

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member**

ITA No.2229/Hyd/2017
(Assessment Year: 2011-12)

Dy. Commissioner of Income Tax (I.T.)-1 Hyderabad <i>(Appellant)</i>	Vs	M/s. Fair Field Developments Ltd Hyderabad PAN:AABCF3158N <i>(Respondent)</i>
---	----	---

C.O. No.20/Hyd/2018
(Arising out of ITA No.2229/Hyd/2017)
A.Y. 2011-12

M/s. Fair Field Developments Ltd Hyderabad PAN:AABCF3158N <i>(Cross Objector)</i>	Vs	Dy. Commissioner of Income Tax (I.T.)-1 Hyderabad <i>(Respondent)</i>
---	----	--

For Revenue :	Shri Nilanjan Dey, DR
For Assessee:	Shri Akshan Surana & Siddharth Surana

Date of Hearing:	08.04.2019
Date of Pronouncement:	12.06.2019

ORDER

Per Smt. P. Madhavi Devi, J.M.

The appeal is filed by the Revenue against the order of the CIT (A)-V, Hyderabad dated 16.06.2014 for the A.Y 2011-12 whereas the C.O is filed by the assessee.

2. At the outset, it is seen that the Revenue's appeal is filed with a delay of 1159 days and an application for condonation of delay is filed. In the application filed initially for the condonation of delay, the Revenue had stated that the assessment order u/s 143(3) r.w.s. 144C of the Act was passed on 27.03.2014 and aggrieved by the same, the assessee filed an appeal before the CIT (A) which was disposed off vide order dated 16.06.2014 along with the appeal of the assessee. He submitted that the order of the CIT (A) was received in the office of the CIT (IT & TP) Hyderabad on 25.08.2014 and that the due date of filing of appeal before the ITAT was 25.10.2014. It is also submitted that the AO had recommended for filing of further appeal before the ITAT and accordingly directions u/s 253(2) of the Act were issued vide orders dated 16.10.2014. He submitted that these directions were duly forwarded to the AO and the Range Head Office, however, the same was not filed before the ITAT within the due date. It was submitted that during the year 2014, cadre restructuring of the I.T. Deptt. had taken place which resulted in a drastic change in the jurisdiction of various offices at Hyderabad and this led to large cross-movement of files and folders across various offices and there was loss of communication between the Officers of the I.T. Department directly. It was submitted that the appeal was filed after a delay of 1154 days and prayed for condonation of appeal.

3. The learned Counsel for the assessee objected to this condonation of delay when the matter was heard on 20.11.2018 and the learned Counsel for the assessee took serious objections to the condonation of delay. He submitted that the application

filed by the Revenue was incomplete as it does not give any details, such as the person responsible for the misplacement of the file, action taken by the Department against such person and as to when the file was misplaced etc., He submitted that the trigger point for filing of this appeal by the Revenue with a delay of 1159 days was the proceedings in the assessee's case for the A.Y 2014-15 and not the reasons stated by the Department in the application filed for condonation of delay. The learned DR at that point of time sought time to file the chronological events regarding the delay of 1159 days and on 26.12.2017 he filed detailed explanation for filing the appeal with a delay. The learned Counsel for the assessee wanted to go through and sought time and accordingly the matter was adjourned till today.

4. The learned DR relied upon the submissions made by the AO i.e. Dy. CIT-I(IT&TP) vide letter dated 28.11.2018 stating that the relevant CIT i.e. Dy. DIT was holding three charges during the relevant period and also that the file had got misplaced due to cadre restructuring of the I.T. Department and movement of files from one office to other. He, therefore, prayed that the delay of 1159 days be condoned and appeal be disposed of on merit.

5. The learned Counsel for the assessee, on the other hand, placed reliance upon the decision of the Hon'ble Supreme Court in the case of Union of India vs. Vidarbha Veneer Industries reported in (1994) SCC, Supl.(2)696 dated 13.08.1993 wherein the Hon'ble Supreme Court took note of similar reasons given

therein that the relevant file was misplaced for quite sometime in the office of the Central Agency and that the SLP was filed for some delay, even though the file could not be traced. The Hon'ble Supreme Court observed that there is nothing in the application for condonation of delay to indicate the action was taken to find out how the file got misplaced or to fix the responsibility on the person who should be accountable for the same. Therefore, the Hon'ble Supreme Court refused to condone the delay. He has filed before us the instructions regarding the standard operating procedure to be followed by the Department to file an appeal before the ITAT and has drawn our attention to the procedures to keep track of the file for filing of the appeal and pursuing the same before the ITAT. He has also filed a detailed chart on the various procedures which should have been adopted by the Department even in the assessee's case and submitted that there is clear dereliction of the duty by the Department and that the delay is clearly without any reasonable cause. He, therefore, submitted the inordinate delay of 1159 days in filing of the appeal should not be condoned. He also reiterated the submissions that the AO filed appeal against the order of the CIT (A) only with an intent to the anticipated benefit for Revenue due to substantial tax effect arising in the year 2014-15.

6. Having regard to the rival contentions and the material on record, we find that in the case before us, the Revenue is explaining, the cadre restructuring in the Department and also holding of different charges by the Dy.CIT (IT) during the relevant period, as a reasonable cause for misplacement of the files and retracing after a period of two years necessitating the filing of the

appeal with a delay of 1159 days. We find that the fact of the case before the Hon'ble Supreme Court in the case of Union of India vs. Vidarbha Veneer Industries (Supra) are slightly different as in that case, the petitioners could not give a satisfactory explanation for misplacement of the files and it was in those circumstances, that the Hon'ble Supreme Court held that the Department has failed to find out and how the file got misplaced and to fix the responsibility on someone and who should be accountable, while in the case before us, the cadre restructuring, the cross-movement of files from one location to another are the reason given for the delay. Being a huge Department, all the standard procedures have been laid down and all the officers are required to follow the same and maintain the files accordingly. The learned CIT (DR) had submitted that this is a single case which had got misplaced and that the Department has taken due care in all the cases to file the appeal without any delay. He submitted that it was only due to the huge workload holding other charges and it escaped the attention and it was only after the file got traced out that the appeal could be filed. We find this contention of the learned DR to be acceptable and the reasons explained by the Department are satisfactory. We also accept the assessee's contention that the proceedings of 2014-15 could be trigger point for tracing of the file and filing of the appeal with delay. However, we are of the opinion that it should not come in the way of considering the reasonable cause for condonation of delay and we accept the contention of the learned DR. Therefore, we condone the delay of 1159 days in filing of the appeal before the ITAT.

7. Coming to the merits of the case, we find that the assessee had made investments in debentures of related parties and had made investments in debentures of Watermarke Residency Private Ltd and had received interest on the investment which was admitted as interest income under the head “income from other sources”. As per the details furnished by the assessee company, the debentures issued by the subsidiaries carried interest rate of 15.75%. During the assessment proceedings the assessee was asked to justify the interest @ 15.75% charged on the investments in debentures of the two subsidiaries.

8. In response, the assessee filed a note wherein it was stated that the Board had decided the rate of interest at 15.75%. The assessee also furnished the details of interest charged on debentures of various companies, the average of which was 11.20%. The AO, observing that the average rate of interest charged in similar circumstances by other company was 11.20%, adopted the same as reasonable rate of interest and the difference of 4.55% was proposed to be added to the returned income of the assessee.

9. The AO also considered the DTAA between India and Cyprus and observed that the DTAA allows recharacterization of costs of payment of interest, as “income from other sources”. Accordingly, he passed a draft assessment order proposing the adjustment of interest. At this stage, the assessee filed an application dated 20.03.2014 requesting the AO to take into consideration the attached information/document filed by the

assessee before passing the order u/s 143(3) of the Act. The AO observed that the assessee's request cannot be accepted for the reason that no new evidence can be considered at the stage after the draft assessment order is passed and the assessee did not prefer to file an appeal/or objections to the DRP. Therefore, final assessment order was passed. The assessee filed an appeal before the CIT (A) by filing additional evidence before him. The CIT (A) accepted the assessee's contention and directed the AO to compute interest @ 15.75% as the "Arms Length" rate of interest. Thereafter, the CIT (A) directed the AO to tax the interest @10% as per the provisions of Article 11(2) of Indo-Cyprus DTAA, without including the surcharge or education cess. Aggrieved, the Revenue is in appeal before us by raising the following grounds of appeal:

"1. The order of the Ld. CIT(A) is erroneous on facts and in law.

2. The Ld. CIT(A) erred in holding that the rate of interest of 15.75% paid by the assessee in respect of debentures of its associate concern M/s Watermarke Residency Private Ltd, represents arms length rate of interest and there is not justification for applying the provisions of Article 11 (7) of the India Cyprus OT AA for treating part of the interest payment as excessive and assessing it as other income liable for tax at 40%.

3. The LO. CIT(A) erred in admitting additional evidences furnished by the assessee during the appellate proceedings though the conditions prescribed for such admission in Rule 46A(1) are not satisfied and without recording his reasons for admission as required under Rule 46A (2) of the I.T Rules.

4. The Ld. CIT (A) erred in considering the additional evidences furnished by the assessee during the appellate proceedings without affording an opportunity to the Assessing Officer to examine such evidences and furnish his rebuttal as mandated under Rule 46A (3) of the I.T. Rules.

5. The Ld. CIT(A) erred in stating that the cases relied on by the AO for determining the arms length rate of interest

cannot be treated as comparable cases on account of such cases having higher turnover and higher credit rating in comparison to the associate enterprise of the assessee which issued the debentures, without bringing any facts on record to support such finding.

6. The Ld. CIT(A) erred in stating that the additional five cases of Indian companies which issued debentures whose details were furnished as additional evidences during the appellate proceedings represent comparable cases on account of such cases having turnover and risk profile similar to that of the associate enterprise of the assessee, without bringing any facts on record to support such finding.

7. The Ld CIT(A) erred in directing the AO to tax the interest income under Article 11 (2) of OT AA @ 10% without levying any surcharge and education cess by relying on decisions of the ITAT Mumbai and ITAT, Kolkota. The learned CIT(A) ought to have followed the decision of the Hon'ble High Court of Uttarakhand in the case of CIT vs. Arthusa Offshore Co 169 Taxman 484 and the decision of the Authority for Advance Ruling in the case of Air Ports Authority of India in Re 299 ITR 102 and held that surcharge and education cess are to be levied in addition to the rate of tax specified in the DT AA for the relevant income.

8. Any other grounds that may be urged at the time of hearing”.

10. We find that the assessee had filed additional details before the CIT (A) but the CIT(A) has not called for any remand report from the AO but has accepted the assessee's contention. Though the powers of the CIT (A) are co-terminous with the AO, the CIT (A) has failed to verify the details himself, nor has he called for a remand report, particularly when the AO in the assessment order had clearly brought out that he is not considering the additional information filed by the assessee because it was filed after passing of the draft assessment order. This acceptance of additional evidence without giving the AO an opportunity to verify the same clearly in violation of Rule 46A of

the I.T. Rules. Further, it is the case of the assessee that the investments in debentures were made in rupees and therefore, the SBI PLR rate should be adopted. We find that all these contentions need consideration by the AO/TPO along with the additional evidence filed before the CIT (A). Therefore, we deem it fit and proper to remand the issue to the file of the AO/TPO for denovo consideration in accordance with law. Needless to mention that the assessee shall be given a fair opportunity of hearing.

11. In the result, Revenue's appeal is allowed.

12. With regard to the assessee's Cross Objection, the C.O is filed with a delay of 72 days and on going through the same, we find that the C.O is only in support of the order of the CIT (A). Therefore, the delay is condoned but the C.O of the assessee is rejected.

13. In the result, Revenue's appeal is allowed and the C.O filed by the assessee is dismissed.

Order pronounced in the Open Court on 12th June, 2019.

Sd/-
(S.Rifaur Rahman)
Accountant Member

Sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 12th June, 2019.
Vinodan/sps

Copy to:

- 1 Dy. CIT-1 (International Taxation) 5th Floor, Aayakar Bhavan, Basheerbagh, Opp: LB Stadium, Hyderabad 500004
- 2 M/s. Fairfield Developments Ltd, D.No.8-2-293/82/L/287A Road No.12, Banjara Hills, Hyderabad
- 3 CIT (A)-V Hyderabad
- 4 Director (I.T. & T.P) Hyderabad
- 5 The DR, ITAT Hyderabad
- 6 Guard File

By Order