IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2020

CORAM:

THE HON'BLE MR. JUSTICE R.MAHADEVAN

W.P.No.18087 of 2012

R.Vincent
Kingsley Construction (Madras)
6/18, Moorthy Avenue,
Laxmi Nagar Extension, Porur
Chennai- 600 116. ...Petitioner

Vs

1. The Secretary,
The Central Board of Direct Taxes
Department of Revenue
Ministry of Finance
Central Secretariat,
North Block, New Delhi.

2. The Commissioner of Income Tax -I,
Income Tax Department
2 V.P.Rathinasamy Nadar Road,
Bibikulam,
Madurai- 625 002.

3. The Additional Commissioner of Income Tax,
Tuticorin Range,
Income Tax Department,
Tuticorin.

4. The Income Tax Officer,
Ward I (2)
Income Tax Department,
Nagercoil. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling for the records of the petitioner on the file of the first respondent, to quash the impugned order dated 17.04.2012 in F.No.312/37/2012-OT in rejecting the plea for the condonation of delay in filing the return of income relating to the Assessment Year 2006-2007, consequently direct the first respondent to condone the delay in filing of the return of income for the Assessment Year 2006-07 to process the claim of refund.

For Petitioner : Mr.S.Sridhar

For Respondents: Mrs.Hema Muralikrishnan
Senior Standing Counsel

ORDER

According to the petitioner, for the assessment year 2006-07, he voluntarily filed return of income on 30.11.2009, claiming a refund of Rs.1,40,777/-. Since the said return of income was filed belatedly, the petitioner moved an application under section 119(2)(b) of the Income Tax Act, 1961 (hereinafter shortly referred to as 'Act') seeking to condone the delay in filing return of income as well as refund claim with respect to the assessment year in question, which was rejected by the second respondent on 28.04.2011. Feeling aggrieved, he filed a review application, which was dismissed by the second respondent, vide order dated 17.10.2011. However, a liberty was given to the petitioner to file appeal before the Central Board of Direct Taxes (CBDT), New Delhi. Accordingly, the petitioner went on appeal before the first respondent / CBDT, which was also dismissed, vide order dated 17.04.2012. Hence, the petitioner has preferred this writ petition to quash the said order and consequently, direct the first respondent to condone the delay in filing the return of income and process the refund claim.

2.The learned counsel for the petitioner submitted that the petitioner had been executing civil contract work under Tsunami Rehabilitation Programme during the assessment years 2006-07, 2007-08 and 2008-09 and due to inadvertent omission to collect the necessary TDS certificates from the NGO concerned, he was unable to file the return of income for the assessment year 2006-07 within the prescribed time. It is also submitted that due to ill-health of the petitioner, he could not undertake fresh contract work and his total income for the subsequent assessment years 2007-08 and 2008-09 declined to Rs.24,000/- and 16,000/- respectively. Thus, according to the learned counsel, the petitioner has shown sufficient cause for condoning the delay and the case of the petitioner is also of genuine hardship and merits consideration and hence, his claim for condonation of delay in filing the IT return may be allowed and the claim of refund may be considered favourably.

3.Per contra, the learned standing counsel for the Revenue submitted that the reasons assigned by the petitioner have been considered and the application for condoning the delay has been rightly rejected by the first respondent, vide the order impugned herein and hence, there is no merit in this writ petition.

4.This Court has given its anxious consideration to the arguments advanced by the learned counsel for the parties and perused the material available on record.

5.The factual matrix of the case as narrated above is not in dispute. The petitioner filed application under Section 119(2)(b) of the Act before the second respondent seeking condonation of delay in filing the return of income for the assessment year 2006-07 and requesting to allow the refund claim of Rs.1,40,777/-. Vide order dated 28.04.2011, the second respondent rejected the said application, stating that the petitioner being an assessee, is expected to be aware of the statutory requirements of filing the voluntary return u/s.139(1) or even within the extended period u/s.139(4) particularly when a refund is due to him and hence, the application for condonation of delay is not acceptable. The petitioner's further application seeking review of the said order, was also dismissed by the second respondent. Thereafter, in terms of the advise made by the second respondent, the petitioner preferred an appeal dated 27.02.2012 before the first respondent and the said appeal was dismissed, vide order dated 17.04.2012, which is impugned herein.

6.It is the contention of the learned counsel for the petitioner that Section 119(2)(b) of the Act specifically provides that the Board may, if it considers desirable or expedient so to do, for avoiding genuine hardship in any case or class of cases, authorise the authority to admit an application for refund after the expiry of the specified period; the powers have been delegated to the Board under section 119 of the Act with a view to tone down the rigour of the law and ensure fair enforcement of the provision; and this power is exercisable for the benefit of the assessee. The learned counsel further contended that due to inadvertent mistake to collect the necessary TDS certificates from the NGO named Sneha, the petitioner had not filed the return of income for the assessment year 2006-07 within the prescribed time. The learned counsel also contended that even though the petitioner has explained the delay and substantiated their hardship, the first respondent declined to condone the delay in exercise of its powers under Section 119(2)(b) of the Act.

7.On the other hand, the learned standing counsel made her submission supporting the order impugned herein.

8.Before deciding the issue involved herein, it is worth referring to Section 119(2)(b) of the Act, which reads as under:

> "Section 119(2)(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, authorize (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.It is also appropriate to quote the observation of the Kerala High Court in Pala Marketing Co-operative Society Ltd., v. Union of India and others [(2009) 311 ITR (Ker)], which reads as under:

> "Even though courts while considering application for condonation of delay under section 5 of the Limitation Act may be justified in considering the merits of the case and consequences to the party for non-consideration of the case on the merits, I do not think section 119(2)(b) is just an incorporation of section 5 of the Limitation Act. What is stated in section 119(2)(b) is that if the Board considers desirable or expedient for avoiding genuine hardship to the assessee, it should condone the delay. In other words, what the Board should consider is hardship to the party if delay is not condoned. The Board should condone the delay if failure to condone the delay causes genuine hardship to the assessee, no matter whether the delay in filing return is meticulously explained or not. Strangely the Board has stated in its order that it is not possible to investigate (scrutinise) the return of

income because the statutory time limit has already elapsed. I do not know on what basis this statement is made because even in a case where the claim of refund is made, the Assessing Officer has to examine the liability for income-tax of the petitioner and refund is made only if tax is not payable or the amount paid is in excess of the tax, interest, etc., payable. In other words, once the Board allows the application under section 119(2)(b) of the Act, the matter goes to the Assessing Officer for considering the assessee's claim for refund under section 237. Section 237 makes it clear that the Assessing Officer while considering application for refund should consider the amount of tax chargeable on the claimant under the Act and refund arises only if the payment is in excess of the tax payable under the Act. In other words, the Assessing Officer has powers of assessment under section 237 while considering an application for refund. Refund is payable only if it is in excess of tax and other amounts payable under the Act. In other words, an assessee who escapes assessment invites assessment if an application for refund is made under section 237."

10.In the case at hand, it is seen that the order dated 17.04.2012 passed by the first respondent, which is impugned herein, is a non-speaking one, which, for better appreciation, is extracted hereunder:

"I am directed to refer to your application dated 27th February, 2012 on the above mentioned, subject. After careful consideration of the same, the Board has declined to interfere in the matter."

The first respondent, being the appellate authority, while dismissing the application filed by the petitioner seeking to condone the delay in filing the return of income under Section 119(2)(b), ought to have given reasons for the same, but they failed to do so, which, in the opinion of this Court, suffers from the vice of non-application of mind. The reason is the heartbeat of every conclusion and the absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Hence, the order impugned herein is liable to be set aside.

11.However, the second respondent has passed a reasoned order on 28.04.2011, rejecting the petitioner's condone delay application in filing the return of income along with refund claim. While doing so, it was observed that the reason given by the petitioner for the delay in filing the return was inadvertent omission to collect necessary TDS certificates from the concerned NGO, whereas the TDS certificates were issued in the month of April, 2006; there was no explanation from the petitioner as to why the TDS certificates were not collected in time; and ill-health was a subsequent event for not taking up the contract work afresh and hence, the petition for condonation of delay was not acceptable. Challenging the same, the petitioner filed a review before the second respondent, before whom, he furnished explanation for not collecting the TDS certificates from the concerned NGO, that the TDS certificates sent by the NGO named Sneha were not delivered to the petitioner as he was handling Tsunami projects at various locations throughout the State and after completion of the same, he went to USA to help her daughter for delivery. Though the petitioner has explained the delay and substantiated their genuine hardship, the second respondent has not accepted the same and ultimately, dismissed the review application.

12.This Court is of the view that the second respondent ought to have considered the explanation given by the petitioner for the delay in filing the return along with refund claim, in the light of the facts and circumstances of the case and also the fact that the petitioner had not delayed the filing of the revised return due to negligence, carelessness or due to any other frivolous reason. In that view of the matter, the second respondent ought to have condoned the delay in filing the return rather than taking a very strict and pedantic view of the matter. After all, the procedures are meant only to discipline and regulate the conduct of assessee. However, strict application of procedure should not come in the grant of legitimate claim to an assessee.

13.It is obvious that there is some lapse on the part of the petitioner. That itself would not be a factor to turn out the plea for filing the return of income, when the explanation offered is acceptable and genuine hardship is established. It was with a fond hope of getting justice at the hands of the second respondent and thereafter, the first respondent, the petitioner preferred Section 119(2)(b) application seeking to condone the delay in filing the return of income along with refund claim. However, the same were dismissed on the ground of limitation, adopting highly pedantic approach, which cannot be countenanced by this Court, as it is trite law that rendering substantial justice shall be paramount consideration of the Courts as well as the Authorities rather than deciding on hyper-technicalities.

14.Thus, for the aforesaid reasons, the order dated 17.04.2012 passed by the first respondent is quashed. Consequently, the delay in filing the return of income by the petitioner relating to the assessment year 2006-07 is condoned. The respondent concerned is directed to process the return of income along with refund claim and pass appropriate orders, on merits and in accordance with law, after affording an opportunity of personal hearing to the petitioner within a period of four weeks from the date of receipt of a copy of this order.

15.This writ petition is allowed in the aforesaid terms. No costs.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

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To

1. The Secretary, Central Board of Direct Taxes
   Department of Revenue
   Ministry of Finance, Central Secretariat,
   North Block, New Delhi.

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   Income Tax Department
   2 V.P.Rathinasamy Nadar Road,
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Income Tax Department,
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+1cc to Mrs.Hema Muralikrishnan, Advocate SR.23282

W.P.No.18087 of 2012

BR(CO)
CB(31/07/2020)