

RESERVED ON : 23.03.2018
DELIVERED ON : 28.03.2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2018

CORAM

THE HON'BLE Mr. JUSTICE M.DURAI SWAMY

W.P.No.24273 of 2016

M/s.REGEN Powertech Private Ltd.,
registered under the provisions of
Indian Companies Act, 1956,
rep by its Joint Managing Director,
R.Sundaresh,
No.2, Harrington Road,
7th Floor, KRM Plaza, North Tower,
Chetpet, Chennai - 600 031. ... Petitioner

Vs.

- 1.The Central Board of Direct Taxes,
rep by its Chairperson,
Room No.143 E, North Block,
Department of Revenue (CBDT) /
Ministry of Finance,
Government of India, New Delhi.
- 2.The Deputy Commissioner of Income Tax,
Corporate Circle - 5(1),
121, Nungambakkam High Road,
Chennai - 600 034. ... Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorarified mandamus and quash the impugned order in F.No.225/121/2015/ITA.II dated 01.06.2016 issued by the 1st respondent and consequently direct the first respondent to accept the Return Of Income filed by the petitioner Company for the assessment year 2014-15 u/s 139(1) of the Act.

For Petitioner : Mr.Vijaya Narayanan, Senior Counsel
for Mr.R.Sivaraman

For Respondents: Mrs.Hema Muralikrishnan,
Senior Standing Counsel

O R D E R

The petitioner has filed the above Writ Petition to issue a writ of certiorarified mandamus to call for the records pertaining to the order passed by the 1st respondent dated 01.06.2016 and consequently direct the 1st respondent to accept the Return Of Income filed by the petitioner Company for the assessment year 2014-15 under Section 139(1) of the Act.

2.The brief case of the petitioner is as follows:

(i)According to the petitioner, it is a Private Limited Company incorporated under the provisions of the Companies Act and is engaged in the manufacturing of Wind Energy Generators. For the assessment year 2014-15, the petitioner Company had filed its Return Of Income (ROI) as required under Section 139 (1) of the Act on 07.01.2015 due to certain reasons beyond the control of the petitioner Company. As per Section 139(1) of the Act, the due date for filing of Return Of Income, in case of assessee having specified international/domestic transactions, was 30.11.2014. There was a delay of 37 days in filing the Return Of Income for the relevant assessment year. It is mandatory on the part of the Company to get its account audited under Section 44 AB of the Act. To file its Return Of Income, Tax Audit Report under Section 44 AB is mandatory, without which the return will not be accepted by the System as a correct return.

(ii)The petitioner Company sought the services of M/s.S.R.Batliboi & Associates, LLP to conduct audit of its Tax accounts and issue a report thereon in Form-3CB prescribed under the Income Tax Rules, 1963. The Chartered Accountant Firm had also agreed to carry out the assignment in terms of their Assignment Letter dated 08.09.2014. Pursuant to the aforesaid engagement Letter, the Audit exercise commenced on 15.09.2014. The team members of M/s.S.R.Batliboi & Associates were deployed and the petitioner Company co-operated with the Audit Firm in providing with necessary details, which were called for from time to time. Periodical interactions were taking place between the Auditor and the petitioner Company and weekly meeting was held to review the progress of the Audit work. The petitioner Company in full faith submitted the details called for by the Auditor in a progressive manner.

(iii)During the assessment year 2014-15, the petitioner Company transferred its Operating & Maintenance (O&M) business division on a going concern basis as a slump sale to its wholly owned subsidiary Company, namely, Renewable Energy Generation Pvt Ltd (now, renamed as REGEN Infrastructure and Services Pvt. Ltd.) for a consideration of Rs.310 crores. The aforesaid consideration was based upon two independent valuation exercises

from M/s.TRC Corporate Consulting Pvt. Ltd and M/s.C.Ramaswamy & B.Srinivasan, Chartered Accountants.

