

**-आयकर अपीलार्थ अधकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
Ms MADHUMITA ROY, JUDICIAL MEMBER**

अपील सं./ITA No.2009/Ahd/2015

अधकरण वर्ष/Asstt. Year:2006-2007

Banyan & Berry Alloys Ltd., 1006, Samudra Annexe, Off C.G. Road, Navrangpura, Ahmedabad-380009. PAN: AABCB7470D	Vs.	A.C.I.T(OSD), Range-1, Ahmedabad.
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(Applicant)		(Responent)
Assessee by :		Shri B.R. Popat, A.R
Revenue by :		Shri Vinod Talwani, Sr. D.R

सुनवाई का ताराख/Date of Hearing : 29/10/2018

घोषणा का ताराख /Date of Pronouncement: 30/11/2018

आदेश/O R D E R

PER Ms MADHUMITA ROY, JUDICIAL MEMBER:

The instant appeal preferred by the Assessee before us against the order dated 13/08/2012, passed by the Learned Commissioner of Income Tax(Appeals)-6, Ahmedabad, arising out of the order dated 29/12/2008, passed u/s.143(3) of the Income tax Act 1961, (in short "the Act") framed by the ACIT(OSD), Range-1, Ahmedabad, for the Assessment Year 2006-2007.

An application for condonation of delay of 998 days has been filed along with the appeal preferred by the assessee before us.

2. The facts leading to the case is this that the assessee is engaged in the business of manufacturing and dealing in various Steel products. The assessee has availed certain financial assistance from certain Nationalized Banks namely Punjab National Bank, Dena Bank and UCO Bank working in consortium with Punjab National Bank being the lead bank. The assessee filed its return of income on 30/11/2006, declaring total income of Rs.1,03,37,500/- the return was ultimately finalized in scrutiny proceeding by the Ld.AO by making addition of Rs.12,39,230/- to the total income of the assessee by disallowing the Guest House Expenditure claimed to have been incurred by the assessee. An appeal before the Ld.CIT(A) was filed against the said order by the assessee which was disposed of on 13/08/2012, which is impugned before us. An application for condonation of delay has also been filed by the assessee being a part of record before us explaining the situation on which the assessee was compelled to preferred this appeal much after the prescribed statutory period.

3. The Ld.representative of the assessee submitted before us that because of acute financial crisis the assessee suffered losses and liquidity crunch resulted into default of making contractual repayment of loans with Banks as mentioned above. In fact the terms of the order passed by the Ld.CIT (A) was made known to the assessee only on 07/04/2015, when certain orders were provided to the assessee by the Ld.AO at the request made by the assessee after the Director was directed to attend the Tax Recovery Officer (TRO) on 26/02/2015. He further relied upon certain other relevant documents in support of his submissions. However, the Ld.DR, has relied upon the order passed by the Ld.CIT (A).

4. It appears from the noting of the Audited Balance-sheet being part of paper book before us that production of company has been halted from November, 2010 in the factory premises hypothecated by consortium Banks was sealed and was taken over under their control for default of payment of outstanding dues to the Banks by the assessee companies. The references was filed with the Board for Industrial and Finance Reconstruction (BIFR). It further appears from the records that the assessee for the first time came to know about the order passed by the Ld.CIT(A) in his appeal on 13/08/2012. In fact on 26/02/2015 when one of the Directors of the company was served with the *summon* only then the outstanding payment of Rs.1748.32 lacs in respect of Assessment Years 2006-07 to 2009-10, was came to the knowledge of the assessee; those orders practically were passed ex-parte since the appellant failed to attend its tax and other legal matters. It is relevant to mention that the assessee was forced to close down its business activities due to financial crunch and possession over the certain asset and properties were also taken over by the Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and Ruled framed there under.

The Ld.AR, has taken us to the application dated 06/07/2015, for condonation of delay wherefrom it appears that the said litigations are still pending before the Court of Law. After getting the information of the demands made by the Revenue authorities the assessee approached the ITO, Ward-1(1)(3), Ahmedabad, by making application for certified copies of each of such orders along with respective notices on demand. The assessee thereafter received certain orders on 07/04/2015, from the Ld.AO including the copy of the order dated 13/08/2012 passed by the Ld.CIT(A), which was ex-parte against the order in quantum u/s.143(3) of the Act; the assessee failed to appear before the said appellate authority for the reasons as already been discussed above. Subsequently,

application was also preferred for obtaining a copy of form No.35 before the Ld.AO in order to prefer appeal before us which was made available only on 30/06/2015, copy whereof was also attached to the application for condonation of delay being part of the records before us. The assessee has further relied upon the order passed by the Co-ordinate Bench on 17/10/2018, regarding condonation of delay preferred in appeal before the First Appellate authority for the Assessment Years 2007-2008 to 2009-2010 and 2011-2012 in respect of the same assessee specifically dealt with the facts as narrated by us hereinbefore, the relevant portion whereof is as follows:

"...4. When the matter was called for hearing against the order of the CIT(A), the learned AR for the assessee appeared alongwith Director of the assessee. It was pointed out that the delay is supported by an application for condonation of delay in filing appeal. The learned AR for the assessee referred to the facts as noted in the order of the first appellate authority and submitted that the assessee is a closely held company engaged in the business of manufacturing and dealing in various steel products and had availed certain financial assistance from certain nationalized banks (Punjab National Bank, Dena Bank & UCO Bank) working in consortium with Punjab National Bank being the lead bank. The learned AR submitted that due to acute financial crisis and market situation, the assessee suffered losses and liquidity crunch and thereby defaulted in making contractual repayments of loans of the above referred banks. This eventually forced the assessee to practically close down all its business activities. As a result of such crisis, even the possession over the specified assets and properties were taken over by the bank under the securitization and re-construction of financial assets and enforcement of Security Interest Act, 2002 and the rules framed thereunder. The litigation arising out of this continues to be pending even at present. The learned AR submitted that all these facts were placed before the appellate authority and has been recorded in its order. It is owing to such grave financial crisis and closure of business activities, the assessee was in total disarray and midst of chaos and could not attend to its tax and other matters. It was submitted that the Directors were not in fact even aware of the notices, orders or any other communication that may have been served by various authorities of the Income Tax Department. As a corollary, the assessee was neither in a position to attend the proceedings or to comply with legal requirement in this regard or to defend its position. The learned AR thereafter submitted that the assessee came to know about the tax demands in respect of AYs 2006-07 to 2009-10 when one of its Directors was served upon with the summons by the Tax Recovery Officer (TRO). It is in pursuance of the recovery proceedings before the TRO, the assessee learnt that the department has passed orders in quantum and in penalty in respect of several assessment years. It was also learnt that most of these orders have been passed ex parte. Consequent upon this, the assessee approached the AO and applied for getting certified copies of each of such orders alongwith respective notices of demand. Pursuant to the requests so moved, the assessee obtained the certified copy of the assessment order on 7th April, 2015 for

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all these assessment years in appeal. After having received the copy of the order and notice of demand on 07.04.2015, the assessee filed appeal before the CIT(A) on 23.04.2015.

5. *The learned AR submitted that in the backdrop of what has been stated above, the assessee filed the appeal within a period of 30 days from the date of actual, physical receipt of the copy of the order accompanying notice of the demand. It is in this background, the assessee submitted before the CIT(A) that appeal has been filed in time or alternatively the delay of intervening period be condoned as prayed. The CIT(A) however did not find merit in the plea of the assessee and refused to admit the appeal for disposal on merits on the ground that delay occurred in filing the appeal does not deserve to be condoned. The learned AR thus submitted that assessee is in appeal before the Tribunal against the aforesaid action of the CIT(A) and prayed that having regard to the ongoing financial mess and business closure and also in view of the fact that the respective orders passed by the AO were received physically on 07.04.2015, the period of limitation should be reckoned from the latter date and consequently, the appeal should be treated as filed in time or in alternative the intervening delay should be condoned for substantial cause of justice.*

6. *The learned DR, on the other hand, referred to and relied upon the order of the CIT(A).*

7. *We have carefully considered the rival submissions and perused the order of the CIT(A). The solitary grievance of the assessee in the instant case is towards denial of the CIT(A) to admit the appeal for adjudication on merits by refusing to condone the delay in filing appeal before the CIT(A). Section 249(2) of the Act contemplates that appeal shall be presented within 30 days from the date of service of the notice of demand relating to assessment or penalty. Section 249(3) of the Act however confers discretion to the CIT(A) to admit an appeal after the expiration of the said period of 30 days if he satisfied that the assessee had sufficient cause for not presenting it within that period. Therefore, the CIT(A) is vested with discretion to admit the appeal belatedly for determination of issues on merits in appropriate circumstances. In this background, we notice from the tabulated statement (supra) that a lapse has been committed by assessee in filing the appeal in terms of Section 249(2) of the Act when the period of delay is reckoned with reference to the date of assessment order/penalty order. However, the assessee has provided justification for such delay. The assessee has taken consistent position that its business venture has closed down and the possession of the premises have been taken by the lender bank on 14.07.2010. The power supply was also disconnected much earlier. The assessee has underlined his precarious financial position giving rise to such alleged lapse. It is the case of the assessee that respective orders of assessment and penalty presently appealed against were not made privy to the assessee. The assessee has obtained the certified copy of the respective orders from the AO belatedly on 07.04.2015 and when this date of receipt/service of order is taken into account, there is no delay in filing the appeal.*

8. *From the conspectus of the circumstances, we are of the view that the assessee has demonstrated the circumstances resulting in delay in filing the various appeals in question. Needless to say, there can be no straight jacket formula to come to conclusion as to whether the sufficient and good grounds have been made out or not while seeking condonation of delay. We do not see any malafide written large on the conduct of the assessee for alleged delay. It is trite that an attempt should also be made to allow the matter to be contested on merits rather than to throw it on such technicalities. Apart from the above, the assessee does not stand*

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to gain in any manner whatsoever by not filing appeal within the period of limitation. In fact, it is the case of the assessee that the appeals have been filed in time when seen with reference to the date of receipt of copy of order from the AO on 07.04.2015. Keeping in view the financial crisis culminating in attachment of properties by the lender and closing down of the business on or about the date of penalty order in ITA No.2152/Ahd/2016, one cannot say that the assessee had been callous and negligent in prosecuting the matter. At this point, reference is made to the decision of the Hon'ble Supreme Court in *Improvement Trust Vs. Ujagar Singh*, (2010) 6 SCC 786 (SC) and *Bombay Mercantile Co-op. Bank vs. CBDT* (2010) 45 DTR 377 (Bom) for the proposition that in the matter of condonation of delay, a highly pedantic approach should be eschewed and a justice oriented approach should be adopted and a party should not be made to suffer on account of technicalities. The test of 'sufficient cause' is purely an individualistic test. It is not an objective of test as observed by the Hon'ble Bombay High Court in the case of *Vithhal Dhondiba Chawan vs. Madhav Rao* (Bom) Civil Application No.9464 of 2008 judgment dated 06.082009. While considering the bonafides of the delay, an adjudication authority is expected to bear in mind the principles laid down by Hon'ble Supreme Court in the locus classicus case of *Collector of land acquisition vs. Mst. Katiji & Ors.* 167 ITR 471 (SC). The Hon'ble Supreme Court laid down the guiding principles for adopting a liberal approach in the matter of condonation of delay. The principles laid down by the Hon'ble Court are reproduced hereunder:

"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.

1. " Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

3. "Every day's delay must be explained" does not mean that 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 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."

9. *The principles enunciated by the Hon'ble Courts say it all.*

10. *In the light of facts and circumstances narrated hereinabove, we are of the view that the assessee has sufficiently discharged its burden of proof for delay. Consequently, we direct the CIT(A) to condone the delay occurred in filing the appeal before it and admit the appeal for adjudication on merits in accordance with law. Accordingly, all the appeals captioned above are restored to the file of the CIT(A) for de novo adjudication on merits in accordance with law after giving fair opportunity to the assessee.*

11. *In the result, all the appeals of the assessee captioned above are allowed for statistical purposes..."*

5. We have heard the respective parties, perused the materials available on records. The above records reveal the practical difficulties of the assessee also the financial crunch resulting into losing control over the assets of the company upon being taken over by the Banks under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and cessation of work made the appellant unable to pursue the legal battle scattered over different forum including the Revenue as it appears from each and every documents placed before us by the assessee in support of his plea for condoning delay of long 998 days. The same was also placed before the Co-ordinate Bench against rejection of condonation of delay by the Ld.CIT(A) in appeals. We observe that the Co-ordinate Bench has also taken pain to deal with each and every aspect of the matter, the downfall of the assessee due to the above reasons and ultimately for doing substantial justice gave relief to the assessee by admitting the appeal preferred before this Tribunal.

We find substantive justice would not be rendered in this application if not allowed by condoning delay. In that view of the matter we find that assessee has tried it best to explain the delay in preferring this appeal before us and we thus condone the delay and admit the appeal of the assessee. The reason for not attending the case before the First Appellate authority has already been considered by us in forgoing

paragraph and allowed. We, therefore, to prevent the miscarriage of justice find it proper to give a further opportunity of hearing to the assessee to represent his case before the Ld.CIT(A) and thus remit the issue to the file of Ld.CIT(A) for fresh adjudication of the matter upon giving a reasonable opportunity of hearing to the assessee. The Ld.CIT(A) is further directed to consider the evidences, if any, which the assessee may choose to refer at the time of said hearing.

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

Order pronounced in the Court on 30/11/2018 at Ahmedabad.

**-Sd-
(WASEEM AHMED)
ACCOUTANT MEMBER**

**-Sd-
(Ms MADHUMITA ROY)
JUDICIAL MEMBER**

True Copy

Ahmedabad; Dated 30/11/2018
Manish

आदेश का प्रतिलिपि अपेक्षित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. व्रभागीय प्रतिलिपि, आयकर अपीलार्थी अधिकरण / DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलार्थी अधिकरण, अहमदाबाद / ITAT, Ahmedabad