

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA Nos.2559 to 2562/MUM/2019
(Assessment Years: 2008-09 to 2011-12)**

M/s Vinayak Mhatre Flat No. B/10, Navsahjivan CHS Ltd, Shiv Srushti, Kurla (East), Mumbai 400 024	Vs.	Pr. CIT-26 4 th Floor,C-10, Pratyaksha Kar Bhawan, Bandra Kurla Complex, Bandra East, Mumbai – 400 051
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PAN No. AEEPM0882N

(Assessee)

(Revenue)

Assessee by	:	Shri Mani Jain, A.R
Revenue by	:	Shri Kipgen,, D.R

Date of Hearing	:	16/06/2021
Date of pronouncement	:	20/07/2021

ORDER

PER RAVISH SOOD, J.M:

The captioned appeals filed by the assessee are directed against the respective orders passed by the Principal Commissioner of Income-tax-26 (for short "Pr. CIT") under Sec. 263 of the Income-Tax Act,1961 (for short 'Act'), dated 23.03.2017 for A.Y 2008-09 to A.Y 2011-12. As common issues are involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal for A.Y. 2011-12 i.e ITA No. 2562/Mum/2019. The assessee has assailed the impugned order on the following grounds before us:

- "1. On the facts and circumstances of the case and in law the Pr. Commissioner of Income Tax (hereinafter referred to as 'Commissioner') erred in passing the impugned order U/s. 263 of the Income Tax Act, 1961 ('the Act') without

providing an adequate opportunity of being heard to the appellant as per the ground stated in the order or otherwise.

2. The Appellant submits that the order U/s. 263 of the Act made by the Pr. Commissioner is bad in law, erroneous, invalid, void, in excess of and / or in want of jurisdiction and otherwise illegal.
3. On the facts and circumstances of the case and in law the Pr. Commissioner erred in holding that the assessment order passed by the Assessing Officer u/s. 143(3) r.w.s 147 of the Act was erroneous and / or prejudicial to the interests of the revenue within the meaning of the provisions of section 263 to the extent AO's action of not disallowing an amount of Rs. 59,28,094/- paid towards equipment hire charges, job work charges and labour charges as per the ground/s contained in the order or otherwise.
4. On the facts and circumstances of the case and in law the Pr. Commissioner failed to consider that the assessment as framed by the Assessing Officer was after due application of mind and after considering the detailed replies on various dates as filed before him during the course of assessment proceedings.
5. The Appellant craves leave to add, to amend, alter, modify and / or withdraw any or all of the above grounds of appeal, each of which are without prejudice to one another.

The appellant prays that the impugned order of the Commissioner may please be quashed and the order of the Assessing Officer may please be restored.”

2. Briefly stated, the assessee who is a contractor and is carrying on his business as a sole proprietor of a concern, viz. M/s Electrovin Engineering Company had filed his return of income for A.Y 2011-12 on 30.09.2012, declaring a total income of Rs.4,77,311/-. The return of income filed by the assessee was processed as such u/s 143(1) of the Act. Observing, that against the total receipt of Rs.1,61,81,566/- on which TDS of Rs.3,21,419/- was deducted as per 'Form AS 26' the assessee had declared only an amount of Rs.57,72,038/- and claimed credit for the entire amount of TDS of Rs.3,21,419/-, the A.O reopened his case u/s 147 of the Act. In the course of the assessment proceedings the assessee filed a revised return of income declaring a total income of Rs.11,18,400/-. On a perusal of the profit and loss account that was filed by the assessee alongwith his revised return of income, it was observed by the A.O that he had though credited the entire receipts of Rs.1,61,81,566/-, but thereafter claiming expenses under the various heads had reflected a minimal net profit of Rs.11,99,356/-. As the facts unfolded in the course of the assessment proceedings, it was observed by the A.O that

the assessee had neither maintained any books of accounts nor as a consequence thereto complied with the provisions of Sec. 44AB of the Act. As the assessee had neither maintained his books of accounts nor had any supporting documents to substantiate his claim of expenses, the A.O, thus, rejected his book results. After so doing, the A.O on the basis of the net profit rates that were shown by the assessee in his respective returns of income for the various years, viz. A.Y 2008-09 to A.Y. 2011-12 worked out the 'average of the net profit rates' at 8.71%. Applying the 'average of the net profit rates' of 8.71% to the assessee's gross receipts of Rs. 1,61,81,566/-, the A.O estimated his business income at Rs. 14,09,414/-. On the basis of his aforesaid observations, the A.O vide his order passed u/s 143(3) r.w.s 147, dated 25.03.2015 assessed the income of the assessee at Rs.12,95,770/-.

3. After the culmination of the assessment proceedings the Pr. CIT called for the assessment records of the assessee. Observing that the assessee had in his profit & loss account debited expenses amounting to Rs.59,28,094/-, without deducting tax at source which as per the mandate of law it was obligated to do, the Pr. CIT held a conviction that the A.O had erred in not disallowing the said expenses u/s 40(a)(ia) of the Act. Being of the view that the failure on the part of the A.O to disallow the aforesaid expenses u/s 40(a)(ia) of the Act had rendered the assessment order passed by him u/s 143(3) r.w.s 147, dated 25.03.2015 as erroneous in so far it was prejudicial to the interest of the revenue u/s 263 of the Act, the Pr. CIT issued a 'Show cause' notice ('SCN'), dated 20.02.2017 and called upon the assessee to explain as to why the assessment order passed by the A.O u/s 143(3) r.w.s 147, dated 25.03.2015 may not be revised for the said reason. As the reply filed by the assessee did not find favour with the Pr. CIT, therefore, vide his order passed u/s 263, dated 23.03.2017 he held the assessment order passed by the A.O u/s 143 (3) r.w.s 147, dated 25.03.2015 as erroneous in so far it was prejudicial to the interest of the revenue u/s. 263 of the Act. Accordingly, the Pr. CIT set-aside the assessment order passed by the A.O with a direction

that the issue in question be adjudicated afresh by him after making necessary verifications.

4. The assessee being aggrieved with the order of the Pr. CIT u/s 263, dated 23.03.2017 has carried the matter in appeal before us. At the very outset of the hearing of the appeal, it was submitted by the Id. Authorized representative (for short 'A.R') for the assessee that the present appeal involved a delay of 504 days. Elaborating on the reasons leading to the aforesaid delay, it was submitted by the Id. A.R that as the order passed by the Pr. CIT u/s 263, dated 23.03.2017 was during his absence served upon his wife Mrs. Sanjeevani V. Mhatre, who at the relevant point of time was not keeping good health and on account of certain multiple medical issues had also remained bed ridden, the impugned order, thus, had inadvertently remained omitted on her part to be delivered to the assessee. It was further submitted by the Id. A.R that it was only when the assessee's Chartered accountant while compiling the submissions with respect to the appeal that was preferred against the order passed by the A.O u/s 143(3) r.w.s 147 had inquired about the status of the order that was passed u/s 263, it was only then that the assessee after making necessary enquiries had gathered that the said impugned order was served on his wife who inadvertently had omitted to deliver the same to him. It was stated by the Id. A.R that the assessee after locating the impugned order had thereafter without any further loss of time delivered the same to his counsel for filing an appeal with the Tribunal. In order to fortify the aforesaid factual position the Id. A.R took us through the 'affidavit' of the assessee wherein he had deposed the aforementioned facts. In the backdrop of the aforesaid facts, it was submitted by the Id. A.R that as the delay in filing of the appeal had occasioned for bonafide reasons, thus, the same in all fairness be condoned. Further, in support of his contention that where a delay in filing of an appeal had occasioned on account of bonafide reasons, the same, in all fairness did merit to be condoned, the Id. A.R relied on certain judicial pronouncements, viz. (i). Shri. Suresh G. Hundia Vs. DCIT-2(4), Mumbai, ITA No. 4858/Mum/2016, dated 21.08.2019; and (ii). M/s

Platinum Properties Vs. The DCIT, ITA No. 2600/Mum/2012. It was submitted by the Id. A.R that in the case of Shri. Suresh G. Hundia (supra) a delay of 2017 days was condoned by the Tribunal.

5. Per contra, the Id. Departmental representative (for short 'D.R') objected to the seeking of condonation of delay involved in filing of the present appeal by the assessee. It was submitted by the Id. D.R that as the assessee had due to his negligent approach substantially delayed the filing of the appeal, therefore, his request for condonation of the delay therein involved did not merit acceptance. It was submitted by the Id. D.R that as the assessee was availing the services of a professional, it was, thus, beyond comprehension that he had remained unaware of the order passed by the Pr. CIT u/s 263 of the Act. In order to buttress his claim that in a case where inordinate delay is involved the same is not to be condoned the Id. D.R had relied on certain judicial pronouncements viz. (i). Vedabai & Vaijyanatabai Baburao Patil vs. Shantaram Baburao Patil, Civil Appeal No. 4494 of 2001, dated 20.07.2001; (ii). Basawaraj & Anr. Vs. The Spl. Land Acquisition Officer, Civil Appeal No. 6974 of 2013, dated 22.08.2013; and (iii). Somerset Place Co-operative Housing Society Ltd. Vs. ITO, ITA (Lodg) No. 874 of 2014, dated 13.02.2015. It was, thus, submitted by the Id. D. R that considering the inordinate delay that was involved in filing of the present appeal by the assessee the same did not merit to be condoned.

6. We have heard the Id. authorized representatives for both the parties, perused the material available on record, and also considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions in context of the issue pertaining to the delay involved in filing of the present appeal before us. In our considered view, the aforesaid facts deposed by the assessee in his duly sworn 'affidavit' inspires substantial confidence as regards the bonafide reasons which had led to the delay in filing of the present appeal. The assessee would not have benefited by adopting any dilatory strategy in filing of the present appeal before us. We

find that as held by the **Hon'ble Supreme Court** in the case of **Ramnath Sao Vs. Gobardhan Sao (AIR 2002 Supreme Court 1201)**, in a case where the explanation of the assessee in respect of the delay in filing of an appeal does not smack of malafide or a dilatory strategy on his part, then, the said explanation cannot be merely turned down for the reason that delay is involved in filing of the appeal. In the aforesaid judgment, the Hon'ble Apex Court while condoning a delay of 130 days that was involved in the said appeal had drawn support from its earlier order passed in the case of **N. Balkrishnan Vs. M. Krishnamurthi (1998) 7 Supreme Court case**, wherein a delay of 883 days was condoned by the Hon'ble Court. We find that a similar view was earlier also taken by the **Hon'ble Supreme Court** in the case of **Collector Land Acquisition Vs. Mst. Kathiji and others (1987) 167 ITR 471 (SC)**. The Hon'ble Apex Court in the aforesaid case had concluded that a sufficient cause for the purpose of condonation of delay should be interpreted with a view to do even ended justice on merits in preference to an approach which scuttles a decision on merits. In the case before us, the delay as explained by the assessee had admittedly crept in on account of a bonafide failure on the part of his wife to deliver to the assessee the order that was passed by the PCIT. At this stage, we may herein observe that the fact that the assessee's wife at the relevant point of time, and also thereafter, was suffering from multiple medical issues cannot be lost sight of as the same lends credence to the explanation of the assessee as regards the bonafide failure on her part to deliver the impugned order to the assessee. We are of the considered view that as the assessee had come forth with a bonafide explanation as regards the delay in filing of the appeal before us, therefore, adopting a holistic approach, we are of a strong conviction that the request of the assessee for condonation of the delay in filing the present appeal merits acceptance. Before parting, we may herein observe that the Id. D.R except for harping on the fact that a substantial period of delay in filing of the present appeal was therein involved, has however, failed to place on record any material which could persuade us to conclude that the explanation of the

assessee as regards the reasons leading to the delay in filing of the appeal was not to be accepted. We, thus, keeping in view the aforesaid facts condone the delay involved in filing of the present appeal.

7. We shall now advert to the contentions advanced by the Id. authorized representatives for both the parties in context of the merits of the case. The Id. A.R took us through the facts of the case. It was submitted by the Id. A.R that as the assessee during the year under consideration had neither maintained the books of accounts nor had any supporting documents to substantiate his claim of expenses, therefore, the A.O after rejecting the books results had applied the 'average of the net profit rates' of 8.71% to the assessee's gross receipts of Rs. 1,61,81,566/- and estimated his business income at Rs. 14,09,414/-. It was, thus, submitted by the Id. A.R that the A.O on the aforesaid basis had estimated the business income of the assessee at Rs.14,09,414/-. It was submitted by the Id. A.R, that now when the A.O had rejected the book results of the assessee and had by applying the 'average net profit rate' of 8.71% (supra) estimated his business income, therefore, there remained no occasion for him to have separately disallowed certain amounts that formed part of the profit and loss account that was already rejected by him. In sum and substance, it was the claim of the assessee that now when the A.O had estimated the business income of the assessee for the year under consideration by applying the average of the net profit rates for the A.Y.2008-09 to A.Y. 2011-12 to the gross receipts of the assessee, therefore, after computing the said estimated business income he could not have separately worked out disallowances in context of expenses which were debited in the profit and loss account. In support of his aforesaid contention the Id. A.R had relied on the judgment of the Hon'ble High Court of Allahabad in the case of CIT vs. Banwarilal Bansidhar (1998) 229 ITR 229 (All). Also, reliance was placed on the order of the ITAT, Pune in the case of Dharrit Yogen Shah Vs. CIT-II, Pune, ITA No. 1658/Pune/2014 and that of the ITAT, Jaipur in M/s Power Liners Vs. ACIT, Circle-3, Jaipur, ITA No. 194/JP/2017, dated 08.01.2018. Drawing support from the order of the ITAT, Pune, in the

case of Dharrit Yogen Shah (supra), it was submitted by the Id. A.R, that as in the said case the 'book results' of the assessee were not verifiable, therefore, the A.O while framing the assessment had rejected the books of accounts and estimated his income @15% of the amount of gross receipts. However, the CIT not finding favour with the estimation of the income of the assessee exercised his revisional jurisdiction u/s 263 and set-aside the assessment order. On appeal, the Tribunal observing that the CIT in exercise of his jurisdiction u/s 263 could not have sought substitution of his view as against that of the A.O, thus, set-aside his order. It was submitted by the Id. A.R, that, as in the present case the A.O had while framing the assessment u/s 143(3) r.w.s 147, dated 25.03.2017 taken a possible view which on the date of framing of the assessment by him was supported by the aforesaid judicial pronouncements, therefore, the Pr.CIT was divested from assuming jurisdiction and setting aside the assessment order in exercise of the powers vested with him u/s 263 of the Act. In support of his contention that where on the date of framing of assessment two views qua an issue were possible, and the A.O had taken one view with which the CIT does not agree, the order therein passed by the A.O cannot be treated as erroneous unless the view so taken is unsustainable in law, the Id. A.R had relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. (2007) 295 ITR 282.

8. Per contra, the Id. D.R relied on the order passed by the Pr.CIT u/s 263, dated 23.03.2017. It was submitted by the Id. D.R that as the A.O had blatantly failed to disallow u/s 40(a)(ia) certain expenses, viz. (i). equipment hire charges of Rs.18,42,674/-; and (ii) and wages and labour charges of Rs.40,85,520/-, despite the fact that the assessee had not deducted tax at source on the said expenses, therefore, the Pr. CIT had rightly observed that the order passed by the A.O u/s 143(3) r.w.s 147, dated 25.03.2015 was erroneous in so far it was prejudicial to the interest of the revenue u/s 263 of the Act.

9. We have heard the Id. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. It is a matter of fact borne from the record that the A.O vide his order passed u/s 143(3) r.w.s 147, dated 25.03.2015, after taking cognizance of the fact that the assessee had neither maintained the books of accounts nor could substantiate his claim of expenses on the basis of supporting documentary evidence, had thus, rejected the books results, and after applying the 'average of the net profit rate' of 8.71% (supra) to his gross receipts of Rs.1,61,81,566/- estimated the business income at Rs.14,09,414/-. As submitted by the Id. A.R, and rightly so, once the business income of the assessee had been estimated in the manner stated hereinabove, then, the A.O could not have been expected to have supplemented the same by separately disallowing the expenses debited in the profit and loss account that had already been rejected by him. Insofar the reliance placed by the Id. D.R on the judgment of the **Hon'ble Supreme Court** in the case of **Kalekhan Mohammad Hanif Vs. CIT (1963) 50 ITR 1 (SC)** is concerned, we find, that the same is distinguishable on facts. In its aforesaid order, it was observed by the Hon'ble Apex court that where the business income of an assessee is estimated, then, merely on the said count the A.O cannot be precluded from making a separate addition of an unexplained cash credit u/s 68 of the Act. We are afraid that the aforesaid judgment would not assist the present case of the revenue. Before us, it is not a case that the A.O for the reason that he had estimated the business income of the assessee not made an addition u/s 68 in respect of an unexplained cash credit, for which reason, the Pr. CIT had stepped in to revise his order u/s 263 of the Act. On the contrary, in the case before us the A.O had estimated the business income of the assessee by applying an 'average of the net profit rate' to his gross receipts, which the Pr. CIT had sought to dislodge, for the reason, that the A.O while framing the assessment had failed to disallow u/s 40(a)(ia) certain expenses which were debited in the profit & loss

account despite the fact that the assessee had failed to deduct tax at source as regards the same. In our considered view, after estimation of the business income of the assessee, making of a separate disallowance of the expenses debited in the profit and loss account that had already rejected by the A.O would undeniably lead to distorted assessment of the assessee's income. Our aforesaid view that once the income of an assessee had been estimated, then, no separate disallowance can be made is supported by the judgment of the **Hon'ble High Court of Allahabad** in the case of **CIT Vs. Banwarilal Bansidhar (1998) 229 ITR 229 (All)** and the judgement of the **Hon'ble High Court of Punjab and Haryana** in **CIT vs. Smt. Santosh Jain (2008) 296 ITR 324 (P&H)**. Apart from that, we find that a similar view had been taken by the **ITAT, Pune** in the case of **Dharrit Yogen Shah Vs. CIT-II, Pune, ITA No. 1658/Pune/2014, ITA No. 1658/Pune/2014**, wherein the order passed by the CIT u/s 263 dislodging the estimation of the assessee's income by the A.O was vacated by the Tribunal. At this stage, we may herein observe, that a disallowance contemplated in Sec. 40(a)(ia) can be made only where the assessee had claimed deduction of an amount under Sec. 30 to Sec. 38 of the Act, and not otherwise. Our aforesaid view can safely be gathered from a perusal of Sec. 40 of the Act, which reads as under :

“40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”, -

.....”

Now, in the present case, the A.O not being satisfied with the correctness and completeness of the accounts of the assessee had made the assessment in the manner provided in Sec. 144, and thus, after rejecting the book results had applied the 'average of the net profit rate' of 8.17% (supra) to the gross receipts and assessed his income at an estimated figure. We, thus, are of the considered view, that as the A.O while assessing the income on an estimate basis had at no stage considered the assessee's claim for deduction of the impugned expenses on which TDS is alleged by the Pr. CIT to have not been

deducted, thus, no disallowance u/s 40(a)(ia) even otherwise could have been made.

10. We, thus, in the backdrop of our aforesaid deliberations, are of the considered view, that as the A.O vide his order passed u/s 143(3) r.w.s 147, dated 25.03.2015 had after estimating the assessee's income not separately disallowed the aforementioned expenses u/s 40(a)(ia), thus, by so doing had taken a possible view which as on the date of passing of the assessment order was supported by the aforementioned orders of the Hon'ble High Courts and that of the coordinate benches of the Tribunal, therefore, the Pr. CIT was clearly divested of his jurisdiction to have revised the said order in exercise of the powers that were vested with him u/s 263 of the Act. Our aforesaid view that where on the date of framing of assessment two views qua an issue were possible, and the A.O had taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue, unless the view taken by the A.O is unsustainable in law, is supported by the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Max India Ltd. (2007) 295 ITR 282 (SC)**. As such, not finding favour with the order passed by the Pr. CIT u/s 263 of the Act, dated 23.03.2017, we herein set-aside the same and restore the order passed by the A.O u/s 143(3) r.w.s 147, dated 25.03.2015.

11. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

A.Ys. 2008-09, 2009-10 and A.Y. 2010-11
ITA Nos.2559 to 2561/MUM/2019

12. As the facts and the issues involved in the aforementioned appeals, both qua the delay in filing of the appeals and also the merits remains the same as were there before us in the appeal of the assessee for A.Y. 2011-12 in ITA no. 2562/Mum/2019, therefore, our order therein passed shall apply mutatis mutandis for the purpose of disposal of the aforementioned appeals

for A.Y 2008-09, ITA No. 2559; A.Y 2009-10, ITA No 2560/Mum/2019; and A.Y 2010-11, ITA No. 2561/Mum/2019.

13. Accordingly, the respective orders passed by the Pr. CIT for the aforementioned years are set-aside and the orders passed by the A.O u/s 143(3) r.w.s 147 are restored.

14. Resultantly, all the appeals of the assessee, viz. A.Y 2008-09, ITA No. 2559; A.Y 2009-10, ITA No 2560/Mum/2019; A.Y 2010-11, ITA No. 2561/Mum/2019 and A.Y 2011-12, ITA No. 2562/Mum/2019 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 20.07.2021

Sd/-

(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai;

Dated: 20.07.2021

PS: Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai