IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 1905/Bang/2019
Assessment Year : 1999-2000

Shri M. Nagaraja, M/s. Nageetha Complex, Double Road, Saraswathipuram, Mysore – 570 009. **PAN: ABOPN8680L**	**Vs.**	The Deputy Commissioner of Income Tax, Circle 2 (1), Mysore.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri S. Parthasarathi, Advocate
Revenue by	:	Shri Praveen Karanth, CIT-DR

Date of Hearing	:	28-07-2022
Date of Pronouncement	:	05-09-2022

ORDER
PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This is an appeal by assessee directed against order of Ld.CIT(A) dated 25/09/2013 for the assessment year 1999-2000.

2. The assessee raised following grounds:-

	GROUNDS OF APPEAL	***Tax Effect relating to each Ground of appeal***
1.	*On the facts and in the circumstances of the case, the learned CIT(A), Mysore erred in passing the order in the manner in which he did.*	*NA*

2.	*On the facts and circumstances of the case, the Hon'ble CIT(A)., Mysore erred in considering the order of the CIT, Mysore u/s.263 wherein it is wrongly stated that the order of AO u/s.147 cannot be less than that of the order u/s.143(3) of the Act.*	*NA*
3.	*The learned CIT(A) having in principle agreed that the appellant was entitled to the deduction of expenditure to the additional receipts offered, ought to have refrained from holding that the income ultimately to be determined should not be less than the income assessed u/s 147 of the Act when the income had been wrongly determined.*	*Rs.1,20,37,709*
4.	*The learned CIT(A) ought to have appreciated that even the observation of the Hon'ble Tribunal in M.P order was not binding and was not to be followed and the present assessment being in consequence of the order of the High Court, the observations of the Appellate Authority were of no consequence and the assessing officer was at liberty to determine the correct income.*	*Rs.1,20,37,709*
5.	*The ld. CIT(A) ought to have appreciated that what was assessable was the real income and not even the income wrongly declared by the Respondent, accordingly, he ought to have directed the deduction of expenditure as claimed after verification.*	*Rs.1,20,37,709*
6.	*On the facts and circumstances of the case the Hon'ble CIT(A), Mysore ought to have appreciated that the assessment u/s 143(3) was made on the non-existent income and taxed thereon erroneously which is non-est in the eye of law.*	*Rs.1,20,37,709*
7.	*Without prejudice, it may be appreciated that the Hon'ble High Court of Calcutta in the case of Mayadin Bansal vs. CIT reported in 117 ITR 125 held that any assessment made on the basis of a return, which is an invalid or a non-est return, is void ab initio and even notice u/s 143(2) cannot be issued.*	*NA*

8.	*The Hon'ble CIT(A), Mysore failed in adjudicating upon the validity of the revised return which is filed beyond the scope u/s 139(5) of the Income Tax Act, 1961 and also the validity of the assessment framed by the A.O u/s 143(3) on the basis of the invalid revised return.*	*NA*
9.	*Without prejudice, the addition/disallowance is excessive, arbitrary and unreasonable and liable to be deleted in full.*	*NA*
10.	*The learned CIT(A) erred in confirming the interest u/s.234B and 234C of the Act.*	*Rs.25,65,111 and Rs.64,187*
	TOTAL TAX EFFECT	*Rs.39,79,665*

3. At the time of hearing, it is noticed that there was a delay of 2111 days in filing the appeal before this *Tribunal*.

4. The Ld.AR submitted vide note dated 30/07/2022 as under:

> *"1. In the case of the Appellant, a survey was conducted on 07.01.1999. Subsequently, the return of income was filed on 31.12.1999 declaring loss of Rs.5,18,874/-. Subsequently, the Appellant filed return on 22.03.2002 declaring an income of Rs.46,20,680/- which is after taking notice of the receipts omitted to be declared when the documents maintained which was found in the course of survey which also included the expenditure incurred not taken into account. While the return the Appellant included the receipts omitted to be considered and however failed to consider the expenditure recorded therein. Thus, the return was filed on 22.02.2022 declaring income of Rs.46,20,677/-. The return filed on 22.03.2022 was neither a return under Section 139(1) nor under Section 139(4) of the Act. Further, no notice under Section 148 was issued then. Accordingly, the return filed was non est in the eye of law. Thus, the valid return originally filed was the one filed on 31.12.1999 wherein loss of Rs.5,18,874/- was declared. The AO concluded the assessment on 28.03.2002 under Section 143(3) of the Act determining the income at Rs.46,20,680/-.*
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> *2. An application under Section 154 was made on 24.01.2003 wherein the Appellant claimed the expenditure which was omitted to be considered while filing the return on 22.03.2002. A copy of the application under Section 154 is enclosed in the Paper Book at Page No.109. The AO has however declined to allow the rectification*

application and passed the order on 29.05.2003 which is enclosed at Page Nos.112-116 of the Paper Book.

3. In the meanwhile, the Appellant filed an application under Section 264 of the Act before the CIT against the assessment made under Section 143(3) which is enclosed at Page Nos.103-108 of the Paper Book. The application was rejected by the CIT vide his order dated 26.03.2003.

4. In the meanwhile, the appeal filed by the Appellant against the order under Section 154 of the Act referred to supra was also dismissed by the CIT(A) vide his order dated 11.11.2003. A copy of the order is kept at Page No.27-29 of the Paper Book.

5. In the meanwhile, notice under Section 148 was issued on 19.03.2003, in response to which the Appellant filed the return on 17.04.2003 admitting total loss of Rs.4,99,636/-. However, the AO passed the order under Section 143(3) read with 147 of the Acton 30.03.2004 determining the total income at Rs.1,49,45,076/-. The said order is kept at Page Nos.18-26 of the Paper Book.

6. Against the said order, an appeal was filed before the CIT(A) and the CIT(A) vide order dated 21.02.2005 dismissed the same. A copy of the order is enclosed at Page Nos.30-35 of the Paper Book. The Appellant filed appeal before the Tribunal against the said order and the Tribunal vide order dated 21.04.2006 allowed the appeal wherein the impugned addition towards cost of construction was deleted. However, the Tribunal did not adjudicate on the Appellant's claim with regard to the various additions under the head "business". A copy of the order of the Tribunal is enclosed at Page Nos.36-42 of the Paper Book. Since the Tribunal did not consider the claim of the appellant, an application under Section 254(2) of the Act was made. The Tribunal recalled its earlier order partly to consider the above issue vide its order dated 30.11.2010 which is enclosed at Page Nos.47-49 of the Paper Book. Subsequently, the Tribunal passed a fresh order in this connection vide order dated 13.01.2011 wherein this issue was set aside to the file of the AO to look into the entire issue afresh in a comprehensive manner in the background of the reasons recorded by them in the order (vide Para 8.6 of the said order), after giving opportunity to the Appellant. The order dated 13.01.2011 is enclosed at Page Nos.50-59 of the Paper Book. In pursuance of the said order, the AO passed a fresh order wherein he had determined the total income at 8% of the total receipt of Rs.94,87,448/- and made further additions and determined the total income of Rs.2,61,948/-. The said order of the AO under Section 143(3) rws 254 is enclosed at Page Nos.68-71 of the Paper Book.

7. In the meanwhile, the Revenue filed an application under Section 254(2) of the Act before the Tribunal against the order of the Tribunal dated 13.01.2011 wherein the Tribunal dismissed the said application.

However, the Tribunal observed that the total income determined in the original assessment under Section 143(3) dated 28.03.2002 could not be reduced in pursuance of the reassessment order. A copy of the order of the Tribunal dated 20.01.2012 is enclosed at Page Nos.66-67 of the Paper Book.

8. In light of the above, when the AO determined the total income at Rs.2,61,950/- vide order dated 30.12.2011 which is enclosed at Page Nos.68-71 of the Paper Book. Proceedings under Section 263 of the Act were invoked by the CIT and cancel the said order and held that the final income determined under Section 143(3) of the Act in the original proceedings at Rs.46,20,677/-could not be reduced in the subsequent proceedings in pursuance of the order of the Tribunal. A copy of the order dated 03.10.2012 is enclosed at Page Nos.117-130 of the Paper Book.

9. Aggrieved by the said order, the Appellant filed appeal before the Tribunal. The Appellant had also filed appeal before the Tribunal against the order of the CIT(A) who dismissed the application under Section 154 of the Act dated 11.11.2003. Both the appeals were taken together by the Tribunal and both the appeals were dismissed vide order dated 22.08.2014. The said order is enclosed at Page Nos.131-155 of the Paper Book. Against the said order, the Appellant filed an appeal under Section 260A of the Act before the Hon'ble High Court of Karnataka. In the meantime, against the relief given by the Tribunal in its order dated 13.01.2011, the Revenue filed appeal under Section 260A of the Act before the Hon'ble High Court of Karnataka wherein the deletion of the addition towards unexplained investment in construction was challenged and the Hon'ble High Court was pleased to set aside the issue for reconsideration vide judgment dated 13.08.2012. A copy of the judgment of the High Court is enclosed at Page Nos.75-80 of the Paper Book. Consequently, when effect was given to the order of the Tribunal under Section 263 of the Act and also the High Court's order under Section 260A of the Act, the AO passed the order on 14.12.2012 wherein he determined the total income at Rs.52,07,190/- which included the impugned addition towards cost of construction to the extent of Rs.31,61,483/-. A copy of the order is part of the appeal memo. The claim of expenditure as made by the Appellant was also not allowed. Accordingly, the Appellant challenged the order before the CIT(A) in appeal. The CIT(A) in his detailed order had deleted the addition towards unexplained cost of construction. However, with regard to the Appellant's claim for allowance of expenses to the tune of Rs.71,72,109/ -, the CIT(A) upheld the order of the AO by holding that the claim of the Appellant was only academic in view of the finality attained by the order of the CIT(A), Mysuru under Section 263 of the Act. Against this observation and upholding of the addition, the Appellant is in appeal before the Tribunal now. A copy of the order of the CIT(A) was enclosed as part of this appeal.

10. Originally, the Revenue filed appeal against the deletion of addition towards cost of construction by the CIT(A) before the Tribunal. As against this appeal, the Appellant filed cross objection which was belated before the Tribunal challenging the sustaining of the impugned addition towards profit without allowing the expenditure.

11. However, on account of monetary limits, the Department's appeal stood dismissed vide order dated 28.08.2019 by the Tribunal and consequently it was also held that the cross objection would not survive and accordingly liable to be dismissed. Accordingly, the Appellant immediately rush to file a fresh appeal against the impugned addition sustained by the CIT(A) in the above said order before the Tribunal and the appeal was filed on 05.09.2019. Thus, there is no delay in filing the appeal after pronouncement of the order by the Tribunal as referred to supra.

12. However, the cross objection originally filed before the Tribunal which stood dismissed by the said order referred to supra was belated by 504 days. The reason for the delay is as per the details given in the annexed statement (List of Dates And Events). We have already filed an Affidavit for condonation of delay on 11.06.2016. The cross objection thus was filed on 18.05.2016 and the same was within the reasonable time from the date of withdrawal of the appeal filed under Section 260A of the Act before the Hon'ble High Court of Karnataka which was on 22.03.2016."

5. The Ld.AR has filed a fresh affidavit for condonation of delay on 18/11/2018 wherein he has explained the above situation that caused the delay in filing the present appeal before this *Tribunal.* He also prayed for the same to be condoned as the delay is not attributable to the assessee.

6. On the contrary, the Ld.DR submitted that the inordinate delay of 2111 days cannot be condoned where there is no reasonable causes and the assessee is in habit of filing the appeals belatedly as seen from the delay in filing the cross objections in this case on earlier occasion where there was delay of 504 days.

7. We have heard the rival submissions and perused the materials available on record. From the arguments and the reasons for the delay in both these rounds of litigation, we are of the view that the plea of assessee has not been heard at any stage on merits. It is submitted that the delay

was due to various protracted litigations that continued in case of assessee and the assessee inadvertently missed to file appeal against the impugned order and therefore assessee choose to file cross objections.

7.1 The necessary events and dates in order to simplify our observation as under:

07.01.1999	*Survey conducted and assessee admitted the additional income by offering the Rs. 1,00,000/- for taxation by filing revised return.*
31.12.1999	*Return of income filed admitting the loss of Rs. 5,18,874/-*
22.03.2002	*Assessee filed revised return declaring income of Rs. 46,20,676/-*
28.03.2002	*AO concluded the assessment u/s 143(3) and determined the total income at Rs. 46,20,680/-*
24.01.2003	*Application u/s 154 of the Act for rectification for the assessment order dt. 28.03.2002*
19.03.2003	*Notice u/s 148 was issued.*
17.04.2003	*Assessee filed ROI in response to the notice u/s 148 of the Act by declaring the loss of Rs. 4,99,636/-*
26.03.2003	*Assessee filed revision petition before CIT(A) Mysore u/s 264 against the order of 143(3) which was dismissed by the CIT*
29.05.2003	*Application u/s 154 of the Act was rejected by the Ld.AO*
11.11.2003	*On appeal against the order u/s 154 dt. 29.05.2003 the CIT(A) dismissed the same.*
30.03.2004	*Re-assessment order u/s 143(3) rws 147 of the Act was passed assessing the income of Rs. 1,49,45,076/-*
21.02.2005	*On appeal against the order u/s 143(3) the CIT(A) dismissed the same.*
21.04.2006	*ITAT passed the order against the order of the CIT(A) Mysore dt. 21.02.2005 in favour of the assessee, directing the AO to allow unaccounted expenditure in relation to unaccounted contract receipts admitted by the assessee.*
30.11.2010	*Misc.application filed by the assessee before the ITAT and the ITAT has passed the speaking order.*
13.01.2011	*ITAT recalled its earlier order dated 21.04.2006 and allowed in favour of the assessee*
30.12.2011	*The AO passed the order u/s 143(3) rws 254 in pursuance of the directions of the ITAT and allowed the expenditure of Rs. 78,82,340/-*

20.01.2012	*Misc. Petition filed Revenue before the ITAT for rectification of the above order dt. 21.04.2006, was dismissed*
09.03.2012	*ITAT dismissed the MP filed by the Revenue.*
09.07.2012	*Notice u/s. 263 was issued.*
13.08.2012	*High Court passed the order remanding the issue for reconsideration to the AO.*
03.10.2012	*CIT passed order u/s 263 of the Act*
14.12.2012	*Consequential order of the Hon'ble High Court u/s 260A of the Act, was passed by AO determining income of Rs. 52,07,190/-*
22.08.2014	*ITAT dismissed the appeal of the assessee which was filed against the order of CIT u/s 263 and against the order u/s 154 of the Act dt. 11.11.2003*
22.03.2016	*Assessee filed ITA before the Hon'ble Court which was withdrawn by the assessee that was filed against order of ITAT dated 22/08/2014.*
18.05.2016	*Cross objection was filed.*
28.08.2019	*Revenue appeal and the cross objection were dismissed by the Hon'ble ITAT due to monetary limit*

7.2. We have carefully perused all the details filed by the assessee. The list of events and dates reproduced hereinabove that forms part of assessee's submissions viz-a-viz the affidavit filed in support of the application for condonation of delay of 2111 days. The entire premise of the assessee is that there is no delay in filing the present appeal as appearing from the following para which forms part of the submission filed by the Ld.AR dated 30/07/2022.

> *"11. However, on account of monetary limits, the Department's appeal stood dismissed vide order dated 28.08.2019 by the Tribunal and consequently it was also held that the cross objection would not survive and accordingly liable to be dismissed. Accordingly, the Appellant immediately rush to file a fresh appeal against the impugned addition sustained by the CIT(A) in the above said order before the Tribunal and the appeal was filed on 05.09.2019. Thus, there is no delay in filing the appeal after pronouncement of the order by the Tribunal as referred to supra."*

7.3 From the records, we note that, the assessment order is passed as per the remand by the *Hon'ble High Court* vide its order dated 13/08/2012 which is placed at pages 75-80 of the paper book in ITA Nos. 1302 & 1304 of 2006 pertaining to A.Ys. 1998-99 and 1999-2000 that arised out of order dated 21/04/2006 passed by this *Tribunal* in *ITA Nos. 719 & 793/Bang/2005* preferred by the revenue. *Hon'ble High Court* while considering the cost of construction of the building has observed the undisputed fact as under:

> *"8. It is not in dispute that the assessee had constructed the building in question during the assessment years 1998- 1999 to 2000-2001. The Assessing Officer during survey noticed the construction of building. During the enquiry, the assessee has admitted the cost of construction as Rs.1,72,98,255/-. The Assessing Officer not agreeing with the assessee referred the matter to the District Valuation Officer to estimate the cost of construction. The District Valuation Officer estimated the value of building at Rs.2,61,54,033/-. The assessee filed objections to the estimation of the valuation of the building. The Assessing Officer addressed a letter to the District Valuation Officer to clarify the objections raised by the assessee. However, the District Valuation Officer has not submitted his reply to the objections raised. In view of that, the estimated value of the building submitted by the District Valuation Officer has been taken into consideration and called upon the assessee to pay the additional tax. The appeal filed by the assessee was dismissed by the CIT (Appeals). However, Income Tax Appellate Tribunal allowed the appeal filed by the assessee solely on the ground that the Assessing Authority cannot rely upon the Valuation Report submitted by the District Valuation Officer under Section 55-A of the Act and the valuation has been done in CPWD rates. The valuation taken by the Assessing Officer is at a higher rate compared to the DSR rates fixed by the PWD and also relied upon the judgment of the Hon'ble Supreme Court in (2003) 262 ITR 407 cited supra. However, the Tribunal has lost sight of the amendment brought into the Income Tax Act and the new Section 142-A inserted by the Finance (No.2) Act 2004 w.e.f. 15-11-1972. Section 142-A of the Act reads as under:*
>
> *(1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B or fair market value of any property referred to in Sub-Section (2) of section 56 is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.*

(2) The Valuation Officer to whom a reference is made under sub-Section(1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).

(3) On receipt of the report from the valuation Officer, the assessing Officer may after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment:

Provided that nothing contained in this section shall apply in respect of an assessment made on or before the 30th day of September, 2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.

9. In view of the amendment to the Income Tax Act, the Assessing Officer has got power to refer the matter to the District Valuation Officer for the purpose of valuation. Further, the Tribunal has committed an error in holding that CPWD rates adopted by the District Valuation Officer was not correct without assigning any reason to arrive at such a conclusion. Hence, the order passed by the Income Tax Appellate Tribunal cannot be sustained.
10. It is the specific case of the respondent-assessee that he had filed detailed objections to the District Valuation report. The Assessing Officer referred the objections to the District Valuation Officer. The District Valuation Officer has not given any reply with regard to the objections raised by the assessee. However, the Assessing Officer without considering the objections proceeded to assess the value of the building. The amended section 142-A(3) contemplates that on receipt of the report from the Valuation Officer, the Assessing Officer must give the assessee an opportunity of being heard and then take into consideration such report in making such assessment or reassessment. In the instant case, on the objections filed by the assessee, though the matter was referred to the District Valuation Officer for his comments, without waiting for further comments from the District Valuation Officer, the Assessing Officer has proceeded with the matter without considering the valid objections raised by the assessee. The same was confirmed by the CIT (Appeals). However, the Appellate Authority set aside the said order without remanding the matter for reconsideration. The matter requires to be reconsidered by the Assessing Authority afresh after getting necessary clarification from District Valuation Officer with regard to value of the building constructed by the assessee. Hence, the points are answered in favour of the assessee. Accordingly, we pass the following:

ORDER The appeals are allowed and remanded to the Assessing Authority to reconsider the matter and pass assessment order afresh in accordance with law."

7.4 Against this remand, the assessing officer passed order on 14/12/2012 wherein it is submitted that assessee could not furnish any necessary required evidence to value the building and that assessee had completed the construction during A.Y. 2000-2001 and therefore the violation based on inspection reported on 20/11/2002 does not suffer any infirmity. The Ld.AO therefore thus relied on the construction cost mentioned in the inspection report to be at Rs.2,61,54,083/- as against Rs.1,72,98,255/- admitted by the assessee.

7.5 Aggrieved by this order by the Ld.AO, appeal was filed before the Ld.CIT(A) and the Ld.CIT(A) vide order dated 25/09/2013 considered the claim of assessee by observing as under:

> *"9. Ground No. 2 & 3 of the appellant are on the addition of difference in cost of construction. This issue is a new issue which was not there in the original order u/s 143(3) and is particular to the order u/s 148 and subsequently the order went upto the Hon'ble Tribunal and Hon'ble Tribunal in their order no. 719 and 793 dated 21.4.2006 observed that the appellant is eligible for benefit of rate difference between CPWD and PWD at 10% and additional 5% for self supervision and also relying on the decision of Hon'ble Supreme Court in Amiyabala Paul 262 ITR 407 and for this reasoning allowed the appeal of the appellant. On further appeal by the department, Hon'ble High Court of Karnataka set aside the matter to the file of the AO in their order no. ITA No. 1302 & 1304/2006 dated 13.8.2012 wherein, it was held that the objections of the appellant were not considered by the DVO and the AO and the ITAT has not given proper reasoning on the decision of percentage allowances. Further, in view of the amendment and new section u/s 142A reference to DVO is valid*
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> *9.1 The directions of Hon'ble High Court were also considered in the present order u/s 143(3) rws 263 rws 260 (1A) by the AO in the present order under appeal. It is observed by the AO that Hon'ble High Court of Karnataka has upheld the validity of valuation report and the adaptation of CPWD rates It is argued before the AO by the appellant that their investment up 31.3.1999 is only considered but the appellant has completed the building on 5.10.99 when the CC was obtained. However, the appellant's objection that the AO has not considered the investment after the date of issue of CC was not accepted on the ground that the plinth area of the method adopted by DVO has taken into consideration the building duly completed as evidenced by completion certificated dated 5.10.1999. The appellant has not produced any evidence to the contrary and hence the objection was over ruled.*

9.2 In appeal, it is argued by the appellant that as could be seen from the balance sheet for the AY 2002-03, the appellant has shown commercial complex at Mysore at Rs. 2,38,29,340/- The DVO's report was in the month of November'2002 subsequent to the return filed along with this balance sheet which was filed on 29th July 2002. This clearly shows that the appellant has disclosed the higher value at the above figure in the balance sheet filed much before the issue was raised by the DVO. Hence, on the date of inspection of DVO, if not higher than this, atleast this investment should have been considered by the AO.

9.3 Similarly, for the AY 2001-02 in the balance sheet the investment was shown at Rs.2,09,49,960/- Hence it is argued, it is not correct to say there is no further investment in this building after obtaining the completion certificate and before the date of inspection of the DVO. Further, the appellant filed letter from tenant i.e Medi Soft Solutions Pvt Ltd dated 06.03.2003 and the letter dated 12.4.2002 of HDFC bank etc., wherein they confirmed to have made certain investments in works like flooring, electrical fittings etc., and the total of these investments of all these tenants works out to Rs.40,67,524/-.

9.4 It is argued, that these investments of the tenants which are also on the building and prior to the inspection of the DVO are also to be counted. These details were also filed before the AO as argued by the appellant. It is also argued that the DVO has counted this investment of the tenants in his report.

9.5 I have considered the rival contentions carefully. I find that t investment of the appellant are periodically reflected in balance sheet as pointed above and there is no finding contrary to this. Hence, the AO is directed to adopt the investment as reflected in the balance sheet as on 31.03.2002 since the DVO's valuation is in Nov'2002. To this investment of the appellant, I find that it is reasonable to also add the investment made by tenants before date of inspection of DVO as claimed by the appellant as above. After all this, I find that there is no difference between the valuation done by the DVO and the value of the building as per the books of the appellant and the investment made by the tenants. Hence the addition is directed to be deleted."

7.6 Against this order, the revenue filed the appeal before this *Tribunal* in *ITA No. 237/Bang/2014* being the second round of appeal post remand by *Hon'ble High Court.* This appeal was dismissed for not satisfying the monetary limits and accordingly the C.O. No. 11/Bang/2016 filed by assessee also was dismissed as infructuous.

7.7 Now considering the submission of assessee that it came into the appeal since the Cross Objection was dismissed, we note that the issue raised in the cross objection could not be adjudicated as the main appeal filed by the revenue got dismissed due to monetary limit. It was thereafter that, the assessee filed the present appeal. It is pertinent to place reliance on judgement of Hon'ble Supreme Court in the case of *Mast. Katiji* reported in *(1987) 167 ITR 471 wherein* laid down following 6 principles.

> (1) 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 at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
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> (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 and pragmatic manner.
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> (4) When substantial justice and technical consideration 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 a non-deliberate delay.
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> (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.
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> (6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

7.8 Respectfully following the above and considering the fact that substantial justice cannot be pitted against the technicalities. We find that

Hon'ble Madras High court has considered the issue of condonation of delay and expounded as under in Sreenivas Charitable Trust v. Dy. CIT (2006) 280 ITR 357 (Mad.).

> *"No hard and fast rule can be laid down in the matter of condonation of delay and courts should adopt a pragmatic approach and should exercise their discretion on the facts of each case keeping in mind that in construing, the expression "sufficient cause" the principle of advancing substantial justice is of prime importance and the expression "sufficient cause" should receive a liberal construction.*
>
> *Held, that it was stated in the petition filed by the assessee for condonation of delay that the order copy was misplaced and thereafter it was found and sent to counsel for preparing the appeal and then, the appeal was prepared and filed before the Tribunal and in that process, the delay of 38 days occurred. The Tribunal was not right in dismissing the appeal as barred by limitation. The delay in filing the appeal before the Tribunal had to be condoned."*

7.9 In the aforesaid case, the delay was that of 38 days and in considering the issue, the jurisdictional High court had considered the following decision of the Apex Court:-

The Hon'ble Supreme Court in Vedabai alias Vaijayanatabai Baburao Patil v. Shantaram Baburao Patil (2002) 253 ITR 798 held as under (page 799):

> *"In exercising discretion, under section 5 of the Limitation Act the courts should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case, the consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard. The court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance. (Emphasis supplied).*

7.10 In the above case, the Apex Court was considering a case where the application for condonation was for a delay of 7 days in filing the appeal against the order of the trial court. In the same case, the Hon'ble Jurisdictional High Court also cited recent decision of Hon'ble Allahabad High Court in Ganga Sahai Ram Swarup v. ITAT (2004) 271 ITR 512. In this case, it was held that it was not in dispute that there was *only a delay of 12*

days in filing the appeal. A liberal view ought to have bee taken by the authority as the delay was only for a very short period and the appellant was not going to gain anything from it. (Emphasis supplied).

7.11. It is also to be noted here that in the land mark decision on the issue of condonation by the Apex Court in the case of Collector Land Acquisition v. Mst. Katigi (1987) 167 ITR 471 wherein the Hon'ble Apex Court has given guidelines that courts should have a liberal and practical approach in exercising the power of condonation of appeal, the *context was dismissal as time barred for 4 days.* (Emphasis supplied)

7.12 In the same case, the Apex Court had also held that doctrine of Equality Before Law is applicable to all litigants including the State as a litigant. They are accorded the same treatment and the law is administered in an even handed manner.

7.13 It is also a well settled judicial principle that words or lines out of a decision should not be exported to be interpolated as precedent with complete disregard of the context.

7.14 Considering the present case on the anvil of aforesaid expositions, we find that delay of 2111 days on account of pursuing of various legal remedies is undoubtedly an inordinate delay. As we find in Oxford English Dictionary, the term "inordinate" is an adjective meaning "unusually large, excessive". It is seen from the above expositions that the pragmatic approach to condonation of delay has always been advocated when the delay is short. By no means, the aforesaid exposition means, that in construing the expression, 'sufficient cause' while advancing the cause of 'substantial justice', the period of delay has to be absolutely ignored. This is more so when the cause attributable for the delay is pursuing various legal remedies, so as to get right relief.

7.16 We therefore condone the inordinate delay based on the above discussion. Accordingly, the condonation petition filed by the assessee stands allowed.

8. On merits, we have considered the submissions by the Ld. Counsel submitted vide written submission dated 1/08/22, and the records placed before us. On the contrary, the Ld. DR submitted that at stage of hearing, the assessee has not been able to establish with details the payments made towards construction activity.

8.1 Before, we advert to the main issue of disallowance by the Ld.CIT(A) challenged by the assessee in the present appeal, it is necessary to elucidate the history of the appeals by the assessee before the revenue authorities, this *Tribunal* and *Hon'ble High Court*.

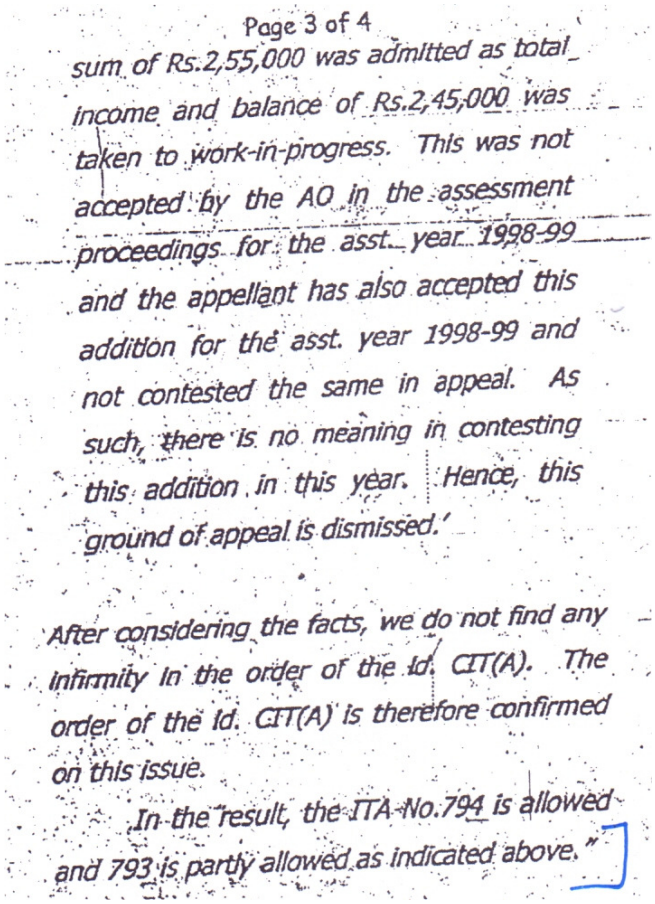
- The assessee filed original return declaring loss of ₹5,18,874/-wide return of income filed on 31/12/1999. There was a survey subsequently on 07/01/1999 and a assessee thereafter revised the return for your under consideration by declaring total income of ₹ 46,20,680/- in the return of income filed on 22/03/2002. We note that the said revised return was accepted under section 143(3). All the subsequent proceedings initiated by the revenue against which assessee have been filing appeals before the various forums is based on the assessment in respect of the income declared by the assessee as per the revised return. We therefore, at the outset reject the plea taken by the Ld. Counsel in para 14 of the written submission that the revised return filed on 22/03/2002 was non-est in the eye of law.
- We note that, subsequently the assessment was reopened vide notice issued under section 148 of the act, dated 19/03/2003 wherein, the reasons were recorded that, there was failure on the part of the assessee to fully and truly disclose all material facts necessary for completion of assessment proceedings in respect of the opening stock taken in excess by ₹2,45,000/- and the departmental supply was claimed at ₹84,23,189/- as against the correct amount of

₹63,72,257/- by the assessee. The Ld.AO was the opinion that, the assessee debited excess claim to the profit and loss account to the extent of ₹20,50,732/-. We note that the reopening of the assessment was based on the details declared by assessee as per the revised return of income. Order under section 147 read with 143 (3) was passed by assessing the income in the hands of a assessee at Rs.1,49,45,076/- as against ₹46,20,680/- declared by the assessee in the revised return of income. Against this assessment order the assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) upheld the additions made by the Ld.AO to in the order passed under section 143 (3) read with Section 148 of the Act. Against side order of the Ld.CIT(A), the assessee filed appeal before this *Tribunal* and this *Tribunal* vide order dated 21/04/2006, allowed the issue alleged by the assessee in respect of the cost of construction being cost of materials, labour. Subsequently miscellaneous petition no 100/2006 was filed by the assessee, that was disposed of by this *Tribunal* vide order dated 15/09/2006 placed at page 43-45 of the paper book, by observing as under:

3. We have perused the grounds of appeal and satisfied that the ground raised in respect of the addition of Rs.2,45,000/- was omitted to be considered in the order of the Tribunal. Therefore, we now propose to consider the same and propose to rectify the order in the following lines by adding para.7.1 after paragraph 7:

"7.1 One ahother ground raised by the assessee for the assessment year 1999-2000 which is in relation to addition on account of opening stock of work-in-progress. In respect of the aforesaid ground raised by the assessee, the ld. CIT(A) observed and passed the order as under:

'The authorized representative contested the addition of Rs.2,45,000/- in the opening stock as work-in-progress. However, the appellant has already admitted this in the asst. year 1998-99 on account of survey wherein he has admitted a sum of Rs.5 lakhs. But only a



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sum of Rs.2,55,000 was admitted as total income and balance of Rs.2,45,000 was taken to work-in-progress. This was not accepted by the AO in the assessment proceedings for the asst. year 1998-99 and the appellant has also accepted this addition for the asst. year 1998-99 and not contested the same in appeal. As such, there is no meaning in contesting this addition in this year. Hence, this ground of appeal is dismissed.'

After considering the facts, we do not find any infirmity in the order of the ld. CIT(A). The order of the ld. CIT(A) is therefore confirmed on this issue.

In the result, the ITA No.794 is allowed and 793 is partly allowed as indicated above."

8.2 One more miscellaneous petition in MP No. 100/2010 was later on filed by the assessee, challenging the order dated 21/04/2006 as well as the order passed in the miscellaneous petition dated 15/09/2006 passed by this *Tribunal*. This miscellaneous petition was disposed of by this *Tribunal* vide order dated 31/11/2010, placed at pages 47-49 by observing as under:

> *"5. After hearing both the parties and after considering the material on record, we are of the opinion, that the Tribunal had erroneously missed to dispose of the ground of appeal no.2 before the Tribunal which is also ground of appeal no.3. & 4 before the CIT(A) and therefore, the order of the Tribunal dated 21-04-2006 needs to be recalled only as regards this issue is concerned i.e. ground no.2 before the Tribunal for rehearing on .merits. We order accordingly and the appeal is posted for hearing on 20-12-2010.*
> *As the date of hearing is declared in the open court, no fresh notice needs to be given.*
>
> *The M.P. filed by the assessee is accordingly disposed of."*

8.3 This *Tribunal* passed the order dated 13/01/2011 (placed at pages 50 to 50), in consequence to the above order dated 31/11/2010 passed in miscellaneous petition observed and held as under:

> *"3. The sequence of events which took place in the intervening period were as under:*
> *I. When the original appeal came up for adjudication, the Hon'ble Bench vide its consolidated order in ITA Nos: 719 & 793/Bang/2005 (AYs. 1998-99 & 99-00) dated: 21.4.2006 had decided the first ground - with regard to the addition of Rs.29.07 lakhs being difference in cost of construction of 'Nageetha complex' - in favour of the assessee;*
>
> *II. Subsequently, the Hon'ble Bench, while disposing off of the assessee's Misc. Petition vide its order in M.P. 100/Bang/2006 dated: 13.9.2006, had decided the second ground – with regard to the adition of Rs. 2.45 lakhs in the opening stock work-in-progress-against the assessee; &*
>
> *III. Finally, the earlier Bench in its finding in M.P. No. 100/B/2010 dated: 30.11.2010 cited supra has recalled the earlier consolidated order in ITA Nos: 719 & 793/B/2005 dated: 21.4.2006 [for the AYs 98-99 & 99-2000] for a limited purpose to adjudicate the ground No. 3 pertaining to the AY 99-00."*

> *"9. Before parting with, we would like to record that as per rule 8 of Income-tax (Appellate Tribunal) Rules, 1963, the contents of Memorandum of appeal should have contained that-*
> ***"8. Every memorandum of appeal shall be written in English and shall set forth, concisely and under distinct heads, the grounds of appeal without any argument or narrative; and such grounds shall be numbered consecutively"***
> *As the above procedure had not been adhered to in an impeccable manner in the present case while preferring the original appeal it had created confusion and, ultimately, culminated in filing of Miscellaneous petitions etc.,"*

8.4 In the meantime a miscellaneous petition No. 58/2011 was filed by revenue (against the order dated 13/01/2012) was disposed off on 09/03/2012 (placed at pages 66-67). This *Tribunal* after recording the entire sequence observed and held as under:

> *"5. We have considered the rival submissions, perused the relevant case records and also the order u/s 143(3) r.w.s. 254 of the Act dated 30.12.2011.*

5.1 At the outset, we would like to reiterate that when the original assessment proceedings were in half-way through, as conceded by the Revenue, the assessee came up with a revised return of income, admitting an income of Rs.46.20 lakhs from contract business which was after due consideration and verification of facts, the AO concluded the assessment u/s 143(3) of the Act. Subsequently, when the re-opened assessment proceedings were concluded, the assessee's income was determined at Rs.1.49 crores as against the original income determined at Rs.46.26 lakhs u/s 143(3) of the Act, by disallowing his claim of Rs.71,72,109/- pertaining to purchase of raw materials, wages etc.,

5.2 After taking into consideration of all the factors including that of the assessee's contentions cited supra, the earlier Bench directed the AO to look into the issue afresh and to allow unaccounted expenses to commensurate with the unaccounted contract receipts admitted by the assessee.

5.3. In this connection, we would like to make it crystal clear that the additional income which had suffered tax pursuant to the issuance of notice u/s 148 of the Act and the completion of the reassessment, the expenditure pertaining to the additional income alone need to be reduced as per the directions of the earlier Bench which were very clear and categorical. We are, therefore, of the considered view that no mistakes have crept in, in the findings of the earlier Bench warranting rectification under section 254(2) of the Act. What has been assessed in the original assessment became final in view of the rejection of the assessee's request u/s 264 of the Act, i.e., the total income which has been assessed to tax in the original assessment u/s 143(3) of the Act by order dated: 28.3.2002 cannot be reduced in pursuance to the re-assessment order.

5.4. Before parting with, we would like to reiterate that the rulings of the Hon'ble Supreme Court quoted by the Revenue have been kept in view while dealing this Misc. petition."

8.5 We note that, the Ld.AO while passing OGE dated 30/12/2011 consequent to the order of Tribunal dated 13/11/2010 did not take into consideration the order dated 09/03/2012, passed by this Tribunal in miscellaneous petition filed by the revenue. This led to computing the total income in the hands of assessee at ₹2,61,950/- by the Ld.AO.

8.6 In the meantime, the assessee preferred appeal against the 1st order passed by this *Tribunal* dated 21/04/2006, wherein the *Hon'ble High Court* vide judgement dated 13/08/2012 (placed at pages 75-80 of paper book), remanded the issue for reconsideration after seeking necessary clarification from the DVO, regarding the value of the building constructed by the assessee.

8.7 In the OGE dated 30/12/2011 passed by the Ld.AO (placed at pages 68-71) as the order passed by this *Tribunal* dated 09/03/2012 in revenue's miscellaneous petition was not considered, review under section 263 was initiated by the Ld. PCIT, since the Ld.AO reduced the total income to ₹2,61,950/-, whereas, this *Tribunal* in the order dated 09/03/2012 (in the revenues miscellaneous petition), made it crystal clear that, what has been assessed in the original assessment became final, in view of the rejection of assessee's request under section 264 of the Act, that is the total income which was assessed to tax in the original assessment under 143(3) of the Act, dated 28/03/2002 cannot be reduced in pursuance to the reassessment order.

8.8 This order passed under section 264 of the Act was challenged by the assessee before this *Tribunal* that was dismissed vide order dated 22/08/2014, against which the assessee preferred appeal before *Hon'ble High Court*. The assessee later withdrew the appeal vide judgement dated 22/03/2016. The Ld.AO passed OGE to the 263 order, as well as the order dated 13/08/2012 by *Hon'ble High Court* on 14/12/2012. In the order passed by Ld.AO dated 14/12/2012 wherein he made addition of Rs. 46,20,680/- in the hands of the assessee. Aggrieved by this order, the assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) partly allowed the appeal of assessee. The only observation that is challenged by the assessee in present appeal is as under:

> *"8.1 The arguments of the appellant that the claim amount of Rs.61,82,866 on account of work in progress and 22,04,186 on account of stock of material lying in the factory which were offered as income in the invalid revised return, this has resulted into denial in*

the arbitration award and resulting in further expenditure of Rs. 10 lakhs to the appellant. Hence there was no income accrued to the extent of above admissions. This is factually correct however this argument is only academic since the order u/s. 143(3) has attained finality as rightly pointed out by CIT, Mysore in the order u/s 263 and I am in agreement with this view."

Against this order assessee filed appeal belatedly, the reason for belated filing and condonation of the same has been dealt with in the preceding part of this order.

8.9. The main argument of the assessee is that, the income in the hands of the assessee must be as determined by the Ld.AO vide order dated 30/12/2011 as follows:

We reject this argument at the threshold relying on the decision of this *Tribunal* in the M.P. No. 58/2011 dated 09/03/2012 as discussed in para 8.4 (supra).

8.10 In our opinion, in the present case, the issue raised by the assessee in this appeal has already reached finality by the above order of the Tribunal in MP No.58/Bang/2011 dated 09/03/2012. Now consideration of the present argument of the assessee's counsel would amounts to review of our earlier order of the Tribunal cited above for which the Tribunal have no power u/s 254 of the Act. Being so, we find no merit in the argument of the Ld. A.R. Accordingly, all the grounds of assessee raised in this appeal deserve to be dismissed.

9. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 5th September,2022

Sd/-	Sd/-
(BEENA PILLAI)	(CHANDRA POOJARI)
Judicial Member	Accountant Member

Bangalore,
Dated, the 5th September, 2022.
/MS /VG/SPSs

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore