

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

WRIT PETITION NO. 1227 OF 2016

M/s. Shirpur Gold Refinery Ltd.

.. Petitioner

v/s.

The Income Tax Appellate Tribunal
Mumbai, Bench 'E' Mumbai & Ors.

.. Respondents

Dr. K. Shivram, Senior Counsel a/w Mr. Rahul Hakani for the petitioner
Mr. N.C. Mohanty for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 27th JULY, 2016.

PC.

1. This petition under Article 226 of the Constitution of India seeks to challenge the order dated 4th December, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order, dismissed the petitioner's application under Section 254(2) of the Income Tax Act, 1961 (the Act) to rectify / recall the order dated 4th March, 2015 passed by the Tribunal under Section 254(1) of the Act relating to the Assessment Year 2006-07.

2. The impugned order held that the order dated 4th March, 2015 does not call for any rectification as there is no error apparent from the

record. It also holds that the issue in dispute had been decided on merits after analyzing the facts and arguments of the petitioner by its order dated 4th March, 2015. Thus, the prayer for recall of the order dated 4th March, 2015 and restoring it to the Commissioner of Income Tax (Appeal) for fresh determination was in the present facts not called for.

3. The grievance of the petitioner is that the impugned order dated 4th December, 2015 incorrectly proceeds on the basis that the order dated 4th March, 2015 passed under Section 254(1) of the Act also dealt with the merits of the dispute after hearing the petitioner. It is the petitioner's case that the merits of the dispute were not even argued by it before the Tribunal leading to the order dated 4th March, 2015. In support, the petitioner has filed a copy of an affidavit dated 23rd April, 2016 of Mr. B.S. Sharma, Chartered Accountant, who represented the petitioner at the hearing of the regular Appeal under Section 254(1) of the Act as well as at the Miscellaneous Application under Section 254(2) of the Act. The affidavit contends that no submissions on merits at the hearing which led to the order dated 4th March, 2015 were made on behalf of the petitioner. This affidavit was in support of its contention that the impugned order is not sustainable in law.

4. We find that the impugned order of the Tribunal was passed on 4th December, 2015, received by the petitioner on 28th December, 2015. This petition has been filed on 29th April, 2016. The petition states that according to the petitioner, there is no delay in filing the petition. However, if this Court is of the view that there is a delay and delay may be condoned. However, no reasons with particulars are specified in the petition. In view of the fact that the petition itself does not explain the reason for the delay, the petition is liable to be dismissed.

5. On 19th July, 2016 the petitioner has filed an affidavit-in-rejoinder. In it for the first time the petitioner has attempted to explain the delay by stating as under :-

“3. I say that the petitioner Company does not have a Managing Director or a whole time Director. It only has a manager Mr. Subhash Pareek, who is stationed at the factory at Refinery site, Shirpur, Dist. Dhule, Maharashtra – 425 405. There are only 5 persons in the administrative department operating from the Corporate Office namely myself being Sr. Accounts Manager, Mr. Naresh Betkar, Sr. Accounts Executive, Mr. Navnit Darji, Jr. Accounts Executive, Mr. Shyam Jha, Jr. Accounts Executive and Mr. Rajendra Bhati, Jr. Accounts Executive. Mrs. Archita Kothari is the CFO of the Petitioner

Company. I say that neither the CFO nor the 5 admins have ever dealt with income tax writ petitions in the past”.

6. During the hearing on 20th July, 2016 the above aspect was explained to support the submission made across the bar that it is a loss making company leading to scarce resources in terms of the staff available. Thus the delay. This contention made across the bar does not find place either in the petition or in the affidavit. We directed the petitioner to produce its latest Annual Report. Today, Dr. Shivram, the learned Counsel for the petitioner produced the 30th Annual Report for the year 2014-15. A perusal of the same reveals a completely different picture. It is true that the petitioner does not appear to have a designated Managing Director or whole time Director but it has a Manager, appointed under Section 269 of the Companies Act, 1956. Therefore, such a Manager is equivalent to an whole time or Managing Director whose appointment has been approved by the Central Government. The affidavit does not disclose this fact, thus suggesting otherwise. We further notice from the Annual Report produced that the petitioner for the year ending 31st March, 2015 has a turnover of Rs.32,222 Millions with a profit before tax of Rs.216 Millions and after tax of Rs.154 Millions. It has operations internationally with 100% subsidiaries in Dubai and Singapore. The Annual Report also

reveals that Dun and Bradstreet (D & B) had ranked the petitioner Company as one amongst India's Top 500 Companies in the year 2015. It is 358 in terms of total income, 467 in terms of net profit and 471 in terms of Return on net wealth. The affidavit in rejoinder filed by the petitioner and the submission made on the last occasion sought to convey that the operations of the company are of a small nature and there is only one Manager who is stationed at Dhule and other 5 persons in administrative Department of the Company. Therefore, the delay. The statements made in the affidavit seeks to present a picture completely different from the facts as are evident from the Annual Report of the Company for the year ending 2014-2015 produced by the petitioner at our instance. An affidavit is a sworn statement and it must reflect the true and complete facts. It must not be an exercise in *suppressio veri suggestio falsi*. Further, when a party seeks to exercise this Court's jurisdiction the least that is expected of the petitioner is full and true disclosure. The conduct on the part of the petitioner disentitles the petitioner from any relief under Article 226 of the Constitution of India.

7. Moreover, in any case, the petitioner has not been able to explain

the reason for the delay in filing this petition.

8. Before parting, we would like to make an observation that leading fresh evidence by filing a copy of an affidavit dated 28th April, 2016 after the impugned order and annexing it to petition is not appropriate. Particularly when the same was not filed before the Tribunal. This is most unfair to the Members of the Tribunal. At the time the rectification application was being heard, the necessary evidence including the affidavit could have been filed before the Members of the Tribunal. In the view we have taken, it is not necessary to go into the merits of the affidavit filed by the Chartered Accountant as a part of this petition.

9. Accordingly, the Writ Petition is dismissed.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)