IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1779 OF 2017
IN
INCOME TAX APPEAL (LODG) NO. 2320 OF 2017

ALONGWITH

NOTICE OF MOTION NO. 1783 OF 2017
IN
INCOME TAX APPEAL (LODG) NO. 2319 OF 2017

Commissioner of Income-Tax
(Exemptions), Pune ....Appellant
V/s.
Lata Mangeshkar Medical
Foundation ....Respondent

* * * * *

Mr. Sham Walve, Advocate for the applicant, original appellant.

None for the respondent despite service.

CORAM :- M.S. SANKLECHA, &

SANDEEP K. SHINDE, JJ.

DATE :- 1ST MARCH, 2018.

P.C. :-

1. These two Notices of Motion have been taken out for condonation of 318 days delay in filing two Appeals from the common impugned order dated 15th April, 2016 passed by the Income-Tax Appellate Tribunal ("the Tribunal" for short). The common impugned order dated 15th April, 2016 of the Tribunal related to Assessment Years 2008-09 and 2009-10. Therefore, the two Appeals and the two Motions for condonation of delay.

2. The two Affidavits dated 16th September, 2017 of Ms. Sudha Gupta in support of the Notices of Motion sets out the following identical particulars as the explanation for the delay :-

(a)The impugned order dated 15th April, 2016 was received by the Principal Commissioner of Income-Tax, Pune on 5th July, 2016. Thereafter, on 11th July, 2016 it was forwarded to the

Commissioner of Income-Tax, (Exemptions) ('Applicant' for short) i.e. the officer having jurisdiction over this case;

(b)Thereafter, the papers were transferred/handed over by the Applicant to the office of the Deputy Commissioner of Income-Tax (Exemptions), Circle, Pune [(however, no date of transfer to the Deputy Commissioner of Income-Tax (Exemptions) is mentioned)];

(c)On 21st September, 2016 the Deputy Commissioner of Income-Tax prepared his report which was approved by the Joint Commissioner of Income-Tax. Thereafter, sent on 29th September, 2016 to the Applicants;

(d) On receipt of the above reports, the Applicant forwarded it to the Chief Commissioner of Income-Tax, New Delhi for approval (however no date of forwarding it is mentioned).

(e) Approval from the Commissioner of Income-

Tax, Delhi was received by the applicant on 29th May, 2017 (no date mentioned of when the approval was granted by New Delhi);

(f) Thereafter, this appeal was filed on 20th July, 2017.

3. The Affidavits further state that, the Revenue has good case on merits. It states that, the tax effect involved is over Rs.6 crores in Notice of Motion No. 1779 of 2017 for the Assessment Year 2009-10 and over Rs.3.4 crores in Notice of Motion No. 1783 of 2017 for the Assessment Year 2008-09. Thus, prays that the delay be condoned and Appeals be heard on merits.

4. These Notices of Motion had first come up for consideration on 5th January, 2018 at which time, the Motion was adjourned to enable completion of service. Consequent to the above, on 18th January, 2018, additional Affidavits were filed in support of the Motion.

Mr. Walve, for the Revenue, fairly states that this was at the instance of the Court seeking better and fuller particulars. These additional Affidavits were filed in support of the Motion. These additional Affidavits seek to explain the delay by stating that on receipt of the approval on 29th May, 2017 the papers were sent to the Counsel who asked for certain papers and the draft was obtained by him only on 30th August, 2017. This again is without any particulars. The additional affidavit states that for subsequent Assessment Year 2010-11, the Revenue has filed its Appeal within the period of limitation.

5. We find that, there is no proper explanation for the delay on the part of the Applicant. Infact, the affidavits dated 16th September, 2017 states that, the Applicant handed over the papers to his subordinate i.e. the Deputy Commissioner. This is also put in as one of the reasons for the delay. This even though when they

appear to be a part of the same office. In any case, the date on which it was handed over to the Deputy Commissioner of Income-Tax (Exemptions), Circle, Pune is not indicated. Further, the affidavit dated 16th September, 2017 also does not explain the period of time during which the proposal was pending before the Chief Commissioner of Income-Tax, Delhi for approval. The Chief Commissioner of Income-Tax is also an Officer of the Department and there is no explanation offered by the Chief Commissioner at Delhi or on his behalf, as to why such a long time was taken in approving the proposal. Infact, there is even no attempt to explain the same. The Applicant being a Senior Officer of the Revenue would undoubtedly be conscious of the fact that the time to file the appeals was running against the Revenue and there must be averment in the application of the steps he was taking to expedite the approval process. Further, there is no proper explanation for the delay after having received the approval from the Chief Commissioner of Delhi on 29th

May, 2017. No explanation was offered in the affidavits dated 16th September, 2017 for having filed the appeal on 20th July, 2017 i.e. almost after two months. The additional affidavits also does not explain the delay except stating that the delay was as the Advocate to whom the papers were sent for drafting asked for some document without giving particulars. Thus, we are not satisfied with the reasons set out in the Affidavits and additional Affidavits in support so as to condone the delay in filing the accompanying Appeal.

