

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.3129/Ind/2017
Assessment Year : 2012-13**

M/s. Pharma Traders Pvt. Ltd., 18/2, Dewas Naka, Lasudia Mori, Indore (Appellant)	बनाम/ Vs.	ACIT- 3(1) Indore (Revenue)
P.A. No. AADCP3277A		

Appellant by	Shri Manoj Fadnis, CA
Revenue by	Shri K. G. Goyal, Sr. DR
Date of Hearing:	05.06.2018
Date of Pronouncement:	27.06.2018

आदेश / O R D E R

PER MANISH BORAD, A.M:

This appeal filed by the Assessee pertaining to A.Y. 2012-13 is directed against the order of Ld. Commissioner of Income Tax(Appeals)-II, Indore, (in short 'CIT(A)'), vide appeal No. IT-409/14-15 order dated 30.11.2015 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(hereinafter called as the 'Act') framed on 13.11.2014 by ACIT-3(1), Indore.

2. This appeal is time barred by 386 days. Ld. counsel for the assessee requested for condoning the delay and admitting the appeal by referring to the affidavit and the condonation application thereby submitting that the order of Ld. CIT(A) received on 12.02.2006. At that point of time, the appellant company was passing through a bad phase and suffered heavy financial losses. During the F.Y. 2014-15 and 2015-16 loss suffered by the company stood at Rs.0.19 crores and Rs.18.20 crores respectively. The Financial Manager was looking after the legal and taxation matters also left the company during the period when the impugned order was received. The ld. counsel further placed reliance on the judgment of Hon'ble Apex Court in the case of Collector, Land Acquisition, Anantnag vs. Mst. Katiji (1987) 2 SCC 107 (SC) wherein the Hon'ble Court has held that "liberal approach is to be adopted in the matter of condonation of delay".

On the other hand, Ld. DR raised objection submitting that there was unreasonable delay of 386 days and the same should not be condoned.

3. We have heard the rival contentions and perused the affidavit, condonation application and also gone through the judgment relied by the Ld. Counsel for the assessee. We find that the assessee company which is registered since 03.01.2001 is regularly complying with the tax provisions in filing its income tax return and paying due tax. The assessee company was having surplus profit up to F.Y. 2013-14 but subsequently during the F.Ys. 2014-15 & 2015-

16, it suffered huge loss. In F.Y. 2015-16, the total loss during F.Y. 2015-16 rose up to Rs.18.20 crore which certainly made vast impact on the regular and day to day working of the company.

4. In the affidavit, it is mentioned that the person looking after the legal and taxation matter left the job and there was no one to look after the taxation work at the point of time when the appeal against impugned order was required to be filed. The ld. counsel has requested for taking liberal judicious approach and to condone the delay.

5. We observe that Hon'ble Apex Court in the case of Collector, Land Acquisition, Anantnag vs. Mst. Katiji (supra), dealing with the issue of condoning delay decided in favour of assessee observing as follows:

“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. The doctrine of equality before law demands that all litigants, including the state as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-

motherly treatment when the “State” is the applicant praying for condonation of delay. In fact, experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherent bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand through more difficult to approve. In any event, the State which represents the collective cause of the community does not deserve a litigant non grata status. The Courts, therefore, have to be informed of the spirit and philosophy of the provision in the course of the interpretation of the expression “sufficient cause”. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits.”

6. From perusal of the above judgment of Hon'ble' Apex Court as well as given facts and circumstances of the case, we observe that the assessee had reasonable cause which prevented it from complying to the statutory requirement of filing the appeal within 60 days of the receipt of order of Ld. CIT(A). We also observe that the assessee on receiving the penalty order on 31.03.2017 made for the A.Y. 2012-13 immediately took the action and inquired about the status of appeal order for the quantum addition which in itself shows about its vigilant approach to the taxation matters.

We, therefore, in the larger interest of justice and taking a liberal approach in the given facts condone the delay of 386 days and admit the appeal for adjudication.

7. Brief facts as culled out from the records are that the assessee is Private Limited Company, engaged in the business of Trading of Medicines, Automobile spare part, Mobile Handsets Recharge vouchers and FMCG Goods. E-return of income declaring income of Rs.49,41,517/- filed on 19.10.2012. The case was selected for scrutiny under CASS. Necessary notices u/s 143 & 142(1) of the Act were duly served upon the assessee. The audited books of account and vouchers were examined by the AO. The Ld. AO apart from making adhoc disallowance of various expenses, viz Telephone & Trunkcall, stationary and freight expenses totaling to Rs.4,40,000/- also made on disallowance of interest u/s 36(1)(iii) of the Act at Rs.37,58,361/-. The issues raised in this appeal relates only to the disallowance of interest of Rs.37,58,361/-. The Ld. AO observed that the assessee has shown addition to capital work in progress of Rs.1,69,33,529/- in schedule 9 of the balance sheet and the closing work in progress on 31.03.2012 is shown at Rs.3,51,44,166/-. This capital work in progress related to the construction of new warehouse and office building and it was shown under construction at the end of the year. This construction was carried out since F.Y. 2010-11 and assessee took the loan of Rs.3,20,00,000/- from TATA Capital Limited. The Ld. AO observed that the assessee had claimed interest expenditure of

Rs.37,58,361/- paid on the loan of Rs.3.20 crores received from TATA Capital Limited. The ld. AO did not allow this claim of interest on the basis of his observation that the assessee has not transferred the completed portion of the assets from capital work in progress head nor it has claimed any depreciation which itself shows that the impugned asset was under construction and not put to use for business. Ld. AO further mentioned that the assessee is dealing in pharmaceutical products and the Basement and Ground floor which were not fully constructed could not have been used for the safe storage of the pharmaceutical products and accordingly rejected the contention that the partly completed building was used for business purpose. Accordingly after making above mentioned additions totalling to Rs.42,08,361/-, assessed income at Rs.91,49,880/-.

8. Aggrieved the assessee preferred an appeal before the Ld. CIT(A). The assessee made written submissions before the ld. CIT(A) but thereafter on subsequent date of hearing did not attend. As a result Ld. CIT(A) passed an ex-parte order giving partial relief to the assessee.

9. Aggrieved the assessee is now in appeal before the Tribunal raising following grounds of appeal:

“Ground no.1 Addition of Rs.37,58,361/- on account of disallowances of interest u/s 36(1)(iii).

- 1. That on the facts and in the circumstances of the case the ld. CIT(A)-I, Indore has erred in confirming the order of the Ld. AO held that the building was under construction and it was being*

shown as capital work in progress in Balance Sheet and in any way not used for storage purpose during the previous year.

- 2. That the Ld. CIT(A)-I, Indore has failed to consider whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter, as held by the Hon'ble Supreme Court in the matter of Kedarnath Jute Manufacturing Co. vs. CIT (1971) 82 ITR 363(Hon'ble Supreme Court).*
- 3. That the disallowance of interest confirmed by Ld. CIT(A)-I, Indore of Rs.37,58,361/- is bad in law.*
- 4. That the addition made by the Ld. AO and as confirmed by the Ld. CIT(A)-I Indore is wrong and contrary to the facts of the case and therefore the additions so made may please be deleted. ”*

10. Though the assessee has raised four grounds of appeal sole grievance is against the order of the Ld. CIT(A) confirming the disallowance of interest expenditure Rs.37,58,361/-.

11. The ld. counsel for the assessee submitted that the alleged building was partly completed. The basement and ground floor was used for the business purpose. After the sanctioning of loan, the amount is released in parts at various stages of completing the construction work and for this purpose certificate from architect is to be given to the lender company for releasing of the loan amount. He submitted that 14,000 sq ft area comprising of basement being completed and the Ground Floor was under construction as on 31.03.2011 and subsequently up to 31.03.2012, 42,000 sq ft area was constructed and Ground, First and Second Floor was complete

and only Third floor was under construction and as on 31.03.2013, 52,500 sq ft areas was constructed and building was completed.

12. The Ld. Counsel tried to convey that the assessee for business expediency started using the completed portion for its business use which in this case was go-down facility. It is practically impossible to believe that a businessman is having a place complete in all aspect to be used as go-down facility but is not used for business for the want of completion of total building area. The ld. counsel further referred to the audited balance sheet and countered the observation of Ld. AO mentioning that the assessee is not dealing solely in pharmaceutical products as it accounts for only around 40% of the total turnover. The assessee also deals in Automobile spare part which too accounts for 40% of the total turnover. And apart from this assessee also deals in FMCG and Electrical goods. The completed portion of the building was used as a go-down for Automobile spare parts.

13. The Ld. counsel referring and relying to the judgment of Hon'ble Apex Court in the case of Kedarnath Jute Manufacturing Co. vs. CIT (1971) 82 ITR 363(SC), submitted that the assessee is entitled to a particular deduction of interest because it is actually being used for business purpose and this rightful claim cannot be denied for the sake that necessary entries were absent in the books of account which in this case was transferring of capital work in progress to fixed assets and charging of depreciation.

14. On the other hand, Ld. DR vehemently argued supporting the order of Ld. CIT(A) and mentioned that the assessee has not made any entry in the regular books of account nor it has shown as a business asset used for business and therefore, no claim of the impugned interest should be entertained.

15. We have heard the rival contentions and perused the record place before us. The issue relates to the disallowance of interest of Rs.37,58,361/- claimed by the assessee on loan of Rs.3.20 crores taken by the assessee from TATA Capital Ltd. for the purpose of constructing multi story building comprising basement, Ground Floor, and Third Floor. The AO on the basis of the audited books of account and financial statements came to the conclusion that the assessee has accepted that the impugned building was under construction and not put to use for business purpose and therefore, no depreciation has been charged. In such situation the interest paid on borrowing for constructing the building should be added to the capital work in progress and when the building gets complete and put to use for business purpose, the assessee can claim depreciation on the total cost incurred for constructing the building as per the provisions of law. In the instant case the assessee has not disputed the fact that total cost incurred up to the end of F.Y. 2011-12 has been shown in the capital work in progress only. It is however contended that the construction of the building started during F.Y. 2010-11 and up to 31.03.2012, the basement, Ground

Floor, First & Second Floor was completed and were used for business purpose as a go-down for the automobile spare parts.

16. The Ld. Counsel challenged the categorical finding of the Ld. AO that the assessee was dealing in Pharmaceutical Products only and the building under construction cannot be used as storage place for the Pharmaceutical Products by contending that the assessee is not only dealing in Pharmaceutical Products but is also dealing with automobile spare parts which constitutes around 40% of the total turnover. We find force in the contention of Ld. counsel for the assessee that a prudent businessman will not keep the completed portion of the business "idle". It is also submitted that the loan was released on the basis of amount invested in the building by the assessee as well as the work completed. The assessee submitted the architect certificate to the lender company showing the work completed so as to get the disbursement of loan installment. A chart of loan disbursements was also submitted before the Ld. CIT(A) which shows that during F.Ys. 2010-11 and 2011-12 total of seven installments of loan cumulating to Rs.3,20,57,432/- was given to the assessee. It is also a known fact that there is a schedule of disbursement of loan and it is only at the completion of particular stage of work that the loan amount is released as per the schedule. All these facts were part of the written submissions given to the Ld. CIT(A) and if proper opportunity had been given to the assessee it could have furnished the architect certificate and the

bank report of disbursement of loans to prove that major portion of the building was complete and ready to use.

17. Summarizing the total facts, we find that the company was dealing in multi products which included Pharmaceutical products, automobile spare parts and FMCG goods. A building comprising of basement, Ground Floor and Third Floor was under construction up to 31.03.2012. Basement, Ground, First and second Floor were completed. The Completed portion was used for business purpose as go-down of automobile spare part and for other business purpose. Necessary entries in the books of account reflecting the partially completed business asset put to use for business is missing but the circumstantial evidence shows that the assessee commenced the use of the completed portion of the building for business purpose. As held by Hon'ble Apex court in the case of Kedar Jute Manufacturing Co. vs. CIT(supra) *“that the assessee is entitle a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can existence or absence of entries in the books of accounts be decisive or conclusive in the matter”*.

18. We therefore, respectfully following the judgment of Hon'ble Apex Court as well as in the given facts and circumstances of the case are of the considered view that the assessee is eligible for one more chance of hearing before the Ld. CIT(A) to put his case along with supportive documents i.e. architect certificate, bank loan disbursement letters and other evidence as required which could

prove that the impugned asset was actually used for business purpose. We therefore, set aside the issues raised in this appeal to the file of Ld. CIT(A) for de novo adjudication in the light of our observation mentioned above. Needless to mention that the assessee to be given proper opportunity of being heard.

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

Order was pronounced in the open court on 27.06.2018.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 27/06/2018

Patel, P.S./नि.स.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Private Secretary/DDO, Indore