IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1176 & 29/Hyd/2016
Assessment Year: 2009-10

Divya Jyothi Steels Ltd., Hyderabad. PAN – AACCD 0901A (Appellant)	vs.	Asst. Commissioner of Income-tax, Circle – 1(2), Hyderabad. (Respondent)

Assessee by : Shri P. Murali Mohan Rao
Revenue by : Shri K. Srinivasa Reddy

Date of hearing 13/03/2018
Date of pronouncement 28/03/2018

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

Both these appeals are filed by the assessee.

ITA No. 1176/Hyd/2016

2. This appeal filed by the assessee is against the order of CIT – 1, Hyderabad dated 03/3/2014, for AY 2009-10, with a delay of 852 days, for which it has filed a petition for condonation of delay along with an affidavit. As per the affidavit, assessee claimed that the appeal against the order of CIT should have been filed on 10/05/2014 but due to bonafide opinion that the directions of ld. CIT was appealable before the CIT(A). Hence, no appeal was filed before ITAT. Further, it was submitted that due to lack of knowledge on the appeal proceedings, they could not proceed with the appeal on time. After finding out the correct appeal procedure, it has filed the appeal

with a delay. It made a plea that it should be considered as sufficient reason for delay in filing the appeal.

3. On the other hand, ld. DR has failed to file any counter-affidavit from AO or any objection for such delay in filing the appeal by the assessee, even though, the bench has advised ld. DR to get any counter-affidavit or objection from the AO, if any, should be filed before hearing. We find that on record, no such affidavit or objections were filed.

4. While adjudicating the delay in filing the appeal, the Hon'ble Supreme Court in the case of Collector, Land Acquisition Vs. MST. Katiju and others, [1987]167 ITR 471, has held as below:

> ***"3.*** *The legislature has conferred the power to condone delay by enacting s. 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice— that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy.*
>
> ***4.*** *And such a liberal approach is adopted on principle as it is realized that:*
>
> *1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.*
>
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense and pragmatic manner.*
>
> *4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

4.1 Considering the above decision and reasons for delay in filing the appeal, we condone the delay in filing the appeal before us on the ground that the assessee was prevented by reasonable cause in filing the appeal belatedly. Accordingly, we admit the appeal for hearing and adjudication.

5. Brief facts of the case are, assessee filed its return of income for this AY on 21/09/2009 declaring an income of Rs. 71,68,230/- and book profits u/s 115JB at Rs. 80,82,863/-, which was processed u/s 143(1) of the Income-tax Act, 1961 (in short 'the Act'). Subsequently, the case was selected for scrutiny under CASS and notice u/s 143(2) was issued and served on the assessee. Assessment was completed u/s 143(3) of the Act on 23/12/2011 accepting the income declared by the assessee. During the course of assessment proceedings, AO called for the details of sales effected during the year and the assessee vide its letter dated 16/12/2011 furnished the details wherein the total sales of Rs. 23,55,16,826/- as against the sales admitted as per P&L A/c of Rs. 23,29,57,591/-.

6. With the powers vested u/s 263 of the Act, the ld. CIT called for the assessment records of the assessee and on verification of the records, he noticed that the assessee has furnished the details of sales but sales admitted in P&L a/c are different and he also claimed provision for excise duty of Rs. 17,76,219/- in its profit and loss account and there is also a claim of MAT credit amounting to Rs. 12,99,195/-. The CIT observed that at the time of assessment, AO

has failed to examine the discrepancies in sales and other issues and its implication in computing the taxable income. In view of the above observation, he came to the conclusion that the order passed by the AO u/s 143(3) of the Act on 23/12/2011 is considered as erroneous and in so far as it is prejudicial to the interests of the revenue. Accordingly, he issued a show cause letter to the assessee u/s 263 of the Act. In response to the said show cause notice, assessee submitted that reconciliation statement between VAT returns and sales according to the books of account were submitted before the AO, in which, no discrepancy was noticed. Further, ld. AR also explained the method of accounting adopted for provision made towards excise duty on finished goods and details of MAT credit claimed were also furnished.

6.1 After considering the submissions of the assessee, ld. CIT found that the order passed by the AO u/s 143(3) of the Act is erroneous and prejudicial to the interests of the revenue. Accordingly, he set aside the order to the file of the AO with a direction to examine the correctness of sales admitted and correctness of claim made towards provision for excise duty and MAT credit and decide the issues afresh after providing opportunity of being heard to the assessee.

7. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal:

> *1. The Ld. CIT, has erred in passing the order u/s. 263 of the Act holding that the assessment order passed u/s. 143(3) dated 23.12.2011 is erroneous in so far as it is prejudicial to the interests of the revenue.*
>
> *2. The Ld. CIT, erred in passing the order u/ s. 263 of the Act by forming mere, change of opinion and without considering the fact that the original assessment had been completed u/ s 143(3) of the IT Act, 1961 after careful verification of all the relevant information.*

3. The Ld. CIT erred in not appreciating that once the AO has applied his mind and concluded an assessment u/s 143(3) of the Act, the provisions of section 263 cannot be invoked on mere change of opinion in the matter.

4. The Ld. CIT ought to have appreciated the fact that the AO has made due verification during the course of scrutiny assessment with regard to the issues on which the revision has been done by the CIT.

5. The Ld. CIT ought to have appreciated that the AO has taken a conscious decision after examining both the impugned issues at the time of passing the order u/ s 143(3) dated 23.12.2011.

6. The Ld. CIT, ought to have appreciated the judgment of Honorable Supreme Court of India in the case of MALABAR INDUSTRIAL CO. LTD. v. COMMISSIONER OF INCOME TAX (2000)-243-ITR -0083 -(SC).

7. The Ld. CIT ought to have appreciated that the assessee has submitted VAT returns, Reconciliation statement and Turnover details during the course of original assessment proceedings regarding impugned variance of Rs. 55,59,235/-.

8. The Ld. CIT erred in not considering the reconciliation statement submitted with regard to the discrepancy pointed out.

9. The Ld. CIT ought to have considered the fact that the provision for Excise Duty of Rs. 17,76,290/- was created correctly by following Excise Duty Rules and also the accounting standards.

10. The Ld. CIT ought to have appreciated that the Excise Duty debited to Profit & Loss A/ c on finished goods is as per Accounting Standard-2, Customs and Excise Duty rules, which has already been included in closing stock and that there is no effect in Profit & Loss AI c for the year under consideration.

11. The Ld. CIT ought to have appreciated that the MAT credit of Rs. 12,99,195/claimed by the assessee has been correctly worked out as per the provisions of the Act.

12. The assessee may add, alter, or modify or substitute any other points to the Grounds of appeal at any time before or at the time of hearing of the appeal."

8. Ld. AR submitted that CIT has failed to quantify the income aspect or found any satisfaction with regard to prejudicial to the interests of revenue. Further, he brought to our notice to page 82 of

the paper book in which AO has sent a questionnaire dated 24/05/2011 wherein the information relating to turnover of the company was asked to submit and the same was duly submitted before the AO. Assessee has filed a detailed report, which is placed at page 27 of the paper book. Further, assessee also submitted a detailed reconciliation statement reconciling sales declared in VAT returns and the sales adopted in financial statement. He submitted that AO after verification of the above information satisfied with the information submitted by the assessee is proper and, therefore, he formed an opinion, which need not be discussed in the assessment order. For this proposition he relied on the decision in the case Spectra Shares & Scrips (P) Ld., 36 Taxman 348 (AP High Court). Further, he submitted that ld. CIT cannot assign the work of enquiry to the AO. For this proposition, he relied on the decision in the case of Development Credit Bank, 196 Taxmann 329 (Bombay High Court) and in the case of DG Housing Projects Ltd., 20 Taxmann 587 (Delhi).

9. On the other hand, ld. DR submitted that CIT had discussed the issue elaborately in his order, he has already formed an opinion for considering the assessment order as erroneous and in so far as it is prejudicial to the interests of revenue. Therefore, CIT has passed necessary order and remitted the case to the file of AO to verify the genuineness of the claim of the assessee.

10. Considered the rival submissions and material on record. We find that during the course of assessment proceedings, AO has asked for the information relating to sales and accordingly, assessee has filed the reasons for difference in sales recorded in financial statements and VAT returns. The same was verified and accepted by the AO, even though, he has not discussed elaborately in the order passed u/s 143(3) of the Act. We find that the Hon'ble Bombay High Court and Delhi High Court, respectively, came to the conclusion that CIT cannot direct the AO to conduct further enquiry to verify without examining the aspect himself. For the sake of clarity, we reproduce

the finding of the Hon'ble Bombay High Court in the case of Development Credit Bank (supra), as under:

> ***"7.*** *A reading of the order passed by the CIT would show that the principal objection which the revisional authority expressed against the order of the AO was an alleged failure of the AO to examine; firstly whether the capital gain of Rs. 1.26 crores has been earned by the assessee on transactions relating to investments 'held to maturity', and secondly whether the depreciation of Rs. 622.39 lakhs was claimed on investments which were held as stock-in-trade. Now from the material on record before the Court it is evident that the assessee, in response to a specific query of the AO dt. 20th Sept., 2004 supplied details of the long-term investments held for a period in excess of one year which the assessee treated as investments held to maturity. The profit on these investments was computed at Rs. 1.26 crores. Insofar as the aspect of depreciation of Rs. 622.39 lakhs on investments held as stock-in-trade was concerned, the assessee had similarly supplied to the AO details of the current investments in response to the query of the AO. In addition, it would also have to be noted that, in pursuance of the order passed by the CIT under s. 263, an assessment order came to be passed on 28th Dec., 2007. During the course of the assessment order, the AO noted that the assessee has explained depreciation claimed against the investments held and classified as stock-in-trade. The explanation of the assessee in this connection was accepted and the AO came to the conclusion that depreciation of Rs. 622.39 lakhs has been claimed towards investments held and classified as stock-in-trade. We have indicated this only as and by way of an illustration in aid of our finding that there was no basis or justification for the CIT to invoke the provisions of s. 263. In the order of assessment, the AO had after making an enquiry and eliciting a response from the assessee come to the conclusion that the assessee was entitled to depreciation to the extent of Rs. 622.39 lakhs on the value of securities held on the trading account. In the absence of any tangible material to the contrary, the CIT could not have treated this finding to be erroneous or to be prejudicial to the interest of the Revenue. The observation of the CIT that the AO had arrived at his finding without conducting an enquiry was erroneous, since an enquiry was specifically held with reference to which a disclosure of details was called for by the AO and made by the assessee. We have adverted earlier to the directions which have been issued by the CIT to the AO with regard to the holding of a fresh enquiry. Before us it is common ground between counsel that the first and the second issues therein relating to the capital gain of Rs. 1.26 crores and depreciation of Rs. 622.39 lakhs constitute the basis of the view of the revisional authority and the others follow in consequence. Once we come to the conclusion that the revisional authority was not justified in exercising the jurisdiction under s. 263 with reference to the aforesaid issues [(i) and (ii) in the directions of the CIT noted earlier], the other issues are consequential to the enquiry which was directed in respect of the first and second issues. This has not been disputed."*

Respectfully following the above decision, we find that the assessee has a merit in its contention and, therefore, we treat the order passed u/s 263 is wrong and the same is hereby quashed. Accordingly, the grounds raised by the assessee are allowed.

11. In the result, appeal of the assessee is allowed.

12. Coming to the ITA No. 29/Hyd/2016, this appeal is filed by the assessee against consequential order passed with reference to 263 order. Since we have already quashed order passed u/s 263, the order passed u/s 143(3) rws 263 becomes infructuous. Even on merits based on the submissions of the ld. AR, AO disallowed the difference in sales and claim of excise duty, with regard to difference in sales, assessee has already explained before the AO and also submitted reconciliation statement before us which we found to be in order. With regard to excise duty, it is the method of accounting adopted by the assessee regularly as per the guidance note issued by ICAI with regard to valuation of excisable finished goods. We find that even on merits, both the disallowances are not sustainable. Therefore, the appeal filed by the assessee is allowed.

13. In the result, both the appeals under consideration are allowed.

Pronounced in the open Court on 28th March, 2018.

Sd/-	**Sd/-**
(D. MANMOHAN)	**(S. RIFAUR RAHMAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 28th March, 2018

kv

Copy to:-

1) M/s Divya Jyothi Steels Ltd., C/o P. Murali & Co., CAs, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad – 82
2) ACIT, Circle – 1(2), Hyd.
3) CIT – 1, Hyderabad
4) Addl. CIT, Range – 1, Hyd.
5) The Departmental Representative, I.T.A.T., Hyderabad.
6) Guard File

S.No.	Description	Date	Intls	
1.	Draft dictated on			Sr.P.S./P.S
2.	Draft placed before author			Sr.P.S/PS
3	Draft proposed & placed before the second Member			JM/AM
4	Draft discussed/approved by second Member			JM/AM
5	Approved Draft comes to the Sr.P.S./PS			Sr.P.S./P.S
6.	Kept for pronouncement on			Sr. P.S./P.S.
7.	File sent to the Bench Clerk			Sr.P.S./P.S
8	Date on which file goes to the Head Clerk			
9	Date of Dispatch of order			