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

WRIT PETITION NO. 2301 OF 2017

M/s. Yash Society .. Petitioners

v/s.

The Commissioner of Income Tax (Exemption)
Mumbai .. Respondent

Mr. Pankaj Toprani a/w Ms. Kripa Toprani i/b PRH Juris Consults for the petitioners
Mr. Ashok Kotangle i/b Ms. Padma Divakar for the respondent

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

DATED : 18th JANUARY, 2018.

P.C.

1. At the request of the learned Counsel for the parties, the petition is being disposed of finally at the stage of admission.

2. This petition challenges the order dated 26th July, 2017 passed by respondent no.1 - the Commissioner of Income Tax (Exemption), Mumbai under Section 119(2)(b) of the Income Tax Act, 1961 (the Act). By the impugned order dated 26th July, 2017, the petitioners' application for condonation of delay in filing its return of income for Assessment Year 2014-15 and claiming refund, was rejected.

3. The petitioner is a Public Trust, duly registered under the Bombay Public Trust Act, 1950 since 1971 and also in possession of Registration under Sections 12A and 80G of the Act. The petitioners Trust is involved in charitable activities and is running a Hospital along with a Medical Research Centre at Nashik as well as a dispensary at Mumbai.

4. The petitioners being a registered Charitable Trust claims exemption from tax under Section 11(1) of the Act for the year ended 31st March, 2014 i.e. Assessment Year 2014-15. For the first time since 1971, the petitioners were unable to file its return of income within the prescribed time for Assessment Year 2014-15 i.e. before 30th September, 2014 under Section 139(1) of the Act. This resulted in the petitioners not being able to claim refund of tax deducted at source on receipt of interest from banks / others aggregating to Rs.7.13 lakhs. This was as time to file the refund for the tax under Section 239(2) of the Act i.e. 30th September, 2016 had also expired.

5. In the above circumstances, the petitioners filed an application on 19th October, 2016 under Section 119(2)(b) of the Act to the Principal Commissioner of Income Tax seeking a condonation of delay

in filing the income tax return and for making a claim for refund of the tax deducted at source. In its application, the petitioners pointed out that the delay in filing the return of income within the prescribed time i.e. 30th September, 2014 (Due date u/s 139(1) of the Act) also 31st March, 2016 (Revised returns u/s 139(4) of the Act) was on account of reasons beyond its control i.e. the preparation of the accounts of the Hospital at Nashik were delayed resulting in the delay in obtaining the Auditor's report. This delay essentially arose on account of the fact that in view of the search and seizure action to which group of the Petitioners Trust belongs, led to its staff members leaving their employment, resulting in delay in preparation of the accounts. This delay it was submitted was not deliberate.

6. On 24th April, 2017, the office of the respondent no.1 - Commissioner of Income Tax issued a notice to the petitioners in response to the petitioners' application i.e. notice called upon the petitioners to submit the following particulars :-

> *"(i) the claim is in accordance with Inst. No.13/2006 dated 22.12.2006 and earlier guidelines of CBDT dated 9th June, 2015. This includes :*
> *(a) Evidence for the claim*
> *(b) Evidence for the TDS*
> *(c) Computation of Income Tax*
> *(ii) The claim is within 6 years from the end of the*

relevant assessment year.

(a) The claim is correct and genuine

(b) There is a case of genuine hardship

(iii) Income is not assessable in the hands of any other person

(iv) The refund has arisen as a result of excess TDS."

7. The petitioners by its letters dated 23rd May, 2017 and 8th June, 2017 responded to the notice dated 24th April, 2017. It was pointed out that the delay in filing the refund was due to late finalizing of accounts and consequent delay in audit. This delay in accounts was due to search action on the group leading to key employees leaving the Trust. Besides, explanation / evidence was offered under each of the heads that the notice called upon the petitioners to respond. The case of genuine hardships was pleaded by relying upon the case laws and in particular upon the decision of this Court in ***Sitaldas K. Motwani Vs. Director General of Income Tax (International Taxation) & Ors. (2010) 323 ITR 0223*** wherein in the context of Section 119(2)(b) of the Act that the words "genuine hardship" have been construed liberally and prayed that delay in filing its return of income and also filing its claim for refund of the tax deducted at source be condoned.

