

IN THE INCOME-TAX APPELLATE TRIBUNAL “G” BENCH MUMBAI

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA No. 674/Mum/2018 (Assessment Year 2012-13)

ITA No. 675/Mum/2018 (Assessment Year 2012-13)

M/s Shree Vijaylaxmi Trading Corporation, C/o. Mr. Shishir Kobra, 305, Sangam Arcade, Station Road, Vile Parle (W), Mumbai-400056. PAN: AASFS5205R	Vs.	ITO Ward-17(3)(3) Room No. 123/111A, Aayakar Bhavan, M.K. Road, Mumbai-400020.
--	-----	---

Appellant

Respondent

Appellant by : Shri Piyush Chhajed (AR)
Respondent by : Shri Satish Chandra Rajore (Sr- DR)
Date of Hearing : 11.03.2019
Date of Pronouncement : 11.03.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeal by assessee are directed against the separate order of Id. Commissioner of Income-tax (Appeals)-28, hereinafter referred as Id CIT(A), Mumbai dated 13.10.2017 for Assessment Year 2012-13. In ITA No. 675/Mum/2018, the assessee has challenged the additions in the quantum assessment and in ITA No. 674/Mum/2018, the assessee has challenged the confirmation of penalty under section 271(1)(c) of the Act. In both the appeals, the Id. CIT(A) dismissed the appeals of the assessee under sub-section (3) of section 249 by not condoning the delay in filing appeal, resultantly the appeals were not admitted for hearing on

merit. The appeal in quantum assessment was filed after 247 days of prescribed period of limitation and similarly the appeal on penalty levied under section 271(1)(c) was filed after 65 days of period of limitation. The Id. CIT(A) decided both the appeal by common order.

2. Brief facts of the case are that the assessee is a partnership firm engaged in the business of import and export of food grains, pulses and commodities. The assessee filed its return of income for Assessment Year 2012-13 on 30.09.2012 declaring income of Rs. 12,56,000/-. The assessment was completed under section 144 on 29.03.2015. The Assessing Officer while passing the assessment order made addition under section 68 of Rs. 1.25 Crore (approx), disallowance under section 40(a)(ia) of Rs. 40 Lakhs and further disallowed sundry creditors on adhoc basis @10% of Rs 4.54 Crore being Rs. 44.45 Lakhs. On appeal before the Id. CIT(A), the appeal of assessee was not admitted being filed after 247 days of prescribed period of limitation. The assessee filed an application for condonation of delay along with affidavit explaining the cause of delay. The application of assessee for condonation of delay was not allowed; thereby appeal of the assessee was dismissed *in limine* being not admitted. Similarly appeal against the penalty order levied under section 271(1)(c) was also filed after 65 days of prescribed period of limitation. The assessee raised identical grounds for condoning the delay as made in appeal for quantum assessment. The Id. CIT(A) not

accepted the contention of assessee in condoning the delay, thereby the second appeal was not admitted and dismissed *in limine*. Thus, with these backgrounds, the assessee has filed both the appeals before this Tribunal.

3. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that the assessee filed detailed affidavit of partner of the assessee-firm. Copy of which is filed vide page no. 1 & 2 of Paper Book. The Id. AR of the assessee further submits that the submission filed before the Id. CIT(A) in support of condonation of delay is also filed vide page no. 3 to 5 of Paper Book. The Id. AR of the assessee further submits that assessment order passed under section 144 dated 29.03.2015 was received by assessee along with demand notice under section 156 on 09.04.2015. The Administrative Office of the Firm was situated at 101, Arihant Building CHS Ltd., 103 Bajaj Road, Vile Parle (W), Mumbai. All records related that the business including vouchers, invoices received, statements were kept in the Administrative Office. During the relevant Financial Year under consideration i.e. 2012-13, the assessee suffered huge business losses and assessee committed in business commitment. The bankers of assessee declared the assessee-firm and its partner as defaulter and the loan of assessee was declared as Non-

Performing Asset (NPA). On the application of bankers of assessee i.e. Allahabad bank and Oriental Bank of Commerce, the Administrative Office/business premises of the assessee was sealed in pursuance of order dated 24.12.2014 passed by Chief Metropolitan Magistrate (CMM), Esplanade, Mumbai in proceeding initiated under SARFAESI Act. The Id. AR of the assessee further submits that 28 cases were lodged against the assessee-firm and the companies wherein the partners were Directors. The Firm and its Directors were facing very tough time and facing significant stress and depreciation due to financial losses and prolonged legal proceedings. As a result, the Firm and its partner could not take appropriate step for filing appeal before the First Appellate Authority. The Id. AR of the assessee submits that in the affidavit filed before the Id. CIT(A), the assessee explained all the facts as narrated above. The Id. AR of the assessee submits that there was sufficient cause for condoning the delay in filing appeal before the Id. CIT(A). In support of his submission the Id AR for the assessee relied upon the following decisions:

1. Collector, Land Acquisition vs. Mst. Katji & Ors [1987] 167 ITR 0471 (SC).
2. S.Duraipandi, [2014] 52 taxmann.com 90, Madras HC).
3. Prime Paper & Engineering (P.) Ltd. [2014] 41 taxmann.com 240 (Bom HC).
4. Alacrity housing Ltd. [2010] 327 ITR 139 (Madras HC).

5. Kaikara Construction Co. [2013] 33 taxmann.com 327 (Cochin Trib.).
 6. Jay Dee Securities & Finance Ltd. [2017] 88 taxmann.com 626 (Del. Trib.).
 7. Elnet Technologies Ltd. [2018] 99 taxmann.com 219 (Madras HC).
 8. Vedabai Aoiyas Vaijyanatabai Baburao Patil vs. Shantaram Baburao Patil. [2002] 122 Taxman 114 (SC).
 9. Progressive Education Society [2019] 102 taxmann.com 402 (SC).
4. The Id. AR of the assessee further submits that assessee has very good case on merit and is likely to succeed in case the assessee is given opportunity to contest the appeal on merit.
5. On the other hand, the Id. Departmental Representative (DR) for the revenue supported the order of Id. CIT(A). The Id. DR for the revenue further submits that the assessee has not shown the financial difficulties or other litigation as disclosed by Id. AR of the assessee, before the Id. CIT(A). The Id. CIT(A) passed the very detailed and reasoned order while dismissing the appeal *in limine* by not condoning the delay in filing the appeal. The assessee failed to explain the delay before the Id. CIT(A), thereby the delay was not condoned in filing appeal and resultantly the appeals were no admitted.
6. In the rejoinder submission, the Id. AR of the assessee submits that the copy of affidavit filed before the Tribunal, original of which was furnished to the Id. CIT(A) and that all facts are categorically explained in the affidavit.

7. We have considered the rival submission of the parties and have gone through the order of Id. CIT(A). The Assessing Officer passed the assessment order on 29.03.2014 under section 144 of the Act making various additions as we have referred above. The assessment order along with the demand notice under section 156 was served upon the assessee on 09.04.2015. The assessee filed appeal before the Id. CIT(A) on 11.01.2016. The assessee also filed application supported the affidavit for condoning the delay of 247 days in filing appeal. The Id. CIT(A) dismissed the appeal of assessee by not condoning the delay, resultantly the appeal was dismissed being not admitted.
8. The Hon'ble Apex Court in Collector, Land Acquisition vs. Mst. Katji & Ors (supra) held that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred the other side cannot claim to have vested right in injustice being done because non-deliberate delay. There is no presumption that delay is occasioned deliberately or on account of culpable negligence or on a malafide. The litigation does not stand to benefit by resorting to delay, in fact he is on serious risk.
9. Hon'ble Madras High Court in S. Duraipandi (supra) held that where assessee faced the financial hardship to pay tax due to relevant time and after making sufficient arrangement of funds can pay taxes, due to delay was to be condoned.

10. The Co-ordinate Bench of Cochin Tribunal in Kaikara Construction Co. (supra) also held that facing acute financial crisis and multiple legal proceeding can be treated as a reasonable ground for delay in filing appeal before the Id. CIT(A). Similarly, the Co-ordinate Bench of Delhi Tribunal in ACIT vs. Jay Dee Securities & Finance Ltd. (supra) held that where there was no gross negligence or laches on the part of assessee, the delay should be condoned and appeal of the assessee should be heard on merit.
11. The Hon'ble Supreme Court in Vedabai Aoiias Vaijayanatabai Baburao Patil vs. Shantaram Baburao Patil (supra) held that the Court should adopt pragmatic approach. The distinction must be made between a case where there is inordinate and a case where the delay is of a few days. In the former case, the consideration of prejudice to the other party will be a relevant factor so the case call for more cautious approach but in the later case no such consideration may arise and such a case deserves a liberal approach, no hard and fast rule can be laid down in this regard. The court has to exercise the discretion of the facts of each keeping in mind that in construing the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance.
12. The Hon'ble Supreme Court in B. Madhuri Goud v. B. Damodar Reddy (2012) 12 SCC 693, by referring various to earlier decisions

of Superior Courts and held the following principal must be kept in mind while considering the application for condonation of delay;

- (i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
- (ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
- (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
- (iv) No presumption can be attached to deliberate cause of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
- (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
- (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
- (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.
- (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.
- (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
- x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.
- (xi) It is to be borne in mind that no one gets away with fraud, is representation or interpolation by taking recourse to the technicalities of law of limitation.
- (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.
- (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

13. Now coming to the facts for condoning the delay placed before the Id.

CIT(A), the assessee in its affidavit has clearly stated that in the

Financial Year 2012-13, the assessee-firm suffered huge losses. The assessee-firm defaulted in financial discipline and to honor its business commitment. The loan/credit facilities against the mortgage/hypothecation charges and other sector were declared as NPA by its banker. The assessee also brought on record that a proceeding initiated under SARFAESI Act against the assessee. The Chief Metropolitan Magistrate, Mumbai issued auction notice under SARFAESI Act in August 2015. Before that the Administrative Office of assessee was sealed by the order of Chief Metropolitan Magistrate, Mumbai vide order dated 16.12.2014. The assessee also contended before the Id. CIT(A) that as a result of multifarious litigation due to financial crunch and court proceeding, the partners of the firm not only suffered stress and depreciation but also facing huge financial crisis. The partner of the assessee firm could not concentrate on other business activities burdened by prevailing circumstances, thereby missed the deadline for filing appeal before the Id. CIT(A). All these facts are not controverted by Id DR for the revenue.

14. We have further noted in the mean time the penalty under section 271(1)(c) was also levied by Assessing Officer vide order dated 28.09.2015. Perusal of penalty order reveals that the order was passed by Assessing Officer as ex-parte. Considering the legal positions as discussed above and the facts of the present case as narrated above, we

are of the view that the assessee has shown sufficient cause for condone the of delay in both the appeal before the ld. CIT(A). In our view, the order of ld. CIT(A) in dismissing the appeal by not condoning the delay is not sustainable in the eyes of law, which we set-aside in both the appeals and restored back both the appeals to the file of ld. CIT(A) to decide the appeals afresh. Needless to say that before deciding the appeal on merit, the ld. CIT(A) shall grant sufficient and adequate opportunity of hearing to the assessee. The assessee is also directed to fully co-operate and provide all necessary documentary evidences and information to the ld. CIT(A).

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 11/03/2019.

Sd/-
N.K. PRADHAN,
ACCOUNTANT MEMBER

Mumbai, Date: 11.03 2019
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai