IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI G.S. PANNU (VP) AND SHRI RAM LAL NEGI (JM)

ITA No. 1193/MUM/2014
Assessment Year: 2009-10

M/s Shree Pushkar Chemicals & Fertilizers Ltd., 202, A Wing, Bldg., No. 3, Rahul Mittal Industrial Estate, Sir M.V. Road, Andheri (East), Mumbai – 4000059 PAN: AAACS9372E	**Vs.**	The CIT-7, Room No. 611, Aaykar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee by : Shri S.C. Tiwari & Ms. Rutuja Pawar

Revenue by : Shri V. Justin &
Manish Kumar Singh (DRs)

Date of Hearing: 18/01/2019
Date of Pronouncement: 15/04/2019

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 08/03/2013 passed by the Ld. Commissioner of Income Tax (CIT) -7, Mumbai, for the assessment year 2009-10, whereby the Ld. CIT has set aside the assessment order to the file of AO for reconsidering some of the issues by exercising jurisdiction u/s 263 of the Income Tax Act, 1961 (for short 'the Act').

2. In the present case, the AO passed the assessment order u/s 143 (3) of the Act determining the total income of the assessee at Rs. 96,09,160/- (rounded off), allowing deduction under chapter VI-A u/s 80IB amounting to Rs. 23,86,938/-The Ld. CIT revised the assessment order u/s 263 of the Act on the ground that the assessment order is erroneous and prejudicial to the

interest of the revenue as the AO has wrongly allowed the assessee's claim of deduction u/s 80IB (3)(ii) amounting to Rs. 23,86,939/-. The assessee has shown the total value of investment and plants and machinery in the undertaking at Rs. 13.21 crore in Form No. 10 CCB, whereas per sub section 14(g) of section 80IB read with section 11(b) of the Industries (Development and Regulation) Act, Small Scale Industry is defined an industrial undertaking in which the investment in plants and machinery does not exceed Rs. 1 crore. Accordingly, the assessee is not eligible for claiming deduction u/s 80IB(3) (ii) of the Act. The Ld. CIT after hearing the assessee set aside the assessment order to the file of AO for taking a decision afresh considering the said issue.

3. Aggrieved by the order of Ld. CIT, the assessee has preferred this appeal before the Tribunal on the following effective grounds:-

1. *"That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in directing the assessing officer to make a fresh assessment order.*

2. *That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in holding that the issue of whether ancillary plant and machinery was to be taken into account for determining total value of plant and machinery with regard to limits for small scale industry was never considered and examined in the assessment proceedings.*

3. *That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in holding that the assessment order under section 143(30 made by the assessing officer was erroneous because of the appellant's claim of deduction under section 80IAB of the Act was allowed without conducting the inquiries which are prima facie warranted on the facts and circumstances of the appellant's case.*

4. *That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in passing the impugned order even though he had no material to hold that*

the appellant's claim of deduction under section 80-IB was not justified.

5. *That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in directing the assessing officer to make a fresh assessment of the appellant without arriving at any specific finding and conclusion in relation to the appellant's claim of deduction under section 80IB.*

6. *That on the facts and in the circumstances of the appellant's case and in law, learned CIT has erred in directing the assessing officer to make a fresh assessment without appreciating that the order under section 263 cannot be made merely because of a difference in opinion with the assessing officer.*

7. *That the impugned order being contrary to law, evidence and facts of the case may kindly be set aside, amended or modified in the light of the grounds of appeal enumerate above.*

8. *That each of the grounds of appeal enumerated above is without prejudice to and independent of one another."*

4. Since, there is a delay of 286 days in filing the present appeal, the assessee has filed an application for condonation of delay on the ground that the tax advisor of the assessee advised the assessee not to file any appeal before passing order by the AO giving effect to the order passed by the Ld. Commissioner u/s 263 of the Act. In the light of the application for condonation of delay, the Ld. counsel for the assessee submitted that since the delay in filing the appeal has been caused due to erroneous advise given by the tax advisor and the assessee had acted upon under the *bona fide* belief, the application may be allowed and the assessee may be permitted to argue its case on merits. The Ld. counsel relied on the judgments of the Hon'ble Supreme Court delivered in the case of *Collector Land Acquisition Vs. Mst. Katiji*

& Others, 1987 AIR 1353 and *Improve trust Ludhiana vs. Ujagar Singh and others* (Civil Appeal No. 2395 of 2008 dated 09.06.2010).

On the other hand, the Ld. DR opposed the application for condonation of delay on the ground that the application has been filed in a mechanical manner as the assessee has not taken any action against the advisor. The Ld. DR further relying on the decisions of the Hon'ble High Court of Bombay in the case of *Somerset Place Co-operating Housing Society vs. ITO (2015) 57 taxman.com 7 (Bom)*, decision of the Hon'ble Madras High Court in the case of *Mrs. P S Rajeshwari vs. ACIT* and the decisions of the various Benches of the ITAT submitted that the assessee had no sufficient cause which prevented it from filing the present appeal within the prescribed period so as to condone the delay.

5. We have heard the rival submissions and also gone through the material on record including the case relied upon by the parties. Sub-section 5 of section 253 of the Income Tax Act provides that the Tribunal may admit appeal or permit filing of memorandum of cross- objection of respondent after expiry of relevant period of limitation referred to in sub-section 3 and 4 section 253, if it is satisfied that there was sufficient cause for not presenting the appeal within the limitation period. Expression "sufficient cause" appearing in this section has also been used in section 5 of Indian Limitation Act, 1961. This expression has come for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court, and the Hon'ble Courts are unanimous in observing that whenever such issue comes for consideration before adjudicating authority, then "sufficient cause" should be considered with justice oriented approach. We deem it appropriate to make reference to the decision of Hon'ble Supreme Court in the case of Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353. The relevant part of the judgment reads as under:

> *"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 pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, 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 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."

6. Similarly, in the case of *Improvement Trust Ludhiana vs. Ujagar Singh and others* (supra) the Hon'ble Supreme Court has held that unless *mala fides* are apparent on the conduct of the parties, as a general rule delay should be condoned and an attempt should be made to allow the matter to be contested on merits rather than to through it on technical grounds. We further notice that the facts of the case relied upon by the revenue are different from the facts of the present case. Hence, respectfully following the ratio laid down by the Hon'ble Supreme Court in the cases discussed above, we allow the application for condonation of delay filed by the assessee in the interest of justice and permitted the Ld. counsel for the assessee to argue the case of the assessee on merits.

7. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT has wrongly exercised the jurisdiction u/s 263 of the Act in the present case as the Ld. CIT has wrongly held that the issue whether ancillary plant and machinery was to be taken into account for determining total value of plant and

machinery with regard to limits for small scale industry was not examined during the assessment proceedings. Since, the assessee was entitled for claim of deduction u/s 80IB of the Act, the Ld. CIT has wrongly held that the assessment order passed u/s 143 (3) is erroneous. The Ld. counsel further contended that the Ld. CIT has wrongly exercised the powers of revision in the absence of any material to hold that the applicant claims of deduction u/s 80IB was not justified. The Ld. counsel further contended that the powers u/s 263 cannot be exercised merely because of a difference of opinion with the Assessing Officer. The Ld. counsel further contended that the assessee never lost its small scale industry character as the cost of the value of plant and machinery as per books of account is only 380.61 lacs and the remaining amount pertain to other auxiliary equipments/assets which are required to be excluded for the purpose of computing the value of plants and machinery. Since, the assessee was entitled for the deduction, the AO has rightly allowed the same. Hence, the order passed by the Ld. CIT is bad in law as the assessment order is not erroneous within the meaning of section 263. The Ld. counsel further contended that since the order is not erroneous and prejudicial to the interest of the revenue, the Ld. CIT has wrongly exercised the powers u/s 263 of the Act. Therefore, the same is liable to be set aside.

7. On the other hand, the Ld. DR relying on the order passed by the Ld. CIT submitted that since the AO has allowed the deduction without examining the eligibility of the assessee, the Ld. CIT has rightly set aside the assessment order to the file of AO for determining the issue afresh in the light of the observations made in order passed u/s 263 of the Act. Since, the Ld. CIT has directed the AO to examine the issue afresh, there is no infirmity in the order passed by the Ld. CIT.

8. We have heard the rival submissions and also gone through the entire material on record including the orders passed by the authorities below. In the present case, the Ld. CIT has set aside the assessment order passed by the AO

on the ground that the AO has not examined the eligibility of the assessee for claiming deduction under section 80IB in the light of the fact that as per the definition of small scale industry, the investment in plant and machinery exceeding 1 crore is not eligible for deduction u/s 80IB. The contention of the assessee is that as on 31.03.2008 the gross block of plant and machinery of the industrial undertaking as per the books of account was Rs. 1320.65 lacs out of which only 380.61 lacs pertain to the plant and machinery and the remaining values pertain to other auxiliary equipments/ assets. As pointed out by the Ld. counsel, small scale industry means an industrial undertaking which is as on the last day of the previous year regarded as small scale industry u/s 11B of the Industrial Development and Regulation Act, 1951 (IDRA). In view of the section 11B of IDRA is the central government is empower to issue notification to declare certain class industry as SSI. The Ld. counsel further pointed out that notification No. SO 857-E dated 10.12.1997 defines nature of plant and machinery which excludes the auxiliary and other equipments not directly related to production or article or thing, the relevant para of the said notification is reproduced as under:-

> *"b. In calculating the value of plant and machinery, the followings shall be excluded, namely:-*
> *i. the cost of equipments such as tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores.*
> *ii. the cost of installation of plant and machinery*
> *iii the cost of research and development equipment and pollution control equipment.*
> *iv. the cost of generation sets and extra transformer installed by the undertaking as per the regulations of the State Electricity Board.*
> *v. the bank charges and service charges paid to the National Small Industries Corporation or the State Small Industries Corporation.*
> *vi. the cost involved in procurement or installation of cables, wiring, bus bars, electrical control panels (not those mounted on individual machines), oil circuit breakers or miniature circuit*

breakers which are necessarily to be use for providing electrical power to the plant and machinery or for safety measures.
vii. the cost of gas producer plants.
viii transportation charges (excluding of sales-tax and excise) for indigenous machinery from the place of manufacturing to the site of the factory.
ix charges paid for technical know-how for erection of plant and machinery.
x. cost of such storage tanks which store raw materials, finished products only and are not linked with the manufacturing process and
xi cost of fire fighting equipments."

9. So if the value of auxiliary equipments/assets are excluded from the gross block of plant and machinery of the industrial undertaking the value of plant and machinery remains Rs. 380.61 lacs and since the value of plant and machinery is not exceeding 1 crore the assessee is entitled for the deduction claimed u/s 80IB. We further notice that this explanation of the assessee was submitted before the Ld. CIT by the assessee on 19.02.2013 in reply to the notice issued u/s 263 of the Act. The Hon'ble Bombay High Court in the case of *CIT vs. Gabriel India Ltd. 203 ITR 108,* has held that the powers u/s 263 can be exercised only if the circumstance specified therein exists i.e. the order must be erroneous and by virtue of the erroneous order prejudice has been caused to the interest of the revenue. Therefore, an order cannot be termed as erroneous unless it is not in accordance with the law. In the case of *Malabar Industrial Co. Ltd* v. *CIT* [2000] 243 ITR 83.the Supreme Court explained the scope and content of revisional power of the Commissioner under Section 263 as follows:

"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised

is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue – recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the Income Tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law."

10. We further notice that in the present case the Ld. CIT has set aside the issue to the file of AO without giving a finding based on cogent material that the order in question is erroneous as wee as prejudicial the interest of the revenue. In the light of the facts of the case and in the law laid down by the Hon'ble High Court and the Hon'ble Supreme court, discussed above, we are of

the considered view that the assessment order passed by the AO in the present case is neither erroneous nor prejudicial to the interest of the revenue so as to revise the same under section 263 of the Act. Hence, we hold that the Ld. CIT has wrongly exercise the jurisdiction u/s 263 of the Act, in the present case. We therefore, allow the sole ground of the appeal of the assessee and set aside the order passed by the Ld CIT under section 263 of the Act.

In the result, appeal filed by the assessee for assessment year 2009-10 is allowed.

Order pronounced in the open court on 15th April, 2019.

Sd/-	*Sd/-*
(G.S. PANNU)	(RAM LAL NEGI)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 15/04/2019

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**