

(2015) 04 KAR CK 0339

In the Karnataka High Court

Case No : Writ Petition No. 14825/2014 (T - IT)

Unique Shelters Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Income Tax Act, 1961 — Section 10A, 10B, 10BA, 119, 119(2)(b)
Motor Vehicles Act, 1988 — Section 2

Citation : (2015) 04 KAR CK 0339

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Sriranga S., for the Appellant; K.V. Aravind and E.I. Sanmathi, Advocates for the Respondent

Judgement

Aravind Kumar, J.—Heard Sri S. Sriranga, learned counsel appearing for petitioner and Sri E.I. Sanmathi, learned counsel appearing for respondents. Perused the case papers. By consent of learned Advocates appearing for parties, matter is taken up for final disposal.

2. Petitioner who is an assessee under Income Tax Act, 1961 (hereinafter referred to as "the Act" for short) is carrying on the business of real estate, property developers and builders and as such, entered into a Joint Development Agreement along with Shriram Properties Pvt. Ltd. by a Joint Development Agreement dated 18.03.2004. For the assessment year 2009-10 return of income came to be filed on 30.03.2011. Said return of income not having been filed within prescribed time namely on or before 30.09.2009, benefit of deduction claimed under Section 80IB was rejected by Assessing Officer by interpreting Section 80AC of the Act and opining that Section 139(1) alone is applicable and Sub-Section (4) of Section 139 of the Act is not attracted to the facts and circumstances of case and as such, return of income having been filed belatedly petitioner is not entitled to claim deduction under Section 80IB of the Act.

3. In fact, petitioner had approached this Court in Writ Petition No. 10798/2012 c/

w Writ Petition Nos. 46400-46858/2012 calling in question the vires of Section 80AC of the Act and the assessment order framed by fourth respondent. Coordinate Bench of this Court having noticed rival contentions raised by parties and particularly submission made by learned standing counsel appearing for respondent - Revenue, disposed of the matter by order dated 31.07.2013, Annexure-L, whereunder petitioner who directed to file necessary applications enclosing all material information and records before Central Board of Direct Taxes (hereinafter referred to as "CBDT" for short) for a decision being rendered on condonation of delay in filing the returns and direction also came to be issued to CBDT to pass orders on said application in accordance with law. Pursuant to same, petitioner filed an application, Annexure-M, before CBDT under 119(2)(b) (c) of the Act, seeking for condonation of delay in filing the return of income for assessment year 2009-10. CBDT after examining the said application on merits by affording an opportunity of personal hearing to the petitioner, arrived at a conclusion that when specific provision is available under the Act namely Section 119(2)(c) petitioner cannot be permitted to seek condonation of delay under Section 119(2)(b) and accordingly, rejected the said contention. While examining the claim of petitioner for considering its application for condoning delay under Section 119(2)(c) of the Act it came to be noticed by CBDT on facts that petitioner/assessee had all the relevant material available even before date of filing of return of income itself and petitioner had nine (9) months time from the date of issue of building completion certificate by Bruhat Bengaluru Mahanagara Palike (for short "BBMP"), which was on 30.12.2008 and as such, assessee's contention that for obtaining the report from the auditors in Form No. 10CCB was time consuming was not acceptable and assessee's contention that same was obtained on 25.03.2011 and immediately thereafter return of income filed on 30.03.2011 as the cause for delay was not accepted by CBDT by its order dated 28.01.2014, Annexure-S. Specific reasons assigned by CBDT for rejecting the application for condonation of delay are as under:

"7.1 In the instant case, the assessee has contended that the delay has been due to delay in obtaining details such as the constructed area of building and area of flat etc. from the co-developer. It has been further contended before the field officials that in order to prepare the report under Rule 19BBB(1) and (2), "particulars such as the constructed plinth area of the building, are of each flat after construction of the same can be given. This exercise is time consuming, the audit report in Form 10CCB was given by auditors on 25.03.2011". It has however been noted that the statutory audit report as per company law was obtained on 2.9.2009 and tax audit report u/s. 44AB on 30.09.2009. Since the books were statutorily audited twice, the books were complete and all documents were available with the assessee.

7.2 Further, the Bruhat Bangalore Mahanagara Palike (BBMP), Bangalore had issued the Building Completion Certificate as early as 30.12.2008. the assessee had enough time of 9 months from the date of issue (30.12.2008) of the Building Completion Certificate to the due dated (30.09.2009) of filing the return of

income, to take measurement of flats constructed against the assessee's contention to have taken 27 months just for taking measurement which is unacceptable. Thus, the assessee has failed to submit any convincing argument show that the cause of delay in filing return of income was due to circumstances beyond the control of the assessee."

Being aggrieved by this order petitioner is before this Court.

4. It is the contention of Sri S. Sriranga, learned counsel appearing for petitioner that while considering an application for delay, Authorities will have to be liberal, inasmuch as, assessee would not stand to benefit by filing the returns belatedly. He would also contend that in the instant case deduction which was claimed by petitioner/assessee under Section 80IB, has not been allowed by Assessing Officer on the ground that return was filed belatedly i.e., beyond prescribed period (30.09.2009) and draws the attention of Court to Section 80AC of the Act, which indicates that deduction is impermissible if return of income for the assessment year is not filed before the due date as prescribed under Sub-Section (1) of Section 139 of the Act and elaborates his submission by contending that when Sub-Section (4) of Section 139 of the Act provides for filing return of income at any time before the expiry of one (1) year from the end of relevant assessment year or before the completion of assessment, whichever is earlier, said provision has to be read as part and parcel of Sub-Section (1) of Section 139 or in the alternative, it has to be read as proviso to Section 139(1) of the Act as held by the Full Bench of this Court in the case of Kareemsons (P.) Ltd. Vs. Commissioner of Income Tax .

5. He would also contend that non filing of return of income as prescribed under Section 139(1) of the Act was due to reasons beyond the control of petitioner as explained in detail in the application namely, report of auditor under Section 10CCB was not available and when return of income is filed claiming deduction under Section 80IB of the Act, such return has to be accompanied by a report of the auditor issued under Section 10CCB and being mandatory as contemplated under Rule 18BBB of Income Tax Rules, 1962 (for short "Rules") petitioner had to await receipt of said reports and immediately on receiving said reports from its auditors on 25.03.2011, return of income was filed on 30.03.2011 and as such, cause for delay in filing return of income being bona fide, same ought to have been condoned by CBDT by reading down the Provision of Section 139(4) into Section 139(1) along with Section 80AC or in the alternate, Board ought to have accepted the reasons assigned by petitioner/assessee for condonation of delay. Hence, he would contend that CBDT under Section 119(2)(b) and (c) of the Act ought to have condoned the delay in filing the return of income. On these grounds, he prays for writ petition being allowed and impugned order being set aside.

6. Per contra, Sri E.I. Sanmathi, learned standing counsel appearing for Revenue would support the impugned order by contending that when Section 80AC indicates that Section 139(1) alone is applicable, reading of Section 139(4) into

Section 80AC is impermissible. He would also draw the attention of Court to Section 10A and 10B of the Act to contend that Special Provisions which provides deduction of certain income under those provisions would also clearly indicate that such deduction would not be allowable to an assessee if such return of income is not filed on or before the due date as specified under Sub-Section (1) of Section 139 of the Act and as such, he contends that neither Sub-Section (4) of Section 139 can be held as applicable to return of income filed by an assessee claiming deduction under Section 80IA, 80IAB, 80IB, 80IC, 80ID or Section 80IE or Section 139(4) cannot be read as deemed to have been imbedded in Section 80AC.

