

Computility Computer Systems Vs. Income-tax Officer

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-30-1996

Reported in : (1997)60ITD256(Mum.)

Appellant : Computility Computer Systems

Respondent : income-tax Officer

Judgement :

1. These are two appeals filed by the assessee and both relate to assessment year 1983-84.
2. The first appeal is filed against the orders of the CIT, City-III, Mumbai, dated 19-3-1987 passed under section 263 of the Income-tax Act, under which he had set aside the assessment originally framed by the ITO and directed the ITO to re-do the assessment with the following directions : "7. In view of the foregoing discussion, I hold that the business carried on by the assessee-company cannot be regarded as a business of manufacture or production of any article or thing. The Income-tax Officer, therefore, erred in allowing investment allowance in respect of machinery and plant used by the assessee-company for purposes of its business.
8. Accordingly, I set aside the assessment order for the assessment year 1983-84 insofar as it relates to the aforesaid issue, and direct the Income-tax Officer to make a fresh assessment for the said year without granting investment allowance to the assessee-company." In the beginning, no appeal against the CIT's order

under section 263 was filed. In pursuance of the 263 order, the Assessing Officer framed a fresh assessment under section 143(3) read with section 263 on 17-3-1989 under which he specifically disallowed investment allowance to the assessee-company on the computer machines held by it. Thus, he withdrew investment allowance of Rs.12,75,473 as per direction of the CIT in his orders under section 263. Against the fresh assessment order dated 17-3-1989, the assessee filed an appeal before the CIT(Appeals), Mumbai, on 25-4-1989. The Id. CIT(A), by his orders dated 12-4-1990, dismissed the appeal stating that the appeal before him is competent in view of the fact that the assessee allowed the 263 order passed by the CIT to become final without an appeal being filed against it before the ITAT. It is the case of the assessee that it consulted its counsel after receipt of the CIT(A)'s order dated 12-4-1990 and on receiving proper legal advice it filed the present appeal against the 263 order with a delay of 3 years 17 days. Appeal against the 263 order was filed on 11-6-1990 along with the affidavit of the Mg. Director of the assessee-company, Mr. Paresh S. Shah, to condone the delay of 3 years 17 years days if filing the appeal. Thus, the first of the appeals before us is the appeal against the 263 order. The second of the appeals before us is the appeal emanated from the fresh assessment order passed by the Assessing Officer on 17-3-1989 under section 143(3) read with section 263 withdrawing the investment allowance. The main question in the first appeal is whether the appeal can be entertained on condoning the delay of 3 years 17 days. Only after the condonation of the delay, the merits can be gone into in that appeal. The second of the appeals before us would be only consequential depending upon the result of the disposal of the first appeal.

3. In the affidavit enclosed to the appeal, the following is what is affirmed : After narrating the facts, it is stated that the Id. CIT(A) had passed his appellate orders against the fresh assessment order under section 143(3) read with section 263 on 12-4-1990 simply dismissal the appeal without considering it on merits. After receiving the said appellate order, the deponent consulted his counsel, who on a perusal of the order of the CIT, advised the assessee that it was possible to take the view that the correct course of action was to file an appeal before the ITAT against the order under section 263 and that the said issue having been conclusively decided by the CIT, it cannot be agitated before the CIT(A) in an

appeal from the order of the Assessing Officer implementing the order of the CIT. It is further affirmed that the assessee-company did not file an appeal in the ITAT from the order of the CIT dated 19-3-1987 within 60 days thereof due to the genuine and bona fide belief that a fresh assessment order passed consequent to the setting aside of an earlier assessment order would be an appealable order and that the company would get an opportunity against to re-agitate the issue before the CIT(A). Thus, after obtaining the legal advice, the assessee filed the present appeal against the 263 order on 11-6-1990 with delay of 3 years 17 days. He further affirms that the delay was due to genuine and bona fide reasons. He prays that the delay may be condoned for the sake of equity and justice.

4. On the question of delay, we have heard Shri A.V. Sonde, Id. Counsel for the assessee, and Dr. Sunil Pathak, Id. Departmental Representative, in these appeals. The Id. counsel, Shri Sonde, had filed a paper book containing 19 pages. Shri Sonde contended that the delay was caused mainly because of the wrong advice given by the Chartered Accountant handling the matter when 263 orders were passed.

According to the learned counsel, the C.A. appearing for the assessee-company had not properly understood the 263 order passed by the CIT. The Id. Chartered Accountant mistakenly understood that under the 263 orders, the assessment order passed by the Assessing Officer was completely set aside and a fresh assessment order was asked to be done. Led away by the wrong advice, the assessee did not prefer any appeal against the 263 order bona fide believing the advice tendered to it. Shri Sonde argued that a wrong advice given by the legal adviser constitutes sufficient cause for condoning the delay and in support thereof he had relied upon the Supreme Court's decision in *Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi* [1979] 118 ITR 507 wherein, as per the head-note of the decision, the following is what is held by the Hon'ble Supreme Court : "Held, that the law is settled that mistake of counsel may in certain circumstances be taken into account in condoning the delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in

an underhand way. The Court must see whether, in such cases, there is any taint of mala fides or element of recklessness to ruse. If neither is present, legal advice honestly sought and actually given, must be treated as sufficient cause when an application under section 5 of the Act is being considered." "A company relied on its legal adviser and the manager's expertise is in company management and not in law. There is particular reason why, when a company or other person retains a lawyer to advise it or him on legal affairs, reliance should be not be placed on such counsel. But if there is gross delay too patent even for laymen or if there is incomprehensible indifference, he shield of legal opinion may still be vulnerable." Therefore, ultimately, he contended that the delay is condonable. The Id. Departmental Representative, strongly opposing the condonation of delay, firstly contended that the very basis of the argument that the assessee is wrongly advised by its legal adviser on the scope and extent of section 263 order is not found in the affidavit filed seeking the delay to be condoned in filing the appeal. We went through minutely the contents of the affidavit of Shri Prasad S. Shah and we entirely agree with the argument of the Id. Departmental Representative. We do not find anywhere in the affidavit about the assessee-company being misled by wrong advice or mistaken advice given by its legal adviser.

Secondly, it is contended that the scope of the 263 order is so unequivocal that even a laymen cannot have any misapprehension about it. We have already extracted the ultimate order under section 263 and the directions given thereunder to the Assessing Officer. It is clearly stated in the said order directing a fresh assessment without giving investment allowance. Therefore, the Id. Departmental Representative contended that any legal advice given to the assessee, assuming to be true, is exhibiting or is full of incomprehensible indifference as stated in the ratio of the Hon'ble Supreme Court and for that reason also legal advice, if any, given cannot constitute sufficient cause for excusing the inordinate delay of 3 years 17 days in filing the appeal.

We completely agree with this argument also. Shri A.V. Sonde also brought to out notice a judgement of the Bombay High Court in Remex Constructions/Remex Electricals v. First ITO [1987] 166 ITR 18/[1986] 28 Taxman 323. The learned counsel had taken us through the important portions of the judgement and he

argued that the facts appreciated by the Hon'ble Bombay High Court in that case are quite similar to the facts on hand. In that case also, the delay was more than 3 years, but still the Hon'ble Bombay High Court had observed that the Tribunal ought to have condoned the delay and out to have taken up the appeal for consideration on merits, Shri Sonde requested us to follow the said decision, and following the ratio of the same, he wanted us to condone the delay even though it is more than 3 years. The Id. Departmental Representative did not accept the contention that the Bombay High Court decision cited before us is on all fours with the facts of the present case and he contended that it is distinguishable. After going through the decision thoroughly, we are of the opinion that it is a decision rendered on appreciation of the peculiar fact and circumstances of that case and there is no general principle or ratio which can be deduced from that decision and it was not intended that any general principle is to be laid down in such cases for condonation of delay. Secondly, in that case, the order passed by the CIT under section 263 was found to be entirely without jurisdiction and, therefore, null and void. In fact, this aspect, in our humble opinion, tilted the scale in favour of the petitioner before the Bombay High Court. However, the order under section 263 in the present case before us cannot be said to be passed without jurisdiction. Therefore, since that is the sheet anchor or was made cornerstone for rendering the decision by the Bombay High Court and since no similar facts are present in this case or more particularly since the 263 order was passed by the CIT with full jurisdiction, the Bombay High court decision, in our opinion, cannot be applied.

5. For the above reasons, we hold that the delay of 3 years 17 days in presenting the first of the appeals filed before us cannot be condoned and the appeal is to be dismissed as horribly time-barred.

6. As already submitted above, the second of the appeals, in the view of the matter which we have taken, is to be considered as only consequential and hence we hold that the impugned order of the CIT(Appeals) that the appeals filed before him is incompetent should be upheld as correct under law and facts. Hence, the second of the appeal also falls and is dismissed.