IN THE INCOME TAX APPELLATE TRIBUNAL,

ALLAHABAD BENCH, ALLAHABAD

(THROUGH VIRTUAL COURT)

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA Nos. 379 to 383/ALLD/2018
Assessment Years: 2008-09 to 2012-13

Principal Maulana Azad Inter College, Sakhawatganj, Qadirabad, Siddharth Nagar-272789	v.	**Joint CIT (TDS). Allahabad**
TAN/PAN:ALDMO1271E		
(Appellant)		(Respondent)

Appellant by:	Shri. Abhinav Mehrotra, Adv
Respondent by:	Shri A. K. Singh,Sr. DR
Date of hearing:	08. 12. 2020
Date of pronouncement:	10.12. 2020

O R D E R

PER SHRI VIJAY PAL RAO, JUDICIAL MEMBER:

These five appeals by the assessee are directed against five separate orders of CIT(A) all dated 21.12.2017 arising from penalty order passed under section 272A(2)(k) read with section 200(3) of the Income Tax Act, for the assessment years 2008-09 to 2012-13 respectively.

2. There is a delay of 271 days in filing all these appeals. The assessee has filed applications for condonation of delay which are also supported by the affidavit of the assessee (Principal Maulana Azad Inter College).

3. The learned AR of the assessee has submitted that the impugned order passed by the CIT(A) was received by the assessee on 17th January, 2018 however, due to board examination scheduled to be conducted in the premises of the assessee school in the month of February, 2018 the entire record of the office of the assessee

was shifted out and was stored at a separate location. In this process, the impugned order got misplaced and was traced only on 5th December, 2018 when one Mr. Anwar Ahmad Khan was going through the office record has located and found the said order. The learned counsel has submitted that immediately after tracing the impugned order, the assessee took step to file the present appeal and consulted its Advocate through the management of the society and finally the appeal was filed on 18th March, 2018. There is a delay of 271 days in filing these appeals. However, the delay was neither intentional nor deliberate but due to unavoidable circumstances beyond the control of the assessee as the school premises was taken over by the board for conducting the board examination in the month of February, 2018. He has further pointed out that after the board examination there was summer vacations and therefore, the impugned order traced out only in the month of December, 2018. Hence, the learned AR has pleaded the delay in filing the appeal may be condoned and the appeals of the assessee may be heard and decided on merits.

4. On the other hand, the learned DR vehemently opposed the condonation of delay and submitted that the assessee is a habitual defaulter and has not attended the proceedings before the AO as well as before the CIT(A) and consequently both the orders passed under section 2272A(2)(k) as well as the impugned order of the CIT(A) are *ex parte.* The learned DR has referred to the penalty order as well as the impugned order of the CIT(A) and submitted that there was no response by the assessee to the notices issued by the AO and the CIT(A). Thus the delay in filing these appeals is nothing but due to casual approach and negligence of the assessee.

5. I have considered the rival contentions as well as relevant material on record. The assessee has explained the delay of 271 days in filing these appeals due to the reasons that after receiving the impugned order on 17th January, 2018, the premises of the assessee were taken over by the education board for conducting the board examination scheduled to be held in the month of February, 2018. The assessee has

narrated all these reasons and facts in the affidavit filed alongwith the application for condonation of delay. The facts as explained by the assessee in the affidavit are not in dispute so far as the receipt of the impugned order and conducting of board examination by the board and consequently the office record of the assessee was shifted out and stored at a new location to facilitate smooth and uninterrupted conduct of the board examination by the authorities. It is also not in dispute that during the month of May & June, the college remained in recess on account of summer vacations and the administrative staff was not attending the office. Finally the order was traced out in the nature month of December, 2018 and thereafter these appeals were filed belatedly. It is settled law that while condoning the delay, the Court should take a lenient view. It is always a question whether an explanation and reasons for delay are bonafide or is a mere device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. While construing the sufficient cause, a lenient view has to be taken on such matters but the litigant is not allowed to take the benefit for filing the appeal belatedly. Whenever substantial justice and technical considerations are opposed to each other, cause of substantial justice has to be preferred and justice oriented approach has to be taken while deciding the condonation of delay.

6. In the case in hand, the assessee has explained the reasons which are not found as mala fide or a devise to cover up any ulterior purpose. Further by filing appeals belatedly, assessee would not get any benefit out of it such as to achieve any ulterior purpose. Accordingly, in the facts and circumstances of the case and considering the reasons / cause explained by the assessee, I am satisfied that the assessee has a sufficient cause of delay in filing the appeals before the Tribunal. Hence, in the interest of justice, the delay of 271 days in filing these appeals is condoned.

7. The assessee has raised common grounds in these appeals. The grounds raised for the assessment year 2008-09 are as under:-

BECAUSE, on the facts and in the circumstances of the case, the impugned order passed by the Ld. CIT (A), dismissing the appeal of the assessee and upholding the order u/s 272A(2)(k)/274 levying penalty for Rs. 1,57,170/- is both bad in law as well as on facts and is liable to be quashed being made without observing the procedure establish under law.

BECAUSE, on the facts and in the circumstances of the case, the impugned order passed by the Ld. CIT (A), dismissing the appeal of the assessee and upholding the order u/s 272A(2)(k)/274 is bad in law since the appeal of the assessee has not been decided on its merits.

BECAUSE, on the facts and in the circumstances of the case, the impugned order passed by the Ld. CIT (A), dismissing the appeal of the assessee and upholding the order u/s 272A(2)(k)/274 is both bad in law as the same has been made without providing the assesse with a due and proper opportunity of hearing and therefore the impugned order deserves to be set-aside being bad in law and it is a case of first and only default.

BECAUSE, on the facts and in the circumstances of the case the impugned order passed by the Ld. CIT (A), dismissing the appeal of the assessee and upholding Assessing Office's Order is bad in law since the explanation submitted by the assessee demonstrating its bonafides has not been considered or addressed.

BECAUSE, on the facts and in the circumstances of the case the treatment of assessee in default without considering the explanations furnished and difficulty faced by him and without application of mind on the submissions made by the assessee rendered the order bad in law and liable to be quashed.

Because, on the facts and in the circumstances of the case, the impugned order passed by the Ld. CIT(A), dismissing the appeal of the assessee and upholding the order u/s 272A(2)(k)/274 levying penalty for Rs. 1,57,170/- is both bad in law as well as on facts and is liable to be quashed since the person against whom the said order has bee made is not the Drawing & Disbursing Officer and hence not liable for penalty under law and TAN is held in the name of "Manager" of the society.

8. The learned counsel for the assessee has submitted that the CIT(A) has passed the impugned order *ex parte* whereas the assessee did not receive the alleged last two notices as referred by the CIT(A). He has pointed out that in response to the first notice, the assessee filed an application for adjournment of hearing which was adjourned by the CIT(A) however, no subsequent notice was received by the assessee regarding the date of hearing fixed by the CIT(A). He has also referred to an additional ground raised by the assessee before the Tribunal and submitted that the AO initiated the penalty proceedings against the wrong person who is not responsible for the payment or deduction of TDS. Thus, the penalty proceedings initiated against a wrong person and impugned order passed by the AO against a wrong person is *void ab initio.*

9. The learned AR has referred to the memorandum of association at page 6 to 29 of the paper book and submitted that as per the memorandum of association, the Manager of the college is responsible for all the receipt of grant, contribution, administration control and finance of the school within the provision of the budget. He is also authority to sanction payment of salary, increments and dues to the employees of the school. Thus, the AO without verifying who is the responsible and Principal Officer as per section 204 of the Income Tax Act has initiated and levied the penalty against the person who is not responsible for payment and deduction of TDS in terms of Section 204 of the Income Tax Act. Thus, the learned AR has submitted that the additional evidence sought to be produced by the assessee in support of the fact that the Principal of the school is not responsible officer against whom the penalty proceedings can be initiated or levied. He has also referred to the notice issued by the AO under section u/s 272A(2)(k) read with section 274 and submitted that the AO has issued the said notice in the name of the college / school and not in the name of Principal of the college. Thus, the learned DR has submitted that the matter may be set aside to the record of the AO or CIT(A) for considering the issue raised by the assessee which go to the root of the matter. The assessee may be granted an opportunity to present his case before the authorities below.

