

(1998) 10 DEL CK 0088

In the Delhi High Court

Case No : C.M. No. 2599 of 1997 in I.T.C. No. 39 of 1996

Prem Chand Bansal and Sons

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 09-10-1998

Acts Referred:

Income Tax Act, 1961 — Section 256, 256(1), 256(2), 43B
Limitation Act, 1963 — Section 29, 29(2), 5

Citation : (1998) 6 AD 623 : (1999) 156 CTR 252 : (1998) 76 DLT 193 : (1999) 237 ITR 65 : (1999) 122 PLR 2

Hon'ble Judges : R.C. Lahoti, J;C.K. Mahajan, J

Bench : Division Bench

Advocate : J.R. Goel, for the Appellant; R.D. Jolly and Premlata Bansal, for the Respondent

Judgement

R.C. Lahoti, J.—An application u/s 5 of the Limitation Act, 1963, seeking condensation of delay in filing a petition u/s 256(2) of the Income Tax Act, 1961, is the subject-matter of the present order.

2. The facts in brief.

3. Before the Income Tax Appellate Tribunal, the subject-matter of controversy, inter alia, was disallowance of Rs. 2,15,453 claimed by the assessed u/s 43B of the Income Tax Act, 1961, on account of payment of sales tax made by the assessed within the time prescribed by the H. P. Sales Tax Act, The appeal having been decided adversely to the petitioner-assessee, the assessed filed an application u/s 256(1) of the Income Tax Act, 1961, seeking reference to the High Court of the question of law arising from the order of the Tribunal. The application was rejected on May 30, 1995, by the Tribunal forming an opinion that the answer to the question was covered by a decision of the Delhi High Court, which is the jurisdictional High Court in Escorts Ltd. Vs. Union of India and others, . Copy of the order was communicated to the petitioner on June 28, 1995.

4. The petitioner was advised not to pursue the matter further inasmuch as it would not yield any result in view of the decision of the Delhi High Court being adverse to the assessee. However, then came the judgment of the Supreme Court in *Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi*, wherein the decision of the Delhi High Court in *Escorts Ltd. Vs. Union of India and others*, was reversed. The judgment of the Supreme Court was delivered on March 10, 1997. The petitioner became aware of the decision in April, 1997, when the decision was reported in law reports. The petitioner was advised to file the petition u/s 256(2) before the High Court. However, Shri J. R. Goel, counsel for the petitioner, who was handling the case got busy in the parliamentary elections wherein the brother of counsel was himself a candidate. A period of about 25 days was lost on this account. On May 24, 1997, the petition u/s 256(2) of the Income Tax Act accompanied by an application u/s 5 of the Limitation Act setting out the above said facts has been filed.

5. The condensation of delay in filing the application is thus sought for on two grounds ; partly, the change in the law brought about by the decision of the Supreme Court without which it would have been futile for the petitioner to have moved the High Court u/s 256(2) of the Income Tax Act ; and partly on account of events attributable to the personal inability of counsel for the petitioner who was handling the brief.

6. The prayer for condensation of delay has been opposed vehemently on behalf of the Revenue. Learned senior standing counsel for the Revenue has submitted that Section 5 of the Limitation Act, 1963, is not applicable to an application u/s 256(2) of the Income Tax Act because the limitation for filing the application is provided not by the Limitation Act but by the Income Tax Act itself. It has also submitted that change in the view of the law cannot be a ground for condoning the delay in filing an application. In other words, change in the view of law does not amount to "sufficient cause" within the meaning of Section 5 of the Limitation Act.

7. The first question for consideration is whether the applicability of Section 5 of the Limitation Act, 1963, is at all attracted. It is true that the period of limitation for filing an application u/s 256(2) of the Income Tax Act is provided in Section 256 itself and not by the Schedule appended to the Limitation Act. Here, the change in law brought by the introduction of the Limitation Act, 1963, over its predecessor enactment assumes significance. Under the Limitation Act, 1908, Section 5 could not be applied to a period of limitation prescribed by special or local law unless its applicability was specifically attracted. u/s 29(2) of the Limitation Act, 1963, Section 5 of the Limitation Act would apply to the periods of limitation prescribed by any special or local law unless such applicability is expressly excluded. It is not disputed that the applicability of the Limitation Act Section 5 has not been excluded by Section 256 of the Income Tax Act. This controversy stands resolved by the Supreme Court in *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker*, . Their Lordships have held (headnote) :

"Section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.

There is no express exclusion anywhere in the Rent Act taking out the applicability of Section 5 of the Limitation Act to appeals filed before appellate authority u/s 18 of the Act. Consequently all the legal requirements for applicability of Section 5 of the Limitation Act to such appeals in the light of Section 29(2) of the Limitation Act can be said to have been satisfied,"

8. For the foregoing reasons, we are of the opinion that Section 5 of the Limitation Act, 1963, applies to petitions u/s 256(2) of the Income-tax Act, 1961. Such is the view taken by a Division Bench of the Delhi High Court in CIT v. Taylor Instrument Co. (India) Ltd. [1992] 64 Taxman 6.

9. The second question is whether change in the view of the law can be a sufficient cause for condoning the delay in preferring a petition within the meaning of Section 5 of the Limitation Act.

10. Learned counsel for the petitioner-assessee has brought to our notice two Full Bench decisions. In Bhagwan Swarup Vs. Municipal Board, Ujhani and Others, and in The State of Bihar Vs. Md. Ismail and Others, , it has been held that delay in filing any appeal due to conflicting decisions misleading the parties in filing an appeal is a good ground for condoning the delay.

11. In the matter of pursuing a legal battle based purely on legal issues the litigants are generally advised by lawyers of their confidence and their opinion is accepted more or less conclusive in determining or guiding their course of action. In Mata Din Vs. A. Narayanan, , their Lordships of the Supreme Court have held that a delay occasioned by mistaken advice of counsel may be accepted by the court as a justification in extending time unless the error of counsel was tainted by any mala fide motive though the mistake of counsel cannot be treated as sufficient ground to condone delay by way of a rule of universal application. It is all a question of determining the bona fides of the litigant. We are of the opinion that decision shall have to be taken in the facts of each individual case whether such circumstance constitutes a sufficient cause for condoning the delay within the meaning of Section 5 of the Limitation Act.

12. In the case at hand the decision was given by the Tribunal rejecting the petitioner's application u/s 256(1) of the Income Tax Act on May 30, 1995, forming an opinion that the issue being governed by an available decision of the jurisdictional High Court, no referable question of law arose from its appellate order. So long as the decision of the Delhi High Court in Escorts Ltd. Vs. Union of India and others, held the field, it would have served no useful purpose in pursuing the matter further. Rather it would have amounted to an attempt at striking the head against the wall. Shortly thereafter the law was settled by an authoritative pronouncement of the Supreme Court. Promptly the matter was entrusted to counsel for moving the High Court by an appropriate application u/s

256(2) of the Income Tax Act. A delay of about 25 days was occasioned for factors attributable to personal inability of counsel for which the litigant cannot be blamed. Factors like gross negligence, contumacy or misconduct cannot be attributed either to the litigant or to counsel.

13. In *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, , their Lordships of the Supreme Court have held that a justice oriented approach has to be adopted while dealing with an application u/s 5 of the Limitation Act and in the name of "every day"s delay must be explained" a rigid and pedantic approach cannot be adopted. The court should be on its guard to see that refusal to condone the delay may result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated.

14. Having reviewed several decided cases from the Supreme Court, this court has held in *Rakesh Kumar Jain Vs. Devender Singh Mehta and Another*, :

"While dealing with applications seeking condensation of delay u/s 5 of the Limitation Act or for setting aside the abatement under rule 9 of Order 22, of the Civil Procedure Code, the approach has to be liberal and judicious guided by the paramount consideration of not depriving a litigant ordinarily of adjudication of rights on merits. Hyper-technical, too strict, and pedantic approach as may cause injustice has to be avoided."

15. In *Ravindra Jain Vs. Natraj Albums Industries (Pvt.) Ltd.*, , a Division Bench of this court has observed :

"A litigant fighting his case with diligence would not ordinarily allow the litigation to be lost by deliberately defaulting in taking steps requisite for keeping the litigation alive so as to secure adjudication of the lis on merits."

16. In the case at hand, it cannot be held that the petitioner-assessee had abandoned his legal pursuit and submitted to the judgment of the Tribunal by unreasonable delay either preceding or following the pronouncement of the Supreme Court. We are, Therefore, of the opinion that sufficient cause within the meaning of Section 5 of the Limitation Act is made out for condoning the delay in filing the petition u/s 256(2) of the Income Tax Act.

17. The application is, Therefore, allowed. The delay in filing the petition u/s 256(2) of the Income Tax Act, 1961, is condoned. It shall be treated to have been filed within the prescribed period of limitation.