

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.3144/MUM/2022 (A.Y: 2014-15)**

Smt Rupa Himanshu Shrimankar 107, Sagar Avenue, S.V. Road Andheri (W), Mumbai - 400056  <b>PAN: AVUPS8496B</b>	v.	ACIT – 24(3) Aayakar Bhavan Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Kiran Mehta</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri S.N. Kabra</b>
<b>Date of Hearing</b>	<b>:</b>	<b>03.04.2023</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>05.04.2023</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-36, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.06.2019 for the A.Y.2014-15.

**2.** Assessee has raised following grounds in its appeal: -

*"1. In the Facts and Circumstances of the Appellant's case the learned CIT (A) erred in confirming an addition of Rs. 774,308 made by the learned AO u/s 68 on the footing that the loss of Rs. 774,308*

*incurred by the Appellant in the shares of Blue Circle Services Ltd was in the nature of an accommodation loss.*

2. *Without prejudice to the above Ground No 1, it is submitted that no such addition could be made u/s 68 and the learned CIT (A) ought not to have sustained the said addition made u/s 68*

3. *In the facts of the case, the learned CIT (A) erred in not appreciating that the said addition has been made twice over in that (a) On one hand the loss for the year was reduced to the extent of the said addition of Rs. 774,308 and (b) On the other hand the very same amount of Rs. 774,308 was again added u/s 68. It is submitted that the said amount could not again have been added u/s 68.*

4. *The learned CIT (A) erred in confirming addition of Rs. 23,339 made u/s 69C on the footing that the said amount represented undisclosed commission paid by the Appellant to obtain the impugned loss."*

**3.** At the outset, we observe that the present appeal is filed by the assessee with a delay of 1197 days and assessee also filed an affidavit in this regard and prayed for condonation of delay. In the affidavit assessee has submitted as under: -

"1. *I am assessed to income-tax under PAN: AVUPS8496B.*

2. *For Assessment Year: 2014-15 I had filed my Return of income on 25/11/2014 declaring NIL income.*

3. *For the year in reference, my case was selected for scrutiny assessment and in the scrutiny assessment I was assessed on a total income of Rs. 7,97,537. In the scrutiny assessment made, the learned AO had disallowed a loss of Rs. 7,74,308 made by me from trading in shares of Blue Circle Ltd. The said loss was disallowed on the ground that the said share was a penny stock and the loss made by me was in the nature of accommodation loss.*

4. *However, while making computation of assessed income, the learned AO made double addition for the said amount of disallowance.*

5. *Being aggrieved by the assessment order, I had filed an appeal with the CIT (A)-36, Mumbai. The learned CIT (A) proceeded to confirm the order of the learned AO.*

6. *The Ground No 1 before the learned CIT (A) was that there was a double addition to the extent of Rs. 7,74,308 in that on one hand this amount was reduced from the loss for the year and on the other hand this amount was separately added u/s 68.*

7. *Thus, the contention before the learned CIT (A) was that once the loss for the year was reduced then the very same amount could not again be added to my income*

8. *However, while passing the order in appeal, the learned CIT (A) did not deal with this ground.*

9. *It was also argued before the Learned CIT (A) that valuation loss arising from the valuation of closing stock of the said Shares was allowed by the very same CIT (A) in AY: 2013-14.*

10. *The order of learned CIT (A)-36, Mumbai, was passed on 28/06/2019 and was received by me on 5/07/2019. The second appeal against the said appeal order ought to have been filed on or before 3/09/2019. However, the second appeal before the Hon. ITAT was filed on 13/12/2022 i.e. late by about 1196 days for the reasons explained below.*

11. *During the relevant period, I was in very bad financial position and I had explained to my AR that I did not have money to file the second appeal and hence I had requested him to try and get the order of CIT (A) rectified.*

12. *Even as we had met the CIT (A) to explain this grievance there was a change in the office of CIT (A). At the personal meeting with the learned CIT (A) in or around end august 2019, we had carried the Rectification petition (Copy enclosed). However, the learned CIT(A) was of the view that since he was on transfer, it would be better if we could take the matter with his successor.*

13. *Thereafter there was confusion as to whether the petition could be filed online or not and whether the matter could be decided by faceless authority or by physical hearing.*

14. Before we could file a formal rectification/Miscellaneous Application, the Global Pandemic of Corona struck and everything went haywire.

15. In this period my family's financial position had gone from the bad to the worst and we were literally living hand to mouth. However, post the pandemic, my family's financial position has improved and we are now in a position to afford to file this appeal in reference.

16. The said delay has been caused mainly due to the poor financial condition of my family, further aggravated by the Global pandemic of Covid 19, and also due to the delays and disruptions caused by the global pandemic."

4. Ld. DR objected to the submissions of the assessee on delay condonation and however, he has not filed any submissions against the affidavit and the facts described in the above affidavit.

5. Considered the submissions of both parties, we observe that in the case of M/s. Midas Polymer Compounds Pvt. Ltd., v. ACIT in ITA.No. 288/Coch/2017 the Coordinate Bench of the Tribunal has considered the issue of condonation of delay and by following various judicial precedents along with the decision of the Hon'ble Supreme Court in the case of Collector, Land Acquisition v. Mst Katiji and ors. (167 ITR 471) condoned the delay of 2819 days observing as under: -

"6. We have heard the rival submissions and perused the record. There was a delay of 2819 days in filing the appeal before the Tribunal. The assessee has stated the reasons in the condonation petition accompanied by an affidavit which has been cited in the

earlier para. The assessee filed an affidavit explaining the reasons and prayed for condonation of delay. The reason stated by the assessee is due to inadvertent omission on the part of Shri Unnikrishnan Nair N, CA in taking appropriate action to file the appeal. He had a mistaken belief that the appeal for this year was filed by the assessee as there was separate Counsel to take steps to file this appeal before the ITAT. Therefore, we have to consider whether the Counsel's failure is sufficient cause for condoning the delay. The Madras High Court considered an identical issue in the case of Sreenivas Charitable Trust v. Dy. CIT (280 ITR 357) and held that mixing up of papers with other papers are sufficient cause for not filing the appeal in time. The Madras High Court further observed that the expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, advancement of substantial justice is the prime factor while considering the reasons for condoning the delay.

6.1 On merit the issue is in favour of the assessee. But there is a technical defect in the appeal since the appeal was not filed within the period of limitation. The assessee filed an affidavit saying that the appeal was not filed because of the Counsel's inability to file the appeal. The Revenue has not filed any counter affidavit to deny the allegation made by the assessee. While considering a similar issue the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji and Ors. (167 ITR 471) laid down six principles. For the purpose of convenience, the principles laid down by the Apex Court are reproduced hereunder:

(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.

(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, commonsense and pragmatic manner.

(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.*

*(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.*

*(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.*

*6.2 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 for injustice being done because of nondeliberate delay. In the case on our hand, the issue on merit regarding allowability of deduction u/s. 80IB of the Act was covered in favour of the assessee by the binding Judgment of the jurisdictional High Court. Moreover, no counter-affidavit was filed by the Revenue denying the allegation made by the assessee. It is not the case of the Revenue that the appeal was not filed deliberately. Therefore, we have to prefer substantial justice rather than technicality in deciding the issue. As observed by Apex Court, if the application of the assessee for condoning the delay is rejected, it would amount to legalise injustice on technical ground when the Tribunal is capable of removing injustice and to do justice. Therefore, this Tribunal is bound to remove the injustice by condoning the delay on technicalities. If the delay is not condoned, it would amount to legalising an illegal order which would result in unjust enrichment on the part of the State by retaining the tax relatable thereto. Under the scheme of Constitution, the Government cannot retain even a single pie of the individual citizen as tax, when it is not authorised by an authority of law. Therefore, if we refuse to condone the delay, that would amount to legalise an illegal and unconstitutional order passed by the lower authority. Therefore, in our opinion, by preferring the substantial justice, the delay of 2819 days has to be condoned.*

*6.3 The next question may arise whether 2819 days was excessive or inordinate. There is no question of any excessive or inordinate when the reason stated by the assessee was a reasonable cause for not filing the appeal. We have to see the cause for the delay. When there was a reasonable cause, the period of delay may not be relevant factor. In fact, the Madras High Court in the case of CIT v. K.S.P. Shanmugavel Nadai and Ors. (153 ITR 596) considered*

*the delay of condonation and held that there was sufficient and reasonable cause on the part of the assessee for not filing the appeal within the period of limitation. Accordingly, the Madras High Court condoned nearly 21 years of delay in filing the appeal. When compared to 21 years, 2819 days cannot be considered to be inordinate or excessive. Furthermore, the Chennai Tribunal by majority opinion in the case of People Education and Economic Development Society (PEEDS) v. ITO (100 ITD 87) (Chennai) (TM) condoned more than six hundred days delay. It is pertinent to mention herein that the view taken by the present author in that case was overruled by the Third Member.*

*6.4. The Madras High Court in the case of Sreenivas Charitable Trust (supra) held that no hard and fast rule can be laid down in the matter of condonation of delay and the Court should adopt a pragmatic approach and the Court 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. Therefore, this Judgment of the Madras High Court (supra) clearly says that in order to advance substantial justice which is of prime importance, the expression "sufficient cause" should receive a liberal construction. In this case, the issue on merit regarding granting of deduction u/s. 80IB was covered in favour of the assessee by the Judgment of the jurisdictional High Court. Therefore, for the purpose of advancing substantial justice which is of prime importance in the administration of justice, the expression "sufficient cause" should receive a liberal construction. In our opinion, this Judgment of the jurisdictional High Court is also squarely applicable to the facts of this case. A similar view was taken by the Madras High Court in the case of Venkatadri Traders Ltd. v. CIT (2001) 168 CTR (Mad) 81 : (2001) 118 Taxman 622 (Mad).*

*6.5 The Mumbai Bench of this Tribunal in the case of Bajaj Hindusthan Ltd. v. Jt. CIT (AT) (277 ITR 1) has condoned the delay of 180 days when the appeal was filed after the pronouncement of the Judgment of the Apex Court. Furthermore, the Revenue has not filed any counter-affidavit opposing the application of the assessee for condonation of delay. The Apex Court in the case of Mrs. Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi (AIR 1978 SC 537) held that non-filing of affidavit in opposition to an application for condonation of delay may be a sufficient cause for condonation of delay. In this case, the Revenue has not filed any counter-affidavit opposing the application of the assessee, therefore, as held by the Apex Court, there is sufficient cause for condonation of delay. The Supreme Court observed that when the delay was of short duration, a liberal view*

*should be taken. "It does not mean that when the delay was for longer period, the delay should not be condoned even though there was sufficient cause. The Apex Court did not say that longer period of delay should not be condoned. Condonation of delay is the discretion of the Court/Tribunal. Therefore, it would depend upon the facts of each case. In our opinion, when there is sufficient cause for not filing the appeal within the period of limitation, the delay has to be condoned irrespective of the duration/period. In this case, the non-filing of an affidavit by the Revenue for opposing the condonation of delay itself is sufficient for condoning the delay of 2819 days*

*6.6 In case the delay was not condoned, it would amount to legalise an illegal and unconstitutional order. The power given to the Tribunal is not to legalise an injustice on technical ground but to do substantial justice by removing the injustice. The Parliament conferred power on this Tribunal with the intention that this Tribunal would deliver justice rather than legalise injustice on technicalities. Therefore, when this Tribunal was empowered and capable of removing injustice, in our opinion, the delay of 2819 days has to be condoned and the appeal of the assessee has to be admitted and disposed of on merit.*

*6.7 In view of the above, we condone the delay of 2819 days in filing the appeal and admit the appeal for adjudication."*

**6.** Respectfully following the above said decision and for the sake of overall justice we condone the delay and admit the appeal for adjudication.

**7.** On merits, Ld. AR submitted that assessee is a trader and this year assessee has purchased and sold the scrip of Blue Circle Services Limited in this regard he submitted that assessee has claimed loss of valuation in previous assessment year on the same scrip and Ld.CIT(A) allowed the same and in this regard he brought to our notice Page No. 1 of the Paper

Book and he also filed a copy of the appellate order. Further, Ld. AR submitted that this year assessee has incurred loss on sale of the above said scrip and claimed the loss. The Assessing Officer merely disallowed the same by relying on investigation wing report and not considered the merits and facts on record. In this regard he relied on the order of the Coordinate Bench in the case of Rajiv Rameshchander v. Income Tax Officer in ITA.No. 1528/Mum/2020 dated 31.01.2023. Further, he submitted that Assessing Officer has not only rejected the loss claimed by the assessee and also made the addition u/s. 68 of the Act. In this regard he brought to our notice Page No. 19 of the Assessment Order.

**8.** On the other hand, Ld.DR relied on the orders of the lower authorities and he brought to our notice Page No. 16 of the Assessment Order and submitted that the script dealt by the assessee is a penny stock. With regard to double addition, he accepted that Assessing Officer not only rejected the loss claimed by the assessee also made the same addition u/s. 68 of the Act.

**9.** Considered the rival submissions and material placed on record, we observe that during the current Assessment Year assessee has purchased the scrip of Blue Circle Services Limited and subsequently sold the same

within the same year from the recognized stock exchange and also through authorised agent. It is also submitted that all these transactions were through banking channels only and in that process assessee has suffered loss of ₹.7,74,308/-. The Assessing Officer mechanically applied the informations received from investigation wing and proceeded to disallow the loss claimed by the assessee as well as proceeded to make the sale proceeds as undisclosed income. The similar issue was dealt with by the Coordinate Bench in the case of Rajiv Rameshchander v. Income Tax Officer (supra) and decided the issue in favour of the assessee, for the sake of clarity it is reproduced below: -

*"9. It was also brought to the notice of the AO that the assessee has purchased and sold the shares during the year under consideration and there is no Short Term Capital Gain(STCG)/Long Term Capital Gain (LTCG)/Short Term Capital loss claimed in the return. Thus, according to the assessee the transaction carried out by the assessee in regard to the share of M/s. SSTL are genuine and bonafide and therefore fully allowable. However, according to assessee, the AO/Ld. CIT(A) has not appreciated the facts in the right perspective and has disallowed the business loss of the assessee while trading in this scrip. It is found that Assessee is a trader in shares which fact has been discerned from the facts discussed (supra). Therefore, the shares traded are his stock-in-trade. And once assessee is found to be a trader, the loss incurred during business need to be allowed as business loss. And therefore the AO is directed to allow the business loss of Rs.41,64,684/-."*

**10.** Respectfully following the above said decision, we are inclined to delete the addition made by the Assessing Officer u/s. 68 of the Act and

direct the Assessing Officer to allow the short term capital loss claimed by the assessee during the year. Accordingly, appeal filed by the assessee is allowed.

**11.** With regard to Ground No. 3, the Assessing Officer has also made similar addition u/s. 68 of the Act also, from the record we observe that Assessing Officer has wrongly made the same addition twice. Therefore, we direct the Assessing Officer to delete the addition made u/s. 68 of the Act also.

**12.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 05<sup>th</sup> April, 2023

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

Mumbai / Dated 05/04/2023  
Giridhar, Sr.PS

**Copy of the Order forwarded to:**

1. The Assessee
  2. The Respondent.
  3. CIT
  4. DR, ITAT, Mumbai
  5. Guard file
- //True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**