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| <b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>                         |
| <b>COCHIN BENCH, COCHIN</b>                                         |
| <b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b> |

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| I.T.A. No. 523 Coch/2019 |
| Assessment Year: 2007-08 |

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| Smt. Jiby Mathew,<br>Biju Nivas,<br>Kumaranalloor P.O.,<br>Kottayam-686 016.<br>[PAN:AOQPC 2947C] | <b>Vs.</b> | The Deputy Commissioner of<br>Income-tax, Central Circle,<br>Kottayam. |
| <b>(Assessee-Appellant)</b>                                                                       |            | <b>(Revenue-Respondent)</b>                                            |

|                          |
|--------------------------|
| I.T.A. No. 524 Coch/2019 |
| Assessment Year: 2007-08 |

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| Shri Mathew Joseph,<br>Biju Nivas,<br>Kumaranalloor P.O.,<br>Kottayam-686 016.<br>[PAN:AQWPJ 6098B] | <b>Vs.</b> | The Deputy Commissioner of<br>Income-tax, Central Circle,<br>Kottayam. |
| <b>(Assessee-Appellant)</b>                                                                         |            | <b>(Revenue-Respondent)</b>                                            |

|                    |                                     |
|--------------------|-------------------------------------|
| <b>Assessee by</b> | Shri Anil D. Nair, Adv.             |
| <b>Revenue by</b>  | Shri Sudhanshu Shekhar Jha, CIT(DR) |

|                              |            |
|------------------------------|------------|
| <b>Date of hearing</b>       | 03/03/2020 |
| <b>Date of pronouncement</b> | 09/03/2020 |

### **ORDER**

Per CHANDRA POOJARI, AM:

These two appeals filed by different assessees are directed against different orders of the CIT(A)-II, Kochi of even date 25/01/2016 and pertain to the assessment year 2007-08.

2. Since the issues involved in these appeals are common, they were heard together and are being disposed of by this common order.

3. The assesseees have raised the following common grounds except for variation in figures:

1. The Assessing Officer assessed the consideration on sale of Agricultural land and the amount receivable in kind Rs.57.50 lakhs totaling Rs.1,36,66,000/- as income of the assessee. The CIT(A) confirmed the finding of the Assessing Officer ignoring the submissions of the assessee.

2. The fact that the land sold was rural agricultural was ignored by the CIT(A).

4. At the outset, we observed that there was a delay of 1250 days in filing the appeals before the Tribunal. The Ld. AR has filed condonation petitions accompanied by affidavits stating the reasons for the delay in filing the appeals before the Tribunal. We shall consider the affidavit filed in the case of Shri Mathew Joseph which reads as follows:

AFFIDAVIT

"I, MATHEW JOSPEH, aged 45 years, S/o Late C.M. Joseph, residing at Biju Nivas, Kumaranalloor P.O., Kottayam District, Kerala State, India do hereby solemnly affirm and state as follows:-

*I was a Non Resident Indian holding a US Passport and settled in United States for the past 15 years till I returned to India in May, 2016. My mother Mariyamma Joseph and father C.M.Joseph were settled in Kottayam and were looking after the bar attached hotel in the name of my mother.*

*My father, on behalf of me and my wife, had purchased Rubber Estate situated in Kakkanad, Ernakulam measuring 89.772 cents in the joint names of myself and my wife during the year 2004 vide two documents.*

Consequent to search in the premises of my parents, an agreement has been found evidencing the sale of the aforesaid 89.772 cents of land to NCC Urban Infrastructure Limited on 26.07.2006 for a consideration in cash of Rs.2 crores together with built up area in the building to be constructed by the purchaser valued at 1.15 crores totaling the sale consideration at Rs. 3.15 crores.

In response to the notice u/s. 153C my father, through his Chartered Accountant, had prepared and filed my return of income of the A Y 2007-08 disclosing total income Rs.79,16,000/- being short term capital gain on transfer of 50% share in the aforesaid Rubber Estate in respect of the cash part of consideration received. In the assessment completed on 28/03/2013 u/s 143(3) r.w.s. 153C the capital gains of Rs. 1,36,66,000/- was charged by taking the sale value including the amount receivable in kind and thereby raised huge demand. The CIT (A) had confirmed the assessment of Short Term Capital Gains of Rs. 1,36,66,000/- in his order dated 20/01/2016.

All these years I was in U.S. and was under the impression that everything was done properly by my father. I have only signed the return of income as I was not familiar with the taxation provisions in India.

My father died on 10<sup>th</sup> day of August, 2013 after which my mother left India and joined us in U.S. The hotel business at Kottayam was managed by the staff. Meanwhile the income tax department demanded for the settlement of the dues and the hotel staff remitted the amounts in monthly installments.

The sale of Rubber Estate took place on 26.07.2006. My father at the time filing the return and completion of the assessment in March, 2013 had informed the tax consultant that the land sold is situated in Thrikkakara Municipality and hence the consultant has not raised the plea before the Assessing Officer and the Appellate Authority that the land sold is agricultural and not a capital asset attracting taxable capital gains. My father was bed ridden during these days and he passed away on 10-08-2013.

The fact that the Thrikkakara Municipality was formed only on 30-11-2010 and Thrikkakara Panchayath was not a notified area for urbanization at the time of transfer ie on 26-07-2006 for the purpose of defining "capital asset" in section 2(14) was overlooked by my father and the tax consultant. The aforesaid land was not taken as an "urban land" within the meaning of section 2 (ea) of the W T Act, therefore, not charged to Wealth Tax as per Wealth Tax Assessment made u/s 16 (3) for the A Y 2006-07.

*Myself and my wife returned to India in July, 2016 winding up our business in U.S.*

*I was new to the existing hotel business and the staff continued to manage the business and also payment of the tax in installments.*

*When I noticed the huge demand still pending in respect of capital gains assessed Rs, 1,36,66,000/- for the A Y 2007-08 I gathered all details and met an advocate at Ernakulam who directed me to Advocate Anil D Nair.*

*He only found that the land is situated outside the limits of the municipality and not liable to income tax. Immediately appeals were prepared and filed. There is a delay of 1250 days.*

*The non filing was noticed only in last week of August, 2019. Immediately the documents and records were verified and the appeal is filed. There is a delay of 1250 days which was caused due to the above facts and there was no willful negligence on my part.*

*Hence it is humbly submitted in the interest of justice that the delay of 1250 days caused in filing the appeal may please be condoned.*

*What is stated above is true and correct.*

*sd/-*  
**MATHEW JOSEPH**  
*Deponent*

*Solemnly affirmed and signed before me by the deponent who is personally known to me on this 27<sup>th</sup> day of November, 2019 at my office at Kottayam."*

Similar affidavit for condonation of delay was also filed in the case of Smt. Jiby Mathew.

4.1 The Ld. AR reiterated the submissions made in the affidavits by the assesseees requesting the Bench to condone the delay. He submitted that the assesseees have shown sufficient cause for the delay and further, the delay is not

intentional. He drew our attention to the copies of the passports and stated that Shri Mathew Joseph was in US from the year 2001 onwards and Jiby Joseph was in US from 2012 onwards. Both are US citizens and continued their citizenship even now. After the death of his father, the assessee shifted his family to Kottayam, Kerala, India in the year 2016. The children were studying in US and re-located to Kottayam. The Ld. AR drew our attention to the travel details along with passport copies. It was also stated that Shri Mathew Joseph and Smt. Jiby Mathew had been travelling from US to India as follows:

Details of travel dates as per passport of Mathew Joseph

| Sl. No | Date       | Arvl      | Place  | Page |
|--------|------------|-----------|--------|------|
| 1.     | 10-07-2001 | Departure | Kochi  | 27   |
| 2.     | 19-08-2001 | Arrival   | Kochi  | 28   |
| 3.     | 26-11-2001 | Departure | Mumbai | 28   |
| 4.     | 23-07-2002 | Departure | Kochi  | 28   |
| 5.     | 31-05-2004 | Arrival   | Kochi  | 28   |
| 6.     | 11-08-2005 | Departure | Kochi  | 30   |
| 7.     | 12-08-2004 | Arrival   | USA    | 24   |
| 8.     | 11-08-2005 | Arrival   | TVM    | 29   |
| 9.     | 24-07-2006 | Departure | Kochi  | 29   |
| 10.    | 25.07.2006 | Arrival   | USA    | 27   |
| 11.    | 30-03-2010 | Arrival   | USA    | 29   |
| 12.    | 04-05-2011 | Arrival   | Kochi  | 31   |
| 13.    | 13-05-2011 | Departure | Kochi  | 31   |
| 14.    | 26-08-2012 | Arrival   | Kochi  | 33   |
| 15.    | 08-09-2012 | Departure | Kochi  | 33   |
| 16.    | 16-09-2013 | Departure | Kochi  | 33   |
| 17.    | 16-09-2013 | Arrival   | USA    | 32   |
| 18.    | 30-08-2014 | Departure | Kochi  | 34   |
| 19.    | 30-08-2014 | Arrival   | USA    | 32   |
| 20.    | 05-02-2014 | Arrival   | Kochi  | 34   |
| 21.    | 25-02-2014 | Departure | Kochi  | 34   |

|     |            |           |       |    |
|-----|------------|-----------|-------|----|
| 22. | 12-07-2014 | Arrival   | Kochi | 34 |
| 23. | 11-02-2016 | Arrival   | Kochi | 34 |
| 24. | 22-02-2016 | Departure | Kochi | 34 |
| 25. | 18-05-2016 | Arrival   | Kochi | 32 |
| 26. | 15-04-2017 | Departure | Kochi | 32 |
| 27. | 26-10-2017 | Arrival   | Kochi | 36 |

Details of travel dates as per passport of Smt. Jiby Mathew

| Sl. No | Date       | Arvl      | Place | Page |
|--------|------------|-----------|-------|------|
| 1.     | 08-02-2013 | Departure | Kochi | 17   |
| 2.     | 08-02-2013 | Arrival   | USA   | 17   |
| 3.     | 16-09-2013 | Arrival   | Kochi | 16   |
| 5.     | 16-09-2013 | Departure | Kochi | 15   |
| 6.     | 13-03-2014 | Arrival   | USA   | 15   |
| 7.     | 30-08-2014 | Departure | Kochi | 18   |
| 8.     | 30-08-2014 | Arrival   | USA   | 18   |
| 9.     | 18-05-2016 | Arrival   | Kochi | 17   |
| 10.    | 11-06-2017 | Arrival   | Kochi | 18   |

4.2 The Ld. AR submitted that the assessees came to know about the passing of the orders by the CIT(A) only when the Department required the assessees to make payment of outstanding demand in these cases. On one of such visits to Kerala, they approached earlier Counsel for the assessees, Shri Mathew Joseph, CA who stated that he had received the orders on 15/02/2016. He also drew our attention to the copy of the acknowledgment slip in the case of both the assessees which is attached.



4.2.1 Thereafter, the orders of the CIT(A) were handed over to the assesseees on 05/08/2019 and the assesseees took steps to file the appeals before this Tribunal, which caused the delay of 1250 days in filing the appeals. The Ld. AR has also filed the affidavits from earlier counsel for the assesseees Shri Mathew Joseph, CA in both cases which reads as follows:

AFFIDAVIT

*"I, C.A. Mathew Joseph, aged 64, Chartered Accountant, s/o Late Joseph Michael residing at 32/2432, Kunnath Lane, Palarivattom, Cochin-682025 do hereby solemnly affirm that:*

*I am a Practicing Chartered Accountant at cochin. Late Shri C.M. Joseph, Biju Nivas, Kurmaranellore, Kottayam requested me to appear before the Dy. Commissioner of Income-tax, Central Circle, Kottayam for his Non Resident son Mathew Joseph and daughter-in-law Jibi Mathew for the AY 2007-08 and entrusted the file in December, 2012 with proper authorization in my favour.*

*2. I represented for both of them in the 143(3) r.w.s. 153C proceedings. The consideration for the sale of landed property obtained by the assessee, was partly in cash and partly in kind in the form of built up area. The assessee returned only the cash portion received. The assessing officer assessed the full amount vide his order dated 28/03/2013.*

*3. At the request of late C.M. Joseph I filed an appeal before the CIT(Appeals) on 25/04/2013. I was made to understand by late C.M. Joseph that the land sold was urban agricultural land and hence could not raise any valid arguments before the CIT(Appeals).*

*4. Meanwhile Sri C.M. Joseph died on 10<sup>th</sup> August, 2013. The CIT(Appeals) dismissed the appeal vide order dated 25.01.2016. Myself received the order on 15/02/2016 and kept it in my file. As my understanding that the land sold was urban agricultural land not eligible for exemption, I Kept the order with me.*

*5. The assessee's staff Sri. Sabu Cyriac.P contacted me for the original order by the CIT(Appeals) on 3<sup>rd</sup> August 2019. I handed over both the*

*original order dated 25/01/2016 in respect of ITA No.2/Cen/KTM/2013-14 in the name of Jiby Mathew and ITA No. 4/Cen/KTM/2013-14 in the name of Mathew Joseph issued by the CIT(Appeals)-II Kochi for the Assessment Year 2007-08 to Sabu Cyriac P on 05/08/2019.*

*I. C.A. Mathew Joseph, the Deponent do hereby declare that what is stated above is true and correct to the best of my knowledge and belief.*

*Sd/-  
C.A. Mathew Joseph  
Deponent*

*Solemnly affirmed and signed before me by the deponent who is personally known to me on this 16<sup>th</sup> day of December, 2019.”*

4.3 The Ld. AR relied on the judgment of the Supreme Court in the case of Senior Bhosale Estate (HUF) vs. ACIT in Civil Appeal Nos. 6671-6676 of 2010 dated 16<sup>th</sup> November, 2019 wherein it was held that “*condonation of delay of 1754 days: If the stand of the Applicant in the Affidavit that he had no knowledge about the passing of the order is not expressly refuted by the Respondent, the question of disbelieving the stand of the Applicant cannot arise. For this reason, indulgence should be shown to the Applicant by condoning the delay.*”

5. On the other hand, the Ld. DR submitted that the assessee had given the address of the earlier Counsel in Form No. 35 as the address to which the notice/order is to be served. The Ld. DR also submitted that the CIT(A) had duly served the appeal orders to the address of the earlier Counsel who has been duly

authorized by the assessees. He submitted that it is the duty of the assessees to follow up the matter with their Counsel. It was also submitted that the assessees had engaged the Counsel and they were also aware of the details of hearing attended by the Counsel before the CIT(A). Hence, as a prudent person, the assessees should have taken due care by enquiring with their Counsel. If the assessees failed to take due care on the issue, it is not the fault of the Department and such inordinate delay should not be condoned. Further, it was submitted that it is not fair on the part of the assessees to put the blame on the earlier Counsel and the affidavits filed by the assessees and the earlier Counsel are self-serving documents which cannot be given credence. Accordingly, the Ld. DR submitted that there was no sufficient cause for the inordinate delay of 1250 days and hence, the delay should not be condoned.

6. We have heard the rival submissions and perused the material on record. There was a delay of 1250 days in filing the appeals by the assesses before the Tribunal. We have to consider whether the assessees' failure to file the appeals in time is supported by sufficient cause so as to condone the delay of 1250 days in filing the appeals. The Madras High Court considered an issue in the case of Sreenivas Charitable Trust v. Dy. CIT (280 ITR 357) and held that mixing up of papers with other papers are sufficient cause for not filing the appeal in time. The Madras High Court further observed that the expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, advancement of

substantial justice is the prime factor while considering the reasons for condoning the delay.

6.1 While considering a delay in filing the appeal, the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) laid down six principles. For the purpose of convenience, the principles laid down by the Apex Court are reproduced hereunder:

- (1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late.
- (2) Refusing to condone delay can result in a meritorious matter being thrown 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.
- (3) 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, commonsense and pragmatic manner.
- (4) When substantial justice and technical consideration are pitted against each other, the 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.
- (5) 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.
- (6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

6.2 When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side

cannot claim to have vested right for injustice being done because of non deliberate delay. Moreover, no counter-affidavit was filed by the Revenue denying the reasons advanced by the assesseees. It is not the case of the Revenue that the appeals were filed deliberately with delay. Therefore, we have to prefer substantial justice rather than technicality in deciding the issue. As observed by Apex Court, if the application of the assessee for condoning the delay is rejected, it would amount to legalise injustice on technical ground when the Tribunal is capable of removing injustice and to do justice. Therefore, this Tribunal is bound to remove the injustice by condoning the delay on technicalities. If the delay is not condoned, it would amount to legalising an illegal order which would result in unjust enrichment on the part of the State by retaining the tax relatable thereto. Under the scheme of Constitution, the Government cannot retain even a single pie of the individual citizen as tax, when it is not authorised by an authority of law. Therefore, if we refuse to condone the delay, that would amount to legalise an illegal and unconstitutional order passed by the lower authority. Therefore, in our opinion, by preferring the substantial justice, the delay has to be condoned.

6.3 The next question may arise whether delay was excessive or inordinate. There is no question of any excessive or inordinate when the reason stated by the assesseees was a reasonable cause for not filing the appeals. We have to see the cause for the delay. When there was a reasonable cause, the period of delay may not be relevant factor. In fact, the Madras High Court in the case of CIT vs.

K.S.P. Shanmugavel Nadai and Ors. (153 ITR 596) considered the condonation of delay and held that there was sufficient and reasonable cause on the part of the assessee for not filing the appeal within the period of limitation. Accordingly, the Madras High Court condoned nearly 21 years of delay in filing the appeal. When compared to 21 years, 71 days cannot be considered to be inordinate or excessive. Furthermore, the Chennai Tribunal by majority opinion in the case of People Education and Economic Development Society (PEEDS) v. ITO (100 ITD 87) (Chennai) (TM ) condoned more than six hundred days delay. It is pertinent to mention herein that the view taken by the present author in that case was overruled by the Third Member.

6.4 The Madras High Court in the case of Sreenivas Charitable Trust (supra) held that no hard and fast rule can be laid down in the matter of condonation of delay and the Court should adopt a pragmatic approach and the Court should exercise their discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause" the principle of advancing substantial justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. Therefore, this Judgment of the Madras High Court (supra) clearly says that in order to advance substantial justice which is of prime importance, the expression "sufficient cause" should receive a liberal construction. In this case, the issue on merit regarding granting of deduction u/s. 80IB was covered in favour of the assessee by the Judgment of the Madras High Court. Therefore, for the purpose of advancing substantial justice which is of

prime importance in the administration of justice, the expression "sufficient cause" should receive a liberal construction. In our opinion, this Judgment of the Madras High Court is also squarely applicable to the facts of this case. A similar view was taken by the Madras High Court in the case of Venkatadri Traders Ltd. v. CIT (2001) 168 CTR (Mad) 81 : (2001) 118 Taxman 622 (Mad).

6.5 The Mumbai Bench of this Tribunal in the case of Bajaj Hindusthan Ltd. v. Jt. CIT (AT) (277 ITR 1) has condoned the delay of 180 days when the appeal was filed after the pronouncement of the Judgment of the Apex Court. Furthermore, the Revenue has not filed any counter-affidavit opposing the application of the assessee for condonation of delay. The Apex Court in the case of Mrs. Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi (AIR 1978 SC 537) held that non-filing of affidavit in opposition to an application for condonation of delay may be a sufficient cause for condonation of delay. In this case, the Revenue has not filed any counter-affidavit opposing the applications of the assessees, therefore, as held by the Apex Court, there is sufficient cause for condonation of delay. The Supreme Court observed that when the delay was of short duration, a liberal view should be taken. "It does not mean that when the delay was for longer period, the delay should not be condoned even though there was sufficient cause. The Apex Court did not say that longer period of delay should not be condoned. Condonation of delay is the discretion of the Court/Tribunal. Therefore, it would depend upon the facts of each case. In our opinion, when there is sufficient cause for not filing the appeals within the period of limitation,

the delay has to be condoned irrespective of the duration/period. In this case, the non-filing of an affidavit by the Revenue for opposing the condonation of delay itself is sufficient for condoning the delay in filing the appeals before the Tribunal.

6.6 In the judgment rendered by the Supreme Court in the case of Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafa Academy & others (Civil Appeal Nos. 8183 - 8184 of 2013), the Supreme Court has referred to some of the decisions rendered by Hon'ble Courts on the principles to be followed while adjudicating the issue of condonation of delay. For the sake of convenience, some of the judgments are extracted as follows:

*a) In Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others (supra), a two-Judge Bench observed that the legislature has conferred power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice, for that is the life-purpose for the existence of the institution of courts. The learned Judges emphasized on adoption of a liberal approach while dealing with the applications for condonation of delay as ordinarily a litigant does not stand to benefit by lodging an appeal late and refusal to condone delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated. It was stressed that there should not be a pedantic approach but the doctrine that is to be kept in mind is that the matter has to be dealt with in a rational commonsense pragmatic manner and cause of substantial justice deserves to be preferred over the technical considerations. It was also ruled that there is no presumption that delay is occasioned deliberately or on account of culpable*

*negligence and that the courts are not supposed to legalise injustice on technical grounds as it is the duty of the court to remove injustice. In the said case the Division Bench observed that the State which represents the collective cause of the community does not deserve a litigant-non grata status and the courts are required to be informed with the spirit and philosophy of the provision in the course of interpretation of the expression "sufficient cause".*

*(b) In G. Ramegowda, Major and others v. Special Land Acquisition Officer, Bangalore (1988)(2 SCC 142), Venkatachaliah, J. (as his Lordship then was), speaking for the Court, has opined thus: "The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See : Ramlal, Motilal and Chhotelal v. Rewa Coalfield Ltd.(1962)(2 SCR 762); Shakuntala Devi Jain v. Kuntal Kumari(1969)(1 SCR 1006); Concord of India Insurance Co. Ltd. V. Nirmala Devi(1979)(3 SCR 694); Lala Mata Din v. A. Narayanan(1970)(2 SCR 90); Collector, Land Acquisition v. Katiji etc. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fide on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay."....*

*(c) In this context, we may refer with profit to the authority in Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another (2010)(5 SCC 459), where a two-Judge Bench of this Court has observed that the law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy*

*without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. Thereafter, the learned Judges proceeded to state that this Court has justifiably advocated adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate. (d) In Improvement Trust, Ludhiana v. Ujagar Singh and others(2010)(6 SCC 786), it has been held that while considering an application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. It has been further stated therein that each case has to be weighed from its facts and the circumstances in which the party acts and behaves."*

6.7 The principles that emanate from the above said decisions are that, in the matter of condonation of delay in filing appeals beyond the limitation period, the courts are empowered to condone the delay, provided the litigant is able to demonstrate that there was "sufficient cause" in preferring appeal beyond the limitation period. The Courts have also held that the expression "sufficient cause" should receive liberal construction so as to advance substantial justice. Hence, the question of condonation of delay is a factual matter and the result would depend upon the facts of the case and the cause shown by the assessee for the delay. It has also been opined that generally delays in preferring appeals are required to be condoned in the interest of justice, where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party

seeking condonation of the delay. In view of the foregoing, we are of the view that the assessee has shown sufficient cause for the delay in filing the appeals before the Tribunal. Accordingly, we condone the delay of 1250 days and admit the appeals for adjudication.

7. The assessee has also filed petitions for admission of the common additional ground of appeals. We shall consider the petition for admission of additional ground in the case of Mathew Joseph which reads as follows:

*"In the appeal filed before the ITAT the assessee has raised the ground that the land sold is Agricultural and hence exempt from payment of tax. This ground was not raised before the CIT(A) as the consultant who appeared for the assessee was under the belief that the land sold was urban agricultural land. The fact that the land sold was rural agricultural land was noticed by the assessee only recently.*

*The non submission of this ground was due to a wrong understanding of the facts by the assessee's father who handled the case in the absence of the assessee.*

*Hence it is humbly submitted that the Hon. ITAT may be pleased to permit the assessee to raise the attached ground as additional ground and to take it on record.*

7.1 The common additional ground of appeals reads as follows:

*"The fact that the land sold was rural agricultural land was ignored by the Commissioner".*

7.2 The Ld. AR has also filed affidavits in support of admission of the common additional ground and drew our attention to them as follows:

*"I, MATHEW JOSEPH, aged 45 years, S/o. Late C M Joseph, residing at Biju Nivas, Kumaranalloor P.O., Kottayam District, Kerala State, India do hereby solemnly affirm and state as follows:-*

*I was a Non Resident Indian holding a US Passport and settled in United States for the past 15 years till I returned to India in May, 2016. My mother Smt. Mariyamma Joseph and father Sri.C.M. Joseph were settled in Kottayam and were looking after the bar attached hotel in the name of my mother.*

*My father, on behalf of me and my wife, had purchased Rubber Estate| situated in Kakkanad, Ernakulam measuring 89.772 cents in the joint names of myself and my wife during the year 2004 vide two documents.*

*Consequent to search in the premises of my parents, an agreement has been found evidencing the sale of the aforesaid 89.772 cents of land to NCC Urban Infrastructure Limited on 26.07.2006 for a consideration in cash of Rs.2 crores together with built up area in the building to be constructed by the purchaser valued at 1.15 crores totaling the sale consideration at Rs. 3.15 crores.*

*In response to the notice u/s. 153C my father, through his Chartered Accountant, had prepared and filed my return of income of the A Y 2007-08 disclosing total income Rs.79,16,000/- being short term capital gain on transfer of 50% share in the aforesaid Rubber Estate in respect of the cash part of consideration received. In the assessment completed on 28/03/2013 u/s 143(3) r.w.s. 153C the capital gains of Rs. 1,36,66,000/- was charged by taking the sale value including the amount receivable in kind and thereby raised huge demand. The CIT (A) had confirmed the assessment of Short Term Capital Gains of Rs. 1,36,66,000/- in his order dated 20/01/2016.*

*All these years I was in U.S. and was under the impression that everything was done properly by my father. I have only signed the return of income as I was not familiar with the taxation provisions in India.*

*My father died on 10<sup>th</sup> day of August, 2013 after which my mother left India and joined us in U.S. The hotel business at Kottayam was managed by the staff. Meanwhile the income tax department demanded for the settlement of the dues and the hotel staff remitted the amounts in monthly installments.*

*The sale of Rubber Estate took place on 26.07.2006. My father at the time filing the return and completion of the assessment in March, 2013 had informed the tax consultant that the land sold is situated in Thrikkakara Municipality and hence the consultant has not raised the plea before the Assessing Officer and the Appellate Authority that the land sold is*

*agricultural and not a capital asset attracting taxable capital gains. My father was bed ridden during these days and he passed away on 10-08-2013.*

*The fact that the Thrikkakara Municipality was formed only on 30-11-2010 and Thrikkakara Panchayath was not a notified area for urbanization at the time of transfer ie on 26-07-2006 for the purpose of defining "capital asset" in section 2(14) was overlooked by my father and the tax consultant. The aforesaid land was not taken as an "urban land" within the meaning of section 2 (ea) of the W T Act, therefore, not charged to Wealth Tax as per Wealth Tax Assessment made u/s 16 (3) for the A Y 2006-07.*

*Myself and my wife returned to India in July, 2016 winding up our business in U.S.*

*I was new to the existing hotel business and the staff continued to manage the business and also payment of the tax in installments.*

*When I noticed the huge demand still pending in respect of capital gains assessed Rs, 1,36,66,000/- for the A Y 2007-08 I gathered all details and met an advocate at Ernakulam who directed me to Advocate Anil D Nair.*

*I*

*He only found that the land is situated outside the limits of the municipality and not liable to income tax. On a perusal of the proceedings before the 1<sup>st</sup> appellate authority, it was noticed that there was no specific ground taken to the effect that the land is situated outside the limits of the municipality and therefore was entitled for exemption from capital gains tax. Therefore, an appeal was drawn up and since this issue was not agitated before the appellate authority, the additional ground is being filed in terms of the ratio of the judgment in Jute Corporation's case reported in 1991 AIR 241 (SC) and approved in NTPC reported in (1998) 229 1TR 383.*

*It is therefore respectfully prayed that the Hon'ble Tribunal be pleased to take on record the additional ground and pass consequential orders.*

*If orders as prayed for are not granted, the petitioner would be put to irreparable loss and hardship. It is therefore accordingly prayed.*

*All what is stated above are true and correct."*

*sd/-*

MATHEW JOSEPH  
Deponent

*Solemnly affirmed and signed before me by the deponent who is personally known to me on this 4<sup>th</sup> day of December, 2019 at my office at Kottayam."*

Similar petition/affidavit for admission of additional ground was also filed in the case of Smt. Jiby Mathew.

7.2.1 The Ld. DR strongly opposed the admission of additional ground and submitted that there is no reasonable cause for filing the additional ground.

7.3 We have heard the rival submissions of the parties and we have perused the decisions on which reliance is placed from both the sides. The Tribunal while dealing with the subject-matter of the appeal in exercise of its power, it may allow the party to take up a new ground of appeal. In other words, the Tribunal has power to permit the assessee to raise a new ground of appeal, not set forth in the memorandum of appeal, even without formal amendment of the grounds set forth in the memorandum of appeal provided that a new ground does not involve a further investigation into the facts. This power of Tribunal is spelt out in r. 11 of ITAT Rules, 1963. Hon'ble Punjab & Haryana High Court has held in the case of Vijay Kumar Jain vs. CIT (1975) 99 ITR 349 (P&H) that the Tribunal may allow a party to press a ground which he does not press before the first appellate authority although he has taken and included in the grounds of the first appeal. The proposition of law on the issue of admission of additional or new

grounds by first appellate authority was laid down by the Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. vs. CIT (1990) 88 CTR (SC) 66 : (1991) 187 ITR 688 (SC) and Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT (229 ITR 383) held that the same will apply to appeal before Tribunal Hon'ble Allahabad High Court in the case of CIT vs. Mohd. Ayyub & Sons Agency (1992) 197 ITR 637 (All) has held that the power of the Tribunal to permit any party to the appeal to raise the question of jurisdiction, which goes to the root of the matter and does not involve further investigation into facts, cannot be disputed on the plain reading of r. 11 of the ITAT Rules, 1963. Indeed on such a plea being taken, the Tribunal is under a statutory obligation not only to entertain the plea but also to decide the same after providing sufficient opportunity of being heard to the other side. Similar views have been taken by Hon'ble Delhi High Court (i) in the case of CIT vs. Mahalaxmi Sugar Mills Co. Ltd. (1993) 200 ITR 275 (Del), (ii) Hon'ble Bombay High Court in the case of Ahmedabad Electricity Co. Ltd. vs. CIT (1992) 106 CTR (Bom) 78 ; (1993) 199 ITR 351, 367 (Bom) and (iii) Hon'ble Rajasthan High Court in the case of Mewar Sugar Mills Ltd. vs. CIT (1993) 203 ITR 415 (Raj). Hon'ble Bombay High Court in the case of Baby Samuel vs. Asstt, CIT (2003) 184 CTR (Bom) 140 : (2003) 262 ITR 385 (Bom) has held that when an issue was not specifically taken in the memorandum and grounds of appeal but mentioned in the written submissions filed before the Tribunal and specifically argued at the time of the final hearing of the appeal, the Tribunal cannot refuse to adjudicate

upon that issue on the merits of the ground that no such ground has been taken specifically in the grounds of appeal. Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (supra) has held :

*"...The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item. There is no reason to restrict the power of the Tribunal under s. 254 only to decide the grounds which arise from the order of the CIT (A). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the CIT(A) is too narrow a view to take off the powers of the Tribunal."*

7.4 Thus, the settled legal position, which emerges from the aforesaid judicial pronouncements, is that the purpose of assessment proceeding is to tax/assess the taxable liability/income of the assessee correctly in accordance with law and if the assessee is entitled to certain relief, deduction or benefit, the assessee should not be denied or deprived of it, even if the claim pertaining to the same is made for the first time before the Tribunal during pendency of appeal before it. In the present case, the issue raised in additional ground is legal issue which goes to the root of the matter and for deciding the legal issue no new facts are required to be considered as all the facts are already recorded in the orders of the authorities below. In view of the matter, we do not find any force in the

argument of the Ld. DR that the assesseees cannot raise the additional ground on the simple reason that it was not challenged before the Assessing Officer. We, therefore, admit the additional ground and restore the issue to the file of the Assessing Officer for verification and fresh adjudication on the legal issue raised by the assesseees.

7.5 On merits, the facts of the case have already been narrated in the affidavits filed by the Id. AR which is not required to be reiterated. Since we have admitted the appeals for adjudication, the additional ground raised by the assesseees which goes to the root of matter which was not at all raised before the lower authorities on earlier occasion needs to be remitted to the file of the Assessing Officer for fresh consideration. The Assessing Officer has to go through the relevant title deed, notifications etc. so as to decide whether the land sold by the assesseees is agricultural land or not. Thus, the additional ground of appeals is partly allowed for statistical purposes.

9. Since we have remitted the additional ground to the file of the Assessing Officer for fresh adjudication, at this stage, we refrain from going into main grounds.

10. In the result, the appeals of the assesseees are partly allowed for statistical purposes.

Order pronounced in the open Court on this 09<sup>th</sup> March, 2020

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 09<sup>th</sup> March, 2020

GJ

Copy to:

1. Smt. Jiby Mathew, Biju Nivas, Kumaranalloor P.O., Kottayam-686 016.
2. Shri Mathew Joseph, Biju Nivas, Kumaranalloor P.O., Kottayam-686 016.
3. The Deputy Commissioner of Income-tax, Central Circle, Kottayam.
3. The Commissioner of Income-tax(Appeals)-II, Kochi.
4. The Commissioner of Income-tax, Central, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T. Cochin Bench

