

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI**

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5462/MUM/2017
Assessment Year: 2009-10**

M/s. Hinal Estates Pvt. Ltd., 204, Tirupati Appts., Nehru Road, Vile Parle (E), Mumbai - 400057 PAN: AABCH6287	Vs.	The Pr. Commissioner of Income Tax -12, Room no. 363, Aayakar Bhawan, M.K. Road, Churchgate, Mumbai 400 020.
(Appellant)		(Respondent)

Assessee by : Shri Nilesh Jain (AR)
Revenue by : Shri Manjunathaswamy (DR)

Date of Hearing: 21/11/2017
Date of Pronouncement: 27/11/2017

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against order dated 30.03.2017 passed by the Ld. Principal Commissioner of Income Tax - 12, Mumbai (for short 'Ld. Commissioner') under Section 263 of the Income Tax Act, 1961 (for short 'the Act'), for the assessment year 2009-10, whereby the Commissioner has set-aside the assessment order dated 13.11.2014 passed u/s 143(3) r.w.s. 147 of the Act.

2. The brief facts of the case are that the assessee filed its return of income for the assessment year 2009-10 declaring a total income of Rs.12,49,429/-. The scrutiny assessment u/s 143(3) r.w.s. 147 of the Act was completed accepting the return of income filed by the assessee.

3. Subsequently, on verification of the assessment order, it was observed by the Principal Commissioner of Income Tax that the assessee-company has obtained accommodation entries to the tune of Rs.2,18,00,000/-from Shri Pravin Kumar Jain and its concerns. It was further noticed that this issue was not properly verified by the Assessing Officer during reassessment proceedings under section 147 of the Act. Accordingly, the Ld. Commissioner issued notice u/s 263 of the Act and asked the assessee to explain as to why proceedings u/s 263 of the Act should not be initiated to modify or set-aside the assessment order passed by the Assessing Officer.

4. As per the order of the Ld. Commissioner, the notice issued u/s 263 was duly served upon the assessee and despite the service of notice, the assessee did not appear either in person or through its authorized representative. Accordingly, the Ld. Commissioner passed the impugned order on the basis of material available on record and set-aside the assessment order on the limited issue and directed the Assessing Officer to verify the genuineness of the share capital premium and pass an order afresh after giving the assessee an opportunity of being heard. Against the said order, assessee is in appeal before the Tribunal by raising the following effective Grounds of appeal:-

“1. That the Ld. CIT has erred in law in passing the order u/s 263, grossly in violation of principal of natural justice.

2. That the Ld. CIT erred in law in passing the order u/s 263 and in directing the assessing officer to verify the genuineness of the share capital and share premium of the appellant, without even affording an opportunity of being heard.

3. That the Ld. CIT erred on the facts and circumstances of the case and in law in ignoring the decision of the Jurisdictional High Court in the case of CIT vs M/s Gagandeep Infrastructure Pvt. Ltd [ITA No. 1613 of 2014] wherein it was held that the proviso to section 68 is prospective and that no addition could

be made in the hands of the appellant company on account of share capital and share premium for the assessment year under consideration.”

5. At the outset, the Ld. Counsel for the assessee submitted that there is a delay of 87 days in filing the present appeal and the assessee has filed application for condonation of delay on the ground that the impugned order dated 30th March 2017 was received on 4th. April 2017. Thereafter the assessee filed a writ petition against the said order in the Hon’ble High Court. The said writ was later on withdrawn and due to the said reason the present appeal could not be filed within the prescribed period. The Ld. counsel further submitted that since the assessee has been prevented by sufficient cause from filing the present appeal within the limitation period, delay may be condoned. On the other hand the Ld. departmental representative (DR) opposed the application and submitted that the ground mentioned in the application is not sufficient to allow the application.

6. We have heard the rival submissions. Sub-section 5 of section 253 of the Act provides that the Tribunal may admit appeal or permit filing of memorandum of cross objection of respondent after expiry of relevant period of limitation referred to in sub-section 3 and 4 section 253, if it is satisfied that there was sufficient cause for not presenting it within that period. So, the sufficient cause is the pre-condition for condonation of delay. In the present case the assessee filed a writ petition in the Hon’ble Bombay High Court against the impugned order and the same was withdrawn in view of the alternative remedy available with the assessee. Since, the matter remained pending before the Hon’ble High Court, the assessee could not file the present appeal. In our considered opinion since the matter remained pending before the Hon’ble High Court, it cannot be said that the delay has been caused due to inaction or negligence on the part of the assessee. Hence, in our considered opinion, the reason stated by the assessee is

sufficient to condone the delay. We therefore, allowed the application and condoned the delay of 87 days in filing the present appeal.

7. The Ld. counsel for the assessee submitted that Ld. Commissioner has passed the impugned order without giving an opportunity of being heard to the assessee. Since the order has been passed in violation of the principle of natural justice, the same is liable to be set aside. The Ld. Counsel further submitted the impugned order is contrary to the law laid down by the Hon'ble High Court of Bombay in CIT vs. M/s Gagandeep Infrastructure Pvt. Ltd.(ITA No 1613 of 2014).

8. On the other hand, the Ld. DR submitted that since the notice was duly served upon the assessee, there is no reason to either set-aside or to send the matter back to the Ld. CIT(A) for fresh adjudication.

9. We have heard the rival submissions and also gone through the material on record. Although the Ld CIT(A) has mentioned in its order that notice was duly served on the assessee and despite that the neither the assessee nor the authorized representative appeared before him on the date of hearing. However, the Ld. CIT(A) has not referred to any document to show that the notice was duly served and despite the service of notice, assessee failed to appear before him. On the other hand, the contention of the Ld. counsel is that no notice was received by the assessee. Admittedly, the impugned order has been passed by the Ld. CIT(A) without hearing the assessee. Under these circumstances we are of the considered view that the assessee should be given an opportunity to present its case before the Ld. CIT(A). Hence, in the interest of justice we set-aside the impugned order and remit the file back to the Ld. CIT(A) for passing order afresh after hearing the assessee. Accordingly, we direct the assessee to appear before the Ld. CIT(A) as and when called for the same. We

further direct the assessee not to seek adjournments on frivolous grounds. The appeal is disposed of accordingly.

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

Order pronounced in the open court on 27th November, 2017

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 27/11/2017

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "H" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai

