-आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI PRADIPKUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.27 and 28/Ahd/2019**
[Asstt.Year: 2007-08]

Shriram Tubes P.Ltd. 11, nandan Society Nr. Naranpura Rly. Crossing Opp: Dena Bank Usmanpura, Ahmedabad 380 013.	Vs.	DCIT, Cir.4(1)(1) Ahmedabad.
(Applicant)		(Respondent)

Assessee by	:	Shri G.C. Pipara, AR
Revenue by	:	Smt.Aparna Agrawal, CIT-DR

*सुनवाई की तारीख/*Date of Hearing : 03/07/2019
*घोषणा की तारीख /*Date of Pronouncement: 28/08/2019

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Present two appeals are directed at the instance of the assessee against two separate orders of the ld.CIT(A)-8, Ahmedabad dated 13.11.2018 passed for the assessment year 2007-08; in other words, ITA No.27/Ahd/2019 has arisen from the assessment order dated 23.3.2015 passed under section 144 r.w. section 143(3) of the Income Tax Act, 1961, whereas ITA No.28/Ahd/2019 has arisen from a penalty order passed under section 271(1)(c) on 28.9.2015. Since common issues are

involved in both the appeals, therefore, we heard them together and proceed to dispose of by this common order.

2. There was a delay of 39 months in filing appeal before the ld.CIT(A) against the assessment order dated 23.3.2015 passed under section 144 r.w. section 143(3) of the Act. Similarly, there was a delay of 27 months in filing the appeal before the ld.CIT(A) against penalty order dated 23.9.2015. The assessee has filed application for condonation of delay before the ld.CIT(A) in both the appeals. Such delay has not been condoned by the ld.CIT(A), and both the appeals were dismissed being time barred. Therefore, common issue involved in both the appeals is, whether the delay in filing the appeal before the ld.CIT(A) deserves to be condoned in both the appeals, and whether they are required to be remitted back for adjudication on merit.

3. The facts on all vital points are common therefore, for the facility of reference, we take up the facts from quantum appeal.

4. Brief facts of the case are that the assessee-company at the relevant time was manufacturing copper tubes. It has filed its return of income on 1.12.2007 declaring total income at Rs.93,90,600/-. This return was processed under section 143(1) of the Act. The AO has observed that DDIT(Investigation), Unit-2(2), Ahmedabad vide letter dated 25.3.2014 intimated that office of Director General of Central Excise Intelligence, Ahmedabad had carried out search and investigation in the case of the assessee. During the course of investigation, it came to the notice of the Exercise Department that the assessee has removed illegally copper mother tubes having value of Rs.6.08 crores during the

period 24.8.2006 to 10.10.2006. Such copper tubes were manufactured out of books and were removed without payment of excise duty. On the basis of same information, the AO sought to reopen the assessment order and he issued a notice under section 148 on 29.3.2014.

5. It emerges out from the record that against this notice, the assessee wrote a letter on 5.5.2014 objecting to the proceedings under section 148 on the ground that the notice was invalid because it was served beyond the time limit of six years from the end of the relevant assessment year. A reference to section 151 was made to the AO. The AO thereafter proceed to pass *ex parte* assessment order, and he made addition of Rs.24,04,65,605/- on account of unaccounted income earned from sale of copper tubes out of books and Rs.3,92,96,299/- with the aid of section 43B on account of non-payment of statutory dues of excise department. According to the revenue authorities, this assessment order was served upon the assessee. This order was passed on 23.3.2015 and dispatched at the address given in the return on 30.3.2015. But it was also returned by the postal authorities in the same manner as the notice issued under section 148 was come back. The assessee has filed the appeal before the ld.CIT(A) against the assessment order after delay of 39 months.