10. On the other hand, learned DR has submitted that the assessee is a habitual defaulter for not appearing before the authorities below despite the sufficient opportunities were granted. He has further contended that the assessee has never raised any objection regarding the validity of the penalty proceedings on the ground of responsible person is the Manager and not the Principal of the college. Thus, the assessee cannot be allowed to raise such an objection at this stage. He has further contended that in response to the show cause notice the Principal of the college has replied and therefore he has not questioned of fact that he is the responsible person for payment and deduction of TDS.

11. The learned DR has further submitted that this fact can otherwise be verified from the TDS return filed by the assessee in the subsequent years. He has also referred to the memorandum of association and submitted that the Principal was the responsible officer for day to day affairs of the college. The Manager may be acted under the delegated powers of the Principal of the college. He has relied upon the orders of the authorities below.

12 I have considered the rival submissions as well as relevant material available on record. The penalty order under Section u/s 272A(2)(k) of the Income Tax Act was passed by the AO *ex parte* when nobody has appeared or attended the proceedings. The assessee challenged the penalty order before the CIT(A) however, the appeal of the assessee was dismissed when there is no attendance on behalf of the assessee after seeking the adjournment on the first date of hearing. The CIT(A) has given the details of the notices issued to the assessee i.e. on 10.09.2017, 10.11.2017 and 8.12.2017. In response to the first notice, the assessee filed an application for adjournment and the hearing was accordingly adjourned on 17.02.2017 though, no notice was issued by the CIT(A) for the said date of hearing. Since the assessee did not attend the hearing on 10.09.2017, the CIT(A) issued notice on 10.11.2017 for the hearing on 29.11.2017 and thereafter a further notice issued on 8.12.2017 for the

hearing on 21.12.2017. There is no attendance on behalf of the assessee on these two hearings and consequently the CIT(A) has dismissed the appeal of the assessee by passing a summary order without discussing the facts or grounds raised by the assessee. The assessee has submitted that these two notices as alleged by the CIT(A) were not received by the assessee however, since the appeals of the assessee were dismissed summarily by the CIT(A) without passing a speaking order therefore, the impugned orders passed by the CIT(A) are not sustainable in law. The assessee has also raised an additional ground challenging the validity of the initiation of the proceedings for levy of penalty under section u/s 272A(2)(k) as well as the order passed by the AO levying the penalty. The assessee has challenged the validity of the order on the ground that the Principal of the college is not the responsible person against whom the AO has initiated the penalty proceedings and passed the impugned order but the Manager of the school is the person who is responsible for payments of salary and other dues to the employees as well as deduction of TDS. Therefore, the delay / default in filing of TDS return is not attributable to the Principal of the college. Since this issue raised by the assessee in the additional ground is taken first time before the Tribunal and was not raised before the authorities below therefore, the relevant record on this aspect is required to be properly verified.

13. Further, the assessee has also sought to produce the additional evidence to show that the Manager of the college is the responsible officer under section 204 of the Income Tax Act. It is pertinent to note that when the assessee has not appeared before the AO and allowed the impugned order to be passed under section u/s 272A(2)(k) of the Income Tax Act and thereafter the appeals of the assessee were also dismissed by the CIT(A) *ex parte,* then this ground raised by the assessee at this stage raises the question whether without bringing this fact on record during the penalty proceedings, the issue raised by the assessee can be conclusively decided at this stage. Accordingly, in the facts and circumstances of the case and in the interest of justice these appeals are set aside to the record of the Assessing Officer to verify all the facts

as alleged by the assessee in the additional ground and then pass a fresh order under u/s 272A(2)(k) of the Act. Needless to say the assessee be given an appropriate opportunity of hearing. All the appeals are allowed for statistical purposes.

14. In the result, the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court on 10/12/2020.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED:10/12/2020
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Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT(A) -
4. CIT
5. DR -

By order

Assistant Registrar