

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "SMC" Bench, Mumbai.

Before Shri Narender Kumar Choudhry (JM)
& Shri Omkareshwar Chidara (AM)

I.T.A. No. 380/Mum/2024 (A.Y. 2016-17)

Fransalian Society Plot No. 79, Central Park Road Nallasopara East S.O. Vasai, Thane Maharashtra-401 209. PAN : AAATF0444K (Appellant)	Vs.	ITO(Exemption) Ward-1(3) 6 th Floor Cumbala Hill Tele Exchange MTNL Maharashtra 401 209. (Respondent)
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Assessee by	Shri Mandar Vaidya
Department by	Shri R.R. Makwana
Date of Hearing	13.08.2024
Date of Pronouncement	22.10.2024

ORDER

Per Omkareshwar Chidara (AM) :-

The issue to be decided in the above captioned appeal is whether the appellant is entitled for accumulation of funds in term of section 11(2) of the Income Tax Act (the Act for short) when Form 10 was filed alongwith revised return of income under section 139(4) of the Act.

2. In the present case, the appellant filed Form 10, 10B and 9A alongwith revised return of income under section 139(4) of the Act and hence the Ld. AO and the Ld. CIT(A) held that the appellant is not eligible for exemption u/s. 11(2) of the Act. The undisputed fact in this case is that Form No. 10 was not filed alongwith return of income within due date mentioned under section 139(1) of the Act. The Ld. AO denied exemption under section 11(2) of the Act because as per amended provisions of the Income Tax Act, Form No.10 shall be filed before the due date of furnishing the return of income

specified under section 139(1) of the Act. The Ld. AO held that if the Form is not submitted before this date, then benefit of accumulation would not be available and such income would be taxable at the applicable rates. The Ld. AO also held that the benefit of accumulation is also not available if the return of income is not furnished before the due date of furnishing the return of income [paragraph 5.3(b), page 5 of the assessment order]. The Ld. AO held that all the cases law prior to amendment in Income Tax Act 1961 are not applicable because this section is inserted by the Finance Act 2015 w.e.f. A.Y. 2016-17. Finally the Ld. AO held that the appellant is not eligible for exemption under section 11(2) of the Act and taxed the accumulated income after expenses and raised the demand accordingly.

3. Aggrieved by this order of the Ld. AO, an appeal was filed before the learned Commissioner of Income Tax (Appeals) [Ld. CIT(A) for short] and the Ld. CIT(A) has agreed with the view of the Ld. AO and confirmed the addition. The Ld. CIT(A) at page 5, paragraph 5.4.2 has held that relevant section 11(2) was amended w.e.f. 1.4.2016 and has put a clear and unequivocal pre-condition for allowance of exemption u/s. 11 of the Act that the Form 10 must be furnished on or before the due date prescribed under section 139(1) of the Act [section 11(2)(c)]. The Ld. CIT(A) further held that the amended provisions of section 11(2)(a) of the Act held that the appellant has not fulfilled the pre-condition to file the requisite report within the prescribed due date mentioned u/s. 13(1) of the Act. The Ld. CIT(A) at paragraph 5.4.3 also held that the appellant has informed that it has applied for condonation of delay for filing Form No. 9A and 10 before the jurisdictional Principal CIT, which is still pending. Therefore, the instant appeal is also liable to be dismissed on account of alternate and appropriate remedy available and opted by the appellant. The Ld. CIT(A) held that remedy is before the Principal CIT for condonation of delay and appeal of the appellant was dismissed.

4. Aggrieved by the orders of the Ld. AO and the Ld. CIT(A), further appeal was instituted by the appellant before the ITAT stating that for filing Form No. 9A, 10 & 10B alongwith revised return u/s. 139(4) is also valid and should be taken into account for the purpose of accumulation u/s. 11(2) of the Act and also is entitled for accumulation since purpose for which the Trust exists is charitable in nature.

5. Per contra, Ld. DR relied on the orders of the Ld. AO and the Ld. CIT(A) and argued that the appellant is not entitled for accumulation benefit.

6. Heard both sides and it is decided that appropriate remedy for the appellant for and after A.Y. 2016-17 is with CIT as power of condoning the delay vest with concerned Commissioner of Income Tax. In this regard reference can be made to the CBDT Circular No. 6/2020 dated 19.2.2020 which reproduced below :-

"F.NO.197/55/2018-ITA-I
Government of India,
Ministry of Finance
Department of Revenue Central Board of Direct Taxes

New Delhi, the 19 February, 2020

Sub: Condonation of delay under section 119(2)(b) of the Income-tax Act, 1961 in filing of Return of Income for A.Y 2016-17,2017-18, and 2018- 19 and Form No.9A and Form No. 10.- Reg.

Representations have been received seeking condonation of delay in filing Return of Income by the Charitable institutions for the Assessment Year 2016- 17 onwards on the grounds of hardship. The Board has issued Circulars authorizing the Commissioners of Income Tax to admit belated applications of Form 9A and Form 10 and to decide on merit the condonation of delay U/S 11 9(2)(b) of the Income-tax Act, 1961 (Act). However, in those cases where the Income Tax Returns have also been filed beyond the due date prescribed under section 139(1) of the Act, the condonation of delay in filing of Form 9A & Form 10 by the Commissioners is not of any help to the assessee, as section 139(1) of the Act, inserted w.e.f. 01.04.20 16, stipulates twin conditions of filing of Form 9A/Form 10 and also of filing Return of Income before the due date.

2. Accordingly, in continuation of earlier Circulars issued in this regard, with the view to prevent hardship to the assessee and in exercise of powers conferred under section 119(2)(b) of the Act, the CBDT has decided that where the application for condonation of delay in filing Form 9A and Form 10 has been filed, and the Return of Income has been filed on or before 31st March of the respective assessment years i.e. Assessment Years 2016-17, 2017-18 and 2018-19, the Commissioners of Income-tax (Exemptions) are authorised u/s 119(2)(b) of the Act, to admit such related applications for condonation of delay in filing Return of Income and decide on merit.

3. For all other application for condonation of delay not mentioned above, the power of condonation of delay u/s 119(2)(b) of the Act will continue with the respective authorities as per the extant Rules and Practice."

17.2 Earlier also a Circular No. 7/2018 dt. 20/12/2018 was issued by the CBDT which read as under:

"SECTION 119 OF THE INCOME-TAX ACT, 1961 - CONDONATION OF DELAY UNDER SECTION 119(2)(b) OF THE INCOME-TAX ACT, 1961 IN FILING OF FORM NO. 10 AND FORM NO. 9A FOR AY 2016-17

CIRCULAR NO. 7/2018 [F.NO.197/55/2018-ITA-I], DATED 20-12-2018

Under the provisions of section 11 of the Income-tax Act, 1961 (hereafter 'Act') the primary condition for grant of exemption to trust or institution in respect of income derived from property held under such trust is that the income derived from property held under trust should be applied for the charitable purposes in India. Where such income cannot be applied during the previous year, it has to be accumulated and applied for such purposes in accordance with various conditions provided in the section.

2. The Finance Act, 2015 amended section 11 and section 13 of the Act with effect from 1-4-2016 (A.Y. 2016-17). Consequently, Income-tax Rules, 1962 (hereafter 'Rules') were also amended vide the Income-tax (1st Amendment) Rules, 2016. As per the amended provisions of the Act read with rule 17 of the Rules, while 15% of the income can be accumulated indefinitely by the trust or institution, 85% of income can only be accumulated for a period not exceeding 5 years subject to the conditions, inter alia, that such person submits the prescribed Form No. 10 electronically to the Assessing Officer within the due date specified under section 139(1) of the Act

3. Further, where the income from the property held under trust and applied to charitable or religious purposes falls short of 85% of the income derived during the previous year for the reason that the income has not been received during that year or any other reason, then on exercise of the option by submitting in Form No.9A electronically by the trust/institution on or before the due date of furnishing the return of income, such income shall be deemed to have been applied for charitable or religious purpose.

4. Representations have been received by the Board/ field authorities stating that the Form No. 9A and Form No. 10 could not be filed in the specified time for AY 2016-17, which was the first year of e-filing of these forms. It has been requested that the delay in filing of Form No. 9A and Form No.10 for AY 2016-17 may be condoned under section 119(2) (b) of the Act.
5. Accordingly, in supersession of earlier Circular/Instruction issued in this regard, with a view to expedite the disposal of applications filed by trusts for condoning the delay and in exercise of the powers conferred under section 119(2)(b) of the Act, the Central Board of Direct Taxes hereby authorizes the Commissioners of Income-tax, to admit belated applications in Form No. 9A and Form No. 10 in respect of AY 2016-17 where such Form No. 9A and Form No. 10 are filed after the expiry of the time allowed under the relevant provisions of the Act 17
6. The Commissioners will, while entertaining such belated applications in Form No. 9A and Form No. 10, satisfy themselves that the assessee was prevented by reasonable cause from filing of applications in Form No. 9A and Form No. 10 within the stipulated time. Further, in respect of Form No. 10 the Commissioners shall also satisfy themselves that the amount accumulated or set apart has been invested or deposited in any one or more of the forms or modes specified in sub-section (5) of section 11 of the Act. 17.3 From the aforesaid Circular it would be clear that in the genuine case of belated application in Form No. 10, the delay may be condone. In the present case the assessee furnished the Form No. 10 before completion of the assessment.
7. Subsequently, CBDT has issued Circular No. 3/2020 (F.No. 197/55/2018-ITA-I) dated 3.1.2020 and the relevant paragraphs are reproduced as under :-
 6. In addition to the above, it has also been decided by the CBDT that where there is delay of upto 365 days in filing Form No.9A and Form No 10 for Assessment Year 2018-19 or for any subsequent Assessment Years, the Commissioners of Income-tax are hereby authorized to admit such belated applications of condonation of delay u/s 119(2) of the IT Act and decide on merits.
 7. The Commissioners of Income-tax shall, while entertaining such belated applications in Form No.9A and Form No. 10, satisfy themselves that the assessee was prevented by reasonable cause from filing of applications in Form No.9A and Form No.10 within the stipulated time.. Further, in respect of Form No.10, the Commissioners shall also satisfy themselves that the amount accumulated or set apart has been invested or deposited in any one or more of the forms or modes specified in sub-section (5) of Section 11 of the Act.

8. Again CBDT vide Circular No.16 of 2022 dated 19/07/2022 has extended the period of delay to condone beyond 365 days upto three years in filing of Form 10B for A.Y.2018-19 after subsequent years, and the powers were given to the Pr. Chief Commissioner and Chief Commissioner to condone the delay and decide on merits. Thus, the statute has given this power for condonation of delay in filing of Form 10B or any audit report u/s. 119(2)(b) to the CITs/CCITs/PCCITs from A.Y. 2016-17 onwards.

9. The power to condone the delay has not been given to Appellate Authorities, or enshrined in section 246 or 246 A or 253. Other than Section 119(2)(b), there is no other provision given to any other appellate authority to entertain such appeal or condone the delay.

10. Once Section 119 of the Act has conferred power upon the CBDT to issue instructions and directions were given to the Income Tax Authorities as it may deem fit for proper administration of the Act which are required to be observed and followed by the Income Tax authorities and CBDT under Sub-section 2 of (b) Section 119 to avoid genuine hardship in the matter of filing of audit report in Form 10B has issued various circulars empowering the authorities at the level of CITs and above to condone the delay in filing of Form 10B for A.Y.2016-17 and subsequent years, then such authorities should only can condone the delay following the judicial precedents laid down by the various Courts i.e., the power to condone delay lies only with the CIT(E) for A.Y. 2016-17 and subsequently years.

11. Now, that the power has been given to the Ld. CIT(E) and the petition for condonation of delay is pending before him, the Ld. CIT(E) is directed to consider the same and pass an order on merits. In ITA No. 3150/Mum/2024 (A.Y. 2021-22) M/s. Damani Welfare and Cultural Association dated 8.8.2024, similar decision was rendered by the Coordinate Bench of Mumbai Tribunal. Same view was taken in the cases of Sheetal Lodha Foundation

(ITA No. 2405/Mum/2024) and Advertising Agencies Association of India (ITA No. 4425/Mum/2023).

12. Respectfully following the above decisions and also due to the elaborate discussion as above, the appeal of the appellant is dismissed. However, the dismissal of this appeal will not have any effect on the fresh decision being taken by the Ld. CIT(E), where petition for condonation of delay of appeal is pending. In other words, decision taken by the Ld. CIT(E) with regard to condonation of delay will prevail in this case even though the present appeal filed by the appellant is dismissed because it is decided that the power to condone the delay is vested with the Ld. CIT(E) .

13. For statistical purposes, the present appeal is dismissed.

Order pronounced in the open court on 22nd October, 2024.

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(Omkareshwar Chidara)
Accountant Member

Mumbai : 22.10.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

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BY ORDER,
(Assistant Registrar)
ITAT, Mumbai