

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH,
MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.3270/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2003-04)

Rushabh Precision Bearings Ltd Fida Mansion, 2 nd floor, 4, Babijan Street, Nagdevi, Mumbai-400002.	बनाम/ Vs.	ACIT-7(2) Aayakar Bhavan, M. K. Marg, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACR5214N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Mandar Vaidya
Revenue by:	Shri S. N. Kabra (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 28/11/2023

घोषणा की तारीख /Date of Pronouncement: 12/12/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

The present appeal has been filed by the assessee challenging the *ex-parte* order dated 03.12.2007 passed u/s 250 of the Income Tax Act, 1961 (hereinafter "the Act") by the Ld. Commissioner of Income Tax (Appeals) for the AY. 2003-04.

2. At the outset, we note that this Tribunal had dismissed this appeal by an *ex-parte* order *qua* assessee on 21.06.2022 which has been recalled by this Tribunal by order dated 24.04.2023 (MA. No.66/Mum/2023).

3. At the outset, the Ld. AR of the assessee pointed out that there was delay of more than seven (7) years in filing the appeal and contended that the delay occurred due to reasons beyond the control of assessee and neither intentional nor deliberate. According to him, due



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to labour-dispute, in the year 1998, winding-up of petition was filed against assessee company; and management/promoters were not allowed to enter the company premises, which ultimately led to winding up of the company in the year 2010; and after that event, the company was in the hands of Official Liquidator, who did not file appeal against the impugned order of Ld CIT(A); and assessee filed the appeal after Hon'ble High Court of Bombay recalled its earlier winding up order vide order dated 05.02.2018, and assessee immediately filed appeal, therefore, prays for condoning the delay of seven years. The Ld. DR opposes the condonation of delay by stating that the impugned order of the Ld. CIT(A) was dated 03.12.2007. And the winding up order of the company was ordered by the Hon'ble Bombay High Court on 30.03.2010. Therefore, according to him, the assessee ought to have filed the appeal within the sixty (60) days from the date of the impugned order on 30.12.2007, (i.e. by Feb 2008) therefore, the delay is more than eleven (11) years. Therefore, he pleaded that application for condonation be dismissed.

4. We have heard both the parties and perused the records. First, we have to decide whether to admit the appeal or not, since there is per-se considerable delay in filing of Appeal. We note that the present appeal is filed along with an application seeking condonation of delay in filing the present appeal. The condonation application is supported by an affidavit of Shri Rajesh Vora, Chairman and Managing Director of the assessee company. In the affidavit, it has been submitted that the impugned order passed by the Ld. CIT(A) was received by the



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company in January 2008 and the present appeal was filed on 16/05/2018. Thus, there is *per-se* delay of more than 10 years in filing the present appeal. It was brought to our notice that in the year 1998 winding up petition was filed against the assessee company and since year 2004, the office of the assessee situated at Wadhwan, Gujarat, [*where all the papers and records are maintained*], was under attachment by officials of Provident Fund and Labour Authorities because of ongoing labour dispute with the workers union; and the workers were not allowing any one from the management to enter the factory premises because of which the assessee could not access any documents or produce any records before the lower authorities. And the dispute went up to the Hon'ble Supreme Court in August 2007. And as afore-stated, winding-up petition being Company Petition No. 18 of 1998 was filed against the company before the Hon'ble High Court of Bombay in the year 1998. Thereafter, pursuant to the winding- up order dated 30/03/2010 passed by the Hon'ble High Court, Official Liquidator was appointed. Subsequently, the winding-up order was recalled in February 2018 and Official Liquidator handed over the possession of the premises to the management in April 2018 and only thereafter, the present appeal was filed on 16/05/2018. It has been further brought to our notice that during this period, assessee's promoters/directors were also declared insolvent, thus, assessee was in financial distress and thus found itself in dire situation and was not in a position to salvage the situation which was not in its control. And finally assessee got over the situation in the year in 2018 (*after*



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recalling of winding up order) and regular business of the company resumed from April 2018 onwards and the assessee immediately filed the appeal. So, assessee prays that the delay in filing the present appeal be condoned. In support of the aforesaid submissions and averments made in the affidavit, assessee has also submitted copies of minutes recorded at the time of handing over possession of factory premises, copies of various orders passed by the Hon'ble High Court in respect of the winding up proceedings in the case of the assessee as well as orders passed by concerned authority in respect of the labour dispute/insolvency etc.

5. We have considered rival submissions and perused the application seeking condonation of delay along with supporting affidavit as well as other documents filed by the assessee. From the perusal of record, it is evident that winding-up proceedings against the assessee was initiated in the year 1998 which is discernable from perusal of the winding-up petition viz Company Petition No. 18 of 1998 filed before the Hon'ble Bombay High Court. We find that the said Company Petition was allowed by the Hon'ble High Court vide order dated 30/03/2010 wherein the Hon'ble High Court also directed appointment of Liquidator. Finally, vide order dated 05/02/2018, Hon'ble High Court recalled its earlier order dated 30/03/2010 and also discharged Official Liquidator appointed pursuant to the said order. Thereafter, the Official Liquidator handed over the possession of the office/factory and other assets to the management in April 2018 and immediately thereafter the present appeal was filed on 16/05/2018.



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According to Ld. AR, the period between the onset of winding-up proceedings to one year after the winding up order is passed is excluded by virtue of operation of law. This contention of assessee need to be examined. In this regard, as per the scheme of Companies Act, 1956, (*which was in existence at the time of filing of winding up petition before the Hon'ble High Court*). Part VII of the Companies Act, 1956 deals with provisions pertaining to winding up of a company. Chapter II of Part VII further deals with provisions pertaining to winding up by the Court. As per section 457(1)(a) of the Companies Act, 1956, Liquidator shall have the power, with the sanction of the Court, to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company. Further, it is pertinent to note the provisions of section 446 of the Companies Act, 1956, which reads as under:

“(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.”

6. Thus, as per section 446 of the Companies Act, 1956, when the winding up order is passed by the Court, no suit or other legal proceedings, inter-alia, shall be commenced against the company, except with the leave of the Court. The term “*suit or other legal proceeding*” used in Section 446 of the Companies Act, 1956 is wide



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enough to even include within its ambit the present appeal. While dealing with the issue, whether such a leave/permission is required to be taken prior to initiation of proceedings, Hon^{ble} jurisdictional High Court in Erach Boman Khavar vs. Tukaram Sridhar Bhat, [2008] 81 SCL 416 (BOM.), observed as under:

“33. Having heard learned counsel appearing for the parties, the first contention which needs consideration is: whether failure to obtain permission prior to institution of suit debars the Court from granting such leave subsequently. This question has already been answered by the Apex Court in the case of Bansidhar Shankarlal (supra) and reiterated by the Apex Court in the recent judgment in the case of State of Jammu & Kashmir (supra) wherein the Apex Court held that the failure to obtain leave prior to institution of suit would not debar the Court from granting such leave subsequently and that the only consequence of this would be that the proceedings would be regarded as having been instituted on the date on which the leave was obtained from the High Court.”

7. It is further pertinent to note that the provisions of section 458A of the Companies Act, 1956, which reads as under:

“Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Court, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a



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period of one year immediately following the date of the winding up order shall be excluded.”

8. Thus, period from the date of commencement of the winding up of the company to the date on which winding up order is passed by the Court and a further period of one year from the date of winding up order, is excluded for the purpose of computation of limitation period for any suit or application in the name and on behalf of the company. Thus, the period between 1998 to 30/03/2010 and one year from that date i.e. 30.03.2011 need to be excluded. While interpreting section 458A of the Companies Act, 1956, Hon“ble jurisdictional High Court in *M. Thankamani vs. Official Liquidator*, [1996] 85 COMP CASE 318 (Bombay), observed as under:

“In our opinion, under section 458A, no new cause of action arises in favour of the official liquidator. The cause of action accrued in favour of the company enures for the benefit of the official liquidator. Section 458A of the Companies Act on its plain reading shows how and to what extent the period is to be excluded and that the period is only from the commencement of the winding up proceedings to the passing of the winding up order and one year thereafter. It nowhere provides that the limitation once started would come to an end forever. The limitation started under the Limitation Act would continue subject to the exclusion of the period mentioned under section 458A.”

9. In view of the above legal position as discernable from the affidavit supporting the application seeking condonation of delay, we



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note that in this case winding up petition was filed against the company in the year 1998 and the winding-up order was passed by the Hon'ble High Court on 30/03/2010. Thus, even if the provisions of section 458A of the Companies Act 1956 are said to be applicable to present case, the period from filing of the winding-up petition till 30/03/2010 and a further period of one year from the date of winding-up order i.e. till 30/03/2011, need to be excluded for the purpose of computation of limitation period of present appeal. In the present case, the impugned order by Ld CIT(A) was passed on 03/12/2007. As the due date for filing the appeal against the aforesaid impugned order before the Tribunal was falling during the exclusion period, as stated in section 458A of the Companies Act, 1956, in our considered view, the limitation period in the present case started from 31/03/2011 and the present appeal was filed by the assessee only on 16/05/2018, i.e. after more than 7 years from 31/03/2011.

10. It is noted that the Hon'ble High Court by order dated 05.02.2018 has recalled earlier order dated 30.03.2010 winding up of assessee, which means once the impugned order against the assessee has been passed on 03.12.2007 by Ld. CIT(A), post-winding up order dated 30.03.2010, the Official Liquidator was appointed by the Hon'ble High Court (vide order dated 30.03.2010), which means post-30.03.2010, the assessee company was in the control of the Official Liquidator, until the Hon'ble High Court has recalled the order vide order dated 05.02.2018. So, the assessee cannot be faulted for the laxity/omission on the part of Liquidator in non-filing the appeal as



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envisaged u/s 457(1a) of the Companies Act,1956. Thus, we note that the Liquidator has not taken any steps to file the appeal before this Tribunal till the time, the Hon'ble High Court vide order dated 05.02.2018 has vacated the earlier winding up order dated 30.03.2010; and after handing over the Management & Control of the company back to the erstwhile management on 18.04.2018, assessee was in a position to file the present appeal before this Tribunal. In such a scenario, the assessee cannot be faulted for inaction/omission on the part of the Official Liquidator between the order of winding up dated 30.03.2010 and recalling the same on 05.02.2018. Further, we find that the assessee had filed the appeal before this Tribunal on 16.05.2018 (*within a month of handing over management to the erstwhile promoters*). In the light of the aforesaid peculiar facts and circumstances of the case and law discussed, we are inclined to condone the delay of seven (7) years which has happened due to non-fault of assessee and assessee cannot be penalized for the omission of Liquidator as discussed (*supra*). Therefore, we condone the delay of seven (7) years and admit the appeal for hearing.

11. However, we note that the issues raised by the assessee has not been considered by Ld. CIT(A) on its merits. Therefore, the issues emanating from the assessment order passed by the AO u/s 143(3) of the Act needs to be remanded back to the Ld CIT(A) for fresh adjudication, and we restore the appeal back to the file of Ld. CIT(A)/NFAC and direct the Ld. CIT(A) to adjudicate the grounds of appeal in accordance to sub-section (6) of section 250 of the Act.



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Assessee is at liberty to file relevant documents in support of its ground and may seek hearing, if it desires, in accordance to Rule and Ld. CIT(A) to pass order in accordance to law.

12. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 12/12/2023.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 12/12/2023.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai