

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' C '**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

I.T. A. No.1035/Bang/2017
(Assessment Year : 2012-13)

Shri Abdul Khayum,
No.35, Langford Road,
Below Madhu Gas Agency,
Bangalore-560 025.

.... Appellant.

Vs.

Income Tax Officer,
Ward 7(2)(2), Bangalore.

..... Respondent.

Appellant By : Shri V.Srinivasan, Advocate.
Respondent By : Shri M.K. Biju, JCIT (D.R)

Date of Hearing : 12.09.2017.

Date of Pronouncement : 23.10.2017.

ORDER

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.21.07.2016 of Commissioner of Income Tax (Appeals)-7, Bangalore for the Assessment Year 2012-13.

2. The assessee has raised the following grounds :

1. The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
2. The learned CIT[A] is not justified in refusing to condone the delay in filing the appeal on the ground that the appellant has failed to give the sufficient reason for the delay in filing the appeal under the facts and in the circumstances of the appellant's case.
3. The learned A.O. is not justified in completing the assessment u/s. 144 of the Act without serving any of the notices on the appellant under the facts and in the circumstances of the appellant's case.
4. The learned CIT[A] is not justified in not disposing off the ground raised by the appellant with regard to the assessing a sum of Rs. 1,30,37,500/- as Long term Capital Gains for the year under appeal under the facts and in the circumstances of the appellant's case.
5. Without prejudice to the above, the learned CIT[A] is not justified in not disposing off the ground raised by the appellant with regard to the learned A.O. ought to have granted exemption u/s. 54 of the Act, under the facts and in the circumstances of the appellant's case.
6. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s.234-A and 234-B of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

7. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.
3. The CIT (Appeals) has dismissed the appeal of the assessee in limine being barred by limitation and refused to condone the delay in filing the appeal. The learned Authorised Representative of the assessee has submitted that the CIT (Appeals) has proceeded on the basis of presumption of incorrect fact and thereby dismissed the appeal of the assessee on limitation. He has pointed out that there was a delay of 149 days in filing the appeal before the CIT (Appeals) as it is not in dispute from the fact recorded by the CIT (Appeals) in para 1 of the impugned order however the CIT (Appeals) has presumed wrong facts while considering the condonation of delay in para 4 of the impugned order and stated that the delay in filing the appeal is of 260 days. Further the CIT (Appeals) has stated in the order that no letter of confirmation or Affidavit has been filed and no letter of condonation of delay in filing the appeal was filed by the assessee whereas the assessee duly filed a petition for condonation of delay which is placed at pages 17 & 18 of the appeal set. The learned Authorised Representative has further submitted that an Affidavit of Tax Practitioner/Tax Consultant was also filed by the assessee before the CIT (Appeals) in support of the cause of delay. Thus the learned Authorised Representative has submitted that when the assessee has duly explained the delay in filing the appeal then

delay of 149 days ought to have been condoned by the CIT (Appeals). He has relied upon the decision of Hon'ble Supreme Court in the case of **Collector, Land Acquisition Vs. Mst. Katiji & Others** 167 ITR 471 as well as decision in the case of **Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and Others** 118 ITR 507 and submitted that every delay must be explained does not mean that pedantic approach should be made. The Doctrine must apply in a ratio, commonsense and pragmatic manner as held by the Hon'ble Supreme Court. Further in the substantial justice and technological considerations are treated against each other because of justice deserves to be preferred. The learned Authorised Representative has further submitted that in the case of **Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and Others** (surpa), the Hon'ble Supreme Court has accepted the mistake on the part of counsel as a sufficient ground in filing the appeal. Hence he has pleaded that the delay of 149 days may be condoned and the matter may be remitted to the CIT (Appeals) for adjudication on merits.

4. On the other hand, the learned Departmental Representative has vehemently opposed the condonation of delay and submitted that the conduct of the assessee does not permit a lenient view. The assessment order in this case was passed under Section 144 as the assessee did not appear before the Assessing Officer and therefore when an ex parte assessment was passed the assessee was expected to be more vigilant and disciplined in filing the appeal before the CIT (Appeals). However the assessee failed to explain the delay in filing the appeal before the CIT (Appeals). This conduct of the assessee is nothing but ignorance of law

and negligence. Ignorance of law is no excuse when the assessee has failed to explain the sufficient reason for delay. He has relied upon the Hon'ble jurisdictional High Court in the case of **Spportthi Sadan Convent** 68 Taxman.com 245 as well as the decision of Third Member of Chennai Bench of the Tribunal in the case of **JCIT Vs. Tractors & Farm Equipments Ltd.** 104 ITD 149.

