

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.580 to 583/Coch/2017
Assessment Years : 2009-10 to 2012-13

Avathar Jewellers, AIWA Towers, Edappal, Malappuram. [PAN:AANFA 7451J]	Vs.	The Deputy Commissioner of Income-tax, Central Circle, Thrissur.
(Assessee-Appellant)		(Revenue-Respondent)

ITA Nos.60&61/Coch/2017
Assessment Year : 2011-12

The Assistant Commissioner of Income-tax, Central Circle, Thrissur.	Vs.	Avathar Jewellers, AIWA Towers, Edappal, Malappuram. [PAN:AANFA 7451J]
(Revenue-Appellant)		(Assessee-Respondent)

Assessee by	Shri V. Venugopalan, CA
Revenue by	Shri Shantham Bose, CIT(DR)

Date of hearing	04/09/2018
Date of pronouncement	27/09/2018

ORDER

Per CHANDRA POOJARI, AM:

These appeals by the assessee as well as by the Revenue are directed against the different orders of the CIT(A)-IV, Kochi and pertain to the assessment years 2009-10 to 2012-13.

2. Since the issues involved in these appeals are common, they were heard together and are being disposed of by this common and consolidated order.

3. Regarding assessee's appeals in ITA Nos.580-583/Coch/2017, there was a delay of 217 days in filing these appeals. The assessee has filed condonation petition accompanied by an affidavit for condonation of the delay. In the condonation petition, it was stated that the assessee's managing partner, Shri U. Abdulla was in police custody for few months because of several cases filed against him for non payment of amounts borrowed by him. After release from police custody, he could sign the requisite documents and hence, there was delay of 217 days in filing these appeals before this Tribunal.

4. We have gone through the contentions made by the assessee in the condonation petition accompanied by the affidavit. It is noticed that the assessee is a partnership firm, having more than two partners. The assessee has not furnished the details of other partners who were running the business

along with Shri U. Abdulla. Further, there is nothing on record to indicate whether the functions were assigned to other partners when he was not available. The assessee has not specified when the managing partner was in police custody and when he was released from police custody. There are no specific details of his absence from his business. Unless it was specified that he was in police custody for the entire period of 217 days which resulted in belated filing of appeals, we are not in a position to condone this delay. The Supreme Court in the case of Collector Land Acquisition vs. Mst. Katigi (167 ITR 471) held that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested interest in injustice being done because of a non-deliberate delay. In the case of Vedabai alias Vaijyanatabai Baburao Patil vs. Shantaram Baburao Patil (253 ITR 798) 253 ITR 798, the Supreme Court held that in exercising discretion u/s. 5 of the Limitation Act the courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case, the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and as such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard. The court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression 'sufficient cause', the principle of advancing substantial justice is of

prime importance. In the above cases, the Apex Court clearly laid down that a distinction between a case where the delay is inordinate and a case where the delay is of a few days. The law assists those who are vigilant, not those who sleep over their rights. In the present case, though there was delay of 217 days, the assessee was not able to specify the exact number of days the managing partner was not in active business and in police custody. In the absence of these details, the delay cannot be condoned simply because assessee's case is hard and calls for sympathy or merely out of benevolence to the party seeking relief. In granting the indulgence and condoning the delay it must be proved beyond the shadow of doubt that the assessee was diligent and was not guilty of negligence whatsoever. The sufficient cause within the contemplation of the limitation provision must be a cause which is beyond the control of the party invoking the aid of the provisions. The Supreme Court in the case of Ramlal vs. Rewa Coalfields Ltd. AIR 1962 SC 361 held that the cause for the delay in filing the appeal which by due care and attention could have been avoided cannot be sufficient cause within the meaning of the limitation provision. Where no negligence, nor inaction, or want of bona fide can be imputed to the assessee, a liberal construction of the provisions has to be made in order to advance substantial justice and seekers of justice must come with clean hands.

5. In the present case, we find that the assessee justified the delay only with reference to the affidavit of managing partner, namely U Abdulla, represented by

Power of Attorney Holder Famid Urathodiyil. In the said affidavit it was stated that he was in police custody without specifying the number of days in police custody. Being so, there was no proper explanation given by the assessee for the delay in filing the appeals. In our opinion, there is no good and sufficient reason to condone the delay. Accordingly we decline to condone the delay of 217 days in filing the appeals for all the assessment years.

6. In the result, all the other appeals of the assessee are dismissed as unadmitted.

7. Now coming to the Revenue appeal in ITA No.60/Coch/2017. The Revenue has raised the following grounds:

1. The CIT(A) erred in suggesting that extrapolation of the findings of the seized document be limited to 180 days and not the whole year (300 days as adopted by AO being working days).
2. If the seized material is correct with respect to a limited period, it is only logical to extend it to the whole year rather to just half a year.
3. The CIT(A) erred in relying on a submission of assessee based on case reported in 251 ITR 561 (AP) without ascertaining whether the facts & circumstances, nature of the seized materials of the assessee's case are identical/relevant to that of the case relied upon.
4. The CIT(A) erred in adopting figure of 72 days in penultimate para of his order when the actual figure is 67 days, being the number of days for which there is seized material.
5. The CITA) erred in overlooking the contents of page 4 of assessment order which reproduced assessee's own submission that number of days is 67.

6. The CIT(A) ought to have considered the decision of the Hon'ble Kerala High Court in the case of CIT vs Hotel Mariya [332 ITR 537 (2011)].

7. The CIT(A) erred in passing order resulting in assessment of income below returned income overlooking the fact that the returned income as per return u/s 153C is Rs 61,03,520 and on implementation of CIT(A)'s order, income is Rs.55,95,160.

8. The decision of the CIT(A) is devoid of logic and is arbitrary.

8. The facts of the case is that the assessee is a partnership firm having three partners, namely U Abdulla, U Abdul Nazar and U Faizal Babu and is engaged in gold jeweler business at Round North, Thrissur. There was search action u/s. 132/133 of the I.T. Act on 09/06/2013 in the Avathar group cases which included the business premises of the assessee at Thrissur and the residence of the partners of Avathar Jewellers, Trichur. During the course of search u/s. 132 of the Act, an amount of Rs.10,77,590/- in cash, gold Gross 52043.490 gms net 46248.310 was found. Out of this only an amount of Rs.10,00,000/- was seized and no other unaccounted assets were seized. A notice u/s. 153C was issued to the assessee on 2/12/2013 against which the assessee filed return on 9/11/2013 declaring income of Rs.61,03,520/-. Later on 05.02.2014, one more return was filed declaring income of Rs.19,86,480/-. During the course of search, there was seized material marked as Annexure CP/A-12 showing the number of days of sales as 72 days at Rs.14,95,82,351/-. The Assessing Officer computed the average sales per day on the basis of the seized material at Rs,20,77,533/- and working out the sales for 300 days at Rs.62,35,59,796/-. This issue was put to

the assessee to which the assessee stated that the income be estimated only at 1.25% to 1.5% on the suppressed sales as requested by the assessee in the case of Edappal Jewellery to consider the profit on the suppressed sales. At the time of assessment, it was clarified by the assessee that sales found during the search and seizure action was only for 67 days and the details were furnished as follows:

Table II

Asst Yr.	Sale details	Average sale Available for	Estimated for For available days	Accounted sales 300 days	Suppressed sales
2011-12	07 days	Rs.19,08,797	Rs.57,26,39,100	Rs.2,00,38,990	Rs.55,26,00,110

8.1 However, the Assessing Officer overlooked it and estimated the income on sales of Rs.57,26,39,100/- at 1.75% (Rs.19,08,797/-) (average sales per day x 300) which worked out at Rs.1,00,21,184/-.

9. Against this, the assessee carried the matter in appeal before the CIT(A). Before the CIT(A), the Ld. AR submitted that the assessee filed a return of income declaring a total income of Rs.1,21,06,220/- for AY 2009-10 whereas on similar basis, the Assessing Officer estimated the income at Rs.85,08,386/-. Similarly in AY 2010-11, the assessee declared an income of Rs.1,18,55,190/- and the Assessing Officer estimated the income at Rs.92,19,688/-, thus in both the years, the income declared by the assessee was higher than the income

estimated by the Assessing Officer. It was submitted that the Assessing Officer had estimated income based on papers found during the course of search, indicating out of book sales, only for a few days in a year, whereas the assessee had disclosed all the income earned by the assessee during this period. It was submitted that during the course of search, only a cash of Rs.10,77,590/- was found out of which Rs.10,00,000/- was seized and no other unaccounted assets were either found or seized. It was further contended that data for unaccounted sales was found for 72 days, though it has been taken for 67 days by the Assessing Officer. It was submitted that the Assessing Officer was not justified to estimate the income for 300 days on this basis. Hence, it was submitted that since the papers found during the course of search proved suppression sales of 72 days only, the estimation of income may be done for a maximum of twice this time and not more. The CIT(A), after considering the facts of the case and the submissions of the assessee opined that income is to be estimated for half a year, i.e., 180 days, on the basis of documents found for 72 days. Accordingly, he directed the Assessing Officer to recompute the income for 180 days in place of 300 days.

10. Against this the revenue is in appeal before us.

11. We have heard the rival submissions and perused the record. This case was covered by the provisions of section 153C of the Act consequent to search

u/s. 132/133 of the Act conducted on 09/06/2013 in the Avathar Jewellers Group cases. Consequent to the search action, material seized marked as Annexure CP/A-12 showed the sales for 67 days at Rs.12,78,89,402/-. The Assessing Officer worked out the average sales per day at Rs.19,08,797/-. On this basis, he estimated 300 days of sales for one year at Rs.57,26,39,100/- and applying the net profit at 1.75%, the Assessing Officer estimated the income on it. Out of this, the Assessing Officer estimated the profit at Rs.1,00,21,184/-. On appeal, the CIT(A) was of the opinion that the income of the assessee could be estimated for a maximum of twice of the suppression sales found during the search action. Accordingly, he directed the Assessing Officer to estimate suppression sales for only 180 days in place of 300 days and to recompute the income of the assessee. This finding of the CIT(A) has no legal sanction. In our opinion, there is no error in the estimation of income of the assessee on the basis of the seized records. The estimation of income by the Assessing Officer is based on the documents found during the search and statement recorded during the course of search. Being so, the Assessing Officer is completely justified in adopting those figures for the whole year, i.e. for 300 working days out of 365 days in a year. For this proposition, reliance is placed on the judgment of the Jurisdictional High Court in the case of Travancore Diagnostics P. Ltd. vs. ACIT (390 ITR 167) wherein it was held that when suppression had been found from the documents and the statement on record, the Assessing Officer was completely justified in adopting those figures for the whole year and for the next

year which was based on sound rationale, since from the statement on behalf of the assessee, the suppression was found to be continued. In view of the uncontroverted and admitted statement given on behalf of the assessee u/s. 133A and the documents impounded during the survey, which were also virtually admitted by the assessee, there was no error in the order of the Tribunal in accepting the materials on record in order to arrive at an assessment. Reliance is also placed on the judgment of the Jurisdictional High Court in the case of CIT vs. Hotel Meriya (332 ITR 537) wherein it was held as under:

“(ii) That the partner of the assessee had in unambiguous terms stated that 20 per cent of the sales outturn was suppressed and only 80 per cent was recorded in the account books and it was the practice from the very beginning. So, it was just and appropriate to presume that there was uniform concealment of income in all the assessment years during the block period. Hence the assessee was liable to be assessed during the block period at a uniform rate.”

In view of the above judgments of the Jurisdictional High Court, we are inclined to allow this ground of the Revenue. The appeal of the Revenue is allowed.

12. In the Revenue's appeal in ITA No.61/Coch/2017, the following grounds have been raised:

1.The CIT(A) erred in passing order resulting in assessment of income below assessed income. We concede that there is error in lowering the Total Income to Rs. 1,54,51,351 by the Assessing Officer when the income returned by the assessee in its original return of income u/s 153C is Rs.

1,78,46,830. The CIT(A) should not have reduced Total Income below the Income determined by the Assessing Officer.

2. The observation of the CIT(A) in para 6.3 of the Appellate Order that the assessee filed its Return of Income in response to notice u/s 153C declaring a total Income of Rs. 12,96,930/- is not factually correct. The assessee did not file its return of Income either u/s 139(1) or 139(4). The original return of income declaring total income of Rs 1,78,46,830 filed by the assessee on 11.11.2013 is not even a belated return u/s 139(4). Even the Return of Income filed by the assessee in response to notice u/s 153C on 18.12.2013 disclosed income of Rs 1,78,46,830. The firm again revised its Return of Income on 06.02.2014 lowering the Total Income to Rs. 26,60,350. Since the Return of Income u/s 153C cannot be revised, the revised Return of Income filed is not valid. As there is no return of income disclosing an income of Rs 12,96,930 as stated by CIT(A), the decision of CIT(Appeals) is not based on correct facts and figures.

3. The observation of the CIT(A) that there are two sets of tally accounts is not correct. Three of the seized documents A-28 (pages 16 & 17/Profit & loss account), A-28 (pages 13 & 14/ Profit & Loss account) & A-II (pages 25 & 26) reflected Rs. 76,68,96,714 as the figure of sales; also A-II (page 29/ sales register for 01/04/2010 to 01/04/2011) showed the closing balance figure as Rs. 79,17,84,486/-. Further as per seized document A-12 (pages 8 to 37 - sales register from 01.04.2010 to 31.03.2011), grand total sales reflected amounted to Rs. 78,35,86,819/-. Thus when majority of the seized material showed the figure of sales ranging from Rs. 76.68 crores to Rs. 79.18 crores, the CIT(A) erred in averaging the sales to Rs 43.68 crores based on figures supplied by the assessee. There is no documentary evidence in form of seized material showing sales of 8,41,81,607 and hence the same was wrongfully adopted.

4. The decision of the CIT(A) is devoid of logic and is arbitrary.

13. The facts of the case are that the assessee filed its return of income in response to notice u/s. 153C declaring a total income of Rs.12,96,930/- which was subsequently revised after two months declaring a total income of Rs.26,60,351/-. The Assessing Officer assessed the income at Rs.1,54,51,351/-.

During the course of search conducted at the business premises of the assessee firm on 09/06/2011, certain documents containing profit and loss accounts were found and seized. Out of that documents, pages 25 and 26 of item A11 of Annexure A, which contained a sales figure of Rs.77,25,67,453/- was utilized by Assessing Officer for estimating the income of the assessee. Hence, the Assessing Officer adopted 2% of the above sales as net profit of the assessee.

14. Against this, the assessee carried the matter in appeal before the CIT(A). The CIT(A) observed that Assessing Officer should not adopt the highest sales figure for estimating assessee's income, when the veracity of data itself is not authenticated. The CIT(A) adopted average of sales turnover from two P&L accounts found during the search to meet the ends of justice. Accordingly, the CIT(A) directed the Assessing Officer to take the average of sales turnover, reflected in two P&L accounts and recompute/estimate the income of the assessee.

15. Against this the Revenue is in appeal before us.

16 We have heard the rival submissions and perused the record. In this case the seized material marked as A-14 to Annexure A page 25-26 showed the total turnover of Rs.78,61,13,658/-. At the time of assessment, it was noticed by the Assessing Officer that the turnover was at Rs.79,17,84,486/- . The assessee was

asked to explain the difference between the turnover reflected in the seized material and the audited accounts. The assessee has not given any reasonable explanation to the query made by the Assessing Officer. The Assessing Officer later considered the total turnover of the assessee at Rs.77,25,67,543/- after deducting sales return of Rs.1,92,16,943/- from Rs.79,17,84,486/- and estimated income at 2% of the gross turnover working out at Rs.1,54,51,351/-. The CIT(A) considered the average of the turnover in audited books of account and total turnover found in seized material and worked out the total turnover of the assessee. In our opinion, audited turnover is part and parcel of total turnover and there is no separate audited turnover so as to take the average of turnover in audited books of account and total turnover found during the course of search and seizure action. Accordingly, we vacate the findings of the CIT(A) and uphold the order of the Assessing Officer wherein he had determined total income on the basis of total turnover found during the course of search and seizure. Hence, this ground of appeal of the Revenue is allowed. Thus, the appeal of the Revenue is allowed.

8. In the result, all the appeals filed by the assessee are dismissed and both the appeals filed by the Revenue are allowed.

Order pronounced in the open Court on this 27th September, 2018.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 27th September, 2018

GJ

Copy to:

1. M/s. Avathar Jewellers, AIWA Towers, Edappal, Malappuram.
2. The Deputy Commissioner of Income-tax, Central Circle, Thrissur.
3. The Assistant Commissioner of Income-tax, Central Circle, Thrissur.
4. The Commissioner of Income-tax(Appeals), Thrissur.
5. The Commissioner of Income-tax, Central, Kochi.
6. D.R., I.T.A.T., Cochin Bench, Cochin.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin