

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Writ Petition No.3714 of 2013
With
Writ Petition No.4499 of 2013**

* Shayona Pulp Conversion Mills P. Ltd.
having its registered office at
D-8, M.I.D.C. Waluj, Aurangabad
Through its Managing Director,
Raman Bhagwandas Patel,
Age 59 years,
Occupation : Business,
R/o Nirala Bazar, Aurangabad. .. **Petitioner.**

Versus

- 1) Commissioner of Income Tax,
Aurangabad having office at
Aaykar Bhavan,
Near Holy Cross English School,
Cantonment, Aurangabad.
- 2) Income-Tax Officer Ward 1(1),
Having its office at
"Jeewan Suman" LIC Building,
2nd Floor, Cannought Place,
N-5 CIDCO, Aurangabad.
- 3) Union of India
Through the Secretary
Department of Revenue,
Ministry of Finance,
North Block New Delhi. .. **Respondents.**

Shri. A.P. Bhandari, Advocate, for petitioner.
Shri. Alok Sharma Standing Counsel, for respondents.
Shri. M.M. Nerlikar, Assistant Government Pleader, for
State of Maharashtra.

**Coram: T.V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

Order reserved on : 23 January 2018

Order pronounced on: 01 February 2018

ORDER (Per T.V. Nalawade, J.)

1) The first petition is filed to challenge the order of the Commissioner of Income Tax made in the proceeding filed by the present petitioner under section 119(2)(b) of the Income Tax Act, 1961 and that was in respect of the refund of income tax for the assessment year 2004-2005. The second petition is filed by the same petitioner in respect of assessment year 2005-2006. Both the sides are heard.

2) The petitioner is a Private Limited Company and it had prayed for refund of excess income tax paid by it for the aforesaid assessment years. As there was the delay caused in filing the claims, the claims were filed along with applications for condonation of delay. The Commissioner of Income Tax has considered various Circulars of the Board and also the instructions. The Commissioner has held that the conditions given in the

Circulars and the instructions are not fulfilled and further it is not a fit case for condonation of delay under section 119(2)(b) of the Income Tax Act. Thus, *prima facie* merits of the claim are also touched by the Commissioner. It cannot be disputed that for consideration of application for condonation of delay both, sufficient cause and existence of some arguable case need to be made out.

3) It is the case of the petitioner-company that the liability to pay income tax for the year 2004-2005 was nil and there was business loss which was to be carried forward of Rs.1,11,81,188/-. The return of income tax was filed on 9-9-2005 and then for the assessment year 2005-2006 the return was filed on 29-10-2005 and carried forward loss was assessed at Rs.1,12,116/-. For both the assessment years the assessee, petitioner-company had paid MAT under section 115JB of the Income Tax Act through self assessment, like tax of Rs.2,72,300/- for assessment year 2004-05 and Rs.48,720/- for assessment year 2005-06 and in those returns no refund was claimed. It is the contention of the petitioner-company that due to financial problems faced by it, it had applied to State Bank

of India for one time settlement in respect of the outstanding loan taken for the business and the bank had considered positively the request made and relief to the extent of Rs.4,93,87,291/- was given and out of that there was the remission of Rs.1,35,78,000/- towards the principal amount of term loan. It is the contention that in profit and loss account the waiver of principal was duly credited but inadvertently it remained to be excluded from the computation of MAT. It is contended that if this amount was excluded, it could have shown business loss of Rs.73,34,378/- for the assessment year 2004-05. The petitioner-company had actually shown the book profit of Rs.64,53,855/- for the assessment year 2005-06. It is contended that as the petitioner was entitled to carry forward the losses, for the assessment year 2005-06 the book profit under section 115JB would have been nil.

4) It is the case of the petitioner-company that as it was sick industry, it could not submit its application within time prescribed for rectification or filing of revised returns and the mistake was detected late and so the delay was caused. Thus, the petitioner-company had

prayed for refund of income tax of Rs.2,72,300/- and Rs.48,720/-.

5) In the order of the Commissioner it is mentioned that under the Board's Circulars and instructions the refund cannot be given as petitioner had paid MAT by self assessment and it was not a case of TDS/TCS and also the payment of advance tax. For claim of interest it is mentioned that such claim is not permissible under section 119(2)(b) of the IT Act. It is also observed that the returns of income tax for the assessment years 2004-2005 and 2005-2006 were not the first time returns and the original returns were filed on 9-9-2005 and 29-10-2005 respectively and admittedly in those returns refund was not claimed. With the previous returns there was certificate of C.A. and with the new returns certificate of another C.A. was produced by the petitioner-company.

6) In section 237 of the Income Tax Act provision is made for refund of income tax paid in excess. In section 239 of the Act the limitation period is given which is one

year from the last date of the assessment year and revised returns were also required to be filed within one year. When such period of limitation is prescribed under the Act, the application was filed on 12-5-2009, many years after the expiry of the period prescribed for filing the claim.

7) The learned counsel for the petitioner took this Court through the provision of Section 119(2)(b) of the Income Tax Act and submitted that when the Board has the power of issuing general or special order to authorise to admit application or claim for such relief, after the period specified by or under the Act, the Commissioner ought to have exercised such power and ought to have condoned the delay. It is already observed that the Commissioner has touched the merits of the claim also by referring some Circulars and instructions issued by the Board and has held that the benefit given under those Circulars and the instructions cannot be given in the present matter. Further, the reason given for the delay also is not acceptable. On the previous occasion also there was certificate of the C.A. and admittedly the petitioner

had shown the aforesaid amount like remission in principal amount of the term loan in profit and loss account and the book profit of more than Rs. 64 lakh was shown. If the business loss can be carried forward, there was the opportunity for the petitioner if such entitlement continues to get the benefit of that provision in subsequent year also. But it appears that in the first return filed the book profit was shown and on that basis self assessment of the income tax was made. Though the merits cannot be considered in detail while deciding application for condonation of delay these things need to be considered to ascertain as to whether there is arguable *prima facie* case in favour of the applicant. That point is not considered in detail and there is no need to do it in the present proceeding also.

8) The provision section 119(2)(b) runs as under :

"119. Instructions to subordinate authorities.

(1)

(2) Without prejudice to the generality of the foregoing power, --

(a)

(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."

9) The order issued by the Board by exercising this power dated 26-20-1993 is on the record and it shows that it is applicable to the excess tax deducted at source, collected at source and payment of advance tax made under the provisions of Chapters XVII-B, XVII-BB and XVII-C respectively and the amount of refund does not exceed Rs. one lakh for any assessment year. Thus, the self assessment was not included in this order issued by the Board. It appears that subsequently on 9-6-2015 order came to be issued by the Board in which the category of self assessment tax was included in the order which can be made by the Board under section 119(2)(b) of the Income Tax Act. Thus, the order came in existence subsequently and the Commissioner had no power to condone delay on the date when the order was made on the application filed by the present petitioner.

10) The learned counsel for the petitioner placed reliance on some observations made by the Division Bench of this Court at Principal Seat in Writ Petition No.3087/2006 (**Artist Tree Pvt. Ltd. v. Central Board of Direct Taxes and Others**). The application in that matter was filed on 7-4-2002 and it was the matter of tax deducted at source. Thus, the observations made in that case can be of no use in the present matter. Reliance was placed on the observations made by Punjab & Haryana High Court in the case reported as **(2005) 1 RCR (Criminal) 591 (Jaswant Singh Bambha v. Central Board of Direct Taxes And Others)**. Reliance is also placed on the case reported as **2010 (Supp.) Bom.C.R. 196 (Sitaldas K. Motwani v. Director General of Income Tax & Ors)**. On the basis of the observations made in these cases it was submitted for the petitioner that there is power with the Board to issue such instructions or order and so the Commissioner ought to have condoned the delay. On this point, learned counsel for the respondent, Department, placed reliance on some observations made by the Apex Court in the cases reported as (1) **2008 AIR SCW 1461 (Singh Enterprises v. Commissioner of Central Excise,**

Jamshedpur); and, (2) (2009) 5 SCC 791 (Commissioner of Customs and Central Excise v. Hongo India (P) Ltd.)

The cases of Apex Court are altogether on different points and provisions of different law were involved in those matters. Whenever there is special provision in special enactment fixing the period of limitation even the Court cannot extend that period and the provision of section 5 of the Limitation Act cannot be applied in those cases. There cannot be dispute over that proposition. In the present matter, due to the provision like section 119(2)(b) made in the Income Tax Act, it can be said that discretionary power is given to the Board to issue such instructions and only after that the assessing authority can use such power. As in the past, at the time when the claim of the petitioner was considered, there was no such instruction or order from the Board, in the present matter such benefit cannot be given to the petitioner. Thus, no case is made out for interference in the order made by the Commissioner of Income Tax. In the result, both the petitions stand dismissed.

Sd/-
(SUNIL K. KOTWAL, J.)
rsl

Sd/-
(T.V. NALAWADE, J.)