IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISIDCTION

WRIT PETITION NO. 8022 OF 2012

Babulal Mohanraj Jain,
6/11, Suparshwanath Society,
Market Yard, Pune- 411 037.
PAN No. AAJPJ5640G. … Petitioner.

V/s.

1. Central Board of Direct Taxes, Delhi having its office at Ministry of Finance, CS Building North Block, Parliament Street, New Delhi- 110 001.

2. The Deputy Commissioner of Income Tax, Circle 2, Pune, 1st Floor, B, Wing, PMT Building, Shankarsheth Road, Swargate, Pune- 411 037.

3. Union of India through the Secretary, Ministry of Finance, North Block, New Delhi- 110 001. … Respondents.

Mr.Mihir Naniwadekar with Mr.Rohan Deshpande for the petitioner

Mr.Sham V. Walve for the respondents.

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

DATE : 8th December 2017.

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

By this petition under Article 226 of the Constitution of India, the petitioner has taken an exception to the order dated 18th April 2012 passed by the Under Secretary (ITA-1) on application made by the petitioner under sub-section (2) of section 119 of the Income Tax Act, 1961 (for short "the said Act"). This petition pertains to the assessment year 2007-08. The petitioner filed return of income electronically on 26th February 2008 on which an order of assessment under sub-section (3) of section 143 of the said Act was passed on 31st December 2009. The petitioner made an application to the first respondent seeking relief under sub-section (2) of section 119 of the said Act of condonation of delay in filing return of income which could not be filed within the time prescribed under sub-section (1) of Section 139 of the said Act. In the said application, in paragraphs- 2 and 3, the petitioner has stated thus:

> "2. Facts of the Tragedy are as under:
>
> My elder brother Kevalchand Jain (Sonigara) had gone to Palithana in Gujarat on pilgrimage, with his family relatives. When they were returning to Ahmedabad from Palithana on way back home by road, the tourist vehicle (Toyota Qualis) in which they were travelling was swept away as the driver of the tourist vehicle made a blunder of

driving through the flooded bridge without railings on river Rangholi near village Ghanghli District Bhavnagar. The car swept away in the river by the force of the flooded river and only driver and one person out of the 7 passengers in the car could saved by rescue team as they were handing to trees on an island in the river Rangholi. The unfortunate accident happened at about 9.30 am on 25/09/2007. On hearing about about the unfortunate accident I rushed to the accident spot the same evening. The force of the flood water was such that the tourist vehicle could be lifted out of the river only after three days and the first body was found on that day, remaining bodies of our beloved relatives were recovered on fourth day of the tragedy by rescue and search team of above 350 people and search by helicopter two times in three days but my brother was not found. All except my brother Kevalchand Jain were found dead but my brother was not found. There was no trace of my brother or of any of his belongings on him at the time of accident. Thus we were hoping to find him alive and great amount of efforts were being made with the help of Govt machinery and local people to find him or his belongings. I went to the site of the accident from time to time with the hope that I would be able to find him. We made calls to the people in the near by talukas by putting banners on the highway, dhabas and transport offices and put an advertisement in Gujarat News Paper. The police department also put notices in all Gujarat Police Stations asking general public to come forward and notify if Kevalchand is seen and found by anybody. Whenever, any information was received we tried to contact the concerned person but all these efforts proved unsuccessful. Ultimately we received death certificate of my beloved brother Kevalchand in first week of Nov 2007. We continued our efforts to find his belongs/ his remains till river dried in Jan/ Feb 08.

Due to this unfortunate accident our entire family were in state of shock and till date we have not been able to find him, his belongs or his remains.

This was a calamity on our family, as the responsible person in the family I had to devote my maximum time and energy in search of my elder brother Kevalchand and bring back life of my nephew and my sister in law to normalcy.

3. As I was engrossed in persist of this sad affair, I could not give attention to other matters. The completing and handing over of books of accounts for purpose of tax audit was delayed and reprimanded or back burner and remained to be done and the audit u/s 44AB could be done and certificate could be obtained only on 20/02/2008. As a result the return of income for A.Y. 2007-08 could be filed only on 10/03/2008 resulting in filing return late beyond the time prescribed u/s 139(1).

Copies relevant information is enclosed, like Police Panchanama, Talethis Certificate, copy of advertisement in a paper in Gujarat and copy of death certificate."

(Underlines supplied)

2. The petitioner invoked powers both under clauses (b) and (c) of sub-section (2) of section 119 of the said Act. The said application was made by the petitioner on 4th January 2010. By the impugned order, the said application has been rejected. The application has been rejected on the ground that though show-cause-notice based on the said application was issued to the petitioner and personal hearing was granted, no satisfactory answer could be given by the petitioner. The second ground on which the application is rejected is that clause (c) of sub-section (2) of Section 119 cannot be applied as the said section does not permit relaxation on any requirement of a any section, particularly section

80AC of the said Act. The third reason given is that though the claim of the petitioner was that he was busy in searching his brother and, therefore, return of income could not be filed within the stipulated time, during the relevant period, the total income of business of the petitioner grew from Rs.1,35,73,197/- to Rs.1,46,46,720/-. It was observed that this figure shows that the business activities of the petitioner were continued and were not adversely affected due to unfortunate event taken place in the financial year 2007-08. Further it was observed that the petitioner's deceased brother had no involvement in his business. It was also observed that to complete tax audit, the personal presence of the petitioner was not required.

3. The learned counsel appearing for the petitioner has taken us through section 119 of the said Act. He also invited our attention to section 80AC of the said Act. He submitted that there is a power vested in the Board to extend time to file return as provided in sub-section (1) of section 139 of the said Act. He submitted that once the time to file return is extended, section 80AC can be invoked and applied as the return will be treated as filed within the time provided by law. In the alternative, he submitted that clause (c) of sub-section (2) of section 119 will certainly apply to the facts of the case. He submitted that requirement of section 80AC is to file a return under sub-section (1) of section 139 within the dates stipulated therein. He submitted that there is a power vested in the Board to relax any such requirement subject to conditions specified in sub-clauses (i) and (ii) of clause (c) of sub-section (2) of section 119 of the said Act provided that the Central Government shall cause every order

issued under this clause to be laid before each House of Parliament. He submitted that both the conditions in sub-clauses (i) and (ii) were satisfied in the facts of the case. He submitted that the return was filed immediately after audit under section 44AB was carried out and, thus, the return was filed as expeditiously as possible.

4. The learned counsel appearing for the respondents opposed the petition. He submitted that by exercise of power under clause (c) sub-section (2) of section 119, the obligation under section 80AC cannot be dispensed with. Secondly, he urged that clause (c) does not permit the Board to relax the conditions incorporated in the statute. He submitted that in the facts of the case, nothing prevented the petitioner from filing return within the stipulated time and, therefore, it cannot be said that the default to comply with such requirement was due to circumstances beyond the control of the petitioner- assessee.

5. We have given careful consideration to the submissions. Sub-section (2) of section 119 of the said Act reads thus:

> **"Section 119 - Instructions to subordinate authorities.**
> (1) ….. ….. ….. ….. ….. ….. ….. …..
>
> (2) Without prejudice to the generality of the foregoing power, –
>
> (a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections [115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK;] 139,

143, 144, 147, 148, 154, 155 [158BFA], sub-section (1A) of section 201, sections 210, 211, 234A, 234B, 234C, [234E], [270A], 271 [271C, 271CA] and 273 or otherwise), general or special orders in respect of any class of incomes or fringe benefits or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information ;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income-tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law ;

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VIA, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely :

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee ; and

> (ii) the assessee had complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed :
>
> **Provided** that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament."

6. In this case, the petitioner claimed deduction under section 80IB which is subject to the provisions of section 80AC. Section 80AC of the said Act reads thus:

> **"Section 80AC - Deduction not to be allowed unless return furnished.**
>
> Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE, no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139."

On plain reading of section 80AC, the condition precedent for admissibility of deduction under section 80IB is of furnishing a return for the relevant assessment year on or before the due date specified under sub-section (1) of section 139. Thus, filing of return within the date specified under sub-section (1) of section 139 is a condition precedent for claiming a deduction under section 80IB of the said Act. Unless the condition precedent is fulfilled, the petitioner cannot claim deduction. The power under clause (b) is of granting extension of time to file return.

Even if the said power is exercised, the condition precedent for claiming deduction under section 80IB is not satisfied. The clause (b) does not permit relaxation of the time provided under sub-section (1) of Section 139 of the said Act. The emphasis is on filing the return before a date fixed by Statute. Therefore, clause (b) of sub-section (2) of section 119 will not help the petitioner.

7. Careful perusal of clause (c) shows that a power is vested in the Board to relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder. The power can be exercised by the Board, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be recorded therein. Thus, there is a specific power vested in the Board which can be exercised in a particular case or class of cases by relaxing the requirements specified in the provisions for claiming deduction contained in Chapter IV or Chapter VI-A of the said Act. In the present case, for claiming deduction under section 80IB, the requirement is of furnishing the return of income on or before the date specified in sub-section (1) of section 139. There is a specific power conferred on the Board by clause (c) to relax the requirements in Section 80AC. The power can be exercised for avoiding genuine hardship subject to conditions being satisfied. The first condition is that default in complying with such requirement must be shown to have been due to the circumstances beyond the control of the assessee and, secondly, the assessee must have complied with such requirement

before the completion of assessment in relation to the previous year in which such deduction is claimed. As far as the second condition is concerned, the date of assessment order is 31st December 2009. It records that the return was filed by the petitioner electronically on 26th February 2008. Hence, the said condition is complied with.

8. Once we find that there was a power vested in the Board to relax the requirements for claiming deduction under section 80AC the question is whether the petitioner has established that the default in complying with the requirement was due to the circumstances beyond the control of the petitioner.

9. We have carefully perused the application made by the petitioner. We have already quoted the paragraphs- 2 and 3 of the said application. It is noted that the car by which the petitioner's elder brother was travelling was swept away in a river due to flood. The incident happened on 25th September 2007. The last date for filing the return was 31st October 2007. He has stated that though the driver and one more person could be rescued, no other person could be rescued. The petitioner had to rush the spot where search operation was in progress. His brother was not found at all. Even his belongings could not be traced. The case of the petitioner is that he was repeatedly visiting the site of the accident from time to time with a hope of tracing his brother. Various other methods were adopted like putting banners on the highway, dhabas and transport offices as well as publishing advertisement in the local newspapers. All efforts were made and, ultimately, in the first week of

November 2007, the competent authority issued a death certificate showing that the petitioner's brother was dead. However, his case is that he still continued his efforts to find out belongings or remains of his brother till January/February 2008 when the river dried. However, nothing could be recovered. In the impugned order, these factual aspects have not been disbelieved or discarded. However, what is set out in paragraph- 3 of the application is not considered while passing the impugned order. It is stated that as the petitioner was busy till January/February 2008, the audit under section 44AB was delayed and, ultimately, it could be completed only on 20th February 2008. Within few days after completion of the audit, the return was filed by the petitioner. In the impugned the order, the Board has observed that the presence of the petitioner for audit was not required. This observation is factually incorrect. The presence of the petitioner was necessary for answering various queries which the auditor may have. Moreover, the state of mind of the petitioner due to the tragic event has not been appreciated by the Board. Moreover, the fact that the business income of the petitioner grew during the relevant year is no ground at all to deny relief to the petitioner. What was required to be considered was whether the default in complying with the requirement was due to the circumstances beyond the control of the assessee. Even taking the findings recorded in the impugned order as correct, it is impossible to disbelieve the case of the petitioner that the default was due to the circumstances beyond his control. Thus, both the conditions (i) and (ii) of clause (c) of sub-section (2) of section 119 of the said Act were fulfilled in the facts of the case.

10. However, considering the findings recorded, the Board has not considered the question whether it is desirable or expedient to relax the requirement for avoiding genuine hardship. For this limited purpose, the application will have to be remanded to the Board (first respondent) for reconsideration.

11. Accordingly, we pass the following order:

O R D E R

(i) The impugned order dated 18th April 2012 (Exh.C to the petition) is hereby set aside;

(ii) The application made by the petitioner seeking relief only under clause (c) of sub-section (2) of section 119 of the Act shall be reconsidered in the light of findings recorded in this judgment and order;

(iii) An appropriate order shall be passed by the first respondent within a period of three months from the date on which an authenticated copy of this judgment and order is produced by the petitioner in the office of the first respondent;

(iv) Rule is made partly absolute in the above terms with no order as to costs.

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