5. Having considered the rival submissions as well as the relevant material on record, we note that the appeal was instituted by the assessee before the CIT (Appeals) on 26.11.2015 against the assessment order dt.10.3.2015 received by the assessee on 31.5.2015. These facts have been recorded by the CIT (Appeals) in the impugned order. the CIT (Appeals) while deciding the condonation of delay has observed in para 4 of the impugned order as under :

4. I have considered the grounds of appeal, statement of facts and submissions made by the AR of the appellant during the appellate proceeding. The Assessment Order of the A.Y. 2012-13 was passed on 10.03.2015 u/s 144 of IT Act as the notices sent by the AO were not complied with and no explanation was offered for claiming exemption u/s 54 of IT Act on the sale of immovable property for the sale consideration of Rs.1,30,37,500/-. Thereafter the return of income filed by the appellant amounting to Rs.2,32,240/- was assessed at Rs.1,32,69,740/- u/s 144 of the Act. The appellant filed the appeal before the undersigned on

26.11.2015. From the perusal of Form No. 35 filed by the appellant it is evident that the order u/s 144 of IT Act dated 10.03.2015 was received by the appellant on 31.05.2015 and even assuming the date of receipt of order as stated by the appellant is correct, the appeal filed is delayed. The Appellant has not filed any letter for condonation of delay in filing of Appeal by 260 days from the date of order against the prescribed period of 30 days. During the appellate proceeding, the same was appraised to the AR Mr. S. Venkatnarasimhan, CA, who submitted that the delay of filing is due to pre-occupation of the tax consultant by the name of Mr. Chandrappa. However, no letter for confirmation or affidavit had been filed neither by the

appellant nor by the said tax consultant. On the next hearing the AR appeared with an affidavit of the said person by the name Mr. Chandrappa in which it was stated that he is a sales tax practitioner and tax consultant and due to his pre-occupation in his profession, the matter of filing the appeal before 30.06.2015 in the case of appellant escaped his attention and he was unable to render the advice to appellant in this matter. In the affidavit he also affirmed that when the department (Income-Tax) sent the recovery notice then the appellant approached to him and then he advised the appellant to approach Mr. S. Venkatesan and Co., CA., which is representing the case of appellant before the undersigned. Mr. Chandrappa was never been the authorised representative of the appellant either at the assessment stage or at the appellate stage. There was no documentary evidence ever filed or brought to the knowledge that Mr. Chandrappa, a sales Tax practitioner was ever been the consultant to the appellant.

It is clear from the fact as stated in para 4 that the CIT (Appeals) took delay in filing the appeal as 260 days whereas the actual delay in filing the appeal before the CIT (Appeals) is 149 days. Further the CIT (Appeals) has proceeded on the premise that the assessee has not filed any objection for condonation of delay as well as Affidavit dt.15.7.2016 of the Tax Practitioner Mr. Chandrappa clearly show that the assessee explained the delay in filing the appeal in the petition for condonation of delay which was not considered by the Tribunal. Without going into the Doctrine and the principles laid down by the Hon'ble Supreme Court, at the outset we note that when the CIT (Appeals) has proceeded on presumption of incorrect facts then the order of rejecting the condonation of delay would not be sustainable. When the delay has been explained by the assessee and also by the tax consultant who has filed an Affidavit and explained the delay as inadvertent mistake of not filing the appeal within a period of limitation. We are satisfied that the assessee has explained the cause of delay of 149 days in filing the appeal

as it was due to a bona fide mistake and inadvertent mistake on the part of the tax consultant who could not take the step within the time. Accordingly, we incline to condone the delay of 149 days in filing the appeal before the Tribunal. Since the CIT (Appeals) has not decided the matter on merits, accordingly, the impugned order of the CIT (Appeals) is set aside and the matter is remitted to the record of the CIT (Appeals) for deciding the same on merits. Needless to say the assessee be given an opportunity of hearing.

6. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on the 23rd day of Oct., 2017.

Sd/-
(JASON P BOAZ)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dt.23.10.2017.

*Reddy gp

Copy to :

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

Senior Private Secretary
Income Tax Appellate Tribunal
Bangalore.