. Vs. Commissioner of Income Tax, Gujarat***", the challenge before the Court was to an order dated 29.1.1970 passed by the Commissioner of Income Tax who had dismissed the petitioner's Revision Application filed under Section 33A and Section 264(1) of the Act on the ground of limitation. The issue pertaied to the Assessment Year 1961-62, 1962-63, 1963-64, for which period the petitioner had incurred certain expenditure, however no deduction was claimed in respect of the same, relying upon the decision of this Court and other High Courts in respect of deductibility of such expenses. The Income Tax Officer had also not allowed this deduction during the course of respective assessment. The assessments were finalised subsequently in the year 1966. The Supreme Court had reversed the view taken by this Court and other High Courts in India and same was reported in the case "***India Cements Ltd. Vs. Commissioner of Income Tax***" and held that such expenditure must be treated as revenue expenditure and therefore, deduction thereof should be given from the gross income earned by the concerned assessee. The petitioner having received the knowledge of the decision of the Supreme Court, moved the Commissioner of Income Tax by a revision application on 26.4.1966. The Commissioner issued a notice to the petitioner recording as to why the application be not treated as time barred. The petitioner responded to the show cause notice stating that the view taken by the Bombay and other High Courts as regards the allowance of

expenditure was upset by the Supreme Court in the case of "***India Cements Ltd***." and has finally laid down principles of law in that regard. It was stated that in these circumstances the petitioner had moved the application for condonation of delay. The Commissioner, however, refused to accept the said reasons and condone the delay. It is in these circumstances the Division Bench of Gujarat High Court held that it was the decision of the Supreme Court which really gave a cause of action to the petitioner – assessee to move the Commissioner in revision and hence, the Commissioner was in error in holding that the change of legal position brought about by "***India Cements Ltd***." was hardly a valid ground for condoning the delay. It was observed that the decision of the Supreme Court amounted to declaration of law as contemplated under Article 141 of the Constitution of India and that same had retrospective effect. It was held that it was only after the decision of the Supreme Court the petitioner had reason to move the Commissioner in revision with a view to obtain refund. This was accepted to be a sufficient cause.

The situation in the present case is, however, quite different. The applicant had a complete opportunity to pursue the legal issue as there was no decision of the Jurisdictional High Court. What we find is that there were certain decisions of the other High Courts on the issue which have been noted in the decision of this Court in the case of "***Sind Co-operative Housing Society Ltd***" *(supra)* on the basis of which the applicants could have very well pursued the proceedings against the orders dated 31.10.2008 passed by the Tribunal. Despite

this position the applicant wished not to to assert their rights and pursue the proceedings by assailing the order passed by the Tribunal.

11. The decision in the case of "***Prem Chand Bansal and Sons Vs. Income Tax Officer***" (supra) the Division Bench of Delhi High Court, as relied on behalf of applicant, was concerned a similar issue as fell for consideration in the decision of Gujarat High Court in the case "***Karamchand Premchand Pvt. Ltd.***"*(supra).* The petitioner therein had asserted that the decision of the Jurisdictional High Court in the case of "***Escorts Ltd. vs. Union of India, [(1991) 189 ITR 81] (Delhi)***" was upset in the decision of the Supreme Court in the case of "***Allied Motors (P.) Ltd. Vs. CIT , (1991) 224 ITR 677***". The petitioner, therefore, approached the High Court by a petition under Section 256(2) of the Act which was filed with a delay of about 25 days. The case of the petitioner interalia was that there was a change in law as brought about by the decision of the Supreme Court. The Delhi High Court while holding that in considering a delay condonation application facts and circumstances of the each case are required to be considered, held that the facts of the case warranted condonation of delay of 25 days. The High Court has made the following observations:-

> "..... We are of the opinion that decision shall have to be taken in the facts of each individual case whether such circumstance constitutes a sufficient cause for condoning the delay within the meaning of Section 5 of the Limitation

Act.

In the case at hand the decision was given by the Tribunal rejecting the petitioner's application under Section 256(1) of the Income-tax Act on 30.5.95 forming an opinion that the issue being governed by an available decision of jurisdiction High Court, no referable question of law arose from its appellate order. So long as the decision of Delhi High Court in Escorts Ltd.' s case (supra) held the field, it would have served no useful purpose in pursuing the matter further. Rather it would have amounted to an attempt at striking the head against the wall. Shortly thereafter the law was settled by an authentic pronouncement of the Supreme Court. Promptly the matter was entrusted to the Counsel for moving the High Court by an appropriate application under Section 256(2) of the Income-tax Act. A delay of about 25 days was occasioned for factors attributable to personal inability of the Counsel for which the litigant cannot be blamed. Factors like gross negligence, contumacy or misconduct cannot be attributed either to the litigant or to the Counsel."

(emphasis supplied)

This decision, in our opinion, is of no assistance to the applicant inasmuch as it is not the case that the applicant was advised by the Counsel not to pursue the proceedings in view of any conflicting position in law.

12. A reliance on behalf of the applicant on the decision of the Supreme Court in the case of "***Collector, Land Acquisition Vs. MST.Katiji &***

Ors." (supra) and the decision in the case of "***N.Balakrishnan Vs. M.Krishnamurthy***" (supra) is also inappropriate in the facts of the present case. These decisions lay down the principles of law the Courts would follow to consider what would be a sufficient cause under Section 5 of the Limitation Act, permitting condonation of delay. There can be no dispute on the proposition as laid down in these decisions. These decision would not assist the applicant in view of the voluntary decision of the applicant not to assail the order of the Tribunal at the relevant time and accepting the decision of the Tribunal for the Assessment Year 2003-04. We are of the considered opinion that only because the applicant has succeeded on the same issue for the Assessment Year 2008-09, the same can not be said to be a sufficient cause so as to condone the delay of five years for the applicant to approach this Court in filing the appeal.

13. In the light of the above observations, we have no hesitation to observe that the applicant has not shown sufficient cause in seeking condonation of delay.

14. The Notice of Motion, therefore, deserves to be dismissed. It is accordingly, dismissed. No order as to costs.

(G.S.KULKARNI,J.) **(M.S.SANKLECHA,J.)**