

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and
Shri Aby T.Varkey, Judicial Member

ITA Nos. 908& 909/Coch/2022
(Assessment Years: 2010-11& 2011-12)

Kasaragod Tody Tappers and
Shop Workers Co-opeative
Society Ltd.
Munnad P.O., Kasargod 671541
[PAN:AABAK4028Q]

The Income Tax Officer
Ward -1, Kasargod
vs.

(Appellant)

(Respondent)

Appellant by: Shri Arun Raj S., Advocate
Respondent by: Smt. J.M. Jamuna Devi, Sr. DR

Date of Hearing: 15.05.2023
Date of Pronouncement: 30.06.2023

ORDER

Per Sanjay Arora, AM

This is a set of two Appeals by the assessee contesting the confirmation of it's assessments under section 147 read with sec. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter), both dated 15.01.2015, for assessment years (AYs.) 2010-11 and 2011-12, by the National Faceless Appeal Centre ('CIT(A)' for short) vide separate orders dated 30.03.2022.

2. The appeals raising common issues, were posted for hearing and, accordingly, heard together. The appeals are time-barred by 122 days, which delay standexplained per an affidavit/s dated 22/9/2022 by the Secretary of the appellant-society, who has also signed the appeal memos. The same attributes the delay to a Kasargode counsel, Shri S.K. Prasad, Advocate, who was assigned the

work of preparing and filing the appeal inasmuch as he retained the appeal papers for the major part of the period since the service of the appellate orders on 30/3/2022, while not communicating with the assessee – who was under the *bona fide* belief that the appeals had been prepared and filed in time, in the matter. The same, not opposed by the Revenue, representing a plausible explanation, was accepted considering that the assessee is a farmer's society, stated as not conversant with the procedures in tax matters. The delay was, accordingly, condoned, and the hearing in the matter proceeded with.

3. Taking up the appeals for hearing, it was to our dismay discovered that the corresponding appeals before the first appellate authority were delayed by a period of 1855 days, i.e., 5 years & 1 month, and which, being unexplained, had not been condoned by him, forming the principal reason for dismissing the same. We say 'dismay' as the prime concern of any court or tribunal in condoning a delay is that the matter is, to the extent possible, heard and decided on merits. Where, however, the principal reason for the dismissal of the appeal itself is the huge, unexplained delay in preferring it before the lower forum, so that it is *prima facie* inadmissible, how, one wonders, could the same, despite being admitted, be decided on merits? That apart, the least the assessee was under the circumstances expected to do, was to exhibit a sense of responsibility and seriousness in prosecuting its affairs. The law, after all, comes only to the rescue of those who are vigilant of their rights. *Third, it was incumbent on the part of Sh. Raj, the ld. counsel for the assessee, as indeed on Smt. Devi, the ld. Sr. DR, to have brought this fact to our notice while canvassing for condonation of delay, or defending it, before the Tribunal.*

4. The ld. CIT(A) examining the aspect of condonation of delay before him, found both the aspects required to be satisfied for the condonation of the delay, i.e.,
(a) proof of absence of negligence; and
(b) proof of satisfactory level of diligence,

as absent. Reference was made by him to certain decisions by the higher courts, bringing to the fore different aspects of the application of law on limitation in judicial and *quasi* judicial proceedings, viz.:

1. *Rankak&Ors. vs. Rewa Coalfields Ltd.* AIR 1962 SC 361 and *JCIT vs. Tractors & Farm Equipments Ltd.* (ITAT, Chennai - TM) 104 ITD 149 - Party has to show reason for delay on the last day of limitation period and thereafter for each day thereafter - Condonation is not a matter of right - Court has to exercise the discretionary jurisdiction.
2. *Brij Inders Singh vs. Kanshi Ram* AIR 1917-PC-156, *Baroda Rayon Copn. Ltd. (Guj.)* 87 STC 266, *M. Krishna Rao D. Phalke vs. Trimbak* AIR 1938 Nag. 156 and *Baldeo Lal Roy vs. State of Bihar* (1960) 11 STC 104 (Pat) - Delay in filing the appeal - cause for delay - whether the appellant has acted with reasonable diligence in the prosecuting of his appeal - to be looked into.
3. *Mrs. Anita Chadha vs. CIT* 189 Taxman 300 (P & H) - Whether delay in filing of appeal beyond period of 120 days prescribed by Sec. 260A(2)(a) can be condoned by entertaining an application u/s.5 of Limitation Act, 1963 - Held - No.
4. *CIT vs. Maharashtra State Government Employee Confederation* Appeal No. CC3159-3160 of 2009, 23.03.2009 (SC) - When the High Court has refused to condone delay of 562 days in filing appeal, we do not see any reason to interfere therewith, more so when the SLP have also delayed. SLP are dismissed both on ground of delay as also on merit.

In the last case, the Hon'ble Apex Court found no reason to interfere with the refusal to condone the delay of 562 days by the Hon'ble High Court, more so when the SLP had also been delayed. Accordingly, the SLP(s) was dismissed by it both on the ground of delay, as also on merits. We mention this separately in view of parallel facts of the instant case, *also validating our observations hereinbefore*. Our view on the condonation of the 122-day delay before us may well have been different if the fact of the 1855-delay attending the filing of appeals at the first appellate stage, as well as of its non-condonation, had been, as is expected to be, brought to our notice inasmuch as it would have impelled us to examine the stated

reason/s for the delay more closely. No self-respecting, responsible professional can be expected to assume responsibility which he cannot ordinarily discharge, while in the instant case the ld. counsel accepting the appeal papers would only be aware of his leaving India soon after for a period of nearly two months and, besides, as per the averment made, not communicated with the assessee even after his return. These charges, in the least, cannot be lightly made, much less at the back of the person concerned. Further still, the appeals, filed at Cochin, were not by him.

On the facts of the impugned delay, there has been, as afore-noted, no explanation for the delay. Rather, as it appears, the assessee, being engaged principally in running toddy shops under licence from the State Excise Department, lost interest therein on the changed scenario whereby the said licence was not renewed. It was only on the launch of the *Vivad Se Viswas Scheme 2020* by the Government of India, that an appeal against assessments dated 15.1.2015 (conveyed on 18.01.2015) were filed on 16.2.2020, i.e., within days of the same becoming public. *So much for the assessee being not conversant with the tax laws!* The assessee's, who failed to meet the case law cited, reliance before us on the decision in *Collector, Land Acquisition vs. Mst. Katiji & Ors* [1987] 167 ITR 471 (SC), where the delay was for four days, is misplaced. Rather, as afore-noted, the assessee's case is *dehors* any factual explanation for the delay which, as explained, has been guided by the consideration to avail the VSV scheme. This though did not succeed as the scheme was available only for matters already under appeal, i.e., under litigation as on the cut-off date, being 31/01/2020. It is to our mind no more than raking up a stale matter, which cannot be countenanced, as explained in *Parshuram Pottery Works Co. Ltd. v. ITO* [1977] 106 ITR 01 (SC). We, therefore, find no reason for interfering with the impugned order on the ground of denying admitting the appeal(s) by condoning the delay of 1855 days. We decide accordingly.

5. The Id. CIT(A), however, without prejudice, and in the alternative, has discussed the appeal on merits as well. It is, in view of our decision confirming his order/s holding the appeal/s before him as not maintainable, not necessary for us to travel to the issue/s on quantum, which concerns the eligibility for deduction u/s.80P(2)(a)(vi) of the Act, i.e., income of a cooperative-society arising from the activity of collective disposal of its labour. We may, nevertheless, do so, if only with the view to highlight the broad aspects involved, in view of the vehement arguments advanced before us, as indeed for the sake of completeness of our order. The issue has been discussed threadbare by the Assessing Officer (AO) and, further, also duly considered by the Id. CIT(A), meeting the contentions raised by the assessee. As fairly conceded by ShriRaj, the matter stands decided by the Hon'ble jurisdictional High Court against the assessee in *Nileswar Range Kallu Chethy Vyavasaya Thozhilali Sahararana Sangham vs. CIT* (in ITA Nos. 141, 145 & 146 of 2014, dated 13.08.2015), upholding the view of the Tribunal following its earlier decision in *CIT vs. Uralungal Labour Contract Cooperative Society* [(2010) KHC 59], and relying on the decision in *Nilagiri Engineering Cooperative Society Ltd. vs. CIT* [1994] 208 ITR 326 (Ors). After reproducing the findings by the AO at para 10 of its order, the Hon'ble Court entered its findings at page 13 of its judgement, which we reproduce hereunder for ready reference: -

“13. We have also gone through the bye-laws of the society. The factual findings of the Assessing Officer, which was confirmed by the appellate Tribunal show that though membership of the society is confined to persons who are enrolled as members of the Toddy Workers Welfare Fund Board and are toddy tappers, for the toddy that is tapped and delivered by them to the society, they are paid remuneration based on the quantity of toddy delivered. On similar terms, toddy is collected from non-members also. *The bye-laws of the society shows that the main object of the society is establishment and management of the toddy shops.* The activity of the society is therefore purchase of toddy from its members and non-members on payment of the agreed remuneration and its sale through the toddy shops established by the society itself.

14. This, therefore, shows that the *collective disposal of the labour* of the members of the society is not resulting in the generation of any income to the

society. On the other hand, toddy tapped and delivered by the members of the society and non-members are purchased by it and remuneration is paid to them at agreed rates. The toddy thus purchased is sold through the Toddy Shops established by the society. *Therefore, the income of the society has nothing to do with the collective disposal of the labour of its members*, but is entirely from out of the price realised by it for the sale of toddy through the society's own toddy shops. When that is the activity of the society, it cannot be said that the sum referred to in section 80P(1) entitling the society for deduction is generated out of the collective disposal of the labour of the appellant societies.

15. *The society does not dispute the correctness of the factual finding that toddy is collected from non-members also.* Though this was attempted to be explained by the learned counsel by pointing out that there are persons who supplied toddy till they became eligible for admission to the Toddy Workers Welfare Fund Board, the fact that at least until then, the suppliers of toddy are non-members of the societies, remain undisputed. However, even if this contention of the Revenue is accepted, the societies would not be totally deprived of the benefit of deduction, but would have been entitled to proportionate deduction.” (emphasis, supplied)

6. It is therefore incorrect to say, as Shri Raj was at pains to emphasize, that the deduction has been denied due to assessee not being a labour contract society, which is the case in *Uralungal Labour Contract Cooperative Society* (supra), also binding on us. The assessee's contentions are inconsistent with its bye-laws and objects, which, duly pursued (refer para 3.7 of the assessment order), are to be given primacy, as explained in *CIT v. Rajasthan Rajya Bunkar Samithi Ltd.*[2010] 323 ITR 365 (SC) and, again, in the context of deduction u/s. 80-P(2)(a)(ii)/(vi) (also refer: *Delhi Stock Exchange Ass. Ltd. v. CIT* [1997] 225 ITR 235 (SC)). Income to the assessee, formed to set-up and run retail toddy shops, arises on the sale of toddy. The economic function of tapping toddy from trees is remunerated by paying wages to the tappers, so that income arising is principally for the functions performed subsequently, of course, to the extent not outsourced. It is this business model that led the Revenue to hold that the income on which exemption is being claimed is on the sale of toddy, purchased from non-members, accounting it as purchase. This is precisely what the Hon'ble High Court holds in *Nileswar....Sangham*(supra). That apart, there is nothing to show that there is a

collective expenditure of labour and, accordingly, of revenue arising on its disposal, which aspect has also been considered in detail by the Hon'ble Court. Rather, as it appears on hearing Sh. Raj, labour is engaged by the individual members, paying them for tapping toddy from their farms, which is sold collectively through licensed shops. The aspect of income being on account of marketing of agricultural produce of its members, deductible u/s. 80-P(1) r/w s. 80-P(2)(a)(iii), has also been discussed by the Id. CIT(A), and toward which reference is made to paras 9 through 10 (pgs. 9-11) of his order. The appellant-society, as found by both the Revenue authorities, is engaged in the activity of tapping and sale of toddy tapped from the trees belonging to non-members, paying them a fixed sum per tree. Thus, apart from the fact, as observed earlier, that labour is paid, income arising is not on sale of agriculture produce of its members. This has not been disputed before us, much less w.r.t. any materials. Two, only to the extent, not shown though at any stage, the sale relates to the agricultural produce, i.e., toddy tapped from the trees grown by its members, would a claim u/s. 80-P(2)(a)(iii), even as observed by the Hon'ble Court, arise. No infirmity in his order/s has been pointed out, and it is incorrect to say, as Sh. Raj would, that this aspect is unadjudicated.

7. The assessee, registered as a miscellaneous society, and not as either a labour contract or a marketing society, is, thus, consistent with its charter and working, engaged in setting-up and running toddy shops for retailing it. It is accordingly not entitled to deduction of its profits either u/s. 80(P)(2)(vi) or s. 80P(2)(a)(iii), but only u/s. 80P(2)(c), which stands allowed to it for both the years under reference. No interference with the impugned orders on merits is, accordingly, called for, even as the appeal have been rightly denied admission by the first appellate authority.

Before parting with this order, we may clarify that the without prejudice adjudication on merits by the Id. CIT(A) would not tantamount to a deemed condonation of the delay, as may well be argued. The Hon'ble Apex Court in *Mela*

Ram and Sons v. CIT [1956] 29 ITR 607 (SC) clarified that not admitting an appeal for any reason also amounts to deciding it, i.e., it is as much an order u/s. 31 (corresponding to s. 250(6) of the Act) as an order dismissing the appeal on merits. There is, thus, clearly no question of a deemed condonation— a non-existent concept, either by the Id. CIT(A) in passing the impugned order, or by us.

We decide accordingly.

8. In the result, the appeals by the assessee are dismissed as not maintainable.

Order pronounced on June 30, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-
(Aby T. Varkey)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: June 30, 2023

Copy to:

1. The Appellant
2. The Respondent
3. The CIT concerned By Order
4. The Sr. DR, ITAT, Cochin
5. Guard File Assistant Registrar

n.p.