7. He would further contend that when a specific provision is available to an assessee to claim condonation of delay, petitioner cannot be heard to contend that application for condonation of delay ought to have been considered by the Board under Section 119(2)(b) of the Act, inasmuch as, Chapter IV and VIA of the Act finds a place in Clause (c) of Sub-Section (2) of Section 119 of the Act and as such, even in the previous round of litigation a submission had been made that in the event of assessee seeking for condonation of delay in filing the return of income, such assessee has to approach the Board/CBDT either under Section 119(2)(b) or under Section 119(2)(c) and there was no concession made that application is to be made only under Section 119(2)(b) and dehors the submission made by the panel counsel before this Court in the previous round of litigation, Board has also examined the issue during the course of personal hearing afforded to petitioner/assessee and on facts it has been clearly held as to how the petitioner's application under Section 119(2)(b) is not maintainable and it requires to be considered only under Section 119(2)(c) on the ground that when there is a specific provision available under the Act, same has to yield to the general provision. Hence, he contends that there is no merit in the contention raised by petitioner that Section 119(2)(b) is attracted to the facts of present case.

8. On facts he would contend that delay having not been properly explained by petitioner and when the Act clearly specifies the period within which a return of income has to be filed and deduction or exemption provision have to be strictly followed and as such, Board having found that even otherwise on merits petitioner had not made out a case for condoning the delay said application was rightly rejected. He submits that there is no infirmity in the order passed by CBDT and as such, he prays for dismissal of the Writ Petition.

9. Having heard the learned Advocates appearing for parties and on perusal of case papers it requires to be noticed that petitioner/assessee in the instant case for assessment year 2010-11 had filed the return of income on 30.03.2011 whereunder deduction under Section 80IB was claimed. Fourth Respondent Assessing Officer by order dated 26.12.2011 rejected the claim for deduction on the ground that return of income was filed on 30.03.2011 and it was belated and not filed within the prescribed time limit namely, as prescribed under Section

80AC i.e., on or before 30.09.2009.

10. While construing fiscal statute and determining the liability of a subject to tax there has to be strict interpretation. It is not the function of court to search for the loop holes in the Section or to add words into Section or subtract the words into Section while interpreting fiscal statute. The true nature of provision has to be understood from the very provision itself without any addition or deletion. The Hon"ble Apex Court in the case of Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. and Others, AIR 1989 SC 611 : (1988) 4 JT 154 : (1988) 2 SCALE 1181 : (1989) 1 SCC 44 : (1988) 3 SCR 380 Supp has observed as under:

"6. It has to be borne in mind that this Act with which we are concerned is as Act imposing liability for cess The Act is fiscal in nature. The Act must, therefore, be strictly construed in order to find out whether a liability is fastened on a particular industry. The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to its natural construction of words. See the observations in *Re Nicklethwait*, (1885) 11 Ex. 452 at p. 456. Also see the observations in *Tenant v. Smith* (1892) Apex Court 150 and Lord Halsbury's observations at page 153. See also the observations of Lord Simonds in *St. Aubyn v. Att. Gen.* (1951) 2 All ER 473 at p. 485. Justice Rowlatt of England said a long time ago, that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used. See the observations in *Cape Brandy Syndicate v. IRC*, (1921-1 KB 64 at p. 71) . This Court has also reiterated the same view in *Gursahai Saigal Vs. Commissioner of Income Tax, Punjab*, AIR 1963 SC 1062 : (1963) 1 ITR 48 : (1963) 3 SCR 893 , *Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar*, AIR 1965 SC 1216 : (1965) 56 ITR 67 : (1965) 1 SCR 815 , *Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal*, AIR 1976 SC 1935(1) : AIR 1976 SC 1935 : (1976) 105 ITR 92 : (1977) SCC 90 : (1976) 4 SCC 643 .

7. The question as to what is covered must be found out from the language, according to its natural meaning fairly and squarely read. See the observations in *IRC v. Duke of Westminster*, 1936 AC 1 at p. 24 , and of this Court in *A.V. Fernandez Vs. The State of Kerala*, AIR 1957 SC 657 : (1957) 1 SCR 837 : (1957) 8 STC 561 . *The Martand Dairy and Farm Vs. The Union of India (UOI) and Others*, AIR 1975 SC 1492 : (1975) 4 SCC 313 : (1975) SCR 265 Supp : (1975) 35 STC 629 : (1975) 7 UJ 431 has observed that taxing consideration may stem from administrative experience and other factors of life and not artistic visualization or neat logic and so the literal, though pedestrian, interpretation must prevail."

11. Nothing can be read into a provision in a fiscal statute nor implied meaning can be searched to ascertain the intendment of legislature. Only plain language implied in the provision is to be noticed and applied. Keeping these principles in

mind when facts on hand are examined it would indicate that petitioner by virtue of a Joint Development Agreement entered into with Shriram Properties Pvt. Ltd. on 18.03.2004 contending that it is qualified to claim deduction under Section 80IB of the Act particularly Sub-Section (10) of Section 80IB on the ground that it is an undertaking involved in building a housing project approved by the local authority, sought deduction of 100% profits derived in the previous year relevant to the assessment year earned from such housing project. Said return of income was filed on 30.03.2011. The embargo placed under the Act to disallow or to disallow the deduction can be noticed from Section 80AC. It reads as under:

"80AC. Wherein computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or Section 80-IAB or section 80-IB or section 80-IC [or section 80-ID or section 80-IE], no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.]"

12. A plain reading of above provision would clearly indicate that deduction claimed under Section 80IA would not be allowed to an assessee if return of income for such assessment year is not filed on or before the due dates as specified under Sub-Section (1) of Section 139 of the Act. Section 139(1) of the Act reads as under:

"139. [(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

Provided that a person, not furnishing return under this sub-section and residing in such area as may be specified by the Board in this behalf by a notification in the Official Gazette, and who at any time during the previous year fulfils any one of the following conditions, namely:-

(i) is in occupation of an immovable property exceeding a specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified by the Board in this behalf; or

(ii) is the owner or the lessees of a motor vehicle other than a two-wheeled motor vehicle, whether having any detachable side car having extra wheel attached to such two-wheeled motor vehicle or not; or

(iii) is a subscriber to a telephone; or

(iv) has incurred expenditure for himself or any other person on travel to any foreign country; or

(v) is the holder of the credit card, not being an "add-on" card, issued by any bank or institution; or

(vi) is a member of a club where entrance fee charged is twenty-five thousand rupees or more,

shall furnish a return, of his income during the previous year, on or before the due date in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

(a) being a company [or a firm]; or

(b) being a person other than a company [or a firm], if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax,

shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

Provided that a person referred to in clause (b), who is not required to furnish a return under this sub-section and residing in such area as may be specified by the Board in this behalf by notification in the Official Gazette, and who [during the previous year incurs an expenditure of fifty thousand rupees or more towards consumption of electricity or] at any time during the previous year fulfils any one of the following conditions, namely:-

(i) is in occupation of an immovable property exceeding a specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified by the Board in this behalf; or

(ii) is the owner of the lessee of a motor vehicle other than a two-wheeled motor vehicle, whether having any detachable side car having extra wheel attached to such two-wheeled motor vehicle or not; or

(iii) [***]

(iv) has incurred expenditure for himself or any other person on travel to any foreign country; or

(v) is the holder of a credit card, not being an "add-on" card, issued by any bank or institution; or

(vi) is a member of a club where entrance fee charged is twenty-five thousand rupees or more,

shall furnish a return, of his income [during any previous year ending before the 1st day of April, 2005], on or before the due date in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may

be prescribed:

Provided further that the Central Government may, by notification in the Official Gazette, specify the class or classes of persons to whom the provisions of the first proviso shall not apply:

Provided also that every company [or a firm] shall furnish on or before the due date the return in respect of its income or loss in every previous year.

Provided also that a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6, who is not required to furnish a return under this sub-section and who during the previous year has any asset (including any financial interest in any entity) located outside India or signing authority in any account located outside India, shall furnish, on or before the due date, a return in respect of his income or loss for the previous year in such form and verified in such manner and setting forth such other particulars as may be prescribed:]

[Provided also that every person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year,-. without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-A exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.]

Explanation 1 - For the purposes of this subsection, the expression "motor vehicle" shall have the meaning assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988).

Explanation 2 - In this sub-section, "due date" means-

(a) where the assessee [other than an assessee referred to in clause (aa)] is-

(i) a company [***]; or

(ii) a person (other than a company) whose accounts are required to be audited under this Act or under any other law for the time being in force; or

(iii) a working partner of a firm whose accounts are required to be audited under this Act or under, any other law for the time being in force,

the [30th day of September] of the assessment year;

(aa) in the case of an assessee [who] is required to furnish a report referred to in section 92E, the 30th day of November of the assessment year;]

(b) in the case of a person other than a company, referred to in the first proviso

to this sub-section, the 31st day of October of the assessment year;

(c) in the case of any other assessee, the 31st day of July of the assessment year.

Explanation 3 - For the purposes of this sub-section, the expression "travel to any foreign country" does not include travel to the neighbouring countries or to such places of pilgrimage as the Board may specify in this behalf by notification in the Official Gazette.]

[(1A) Without prejudice to the provisions of sub-section (1), any person, being an individual who is in receipt of income chargeable under the head "Salaries" may, at his option, furnish a return of his income for any previous year to his employer, in accordance with such scheme as may be specified by the Board in this behalf, by notification in the Official Gazette, and subject to such conditions as may be specified therein, and such employer shall furnish all returns of income received by him on or before the due date, in such form (including on a floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media) and manner as may be specified in that scheme, and in such case, any employee who has filed a return of his income to his employer shall be deemed to have furnished a return of income under sub-section (1), and the provisions of this Act shall apply accordingly.]

[***]

[(1B) Without prejudice to the provisions of sub-section (1), any person, being a company or being a person other than a company, required to furnish a return of income under sub-section (1), may, at his option, on or before the due date, furnish a return of his income for any previous year in accordance with such scheme as may be specified by the Board in this behalf by notification in the Official Gazette and subject to such conditions as may be specified therein, in such form (including on floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media) and in the manner as may be specified in that scheme, and in such case, the return of income furnished under such scheme shall be deemed to be a return furnished under sub-section (1), and the provisions of this Act shall apply accordingly.]

[(1C) Notwithstanding anything contained in sub-section (1), the Central Government may, by notification in the Official Gazette, exempt any class or classes or persons from the requirement of furnishing a return of income having regard to such conditions as may be specified in that notification.]"

13. The contention of petitioner/assessee is that return of income was no doubt filed beyond the period prescribed under Section 139(1) which was on account of audit report prescribed under Section 10CCB had to accompany such return of income and for want of said report under Section 10CCB from its auditor, it could not file the return of income within the prescribed period and hence petitioner contended that delay had occasioned in filing the returns of income belatedly namely there was delay of two (2) years. At this juncture itself it would be apt to

deal with contention raised by learned counsel for petitioner namely that Section 139(4) of the Act would enable the assessee to file return of income beyond the period prescribed under Section 139(1) namely if it is not filed within the time allowed either under Sub-Section (1) of Section 139 or Sub-Section (1) of Section 142 and as such, Sub-Section (4) has to be read conjointly along with Sub-Section (1) of Section 139 of the Act. Though this argument at the first blush looks attractive, it cannot be accepted for reasons more than one.

14. Exemption provision has to be read strictly. A reading of Section 80AC would clearly indicate that when return of income is filed by an assessee under Section 139(1) and deduction is claimed under provision of Chapter VIA, such deduction would be disallowed under Section 80AC particularly in respect of deduction admissible under Section 80IA, 80IAB, 80IB, 80IC, 80ID or Section 80IE, unless such return of income is filed on or before due date specified under Sub-Section (1) of Section 139 of the Act. This embargo placed under Section 80A of the Act came to be inserted by Finance Act, 2006 with effect from 01.04.2006. Under Chapter III of the Income Tax Act certain income had been held as not forming part and parcel of total income. While computing the total income of an assessee these exemption provisions would indicate that under Section 10A of the Act the profits and gains derived by an undertaking from export of articles and things etc., would be allowed from the total income of assessee as a deduction subject to provisions mentioned therein. Likewise, a newly established undertaking with 100% export oriented have also been provided such deductions of profits and gains under Section 10B of the Act. Said provision 10A and 10B having been substituted by Finance Act, 2000 with effect from 01.04.2001 underwent further change and by Finance Act, 2005 proviso to Sub-Section (1)(a) under Section 10A and further proviso to Sub-Section (1) of Section 10B came to be inserted with effect from 01.04.2006. It requires to be noticed that Section 80AC namely relevant provision which is applicable to facts on hand also came to be inserted with effect from 01.04.2006 by Finance Act, 2006. Provisions which came to be inserted in Section 10A and 10B would clearly indicate that deductions provided under these two sections would not be allowed to an undertaking where the assessee does not furnish return of income on or before the due date specified under Sub-Section (1) of Section 139 of the Act. Thus, Parliament consciously being aware of the fact that though Sub-Section (4) of Section 139 of the Act would be available to an assessee to file return of income beyond period prescribed under Section 139(1) of the Act, have omitted to insert Sub-Section (4) of Section 139 either under Section 10A or under Section 10B or Section 80AC. The Full Bench of this Court in the case of Kareemsons (P.) Ltd. Vs. Commissioner of Income Tax while examining the effect of Section 139(4) of the Act has held to the following effect:

"In the Indian Income-tax Act, 1922, xxxxxxxxxxxxxx matter to a Special Bench. The principles stated by the Supreme Court, when applied to the present section 139, results in the inference that section 139(4) should be read as a proviso to section 139(1) and that a return filed within the time allowed under sub-section

(4) of section 139 would also be considered as a return filed within the time allowed under sub-section (1). A "loss return" being the xxxxxxxxx can be brought to charge."

15. In view of this finding recorded by the Full Bench of this Court petitioner is attempting to take an umbrage under it to contend that even in respect of Section 139 occurring elsewhere in the Income Tax Act it has to be held as imbedded with the provision of Section 139(4) also. While examining a provision under fiscal statute and that too exemption provision, the words found in that Section alone is to be looked into or examined and no other provision of the Act can be imported to be read along with said provision since Parliament has consciously omitted to include Sub-Section (4) of Section 139 of the Act by not inserting the said provision in Section 80AC, 10A or 10B etc. In that view of the matter, this Court is of the considered view contention raised by Sri S. Sriranga, learned counsel appearing for petitioner cannot be accepted and same stands rejected.

16. Yet another contention which has been raised is that petitioner/assessee pursuant to liberty granted by this Court had filed an application for seeking condonation of delay in filing the return of income and as such, Board ought to have condoned the delay by accepting the cause shown. In support of his submission he has relied upon the judgment of the Bombay High Court in the case of Sitaldas K. Motwani Vs. Director General of Income Tax (International Taxation), Joint Director of Income Tax (International Taxation), Commissioner of Income Tax (Judicial) and Union of India (UOI), (2010) 228 CTR 373 : (2010) 323 ITR 223 : (2010) 187 TAXMAN 44 , whereunder High Court of Mumbai was examining as to whether in the facts and circumstances of said case delay in filing the claim ought to have been condoned by CBDT by adopting liberal approach or not and in this regard it has been opined by the Mumbai High Court as under:

"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 October 12, 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 the merits. 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 bear 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 the merits after hearing the parties. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have a 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 mala fides. 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 the cause of justice. If refund is legitimately due to the applicant, mere delay should not defeat the claim for refund.

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 the 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 a 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."

17. By relying upon the dicta laid down in above referred case Sri Sriranga, learned counsel appearing for petitioner would contend that filing of return of income in the instant case being on 30.03.2011 was on account of report of auditor in Form No. 10CCB having not been received by petitioner - assessee. He has also contended that return of income ought to have been accompanied with said report as contemplated under Rule 18 of Rules and as such return of income was filed belatedly on 30.03.2011 i.e., immediately after report of auditor under Section 10CCB was received. It does not detain this Court too long to brush aside the said contention for reasons more than one: firstly, filing of return of income without enclosing reports (required to be filed along with return of income) by itself would not render such return of income illegal. Non filing of return of income along with auditor's report which ought to have accompanied such return of income, if filed either at a later stage or at any rate before framing of assessment proceedings it becomes a curable defect or return of income at the most such filing of return of income can be construed as an irregularity and not an illegality. In view of the same, contention of learned counsel for petitioner that return of income could not have been filed on or before 30.09.2009 cannot be accepted. Secondly, petitioner was in possession of statutory audit report as prescribed under Companies Act, since same had been obtained on 02.09.2009 itself and petitioner had also obtained tax audit report under Section 44AB on 30.09.2009. As such, only exercise which was required to be undertaken by the petitioner was to file return of income on 30.09.2009 and substantiate its claim during assessment proceedings by furnishing the report of the auditor in Form No. 10CCB. Having not adopted said course, petitioner cannot be heard to contend that filing of Form No. 10CCB along with return of income being mandatory and as such, it had to await such report from the auditor and till then

it could not file the return of income, cannot be accepted. Hence, second contention also stands rejected.

18. Now turning my attention to third contention namely on facts CBDT ought to have accepted the cause shown by petitioner for belatedly filing return of income and condoned the delay, requires to be examined with utmost circumspection; firstly, as noticed hereinabove except auditor's report in Form No. 10CCB all other materials were available with petitioner to file the return of income. In fact building completion certificate which came to be issued by BBMP on 30.12.2008 was very much available with the petitioner as on 30.09.2009 (last date for filing return of income). As rightly observed by Board - CBDT, petitioner had nine (9) months time and yet it did not file return of income from the date of receipt of completion certificate i.e., 30.12.2008. In that view of the matter, finding recorded by Board at paragraph 7.1 and 7.2 of impugned order which is already extracted supra cannot be held as suffering from any illegality calling for interference at the hands of this Court.

19. That apart it requires to be noticed that law of limitation cannot be jettisoned on the ground of purported report ought to have been received by petitioner and as such, there has been delay in filing the return of income. Hon'ble Apex Court in the case of Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others, AIR 2011 SC 1199 : (2011) 112 CLT 152 : (2011) 2 RCR(Civil) 880 : (2011) 2 SCALE 703 : (2011) 4 SCC 363 : (2011) 3 SCR 217 : (2011) AIRSCW 1459 : (2011) 2 Supreme 174 has held that concepts such as "liberal approach", "justice oriented approach", "substantial justice", cannot be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for delay.

20. Keeping these contours in mind when facts on hand are examined it would indicate that provision of Section 80AC read along with Section 119(2)(b) and contentions urged in the facts and circumstances of the case it would clearly indicate that petitioner had all the material available with it for filing of return of income except report of auditor in Form No. 10CCB as on 30.09.2009 and nothing prevented the petitioner to file the return of income on that date. In the alternate, petitioner could have said filed said report on or before framing of assessment proceedings. In that view of the matter this Court is of the view that no infirmity can be found in the impugned order calling for interference at the hands of this Court. For the reasons aforesaid, I proceed to pass the following:

ORDER

(i) Writ petition is hereby dismissed.

(ii) Order dated 28.01.2014, Annexure-S, passed by second respondent is hereby affirmed.

(iii) Costs made easy.