IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.365/CTK/2019
Assessment Year : 2014-15

M/s. B.K.Jena & Associates, Rangiagarh, Jhimani, Kujang, jagatsinghpur	Vs.	Pr. CIT, Cuttack
PAN/GIR No.AAGFB 4157 P		
(Appellant)	..	(**Respondent**)

Assessee by : Shri P.R.Mohanty, AR
Revenue by : Shri M.K.Gautam, CIT (DR)

Date of Hearing : 16/9/ 2022
Date of Pronouncement : 16/9/2022

O R D E R

Per Bench

This is an appeal filed by the assessee against the order of the Pr. CIT, Cuttack dated 29.3.2019 passed under section 263 of the Act for the assessment year 2014-15.

2. Shri P.R.Mohanty, ld AR appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue.

3. It was submitted by ld AR that the appeal of the assessee is delayed by 133 days, for which, the assessee has filed an affidavit, wherein, it is mentioned that Shri Ajit Kumar Swain, CA was appointed on 1.5.2019 to

advise the assessee in respect of order passed u/s.263 of the Act and that the assessee was not properly advised and also on account of cyclone 'Fani', the State of Odisha was badly affected and, therefore, the delay in filing of appeal has occurred. It was submitted by ld AR that in the order u/s.263 in para 13, the Pr. CIT has extracted the submission of the assessee, wherein, in page 6 sub-clause (c), the reasons for the failure on the part of the assessee to properly represent his case has also been mentioned to be due to demise of Shri Santosh Kumar Sahu, Advocate, who was looking after the assessee's accounts and assessment proceedings. Consequently, the books of account of the assessee were also stuck up in the hands of late Sri Santosh Kumar Sahu. It was his prayer that the delay of 133 days may be condoned.

4. In reply, ld CITA DR has filed a written submission, which is extracted herein below:

> "This is the assessee's appeal against the revision order dated 29.03.2019 u/s.263 of the Act passed by the Pr. CIT, Cuttack.
>
> a) At the outset, there is a delay of 133 days in filing of present appeal. In the petition for condonation of delay and affidavit, there are certain contradictions which need to be examined.
>
> i.) As per Form-36, the revision order was received by the assessee firm on 26.04.2019.
> ii.) It is stated that one Shri Ajit Kumar Swain, CA was appointed on 01.05.2019 to advise the assessee as regards filing of appeal. It is alleged that he advised the assessee firm that appeal should not be filed against the revision order u/s.263 of the Act. However neither his whereabouts have been disclosed nor his sworn affidavit in this regard has been filed by the assessee firm.

iii.) It is further alleged that super cyclone "FANI' struck the state of Odisha on 03.05.2019.

iv.) It is stated that appeal was to filed before Hon'ble ITAT by 25.06.2019 but same was filed on 05.11.2019 after a delay of 133 days.
v.) It is not clear as to what was the assessee firm doing during these four and half months. The impact of FANI cyclone on appeal matters is not understood. It is not clear as to who advised the assessee firm to file the appeal against the revision order u/s.263 of the Act after such a long delay. In absence of any satisfactory explanation from the assessee firm, the delay in filing of appeal should not be condoned.

b) Reliance is placed on the decision of Hon'ble Allahabad High Court in the case of Dr. G. G. Dhir vs. DCIT (41 taxmann.com 88) wherein it was held that where delay in filing appeal was due to negligence of advocate and also negligence of assessee who did not enquire about filing of appeal for more than two and half years, application for condonation of delay was to be rejected. It was observed in para-5, 6 , 7 & 8 as under:

> "5. The explanation given by the appellant of the negligence of the Advocate is neither good nor sufficient. Admittedly the order of the Income Tax Appellate Tribunal was served upon the applicant on 23.9.2009. If the order was sent and received in the office of the Advocate in October, 2009 to file the appeal and was allegedly misplaced by Shri Jagannath, whose parentage and the period since which he was engaged by the Advocate, and the date, when he left the job, has not been given. The appellant himself being the aggrieved person, was required to inquire about the filing of the appeal".

6. The filing of the appeal requires engagement of an Advocate in the High Court and also payment of professional fees of the counsel, court fees and of affirming affidavit in the High Court. It is difficult to believe that the appellant does not know these basic requirement of filing of appeal, and waited for more than 2 and 1/2 years before he made enquiries on 26.9.2012 about the status of the appeal from the Advocate.
7. It is submitted by learned counsel for the petitioner that the appellant should not suffer on account of the negligence of the Advocate, and has relied upon few cases decided by the Court, where the Advocate's negligence was treated to be sufficient to condone the delay. In the present case it is not only a case of negligence by the Advocate, who has admittedly committed professional misconduct, it also includes the negligence of the appellant, who did not enquire about the filing of the appeal for more than 2 and 1/2 years, and decided to file the appeal, when he received notice of appeal filed by the department.

8. The delay in filing the appeal has not been sufficiently explained. The application for condonation of delay is thus rejected. The income tax appeal is consequently dismissed".

Reliance is also placed on the decision of Hon'ble Jaipur Tribunal in the case of K. G. N. M. M. W. Educational & Research Society vs. ITO (54 taxmann.com 329) wherein it was held that where Chartered Accountant representing assessee-society filed appeal before Tribunal with a delay of 347 days taking a plea that he had gone for audit of a bank and in meantime his staff filed papers belonging to assessee in record, since delay was not explained on day to day basis, appeal was to be dismissed being barred by limitation. It was held in para-9 that It is unbelievable that an assessee, whose taxable income is claimed to be NIL is taxed for two years assessed at such a high income resulting in a huge tax and interest demand will not visit the C.A. office almost for a period of about one year to know about the filing of the appeals. It was held in para-10 that the affidavit and cavalier conduct of Shri Kaushal Agarwal, C.A. raises serious questions on his professional competence and work ethics in giving such an affidavit which hides more than it explains. The burden is on the assessee to reasonably explain day to day delay and establish that there existed reasonable and sufficient cause in delaying the filing of appeals for about 1 year. If the proper dates or occasions are not mentioned with proper facts then the delay cannot be condoned. It was further held that law helps diligent and not the indolent as well as the axiomatic delay defeats equity. The Hon'ble Jaipur ITAT held that in its considered view that the condonation petitions filed by the assessee and material available on the record, failed to invoke any confidence, failed to explain reasonable and sufficient cause for condonation of long delay of 347 days in filing these appeals . The assessee had to come clean with all the relevant facts, which happened in the period of one year. The assessee has to explain all the events and be specific in the dates. The depositions made in the C.A. affidavit remain uncorroborated and there is no affidavit from the said Shri Malik Parvej in support of the affidavit of C.A.. Thus, the vague affidavit given by the C.A. remained uncorroborated and unreliable. In the entirety of facts and circumstances of the case, it declined to condone the delay of 347 days in filing these appeals. In view of above facts, it is requested that delay should not be condoned".

5. Ld CIT DR also placed reliance on the decision of Third Member of ITAT Delhi Benches in the case of Napar Drugs P. Ltd., 98 ITD 285 (Del TM)., wherein, at page 358 para 77, the Third Member has categorically held that " The Tribunal while deciding the appeal has to accord a treatment of equality between the assesse and the revenue. However, the fact that Hon'ble Judicial member has repeatedly referred to these

questions makes me pause for a moment as apparently the Hon'ble Judicial Member gathered the impression that while deciding an appeal the Tribunal should attach more importance to the arguments of the assessee than the arguments of revenue. In my humble opinion, such an impression is totally incorrect. While deciding an appeal, the Tribunal as an appellate body has to decide issues before it objectively on merits irrespective of the fact whether the decisions goes in favour of the assessee or in favour of the revenue, as both deserves equal treatment". We fully agree with the view expressed by the Third Member . At this point, it was also request of ld. CIT DR to specify when this Bench of the Tribunal has shown any partiality in respect of the hearing of the appeals much less in the orders passed by it. Ld CIT DR was not able to point out any specific occasion when this has happened. It must also be mentioned that the ld CIT DR has been repeatedly stating that this Bench does not give him an opportunity to represent his case properly. It must be mentioned here that this Bench of the Tribunal has always granted both the sides being revenue and the assessee fair opportunity of being heard and it has never stopped either the revenue or the ld ARs who appeared on behalf of the assessees from representing their case and making submissions to their satisfaction.

6. It was with this, the appeal was proceeded with and ld CIT DR submitted that the affidavit filed by the assessee in respect of the delay of 133 days showed that due date of filing of appeal was 25.6.2019 but the

appeal has been filed on 5.11.2019 thereby causing a delay of 133 days. It was mentioned that no reasons for the delay in filing appeal between the Cyclone 'Fani' and the filing of the appeal after 4 ½ months has been explained. It was the submission that Shri A.K.Swain, CA has not filed any affidavit. He placed reliance on the decision of Hon'ble Allahabad High Court in the case of Dr G.G.Dhir (supra), wherein, the Hon'ble High Court had rejected the assessee's prayer for condoning the delay of 2 ½ years on the ground that the explanation given by the appellant of the negligence of the advocate is neither good nor sufficient. The appellant therein had waited more than two and half years before he made enquiries about the status of the appeal from the advocate. He also placed reliance on the decision of the Co-ordinate Bench of Jaipur Tribunal in the case of K.G.N.M.M.W.Educational & Research Society (supra), wherein, the Tribunal had refused to condone the delay of 347 days as the delay was not explained on day to day basis and moreover, the President of that Society had not corroborated the vague the affidavit filed by the C.A. It was the submission that each day delay is required to be explained by the assessee and as the assessee has not explained each day delay, the delay in filing of the appeal is not liable to be condoned.

7. We have considered the rival submissions. A perusal of section 254(1) of the Income tax Act, 1961 categorically provides that "the Tribunal is to give both the parties to appeal an opportunity of being heard, pass

such orders thereon as it thinks fit". Admittedly, the Tribunal does have the power to condone the delay. The Tribunal being the highest fact finding body has to be judicious in its approach. The Tribunal is not bound by simple technicality. It is very well known in the legal parlance that when technicality is pitted against substantial justice, technicality must step down and substantial justice could prevail. The Income tax Act itself is substantially complicated and an Act which under goes amendment practically with every Finance Act. Even the amendment goes through in the middle of the financial year. With such highly complicated enactment expecting an assessee to be very well versed with all aspects of the law in the effect of practically impossible. Even lawyers are not well versed in all the subject of laws, much less with all changing amendments. It is because mistakes happens that the appeal is provided for. To take strict interpretation in respect of venial technical breach is to cause unnecessary hardship being placed on citizens. Ordinarily, litigant does not stand to benefit by filing an appeal late. By holding on to strict technical interpretation be it of judicial authority or statute, many a times in respect of delay meritorious matters could get thrown out at the very threshold and cause of justice would be denied by not condoning the delay. The maximum that could happen is that the appeal would be heard on merits. The Hon'ble Supreme Court in the case of Collector, Land Acquisition vs Mst. Katiji (1987) 167 ITR 471 has also supported the said view. It is also

to be mentioned here that the Hon'ble Supreme Court went on further to hold that " Every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. There is no presumption that the delay is occasioned deliberately or on account of culpable negligence or on account of *mala fides* . It must be understood that the judiciary is respected not for legalizing injustice on technical grounds but for removing injustice, which it is expected to do so. The Tribunal being a quasi judicial authority is also bound by such path. A perusal of the affidavit filed by the assessee alongwith reading of the explanation given by the assessee before the Pr. CIT in para (c) of its reply shows that there has been change in counsels and this has resulted in delay in filing of the appeal. Considering the totality of the facts, we are of the view that the delay in filing of the appeal by the assessee is explained and such explanation is reasonable and consequently, we condone the delay.

8. On merits, ld AR drew our attention to the assessment order passed u/s.143(3) of the Act dated 27.12.2016 at para 1 of the assessment order to submit that this was a case of "Limited Scrutiny" under CASS. It was the submission that in the limited scrutiny, the notice issued u/s.142(1) categorically asked for (i) reconciliation of gross receipts shown in the return of income with 26AS data (ii) statement of gross receipts "deductor wise" (iii) copy of bank account for verification. This notice has been issued

on 19.4.2016. Similar notices have been issued asking the details in regard to gross receipts shown as against that shown in 26AS. The assessment had been completed u/s.143(3) on 27.12.2016. The show cause notice came to be issued u/s.263 of the Act on 26.11.2018. The assessee filed his reply on 25.3.2019 after taking adjournment of two times. The Pr. CIT, it was submitted by ld AR, was of the mistaken impression that the order passed u/s.143(3) was a "complete scrutiny". He drew our attention to page 3 para 7 of the impugned order, wherein, the Pr. CIT has mentioned that the assessment u/s.143(3) was picked up for" complete scrutiny". He further drew our attention to page 13 in para (e), wherein, again the pr. CIT mentions that the case was picked up for complete scrutiny. He also drew our attention to page 11 para 20, wherein, again the Pr. CIT mentions that the assessee's case was picked up for complete scrutiny. It was the submission that the pr. CIT has proposed revision of the following grounds:

> (a) On verification of the assessment record, from the details of 26AS and documents available on record, it was seen that the assessee had got credit/had received total amount of Rs.2,89,34,856/- towards works contract with TDS credit of Rs.5,78,7007- u/s.194C of the Act. The details of receipt are as under:

SI No.	Name of the party no	Gross amount	TDS amount
1	IOC	20,01,972	40,040
2	IFFCO	1,60,84,282	3,21,685
3	PPL	1.31,552	2,634
4	Sharma Kalyapso Pvt Ltd	1,07,17,050	2,14,341
Total		**2,89,34,856**	**5,78,700**

(b) But it was noticed that in its P&L account, the assessee had partially disclosed the "gross receipts from contract works" at Rs.2,40,55,730/-as against actual receipts of Rs.2,89,34,856/-. Thus, the assessee had suppressed contract receipts to the tune of Rs.48,79,126/- (Rs.2,89,34,856 - Rs.2,40,55,730/-). But, the AO brought to tax only 8% of the Suppressed receipt after invoking section 44AD of the Act, whereas it was not a case where the provisions of section 44AD could have been invoked as even the disclosed turnover was more than Rs.1 crore and the assessee had got its accounts audited u/s.44AB of the Act. It is a common knowledge that presumptive rate of tax prescribed u/s.44AD only applies to cases where the annual turnover was less than Rs.1 crore during the relevant year. Thus in the case in hand section 44AD was wholly inapplicable. This action of the AO is a clear instance of acting in contravention of the provisions of the statute.

c) On perusal of the details of 26AS as well as the P&L account of the assessee, it was seen that the assessee had received income under the following heads during the previous year:

Sl.No.	Nature of receipts	Gross Amount As appearing in	TDS amount and section Under which TDS deducted	Remarks
1.	Contract works	2,89,34,855.45 or 2,89,34,856	5,78,700/- u/s.194C	Partly disclosed (Rs.2,40,55,730
2.	Payment on transfer Of immovable property	56,80,820.90 or 56,80,821	1,13,625/- u/s.194 IA	The AO did not enquiry the details of the property against which such tax was deducted.
3.	Int. income	1,57,105/-	15,120/-	disclosed to the income

But in its P&L account, the assessee had partially disclosed the receipts from contract works at Rs.2,40,55,730/- as against actual receipts of Rs.2,89,34,856/-. It is strange that while framing the assessment order, the AO has applied provisions of section 44AD (presumptive rate of income @ 8% of turnover) even on partial sale consideration of Rs.56,80,821/- paid for acquisition of immovable property, which by any stretch could not have been termed as "turnover".

(d) Since assessee's books of account were claimed to have been audited u/s 44AB of the !.T.Act,1961, before estimating profit @8% on suppressed contract receipts, the AO ought to have examined whether or not all the expenses relating to said suppressed contract receipts were included in the audited P & L account. Had all the expenses relating to suppressed contract

receipts been found to be included in the audited P & L account, then entire suppressed receipt of Rs. Rs.48,79,126/- should have been added to the total income. However, the AO, without verifying this aspect, had estimated profit @8% on suppressed contract receipt without any basis, thereby adding only Rs.8,51,022/- to the returned income.

(e) Moreover, it was also seen that the AO had not examined the genuineness and reasonableness of any of the expenditure debited in its P & L Account although the case had been picked up for "complete scrutiny". For example, the assessee had debited huge amounts under the head "Material Consumed" (Rs. 1.00 crore), "labour" (Rs. 62.41 lakhs), "Transportation" (Rs. 12.53 lakhs), "Site Expenses" (Rs. 8.18 lakhs), "Interest on Hire Purchase loan" (Rs.6.04 lakh) etc. But no details in respect of any of these amounts were called for by the AO to examine the correctness of these claims.

(f) Similarly, the AO had not examined the applicability of Section 40A(3) & 40(a)(ia) of the IT. Act while completing the assessment.

(g) Neither did the AO call for proof of various additions to assets acquired during the year, nor examined whether they were put to use before allowing the claim of depreciation on such assets.

(h)The AO had also not examined whether there were any fresh cash credits/investments introduced during the year from the angle of applicability of Section 68 or 69 of the IT. Act.

(i) The disclosed total income, excluding the interest income, was only Rs.2,34,669/- (Rs.3,91,774 - Rs.1,57,105), which is merely @0.97% of disclosed "receipt from Contract work" of Rs. 2,40,55,730/-. The AO had not examined as to why the rate of profit was so low and whether the books needed to be rejected. It was really surprising that the same AO had adopted 8% net profit rate on the suppressed turnover, but he did not raise his finger as to why the rate of net profit on the disclosed turnover is low at 0.97%."

9. It was the submission that as the assessment in the case of the assessee was under Limited scrutiny, the powers of the pr. CIT in revisionary proceedings were limited to the issues raised in the Limited scrutiny. It was the submission that as none of the issues raised by the pr. CIT were in the issue of Limited scrutiny, the order passed u/s.263 by the Pr. CIT was liable to be quashed.

10. It was further submitted by ld AR that the pr. CIT has placed reliance on Explanation (2)(a) to section 263 to say that the impugned assessment order was passed without making enquiries or verification which ought to have been made thereby making it erroneous and prejudicial to the interest of the revenue. It was the submission that the impugned assessment year is 2014-15 and said explanation came into Act w.e.f. 1.6.2015 and consequently, the said explanation had no applicability to the facts of the case. It was his prayer that the order of the ld Pr. CIT be quashed.

11. In reply, ld CIT DR drew our attention to page 12 of the order of the pr. CIT to submit that in Item No. (c), the issue was in relation to 26AS. It was the submission that the Pr. CIT has categorically brought out that the Assessing Officer did not enquiry into this issue but had added 8% of the same as gross profit especially when the payment was in respect of transfer of immovable property and was not in the nature of any contract receipts. It was the submission that as the Pr. CIT has invoked his powers u/s.263 in respect of an issue which has been considered by the AO in the assessment and which has been wrongly done by the AO, the order u/s.263 is liable to be upheld. It was the submission that the nature of receipts was not looked into and this clearly showed non-application of mind by the Assessing Officer and erroneous application of law. It was the submission that certain TDS certificates were available on record, which showed the gross receipts of Rs.2.89 crores, whereas the assessee had shown only

Rs.2.40 crores, the difference of which had not been added by the AO nor considered by him. It was the submission that in the consequential order passed by the AO, in fact, this amount of Rs.48,79,126/- has been brought to tax by the AO in its entirety. It was the submission that the pr. CIT had called for books of accounts and the same was not submitted before him. Ld CIT DR on the issue of Limited scrutiny placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Sushanta Kumar Choudhury in ITA No.226/CTK/2019 order dated 5.10.2020, wherein, the Co-ordinate Bench of this Tribunal had relied on the decision of Cochin Bench of this Tribunal in I.T.A. No.420/Coch/2019 and this Bench of the Tribunal in the case Maa Tarini Industries in ITA No.292/CTK/2019, order dated 17.03.2020,and distinguished the decision in the case Akash Ganga to hold that even in Limited Scrutiny case, the Pr. CIT can invoke his power u/s.263 on issues beyond the issues raised in the Limited Scrutiny. It was the prayer that the order of the pr. CIT was liable to be upheld.

12. In the middle of the dictation of the order, the Ld CIT DR also raised an issue that the issue of Limited scrutiny was not raised in the grounds of appeal by the assessee.

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

> "1. For that on the facts and circumstances of the case, the Ld Pr. CIT has erred in law to invoke sec.263 by considering the order passed by the AO u/s.143(3) is erroneous and prejudicial to the interest of the revenue when the ld AO passed the order after due consideration of law and facts. Therefore, invoking jurisdiction

u/s.263 is null and void. Hence, we request to set aside the order passed by the Pr. CIT.

2. For that on the facts and circumstances of the case, the Ld Pr. CIT has erred in law, by set aside the assessment order for the purpose of further examination and re-examination of the profit estimated at 8% by the AO and complete the fresh assessment. Therefore, passing an order u/s.263 to set aside the assessment order passed u/s.143(3) is arbitrary, unjustified, illegal on the facts & circumstances of the case. Hence, we request to set aside the order passed by the Ld. PCIT."

14. Perusal of the grounds of appeal filed by the assessee, most specifically in Ground No.1 shows that this is an open ended ground and the assessee can raise the issue in the said ground.

15. We have considered the rival submissions.

16. Coming to the issue of limited scrutiny, most specifically, the decision of the Co-ordinate Bench of this tribunal in the case of Sushant Kr. Choudhury (supra), it must be mentioned that this has been considered in depth by this Bench in the case of M/s. Shark Mines & Minerals Pvt Ltd in ITA No.128/CTK/2019 order dated 18.8.2022, wherein, both of us are parties. The said decision of Sushant Kr Choudhury (supra) has been distinguished and it has been categorically held that orders of revision by the Pr. CIT on issues, which are unconnected with the issues raised in the Limited scrutiny assessment are not permissible. Admittedly, the assessment u/s.143(3) in the case of the assessee is one of limited scrutiny. The notice u/s.142(1) also clearly shows that this is a case of Limited scrutiny. A perusal of

para 20 of the order of the pr. CIT passed u/s.263 clearly shows multiple issues beyond the issues raised in the Limited scrutiny have been picked up by the Pr. CIT. This being so, the order of the pr. CIT to the extent of proposing to revise the issue raised in the limited scrutiny assessment stands upheld, being issues raised in para 20(a)(b) and (c). None of the other issues being issues raised in para 20(d)(e)(f)(g)(h) and (i) have any in relation to the issues raised by the AO in the Limited Scrutiny. Consequently, the direction issued in respect of those issues stand quashed.

17. In the result, appeal of the assessee stands partly allowed.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 16 /09/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The appellant: M/s. B.K.Jena & Associates, Rangiagarh, Jhimani, Kujang, jagatsinghpur
2. The Respondent. Pr. CIT, Cuttack
3. The CIT(A)-, Cuttack
4. DR, ITAT, Cuttack
56. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack