OD-13

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income tax)
ORIGINAL SIDE

IA No.GA/1/2018 (OLD NO:GA/639/2018)
GA/2/2018 (OLD NO: GA/640/2018)
In
ITAT/65/2018

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL- 1
Vs.
BINANI INDUSTRIES LIMITED

BEFORE:
The Hon'ble JUSTICE T. S. SIVAGNANAM
AND
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA
Date : 23rd FEBRUARY, 2022
[*Via Video Conference]*

Appearance:
Mr. S.N. Dutta, Advocate
…for the appellant.

Mr. Madhu Agarwal, Advocate
Mr. Pranit Bag, Advocate
Mr. A.K. Dey, Advocate
…for the respondent.

The Court : We have heard Mr. S.N. Dutta, learned Standing Counsel for the appellant and Mr. Madhu Agarwal, learned Advocate duly assisted by Mr. Pranit Bag and Mr. A.K. Dey, Advocates for the respondent.

This application has been filed by the revenue for condoning the delay of 4357 days in filing the appeal. We have perused the affidavit in support of the condone delay petition wherein the dates and events have been set out in paragraph 2. The certified copy of the impugned order passed by the Tribunal was received by the department on 1.12.2005. The appeal should have been filed not later than 30.3.2006 to be within the period of limitation. It is only on 30.3.2006 the Director General of Income Tax (Investigation) recommended for filing an appeal against the impugned order. Thereafter steps were taken by the department and the file was forwarded to the Ministry of Law, Justice and Company Affairs on 3.4.2006 for drawing the Memorandum of Appeal and connected applications. On 5.4.2006 the Ministry of Law, Justice and Company affairs nominated an empanelled counsel for drawing the appeal and the applications. It is only on 19.01.2011 the learned Counsel returned the papers without drafting the Memorandum of Appeal, stay petition and the condone delay petition. It is stated that on 24.1.2011 the learned panel counsel had sent a letter explaining the reasons for not drafting the memorandum and petitions. It is stated that the letters written by the learned Counsel dated 19.1.2011 and 24.1.2011 are annexed to the application as annexure A. However, we find that there is no annexure. Thereafter the action taken has been mentioned and finally nominated counsel appears to have drafted the memorandum of appeal for filing the appeal and sent the same along with judicial folder to the Ministry of Law and Justice for their approval on 19.1.2012. It is stated that on 31.1.2012 the Ministry of Law, Justice and Company affairs after perusal of the draft sent the draft along with judicial folder to the Commissioner of Income Tax, Central – I for approval. It is only on 17th July 2017 the Principal

Commissioner of Income Tax, Central – I, Calcutta returned the approved drafts of the Memorandum of Appeal and the petition for condonation of delay. It has been stated that due to unfortunate circumstances, the judicial record was not traceable in respect of the case on hand and the appeal papers were prepared in the last month of the financial year and at the relevant period time barring work was pending. Further it is stated that at the relevant time the department was also in the process of shifting its office premises. Therefore, the department would state that there is no mala fide intention on the part of the staff and the reasons for the delay was bona fide. With these averments, the revenue seeks for condonation of delay of 4357 days. The respondent assessee has filed an affidavit-in-opposition, objecting to the condonation of delay. It is stated that there is no sufficient cause shown by the department for condonation of delay of more than twelve years. It is further stated that the delay between 27.10.2005 till 5.3.2018 has not been explained. It is further stated that the statutory time limit of 120 days for filing the appeal expired on 30.3.2006. The judicial folder was sent on 3.4.2006 to the Ministry of Law, Justice and Company affairs for preparing the draft of the appeal and for a period of four months no serious effort was taken by the department to get the appeal drafted and filed before this Court and the entire period was spent for shifting the judicial folder from one office to another for approvals. Further it is stated that for a period of more than five years from 5.4.2006 to 19.11.2011 i.e. 2054 days revenue did not make any enquiry about the status and the progress of the appeal to be drawn up by the Ministry of Law, Justice and Company affairs. Further the department miserably failed to ascertain the status and progress. Further it is submitted that according to the department on 24.1.2011 the Counsel nominated by the Ministry returned the papers and accordingly another learned Counsel was appointed to take over the matter. The revenue has not given any explanation for the delay of five years in returning the papers to the Ministry. Further it is stated that newly nominated Counsel has sent the draft along with judicial folder to the deponent/petitioner on 31.1.2012 and no effort appears to have been taken by the petitioner till such time to expedite the process of drafting and filing the appeal and for almost one year there was no effort taken. Further it is stated that the period from 31.1.2012 till 17.7.2017 i.e. 1994 days has not been explained. The judicial folder was sent by the Ministry of Law, Justice and Company affairs to the department on 31.1.2012. However, no action was taken by the department till 17.7.2017. Thus it is submitted that in absence of cogent reasons for the enormous delay, this Court may refuse to exercise discretion to condone the delay. The learned Counsel appearing for the respondent placed reliance on the decision of the Hon'ble Supreme Court in the case of *Postmaster General & Ors. Vs. Living Media India Limited & Anr. : 1992(3) SCC 563* and the decision of this Court in the case of *Commissioner of Income-tax. Kolkata V. Prakash Chandra Bhutoria [218 Taxman 32]* . Reliance was also placed on the decision of this Court in the case of *Commissioner of Income-tax v. Peerless General Finance & Investment Co. [216 Taxman 12 (Cal.) (Mag.)]* wherein the Court refused to condone the delay of 2197 days in filing the appeal by the department. Reliance was also placed on the decision of the High Court in Delhi in the case of *Commissioner of Income Tax V. Smt. Shirin Kamaljit Singh [115 Taxmann.com 242 (Del.)],* wherein the Court had observed that the department is taking a standard excuse for delay in filing the appeal about the change of standing counsel for the department and the failure by the earlier counsel to inform the department about the appeal lying in defect. Reliance was also placed on the decision of the Hon'ble Supreme Court in *University of Delhi V. Union of India [Civil Appeal Nos. 9488-9489 of 2019 arising out of SLP (Civil) Nos. 5581-5582 of 2019] rendered on 17th December, 2019,* wherein it has been held that the delay of 916 days on the part of the Government Authorities in filing the appeal was held to be not condonable. On the above submission, learned Counsel appearing for assessee prayed for rejecting the prayer for condonation of delay.

We have elaborately heard the learned Counsel for the parties and carefully perused the averment set out in the affidavit filed in support of the condone delay application giving certain reasons for condonation of delay. In the preceding paragraph while noting the fact we have taken note of the lack of explanation on the part of the department for not preferring the appeal within the time. The cumulative delay is more than twelve years. Though it can be stated that ordinarily a litigant does not stand to benefit by lodging an appeal late and refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold, we need to bear in mind the plight of the respondent when there is inordinate delay in preferring the appeal. Though it may not be required that every hour, every day, every week of the delay should be explained but the explanation offered for the delay should be reasonable and there should be sufficient cause for not being able to prefer the appeal within time. Each case has to be tested on its own facts. The length of delay at time is immaterial and even a meagre delay, would be refused to be condoned if it is established that for collateral purposes the appeal was presented belatedly. The case on hand unravels bureaucratic approach adopted by the department in handling the matter. The learned Counsel for the appellant would strenuously contend that substantial revenue is involved in the matter and, therefore, the Court should exercise discretion. The exercise of discretion has to be on reasonable basis and for us to do so, we have to examine the facts of each and every case. As pointed out earlier though the Ministry of Law, Justice and Company affairs had entrusted the matter to the learned panel counsel on 5.4.2006, the case papers were returned to the Ministry only on 19.1.2011 after more than five years. Though certain letters said to have been written by the erstwhile panel counsel have been referred to in the affidavit filed by the department, the copies are not being enclosed along with the affidavit. In any event, those letters cannot in any manner advance the case of the department as it is the department who should have followed up the matter and ascertained the progress of the matter and they cannot shift the blame on the panel counsel who had initially been nominated to draft the Memorandum of appeal. Even thereafter there has been three other panel counsel who have been nominated and Mr. S.N. Dutta, is stated to be the fourth learned panel counsel, who has been now nominated in the matter. We fail to understand as to why Ministry of

Law, Justice and Company affairs has complicated the entire process rather dealt with the matter in a very casual manner. It is not clear as to which of the empanelled counsel had drafted the Memorandum of Appeal and the affidavits which were given to the Ministry as the learned standing Counsel appearing in the matter before us today has not drafted the Memorandum of Appeal and affidavits. The draft Memorandum of Appeal and affidavits were submitted to the ministry for approval on 19.01.2012. The Ministry of law, Justice and Company affairs after perusal of the draft sent the draft to the Commissioner of Income Tax, Central – I for their approval. It is only on 17.07.2017 the Principal Commissioner of Income Tax, Central – I, Kolkata had returned the approved drafts. The delay between 31.01.2012 and 17.07.2017 remain unexplained. Thus we are fully satisfied that this is not a case where any indulgence can be shown nor any discretion can be exercised by us.

For all the above reasons, the application for condonation of delay stands dismissed and consequently the appeal stands rejected.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.chandra/GH.