6. The Apex Court in the case of **Office of the Chief Post Master General and Others V/s. Living Media India Ltd. and Another, reported in (2012) 348 ITR 7 (SC)** while dealing with the condonation of delay application by the State, has observed as under :-

> "12. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking

up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they

> perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

7. In this case also, it is not in dispute that the officers of the Revenue were conscious of the time for filing the Appeal. This is particularly so as on an average over 2000 appeals every year from the order of the Tribunal is filed by it before this Court. Inspite of the above, said callous delay. Thus, we informed Mr. Walve for the Revenue, that we are not inclined to condone the delay.

8. At this stage, Mr. Walve, the Learned Counsel appearing for the Revenue, submitted that the aforesaid

decision of the Apex Court in *Living Media India Ltd (supra)* would not apply in case of tax appeals. In support, he invited our attention to the decision of the Apex Court in **Commissioner of Income Tax, Kolkata-II V/s. West Bengal Infrastructure Development Finance Corporation Ltd. reported in (2010) 15 Supreme Court Cases page 242** wherein the Apex Court in an order passed on 10th December, 2010 while condoning the delay passed the following order :-

> "1. By consent, the matter is taken up for hearing. Heard the learned counsel on both sides. Delay condoned. Leave granted.
>
> 2. Looking to the amount of tax involved in this case, we are of the view that the High Court ought to have decided the matter on merits. In all such cases, where there is delay on the part of the Department, we request the High Court to consider imposing costs but certainly it should examine the cases on merits and should not

dispose of cases merely on the ground of delay, particularly when huge stakes are involved.

3. Accordingly, the impugned order is set aside and the matter is remitted to the High Court to decide the case de novo in accordance with law. We request the High Court to dispose of this case as early as possible, preferably within a period of four months from today.

4. The civil appeal is, accordingly allowed. No order as to costs."

9. On the basis of the above order, Mr. Walve submits that the Apex Court has directed/requested the High Courts to examine the Appeals filed by the Revenue on merits, even if there is a delay on its part in filing the Appeal, by imposing costs. This is particularly so when huge stakes are involved, as in this case. This, he submits, is the law of the land with regard to the tax matters and the decision in *Living Media Ltd. (supra)* is not a matter arising in an tax Appeal. Besides, he submits

the decision in *Living Media Ltd. (supra)* was of a two Member Bench of the Hon'ble Supreme Court while the decision in *West Bengal Infrastructure Development Finance Corporation Ltd*. (supra) was of a Three Member Bench and in the absence of the aforesaid decision being brought to the attention of the Supreme Court in the case of *Living Media Ltd*. they had no occasion to consider the same. Thus, the decision of the Apex Court in *Living Media Ltd. (supra)* is per-incuriam. Mr. Walve, further places reliance on the decision of the Apex Court in **G. Ramegowda, Major and Others V/s. Special Land Acquisition Officer, Bangalore, reported in (1988) 2 Supreme Court Cases page 142** to contend as observed therein that even though the law of limitation is same for a private citizen, as well as, government authority, invites our attention to the following observation :

> "While a private person can take instant

> decision a "bureaucratic or democratic organ" it is said by a learned Judge "hesitates and debates, consults and considers, speaks through paper, moves horizontally and vertically till at last it gravitates towards a conclusion,-unmindful of time and impersonally".

. This, he submits is the inherent nature of the manner in which the State functions. Therefore, he submits, the Courts should condone the delay and consider the appeal on merits.

10. In so far as, the reliance upon the decision of the Apex Court in *West Bengal Infrastructure Development Finance Corporation Ltd*. (supra) is concerned, we are of the view that the Apex Court had, after hearing the parties, condoned the delay on the part of the Revenue in filing the Appeal. After that, the Apex Court had observed that looking at the tax amount involved in all such cases, where there is delay on the

part of the department, the High Court was requested to consider condonding the delay by imposing costs and examine the case on merits. It is sought to be contended by the Revenue that where large amounts are involved, the Revenue should, as a matter of right, be heard on merits of its appeal and the delay should be condoned on payment of costs. Such a reading would be rendering Section 260A(2A) of the Act which came into the statute by the Finance Act, 2010 with retrospective effect of 1998 completely otiose/redundant. Sub-section (2A) of the Section 260A of the Act allows the Court to admit an appeal beyond the period of limitation, if it is satisfied there is sufficient cause for not filing the appeal in time. The judgment has to be read in consonance with the Act. The decision of the Hon'ble Apex Court in *West Bengal Infrastructure Development Finance Corporation Ltd. (supra)* is without doubt binding upon us and we are bound to follow it. However, the Apex Court decision in *West Bengal Infrastructure Development Finance*

Corporation Ltd., (supra) according to us, does not give any such blanket direction as submitted by the Revenue. All it asked the High Courts to do is to examine the case on merits only after a case has been made out to condone the delay after awarding costs, if necessary. This has to be in terms of Section 260(2A) of the Act. Further, the observations of the Apex Court, do not in any way, fetter the High Courts from exercising its discretion to condone or not to condone the delay in filing of the Appeal. The condonation of delay application will have to be case specific and the judgment of the Apex Court cannot be read so as to ignore the will of the Parliament. Thus, the decision of the Apex Court in *Living Media* (supra) is not per incuriam as submitted by the Revenue. In any case, as a lower Court it is not open for us to disregard the decision of the Apex Court in *Living Media* (supra) as per incuriam. Therefore, the submission on behalf of the Revenue cannot be accepted that in the appeals by the Revenue, the delay has to be condoned, if large amounts are involved, on payment of costs. Therefore, according to us, each case for condonation of delay would have to be decided on the basis of the explanation offered for the delay i.e. is it bonafide or not, concocted or not or does it evidence negligence or not.

11. Further, the decision of the Apex Court in *G. Ramegowda* (supra) was a subject matter of consideration by the decision of the Apex Court in *Living Media Ltd* (supra). In the latter case, the observations in *G. Ramegowda* (supra) of the State possessing an impersonal machinery and inherited bureaucratic methodology leading to delay was found not acceptable in view of the modern technologies being used and available to the State. Further, in *G. Ramegowda*, the Apex Court had *inter-alia* observed that that the *malafides* of the officers should not be imputed to government. In the present case, it is not the case of the Revenue that the officers were not bonafide in taking their decision and

therefore the delay was caused. The reasons as come out from the Affidavits filed is, that our work takes time and therefore the period of limitation imposed by the State should not be applied in case of Revenue's appeal where the tax effect involved is substantial. We cannot accept such a proposition as it would be contrary to the law laid down by the Apex Court that there is no different period of limitation for the State and the citizen.

12. One more submission made on behalf of the Revenue is that, the respondents have been served and they have chosen not to appear. Therefore, it must necessarily follow that they have no objection to the delay being condoned and the Appeal being entertained. Thus, it is submitted that the delay be condoned and the appeal be heard on merits. This submission ignores the fact that the object of the law of limitation is to bring certainty and finality to litigation. This is based on the Maxim “interest reipublicae sit finis litium” i.e. for the general benefit of

the community at large, because the object is every legal remedy must be alive for a legislatively fixed period of time. The object is to get on with life, if you have failed to file an appeal within the period provided by the Statute. It is for the general benefit of the entire community so as to ensure that stale and old matters are not agitated and the party who is aggrieved by an order can expeditiously move higher forum to challenge the same, if he is aggrieved by it. As observed by the Apex Court in many cases, the law assist those who are vigilant and not those who sleep over their rights as found in the Maxim "Vigilantibus Non Dormientibus Jura Subveniunt". Therefore, merely because the Respondent does not appear, it cannot follow that the applicant is bestowed with a right to the delay being condoned.

13. We are conscious of the fact that the period of limitation should not come as an hindrance to do substantial justice between the parties. However, at the

same time, a party cannot sleep over its right ignoring the statute of limitation and without giving sufficient and reasonable explanation for the delay, expect its Appeal to be entertained merely because it is a State. Appeals filed beyond a period of limitation have been entertained by us, where the delay has been sufficiently explained such as in cases of bonafide mistake, malafide action of the Officer of the State etc. However, to seek that the period of limitation provided in the statute be ignored in case of Revenue's appeals cannot be accepted. The Appeals which are filed by the Revenue in this Court under Section 260A of the Act are very large in number and on an average over 2000 per year from the orders of the Tribunal. Thus, the officers of the Revenue should be well aware of the statutory provisions and the period of limitation and should pursue its remedies diligently. It cannot expect their Appeals be entertained, because they are after all the State, notwithstanding the fact that delay is not sufficiently explained.

14. In the above view, both the Notices of Motion are dismissed. No order as to costs.

15. Both the Appeals also stand disposed off.

(SANDEEP K. SHINDE, J) **(M.S. SANKLECHA, J)**