

IN THE INCOME TAX APPELLATE TRIBUNAL, "SMC" BENCH, SURAT
BEFORE DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.372/SRT/2023

(निर्धारण वर्ष / Assessment Year: (2007-08)

(Hybrid Hearing)

Shilpaben Nieshbhai Gami, 9-10, Omkarnagar Society, Near Jalaram Temple, Bardoli- 394601	Vs.	Income Tax Officer, Ward 3(1)(5), Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACBPP 8678 C		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by	Shri Manish J. Shah, Advocate
निर्धारिती की ओर से /Respondent by	Shri Vinod Kumar, Sr. DR
सुनवाई की तारीख /Date of Hearing	31/10/2023
घोषणा की तारीख /Date of Pronouncement	29/12/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2007-08, is directed against the order passed by the Commissioner of Income Tax (Appeals)-3, Surat [in short, "Ld. CIT(A)"] dated 08.03.2017, which in turn arises out of an assessment order passed by the Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act'), dated 20.03.2015.

2. Grounds of appeal raised by the assessee are as follows:

"1. The learned Assessing Officer erred in making addition of Rs.17,71,655/- u/s 143(3) r.w.s. 147 of the IT Act without considering documents and evidences submitted.

2. The learned AO erred in rejecting the amount claimed as long- term capital gain without proving otherwise.

3. It is therefore prayed that the assessment may please be cancelled or above incorrect additions made by the assessing officer may please be deleted.

4. The assessee craves leave to add, alter and withdraw any of grounds of appeal before or at the time of hearing."

3. The appeal filed by the assessee for Assessment Year 2007-08, is barred by limitation by 2208 days (more than 6 years) . The assessee has moved a petition requesting the Bench to condone the delay. The contents of the petition for condonation of delay are reproduced below:

“I, Shilpaben Nileshbhai Gami, aged 48 years, presently residing at 9-10, Omkar Nagar Society, Near Jalaram Temple, Bardoli-394601, solemnly affirm and state on oath as follows to explain the delay of 2208 days in filing the appeal to the Hon’ble Income tax Appellate Tribunal.

1. I was previously residing at the following address and filed my original return of income for A.Y 2007-08 on 28.03.2008, mentioning this address;

Old Address

A-11, Trikam Nagar Society No.1,L.H. Road, Surat

I had been issued notice u/s 148 dated 27.03.2014 for assessment for A.Y 2007-08. In the meantime, I had shifted to the following new addresses and therefore, had filed my return of income in response to the aforesaid notice u/s 148 mentioning the following new address of Surat:

New Address

(i) 33-34, Intercity Township, Near Kiran Motors, Puna-Kumbharia Road, Surat-395010

(ii) 9-10, Omkar Nagar Society, Near Jalaram Temple, Bardoli-394601

I was residing at both Surat and Bardoli for various social reasons, personal family reasons and also for business purpose.

2. Thereafter, the assessment proceeding u/s 143(3) r.ws. 147 was carried out and communication was made at the above new address at Surat. The assessment order dated 20.03.2015 passed u/s 143(3) r.w.s. 147 also mentions the new address at Surat. Thereafter, I had filed appeal before the Hon’ble CIT(A) inform 35. Although, in the cause title of Form 35, I had inadvertently mentioned my old address, yet I had duly mentioned my new address of Surat in the column of “Address to which notices may be sent to the appellant”.

3. Thereafter, the appellate proceeding u/s 250 was carried out and communication was made at the new addresses. During the pendency of the appellate proceedings before the Hon’ble CIT(A) u/s 250, I had permanently shifted to the above new address at Bardoli only, in the year 2015 and therefore, my address in the Income Tax Database was updated to this new address at Bardoli. The return of income for A.Y 2015-16 and subsequent years had been filed by me with this new address at Bardoli. The order dated 08.03.2017 passed u/s 250 by the Hon’ble CIT(A) also mentions the new address at Bardoli. My authorized representative had appeared before the Hon’ble CIT(A) during the course of appellate proceedings and had also made submissions and furnished documents. However, the appellate order u/s 250 dated 08.03.2017 had never been served to me.

4. Recently in the year 2022, on checking up of the outstanding demands on the Income Tax Portal, I was reminded of the pending appellate proceedings for A.Y 2007-08 and so when I enquired regarding the same with my

Chartered Accountant who in turn enquired with the Income Tax Office, I was informed that, an order u/s 250 had already been passed. Therefore, I immediately made an application to the Hon'ble CIT(A)-3, Surat on 01.06.2022 to provide me a copy of the appellate order. However, I was not provided with a copy of the appellate order due to shifting to the new faceless appeal scheme. After multiple personal visits by my Chartered Accountant to the office of the Hon'ble CIT(A) as well as the Assessing Officer, I could obtain a copy of the said order only on 12.05.2023 from the office of the Hon'ble CIT(A).

- 5. In order to find the true facts regarding service of the appellate order, I had filed a RTI application for the same. An order has been passed in response to my RTI application revealing that, the said order had never been served on me as the order was sent on the above old address and the post was returned with the remark "LEFT".*
- 6. Due to the inadvertent mistake of mentioning the old address in the Form 35 by me as well as service of the order u/s 250 by the office of the Hon'ble CIT(A) at the old address despite availability of new address, the said order could not be validly served on me. Thereafter, on receipt of it, immediately forwarded the same to the office of Adv. Manish J Shah for the purpose of filing an appeal before the Hon'ble ITAT and the appeal was filed belatedly by 2208 days.*
- 7. It is because of the above mentioned facts and circumstances, that the delay has taken place. It may kindly be appreciated that there was no mala fide intention in delaying the filing of appeal and the delay has arisen because of bona fide reasons as have been stated hereinabove.*
- 8. I say that whatever I have stated above is true to the best of my knowledge, information and belief and I believe the same to be true."*

4. Based on the contents of the petition for condonation of delay, as noted above, the Ld. Counsel contended that assessee has explained the sufficient reasons, therefore the delay in filing the appeal may be condoned.

5. On the other hand, Ld. Sr. DR for the Revenue submitted that such huge delay should not be condoned because assessee filed the appeal mainly after knowing the fact that in her sister's case, the appeal had been allowed by the Tribunal. That is, when the order was announced by the Tribunal, after that the appeal has been filed by the assessee before the Tribunal, hence assessee did not have intention to file the appeal prior to the period of order by Tribunal, in sister's case, that is, assessee filed the appeal before this Tribunal after knowing the favorable results in sister's

case to take the benefit of covered case, otherwise, the assessee did not want to file appeal before this Tribunal. Hence, this shows made file intention of the assessee and assessee failed to explain the sufficient cause for delay, therefore delay should not be condoned.

6. In rejoinder, Ld. Counsel for the assessee submitted that the issue is squarely covered by the judgment of Hon'ble Andhra Pradesh High Court, in the case of **Jayalakshmi Cloth Stores vs. ITO [1979] 2 Taxman 373 (AP)**, wherein it was held as follows:

“We have already held that the procedure adopted by the AAC in serving the copy of the appellate order on Sri A. Subba Rao, an erstwhile partner of the dissolved firm, who did not prefer an appeal, ignoring the address given in Form No. 35, is contrary to law and can certainly be ignored by the writ petitioner. We, therefore, hold that the petitioner's appeals are not barred by limitation but are well within the period of limitation prescribed therefor.

This view of ours gains support from the decision of the Orissa High Court in Fatechand Agarwal v. CWT [1974] 97 ITR 701, wherein it was held that it is the duty of the revenue to establish that the service of an order or notice was made on the assessee himself or on somebody duly authorised by him to receive such notice. In the instant case, we have already held that Sri Subba Rao was not authorised to receive the same.

We may notice here a decision of the Allahabad High Court in K.D. Kalra & Co. v. CIT [1975] Tax LR 614. Therein it was held that the limitation for preferring an appeal against the order of the AAC to the Tribunal would start from the date of the communication of the appellate order to the assessee. The memorandum of appeal to the AAC in the prescribed form requires the address of the appellant for sending notices. The address furnished in the prescribed form of appeal must be construed to be not only for the purpose of communication of the notice of appeal but also the notice of appellate order. The limitation for appeal to the Tribunal will start from the date of service of notice of the appellate order of the AAC on the appellant at the address given in the memorandum of appeal in the prescribed form.

For the reasons stated, we quash the orders of the Tribunal and direct the Tribunal to receive the memoranda of appeals filed by the petitioner herein as they are within the period of limitation prescribed therefor. The petitioner is entitled to his costs. Advocate's fee Rs.250.”

7. The Ld. Counsel also relied on the judgment of Hon'ble Supreme Court in the case of **N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123**, and contended that in the interest of justice, delay may be condoned.

8. I have heard the rival arguments made by both the sides and perused the material available on record. I find that assessee filed the appeal after expiry of more than 6 years (2208 days). Admittedly, the assessee filed the appeal knowing the result of her sister case (Smt. Prabhaben Prakashbhai Patel (Gami) in ITA No.3497/AHD/2015 for A.Y. 2007-08, order dated 14.06.2021. The Tribunal order in sister`s case is dated 14.06.2021, whereas the assessee under consideration filed the appeal before this Tribunal on 25.05.2023, this clearly shows that assessee wants to take advantage of covered case (sister`s case), otherwise, as I have noted above that assessee never thought to file the appeal within the period of 6 years. Therefore, considering the above facts, I find that there was no sufficient cause explained by the Id Counsel, for not presenting the appeal within the limitation period, hence delay should not be condoned.

9. At the cost of repetition, I state that delay in filing the present appeal for assessment year 2007-08 is more than 6 years and I note that when assessee`s sister case (appeal) was decided by the Tribunal in favour of assessee`s sister, then only, after observing the favourable results, the assessee took the steps to file the appeal. The assessee in present case filed this appeal very late, with the intention to take the advantage of covered case in assessee`s own sister case. Till the time assessee`s sister case was not decided by the Tribunal, the assessee did not file appeal, however, when Tribunal decided assessee`s sister case in favour of her, then only, the assessee under consideration, filed the appeal, this clearly shows *mala fide* intention to take the advantage of the covered case, hence delay should not be condoned.

10. The Assessee filed the appeal before Ld.CIT(A) himself and stated the address on Form No.35. On the address mentioned in Form No.35, the order of Ld.CIT(A) was delivered, hence Department cannot be blamed.

The assessee himself stated that in Form No.35, the old address was mentioned by him. It is like putting the cart before the horse, that is, assessee did mistake himself and thereafter saying that he is correct. The Revenue authorities sent the order of Id CIT(A), on time, on the address mentioned by the assessee in Form No.35, therefore, assessee cannot make excuse now stating that he did not get the order of CIT(A) on time, hence delay has occurred, which may be condoned, such approach is not acceptable to condone the delay of more than 6 Years.

11. Moreover, the Assessee himself filed the appeal before Ld. CIT(A), and as per assessee's instruction, the Authorized Representative (AR) of the assessee appeared before Ld. CIT(A), therefore assessee should know, by common sense, the result of Ld.CIT(A) may come very soon and conduct the necessary enquiries, as to why there was delay in delivering the order of Ld.CIT(A). A vigilant assessee after filing appeal before Ld.CIT(A) and after appointing AR which appeared before Ld.CIT(A) during appellate authorities, should know by common-sense that order of Ld.CIT(A) would likely to come very soon, if the order of Ld.CIT(A) could not reach to assessee, then assessee himself or AR of the assessee should have enquired in the office of Ld.CIT(A) that why appellate order was not despatched to the assessee, rather than to wait for six years. Therefore, such huge delay of six years cannot be condoned merely because there was inadvertent mistake on the part of the assessee to mention old address in Form No.35.

12. The judgment of Hon'ble Andhra Pradesh High Court (supra) relied on by Ld. Counsel would not help the assessee to condone the intentional delay in filing appeal late by more than six years. Hence, based on these facts, I note that assessee has failed to explain the sufficient cause to condone such huge delay, for that I rely on the latest judgment of Hon'ble

Supreme Court in the case of **Majji Sannemma @ Sanyasirao vs. Reddy Shridevi and Others, Civil appeal No. 7696 of 2021**, dated 16.12.2021, wherein the Hon`ble Supreme Court held as follows:

“2. That the appellant herein – original plaintiff permanent injunction against the respondents herein – original defendants. That the Trial Court dismissed the said suit by judgment and decree dated 23.04.2016. That the First Appellate Court allowed the suit by quashing and setting aside the judgment and decree passed by the Trial Court, by judgment and decree dated 01.02.2017. That the original defendants – respondents herein applied for the certified copy of the judgment and order on 04.02.2017. The same was ready for delivery on 10.03.2017. That after a period of approximately 1011 days, the respondents herein – original defendants preferred the Second Appeal before the High Court. Application to condone the delay was also filed being I.A. No.1 of 2021. By the impugned order, the High Court has condoned the delay of 1011 days in preferring the Second Appeal, which is the subject matter of appeal before this Court.

3. Learned counsel appearing on behalf of the appellant herein – original plaintiff has vehemently submitted that in the present case, High Court has committed a grave error in condoning huge delay of 1011 days in preferring the appeal. 3.1 It is submitted that as such no sufficient cause was shown by the respondents herein appellants before the High Court, explaining the huge delay of 1011 days in preferring the Second Appeal.

3.2 It is further submitted that even while condoning the huge delay of 1011 days, the High Court has also not observed that sufficient cause has been shown explaining the delay of 1011 days in preferring the Second Appeal. 3.3 It is further submitted that even considering the averments in the application for condonation of delay, there is no explanation whatsoever explaining the delay for the period after 15.03.2017 till June, 2021 till the Second Appeal was preferred.

3.4 Making the above submissions and relying upon the decisions of this Court in the cases of Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., (1962) 2 SCR 762; P.K. Ramachandran Vs. State of Kerala and Anr., (1997) 7 SCC 556 as well as the decision in the cases of Pundlik Jalam Patil Vs. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448 and Basawaraj and Anr. Vs. Special Land Acquisition Officer., (2013) 14 SCC 81, it is prayed to allow the present appeal.

4. Shri Siddhartha Srivastava, learned counsel appearing on behalf of respondent Nos.1 and No.2 – appellants before the High Court, has supported the impugned order passed by the High Court allowing the application for condonation of delay and condoning the delay in preferring the appeal. 4.1 It is submitted that when the High Court has exercised discretion and has condoned the delay, the same may not be interfered with by this Court in exercise of powers under [Article 136](#) of the Constitution of India.

4.2 It is further submitted by learned counsel appearing on behalf of respondent Nos.1 and 2 that as rightly observed by the High Court if the delay is condoned in that case the appeal will be considered and decided on merits and therefore, no prejudice would be caused to the appellant. It is submitted that in order to enable the respondents – appellants before the High Court, to submit the case on merits instead of nonsuiting them on the technical ground of delay, it is prayed to dismiss the present appeal.

5. We have heard the learned counsel appearing on behalf of the respective parties at length.

6. At the outset, it is noted that by the impugned order the High Court has condoned a huge delay of 1011 days in preferring the Second Appeal by respondent Nos.1 and 2 herein – original defendants – appellants before the High Court. While condoning the delay, the High Court has observed as under: “In these circumstances, when there are certain questions, which require a debate in the second appeal, it is not necessary that this matter be rejected at this stage, without inviting a decision on merits. If the delay is condoned though enormous, what happens at best is to give an opportunity to the parties to canvass their respective case. Since this question being of procedure, the attempt of the court should be to encourage a healthy discussion on merits than rejecting at threshold.

Viewed from such perspective, accepting the reasons assigned by the petitioner, the delay in presenting this second appeal should be condoned.

Apparently, there is no wilful negligence on the part of the petitioners nor this attempt suffers from want of due diligence. It appears being a bonafide attempt on the part of the petitioners to canvass their claim particularly when the trial court had accepted their plea, which was subjected to reversal by the appellate court. However, the petitioners should compensate the respondent by means of costs for this delay. The contention of the respondent that valuable rights are accrued to her on account of inaction of the petitioners in failing to prefer the Second Appeal within time, cannot be a significant factor in the backdrop of the circumstances found in this case.

In the result, this petition is allowed condoning the delay of 1011 days in filing the second appeal subject to payment of costs of Rs.2,000/ (Rupees Two thousand only) to the learned counsel for the respondent on or before 05.10.2021.” Thus from the aforesaid, it can be seen that the High Court has not observed that any sufficient cause explaining the huge delay of 1011 days has been made out.

6.1 The High Court has observed that if the delay is condoned no prejudice will be caused to the appellant as the appeal would be heard on merits. The High Court has also observed that there is no wilful negligence on the part of the respondents herein nor it suffers from want of due diligence. However, from the averments in the application for condonation of delay, we are of the opinion that it was a case of a gross negligence and/or want of due diligence on the part

of the respondents herein – appellants before the High Court in filing such a belated appeal.

6.2 We have gone through the averments in the application for the condonation of delay. There is no sufficient explanation for the period from 15.03.2017 till the Second Appeal was preferred in the year 2021. In the application seeking condonation of delay it was stated that she is aged 45 years and was looking after the entire litigation and that she was suffering from health issues and she had fallen sick from 01.01.2017 to 15.03.2017 and she was advised to take bed rest for the said period. However, there is no explanation for the period after 15.03.2017. Thus, the period of delay from 15.03.2017 till the Second Appeal was filed in the year 2021 has not at all been explained. Therefore, the High Court has not exercised the discretion judiciously.

7. At this stage, a few decisions of this Court on delay in filing the appeal are referred to and considered as under:

7.1 In the case of Ramlal, Motilal and Chhotelal (supra), it is observed and held as under: In construing s. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chattappan, (1890) J.L.R. 13 Mad. 269, "s. 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant."

7.2 In the case of P.K. Ramachandran (supra), while refusing to condone the delay of 565 days, it is observed that in the absence of reasonable, satisfactory or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly. It is further observed that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. It is further observed that while exercising discretion for condoning the delay, the court has to exercise discretion judiciously.

7.3 In the case of Pundlik Jalam Patil (supra), it is observed as under: "The laws of limitation are founded on public policy. Statutes of limitation are

sometimes described as “statutes of peace”. An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based on the maxim “interest reipublicae ut sit finis litium”, that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing timelimit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his Jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy.” 7.4 In the case of Basawaraj (supra), it is observed and held by this Court that the discretion to condone the delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression “sufficient cause” cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is observed that each application for condonation of delay has to be decided within the framework laid down by this Court. It is further observed that if courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to legislature. 7.5 In the case of Pundlik Jalam Patil (supra), it is observed by this Court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Courts help those who are vigilant and “do not slumber over their rights”.

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and considering the averments in the application for condonation of delay, we are of the opinion that as such no explanation much less a sufficient or a satisfactory explanation had been offered by respondent Nos.1 and 2 herein – appellants before the High Court for condonation of huge delay of 1011 days in preferring the Second Appeal. The High Court is not at all justified in exercising its discretion to condone such a huge delay. The High Court has not exercised the discretion judiciously. The reasoning given by the High Court while condoning huge delay of 1011 days is not germane. Therefore, the High Court has erred in condoning the huge delay of 1011 days in preferring the appeal by respondent Nos.1 and 2 herein – original defendants. Impugned order passed by the High Court is unsustainable both, on law as well as on facts.

9. In view of the above and for the reasons stated above, the present Appeal is Allowed. The impugned order dated 16.09.2021 passed by the High Court condoning the delay of 1011 days in preferring the Second Appeal by respondent Nos.1 and 2 herein is hereby quashed and set aside. Consequently, Second Appeal No.331 of 2021 preferred by respondent Nos.1 and 2 herein

stands dismissed on the ground of delay. The present Appeal is accordingly Allowed.”

13. Considering the above facts and circumstances and respectfully following the latest binding judgment of Hon`ble Supreme Court in the case of **Majji Sannemma @ Sanyasirao (supra)**, the delay should not be condoned. Accordingly, I do not condone the delay, and therefore assessee’s appeal is dismissed.

14. Since, I have not condoned the delay, and dismissed the appeal of the assessee; therefore, I do not adjudicate the grounds raised by the assessee on merit.

15. In the result, the appeal of the assessee is dismissed.

Order is pronounced on 29/12/2023 in the open court.

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूरत / Surat दिनांक/ Date: 29/12/2023

DKP (Sr. PS Outsourcing) / SS**

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat