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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6287 OF 2015
WITH
WRIT PETITION NO. 8955 OF 2015

M/s. EBR Enterprises and Anr. … Petitioners

vs.

Union of India through the Secretary and Ors. … Respondents

……….

Mr. Naresh Jain a/w. Mr. Rakesh K. Agrawal and Ms. Neha Anchlia i/b. M/s. Agrud Partners for the Petitioners in both the Petitions.

Mr. Arvind Pinto for the Respondent Nos. 1 to 3 in both the Petitions. .

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CORAM : A.S. OKA & A.K. MENON, JJ.

DATE : 6th NOVEMBER, 2017

ORAL JUDGMENT (Per A. S. Oka, J.)

1. In Writ Petition No. 6287 of 2015 there is an order dated 10th September, 2015 directing the disposal of this petition at the admission stage. Both the Petitions are taken up for final hearing.

2. The challenge in these two petitions under Article 226 read with Article 227 of the Constitution of India is to the two similar orders dated 12th November, 2014 passed by the Commissioner of Income Tax on the applications made by the petitioner assessee under Section 264 of the Income Tax Act, 1961 (for short “the said Act”).

3. Writ Petition No. 6287 of 2015 relates to the Assessment year 2007-08 and Writ Petition No. 8955 of 2015 relates to the Assessment year 2008-09.

4. The finding recorded in the impugned orders by the Commissioner is that delay in filing the applications under Section 264 of the Income Tax Act cannot be condoned and therefore, he proceeded to dismiss the Revision Applications. As the impugned orders are more or less identical, for the sake of convenience, we are referring to the impugned order made in Writ Petition No. 6287 of 2015.

5. The learned Counsel appearing for the petitioners has taken us through the impugned order. His submission is that the Commissioner has completely misdirected himself, as the Commissioner has not noted that the power to condone delay is vested in him under the provision of Sub-Section 3 of Section 264 of the said Act. He submitted that the reasons for delay were set out in the application for Revision filed by the petitioners. He submitted that the Commissioner could not have gone into the question,whether on merits, any relief could be granted to the petitioners if the Revision Application was to be entertained.

6. The learned Counsel appearing for the respondent-revenue pointed out that there is a finding of fact that every day's delay has not been explained by the petitioners. Secondly, his submission is that in view of Section 80A(5), the deduction under Section 80-IB(10) could not have been granted, as no

such claim was made in the returns filed for the relevant assessment year. He would, therefore, submit that no interference is called for.

7. We have considered the submissions. Section 264 confers revisional jurisdiction on the Principal Commissioner or the Commissioner. Sub Section (3) of Section 264 reads thus :

> *"In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier: Provided that the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period."*

8. Thus proviso to sub-section (3) of Section 264 clearly confers a power on the Revisional Authority to condone the delay, provided sufficient cause is made out.

9. The Revision Application was filed by the petitioner on 20th March, 2014 for challenging the order of Assessment dated 21st December,2009. In the Revision Application, a reference is made to Section 80-IB(10) as amended with effect from 18th April, 2005. After referring to the said provisions, it is stated thus :

"However, the new sub-section(d) which was inserted w.e.f. 01.04.2005 gave an impression to the applicant it may also apply for the ongoing projects during F.Y. 04-05 (A.Y. 05-06) even though the projects have been approved before 01.04.2005. In fact, Department in many cases took this stand. Hence, the applicant did not claim any deduction u/s 80-IB (1) for the A.Y. 2007-08.

However, later on, various High Courts and ITAT had taken a view that the amendment is not applicable to projects approved prior to 1.4.2005. Based on those decisions, the applicant claimed deduction u/s 80IB (10) for the first time in A.Y. 2009-10 by filing revised return on 31.03.2011. The claim was rejected by the Ld. Assessing Officer vide his order dated 19.12.2011 but subsequently, the claim was allowed by CIT (A) vide order dated 20th February, 2014 enclosed as Annexure 3. It is only after the favourable order by CIT(A) that the applicant revived the claim for deduction u/s. 80-IB (1) for the year under reference."

10. The claim made by the petitioner for the Assessment Year 2009-10 was allowed by the order dated 20th February, 2014 by CIT (Appeals). Immediately within a period of one month, an application seeking exercise of Revisional Jurisdiction was filed by the petitioner on 20th March, 2014. Thus, there was a valid explanation for the delay, though it appears to be long.

11. Coming back to the impugned Order, the Commissioner has observed there are binding decisions which require each and every day's delay to be explained. The Commissioner has made a reference to a decision of the Apex

Court in the case of ***Collector, Land Acquisition vs. Mst. Katiji & Others***[1]. However, the Commissioner has ignored the ratio of the said decision. In paragraph 4 of the said decision, the Apex Court has held thus :

> *"4. And such a liberal approach is adopted on principle as it is realized that :*
>
> *1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *3. <u>"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense and pragmatic manner.</u>*
>
> *4. <u>When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.</u>*
>
> *5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or*

1 **(SC) 167 Itr 471**

> *on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk."* *(underlines supplied)*

12. In view of the law laid down by the Apex Court, it was not necessary for the petitioner to have explained each and every day's delay. On the contrary, the Apex Court held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice is to be preferred. The Apex Court also held there is no presumption that delay is intentional and deliberate, as normally a litigant does not stand to benefit by resorting to delay. As stated earlier, in the application dated 20th March, 2014 seeking invocation of the power under Section 264, the delay has been adequately explained.

13. Perusal of the impugned order shows that the Commissioner has misdirected himself by going into the question whether the petitioners could have made the claim. The question of going into maintainability of the claim made by the petitioners could have been gone into on merits, only if the delay was condoned. As stated earlier, the learned Commissioner has referred to the decision of *Collector Land Acquisition (supra)*. *B*ut we find that the ratio of the said decision has been completely ignored.

14. Therefore, the delay ought to have been condoned by the Commissioner by invoking the power under the proviso to Sub-Section 3 of Section 264 of

the Income Tax Act. As far as the merits are concerned, both the learned Counsel for the petitioners and respondent tried to contend that there is an adjudication made on merits. For that purpose we must closely scrutinise the impugned judgment. In paragraph 17 of the judgment, it is observed that :

> *"The issue before us is as to whether the assessee could claim deduction u/s. 80IB(10) though it had not made any claim in the return of income for the relevant assessment year and the impact of sec.80A(5) on such a claim.*

15. On a plain reading of the judgment of the Commissioner, it appears that the said issue though noted by the Commissioner has not been decided. As stated earlier, on a plain reading of the application made by the petitioners, there was sufficient explanation for the delay. The application for revision was filed within one month from the date on which the petitioners were granted relief for the subsequent years.

16. Provisio to Sub-Section (3) of Section 264 confers a statutory power on the Commissioner to condone the delay. Therefore it was not necessary for the Commissioner to have taken recourse to Section 5 of the Limitation Act, 1963.

17. As the Statute conferring a power of revision itself confers the power of condonation of delay, it is not necessary to go into the question whether Section 5 of the Limitation Act will apply or not.

18. Hence, we pass the following order : -

(i) The Writ Petitions are partly allowed by setting aside the impugned orders and by condoning the delay in the filing Revision Applications;

(ii) In view of the setting aside of the impugned order at Exhibit A, the Revision applications preferred by the petitioners for the Assessment years 2007-08 and 2008-09 under Section 264(1) of the Income Tax Act are restored to the file of the Commissioner of Income Tax for fresh adjudication;

(iii) We direct the Commissioner of Income Tax to decide both Revision Applications on merits as expeditiously as possible and preferably within a period of three months from the date on which an authenticated copy of this Order is produced in his office;

(iv) All contentions on merits of the Revision Applications are kept open to be decided at the appropriate stage;

(v) Writ Petitions are partly allowed on above terms.

(vi) All contentions of the parties on merits of the Revision Applications are kept open to be decided by the Revisional Authority.

(A.K. MENON, J) **(A.S. OKA, J)**