IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "A", MUMBAI

BEFORE SHRI SANJAY ARORA, AM & SHRI SANJAY GARG, JM

ITA No.: 3297/Mum/2012
Assessment Year: 2006-07

Shri Kunal Surana, 302, Pandya Mansion, 3rd Floor, Pandya Mansion, 3rd Floor, 625 Girgaon Road, Mumbai- 400 002.	vs.	The ITO 14(1)(13), Mumbai.
PAN: AAQPS1901G		
(**Appellant)**		**(Respondent)**

Appellant By	:	Shri Ashok Rao
Respondent By	:	Shri Manoj Kmar
Date of hearing	:	14.03.2013
Date of pronouncement	:	19.04.2013

O R D E R

Per Sanjay Garg, JM :

The present appeal has been filed by the assessee against the order of the learned CIT(A) dated 16.03.2012 relevant to assessment year 2006-07. The grounds of appeal are reproduced below:

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in not condoning the delay in filing of the appeal.*

2. *On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in not referring to the Written Statement given by the Appellant's Representative giving complete reasons supporting the grounds of appeal.*

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3. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition made by the AO of an amount of Rs.8,94,550/- on account of alleged introduction of capital during the concerned year, u/s. 68 of the Income-tax Act, 1961.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition made by the AO of an amount of Rs.9,80,015/- on account of loans allegedly taken from Finishing Touch during the year, u/s. 68 of the Income-tax Act, 1961.

5. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in not disposing of the ground No.3 before him pertaining to addition of Rs.34,249 out of labour charges.

6. On the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in not disposing of the ground No.4 before him pertaining to addition of Rs.3,858 out of telephone charges."

2. The brief facts of the case are that the assessee, a dealer in paper and paper products, filed his return of income declaring total income of Rs.1,63,255. The return was processed u/s. 143(1) of the Income Tax Act. The AO found that the assessee had introduced capital of Rs. 8,94,550 during the relevant year. The assessee was asked to file the details of capital so introduced. However, the assessee despite opportunities given to him failed to provide the necessary details. The AO thus in the absence of explanation of the source of capital, treated the said sum as income of the assessee. The AO further found that the assessee had claimed to have taken unsecured loan of Rs.9,80,015. On being asked, the assessee failed to provide the details of loan, confirmation from creditors and credit worthiness of the creditors, etc. Hence, the AO made an addition of unsecured loan of Rs.9,80,015 to the income of the assessee. The AO further disallowed 10% of the labour charges claimed by the assessee amounting to Rs.34,249 for want of necessary explanation from the assessee. Aggrieved against the order of the AO dated 16.12.2008, the assessee preferred appeal before the CIT(A).

3. The learned CIT(A) in his order has categorically observed that number of opportunities were given to the learned AR to present the case of the assessee. But the learned AR remained reluctant to appear before him [CIT(A)] and the case was adjourned several times. Neither the assessee nor his representative appeared on the stipulated dates of hearing. However, prior to passing of the order, the learned representative of the assessee appeared on 16.03.2012 and was heard. The ld. CIT(A) found that there was delay of four months in preferring the appeal before him. The delay was not reasonably explained. Even on merits, the learned CIT(A) found that despite several opportunities given by the AO to the assessee, the assessee had not cared to explain the issues/points raised by the assessee which entailed additions. The relevant portion of the order of the ld CIT(A) is reproduced as under:

> *"3. Before adjudicating the appeal on merit, it has to be adjudicated whether delay in filing of appeal can be condoned in light of reasons mentioned by the Ld. A.R. Accordingly, the preliminary issue is adjudicated hereinafter.*
>
> *4. As per the statute, the assessee was required to file the appeal by 5/2/2009 because the demand notice and assessment order was received on 6/1/2009. The assessee had filed an appeal on 5/6/2009. Thus, there is delay of 4 months. The assessee was asked to explain the delay with necessary evidences. The assessee had not explained the delay satisfactorily with cogent evidences. It is seen from the record that the representative of the assessee had filed a letter alongwith Form No.35 requesting for condonation of delay in submission of appeal. In his letter, the representative had stated as under. (The assessee vide his letter dated 15/2/2010 had endorsed the letter of the representative filed with form No.35)*
>
> > *"1. That we were the Authorised Representative in respect of matter concerning Mr. Kunal Surana before the Assessing Officer for the Assessment Year 2006-07*
> >
> > *2. That the Assessing Officer had passed order under section 143(3) dated 16th December, 2008 and was duly served on 6th January, 2009.*
> >
> > *3. That due to my visit to outside Mumbai on some urgent person work the preparation and submission of appeal was given to my Asssistant Mr. Anand Kanse.*

4. However, he had kept these papers in his drawer and failed to take necessary action in the matter.

5. On my resumption of office, he had not informed me about the pendency of submission of appeal due to fear of reprimanded.

6. On receiving the penalty under section 271(1)(c) dated 27th May 2009 (received by our client on 30th May, 2009) it came to my notice about non submission of above appeal.

7. On further inquiry the papers were found in his drawer and left without any action.

8. That as stated above, it was due to oversight and unintentional mistake that the necessary appeal could not be submitted in time.

9. That I feel sorry for the inconvenience caused due to non submission of appeal in time.

10. Considering the circumstances, we on behalf of our above named clients, request you to kindly condone the delay in filing of the appeal."

5. The explanation of the assessee's A.R in form of the said letter is not supported by any evidences and is of general nature. The same is not authenticated by an affidavit of Shri R N Sirsalewala, who had written the said explanation and also affidavit of Mr. Anand Kanse. It is unbelievable that the papers were kept in the drawer of assistant which were not noticed till 4 months. There is no affidavit of the assessee also to authenticate the facts stated by Shri R N Sirsalewala and why he did not care for 4 months. There is gross negligence on the part of the assessee as well as A.R. The Law helps to persons who are vigilant in their rights. [vigilantibus, et non dormientibus, jura subveniunt :- The vigilant, and not the sleep, are assisted by the laws (reference: Law Dictionary)] Surprisingly, the ***said letter of Shri R.N.Sirsalewala is dated 27/6/2008, whereas the said letter was filed alongwith Form No.35 on 5/6/2009****. How the letter dated 27/6/2008 can be attributed to the appeal against the order u/s. 143(3), which was passed on 16/12/2008. Thus, it immensely transpires that the reasons mentioned in the letter of Shri R.N.Sirsalewala are evasive and unreliable on the face of it. It represents make believe and fabricated excuses. Even otherwise, delay of 4 months in not a small delay. As held by the Hon'ble Supreme Court, the condonation of delay is an exception and should not be used as*

anticipated benefit for a person. Recently, the Hon'ble Supreme Court had refused to condone the delay in filing of appeal by Government of India inspite of the fact that government working has inherent, impersonal and bureaucratic procedure, which makes obvious delay in filing of appeal [Reference : ***The Chief Post Master and Others v/s. Living Media India Ltd. & Anothers (Civil Appeal No.2474-2475 of 2012 arising out of SLP {C} No.7595-96 of 2011)****]. In given facts and circumstances, the delay of 4 months cannot be condoned. Hence for the reason of inordinate delay, the appeal is liable to be dismissed and is done so. Apart from dismissal of appeal for the reason of inordinate delay discussed hereinabove, the appeal lacks merit also. On perusal of assessment order, it immensely transpires that inspite of sufficient opportunities, the assessee had not cared to explain the issues/points raised by the AO, which entailed additions. For ease of reference, relevant extract of assessment order of AO as contained in page 1 and 2 is reproduced as under.*

Page 1

"Capital introduction treated as cash credit u/s. 68 *: It is seen from the assessee's proprietary capital account that assessee has introduced capital during the year of Rs.8,94,550/-. The assessee vide questionnaire were asked to file the details of capital introduction with sources of the same alongwith documentary evidences.* ***The assessee did not produce the details and sources of capital introduced during the year. A reminder letter dt. 17.10.2008 was issued and served on the assessee asking to file these details. There was no compliance from the assessee's side to this reminder letter. A final opportunity letter was given to the assessee vide letter dated 21.11.2008 and case was fixed for hearing on 27.11.2008 to file the details called for. No details filed on this date. In response to this letter the assessee filed letter dt. 02.12.2008 of adjournment and again case was fixed on 04.12.2008 in view of natural justice. The assessee had not turn up or filed the details called for on the adjourned date.***

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"Unsecured loan treated as cash credit u/s. 68: *It is seen from the assessee's personal balance sheet that assessee has taken unsecured loan from one party Finishing Touch of Rs.9,80,015/-. The assessee vide questionnaire was asked to file the details of unsecured loan taken, confirmation of loan, copy of return of income filed, its PAN no, copy of balance sheet alongwith documentary evidences.* ***The assessee did not produce the details and sources of capital introduced during the***

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year. A reminder letter dt. 17.10.2008 was issued and served on the assessee asking to file these details. There was no compliance from the assessee's side to this reminder letter. A final opportunity letter was given to the assessee vide letter dated 21.11.2008 and case was fixed for hearing on 27.11.2008 to file the details called for. No details filed on this date. In response to this letter the assessee filed letter dt. 02.12.2008 of adjournment and again the case was fixed on 04.12.2008 in view of natural justice. The assessee had not turn-up nor filed the details called for on the adjourned date."

In such facts and circumstances, no interference warrants in decision of AO.

6. In result, for statistical purposes, appeal filed by the appellant is treated as ***dismissed."***

4. Before us, the learned AR has stressed that the learned CIT(A) ought not to have dismissed the appeal on the ground of limitation. He has further stressed that during the pendency of appeal, the application dated 04.03.2010 under rule 46A of the I.T. Rules, 1962 for additional evidence was moved before the CIT(A), upon which the learned CIT(A) vide letter dated 12.03.2010 called for the remand report from the AO, directing him to examine the additional evidence and furnish the report. The AO furnished his remand report dated 07.04.2010 to the learned CIT(A). The main contention of the learned AR is that once the learned CIT(A) acted on the application for additional evidence and called for the remand report, then under such circumstances the application for condonation of delay was deemed to be allowed by the learned CIT(A).

5. On the other hand, the learned DR has submitted that there cannot be an automatic condonation of delay in such a manner. He submitted that until and unless the application for condonation of delay is not allowed by a speaking order with the application of mind, it cannot be said that the delay was condoned automatically on entertaining the application for additional evidence by the learned CIT(A).

6. We have considered the submissions of the learned representatives of the parties. In our view there is no merit in the contention of the learned AR that on entertaining the application for additional evidence, the delay in preferring the appeal was deemed to be condoned. When a case is barred by limitation, it creates a substantive right in favour of the other party. It cannot be curtailed or taken away by such type of interpretation; rather, an application for condonation of delay is required to be heard on merits and is required to be allowed or disallowed taking into consideration the relevant facts as to whether or not the appellant/applicant was prevented by sufficient cause for not preferring the appeal in time, per a speaking order and cannot be a matter of presumption. However, if during the pendency of the appeal as well application for condonation of delay, the assessee or his counsel without bringing into knowledge of the adjudicating authority that the appeal was time barred, had moved an application for additional evidence and the first appellate authority in routine manner had called for the remand report regarding the said documents/additional evidence, that itself does not mean that the application for condonation of delay was allowed or any such type of right to get the appeal heard on merits without adjudication on application of condonation of delay has ever accrued to the assessee. We may observe that there was no admission of the additional evidence by the learned CIT(A) u/r 46A, which is mandatory. It may be observed that the proceedings before the first appellate authority i.e. the learned CIT(A) were conducted in a summary manner and if the learned CIT(A) preferred to dispose off both the application for condonation of delay as well as appeal on merits by a consolidated order, there was no illegality in the same. Even if for the sake of argument, we assume that without disposing of the application for condonation of delay, the learned CIT(A) should not have entertained the application for additional evidence and if he has done so even then no automatic right has accrued to the assessee for the hearing of his appeal on merits without adjudication on the application for condonation of delay. At the most it can be said that the order calling for remand report on the application of additional evidence moved by the assessee was without jurisdication. It does not mean

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that the other party/revenue has forfeited any right in favour of the assessee. Reliance can be placed in this respect on the authority of the Bombay High Court styled as **"Mathuradas Mohota College of ... vs R.T. Borkar & Ors"(1996) 98 BOMLR 718.** Reliance can also be placed on the authorities of Hon'ble Karnataka High Court in the case of "**Bangalore Metropolitan vs. The Deputy Labour Commissioner",** wherein, vide its order dated 07.01.2008, it has been held that in the absence of condoning the delay, the action of the Controlling Authority to deal with the application on merit could be one without jurisdiction and in case of North West Karnataka Road Transport Corporation vs. Deputy Labour Commissioner in WP No. 9430 of 2006 dated 07.01.2008. Similarly reliance can be placed on another authority of Bombay High Court styled as **R.P. Dhanda vs Regional Manager, UCO Bank & .... 2007 (4) Bom CR 321, (2007) IIILLJ 106 Bom.**

7. We may further observe that a duty was cast upon the representative of the assessee to bring into the knowledge of the first appellate authority that the appeal preferred by the assessee was time barred and before an application of additional evidence was filed, he should have pressed before the learned CIT(A) for adjudication on the application for condonation of delay. The contention of the learned AR that a right for hearing of the appeal on merits has automatically accrued to the assessee because of the fact that he has succeeded in getting entertained the application for additional evidence by keeping the learned authorities in dark about the pendency of limitation application cannot be appreciated. No one can be allowed to take benefit of his own wrong. Moreover, as observed above, in view of the settled position of law that even entertaining the application for additional evidence pending adjudication on application for condonation of delay does not give any automatic right of condonation of delay. Rather, the said order passed on any application without disposal of application for condonation of delay can be said to be without jurisdiction and is required to be treated as non-est.

In view of the settled law as discussed above this contention of the assessee is not tenable.

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8. The second contention of the learned counsel for the assessee is that the learned Commissioner ought to have condoned the delay in view of the "sufficient cause" as explained by the learned representative of the assessee namely Shri R N Sirsalewala to the learned CIT(A) vide letter dated 27.06.2008. The contents of the said letter have been reproduced by the learned CIT(A) in his order, which in turn has been reproduced by us in earlier para of this order. At this stage, we may observe that earlier the case was fixed for 13.03.2013. The learned AR on that date produced an affidavit of Mr. Rakesh N.Sirsalewala for the sake of affirmation of the contents of letter dated 27.06.2008. It was brought to the knowledge of the learned AR that the said affidavit did not fulfill the requirements of a valid affidavit under law and was even unattested without affirmation of oath before the competent authority. The learned AR requested for an adjournment so that he can file the affidavit as per requirements of law. The said affidavit was returned to him and the case was adjourned to next day i.e. 14.03.2013. On 14.03.2013, he filed the same affidavit with notarized seal and signature. It was again pointed out to him that the said affidavit was still falling short of the requirements of a valid affidavit under law, but he insisted before us that the said affidavit was a valid affidavit and there is no defect in the same. He strongly relied upon the said affidavit. Under such circumstances, it has become imperative upon us to discuss as to on what aspects, the affidavit produced by the learned AR cannot be said to be a valid affidavit as per the requirement of law.

We may note that there is no verification appended on the affidavit and there is also no mention as to which of the paras are true to the knowledge of the deponent and which of the paras of the affidavit are true to the belief of the deponent. The Hon'ble Supreme Court in the case of **Amar Singh v. Union of India and Others Writ Petition Civil No.39 of 2006** has summed up the law relating to the requirement of verification clause in the affidavit and the importance of affidavits requiring the same to be strictly confirming to the requirements of Order XIX Rule 3 of the Code of Civil Procedure. The relevant extract of the judgment is reproduced below:

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"12. The provision of Order XIX of Code of Civil Procedure, deals with affidavit. Rule 3 (1) of Order XIX which deals with matters to which the affidavit shall be confined provides as follows:

***"Matters to which affidavits shall be confined.** - (1) affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated."*

13. Order XI of the Supreme Court Rules 1966 deals with affidavits. Rule 5 of Order XI is a virtual replica of Order XIX Rule 3 (1). Order XI Rule 5 of the Supreme Court Rules is therefore set out: "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated."

14. In this connection Rule 13 of Order XI of the aforesaid Rules are also relevant and is set out below:

"13. In this Order, `affidavit' includes a petition or other document required to be sworn or verified; and `sworn' includes affirmed. In the verification of petitions, pleadings or other proceedings, statements based on personal knowledge shall be distinguished from statements based on information and belief. In the case of statements based on information, the deponent shall disclose the source of this information."

*15. The importance of affidavits strictly conforming to the requirements of Order XIX Rule 3 of the Code has been laid down by the Calcutta High Court as early as in 1910 in the case of **Padmabati Dasi v. Rasik Lal Dhar [(1910) Indian Law Reporter 37 Calcutta 259].** An erudite Bench, comprising Chief Justice Lawrence H. Jenkins and Woodroffe, J. laid down:*

"We desire to impress on those who propose to rely on affidavits that, in future, the provisions of Order XIX, Rule 3, must be strictly observed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be sage to act on the deponent's belief."

*16. This position was subsequently affirmed **by Constitution Bench of this Court in State of Bombay v. Purushottam Jog Naik, AIR 1952 SC 317**. Vivian Bose, J. speaking for the Court, held:*

"We wish, however, to observe that the verification of the affidavits produced here is defective. The body of the affidavit discloses that certain

matters were known to the Secretary who made the affidavit personally. The verification however states that everything was true to the best of his information and belief. We point this out as slipshod verifications of this type might well in a given case lead to a rejection of the affidavit. Verification should invariably be modelled on the lines of Order 19, Rule 3, of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed. We draw attention to the remarks of Jenkins, C. J. and Woodroffe, J. in ***Padmabati Dasi vs. Rasik Lal Dhar 37 Cal 259*** *and endorse the learned Judges' observations."*

17. ***In Barium Chemicals Limited and another v. Company Law Board and others, AIR 1967 SC 295****, another Constitution Bench of this Court upheld the same principle:*

"The question then is: What were the materials placed by the appellants in support of this case which the respondents had to answer? According to Paragraph 27 of the petition, the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him, the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on reasons to believe. Even for their reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made, such as its contents, its time or to which authority it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of mala fides, but then were such knowledge is wanting he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in 1952 SCR 674: AIR 1952 SC 317, that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of O. XIX, R. 3 of the Civil Procedure Code and that where an averment is not based on personal knowledge, the source of information should be clearly deposed. In making these observations this Court endorse the remarks as regards verification made in the Calcutta decision in ***Padmabati Dasi v. Rasik Lal Dhar, (1910) ILR 37 Cal 259."***

18. Another Constitution Bench of this Court in ***A. K. K. Nambiar v. Union of India and another, AIR 1970 SC 652,*** *held as follows:*

"The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in

answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence."

19. In the case of ***Virendra Kumar Saklecha v. Jagjiwan and others, [(1972) 1 SCC 826],*** *this Court while dealing with an election petition dealt with the importance of disclosure of source of information in an affidavit. This Court held that non-disclosure will indicate that the election petitioner did not come forward with the source of information at the first opportunity. The importance of disclosing such source is to give the other side notice of the same and also to give an opportunity to the other side to test the veracity and genuineness of the source of information. The same principle also applies to the petitioner in this petition under Article 32 which is based on allegations of political motivation against some political parties in causing alleged interception of his telephone. The absence of such disclosure in the affidavit, which was filed along with the petition, raises a prima facie impression that the writ petition was based on unreliable facts.*

20. In case of ***M/s Sukhwinder Pal Bipan Kumar and others v. State of Punjab and others, [(1982) 1 SCC 31],*** *a three Judge Bench of this Court in dealing with petitions under Article 32 of the Constitution held that under Order XIX Rule 3 of the Code it was incumbent upon the deponent to disclose the nature and source of his knowledge with sufficient particulars. In a case where allegations in the petition are not affirmed, as aforesaid, it cannot be treated as supported by an affidavit as required by law. (See para 12 page 38)*

21. The purpose of Rules 5 and 13 of the Supreme Court Rules, set out above, has been explained by this Court in the case of ***Smt. Savitramma v. Cicil Naronha and another, AIR 1988 SCC 1987.*** *This Court held, in para 2 at page 1988, as follows: "...In the case of statements based on information the deponent shall disclose the source of his information. Similar provisions are contained in Order 19, Rule 3 of the Code of Civil Procedure. Affidavit is a mode of placing evidence before the Court. A party may prove a fact or facts by means of affidavit before this Court but such affidavit should be in accordance with Order XI, Rules 5 and 13 of the Supreme Court Rules. The purpose underlying Rules 5 and 13 of*

Order XI of the Supreme Court Rules is to enable the Court to find out as to whether it would be safe to act on such evidence and to enable the court to know as to what facts are based in the affidavit on the basis of personal knowledge, information and belief as this is relevant for the purpose of appreciating the evidence placed before the Court, in the form of affidavit...."

22. In the same paragraph it has also been stated as follows:

"...If the statement of facts is based on information the source of information must be disclosed in the affidavit. An affidavit which does not comply with the provisions of Order XI of the Supreme Court Rules, has no probative value and it is liable to be rejected..."

23. In laying down the aforesaid principles, this Court in Smt. Savitramma (supra) relied on a full Bench judgment in Purushottam Jog Naik (supra).

24. In the instant case, the petitioner invoked the extraordinary writ jurisdiction of this Court under Article 32, without filing a proper affidavit as required in terms of Order XIX Rule 3 of the Code. Apart from the fact that the petitioner invoked Article 32, the nature of the challenge in his petition is very serious in the sense that he is alleging an attempt by the government of intercepting his phone and he is further alleging that in making this attempt the government is acting on extraneous considerations, and is virtually acting in furtherance of the design of the ruling party. It is, therefore, imperative that before making such an allegation the petitioner should be careful, circumspect and file a proper affidavit in support of his averment in the petition.

25. In our judgment, this is the primary duty of a petitioner who invokes the extraordinary jurisdiction of this Court under Article 32."

The Hon'ble Supreme Court has further observed as under:

"65. This court wants to make one thing clear i.e. perfunctory and slipshod affidavits which are not consistent either with Order XIX Rule 3 of the CPC or with Order XI Rules 5 and 13 of the Supreme Court Rules should not be entertained by this Court.

66. In fact three Constitution Bench judgments of this Court in ***Purushottam Jog Naik (supra), Barium Chemicals Ltd. (supra) and A.K.K. Nambiar (supra)*** *and in several other judgments pointed out the importance of filing affidavits following the discipline of the provision in the Code and the said rules.*

67. These rules, reiterated by this Court time and again, are aimed at protecting the Court against frivolous litigation must not be diluted or ignored. However, in practice they are frequently flouted by the litigants and often ignored by the Registry of this Court. The instant petition is an illustration of the same. If the rules for affirming affidavit according to Supreme Court were followed, it would have been difficult for the petitioner to file this petition and so much of judicial time would have been saved. This case is not isolated instance. There are innumerable cases which have been filed with affidavits affirmed in a slipshod manner.

68. This Court, therefore, directs that the Registry must henceforth strictly scrutinize all the affidavits, all petitions and applications and will reject or note as defective all those which are not consistent with the mandate of Order XIX Rule 3 of the CPC and Order XI Rules 5 and 13 of the Supreme Court Rules."

So the Hon'ble Supreme court in the above said judgment citing various authorities has discussed about the defects in the verification of the affidavit. But in the case in hand, there is no verification at all what to say of defects; and as such, the same cannot be read into.

9. It may also be noted that the said affidavit cannot be said to be a duly sworn affidavit as required under Rule 10 of the ITAT Rules 1963. For the sake of convenience, Rule 10 is reproduced as under:

"Filing of affidavits.

10. *Where a fact which cannot be borne out by, or is contrary to, the record is alleged, it shall be stated clearly and concisely and supported by a duly sworn affidavit.*"

It may be observed that the said affidavit has not been properly endorsed by the notary regarding the oath of affirmation before him by the executant of the affidavit. We may observe that the notary has put his signatures under his name seal but there is no mention whether the oath was administered to the signatory or if done so, when and where it was administered. Even words "Sworn before me" are missing.

The function of swearing of oath is different from the function of simple attestation of an instrument. Under The Notaries Act, 1952 the definition of instrument has been given as under:

> *(b) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded;"*

The functions of notaries have been mentioned u/s 8 of the Act, the relevant portion of the same is reproduced as under:

> *(a) "verify, authenticate, certify or attest the execution of any instrument;*
>
> *(b) ...*
>
> *(e) administer oath to, or take affidavit from, any person;"*

It can safely be observed that an affidavit does not fall in the definition of an instrument as described under the Notaries Act. It may be further observed that the function of attestation of an instrument is different from the function of administration of oath as former has been described under clause (a) of section 8 and later under clause (e) of the said section. The notary while administering oath to the signatory of the affidavit is required to make an endorsement to the effect that the assessee has sworn or affirmed the contents of affidavit before him. The place and date of administration of oath is also required to be mentioned. The procedure to administer the oath and making of endorsement has been described in Chapter XXVII of Maharashtra Civil Court Manual. Rule 510 & 511 of the said manual are relevant, which for the sake of convenience are reproduced here under:

> *510. "The Officer, authorised to administer oaths shall before certifying the affidavit, him personally or identified before him by a person whom he personally knows, or whose identity is duly established to the satisfaction of the Officer by any of the following documents, namely Passport, Driving License, Voters identity Card, PAN Card, or photo Identity Card issued by State/Central*

Government. The manner in which the identification is so made shall be certified by the Officer administering the oath"

Every Officer administering an oath in such a case shall add the following
words after the words, "Solemnly affirmed before me," namely, "by" …" who is identified before me by" … or "whom I personally know."

511. (1) Every affidavit to be used in a Court shall be entitled "In the Court of ………."

(2) Every affidavit shall bear the number of the proceeding in which it is proposed to be filed and shall set out the names of the parties to the proceedings.

(3) Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject.

(4) The declarant shall state what paragraphs or portions of his affidavit he swears of solemnly affirms to from his own knowledge and what paragraphs or portions he swears or solemnly affirms to on his belief, stating the grounds of such belief.

(5) (a) The officer administering the oath or affirmation for the purpose of affidavits shall satisfy himself that the language in which the affidavit is sought to be made is known to the declarant.

IF the language is not known or understood by the declarant, the Officer administering the oath or affirmation shall, where the party is represented by a lawyer, require the said lawyer to certify in writing below the affidavit that the contents of the affidavit have been interpreted to the declarant in a language known to him and that the declarant has fully understood them.

(c) Where the declarant is not represented by a lawyer, the Officer Administering the oath or affirmation shall, when necessary, cause the affidavit to be interpreted to the declarant by any person appointed by him as an Interpreter. The person interpreting the document shall certify below the document that its contents have been interpreted to the declarant in a language known to him

(d) When the Officer administering the oath or affirmation is satisfied that the language of the document as known or understood by the declarant, or when the lawyer or the interpreter certifies that the contents have been interpreted to the declarant in a language known to him, the oath shall be administered and the affidavit completed by the signature of the declarant below the declaration on oath in the presence of the Officer and the certification by the officer of the administration of the oath.

Rule 199 and Rule 200 of the Bombay High Court Original Side Rules are also relevant, which for the sake of convenience are reproduced as under:

> ***"199. Place of administering oats to be state when oath administered outside Court House.-*** *The officer authorized to administer an oath or affirmation shall state at the foot of the affidavit the place where he has administered the oath or affirmation in the event of the same being administered elsewhere than in the Court House.*
>
> ***200. Affidavit not to be filed unless properly endorsed.****- No affidavit shall be filed in the several offices of the Court unless properly endorsed, giving the names of the deponents, the date on which it is sworn, and stating by whom or whose behalf it is filed."*

Rule 9 & 10 of Chapter III Part II- '**Procedure and Practice Bombay High Court Rules'** are also relevant, which for the sake of convenience are reproduced as under:

> "***9. Oath to be administered under Oaths Act . —*** *Oaths and affirmations to be made by a witness or interpreter under section 4 of the Oaths Act, 1969 (Act XLIV of 1969), shall, as required by section 6(2) of that Act, be administered as per Rule 9 of Chapter II of the Bombay High Court Appellate Side Rules. I960.*
>
> *The following forms of oaths and affirmation are prescribed under section 6 of the Oaths Act, 1969 :~*
>
> *Form No. 1 (Witnesses):*
>
> *I do swear in the name of God/solemnly affirm that what I shall state, shall be the truth, the whole truth and nothing but the truth.*
>
> *Form No. 3 (Interpreter) :*

I do swear in the name of God/solemnly affirm that I will well and truly interpret and explain all questions put to and evidence given by witnesses and translate correctly and accurately all documents given to me for translation.

Form No. 4 (Affidavits) :
I do swear in the name of God/solemnly affirm that this is my name and signature (or mark) and that the contents of this my affidavit are true.

10. Solemn declaration by the party making the affidavit. *—*
The declaration by the party making the affidavit shall be in the following form:—

"I .... the Appellant/Respondent, Applicant/ Opponent abovenamed do solemnly declare that what is stated above in paragraph is true to my own knowledge and that what is stated in the remaining paragraphs is true to the best of my information which I obtained from the following sources:—

I believe the information to be true for the following reasons :—

Solemnly declare at... abovesaid
this .... day of.........19

(Signature)

Before me,
Assistant Registrar,
Solemnly affirmed before me by
whois identified before me by
whom I personally know.
This day of 19
High Court, Appellate Side, Bombay.
Assistant Registrar "

It may be mentioned that Notaries have also been authorized to administer oaths under the above said provisions but are required to make endorsements as per rules as noted above.

Now we also feel it necessary to discuss the case law on the above said subject also. The Hon'ble Allahabad High Court in **Kashi Prasad Saksena vs State Government of U.P., Lucknow AIR 1969 All 195** has observed that if oath has been administered or an affidavit has been taken by a Notary unless that fact is certified or endorsed on the affidavit the affidavit remains a waste paper. Reliance was also placed on the authority of Hon'ble Bombay High Court styled as **Purushottam vs. Returning Officer and Others- Election Petn. No. 7 of 1990 dated 29.01.1991.** The Hon'ble Supreme Court in **Krishan Chander Nayar v. Chairman, Central Tractor Organisation, AIR 1962 SC 602** has emphasized the responsibility for making precise and accurate statements in affidavit. In **M. Veerabhadra Rao v. Tek Chand, AIR 1985 SC 28** it has been observed that the part or role assigned to the person entitled to administer oath is no less sancrosanct. Hon'ble Supreme Court of India in the case of **Dr. (Smt.) Shipra Etc. Etc. vs. Shanti Lal Khoiwal** Etc. Etc has observed as under:

> *"Verification by a Notary or any other prescribed authority is a vital act which assures that the election petitioner had affirmed before the notary etc. that the statement containing imputation of corrupt practices was duly and solemnly verified to be correct statement to the best of his knowledge or information as specified in the election petition and the affidavit filed in support thereof; that reinforces the assertions. Thus affirmation before the prescribed authority in the affidavit and supply of its try copy should also contain such affirmation so that the returned candidate would not be misled in his understanding that imputation of corrupt practices was solemnly affirmed or duly verified before the prescribed authority."*

Reliance may also be placed on the authority of The **Hon'ble Karnataka High Court in the case of V.R.Kamath vs. Divisional Controller AIR 1997 Kant 275, ILR**

1997 KAR 1856. It may be observed that despite giving sufficient opportunity to the assessee to cure the defects in his affidavit, he has failed to do so. Even the Notary has affixed his seal on the affidavit already signed by the executants, which in fact was produced before us on 13.03.2013, which means that executants has not signed the affidavit before the Notary and as such it cannot be said that there was any affirmation of oath as per law. As discussed above, the affidavit produced by the learned AR does not conform to the requirements of a valid affidavit under law and cannot be said to be a 'duly sworn' affidavit as required under Rule 10 of the Income Tax Appellate Rules 1962.

10. Now coming again to the facts of this case, out of the reasons given by the appellant for condonation of delay, it is to be looked into whether the appellant had acted with reasonable diligence in prosecuting his appeal and whether he was prevented by sufficient cause for not filing his appeal within the period of limitation as prescribed by law. We may observe that the explanation put forth by the learned AR does not constitute sufficient cause for delay. It has been submitted in the said letter that the assessment order dated 16.12.2008 was duly served upon the assessee on 06.01.2009. It has been further explained that due to some personal work the said representative of the assessee went outside Mumbai and the said work of preparation and submission of appeal was given by him to his assistant Mr. Anand Kanse. However, the said assistant kept the papers in his drawer and failed to take necessary action in the matter. On his resumption of office, the said assistant did not inform the AR about the pendency of appeal. It was only when the penalty notice was received on 30.05.2009, he came to know about the non-submission of above appeal and on further enquiry the papers were found in his drawer and left without taking any action. It has been further explained that as stated above, it was due to oversight and unintentional mistake that the appeal could not be submitted in time.

This type of explanation given by the representative of the assessee is vague and evasive and does not constitute sufficient cause as is required to condone the delay under the law of limitation. There is no explanation as to on which date the papers

were handed over by the assessee to his representative Shri Sirsalewala and on which date he went out of Mumbai and on which date he resumed office. There is no explanation as to why he did not enquire about the preparation or filing of appeal from his assistant. There is no mention as to whether the assessee ever enquired from his representative about the filing or non-filing, pendency or date of hearing of appeal. Neither any affidavit of the assessee nor any affidavit of the learned representative was produced before the learned CIT(A). The case is of gross negligence and inaction on the part of the assessee as well as his representative. The learned CIT(A) has rightly observed that the said letter is dated 27.06.2008, which was filed along with form no.35 on 05.06.2009, however, the assessment order is dated 16.12.2008 and the appeal has been filed on 05.06.2009 and the said letter which is prior to the assessment order cannot be related to the appeal against the said assessment order. All these facts show sheer negligence, carelessness and non-application of mind on the part of the learned representative of the assessee. No doubt, courts adopt liberal view while condoning delay on the principle that technicalities when pitied against the cause of justice, the latter should prevail. However, it can be observed that it does not mean that the litigants should take the courts for granted to ignore the gross negligence and carelessness on their part while appealing for condoning of delay. As observed earlier, non-filing of appeal within the limitation period creates a substantive right in favour of the other party and cannot be defeated with a taken for granted attitude. A perusal of the letter dated 27.06.2008, relied upon by the learned AR reveals that the representative of the assessee did not even prepare the appeal papers, what to say of its filing. He handed over the papers for preparation of appeal to his assistant which means the appeal in question was never drafted. It has not been explained whether the representative's assistant Mr. Anand Kanse was competent and qualified to prepare and file the appeal for the assessee. After handing over the paper to his assistant, he never bothered to enquire as to what happened to those papers thereafter. It was the duty of the learned representative not only to enquire about the papers given by him to his assistant for filing of appeal but also to prepare draft, sign the same and present it

before the competent authority. He never bothered to look into the matter. There is also total inaction and gross negligence on the part of the assessee himself also. After handing over the papers to his representative, he also never bothered to enquire as to whether the appeal was filed and what was the next date of hearing or whether his signatures on the duly prepared appeal were required or not. Neither the assessee nor his representative cared in this respect. Even the conduct of the assessee shows that he always remained careless and negligent in pursuing his case before the AO also. A perusal of the assessment order reveals that the assessee never bothered to attend the proceedings before the AO. He did not give any explanation or reply to various opportunities granted to him by the learned AO to answer his queries. When the assessee did not turn up to answer the enquiries and the assessment was going time barred on 31.12.2008 only then the assessment order was passed by the AO. Again a perusal of the order under appeal reveals that the learned CIT(A) has categorically mentioned that on the stipulated dates of hearing, neither the assessee nor his representative appeared even after adjourning the case for several times. Lastly, the learned representative of the assessee appeared on 16.03.2012 and the case was heard on merits. A perusal of the assessment order as well as the order of the CIT(A) reveals that the assessee and his representative always remained careless and negligent in pursuing their case. The explanation put forward is vague and evasive and does not constitute any sufficient cause for condonation of delay. Faced with somewhat similar situation, Hon'ble Punjab & Harayana High court in the case of **Krishan Dev Dhiman vs. Mahesh Bhatia and others [RSA No.3142 of 2006 decided on 08.04.2008]** has observed as under:

> *"Even otherwise, the only ground for condonation of delay is contained in paragraph 3 of the application wherein it is stated that the brief was misplaced by the clerk of the counsel who has now left the service and on finding the file, the same has been filed now. Even otherwise, no details are given as to when the Clerk of the counsel has misplaced the file, when he had left the service of the counsel for the applicant-appellant and when the file has been found.*

Learned counsel appearing for the applicant-appellant has stated that it was due to the fault of the Clerk that delay has been caused.

I am not impressed by this argument. It is the duty of the party also to follow his/her case. It cannot be believed that the applicant-appellant has not bothered to enquire about his case for a period of more than four years. If he has not taken any interest, it is sheer negligence on the part of the applicant-appellant. In the absence of there being any details about the misplacing of the file and finding the same, when the Clerk of the counsel left the service and when the new Clerk/counsel found the file, the grounds urged in paragraph 3 of the C.M.Application cannot be taken on his face value.

For condonation of delay, two questions are required to be seen (i) whether there is sufficient cause and it depends from case to case whether in given circumstances, sufficient cause has been established or not? (ii) Whether the law of limitation has to be enforced or the question of limitation should be taken only as a mere formality.

In the present case, it is not the case of the applicant-appellant that after the file was misplace any effort was made by the learned counsel or his clerk to trace the file. Even the applicant-appellant (client) did not bother to enquire about his case from his counsel. This is a case of total callousness and negligence on the part of the applicant/appellant. Even affidavit accompanying the application contains no cogent details about the delay. I am not inclined to accept the explanation particularly when the applicant-appellant has misrepresented in paragraph 2 of the application that case was lastly refilled on 21.09.2004 whereas the file was returned to him on 21.09.2004 with some objections and the same was refilled lastly on 04.07.2006.

It is settled law that rigour of limitation must apply where the statute so provides. Limitation cannot be condoned on the ground of compassion or equitable considerations or where the party seeking condonation appears to be callous or negligent. My view is fortified with the following judgments of the Hon'ble Apex Court:-

In the case of ***P.K.RAMACHANDRAN Vs. STATE OF KERALA AND ANOTHER (1997) 7, Supreme Court Cases, 556****, wherein it has been held as under:-*

> *"The law of limitation may harshly affect a party 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. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order*

> *condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by time."*

In the case of ***Municipal Corporation of Delhi and others Vs. International Security and Intelligence Agency Ltd. (2004) 3 Supreme Court Cases, 250*** *the Hon'ble Supreme Court has held as follows:-*

> *"21………… It has to be remembered that law of limitation operates with all its rigour and equitable considerations are out of place in applying the law of limitation. The cross-objector ought to have filed appeal within the prescribed period of limitation calculated from the date of the order if he wished to do so. Having allowed that opportunity to lapse he gets another extended period of limitation commencing from the date of service of the notice of the appeal enabling him putting in issue for consideration of the appellate court the same grounds which he could have otherwise done by way of filing an appeal. This extended period of limitation commences from the date of service of the notice of appeal and such notice ought to be in a valid or competent appeal."*

In similar circumstances, in the case of ***Bhagwna Vs. Tara Chand and others (CM No.11634 –C of 2007 in RSA No.4122 of 2007)*** *decided on 18.01.2008, condonation of delay in refilling the appeal has been dismissed."*

The Hon'ble Supreme Court of India in the case of **G Ramegowda, Major vs Special Land Acquisition 1988 AIR 897, 1988 SCR (3) 198** has held that there is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fides on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. In another authority of Hon'ble Orissa High Court styled as **Mohan Prasad Singh Deo vs Ganesh Prasad Bhagat And Ors AIR 1952 Ori 168**, His Lordship Narasimham J; has observed as under

". It is well known that on many difficult questions of law there is a conflict of decisions and it is difficult for any Counsel to anticipate what view a Judge would take. No amount of care or diligence on his part would therefore suffice and in such circumstances there may be a good case for condoning the delay. Similarly mistake of fact if it is committed while acting in good faith may be a sufficient cause. But a mistake of fact arising out of negligence cannot be said to be committed in good faith.

20. In 'AMBIKA RANJAN v. MANIKGANJ LOAN OFFICE', 55 Cal 798 and 'SURENDRAMO-HAN v. MAHENDRANATH', 59 Cal 781 *the question as to how far a party would suffer for the negligence of his legal adviser was considered and reliance was placed on the following observations of* ***Brett M. R. in 'HIGHTON v. TREHERNE', (1879) 48 L J Ex 167.***

"In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal adviser he has his remedy against that legal adviser, and meantime the suitor must suffer. But where there has been a bona fide mistake, not through misconduct nor through negligence nor through want of reasonable skill but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited." In the present case I cannot hold that the legal adviser of the petitioner was not guilty of negligence bearing in mind the definition of 'good faith' given in the Limitation Act."

12. So in view of the law laid down by the Higher Courts, there is no merit in the case of the assessee for condonation of delay. It is a case of gross negligence, inaction and laches not only on the part of the appellant but also on the part of his representative. Neither the appellant nor his representative have acted with reasonable diligence in prosecuting the appeal before the CIT(A) and as observed above, even they remained reluctant to attend or answer the reasonable queries in the assessment proceedings before the AO. The appellant has to suffer for not filing appeal within the period of limitation when he was not prevented from any sufficient cause as the courts of law cannot be taken for granted. In our view, the learned CIT(A) has rightly dismissed the application for condonation of delay and thereby appeal of the assessee

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being barred by limitation. The finding of the learned CIT(A) in respect of the matter is hereby upheld.

Since we have upheld the order of the CIT(A) on limitation point, it is not necessary to adjudicate on other issues on merit as the same are rendered academic.

13. In the result, the appeal of the assessee is hereby dismissed.

Order pronounced in the open court on this 19th day of April 2013.

Sd/- **Sd/-**

(Sanjay Arora) (Sanjay Garg)
ACCOUNTANT MEMBER JUDICIAL MEMBER

MUMBAI, Dt : 19th April, 2013
SA

Copy forwarded to :

1. The Appellant
2. The Respondent
3. The C.I.T. concerned Mumbai
4. CIT (A) concerned Mumbai
5. The DR, " A " - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

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