

आयकर अपीलिय अधिकरण  
मुंबई पीठ "एस एम सी"  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री एस. रिफौर रहमान, लेखा सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI S.RIFAUR RAHMAN , ACCOUNTANT MEMBER  
आअसं.1455/मुं/2021 (नि.व. 2010-11)  
ITA NO.1455/MUM/2021(A.Y.2010-11)

Shailesh R. Somani,  
B/307, Indraprastha II, Jitendra Road,  
Malad (E), Mumbai 400 097  
PAN: ANWPS-2126-C

..... अपीलार्थी /Appellant

बनाम Vs.

Income Tax Officer WD 19(3)(3),  
Mumbai

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Mandar Vaidya, Advocate with  
C.A H.K Chheda

प्रतिवादी द्वारा/Respondent by : Shri Suresh Pariasamy

सुनवाई की तिथि/ Date of hearing : 11/05/2022

घोषणा की तिथि/ Date of pronouncement : 19/05/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax(Appeals)-30, Mumbai [in short 'the CIT(A)'] dated 28/09/2018, for the assessment year 2010-11.

2. This appeal is time barred by 963 days. The assessee has filed an application supported by an affidavit seeking condonation of delay in filing of the appeal. Shri Mandar Vaidya appearing on behalf of the assessee submitted

that out 963 days, the delay of 445 days is for the period prior to COVID-19 Pandemic. Citing reasons given in the affidavit causing delay in filing of the appeal, the Id.Authorized Representative for the assessee submitted that impugned order dated 28/09/2018 was received by the assessee on 05/11/2018. The assessee gave all relevant documents to the Chartered Accountant Shri Harakchand K. Chheda for filing of the appeal before the Tribunal. The Chartered Accountant could not file appeal during limitation period as his ailing Mother-in-law was staying with his family and had to be hospitalized for her Left Bipolar Hip Replacement surgery. Thereafter, she remained admitted in the hospital because of complications and was discharged on 02/12/2019. Shortly thereafter she died on 28/12/2019. The Chartered Accountant could not attend his office work properly during that period. In the month of January 2020 the Chartered Accountant got busy with filing of quarterly and monthly returns under GST and filing TDS/TCS return under Income Tax. In the process there was delay in filing of the appeal. When the Chartered Accountant of the assessee realized that there is a delay in filing of the appeal, the lockdown was announced on account of COVID-19 Pandemic. The Id.Counsel for the assessee for the assessee submitted that the delay in filing of appeal was not deliberate but it occurred on account of medical exigencies in the family of Chartered Accountant. The assessee has prima-facie good case in his favour. The assessee should not suffer on account of pressing genuine reasons for not filing appeal within the time by the Chartered Accountant. The affidavit of the Chartered Accountant is on record. The Id.Authorized Representative for the assessee prayed for condoning delay and admitting the appeal for adjudication on merits.

3. Shri Suresh Pariasamy representing the Department vehemently opposed the application of assessee seeking condonation of inordinate delay. The Id. Departmental Representative submitted that from perusal of affidavit of Chartered Accountant of the assessee it is evident that inordinate delay of each day in filing appeal is not explained. The Hon'ble Courts have time and again held that each day delay has to be explained.

4. We have heard the submissions of rival sides on the issue of condonation of delay. From perusal of the affidavit of Shri Harakchand K. Chheda, Chartered Accountant, who had represented the assessee before Assessing Officer it emanates that the delay in filing of appeal is caused on account of medical exigencies in his family. Out of 963 days delay, the delay of 445 days is of pre- COVID-19 period. Taking into consideration entirety of facts and the reasons given for causing delay in filing of the present appeal, we are satisfied that the delay was on account of bonafide reasons.

4.1 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 observations 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 neqliqence 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 arquable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party aqainst 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” [Emphasised by us]*

5. 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.

5.1 The Hon'ble Supreme Court of India in the case of N.Balakrishnan vs. M. Krishna Murthy [1998]7 SCC 123 while dealing with the application for condonation of delay of 883 days observed, that condonation of delay is a matter of discretion of the Court. The length of delay is no matter, acceptability of the explanation is the only criteria. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation,

whereas in certain other cases, a delay of a very long range can be condoned as an explanation there of can be satisfactory.

6. In the present case, we find that the delay in filing of the appeal has been reasonably explained. Part of the delay is attributable to the unprecedented situation caused by COVID-19 Pandemic. The Hon'ble Supreme Court of India taking cognizance of the hardship caused by the Pandemic on its own motion vide order dated 23/03/2020 [117 taxmann.com 66(SC)] extended the time for filing of the appeals. Thus, in view of the above, the delay in filing of the appeal is condoned and the appeal is admitted to be heard and disposed of on merits.

7. The Id.Authorized Representative for the assessee submitted that the assessee is engaged in trading of ferrous and non-ferrous metals. The assessment in the case of assessee was reopened for the reason that the assessee has made bogus purchases aggregating to Rs.1,49,02,876/- from various hawala operators. During the course of assessment proceedings the assessee furnished purchase bills, corresponding sales details, details of the payment made to the dealers, etc. The Assessing Officer after considering evidences submitted by the assessee made addition by estimating profit element embedded in unproved purchases @12.5% and, hence, made addition of Rs.18,62,860/-. Aggrieved by the assessment order dated 03/03/2016 passed under section 143(3) r.w.s. 147 of the Income Tax Act,1961 ( in short 'the Act') the assessee filed appeal before the CIT(A) . The CIT(A) in an ex-parte proceedings confirmed the addition in toto. The Id.Authorized Representative for the assessee submitted that the addition made by authorities below by estimating suppressed profit @12.5% is very

much on the higher side. The assessee has declared G.P @4%. The same has been accepted by the Revenue Authorities. The Id.Authorized Representative for the assessee prayed for restricting the addition on alleged bogus purchases @4%.

8. The Id.Departmental Representative vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that assessee has failed to prove genuineness of purchases made from hawala operators, hence, the Assessing Officer made addition by estimating suppressed profit margin @12.5%. The CIT(A) has upheld the same following the decision rendered in the case of CIT vs. Simit P. Sheth reported as 356 ITR 451 (Guj).

9. Both sides heard, orders of authorities below examined. The solitary issue raised in the appeal is with respect to addition made on account of bogus purchases. Undisputedly, the assessee has failed to prove genuineness of purchases from alleged hawala operators. The Hon'ble Jurisdictional High Court in the case of PCIT vs. Paramshakhti Distributors Pvt. Ltd. in Income Tax Appeal No.413 of 2017 decided on 15/07/2019 has held that only profit element embedded in unproved purchases can be added. The G.P rate in trading of ferrous and non-ferrous metal generally range between 5% to 8%. Taking into consideration entirety of facts we are of considered view that estimation of 12.5% by CIT(A) is on higher side. The impugned order is modified and the addition is restricted to 8%. Thus, ground No.1 of appeal is partly allowed in the terms aforesaid.

10. The grounds No.2 & 3 raised in appeal were not agitated by the Id.Authorized Representative for the assessee. No arguments were advanced in respect of these grounds. Accordingly, ground No.2 and 3 of the appeal are dismissed.

9. In the result, appeal by assessee is partly allowed.

Order pronounced in the open court on Thursday the 19<sup>th</sup> day of May, 2022.

Sd/-

( S.RIFAUR RAHMAN )

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 19/05/2022

Vm, Sr. PS(O/S)

**प्रतिलिपि अग्रेषित**Copy 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.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**