6. Similarly, penalty proceedings under section 271(1)(c) of the Act was initiated against the assessee, and in an *ex parte* order penalty of Rs.8,09,40,722/- was imposed vide order dated 28.9.2015. Appeal against this order was presented after expiry of limitation by 27 months. In order to explain the delay, the

assessee has filed explanation which has been reproduced by the ld.CIT(A), and the same reads as under:

> 1. *"The Company Shriram Tubes Pvt. Ltd. (STPL) is a Private Limited company incorporated on 12/11/1987 vide Registration No. U27100GJ1987PTC010130.*
>
> *2. It is assessed to income tax under PAN No. AACCS6844H.*
>
> 3. *For the relevant Asst, year 2007-08, the jurisdiction of the appellant company was with the Income Tax Officer, Ward 8(2), Ahmedabad and its present jurisdiction lies with the Dy. CIT, Circle-4(1)(1), Ahmedabad.*
>
> 4. *During the previous year relevant Jo Asst. Year 2007-08, the appellant company is engaged in the business of manufacturing and selling of copper tubes.*
>
> 5. *The books of account of the appellant company are subject to audit under the provisions of Companies Act, 1956 as well as under the provisions of Sec. 44AB of the Income Tax Act, 1961 (hereinafter referred to as the Act). For the Financial Year 2006-07 relevant to Asst. Year 2007-08, Total Turnover (Sales Jobwork Charges & Job work charges) of the appellant company is of Rs. 19,32,38,280/-and Net Profit before Tax is of Rs. 90,33,664/-.*
>
> 6. *The return of income for Asst. Year 2007-08 was e-filed on 01/12/2007 declaring total income of Rs. 93,90,600/-. The same was processed u/s. 143(1) of the Act. (However, the copy of the Intimation u/s. 143(1) of the Act is not available with the appellant company).*
>
> *7. As per the Panchnama dated* 28/08/2012 *in Appendix-IIIB, the Assistant Commissioner, Central Excise, Division-Ill, Ahmedabad-I attached the factory premises of the appellant company situated at Plot No. 415/2/1, GIDC, Phase-11, Vatva, Ahmedabad. (This was the registered office and factory premises of the company).*
>
> *Further, as per Appendix-IIIC dated 27/08/2012, the Assistant Commissioner, Control Excise, Division-III, Ahmedabad-1 ordered that "It is ordered that you are hereby prohibited and restrained, until the further order of the under signed, from transferring or charging the under-mentioned property in any was and that all persons be, and that they are hereby prohibited from taking any benefit under such transfer or charge." The specification of the property given in the said Appendix IIIC is as under:*
>
> *M/s. Shriram Tubes,*
> *Plot No. 415/2/1,*
> *GIDC, Phase-11, Vatva,*
> *Ahmedabad (Specification of property)*

Subsequently, the Dy. CIT, Circle-8, Ahmedabad issued the notice u/s.148 of the Act dated 29/03/2014. The said Notice dated 9/03/2014 was addressed as under:

> *M/s. Shriram Tubes Pvt. Ltd.*
> *Shriram Tubes Pvt. Ltd.*
> *415/2/1 GIDC, Phase II, Vatva Road,*
> *Ahmedabad Gujarat 382440*

The appellant company vide its letter dated 05/05/2014 addressed to The Dy. CIT, Circle-8, Ahmedabad, which was filed in Tapal on 07/05/2014 with the office of the Dy. CIT, Circle-8, Ahmedabad, submitted that the Notice u/s. 148 of the Act dated 29/03/2014 was, dispatched from the I.T. Department itself on 09/04/2014 only and not on 29/03/2014 and thus, there was no valid issue and service of the notice u/s. 148 of the Act on or before 31/03/2014. In support of this fact, the copy of Track result for the speed post booked vide No. EG205353495IN and another speed post 'booked vide No. EG205353257IN taken from the web-site of India Post along with the copy of the speed post covers of both the nos. were attached with the said letter dated 05/05/2014. From the verification both the Track Results along with the speed post covers, following facts emerge:

<u>Speed Post Booking No. - EG205353495IN:</u>

(i) *The Speed Post has been addressed to Shri Chhaganlal Malookchand Shah for the address of 11, Nalanda Society, Naranpura, Ahmedabad-13.*

(ii) The *booking date is 09/04/2014 and booking time is 17:33:00 at Ahmedabad RMS.*

(iii) *This speed post has been delivered on 10/04/2014 at 15:46:00 at Naranpura.*

<u>Speed Post Booking No. - EG205353257IN:</u>

(i) *The Speed Post has been addressed to Shrl Chhaganlal Malookchand Shah for the address of C/o Jay Banas Metal Corporation, 35, Kika Street, Mumbai - 400004.*

(ii) *The booking date is 09/04/2014 and booking time is 18:26:23,at Ahmedabad RMS.*

iii) This speed post has been delivered on 11/04/2014 at 16:55:00 at Girgaon S.O.

(iv) *The Dy. CIT, Circle-4(1)(1), Ahmedabad issued the Notice u/s. 179 of the Act dated 30/03/2017 addressed to Shri Chhaganlal M. Shah, director of the appellant company. However, the same was not attended/complied by him.*

(v) *The Dy. CIT, Circle-4(1)(1), Ahmedabad issued the Letter No. DCIT/Cir- 4(1)(1)/Recovery/STPL/2017-18 dated 29/08/2017 in connection with the recovery of arrear demand for AY 2007-08 in case*

of the appellant company. The said letter dated 29/08/2017 was addressed to Shri Chhaganlal M. Shah, director of the appellant company. (However, the same was not attended/ complied by him).

(vi) *Subsequently, the Dy. CIT, Circle-4(1)(1), Ahmedabad passed the Order u/s. 179 of the Act dated 02/11/2017 in the name of the appellant company having address* as *415/2/1, GIDC, Phase II, Vatva, Ahmedabad - 382440. The copy of the said order u/s. 179 of the Act dated 02/11/2017 was also sent to Shri Chhaganlal M. Shah, Director of f the appellant company at his residence address i.e. 11, Nandan Society, Naranpura, Ahmedabad - 380 013 and to Shri Mafatlal H. Shah, also director of the appellant company mentioning the address of the factory premises of the appellant company.*

(vii) *Finally, the factory premises of the appellant company was auctioned on 23/01/2018 by MSTC Limited, Vadodara to the HI bidder namely Raj Enterprise.*

(viii) *Thereafter, the Dy. CIT, Circle-4(1)(1), Ahmedabad passed the Corrigendum to Order u/s. 179 of the Act dated 09/04/2018 stating that The Order passed u/s. 179 of the Act in the name of the company M/s. Shriram Tubes Pvt. Limited wherein the name and address should be read as Shri Chhaganlal M. Shah and Shri Mafatlal H. Shah, Jay Banas Metal Corporation, 35, Kika Street, Mumbai, Maharashtra - 400 004."*

(ix) *Thereafter, the Dy. CIT, Circle-4(1)(1), Ahmedabad issued the Notice u/s. 226(3) of the Act dated 06/06/2018 addressed to the Branch Manager, HDFC Bank, Kalol Brand, Kaiol, Gandhinagar. A copy of the said Notice -u/s. 226(3) of the Act dated 06/06/2018 was also sent to the director Shri Chhaganlal Jain at his residential address i.e. 11, Nandan Society, Nr. Naranpura Railway Crossing, Usmanpura, Ahmedabad.*

Thereafter, the tax Recovery Officer-4, Ahmedabad issued Notice of demand under Rule 2 of second Schedule to the Act dated 08/06/2018 in the name of "The Principal Officer, M/s. Shriram Tubes Pvt. Ltd. having address at Plot No. 415/2/1, Phase II, GIDC, Vatva, Ahmedabad certifying the sum of Rs. 27,38,04,032/- due from the appellant company and directed the said sum within 15 days of receipt of the said notice dated 08/06/2018.

12. *Meanwhile, the Tax Recovery Officer-4, Ahmedabad issued the Summons under Rule 83 of the Income Tax Rules, 1962 in the name of Shri Chhaganlal M. Shah, director of the appellant company to attend his office in connection with the recovery proceedings in case of the appellant company. Shri Chhaganlal M. Shah attended before the Tax Recovery Officer-4, Ahmedabad during the period from 02/07/2018 to 05/07/2018 (exact date of presence before the Tax Recovery Officer-4, Ahmedabad is not remembered / known) and his statement was recorded in the Chamber of the Dy. CIT, Circle-4(1)(1), Ahmedabad during that time, (exact date of recording of the statement of Shri Chhaganlal M. Shah is not remembered / known).*

13. *It was only during the course of recording of the statement of Shri Chhaganlal M. Shah by the Tax Recovery Officer-4, Ahmedabad in the chamber of* Dy. C/T, *Circle- 4(1)(1), Ahmedabad in connection with the demand recovery proceedings in case of Shriram Tubes Pvt. Ltd (i.e. the appellant company), the copy of the scrutiny assessment order u/s.144 r.w.s. 147 of the Act dated 23/03/2015 for AY 2007-08 was provided to him by the DCIT, Circle-(1)(1), Ahmedabad.* ***This is for the first time that the appellant company came to know and received the copy of the scrutiny assessment order dated 23/03/2015 for AY 2007-08.***

14. *The AO completed the scrutiny assessment u/s. 144 r.w.s. 147 of the Act vide Order dated 23/03/2015 determining the total income at Rs. 28,91,52,500/- as against the returned income of Rs.* 93,90,600/- *while making following additions/ disallowances:*

(i) Addition on account of alleged illicitly
15. *manufacturing and clandestinely clearing the copper mother tubes (product) during period from April-2006 to 10/10/2006 Rs. 24,04,65,605/-*

(ii) Addition on account of Alleged non-payment of Statutory dues u/s. 43B Rs.3,92,96,299/-

Total Rs. 27,97,61,904/-

However, as explained hereinabove, the impugned assessment order has not been received by the appellant company since the addressed premises was under seal and possession of the Excise Department since 28/08/2012.

On verification of the said scrutiny assessment order passed u/s. 144 r.w.s. 147 of the Act dated 23/03/2015, it has been gathered that the Assessing Officer i.e. Dy. CIT, Circke-4(1)(1), Ahmedabad has made the total addition of Rs.27,97,61,904/- detailed as above merely on the basis of the information received from information received from the DD/T(Inv.), Unit-/I(2), Ahmedabad vide letter No. DD/T (Inv.)/Unit-II(2) / 07500732/2013-14 dated 25/03/2014.

The director Shri Chhaganlal M. Shah decided to file an appeal against the said scrutiny assessment order u/s. 144 r.w.s. 147 of the Act dated 25/03/2014. The appeal is to be filed online only and for filing the same, digital signature certificate (DSC Token) of the director of the appellant company is required. Since, the company was closed, none of the directors were having the DSC Token. Accordingly, the procedure to obtain the digital signature certificate of the director Shri Chhaganlal M. Shah was followed and his digital signature certificate was obtained on 29/08/2018. Accordingly, this appeal is filed online on 31/08/2018 using said DSC of Shri Chhaganlal M. Shah."

7. Before us, Shri Chhaganlal M. Shah filed a fresh affidavit highlighting factual background, which also reads as under:

"I, Chhaqanlal M. Shah, aged about 76 years, residing at 11, Nandan Society, Near Railway Crossing, Opp. Dena Bank, Naranpura, Ahmedabad - 380 013 and having Aadhar No. 3160 0379 4341 solemnly state and affirm on oath as follows:

1. That I was managing director of the company namely SHRIRAM TUBES PVT. LTD. having its registered office-cum-factory situated at Plot No. 415/2/1, Pjase-1 II, GIDC, Vatva, Ahmedabad - 382445. Another director of the company was Shri Mafatlal H. Shah.

2. That the company Shriram Tubes Pvt. Ltd. has e-filed its return of income for AY 2007-08 on vide acknowledgment no.10048641011207 dated 01/12/2017 declaring total income of Rs. 93,90,600/-.

3. That the registered office-cum-factory premises situated at above mentioned address was seized and possession was taken by the Central Excise Department on 28/08/2012. No business has been carried out by the company thereafter.

4. Finally, said registered office-cum-factory premises was auctioned by the office of the Pr. Commissioner, CGST, Ahmedabad South on 23/01/2018 and the possession was handed over to the buyer by the Excise Department.

5. That in connection with the recovery of outstanding demand of the company Shriram Tubes Pvt. Ltd., I was summoned u/s. 131 of the Act dated 24/07/2018 to remain present before the CJy. Commissioner of Income Tax, Circle-4(l)(l), Ahmedabad. I attended the, of ice between 02/07/2018 to 05/07/2018 (exact date is not remembered / know due to my old age)

6. That my statement was recorded in the office of Dy. Commissioner of Income Tax, Circle-4(l)(l), Ahmedabad between these dates in relation to recovery of arrear demand of the company Shriram Tubes Pvt. Ltd. It was only during this recording of my statement, the copy of the scrutiny assessment order passed u/s. 144 r.w.s. 147 of the Act dated 23/03/2015 and the Penalty Order passed u/s. 271(l)I of the Act dated 28/09/2015 in the name of the company Shriram Tubes Pvt. Ltd. was provided by the Dy. Commissioner of Income Tax to me. This is for the first time that I came to know and received the copy of the scrutiny assessment and penalty order for the AY 2007-08 in the name of the company. Immediately, I informed this fact to another director Shri Mafatlal H. Shah.

7. That after receipt of both the orders, I being one of the directors, decided to file and appeal against both orders. The appeal

before the CIT(Appeals) can be filed online only and for filing the same the Digital Signature Certificate (DSC Token) of the director of the company is required. Since the company was closed, none of the directors were having DSC Token.

8. That the procedure and paper-work to obtain my digital signature certificate was followed and the same was obtained on 29/08/2018.

9. That the appeal against the order u/s. 144 r.w.s. 147 of the Act for AY 2007-08 was then filed on 31/08/2018 using my DSC. Considering the date of receipt of the scrutiny assessment order u/s. 144 r.w.s. 147 of the Act as of dated 02/07/2018, the due date of filing the appeal was 31/07/2018. The same has been filed on 31/08/2018. Thus there is a delay of 31 days in filing the appeal before the CIT(Appeals) on account of unavailability of the DSC Token.

10. That the appeal against the penalty order u/s. 271(l)(c) of the Act for AY 2007-08 was then filed on 07/09/2018 using my DSC. Considering the date of receipt of the penalty order u/s. 27l(l)(c) of the Act as of dated 02/07/2018, the due date of filing the appeal was 31/07/2018. The same has been filed on 07/09/2018. Thus there is a delay of 38 days in filing the appeal before the CIT(Appeals) on account of unavailability of DSC Token.

In view of the above facts and circumstances of the case, there has been a genuine delay of 31 days in filing the appeal before the CIT(Appeal) against the orders u/s. 144 r.w.s. 147 of the Act and not of more than 39 months delay as stated by the CIT(Appeals) in his appellate order dated 13/11/2018. Similarly, there has been a genuine delay of 38 days in filing appeal before the CIT(Appeals) against the penalty order u/s. 271(l)(c) of the Act and not of more than 27 months delay as stated by the CIT(Appeals) in his appellate order dated 13/11/2018."

8. With the assistance of the ld.representatives, we have gone through the record carefully. Sub-section 5 of Section 253 contemplates that the Tribunal may admit an appeal or permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient cause for not presenting it within that period. This expression "sufficient cause" employed in the section has also been used identically in sub-

section 3 of section 249 of Income Tax Act, which provides powers to the ld.Commissioner to condone the delay in filing the appeal before the Commissioner. Similarly, it has been used in section 5 of Indian Limitation Act, 1963. Whenever interpretation and construction of this expression has fallen for consideration before Hon'ble High Court as well as before the Hon'ble Supreme Court, then, Hon'ble Court were unanimous in their conclusion that this expression is to be used liberally. We may make reference to the following observations of the Hon'ble Supreme court from the decision in the case of Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353:

> *"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."

9. Similarly, we would like to make reference to authoritative pronouncement of Hon'ble Supreme Court in the case of N.Balakrishnan Vs. M. Krishnamurthy (supra). It reads as under:

"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi lain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749]. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation

does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

10. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Hon'ble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the delay, then such reasons are to be construed with a justice oriented approach.

11. In the light of the above, let us examine the facts of the present case. As per the stand of the assessee its factory premises was put under attachment by the Excise department on 28.8.2012 and no business has been carried out by the company thereafter. Thus, notice sent on that address was not received by anyone because the factory premises was closed down. For buttressing this contention, it was submitted that the department has not referred about the disclosure of business receipts in the subsequent return. It was also contended that notice for reopening of the assessment was itself issued on 9.4.2014 which is beyond six years from the end of relevant assessment year for taking cognizance under section 148 of the Act against the assessment for the Asstt.Year 2007-08. For buttressing this contention, the assessee has placed on record certain details

downloaded from website of the postal authorities. It has been shown that notice to Chaganlal M. Shah was issued under the speed post bearing no.EG205353495IM. Tracking of this number indicate that it was issued on 9.4.2014 and it reached for delivery on 10.4.2014. Thus, according to the assessee no valid service of notice was ever effected. The ld.counsel for the assessee also drew our attention towards the information collected by the assessee under the RTI Act and the copy of the application of the RTI as well as reply submitted thereunder by the Jt.Commissioner of Income-tax has been placed on pages no.87 to 95.

12. On the other hand, stand of the Revenue is that postal receipts referred by the assessee are not the one under which notice under section 148 was issued and served, rather this was subsequent notice given to the directors informing the proceedings. The first notice was issued to the company at the address given in the return. Similarly, the orders were issued vide speed post receipt no.EG269492778IN dated 30.3.2015 (service of assessment order) and E9258720899IN(Service of penalty order) dated 29.9.2015. It has been observed by the ld.CIT(A) that Excise department has just prohibited the assessee from alienating the property or creating any encumbrance of third party. It has not sealed the property. The assessee could use it; could receive notice, and therefore, it is incorrect at the end of the assessee to say that factory premises was attached by the Excise department. The ld.CIT(A) thereafter observed that the assessment proceedings was in the knowledge of the assessee, and it should have participated in the assessment proceedings. It should have ensured the collection of the assessment order from the factory premises. In other words, the ld.CIT(A) was of the

opinion that there is no plausible explanation at the end of the assessee to explain huge delay of more than three years in the quantum proceedings, and two years in the penalty proceedings.

13. It is pertinent to note that the assessee has raised specific objection against the reopening of the assessment, pleading therein that notice was not served upon the assessee or even not issued by the department within six years from the end of the relevant assessment year. This aspect has been tried to be established with the help of information collected under RTI. But one thing is clear that this aspect has not been dealt by the AO even in ex parte order. Whether the AO has assumed jurisdiction validly or not, he ought to have adjudicated this objection first before taking the proceedings ex parte against the assessee for passing the assessment order. Before embarking anything upon the assessment order about its merits, and the manner in which additions have been made, we would like to appraise that though it is an ex parte assessment order, but even in an ex parte assessment order passed under section 144, according to the best judgment of the AO, he has to bear in mind certain basic principles, viz. in making a best judgment assessment, the Assessing Officer must not act dishonestly or vindictively or capriciously. He must make, what he honestly believe to be a fair estimate of the proper figure of assessment and for this purpose he must be able to take into consideration, local knowledge, reputation of the assessee about his business, the previous history of the assessee or the similarly situated assessee. It is also pertinent to mention that judgment is a faculty to decide matter with wisdom, truly and legally. Judgment does not depend upon

the arbitrary, caprice of an adjudicator, but on settled and invariably principles of justice.

14. A perusal of the assessment order would indicate that the AO has worked out unaccounted production worth Rs.24,04,65,705/-. He treated this short term production as undisclosed income of the assessee without correspondingly setting off the expenditure involved in this production. We could appreciate the action of the AO had he found out something that expenditure were already accounted for in the books of accounts. The case of the assessee is that books have been impounded by the Excise department. Its factory premises was attached and it has not carried out any business thereafter. In this situation, the AO ought to have used his power calling for details from the Excise department and determine the element of income involved in this production instead of exercising his power as quasi judicial officer, he found out a way to punish the assessee by treating the gross production as profit of the assessee, which required to be taxed. It is a negligent and irresponsible act at the end of the AO even in an *ex parte* order. This action has been further amplified while imposing penalty of more than Rs.9 crores under section 271(1)(c) of the Act. As observed above, the conduct of the assessee also not aboveboard, which is required to be deprecated and cannot be absolved completely. The directors, to some extent must have information about the assessment proceedings, and the demand raised against the assessee in an *ex parte* assessment order. Possibility of non-service of assessment order strictly in compliance with Rules cannot be ruled out. But once the assessee has been facing litigation with the Excise department and directors were aware about the notice under section 148, it should be little

more vigilant in conducting the income tax proceedings. Faced with the above situation, and in the light of principle expounded in various authoritative pronouncement as observed earlier, we are of the view that though equity in taxation matters is not a sound principle for adjudicating the controversy, but it is always to be kept in mind that where it is possible to draw two inferences from facts and where there is no evidence of intentional dishonesty or improper motive on the part of the assessee, then it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Neither the AO has acted in a fair manner nor the assessee has prosecuted its income tax proceedings before the ld.Revenue authorities diligently; nothing will happen to the authorities, but the punishment in the shape of tax liability on an addition of Rs.27 crores amplified with the penalty of Rs.9 crores, is in our understanding a quite disproportionate to the negligence of the assessee. If we weigh scale keeping in mind both these facts, then to our mind scale would tilt in favour of the assessee because by condoning the delay nothing is being taken away on merit from the department. It will be a just an opportunity to the assessee to explain its case. If something has been done illegally against it, then that illegality should not be regularized on account of technicalities. At the most, the other side could be compensated with some cost for lingering the litigation. Therefore, evaluating all these aspects, we are of the view that delay in filing the appeals before the ld.CIT (A) deserves to be condoned subject to payment of cost of Rs.50,000/- (Rupees fifteen thousand only). We accordingly condone the delay in filing the appeals before the ld.CIT(A) and set aside the impugned orders. The ld.CIT(A) is a first appellate

authority, it has not applied its mind on facts on the merit of the issues, therefore, we remit both the issues to the file of the ld.CIT(A) for fresh adjudication on merit. It is needless to say that observation made hereinabove will not impair or injure the cast of the AO and will not cause any prejudice to the defence/explanation of the assessee on merit. The assessee will be liberty to raise any plea on merit for both the appeals, and the ld.CIT(A) shall decide appeals after providing due opportunity of hearing to the assessee.

15. In the result, subject to payment of Rs.50,000/- (Rupees fifty thousand only) by the assessee, appeals are allowed for statistical purpose. The cost of Rs.50,000/- (Rupees fifty thousand) be deposited in Government account and evidence to this effect be furnished before the ld.CIT(A).

Order pronounced in the Court on 28th August, 2019.

Sd/-	Sd/-
(PRADIPKUMAR KEDIA)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER