

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 11TH DAY OF JULY 2016/20TH ASHADHA, 1938

WP(C).No. 18010 of 2012 (A)

PETITIONER(S):

M/S.BETA CASHEWS AND ALLIED PRODUCTS PVT. LTD.,
NNC ESTATE, VADAKKEVILA P.O., KOLLAM - 691 010,
REPRESENTED BY ITS DIRECTOR, T.V. RAJENDRAN NAIR.

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SMT.NISHA JOHN
SRI.V.P.NARAYANAN
SMT.BOBY M.SEKHAR

RESPONDENT(S):

1. THE COMMISSIONER OF INCOME TAX,
AAYAKAR BHAVAN, KAWDIAR,
THIRUVANANTHAPURAM - 695 003.
2. THE INCOME TAX OFFICER, WARD-I,
KOLLAM - 691 001.

BY ADV. SRI.JOSE JOSEPH, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 11-07-2016, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

msv/

WP.(C).No. 18010 of 2012 (A)

APPENDIX

PETITIONER(S) ' EXHIBITS:

EXHIBIT-P1-TRUE COPY OF THE APPLICATION SUBMITTED BY THE
PETITIONER U/.S 119 (2) (B) ON 10/11/2010 FOR 2004-
2005 BEFORE THE IST RESPONDENT.

EXHIBIT-P2-TRUE COPY OF THE APPLICATION SUBMITTED BY THE
PETITIONER U/.S 119 (2) (B) ON 10/11/2010 FOR
2005-2006 BEFORE THE IST RESPONDENT.

EXHIBIT-P3-TRUE COPY OF THE NOTE SUBMITTED BY THE PETITIONER
BEFORE THE IST RESPONDENT.

EXHIBIT-P4-TRUE COPY OF THE ORDER NO. 308/TECH/119(2)(B)/28/10-11
DATED 06/02/2012 ISSUED BY THE IST RESPONDENT.

RESPONDENT(S) ' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

A.M. SHAFFIQUE, J.

W.P.(C) No.18010 of 2012

Dated this the 11th day of July, 2016

JUDGMENT

Petitioner challenges Ext.P4, by which the Commissioner of Income Tax had dismissed the petition seeking refund of the advanced tax paid for the assessment years 2004-2005 and 2005-2006 on the ground of delay. The assessee is before this Court challenging the said order *inter alia* contending that the first respondent had failed to consider the application in its proper perspective. The statute provides for a Company to file an application to condone delay for refund. Petition is not filed within the prescribed period. It is stated that the only consideration that is required is to find out whether there was genuine hardship, in which event the delay ought to have been condoned. It is submitted that the petitioner Company was suffering huge loss for a period of time and they were not even in a position to engage a proper accountant for preparing the

accounts and filing the returns in time. This resulted in the petitioner not approaching the competent authority within time. The fact that the petitioner Company had suffered losses during the relevant time by itself, ought to have been taken as a reason for condoning delay, as non-payment would have created genuine hardship to the petitioner.

2. Statement has been filed on behalf of the respondents supporting the stand taken in the matter. It is contended that the petitioner has even delayed the returns for subsequent years, which also has been taken note of while considering whether there is any genuine hardship, caused to the petitioner warranting condonation of delay.

3. Section 119 (2) (b) reads as under:-

“119.(2): Without prejudice to the generality of the foregoing power: -

(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.

4. Learned counsel for the petitioner places reliance on few judgments including **Sitaldas K. Motwani v. Director General of Income Tax (International Taxation) & Ors. [2010 (323) ITR 223]**. In that case, the Bombay High Court has taken a view that while considering Section 119 (2) (b), 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 and if the refund is legitimately due to the applicant, mere delay should not defeat the claim for refund. It is held at paragraphs 15 & 16 are under:

“15. The phrase “genuine hardship” used in S. 119 (2) (b) should have been construed liberally even when the petitioner has complied with all the conditions mentioned in Circular dt. 12th Oct, 1993. The legislature has conferred the power to condone delay to enable the authorities to do substantive justice to the parties by disposing of the matters on merit. The expression “genuine” has received a liberal meaning in view of the law laid down by the Apex court referred to

herein above 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 merits after hearing the parties. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. The approach of the authorities should be justice oriented so as to advance cause of justice. If refund is legitimately due to the applicant, mere delay should not defeat the claim for refund.

16. Whether the refund claim is correct and genuine, the authority must satisfy itself that the applicant has a prima facie correct and genuine claim, does not mean that the authority should examine the merits of the refund claim closely and come to a

conclusion that the applicant's claim is bound to succeed. This would amount to prejudging the case on merits. All that the authority has to see is that on the face of it the person applying for refund after condonation of delay has a case which needs consideration and which is not bound to fail by virtue of some apparent defect. At this stage, the authority is not expected to go deep into the niceties of law. While determining whether refund claim is correct and genuine, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."

Still further in paragraph 5 of **Pala Marketing Co-operative Society Ltd v. Union of India [2009 (311) ITR 177]**, learned Single Judge of this Court in Paragraph 5 held as under:

"5. So far as the merits of the assessee's claim for condonation of delay is concerned, I find the assessee is bound to get its accounts audited under s.64 of the Co-operative Societies Act. The delay in audit by the auditor appointed under the Act is not attributable to the assessee. Even though standing counsel submitted that the assessee

was free to get the accounts audited by any accountant defined under the Act, I do not think this contention can be accepted because audits covered by other statutes are recognised under second proviso to s. 44 A (b) of the IT Act. Until 2001 audited accounts and report in the prescribed form could be filed through the statutory audit. However only from 1st April, 2001 report from auditor is required and even thereafter the audit report prepared by auditor appointed under the special statute could be submitted. Besides showing sufficient cause for delay in filing the return for refund, assessee its also established its case of genuine hardship inasmuch as it has suffered losses in the five succeeding years. The genuine hardship contemplated under s. 119 (2) (b) obviously is financial hardship caused to the assessee if delay is not condoned. If delay in this case is not condoned, the co-operative society will be deprived of Rs.10 lakhs and odd which it was otherwise not liable to pay by virtue of the exemption claimed under s.80P of the IT Act. In the circumstances, I quash Ext.P9 denying petitioner's entitlement for

condonation of delay under s.119(2)(b) of the Act and consequently direct the fourth respondent to process petitioner's claim for refund under s.237 and grant refund to the extent found eligible within a period of three months from the date of production of copy of this judgment by the petitioner."

5. Learned Standing Counsel appearing for the respondent however, submits that each case will have to depend upon its own facts. It is argued that in this particular case, the petitioner has consistently delayed filing the returns and seeking refund of claim. Such a person is not entitled for condonation delay. Therefore, it is contended that the challenge to Ext.P4 is not sustainable.

6. Ext.P1 is the application submitted by the petitioner for condoning delay. It is stated that the petitioner did not have a permanent employee to write up the accounts and even after earnest efforts to find out a competent person. Further, it is indicated that there is delay in completion of accounts and consequent delay in completion of audit. It is also pointed out

that the assessee will be deprived of Rs.2,11,490/- which is to be refunded. In the application, the petitioner has also relied upon various judgments. Ext.P2 is issued for the corresponding year. It is therefore relevant to note that the total amount which is sought to be refunded is more than Rs.6 lakh. Ext.P3 is submitted to the Commissioner of Income Tax, wherein the petitioner had given all details regarding the loss that they had suffered over a period of time.

7. Having regard to the aforesaid submission, I am of the view that when an assessee is suffering huge losses for over a period of time, it has to be assumed that they have genuine hardship and that genuine hardship can be redressed or avoided only on payment of the amount which is legally due to them. Of course, the delay is also a matter which is required to be considered by the Commissioner while directing refund of the amount. Section 119 (2) (b) clearly indicates that if it considers desirable or expedient so to do, authorize the Commissioner (Appeals) to admit an application or claim

for any exemption, deduction, refund or any other relief, in accordance with law. Therefore, when the Commissioner is given the power to adjudicate all such issues and find out that on account of non-payment, genuine hardship will be caused to a person, the Commissioner will have to condone the delay.

8. In the case on hand in Ext.P4, the reference is made to the returns filed for the Assessment years 2006-07 onwards and 2008-09. It is stated that in the subsequent years, returns were filed belated. That by itself cannot be a reason to arrive at a finding as to whether there is any hardship caused to the assessee or not. In the case on hand, it is demonstrated by the material placed that the assessee company was suffering huge losses. In the said circumstances, if the amount claimed is not refunded, definitely their losses will be much more than what is computed presently. In the said circumstances, it would have been appropriate for the Commissioner to have condoned the delay.

I am of the view that sufficient cause has been shown by the petitioner for condoning the delay in submitting the application and accordingly, this writ petition is disposed of as under:

(i) Ext.P4 is set aside.

(ii) The second respondent shall process the return and pass appropriate orders in accordance with the procedure prescribed, within a period of two months from the date of receipt of a copy of this judgment.

Sd/-
A.M. SHAFFIQUE
JUDGE

W.P.(C) No.18010 of 2012

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