8. Thereafter, the respondent no.1 granted a personal hearing to the petitioners and on 26th July, 2017 the impugned order was passed.

Mr. Toprani, learned Counsel for the petitioners submits that the impugned order of the respondent no.1 has dismissed the application for condonation of delay *inter alia* on the merits of the claim / extent of exemption. This issue of merits he submits is an issue to be decided under Section 11 of the Act by the Assessing Officer on filing a return of income. It is submitted that the respondent no.1 does not deal with the tests to be satisfied for the delay being condoned as indicated in the notice dated 24th April, 2017. Thus, the impugned order cannot be sustained. On the other hand, Mr. Kotangle, learned Counsel for the respondent supports the impugned order.

9. We find that the impugned order does not deal with the various criteria which the petitioners were asked to satisfy for consideration of its application for condonation of delay as set out by order dated 24th April, 2017 issued by the office of the Commissioner of Income Tax (Exemption). The impugned order has in fact proceeded to deal with the merits of the petitioners' claim for expenses in determining its income and claim for exemption under Section 11 of the Act. In fact, the impugned order *inter alia* rejects the application for condonation of delay on the ground that there is huge cash expenditure on the part of the petitioners Trust. In fact, at the stage of considering delay

condonation application filed by the petitioners, the merits of the claim cannot be a subject matter of examination as held by this Court in the case of *Sitaldas K. Motwani (supra)*. In the above case, it has *inter alia* been observed as under :-

> *"16. Whether the refund claim is correct and genuine, the authority must satisfy itself that the applicant has a prima facie correct and genuine claim, does not mean that the authority should examine the merits of the refund claim closely and come to a conclusion that the applicant's claim is bound to succeed. This would amount to prejudging the case on merits. All that the authority has to see is that on the fact of it the person applying for the refund after condonation of delay has a case which needs consideration and which is not bound to fail by virtue of some apparent defect. At this stage, the authority is not expected to go deep into the niceties of law. While determining whether refund claim is correct and genuine, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."*

10. We also note that the specific evidence / test laid down by the CBDT as indicated in the notice dated 24th April, 2017 issued by the office of the respondent no.1, has not been dealt with in respect to each of the heads.

11. Further, in this case, the petitioner Trust is engaged in charitable activities as it is not only registered under Section 12A of the Act but also under the Bombay Public Trust Act. The petitioners income is exempted from tax under Section 11 of the Act and consequently the refund of the tax deducted at source of Rs.7.13 lakhs would be utilized by the petitioners' Trust in discharge of its charitable objects particularly in running a Hospital at Nashik and a dispensary in Mumbai. The impugned order completely ignores the decision of this Court in the case of *Sitaldas K. Motwani (supra)*. In the above case, this Court while dealing with the meaning of the words "genuine hardship" as found in Section 119(2)(b) of the Act, had observed that *"There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. The approach of the authorities should be justice oriented so as to advance cause of justice. If refund is legitimately due to the applicant, mere delay should not defeat the claim for refund".*

12. In fact, the impugned order also disregards the decision of Kerala High Court in the case of ***Pala Marketing Co-operative Society Ltd. Vs. Union of India, 311 ITR 0177*** relied upon by the petitioners. In

the above case, the Court held that in case where a party is deprived of a refund, then, it would be a case of genuine hardship. This of course has to be considered along with other facts of the application for condonation of delay.

13. In the above facts and circumstances of the case, we set aside the impugned order dated 26th July, 2017 passed by the Commissioner of Income Tax under Section 119(2)(b) of the Act rejecting the petitioners' application for condonation of delay in filing the return of income and delay in claiming refund due to it. We restore the petitioners' application dated 30th October, 2016 to the file of the respondent no.1 - Commissioner of Income Tax for fresh disposal. Needless to state that the fresh order would be passed bearing in mind the parameters listed out in the communication dated 24th April, 2017 issued by office of the Commissioner of Income Tax to the petitioners, while considering the petitioners' application for condonation of delay.

14. The Petition is disposed of in the above terms. No order as to costs.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**