

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'A' PUNE – VIRTUAL COURT

BEFORE SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER AND
SHRI DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.1956/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Sanket Food Products Private Limited, Flat No.101, Bhoomi Apartment, 1 st Floor, Nutan Laxmi CHS, Plot No.9, JVPD Scheme, Ville Parle (W), N.S. Road, No.8, Mumbai – 400056 PAN: AA ECS0131P	Vs.	ITO, Ward 1(3), Jalna
Appellant		Respondent

Assessee by None
Revenue by Shri S.P. Walimbe
Date of hearing 08-02-2022
Date of pronouncement 11-02-2022

आदेश / ORDER

PER DR. DIPAK P. RIPOTE, AM :

This appeal is against Commissioner of Income Tax (Appeals)-1, Aurangabad's order dated 24.03.2017 for assessment year 2012-13.

2. The history of notices by ITAT issued for hearing in this case is as under:

Date of hearing	Present / Absent
03.07.2020	Ld. AR present and sought adjournment
04.08.2020	Ld. AR present and sought adjournment
09.09.2020	None present on behalf of appellant
09.10.2020	None present on behalf of appellant
10.11.2020	None present on behalf of appellant
08.01.2021	None present on behalf of appellant
30.04.2021	None present on behalf of appellant
16.09.2021	None present on behalf of appellant
08.11.2021	None present on behalf of appellant
15.12.2021	None present on behalf of appellant
08.02.2022	None present on behalf of appellant

3. Even on 08.02.2022, no one has appeared on behalf of the appellant. From the history of hearings mentioned above, it can be seen that sufficient opportunity has already

been given to the appellant but appellant has failed to avail the opportunity. Therefore, the appeal is being decided in the absence of representation from the appellant's representative.

4. The Id. DR pointed out that the assessee filed the appeal beyond statutory time limit. It is also urged that the assessee's appeal is delayed by 86 days. The Director of the appellant company Mr. Vinay Shah filed an affidavit along with condonation application. It is mentioned by the Director of the appellant company that the company has discontinued its business and there are no employees. The CIT(A)'s order was dropped into the office premises of appellant.

5. The condonation application and affidavit has been considered. The reasons given by the appellant are valid and sufficient. We have gone through the condonation petition as well as the affidavit and have found that reasons specified therein are justified and that the delay cannot be attributed to the deliberate conduct of the assessee neither through intention nor through action. The reasons for delay in filing the appeal late were beyond the control of the assessee.

6. The Hon'ble Supreme Court in the case of Collector Land Acquisition Vs. Mst. Katiji & Ors. Date of Judgment 19/02/1987 has observed as under :

Quote "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 con- doned 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."Unquote

7. The Hon'ble Supreme Court has observed in the case of SENIOR BHOSALE ESTATE(HUF) vs. ACIT, CIVIL APPEAL NOS.6677-6690 OF 2010 :

Quote "Unless that fact was to be refuted, the question of disbelieving the stand taken by the appellant(s) on affidavit, cannot arise....."Unquote.

8. The Hon'ble Supreme Court in the case of Ramnath Sao AIR2002 SC1201 has held that acceptance of explanation furnished seeking condonation of delay should be the rule and refusal an exception, more so when no negligence or inaction or want of bona fide can be imputed to the defaulting parties. Taking a pedantic and hyper-technical view of the matter, the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party.

9. Thus substantial justice is important than mere technicality. In this case the facts mentioned by the Appellant have not been rebutted by the revenue. Therefore, there was reasonable and sufficient cause for delay in filling appeal. In view of the matter, we condone the delay and proceed to hear the appeal on merits.

10. Grounds of appeal raised by the assessee are as under :

1. *The Learned CIT(A) has erred in disallowing Rent of Rs.41,08,553/- incurred for Office situated at Mumbai*
2. *The Learned CIT(A) has further erred in disallowing advertisement expenses of Rs.36,76,778/-*
3. *The Learned CIT(A) further erred in disallowing Security expenses of Rs.22,22,187/-*
4. *The Learned CIT(A) further erred in disallowing Interest on Excise Duty to the tune of Rs.29,89,381/-.*
5. *The Learned CIT(A) further erred in disallowing Interest for delay in payment of TDS to the tune of Rs.86,169*

11. In this case, assessment order was passed *ex-parte*. However, the appellant was represented by a Chartered Accountant before the CIT(A). The appellant filed additional evidences before the CIT(A), who had called for remand report. The CIT(A) had also issued Summons u/s 131 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

Based on material on record, the CIT(A) passed order dated 24.03.2017. Against the said order, appellant filed appeal before this Tribunal.

Ground No.1 - Disallowance of Rent of Rs.41,08,553/-

12. The CIT(A) has discussed this issue on page 6, para 6 of his order. As per CIT(A)'s order, the appellant has claimed to have paid rent of Rs.41,08,553/- to M/s. Vishal Beverage Pvt. Ltd., Indore and M/s. Kanti Beverage Pvt. Ltd., Indore at Solitaire Corporate Park, Second Floor, Unit No.232, Andheri (East), Mumbai. The CIT(A) asked the appellant the nature of business being conducted from the said office and asked to establish that it was wholly and exclusively incurred for the purpose of business. The CIT(A) concluded that the appellant failed to establish that the said rent has been paid wholly and exclusively for the purpose of business of appellant and therefore upheld the disallowance of Rs.41,08,553/-.

12.1 During the proceedings, the Ld. DR took us through the CIT(A)'s order and assessment order. It is observed that the entire sales have been made through M/s. Sanket Industries Limited to the vendors at Shirdi, Solapur, Nashik, Baramati, Nagpur, Delhi, Kolkata and Hubli, Haliyal & Bijapur in Karnataka. Thus, there was no sale from Mumbai office and appellant could not establish that the Mumbai office was used for the purpose of appellant. As per CIT(A)'s order, the same premises was shown to be taken on rent in A.Y. 2011-12 (earlier year) by the associate concern of the appellant and paid rent of Rs.39,12,898/- though the sales of associate concern for that particular year were only Rs.58,91,562/-. For A.Y. 2012-13, it is shown as being rented by the appellant. No documentary evidence has been submitted to establish that the appellant has actually taken the premises on rent. For any expenditure to be claimed u/s 37(1) of the Act, the appellant has to establish that it was incurred wholly and exclusively for the purpose of business. However, in this case, the appellant has not filed any document to establish that it was used

for the purpose of business leave apart wholly and exclusively for the purpose of business. Therefore, based on the facts of the case, there is no material evidence to establish that rent has been paid wholly and exclusively for the purpose of business.

12.2 The necessary conditions for allowance under section 37 are :

Such expenditure should not be covered under the specific section i.e. sections 30 to 36.

Expenditure should not be of capital nature .

The expenditure should be incurred during the previous year.

The expenditure should not be of personal nature.

The expenditure should have been incurred wholly or exclusively for the purpose of the business or profession.

The business should be commenced.

12.3 Thus the fundamental principle in allowing expenditure under Section 37 is that it should full fill the conditions mentioned above. The expenditure should have been incurred wholly and exclusively for the purpose of business of the Appellant. In this case the appellant has not filed any documents to establish that the expenditure was incurred wholly and exclusively for the purpose of business of the expenditure. The burden of proof is on appellant. Appellant failed to discharge the same.

12.4 Therefore, the CIT(A)'s order on the issue of rent of Rs.41,08,553/- is upheld. The ground of appeal No.1 is thus, dismissed.

Ground No.2 - Disallowance of Advertisement expenses of Rs.36,76,778/-

13. The appellant has claimed advertisement expenses of Rs.42,40,578/- under the broader head "Administrative and Selling expenses" of Rs.1,81,46,847/-. No documents

were filed before the Assessing Officer to prove the genuineness of expenditure. As per CIT(A)'s order, the appellant has paid following expenditure:

- | | | |
|--|---|---------------|
| (i) Dainik Divya Marathi, Aurangabad | - | Rs.4,50,000/- |
| (ii) M/s. Bhakti Advertising, Jalna | - | Rs.67,450/- |
| (iii) Lokmat News Papers Pvt. Ltd. | - | Rs.90,000/- |
| (iv) M/s. Twenty First Century Media Pvt. Ltd. | - | Rs.4,96,350/- |
| (v) M/s. Banger B.T. Publicity, Mumbai | | |

13.1 The CIT(A) directed the AO to issue Summons u/s131 of the Act ,to the persons to whom the appellant has claimed to have paid advertising charges. Accordingly, the AO conducted enquiries and submitted the remand report. As per the AO, M/s. Bhakti Advertising, Jalna confirmed the receipt of Rs.67,450/- from the appellant for the purpose of advertising and also M/s. Twenty First Century Media Pvt. Ltd. confirmed the transaction of Rs.4,96,350/-.The other persons did not responded to the Summons issued by the AO. The CIT(A) independently issued notice u/s 133(6) to Banger B.T.Publicity Mumbai. However, no reply was received by the CIT(A). The CIT(A) forwarded copy of remand report to the appellant and sought appellant's comments. The appellant's Chartered Accountant appeared before the CIT(A) and expressed his inability to furnish necessary evidence. Based on these facts, the CIT(A) concluded that advertising charges paid to M/s. Bhakti Advertising, Jalna of Rs.67,450/- and M/s. Twenty First Century Media Pvt. Ltd. of Rs.4,96,350/- shall be allowed and remaining advertising charges of Rs.36,76,778/- are disallowed. Thus, the CIT(A) confirmed the addition to the extent of Rs.36,76,778/- out of advertising expenses.

13.2 On going through the CIT(A)'s order, it is observed that the CIT(A) has granted reasonable opportunity to the appellant. The CIT(A) has also forwarded the copy of remand report to the appellant. However, the appellant failed to file documentary evidence

to establish that the so-called advertising expenses were paid wholly and exclusively for the purpose of business of the appellant. In the absence of any evidence being filed by the appellant, the CIT(A) has rightly confirmed the disallowance of Rs.36,76,778/-. During the proceedings before this Tribunal, the appellant has not filed any evidence to establish that it was wholly and exclusively incurred for the purpose of business of the appellant. The conditions to be fulfilled for claiming deduction u/s 37 of the Act has already been mentioned in earlier para. The appellant failed to prove that it fulfilled the conditions required to be fulfilled for claiming deduction u/s 37 of the Act. Therefore, the CIT(A)'s decision to disallow Rs.36,76,778/- is upheld. The ground of appeal No.2 is thus, dismissed.

Ground No.3 – Disallowance of Security Expenses of Rs.22,22,187/-

14. The CIT(A) has mentioned that the appellant company has claimed to have paid Rs.22,22,187/- to M/s. B.S.S. Security Services, Jalna and B Plus Surksha, Jalna. The CIT(A) directed the AO to issue Summons to these persons. The AO after conducting necessary enquiries filed remand report that the genuineness of said security expenses was in doubt as both the entities failed to respond to Summons u/s 131 of the Act. The CIT(A) forwarded the copy of remand report to the appellant. The authorized representative of the appellant appeared before the CIT(A) to express his inability to furnish bank statements and other details. Based on these facts, the CIT(A) confirmed the addition of Rs.22,22,187/-.

14.1 The onus lies on the appellant to prove the genuineness of expenses claimed by the appellant as to prove by documentary evidence the genuineness of expenditure claimed and also as to prove that the expenditure was incurred wholly and exclusively for the purpose of business of the appellant. However, in this case, the appellant failed to prove the genuineness of expenditure and also failed that the expenditure was incurred wholly and

exclusively for the purpose of business of the appellant. During the proceedings before this Tribunal, the appellant has not filed any document to prove the same. As mentioned earlier, initial onus is on appellant to prove that the said expenditure has been genuinely incurred wholly and exclusively for the purpose of business of the appellant. The conditions to be fulfilled for claiming deduction u/s 37 of the Act has already been mentioned in earlier para. The appellant failed to prove that it fulfilled the conditions required to be fulfilled for claiming deduction u/s 37 of the Act. Therefore, the disallowance of Rs.22,22,187/- made by CIT(A) is upheld. The ground of appeal No.3 is thus, dismissed.

Ground No.4 – Disallowance of Interest on Excise Duty of Rs.29,89,381/-

15. The CIT(A) has allowed interest of Rs.1,29,45,747/- on Excise duty. However, interest of Rs.29,89,381/- was not allowed as the same was shown by the appellant as payable as on 31.03.2012 due to changes in Union Budget. Therefore, the CIT(A) concluded that the liability in question has not crystallized in the year under reference.

16. The CIT(A) has established that interest liability of Rs.29,89,381/- on Excise duty was shown as payable as on 31.03.2012. The appellant explained that it was due to changes in Union Budget. However, the appellant could not file copy of any show cause notice or order of the Excise authorities to substantiate its claim. Only the crystallized clear liability can be allowed. As per section 43B of the Act, any sum payable by assessee by way of tax, duty, cess or fees by whatever name called is allowable only on actual payments. As mentioned earlier, it has been verified by the CIT(A) that the liability of Rs.29,89,381/- has not been crystallized during the year. Therefore, the disallowance of interest on Excise duty of Rs.29,89,381/- is upheld. The ground of appeal No.4 is thus, dismissed.

Ground No.5 – Disallowance of Interest for delay in payment of TDS of Rs.86,169/-

17. The appellant has paid interest of Rs.86,169/- as interest for delay in payment of TDS. This is not an allowable expenditure. Therefore, disallowance of Rs.86,169/-by the CIT(A) is upheld. The ground of appeal No.5 is thus, dismissed.

18. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the Open Court on 11th February, 2022.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 11th February, 2022
Sujeet

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Aurangabad
4. The Pr.CIT-1, Aurangabad
5. DR, ITAT, 'A' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune