IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Ms. Kavitha Rajagopal, Judicial Member

ITA Nos. 947& 948/Coch/2022
(along with stay petitions SA 73 & 74/Coch/2022)
(Assessment Years: 2014-15& 2015-16)

Kathikode Charitable Trust Koolimuttam P.O. Thrissur 680961 [PAN: AACTK5779L]	vs.	Income Tax Officer Ward - 2(1), Thrissur
(Appellant)		(Respondent)

Appellant by:	Shri Jojo, Advocate
Respondent by:	Smt. J.M. Jamuna Devi, Sr. DR

Date of Hearing:	14.02.2024
Date of Pronouncement:	10.05.2024

O R D E R

Per: Sanjay Arora, AM

This is a set of two Appeals by the Assessee, directed against the dismissal of it's appeals contesting the processing of it's returns of income for Assessment Years (AYs.) 2014-15 (dated 16.03.2016) and 2015-16 (dated 27.03.2017) by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], as not maintainable vide his separate orders dated 03.06.2022.

2. The brief facts of the case are that the assessee, a charitable trust working for the promotion of education, culture and philosophy in Thrissur district of Kerala since 2009, filed it's return of income belatedly on 24.12.2015 and 28.12.2015, claiming, as stated, loss at Rs.4.64 lakhs and Rs.6.43 lakhs respectively for the two successive years under reference. The same were processed under section 143(1) of the Income Tax Act, 1961 (the Act), raising demands, including interest, at Rs.28.47 lakhs and Rs.37.75 lakhs for the two consecutive years respectively. The assessee

admittedly did not act thereon, stating that it was 'awaiting' – whatever that would mean; Sh. Jojo, the learned counsel for the assessee, being also unable to explain us the same, orders u/s. 143(3) of the Act. The communication regarding recovery of the outstanding demand was subsequently received on 28.05.2019 which, as stated, led to it, acting with alacrity, filing appeals, for both the years, with the ld. CIT(A) on 07.06.2019. And, therefore, with a delay of 3 years 2 months and 2 years and 2 months respectively, which were accordingly dismissed as not maintainable on a finding of gross negligence. Reliance stands placed on decisions in:

- *Jayvant Vaghela v. ITO* [2013] 40 taxmann.com 491 (Guj)
- *Abzony Safety Glass Ltd. v. CIT* [2012] 344 ITR 471 (P&H)
- *Mountview Exports(P.) Ltd. v. CIT* [2002] 258 ITR 46 (Cal)
- *CIT v. Rammohan Kabra* [2002] 257 ITR 773 (P&H)

3. Before us, it was submitted by Shri Jojo that the assessee's only fault, inasmuch as it was not registered u/s. 12AA of the Act, was in furnishing the return per a wrong Form, i.e., ITR-7, applicable, *inter alia*, to a person in receipt of income from property held under trust. This led to it being assessed, as opposed to at a loss, inasmuch as there was a deficiency, i.e., excess of expenditure over income, for the relevant year/s, at it's gross receipt. The assessee sought to correct the mistake by filing a return, as suggested by the Assessing Officer (AO), in ITR-5, i.e., as applicable to business income, for both the years, on 11.09.2018, but the same was not processed. It was under these circumstances that the assessee, being pursued for recovery of demand by the Revenue, filed appeals with the ld. CIT(A) on 07/6/2019, who, however, refused to condone the delay, and dismissed the appeals as not maintainable. He would, on being queried, state that the assessee was conscious that it being not registered u/s. 12AA of the Act, was not entitled to any claim u/s. 11, and all that it was seeking was for being assessed at the returned income – nothing more and nothing less. Smt. Devi, the Sr. DR, would, taking us through the Intimations u/s.

143(1), show us that the assessee had not been, for both the years, assessed, as claimed, at the gross receipt; the only adjustment made on processing being the denial of application of income u/s. 11(1)(a), claimed at Rs.69.21 lakhs and Rs.100.62 lakhs for the two consecutive years respectively, and which has led to the impugned demands. Shri Jojo would, in response, submit it to be not so and, in fact could not possibly be, as there was, rather a deficit for both the years, so that there was no question of claiming, as being alleged, exemption on account of application of income. In fact, he would continue, the returns for AY 2016-17 onwards, filed in ITR 5, have been processed u/s. 143(1) of the Act and at the returned income (deficit), taking us through the same (PB pgs. 6-34). He, however, could not answer the question as to why; it being in receipt of Intimations on 16.03.2016 (for AY 2014-15) and 27.03.2017 (AY 2015-16), filed appeals with the first appellate authority only on 07.06.2019; it filing the returns in ITR 5 on 11.09.2018, i.e., 2 ½ (1 ½) years of receipt of the Intimation for AY 2014-15 (2015-16) and, further, applying for registration u/s. 12AA of the Act, again, only on 06.06.2019.

4. We have heard the parties, and perused the material on record, giving out careful consideration to the matter.

4.1 The first issue before us is if the assessee's appeal/s before the ld. CIT(A), being delayed by 3 years (2 years) and 2 months (2 months), is maintainable. In our clear view: not. No reason, much less plausible, even as the law provides for sufficient cause being shown and, further, over the period of delay, for it to be condoned, has been furnished, either before him, or even before us, for us to disturb his finding of it being a case of gross negligence. The assessee stating of having received demand notices on 29.05.2019 is false as the Intimations, which are by law deemed as notices of demand, were received in March, 2016 and March, 2017 for the two successive years respectively. *If the assessee could act on the communications dated 29.05.2019, it could equally do so on the receipt of Intimation/s*. Further, it

stating that it was 'awaiting' assessment order u/s. 143(3) of the Act – whatever that may mean and, which Sh. Jojo could not explain us, is as ludicrous as it can get; nay, misconceived. It could in that case keep on waiting indefinitely as no assessment u/s. 143(3) was ever made. Why, notice u/s. 143(2), a prerequisite for assessment u/s. 143(3), could be issued latest by 30.06.2015 (30.06.2016), i.e., years earlier. It is then said that it was only in September, 2018 when jurisdiction was transferred to the field formation, that it could meet the AO and file returns in ITR 5, which is again misplaced. The returns filed on 11.09.2018(in ITR 5), supposedly u/s. 148, are *non est*. Going by the assessee's statement, they could be filed only subsequent to 24.09.2018 when the 'jurisdiction' for both the years was transferred. *Further, it still does not explain the non-filing of appeals against the impugned Intimations which, apart from rectification, was the only recourse available in law*. No notices u/s. 148 (which proceedings are even otherwise for the benefit of the Revenue)were issued, so that the assessee stating that the returns of September, 2018 were in response to notices u/s. 148, is again incorrect, with in fact the return/s mentioning the date/s of the Intimation/s u/s. 143(1) as of the notice/s u/s. 148. The same was accordingly not processed, but filed by the Department, proving the falsity of the claim/s.

4.2 Continuing further, though no such plea was taken before us, the assessee has placed on record the decision in *Swarup K. Saha v. ITO* (ITA No. 366/Kol/2018, dated 20.07.2018), where the delay arose on following the legal advice of the learned counsel for the assessee. The same, where *bona fide*, can certainly be taken into account by an authority considering the plea for condonation of delay, as explained in *Concord of India Insurance Co. Ltd. v. Nirmala Devi* [1979] 118 ITR 507 (SC). No such plea was however taken before the ld. CIT(A), so that it is clearly an afterthought. Two, it is unsubstantiated, while the Tribunal can proceed only on the basis of the material on record, while here we do not even have an affidavit by the assessee, giving full facts, including the name of the counsel and the advice rendered.

This is particularly so as once an assessee, even if based on the advice of a counsel, not clarified, takes a conscious decision, adopting a particular course of action, the same cannot then be said to be a sufficient cause, intrinsic to which is the concept of being prevented from taking the otherwise desired course of action.

4.3 The two ingredients necessary for condoning the delay, which could only be the result of a positive, affirmative action, i.e.,
(a) proof of absence of negligence, and
(b) proof of satisfactory level of diligence,

are found completely missing in the instant case. It is apparent that the assessee is merely raising multiple pleas, *de hors* the facts of the case and law in the matter, in the hope that any one may 'work'. It is only a plea made per Form 35, supported by affidavits, i.e., where so required by the first appellate authority, that can be taken cognizance by us as the second appellate authority reviewing his decision *qua* non-condonation of delay in further appellate proceedings. The delay, which extends to 26 months and 36 months for the two years respectively, is wholly unexplained and is a clear case of gross negligence. We find no reason to interfere in the matter and, accordingly, confirm the impugned order on this aspect.

4.4 Be that as it may, this cannot be regarded as the end of the matter. True, the assessee has not invoked the appropriate proceedings under the Act or moved the Hon'ble High Court under it's extraordinary jurisdiction, seeking issue of writ of prohibition or any other, restraining processing it's deficit return at a huge income, or being acted upon by the Revenue. Nevertheless, having not done so, we do not think that it is left without any remedy in law, i.e., under the Act. Why, even as observed by the Bench during hearing, could not it's representation before the AO, stated to be in August/September, 2018, or if undocumented, it's return/s filed of11/9/2018, be regarded as a petition u/s. 154 of the Act, and the assessee's grievance sought to be addressed on that basis?Why, again, it's appeals, filed on 07.06.2019, be, likewise,

regarded as it's grievance for non-disposal of it's petitions u/s. 154 of the Act? The reason, it may be appreciated, is simple. No tax can be levied except by the authority of law (Article 265 of the Constitution of India), which we find as having been seriously violated in the instant case, and which explains our reference earlier to the jurisdiction of the Hon'ble High Court. The law cannot be a one-way street, i.e., operating only for the benefit of the Revenue; rather, is a hand maiden of justice. *Filing a return in a wrong form, or filing the form incorrectly, could not lead to a charge of tax u/s. 4 of the Act*? The assessee, both per it's subsequent returns dated 11.09.2018, which exhibit deficit, as indeed the original returns, states of having filed them correctly. Inasmuch as the law obliges the assessee to file the return in the prescribed form, it could at worst lead to the inference of the assessee as having not filed the return, even as one would, to draw that inference, definitely expect the assessee to be, intimating the deficiency per a defect memo, provided an opportunity to rectify it. Further, it's audited financial statements, which are apart of it's return (s. 139(9)), even if required not to be submitted along with (s. 139C), clearly reflect deficit at the stated figures. The same are not filed along with the return only as a record management measure by the Legislature, reserving a right to call for the same as and when required for the purposes of the Act. This is precisely what the AO was, exercising his enabling power, required to do in the instant case. The Board Circular No. 14(XL-35) of 1955, dated 11.04.1955 requires the AO to assist the tax payer in every reasonable way, particularly in the matter of claiming and securing relief, and in this regard, departmental officers should take initiative in guiding the tax payer where proceedings or other particulars before them indicates that some refund or relief is due to him. The Revenue cannot take advantage of the ignorance of the assessee as to his rights. Similar instructions stand issued by the Hon'ble Courts whenever such instances have come up before them for their consideration (*Parekh Brothers v. CIT* [1984] 150 ITR 105 (Ker);*CIT v. K.N. Oil Industries* [1983] 142 ITR 13 (MP)). It would in this context be relevant to reproduce from a recent decision by

the Cochin Bench (*Changanacherry Co-op. ARDB Ltd. v. ITO*, in ITA 939/Coch/2022, dated 16/4/2024), wherein, again, the assessee was not allowed claim u/s. 80P due to the improper filling the return form, wholly discountenanced by the Tribunal:

'6. Our first observation in the matter is that the very fact that the assessee includes the claim for deduction u/s.80P in the Schedule 'BP' relating to computation of income, implies that it regards it's relevant income as taxable, i.e., forming part of gross total income, and claims deduction u/s.80P there-against. The mismatch in it's return inasmuch as the same finds mention in the schedule of 'Exemption', rather than 'Deduction', can thus only be regarded as mistaken, to which, in context, the doctrine of '*DeMinimis*' is applicable. Rather than the said mistake being therefore capitalized by the Revenue by denying the assessee it's claim u/s.80P, it ought to have considered it holistically, consistent with the assessee's claim u/s.80P. What, in any case, we wonder, leads it to the inference of the assessee having not claimed deduction u/s.80P, which is the basis of the disallowance? Besides, if the Revenue regards it as, and only rightly so, not a case of exemption, what prevents it to be regard it, as it considers it to be, and as it actually is, a claim of deduction. The Board per its Circular No.14 (XL-35), dated 11.04.1955 which, being beneficial, as is trite law, binding on the Revenue [refer, inter alia, *CIT v. Hero Cycles* [1997] 228 ITR 463 (SC)], clarifies that the Department must not take the advantage of the ignorance of an assessee to collect more tax than what is legitimately due. This also reflects the uniform view of the Hon'ble Courts, as in *Parekh Brothers v. CIT* [1984] 150 ITR 105 (Ker), exhorting the Revenue to assist the tax payer in every way, particularly in the matter of claiming and securing relief. While in the instant case, the assessee is being denied, on account of wrong presentation, it's right to claim deduction u/s.80P. This further is also the sum and substance of the Tribunal in the assessee's case for A.Y 2016-17 (supra), relied upon by the assessee. There is though in the instant case no plea as to non-receipt of notice for adjustment, to though no consequence.'

Here it may also be relevant to clarify that *qua* an appellate authority, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (*CIT v. C. Parakh & Co. (India) Ltd*. [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)).

4.5 The premise of the foregoing is that the assessee should get a fair deal and, two, only tax exigible under law is to be levied/collected. The assessee, in our view, has filed the return u/s. 139(4A) in the correct form, i.e., Form-7. It is a charitable trust, even if, prior to it's registration on 10.12.2019, a private discretionary trust.

Being a charitable institution, it's income is to be computed in the manner applicable therefor, and it returning income in Form 5, which is for returning business income, is surely incorrect, unless, perhaps, it is a case of business undertaking itself being the property held under trust, and the business incidental to the attainment of it's objects. *Could, in any case, as afore-questioned, returning income in a wrong Form, or incorrectly, result in converting a loss into income*? Clearly not, inasmuch as the same can only be in terms of provisions of the Act. The processing of return itself validates the same, i.e., of it being in the proper Form and, in the very least, of it being not an irrelevant consideration. Where the default in not filing the return in the prescribed Form is regarded as material, which we state to carry the argument to its logical conclusion, there is no return of income in the first place. The question of processing it, and raising demand on that basis, does not arise. Clarifying once again, if that is necessary, that the returns in Form 7 are valid and proper returns of income. Nothing, in any case of the matter, as afore-explained, turns thereon.

In Sum

5.1 In view of the foregoing, we only consider it fit and proper under the circumstances to direct the ld. CIT(A) to, taking cognizance of the assessee's claim in the appeal before him, direct the AO to consider the assessee's returns of income filed on 11.09.2018 for the relevant years as rectification petitions. The AO shall, for the purpose, exercising his power u/s. 154 r/w s. 139C, call for the assessee's audited final accounts, or any material he deems proper, which constitutes a part of a return. The assessee shall be heard before disposing it's applications, per a speaking order, and in accordance with law, and which shall be in a time bound manner.

5.2 We may, before parting with our order, clarify the legal basis of our decision. The principle at work is captured by the legal maxim '*Actus curiae neminem gravabit*', i.e., no Court or Tribunal can, by it's action or, as the case may be, non-action, prejudice any party before it. And, where, or shown to be, so, it is a 'mistake'

liable to be rectified (*Honda Siel Power Products Ltd. v. CIT* [2007] 295 ITR 466 (SC)).In the instant case we find the assessee to have filed the returns of income in the prescribed form, claiming to be filled correctly, i.e., consistent with it's accounts, at a deficit, so that the question of claiming exemption u/s. 11 for application of income, denied thereto, does not arise in the facts and circumstances of the case. If indeed so, as appears to be the case, processing the return/s denying exemption u/s. 11(1)(a) is *a mistake apparent from record*. In *Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC), it stands explained that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal, and to issue, if necessary, appropriate directions to the authority, against whose decision appeal is preferred, to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by the statute. In the facts of the case, we have found the assessee's appeals as *per se* not maintainable before the ld. CIT(A) in view of the unexplained delay attending their filing, upholding their 'non-admission'. So, however, regarding the assessee's representations/returns as petitions u/s. 154, as ought to be the case, the first appellate authority, enjoying co-terminus powers, was, in appeal, not constrained to issue proper directions to the AO, addressing the assessee's concerns. His failure to do so would not in turn restrain us from in further appeal issuing instructions thereto. That is, it was competent for him to in the proceedings before him issue such directions. Non-exercise of those powers, which we consider as incumbent on him to have, addressing the issue/s arising, cannot but be a subject matter of appeal before us. In this context we draw on the exhortation by the Apex Court in *CIT v. Walchand & Co. (P.) Ltd*. [1967] 65 ITR 381 (SC), wherein it stands held that the Tribunal is to deal with and determine questions which arise out of the subject-matter of the appeal in the light of the evidence, and consistently with the justice of the case. Case law in the matter is legion. This, then, provides the legal basis for our deciding in the manner we have. We draw support from the decisions in *The Nehru Memorial*

Education Society v. ITO (in ITA No. 159/Coch/2023, dated 07/3/2024) and *Changanacherry Co-op. ARDB Ltd.* (supra).

5.3 Inasmuch as we have decided the assessee's appeals, it's stay applications, which are in respect of demands arising for the relevant years, become infructuous.

5.4 We decide accordingly.

6. In the result, the assessee's appeals are allowed for statistical purposes, and it's stay petitions dismissed as infructuous.

Order pronounced on May 10, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Kavitha Rajagopal)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: May 10, 2024
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin