

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3620 OF 2021

R. K. Madhani Prakash Engineers J V)
having its registered office at No.127-136)
Madhani Estate, 542, Senapati Bapat Marg)
Mumbai, Maharashtra 400 028)Petitioner

V/s.

1 Union of India (through the Secretary))
Ministry of Finance, Department of Revenue)
North Block, New Delhi 110 001)

2 The Director (OT & WT) of Central Board)
of Direct Taxes (OT & WT), CBDT)
5th floor, Jeewan Vhiar Building,)
Sansad Marg, New Delhi 110 001)

3 The Commissioner of Income Tax-22,)
Piramal Chambers, Lalbaug, Mumbai-12)

4 The Commissioner of Income Tax (OSD))
OT & WT), Room No.13, 5th floor,)
Jeewan Vhiar Building, Sansad Marg,)
New Delhi 110 001)

5 The Deputy Secretary)
(OT & WT), CBDT)
5th floor, Jeewan Vhiar Building,)
Sansad Marg, New Delhi 110 001) ...Respondents

Mr. Bharat Raichandani i/b UBR Legal Advocates for Petitioner.
Mr. Akhileshwar Sharma a/w Ms Shilpa Goel for Respondent.

**CORAM : K.R. SHRIRAM &
FIRDOSH. P. POONIWALLA, JJ**
DATED : 18th JULY 2023

(ORAL JUDGMENT PER K. R. SHRIRAM J.) :

1 Petitioner is a joint venture between M/s R. K. Madhani & Co. and
M/s Prakash Engineers & Infraprojects Private Limited. Petitioner was

engaged in executing the projects launched by the Municipal Corporation of Greater Mumbai (MCGM).

2 During the assessment year 2016-2017, petitioner paid tax amounting to Rs.91,38,083/- which is also reflected in Form 26AS. Petitioner filed its return of income belatedly on 30th November 2016 under Section 139(4) of the Income Tax Act 1961 (the Act). The due date for filing the income tax return was 30th September 2016. The time to file income tax return had been extended upto 17th October 2016. Hence there was delay of 43 days in filing the return of income.

3 By a letter dated 19th July 2019, petitioner requested respondent no.3, Commissioner of Income Tax-22, to condone the delay in filing the return of income for A.Y.-2016-2017. Documents were submitted in support of their contention. Petitioner explained to respondent no.3 that the delay was due to the concerned person who was entrusted with the work of filing of return being indisposed due to medical reasons. There was also certain other reasons. As there was no response, petitioner by a letter dated 14th August 2019 once again addressed communication to respondent no.3 informing that the return of income filed by petitioner was being shown as invalid since petitioner inadvertently filed the Return of Income as AOP instead of firm. Petitioner requested for rectifying the mistake and filed revised return on 13th August 2019. Respondent no.4 by a letter dated 11th February 2020 sought for various details to which petitioner responded vide letter dated 12th March 2020. Petitioner also requested the delay be condoned and

sought refund of Rs.82,13,340/-. Petitioner alongwith letter also submitted income tax return under Section 119(2)(b) of the Act and also sought condonation of delay in filing the return. Respondent no.5 by letter dated 28th May 2020 sought for certain clarifications on petitioner's application which was provided.

4 By letter dated 26th June 2020, respondent no.5 informed petitioner to submit written submissions on or before 17th September 2020 and if, petitioner wished to be heard in person, an opportunity will be provided to petitioner after the lock down measures due to Covid-19 pandemic situation came to an end. Petitioner by its letter dated 8th July 2020 submitted their written submission and once again prayed for condonation of delay.

5 Petitioner thereafter, received the impugned order dated 24th December 2020 rejecting petitioner's request for condonation of delay.

6 Before we proceed further, we should note that pursuant to Circular F No.312/22/2015-OT dated 9th June 2015 issued by CBDT, application / claim for amount exceeding Rs. 50 lakhs shall be considered by the Board. We say this because the last sentence in the impugned order dated 24th December 2020 reads; " This order is passed with the approval of the Member (TPS & Systems), CBDT." There is nothing to indicate that Board has considered petitioner's application. We also find that copy of the impugned order dated 24th December 2020 is sent to, (a) the Principal Chief Commissioner of Income Tax, Mumbai, (b) Principal Commissioner of Income Tax-21, Mumbai, (c) Director of Income Tax, Centralized Processing

Cell, Bengaluru, (d) the applicant and (e) the Guard File but it is not sent to the Member on whose approval the said order is supposed to have been passed. In our view, this means the Member has not passed the order but has been passed by the Director. On this ground alone, this order has to be quashed and set aside.

7 Further in paragraph 6 of the impugned order it is stated that the field authorities at Mumbai have also stated that the reasons attributable to the delay in filing of the ROI to one of the partners being abroad was not supported by any evidence. It is unacceptable. Principles of natural justice would require petitioner being provided the statement submitted by the field authorities at Mumbai so that petitioner could have effectively responded.

Moreover, it is stated that the applicant in its petition has stated that the partner was held up abroad due to unavoidable circumstances, whereas this letter stated that the partners were all available in India but the key person, who was entrusted by the joint venture partners to advise on the filing of ROI was out of country. These are issues which certainly petitioner could have been called upon to appear personally or through video conferencing to explain, which has not been done.

8 Further it is recorded in the impugned order that petitioner has failed in proving the genuine hardship. In this regard, we would refer to the judgment of a Division Bench of this court in the case of *Sitaldas K.*

Motwani Vs. Director General of Income Tax (International Taxation) & Ors¹, where the court has discussed the phrase “genuine hardship” used in Section 119(2)(b) of the Act. The court has held that the phrase “genuine hardship” should be construed liberally particularly when the legislature had conferred the power to condone the delay to enable the authorities to do substantive justice to the parties by disposing the matter on merits. While considering this aspect of genuine hardship, the authorities are expected to bear in mind that ordinarily applicant applying for condonation of delay does not stand to benefit by lodging its claim late. More so, in the case at hand where applicant was seeking refund of a large amount of Rs.82,13,340/-. Refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. The authorities fail to understand that when the delay is condoned, the highest that can happen is that the cause would be decided on merits after hearing the parties. In our view, the approach of the authority should be justice oriented so as to advance cause of justice. If refund is legitimately due to applicant, mere delay should not defeat the claim for refund.

Paragraphs 13 to 16 of *Sitaldas K. Motwani* (Supra) read as under:

13. Having heard both the parties, we must observe that while considering the genuine hardship, respondent No. 1 was not expected to consider a solitary ground as to whether the petitioner was prevented by any substantial cause from filing return within due time. Other factors detailed hereinbelow ought to have been taken into account.

1. 2009 SCC OnLine Bom 2195

14. *The Apex Court, in the case of B.M. Malani v. CIT and Anr. MANU/SC/4268/2008 : (2008) 10 SCC 617, has explained the term "genuine" in following words:*

16. *The term "genuine" as per the New Collins concise English Dictionary is defined as under:*

'Genuine' means not fake or counterfeit, real, not pretending (not bogus or merely a ruse).

18. *The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well known principle, namely a person cannot take advantage of his own wrong, may also have to be borne in mind.*

The Gujarat High Court in the case of Gujarat Electric Co. Ltd. V. CIT MANU/G1/0407/2001: 255 ITR 396, was pleased to hold as under:

The Board was not justified in rejecting the claim for refund on the ground that a case of genuine hardship was not made out by the petitioner and delay in claiming the relief was not satisfactorily explained, more particularly when the returns could not be filed in time due to the ill health of the officer was looking after the taxation matters of the petitioner.

The Madras High Court in the case of Seshammal (R) v. ITO MANU/TN/0879/1998: (1999) 237 ITR 185 (Madras), was pleased to observe as under:

This is hardly the manner in which the State is expected to deal with the citizens, who in their anxiety to comply with all the requirements of the Act pay monies as advance tax to the State, even though the monies were not actually required to be paid by them and thereafter seek refund of the monies so paid by mistake after the proceedings under the Act are dropped by the plea of limitation in such a situation to avoid return of the amounts. Section 119(2)(b) of the Act vests ample power in the Board to render justice in such a situation. The Board has acted arbitrarily in rejecting the petitioner's request for refund.

15. *The phrase "genuine hardship" used in Section 119(2)(b) should have been construed liberally even when the petitioner has complied with all the conditions mentioned in Circular dated 12th October, 1993. The Legislature has conferred the power to condone delay to enable the authorities to do substantive justice to the parties by disposing of the matters on merit. The expression "genuine" has received a liberal meaning in view of the law laid down by the Apex Court referred to hereinabove and while considering this aspect, the authorities are expected to bare in mind that ordinarily the applicant, applying for condonation of delay does not stand to benefit by lodging its claim late. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. When substantial justice and technical*

considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. 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.

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 face of it the person applying for 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."

(emphasis supplied)

9 Having said so, we are satisfied that Board has not considered the prayer for condonation of delay in its proper perspective. It needs to be considered afresh.

10 Therefore, we hereby quash and set aside the order dated 24th December 2020 impugned in this petition and remit the matter back to the Board for denovo consideration. We direct the Board to decide the question of hardship as well as that of correctness and genuineness of the refund claim in the light of the observations made above. All rights and contentions of the parties are kept open.

11 We direct the Board / Member of the Board or members of the Board who would consider this application, to also grant a personal hearing to

petitioner, and pass the order and sign the order. The order cannot be passed by anyone else even with the approval of the Board.

12 Petition disposed.

(FIRDOSH P POONIWALLA, J.)

(K.R. SHRIRAM, J.)