

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

WA.No. 1152 of 2013 () IN WP(C).24109/2005

AGAINST THE JUDGMENT IN WP(C) 24109/2005 of HIGH COURT OF KERALA
DATED 01-03-2013

APPELLANT(S)/RESPONDENTS:

1. DEPUTY COMMISSIONER OF INCOME TAX
CALICUT, DIVISION-1, CALCUT.
2. THE COMMISSIONER OF INCOME TAX
CALICUT
3. THE CHIEF COMMISSIONER OF INCOME TAX
COCHIN.

BY ADVS. SRI.P.K.R.MENON, SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S):

VASCO SALES AND MARKETING CORPORATION
REPRESENTED BY ITS MANAGING PARTNER, V.HAMEED
20/272-D, KALLAI HEIGHTS, KALLAI
KOZHIZKODE-673 003.

R BY SRI.K.P.BALASUBRAMANYAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 22-05-2015, THE
COURT ON 03-07-2015 DELIVERED THE FOLLOWING:

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

W.A.No.1152 of 2013

Dated this the 3rd day of July, 2015

JUDGMENT

Antony Dominic, J.

1. This writ appeal is filed by the respondents in W.P.(C)No.24109 of 2005. The writ petition was filed by the respondents herein challenging Ext.P13 order by which their claim for refund was rejected on the ground that return for the assessment years 1996-97 and 1997-98 were filed belatedly and Ext.P16 order, declining to condone delay in filing the returns. By the judgment under appeal, relying on the judgment of this Court in Pala Marketing Co-op. Society Ltd. v. Union of India and Others [2008 (1) KLJ 561], the learned Single Judge condoned the delay in applying for refund and remitted the case to the 3rd appellant to reconsider the application for refund afresh and pass orders thereon. It is this judgment which is impugned before us.

2. We heard the learned counsel for the appellants and the learned counsel appearing for the respondent.

3. Admittedly, returns for the assessment years 1996-97 and 1997-98 were filed belatedly on 30.06.1998 and 29.02.2000 respectively. In these returns, the assessee claimed refund of the advance tax paid. Ext.P13 order was passed rejecting their claim for refund on the ground that returns were filed after the due dates for both the assessment years and the claim for refund cannot be entertained. It was thereupon that the assessee filed Exts.P14 and P15 applications before the 2nd appellant to condone the delay in terms of Section 119 (2)(b) of the Income Tax Act. On that application, Ext.P16 order was passed. In that order, the 3rd appellant held that the returns were filed in response to notices issued under section 148 and that in such a case, the assessee will not be entitled to claim refund of advance tax paid and relied on the judgment of the Bombay High Court in K. Sudhakar S. Shanbhag v. Income Tax Officer [(2000) 241 ITR 865]. The 3rd appellant also held that the assessee has not properly explained the delay. It is these orders which are set aside by the learned Single Judge.

4. It is true that returns are to be filed before the due date under section 139(1) or (4) of the Income Tax Act and in cases where returns are belatedly filed or refund claims are made beyond the time provided in section 239 of the Act, refund cannot be claimed. However, section 119 (2)(b) of the Act empowers the Central Board of Directors to authorize any income tax authority, not being a Commissioner (Appeals), to admit an application or claim for any refund 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. As is evident from this section, the purpose of conferring such authority is for "avoiding genuine hardship".

5. Section 119(2)(b) reads thus:

"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."

6. In the light of the above provision, when Exts.P14 and P15 applications were filed by the assessee, what was required to be examined was whether, to avoid genuine hardship to the assessee, it was necessary to condone the delay in making the application for refund. Ext.P16 order does not show that the Commissioner has examined Exts.P14 and P15 applications in the manner as required under Section 119(2)(b). On the other hand, Commissioner has discussed on the merits of the application and held that the delay has not been properly explained and that when returns are filed in response to notices issued under Section 148, assessee will not be entitled to claim refund of advance tax paid. In our view, such an order does not reflect a proper exercise of power under Section 119(2)(b) and for that reason, Ext.P16 is unsustainable.

7.It is true that the Bombay High Court in the judgment in K.Sudhakar S.Shanbhag (supra) has held that when return is filed in response to a notice under Section 148, assessee is not entitled to claim refund. However, if the Commissioner condones the delay in exercise of his power under Section 119 (2)(b), the fact that return was filed in response to a notice under Section 148 would pale into insignificance.

8.In this case, according to us, when Ext.P16 order was passed in an improper manner, the learned Single Judge ought to have directed reconsideration of Exts.P14 and P15 instead of condoning the delay by himself. Therefore, while we are inclined to agree with the learned Single Judge on the unsustainability of Exts.P13 and P16 orders, according to us, the proper consequential order to be passed is to direct reconsideration of Exts.P14 and P15 with a direction to pass fresh orders in the matter.

9.Therefore, we set aside the judgment of the learned Single Judge to the extent the delay is condoned and dispose of the writ appeal quashing Exts.P13 and P16

orders and directing the competent authority among the appellants to reconsider Exts.P14 and P15 and pass orders thereon in the light of Section 119(2)(b) of the Income Tax Act. This shall be done at any rate within 2 months from the date of receipt of a copy of this judgment.

writ appeal is disposed of as above.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

k kb.

/True copy/

PS to Judge