

आयकर अपीलिय अधिकरण
मुंबई पीठ “ एस एम सी ”
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “SMC”, MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं.4759/मुं/2019 (नि.व. 2010-11)
ITA NO.4759/MUM/2019(A.Y.2010-11)

Naeemuddin Azimuddin Shaikh,
2/25, Parlelshwar Society,
Shahaji Raje Marg,
Vile Parle (East), Mumbai 400 057.
PAN: BLUPS-1557-G

..... अपीलार्थी /Appellant

बनाम Vs.

Income Tax Officer, Ward 26(2)(4),
Pratyakshakar Bhavan, C-11, Room No.711,
7th Floor, Bandra Kurla Complex,
Bandra (E),Mumbai 400 051.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Vishwas Mehendale

प्रतिवादी द्वारा/Respondent by : Shri Anoop Hiwase

सुनवाई की तिथि/ Date of hearing : 09/02/2022

घोषणा की तिथि/ Date of pronouncement : 06/05/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against an ex-parte order of the Commissioner of Income Tax (Appeals)-38, Mumbai (in short ‘ the CIT(A) ’) dated 13/03/2019 for the assessment year 2010-11.

2. The brief facts of the case as emanating from records are: The assessee is a wood work contractor. The assessee filed his return of income for assessment year 2010-11 on 24/02/2011 declaring total income of Rs.5,09,930/-. The assessment in the case of assessee for assessment year 2010-11 was reopened on the basis of information received from DGIT(Investigation), Mumbai that the assessee has obtained bogus purchase bills amounting to Rs.12,62,317/- from M/s. Rajeshwar Metal Industries. In assessment proceedings, the Assessing Officer issued notice u/s. 148 and 142(2) of the Income Tax Act, 1961 [in short 'the Act'] and also issued several notices under section 142(1) of the Act to the assessee through email as well as RPAD. The assessee neither responded to the notices nor any written submissions were filed before the Assessing Officer. Hence, the Assessing Officer invoked the provisions of section 144 of the Act and completed the assessment proceedings. In the absence of any assistance from the assessee the Assessing Officer made addition of the entire unproved purchases. Thereafter, the assessee filed appeal against the assessment order. The appeal was time barred by 501 days. The notice of hearing of the appeal was sent to the assessee. The assessee failed to respond to the same as well. The CIT(A) dismissed the appeal in an ex-parte proceedings on the ground of limitation. Hence, the present appeal by assessee.

3. Shri Vishwas Mehendale appearing on behalf of the assessee submitted that the CIT(A) has erred in dismissing the appeal without affording adequate opportunity of hearing. The CIT(A) had issued defect memo. Along with defect memo notice of hearing was issued. Before the assessee could remove the defects the appeal of the assessee was dismissed in-limine on the ground of limitation. The assessee had filed an application seeking condonation of delay

citing reasons causing delay in filing of the appeal, however, the same was rejected by the CIT(A) on hyper technical ground. The Id. Authorized Representative of the assessee submitted that the assessee has prima-facie good case in his favour. The solitary addition is with respect to bogus purchases from M/s. Rajeshwari Metal Industries. The assessee has in his possession invoices vide which the assessee had purchased material from the aforesaid party. The assessee has executed the work by utilizing the material purchased from M/s. Rajeshwari Metal Industries. The Id. Authorized Representative of the assessee submitted that the delay in filing of the appeal before CIT(A) was due to the fact that the assessee was under bona-fide impression that the appeal has already been filed by his Tax Consultant, Shri Yatin Rane. Subsequently, it transpired that Shri Rane has neither filed the appeal nor has made proper tax compliances under the Income Tax Act and VAT. The assessee immediately contacted another Chartered Accountant, who thereafter filed the appeal against the assessment order passed u/s. 144 r.w.s. 147 of the Act. Non representation of the assessee before the Assessing Officer and the CIT(A) was not deliberate. It was only because of negligence of the previous Tax Consultant of the assessee who kept the assessee in dark about tax proceedings. The Id. Authorized Representative for the assessee submitted that an opportunity may be granted to the assessee to present his case before the CIT(A).

4. On the other hand, Shri Anoop Hiwase representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that assessee is absolutely non-cooperative. The assessee neither appeared before the Assessing Officer nor appeared before the CIT(A). Even the appeal filed

before the CIT(A) was time barred. The reasons given for delay in filing of the appeal were neither supported by documentary evidences nor any bona-fide reasons were given explaining the delay.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. Undisputedly, the assessee neither appeared before the Assessing Officer nor before the CIT(A). A perusal of the assessment order reveals that several notices were sent to the assessee, however, the assessee neither responded to the notices nor furnished any submissions before the Assessing Officer. Therefore, the Assessing Officer was constrained to complete the assessment order u/s. 144 of the Act. The first appeal filed by the assessee was defective as the necessary documents to be filed along with Form -35 were not furnished. The said appeal was also time barred by 501 days. The assessee had filed application seeking condonation of delay, explaining reasons for delay in filing of the appeal. A perusal of the impugned order shows that solitary notice of hearing was sent to the assessee along with the defect memo on 28/02/2019 for the hearing fixed on 13/03/2019, and on the said date i.e. 13/03/2019 the CIT(A) dismissed the appeal of assessee on the ground of limitation.

6. The assessee has filed a detailed affidavit before the Tribunal explaining circumstances resulting in delay in filing of the appeal before the CIT(A). After examining the same we are satisfied that the delay in filing of the appeal before the CIT(A) was not deliberate, but had occurred for the bonafide reasons stated in the affidavit. The Hon'ble Supreme Court of India in the case of Ram Nath Sao vs. Gobardhan Sao and others, reported as 2002 AIR 1201 has held that acceptance of explanation furnished 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 party. Taking pedantic and hyper technical view of the matter explanation furnished should not be rejected, as it would cause enormous loss and irreparable injury to the party against whom lis terminate either by default or inaction. The relevant extract of the observation made by Hon'ble Apex Court are reproduced herein below:

“ Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished 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 party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by 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 against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way” [Emphasis by us]

7. The Hon'ble Apex Court in the case of Collector, Land Acquisition vs. Mst.Katij& Others, 167 ITR 471 has held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of non-deliberate delay. The

Hon'ble Apex Court held that while dealing with the application seeking condonation of delay a liberal approach should be adopted.

7. Taking into consideration the facts of case and the law expounded by Hon'ble Supreme Court of India and reiterated in catena of judgments with regard to liberal approach while considering application for condonation of delay and the explanation furnished, we are of the considered view that delay in filing of the appeal before the CIT(A) deserves to be condoned. We hold and direct accordingly. The appeal is restored back to the file of CIT(A) for adjudication on merits after affording reasonable opportunity of hearing to the assessee, in accordance with law.

9. The assessee is directed to remove the defects in Form No.35 as pointed by the CIT(A) vide defect memo dated 28/02/2019. The assessee on service of notice shall appear in person or through his Authorized Representative before the CIT(A) to make his submissions. The assessee is directed to cooperate in First Appellate proceedings without causing further delay in disposal of appeal.

10. In the result, appeal by assessee is allowed for statistical purposes.

Order pronounced in the open court on Friday the 06th day of May, 2022.

Sd/-

(GAGAN GOYAL)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 06/05/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai