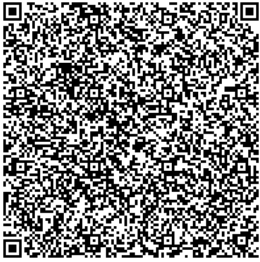


2025:BHC-GOA:1086-DB



Suzana

IN THE HIGH COURT OF BOMBAY AT GOA**MISCELLANEOUS CIVIL APPLICATION NO.491 AND 492
OF 2024**
-----**MISCELLANEOUS CIVIL APPLICATION NO.491 OF 2024
IN
TAX APPEAL NO.2756 OF 2024(FILING)**

Mrs. Neelam Ajit Phatarpekar, an
Individual, aged 62 years, residing
At 601-602, 6th Floor, Gera Emporium,
Patto, Panaji, Goa-403001
PAN AFJPP5785R

... Applicant*Versus*

The Assistant Commissioner of Income
Tax, Circle 2(1), Panaji, Aayakar bhavan,
Plots No.-5, EDC Complex, Patto Plaza,
Panaji-403001

... Respondent**AND
MISCELLANEOUS CIVIL APPLICATION NO.492 OF 2024
IN
TAX APPEAL NO.2754 OF 2024(FILING)**

Ajit Phatarpekar
(Since deceased thr. his
Legal heirs, Mrs. Neelam Phatarpekar
& Anr.

... Applicant*Versus*

The Assistant Commissioner of Income
Tax, Circle 2(1), Panaji.

... Respondent

Mr Dharan Gandhi, Advocate with Mr Gaurang Panandiker, Advocate for the Applicant.

Ms Susan Linhares, Senior Standing Counsel with Ms Swati Wagh Kamat, Standing Counsel for the Respondent.

**CORAM : BHARATI DANGRE &
NIVEDITA P. MEHTA, JJ.**

DATED : 23rd JUNE, 2025.

ORAL JUDGMENT: (Per Bharati Dangre, J.)

1. The two Miscellaneous Civil Applications filed in the Income Tax Appeals seek condonation of delay in its institution, on the ground that the delay is bonafide and since the certified copy of the order of the Tribunal, against which the appeals are filed were received on 17.05.2024, and there is a delay of 40 days in filing the Appeals.

Amongst the two applications, Miscellaneous Civil Application No.491 of 2024 is filed by Neelam Ajit Phatarpekar, an assessee, one of the respondents in the proceedings instituted by the Revenue, being aggrieved by the order of the Commissioner of Income Tax, whereas Miscellaneous Civil Application No.492 of 2024 is filed by her

as legal heir of late Ajit Phatarpekar, assessed to tax under Income Tax Act, 1961 along with her son, Aniket Ajit Phatarpekar.

2. The Applicant along with her husband, were assessed to tax for the Assessment Year 2009-2010 and they having filed the Appeals No. 88 and 89 before the Commissioner of Income Tax (Appeals), their appeals came to be allowed. This gave a cause for the Revenue to approach the Appellate Tribunal, Panaji Bench, by filing Income Tax Appeal No.169 and 170/PAN/2016.

The Income Tax Appellate Tribunal heard the Appeals of the Revenue, where the Assesseees were represented by Shri Sandeep Bhandare, a Chartered Accountant, and the departmental representative represented the Revenue.

It is pertinent to note that Shri Ajit Phatarpekar passed away on 02.04.2016, which is during the pendency of the Appeals and when the decision was pronounced by the Appellate Tribunal on 14.09.2016, in fact it was only the assessee no.2, Neelam Phatarpekar against whom the order was passed and the Appeals filed by the Revenue were allowed, with the finding being recorded that the Tribunal which has held that the Appeal is not maintainable against the order

passed by the Assessing Officer giving effect to the order passed under Section 263 by the Commissioner of Income Tax, cannot be sustained in the wake of the decision of the Coordinate Bench of the Tribunal in the case of ***Smt. Sunita Ajit Patil*** in ***ITA No.190/PAN/2015 dated 28/06/2016***.

As a result, the order passed by the Income Tax (Appeals) was set aside and the order of the Assessing Officer was restored.

3. It is against this decision of the Appellate Tribunal, two distinct appeals are preferred: Tax Appeal No.2754 of 2024 (Filing) in the name of Ajit Phatarpekar through his legal heirs and Tax Appeal No.2756 of 2024 (Filing) filed by Neelam Ajit Phatarpekar.

Since the Appeals of the year 2024 are filed being aggrieved by the decision of the Tribunal dated 14.09.2016, it is supported by an application for condonation of delay.

4. Mr Gandhi, learned Counsel appearing for the Applicants has urged before us that as per Section 260(A) of the Income Tax Act, an appeal to the High Court shall lie from the order passed in appeal by the Appellate Tribunal on a substantial question of law and such appeal shall be filed within 120 days

from the date on which the order appealed against is received by the assessee from the Principal Chief Commissioner or the Chief Commissioner.

Sub-section (2A) permit the Appeal to be admitted after expiry of period of 120 days if the High Court is satisfied that there is sufficient cause for not filing it within the said period.

According to Mr. Gandhi, the impugned order was passed on 14.09.2016 but the Applicant was not aware of the said order until April 2024 when she was served with a recovery notice for the Assessment Year 2009-2010 and thereafter she applied for certified copy of the order, which was received by her on 17.04.2024 and therefore the delay of 40 days has occasioned in filing the appeal, if counted from the date of receipt of the certified copy of the order.

He would further submit that the Appellate Tribunal has passed a common order for the Appellant as well as her late husband, who was looking after the tax matter, who demised on 02.04.2016 before the Appeals could be disposed of and it is in these circumstances she was unaware of the order being passed by the Tribunal until she was served with a recovery notice.

From the date of receipt of the order dated 14.09.2016, Mr Gandhi would submit that the Appeal is filed after 40 days' delay and the cause being bonafide, it deserve to be condoned.

5. Ms Susan Linhares, the learned Counsel appearing for the Revenue, has, however, vehemently opposed the application by submitting that it is incorrect to say that there is delay of 40 days in filing the application as according to the Revenue, the Appeal has been filed after a delay of 2961 days (8 years and 41 days).

The application is opposed by filing an affidavit, which assert that the applicant was very much aware of the order dated 14.09.2016 as she, along with her husband, were represented before the Tribunal by Shri Sandeep Bhandare, their authorised representative and who appeared and advanced submissions on their behalf. It is stated that, since the Tribunal by common order dated 14.09.2016 disposed of the application filed by the Revenue, she cannot claim ignorance of the order that was passed and it was her duty to collect the copy of the order from the Tribunal and therefore the delay in filing the appeal is not of 40 days but is of 2961 days, which cannot be condoned without sufficient justification.

6. During the course of the hearing of the application, Ms Linhares has placed before us a copy of the order passed by the ITAT on 14.09.2016 which reflect that upon the order being passed, the copy has been marked as below:

“1. The Assessee.

a) Shri Ajit R. Phatarpekar, 601-602, 6th Floor, Gera Emporium, Panaji-Goa.

b) Smt. Neelam A. Phatarpekar, 601-602, 6th Floor, Gera Emporium, Panaji-Goa.

2. The Revenue.

ACIT, Circle-2(1), Panaji-Goa.

3. The CIT, Panaji.

4. The CIT(A), Panaji-1, Goa.

5. The D.R.

6. Guard file.”

Down below, is the endorsement by S. P. Bhandare who has acknowledged receipt of two copies of the Tribunal's Order and has affixed the date as 20.09.2016.

7. Relying upon the above endorsement, Ms Linhares would urge that the authorised representative of the applicant, Shri Sandeep P. Bhandare, Chartered Accountant has received the copy of the order on 20.09.2016 and therefore the Applicants cannot claim that they were unaware of the order passed.

This assertion on behalf of the Revenue has received a response, from the Applicant who has affirmed an affidavit on 17.06.2025, which is accompanied by a communication of the

same date addressed to her by S.P. Bhandare, Proprietor of S.P. Bhandare & Associates, Chartered Accountants.

In the said communication, the Chartered Accountant has accepted the acknowledgement of two copies of the order dated 14.09.2016 on 20.09.2016 but he categorically state as below:

'In connection to the above I would like to state that this incident has occurred almost 10 years back and I am not able to specifically recollect whether I have personally collected the orders. Further when the said incident occurred in 2016, Mrs. Neelam Phatarpekar was grieving due to the death of her late husband. As such I am not able to collect if the copies of the impugned order, if collected by me, were given to Mrs. Neelam Phatarpekar or the legal heirs or the then staff of Late Mr. Ajit Phatarpekar in 2016.'

The affidavit tendered by the Applicant is taken on record.

8. In the wake of the aforesaid factual background, the question that arises before us for consideration is whether the copy of the order passed by the Tribunal when served upon the Chartered Accountant is sufficient service and whether it can be construed as 'copy received by the assessee/applicant'.

Ms Linhares, in support of her submissions would place reliance upon the decision of Allahabad High Court in the case of ***Sultanpur Kshetriya Gramin Bank v/s. Joint***

***Commissioner Of Income Tax in Income Tax Appeal
Defective No.221 of 2005 dated 29.01.2010.***

On the other hand, Mr Gandhi would place reliance upon the decision of the High Court of Orissa in the case of ***Nandram Hunatram v/s. Commissioner of Income-tax¹*** and also the decision in the case of ***Director of Income-tax (international Taxation) v. Hyundai Heavy Industries Co. Ltd²***.

9. Arguments of the respective Counsel will have to be appreciated in the background of the precedence cited before us, with reference to the statutory scheme involved.

Section 260(A) is a provision for appeal to the High Court and it contemplate the appeal to be filed within a period of 120 days from the date on which the order appealed against is “received by the assessee.....”.

It is also relevant to take note of Section 254 as regards the orders to be passed by the Appellate Tribunal and Sub-section (3) of the Section read thus:

“(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Principal Commissioner or Commissioner.”

¹ [1959] 37 ITR 500

² [2018] 407 ITR 129

Section 255 carve out the procedure to be followed by the Appellate Tribunal.

10. The next relevant provision is Section 288 of the Income Tax Act, 1961 captioned as “**Appearance by authorised representative**” and read thus:

“Any assessee who is entitled or required to attend before any income-tax authority or the Appellate Tribunal in connection with any proceedings under this Act otherwise than when he is required to attend personally for examination on oath or affirmation as per Section 131, may attend by an authorised representative.”

Sub-section (2) of Section 288 set out as to who would be covered within the term “authorised representative”.

The authorised representative for the purposes of the Act of 1961 means a person authorised by the assessee in writing to appear on his behalf, being—

“ ...
(iv) *an accountant*; ”

The explanation appended to the Section further clarify that “accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered

Accountants Act, 1949 who hold a valid certificate of practice under sub-section (1) of section 6 of that Act.

There can be no doubt in our mind that the assessee can be represented by a Chartered Accountant, and he may act as his authorised representative.

One more provision which is relevant for our purpose is Rule 35 of the Income-tax (Appellate Tribunal) Rules, 1963, which read thus:

“35. The Tribunal shall, after the order is signed, cause it to be communicated to the assessee and to the Commissioner.”

11. In light of the aforesaid scheme of the statute, it is evidently clear that upon the order being passed under Section 254 by the Appellate Tribunal, it shall send a copy of the order to the assessee and even the Rules make it imperative for the Tribunal, after the order is signed to cause it to be communicated to the assessee and to the Commissioner.

The term “cause it to be” means to make something happen or to bring something about.

A conjoint reading of the provision of the Act along with Rule 35 clearly provide that after the order is passed, the Tribunal shall communicate the order to the assessee and there is not escape from this provision.

12. It is the stand adopted by the Revenue that communication of the order passed by ITAT, Panaji, to the Chartered Accountant who was representing the assessee in the proceedings before the Tribunal is akin to the communication to the assessee, i.e. the Applicant. We, however, disagree with the said proposition, for the reason which we would reveal in the paragraph to follow.

13. The assessee is permitted to be represented in any proceedings before any Income Tax Authorities or the Appellate Tribunal by an authorised representative, which would include Chartered Accountant or a legal practitioner who is entitled to practice in any civil Courts in India or even by a person related to the assessee in any manner. However, from the specific provision in form of Section 254, intention of the Legislature can be clearly discerned that the decision of the Appellate Tribunal shall be communicated to the assessee and to the Principal Commissioner/Revenue.

Sub-section (3) of Section 354 has permitted a copy of the order to be served upon the authorised representative of the assessee but has specifically stipulated that the copy of the order shall be sent to the “assessee”, who is permitted to file an appeal being aggrieved by the order passed by the Appellate Tribunal to the High Court.

Even Rule 35 cast a mandate on the Tribunal, to communicate the order, after it is signed, to the assessee and to the Commissioner and by use of the word “cause it to be” which clearly imply that the Tribunal shall ensure the communication of the order to the assessee by any mode of communication, the legislative intent is evidently clear. Thus, the statutory scheme cast a burden upon the Tribunal to ensure that the assessee is made aware of the order so that within 120 days as prescribed, he can file an appeal before the High Court.

14. In ***Sultanpur Kshetriya Gramin Bank v/s. Joint Commissioner Of Income Tax*** (supra), the Allahabad High Court was dealing with a case where while dealing with the application for condonation of delay filed under Section 260(A) of the Income Tax Act, when an objection was raised about the appeal being time barred, the stand adopted was

the assessee was represented before the Tribunal by the Advocates and on passing of the order by the Tribunal on 25.11.2004, a copy thereof was served on 10.12.2004 on the Counsel of the assessee. However, the certified copy of the order dated 25.11.2004 was not served on the assessee by the office of the Tribunal in accordance with Rule 35 of the Appellate Tribunal Rules, 1963 and, therefore, the knowledge was gained by the Appellant about the order received from the Advocate, on 24.05.2005.

The Advocate himself filed an affidavit stating that he had received the copy of the order by post but forgot to communicate it to the Appellant and thereafter the copy was misplaced and it was only on 24.05.2005 it was supplied to the General Manager of the Appellant Bank, the Applicant.

Opposing the said application, the Revenue adopted a stand that when the copy of the order was served upon the Advocate who was duly authorised “to receive all documents” on behalf of the Appellant Bank, which was apparent from the Vakalatnama executed in favour of Shri S.P. Agrawal, the arguments that the copy of the order was not validly served upon the assessee is not available.

15. Dealing with the rival contention, the Allahabad High Court invoked Section 282 of the Income Tax Act, relating to service of notice generally and inferred that the said provision would show that there are two modes of service that are possible; by post or as if it were summon issued by Court under Code of Civil Procedure, 1908.

While deciding the issue whether copy of the order was validly served or it is deemed to have been served upon the Appellant, as it was received by his Counsel and was collected by the assessee as per his convenience, the High Court invoked Order 5 Rule 12 of CPC and expressed that since a Vakalatnama filed by the Counsel authorised him to receive all documents on behalf of the assessee/appellant and therefore since the Counsel was authorised representative of the assessee, in terms of Order 5 Rule 12, the service effected upon him amounted to a service upon the assessee himself.

The following conclusion was recorded by the High Court:

“The submission of the learned counsel for the appellant that in view of the plain language of Section 260 A of the Act, service should be affected on the assessee is without any substance. Its Sub-section (2) (a) provides that an appeal can be filed within 120 days from the date on which order appealed against is received by the assessee or the

Chief Commissioner or the Commissioner. The phrase “received by the assessee” means received by the assessee either himself or through his authorized agent which in the present case, would be the advocate duly appointed by him to conduct the case. A legal practitioner is an agent of the client whose brief he holds.”

16. We are unable to subscribe to the view expressed above.

Firstly, for the reason that Vakalatnama in favour of a Counsel would authorise him to receive all documents on behalf of the Appellant but in case of a Chartered Accountant he only acts as an authorised representative. Secondly, the invocation of Order 5 Rule 12 of CPC is completely misplaced in the present scenario as the provision invoked refer to the service on defendant in person or on his agent and as Order 5 Rule 12 provide that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept the service, in which case service on said agent shall be sufficient. From reading of the aforesaid provision, it is evidently clear that unless and until an agent is empowered by the defendant to accept service, the service will have to be effected on the defendant himself.

Under the scheme of the Income Tax Act, 1961, Section 282 clearly provide that service of

notice/summons/requisition or order shall be made by delivering or transmitting a copy thereof to the person by post or by courier service as may be approved by the Board or in such manner as provided by the Code of Civil Procedure, 1908 for the service of summons or in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 or by any other means of transmission of documents.

The parlance of Order 5 Rule 12 cannot be made applicable in the present case as Rule 12 contemplate an agent empowered to accept service and a Chartered Accountant definitely do not act as an agent of the assessee but he represent the assessee in the proceedings before the Income Tax Officer/Appellate Authority and there is no specific authorisation to a Chartered Accountant as it may be in case of a lawyer, who, by taking Vakalatnama, has agreed to accept documents on behalf of his client.

Such not being the scenario here, the decision of the Allahabad High Court, in our view, is not applicable to the present case where it is the case of the Revenue that the Chartered Accountant had accepted the order of the ITAT.

17. At this stage, we must also take note of Order 3 of the Code of Civil Procedure which deals with recognized agents and pleaders, and the recognised agents as per Rule 2 include (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of a party; (b) persons carrying on trade or business for and in the name of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance. Rule 3 clearly specify that processes served on the recognised agent of a party shall be effected as if the same has been served on the party in person, unless the Court otherwise directs.

The Chartered Accountant since is not also authorised specifically to accept copy of the order, cannot be said to be a recognised agent of the Assessee.

18. The Orissa High Court while dealing with a similar issue where the assessee engaged a lawyer at the time of submitting memorandum of appeal to the Tribunal but had stated his own address in the form to which all communication should be sent and when the lawyer argued the appeal but the order was not pronounced on the very same day and a copy was handed over to him at a subsequent

point of time which was received by the assessee at a belated stage, when the benefit of limitation was sought to be taken by the assessee, held that since there was no express authorisation to the lawyer to receive the order, the date of receipt of order by the lawyer could not be taken as starting point for limitation.

The Orissa High Court clearly expressed its view in the following words:

“In my opinion, this case does not apply as in the case of the assessee before us the order of the Tribunal was not announced in court in the presence of the assessee or his representative, the order having been served some days after the hearing on Mr. B.N. Mohanty. For purpose of an application under section 66(1) it is absolutely necessary to have the order so that the assessee may state the points to be referred to the High Court. Rule 34 of the Appellate Tribunal Rules clearly requires that the copy of the order shall be communicated after it is signed to the assessee and to the Commissioner.

The rule is very definite. The communication of the order must be to the assessee. Though the assessee engaged a lawyer at the time of submitting the memorandum of appeal to the Tribunal yet in the form he definitely stated the address to which all communications should be sent and that address was not the address of the lawyer. The lawyer was engaged to argue the appeal. He argued the appeal. The order was not pronounced after close of the arguments on that date. The order was handed over to the lawyer on some other day during the continuance of the circuit of the Tribunal at Puri simply because Mr. B.N. Mohanty happened to be there in connection perhaps with some other case. Such a handing

over of the order cannot be deemed to be a strict compliance with the mandatory Rule 34 of the Appellate Tribunal Rules.”

In absence of express authorisation to the lawyer to receive the order, it was held that it cannot be taken as starting point for limitation.

19. In the wake of the aforesaid, since the facts involved clearly reveal that the copy of the order against which the appeal is preferred, is received by the Chartered Accountant, who has filed his affidavit categorically stating that he is unable to recollect if the copies were given by him to Mrs Neelam Phatarpekar or the legal heirs of Mr Ajit Phatarpekar in the year 2016 and since we are of the view that service upon the Chartered Accountant do not absolve the Tribunal of serving the copies of the order upon the assessee, who has adopted a specific stand before us that it is only upon receipt of the recovery notice the applicant gained knowledge about the impugned order and thereafter preferred an application for certified copy of the order which was received on 17.05.2024 and the appeal was preferred with a delay of 40 days.

We are convinced with the justification of the Applicant that she was unaware of the impugned order being

passed on 14.09.2016 until April 2024 when she was served with the recovery notice for the Assessment Year 2009-2010, thereafter steps were taken by her so as to institute the appeals against the said order which is filed beyond the period of limitation prescribed under Section 260(A). As the Applicant had no knowledge of passing of the impugned order, only on receipt of the certified copy of the same, she has preferred the Appeals.

We are of the view that the Appeals deserve to be decided on merits by condoning the delay that has occurred in instituting the Appeals.

20. The applications are, therefore, made absolute in terms of the prayer clauses by condoning the delay of 40 days from the date of receipt of the impugned order.

21. The Tax Appeal No. 2754 of 2024 (Filing) and Tax Appeal No.2756 of 2024 (Filing) are directed to be listed for hearing.

NIVEDITA P. MEHTA, J.

BHARATI DANGRE, J.