(iv)The Tax Auditors viz., M/s.S.R.Batliboi & Associates, Chartered Accountant had certain reservations in the valuation of the aforesaid business transfer and wanted to issue a disclaimer in this regard in the Audit Report in Form-3CB prepared for the purpose of Tax Audit. The reservation was orally communicated by their Tax Auditors to the petitioner Company on the last day of November 2014. The petitioner made an attempt to explain their Auditors about the last date for filing return and the importance and consequences of filing the Tax Audit Report along with the return. However, the Auditors were delaying the process of Audit completion without proper reasons inspite the petitioner providing expert valuation report from other professional firm to satisfy their concerns.

(v)The Auditors could have completed the audit by providing their qualified opinion as regards the above point, but they used this point to justify their delay in completion of the Tax Audit, which caused serious hardship to the petitioner, which was beyond the control of the petitioner Company. This has resulted in delay in finalizing the Tax Audit Report, without which the petitioner cannot upload the return electronically. The Tax Auditor viz., M/s.S.R.Batliboi & Associates, has been dragging the completion of the Audit before the due date. In the last moment viz., 29.11.2014, they had orally communicated their unwillingness to complete the audit and to issue a Tax Audit Report before the due date viz., 30.11.2014. The petitioner Company, left with no other alternative, but to look for an alternative Auditor, after getting written communication from M/s.S.R.Batliboi & Associates, who could be assigned the work of carrying out the Tax Audit as required under Section 44 AB of the Income Tax Act.

(vi)The petitioner Company, after due deliberations and taking note of various aspects, had approached M/s.CNGSN Associates, LLP, Chartered Accountants, Chennai, to conduct the Tax Audit work as required under the statute and issue a Tax Audit Report. The assignment was accepted by M/s.CNGSN Associates subject to No Objection Certificate from the existing Auditors viz., M/s.S.R.Batliboi & Associates. M/s.CNGSN Associates, by their letter dated 29.11.2014, also requested M/s.S.R.Batliboi & Associates to issue No Objection Certificate to conduct the audit work. But, however, no such NOC was given. Only upon the insistence by the petitioner Company and after considerable lapse of time by a written communication dated 15.12.2014, the Statutory Auditor viz., M/s.S.R.Batliboi & Associates expressed their inability to carry out their audit and to issue report thereon.

(vii) The petitioner cannot appoint an alternative Auditor without getting NOC from the existing Auditor. The new Auditor viz., M/s.CNGSN Associates had completed the audit work and issued a Tax Audit Report dated 29.12.2014 and the petitioner Company, based on this, uploaded the Return Of Income on 07.01.2015 along with the Tax Audit Report.

(viii) The belated filing of the return arose on account of the reasons beyond the control of the petitioner, who had no intentions in delaying the filing of the return. There is sufficient cause for the non-filing of the return within the due date. The petitioner Company was prevented from filing the return before the due date. The petitioner Company wished to file a revised Return Of Income, after making certain modifications to the earlier one, which is uploaded on 07.01.2015. Such filing of the revised return is possible only if the original return had been filed within the time prescribed under Section 139 (1) of the Act.

(ix) In the original return filed on 07.01.2015, exemption for the transfer of business to wholly owned subsidiary under Section 47(iv) was inadvertently not claimed and it was wrongly shown under the head "Long term capital gains" in the original Return Of Income.

(x) In order to accept the revised return, the original return should be filed under Section 139(1) of the Act within the due date, which was 01.12.2014 for the previous year 2013-14, relevant to the assessment year 2014-15. Since the petitioner Company did not file the return under Section 139(1) within the time limit (i.e.) before 01.12.2014, the petitioner had filed an application on 25.03.2015 for condonation of the delay of 37 days in filing the Return Of Income under Section 119(2) (b) of the Act for the assessment year 2014-15.

(xi) Since the petition filed under Section 119(2) (b) was pending for a long time, the petitioner Company filed a Writ Petition before this Court in W.P.No.4677 of 2016 to direct the respondent to consider the petitioner's application in accordance with law. This Court, by order dated 08.02.2016, directed the respondent to consider the petitioner's application dated 25.03.2015, on merits and in accordance with law, within a period of eight weeks from the date of receipt of a copy of the order, preferably, on or before 31.03.2016. The petitioner Company, through their Authorized Representative, appeared and filed the written submissions and explained to the 1st respondent the practical genuine difficulties, which were faced by the petitioner Company in filing the Return Of Income within the due date.

(xii)By order dated 01.06.2016, the 1st respondent refused to condone the delay of 37 days in filing the Return Of Income. Though the application was filed by the petitioner for condoning the delay of 37 days as early as on 25.03.2015, the 1st respondent had disposed of the application only on 01.06.2016. In these circumstances, the petitioner has filed the above Writ Petition.

3.The brief case of the respondents is as follows:

(i)According to the respondents, the 1st respondent had passed a valid order. Further, the respondents contended that the petitioner has not established that the delay in finalization of the Tax Audit Report is only because of the Auditor's fault. The petitioner has not been able to establish that the work of the Tax Audit got delayed due to the professional misconduct on the part of the Auditor, for which the petitioner had not resorted to any legal action against the Auditor. The reasons given by the petitioner for the condonation of the delay were duly considered by the 1st respondent and it was held that the grounds raised were not valid so as to invoke the powers of the Board under 119 of the Act. If the Tax Auditor had qualified his report and expressed his opinion on a particular item, then the taxpayer can still take a contrary view in the Return of Income.

(ii)In the case on hand, instead of letting the Auditor to complete the work of Audit within the deadline prescribed under the Act, the petitioner chose to effect change of Auditor, which led to the delay. The action of the petitioner, in effecting change of Auditor on the issue of difference of opinion, is clearly against the objective of making Tax Audit work independent of the taxpayer. There is no genuine hardship for the petitioner. In these circumstances, the respondents prayed for dismissal of the Writ Petition.

4.Mr.Vijaya Narayanan, learned senior counsel appearing for the petitioner submitted that the 1st respondent has erroneously dismissed the petition when the petitioner had satisfactorily explained the reasons for the delay. Further, the learned senior counsel submitted that since there was some misunderstanding between the petitioner and their Auditor, the Return Of Income could not be filed before the due date, hence, there was a delay of 37 days in filing the Return Of Income.

4.1.In support of his contentions, the learned senior counsel relied upon the following judgments:

(i)[2006] 157 Taxman 1 (SC) [Goetze (India) Ltd. Vs. Commissioner of Income Tax] wherein the Apex Court held as follows:

"...

4.The decision in question is that the power of the Tribunal under Section 254 of the Income Tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim of deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961. There shall be no order as to costs."

(ii)Un-reported judgment of a Division Bench of this Court made in W.A.No.1314 of 2016 [The Central Board of Direct Taxes Vs. M/s.Regen Infrastructure & Services Pvt. Ltd.] dated 01.11.2016 wherein the Division Bench of this Court held as follows:

"...

9.When once an authority has been conferred discretion to condone the delay, application seeking condonation of delay of one day cannot be rejected for such reasons as are assigned by the Board in its order dated 05.05.2014. Hence, we are of the opinion that the Board has not exercised its discretion properly in the matter and in keeping with the legal principles relevant for such consideration. Hence, we have no hesitation to come to the conclusion that the learned Single Judge has rightly allowed the writ petition and set aside the order dated 05.05.2014 passed by the Board."

(iii)Un-reported order of this Court made in W.P.No.5137 of 2015 [M/s.Regen Infrastructure & Services Pvt. Ltd. Vs. The Central Board of Direct Taxes dated 14.03.2016 wherein this Court held as follows:

"...

7.In the case on hand, the petitioner has satisfactorily explained the reasons for the delay in filing the return on 16.10.2010 instead of 15.10.2010. Further, it is not the case of the respondents that the petitioner is not entitled to claim the carry forward loss under Section 139(3) of the Act. When the petitioner is entitled to claim the carry forward loss under Section 139(3) of the Income Tax Act, it cannot be stated that the delay in filing the return had occurred deliberately or on account of culpable

negligence or on account of mala-fides. Further, the petitioner do not stand to benefit by resorting to delay as held by the High Court of Bombay. In fact, they run a serious risk. Moreover, when the petitioner had satisfactorily explained the delay in filing the said return, the approach of the first respondent should be justice oriented so as to advance the cause of justice. In this case, when the petitioner as a litigant is entitled to claim carry forward loss, mere delay should not defeat the claim of the petitioner. The judgments relied on by the learned counsel for the petitioner squarely applies to the facts and circumstances of the present case. In these circumstances, I am of the view that the first respondent should have condoned the delay of one day in filing the return by the petitioner."

(iv) [2010] 195 Taxman 106 (Bombay) [Bombay Mercantile Co-op. Bank Ltd. Vs. Central Board of Direct Taxes] wherein the Bombay High Court held as follows:

"...

7.As can be seen from the reading of the said provision that the board is vested with the power to admit any application after the expiry of the period specified by or under this Act if sufficient grounds are made out. To effectuate such power, that the CBDT had issued the Circular No.8 of 2001. It is in the context of the said statutory provision as well as the circular that the reasons mentioned by the petitioner in the application for condonation of delay have to be considered. As indicated above, the principal reason cited by the petitioner is that the statutory auditors were appointed by the Central Registrar on 3-9-2001 and that the said statutory auditors completed the audit on 15.11.2001 and the tax auditors completed the audit on 28-11-2001 and, therefore, there was a delay in filing the return. It would have to be noted that, the petitioner is a Multi-State Co-operative Bank operating under the Multi-State Co-operative Societies Act, 1984. The power to appoint the statutory auditors is that of the Central Registrar, who is the Registrar of the Co-operative Societies, Maharashtra State. The said authority had appointed the statutory auditors on 3-9-2001. It appears that the said authority appointed Chartered Accountants to be statutory auditors in place of the Departmental Auditors. This change was made in respect of all the societies. Therefore, the petitioner, in our view, cannot be blamed for the delay in carrying out its audit, as the same was beyond its control. The contention of the learned counsel for the respondents that the Departmental auditors, in fact,

had started the audit in the year 2000 and it was for the petitioner to get the audit expedited, cannot be accepted. Though the departmental auditors might have started the audit, it appears that pursuant to the said policy decision that was taken, the departmental auditors were replaced by the Chartered Accountants to be the statutory auditors, which was by letter dated 3-9-2001. In our view, therefore, the said reason mentioned by the petitioner in its application, deserves to be accepted. The other reasons cited for condonation of delay, therefore, need not be gone into as the petitioner in out view, would be entitled to condonation of delay on the said ground alone. The other grounds raised in the petition to assail the impugned order also need not be gone into. It is further required to be noted that the Assessing Officer imposed a penalty of Rs.1,00,000/- under Section 271(1) (b) of the said Act. However, CIT(A)-I in the Appeal filed by the petitioner has set aside the penalty holding that there was reasonable delay in filing the return late by one month. Therefore, CIT (Appeals) accepted the very same facts as were mentioned by the petitioner in the application under Section 119(2) (b) of the said Act.

8.It is well-settled that in matters of condonation of delay a highly pedantic approach should be eschewed and a justice oriented approach should be adopted and a party should not be made to suffer on account of technicalities."

5.Countering the submissions made by the learned senior counsel for the petitioner, Mrs.Hema Muralikrishnan, learned senior standing counsel for the respondents submitted that the petitioner had not explained the reasons for the delay in a proper manner and therefore, the 1st respondent had rightly dismissed the petition. Further, the learned standing counsel submitted that in the absence of acceptable reasons given by the petitioner, the delay should not be condoned.

5.1.In support of her contentions, the learned standing counsel relied upon the following judgments:

(i)[1998] 101 Taxman 634 (Kerala) [A.P.Sivaraman Vs. Income Tax Officer] wherein a Division Bench of the Kerala High Court held as follows:

"...

6.We fully agree with the learned Single Judge that it was purely within the discretion of the Board to condone or not to condone the delay. In this case, it cannot be said that the Board acted arbitrarily, inasmuch the Board rejected the application for condonation of delay only after taking into

consideration the report called for from the Commissioner, Cochin, which were duly forwarded to the Chief Commissioner at Bangalore.”

(ii)[2014] 50 Taxmann.com 141 (Kerala) [Travancore Cements Employees Co-operative Bank Ltd. Vs. Commissioner of Income Tax, Kottayam] wherein the Kerala High Court held as follows:

“... ”

5.In the instant case, it cannot be said that the delay was not attributable to the petitioner Society. Though the assessee in the cited case and that herein are Co-operative Societies; the similarity ends there. The statutory audit to be carried out by the department was delayed; but the auditor has specifically noticed in the audit report that the delay was attributable to the Society. In fact there is further delay after receipt of the audit report which the petitioner seeks to balance the Chartered Accountant, who according to the petitioner has to conduct the audit under Section 44 AB of the Act.”

(iii)[2018] 91 Taxmann.com 241 (Delhi) [B.U.Bhandari Nandgude Patil Associates Vs. Central Board of Direct Taxes] wherein the Delhi High Court held that unless compelling and good reasons are shown and established for grant of extension of time, the extension cannot be claimed as a vested right on mere asking and on basis of vague assertions without proof.

6.On a careful consideration of the materials available on record, the submissions made by the learned senior counsel on either side and also the judgments relied upon by the learned counsel on either side, it could be seen that for the assessment year 2014-15, the petitioner Company had filed its Return Of Income, as required under Section 139 of the Act, on 07.01.2015, when the due date for filing of the Return Of Income, in case of assessee having specified international/domestic transactions, was 30.11.2014. There was a delay of 37 days in filing the Return Of Income for the relevant assessment year 2014-15. The petitioner contended that they sought the services of M/s.S.R.Batliboi & Associates, LLP, to conduct Audit of its Tax accounts and issue a report thereon in Form-3CB prescribed under the Income Tax Rules, 1963. The Chartered Accountant Firm had also agreed to carry out the assignment in terms of their Assignment Letter dated 08.09.2014. According to the petitioner, the Audit exercise had commenced on 15.09.2014 and the team members of M/s.S.R.Batliboi & Associates were deployed and the petitioner Company co-operated with the Audit Firm in providing with necessary details, which were called for from time to time. According to the petitioner, in full faith, the petitioner Company submitted the details called for by the Auditor in a

progressive manner. During the assessment year 2014-15, the petitioner Company transferred its Operating & Maintenance (O&M) business division on a going concern basis as a slump sale to its wholly owned subsidiary Company namely Renewable Energy Generation Pvt Ltd (now, renamed as REGEN Infrastructure and Services Pvt. Ltd.) for a consideration of Rs.310 crores. The said consideration was based upon two independent valuation exercises from M/s.TRC Corporate Consulting Pvt. Ltd and M/s.C.Ramaswamy & B.Srinivasan, Chartered Accountants. The Tax Auditors viz., M/s.S.R.Batliboi & Associates, Chartered Accountant had certain reservations in the valuation of aforesaid business transfer and wanted to issue a disclaimer in this regard in the Audit Report in Form-3CB prepared for the purpose of Tax Audit. This reservation was orally communicated to the petitioner by their Tax Auditors on the last day of November 2014. The petitioner made an attempt to explain their Auditors about the last date for filing return and the importance and consequences of filing the Tax Audit Report along with the return.

7.It is pertinent to note that without the Tax Audit Report under Section 44 AB, the Return Of Income cannot be filed and the same will not be accepted by the System as a correct return. According to the petitioner, the Auditors were delaying the process of audit completion without proper reasons inspite of the petitioner providing expert valuation report from other professional firm to satisfy their concerns. The petitioner, left with no other alternative, but to look for an alternative Auditor, after getting the NOC from M/s.S.R.Batliboi & Associates. Thereafter, the petitioner Company appointed M/s.CNGSN Associates, LLP, Chartered Accountant, Chennai as their Tax Auditor and requested them to prepare the Tax Audit Report. The assignment was accepted by M/s.CNGSN Associates on 29.11.2014, subject to NOC from the existing auditors viz., M/s.S.R.Batliboi & Associates. M/s.CNGSN Associates, by their letter dated 29.11.2014, also requested M/s.S.R.Batliboi & Associates to issue NOC. However, no such NOC was given by the erstwhile Auditors. After repeated requests made by the petitioner, M/s.S.R.Batliboi & Associates gave their written communication dated 15.12.2014 expressing their inability to carry out their audit and to issue a report.

8.It is pertinent to note that the petitioner cannot appoint an alternative Auditor without getting the written letter/NOC from the existing Auditor. Thereafter, after getting NOC from the erstwhile Auditor, the petitioner uploaded the Return Of Income along with the Tax Audit Report on 07.01.2015, hence, there was a delay of 37 days in filing the Return Of Income. By delaying the submission of the Return Of Income, the petitioner did not stand to benefit in any manner whatsoever.

9. When the petitioner had satisfactorily explained the reasons for the delay in filing the Return Of Income, the approach of the 1st respondent should be justice oriented so as to advance the cause of justice. The delay of 37 days in filing the Return Of Income should not defeat the claim of the petitioner. In the case of the petitioner failing to explain the reasons for the delay in a proper manner, in such circumstances, the delay should not be condoned. But, when the petitioner has satisfactorily explained the reasons for the delay of 37 days in filing the Return Of Income, the delay should be condoned.

10. As contended by the petitioner, the petitioner Company could not be blamed for the delay in carrying out its audit, as the same is beyond its control. Since there was some misunderstanding between the erstwhile Auditor and the petitioner, the Return Of Income could not be presented before the due date (i.e.) 30.11.2014. The petitioner has stated that even the NOC could not be obtained from the erstwhile Auditor immediately, hence, after obtaining NOC, they have engaged M/s.CNGSN Associates for filing the Return Of Income along with the Tax Audit Report. Thereafter, the petitioner had presented the Return Of Income along with the Report and uploaded the same on 07.01.2015. When once the authority has been conferred with discretion to condone the delay, the application seeking condonation of the delay of 37 days cannot be rejected for such reasons as are assigned by the 1st respondent. The 1st respondent should exercise its discretion in a proper manner.

11. The judgments relied upon by the learned senior counsel for the petitioner squarely applies to the present case. Though there is no dispute with regard to the ratio laid down in the judgments relied upon by the learned standing counsel for the respondents, since the facts and circumstances are different, the same are not applicable.

12. Since the petitioner has satisfactorily explained the reasons for the delay in a proper manner, I am of the considered view that the 1st respondent should have condoned the delay of 37 days in filing the Return Of Income along with the Audit Report.

13. In these circumstances, the impugned order passed by the 1st respondent dated 01.06.2016 is liable to be set aside. Accordingly, the same is set aside. The Writ Petition is allowed. No costs.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

va

To

1.The Chairperson,
Central Board of Direct Taxes,
Room No.143 E, North Block,
Department of Revenue (CBDT)/Ministry of Finance,
Government of India, New Delhi.

2.The Deputy Commissioner of Income Tax,
Corporate Circle - 5(1),
121, Nungambakkam High Road,
Chennai - 600 034.

+1 CC to Mr.R. Sivaraman, advocate sr 23585.

+1 CC to Mrs. Hema Muralikrishnan, advocate sr 23817.

W.P.No.24273 of 2016

RRK (28/03/2018)



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