

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**  
**AND**  
**MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

**ITA No. 237/MUM/2023**  
**Assessment Year: 2013-14**

Shree Swamy Samarth,  
Prassana Oshiwara (E) Unit  
3 CHS Ltd.  
Oshiwara (E) Unit 3 CHS  
Ltd., Plot No. 1/41, Deep  
Tower, New Link Road, Near  
Millat Nagar, Andheri (West)  
Mumbai-400053.

**PAN No. AACAS 7886 B**  
**Appellant**

ITO-25(1)(3),  
C-10, Room No. 404, 4<sup>th</sup>  
floor, Pratyakshakar  
Bhavan, BKC,  
Mumbai-400051.

**Vs.**

**Respondent**

**Assessee by** : Mr. Tarun Ghia  
**Revenue by** : Mr. A.N. Bhalekar, CIT-DR

Date of Hearing : 10/05/2023  
Date of pronouncement : 22/05/2023

**ORDER**

**PER OM PRAKASH KANT, AM**

This appeal has been preferred by the assessee against order dated 30.11.2022 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2013-14, raising following grounds:



1. *On facts and in circumstances of the case and in law, Ld. AO erred in reopening assessment us. 147 of the Income Tax Act, 1961.*

2. *On facts and in circumstances of the case and in law, the assessee was not required to file the return of income.*

3. *On facts and in circumstances of the case and in law, on receipt of notice under section 148 the assessee did not have correct advice and therefore could not furnish correct information and explanation.*

4. *On facts and in circumstances of the case and in law, as the impugned investment was by a co operative housing society having invested accumulated surplus generated out of collections of funds from its own members.*

5. *On facts and in circumstances of the case and in law, Ld. AO should have appreciated that a co operative housing society collecting funds from its own members and spending the same for its*

*own members is covered by the concept of mutuality and consequent non taxability. Ld. CIT-A has erred in confirming the assesment order with addition.*

6. *On facts and in circumstances of the case and in law, Ld AO should have appreciated that a co operative housing society administering the maintenance of the society on behalf of its members and collecting uniformly from its members cannot have any unexplained investment.*

7. *On facts and in circumstances of the case and in law, on receipt of ex parte assessment order under section 144, the assessee did not have correct advice and the reasons for delay were not disclosed correctly and therefore could not file appeal at Ld. CIT-A in time.*

8. *On facts and in circumstances of the case and in law, Ld. CIT -A having availed the audited financial statements of the assessee should have appreciated the gross injustice happening to the assessee and should have condoned the delay so that the assessment can take place on merits.*



2. At the outset, we find that the Ld. CIT(A) has not condoned the delay of 387 days in filing the appeal before him and appeal has been rejected as not admitted. The relevant finding of the Ld. CIT(A) is reproduced as under:

*“21. In the present case, the appellant has not adduced any reasonable cause which prevented it from filing the appeal within the 30 days' time limit which ended on 26.01.2017 and even thereafter for more than 387 days. Unless and until it is demonstrated that there was sufficient cause that prevented the appellant from exercising its legal remedy of filing appeal within that prescribed period of 30 days, the delay thereafter cannot be condoned without there being compelling grounds as advocated by the Hon'ble Courts.*

*22. From the facts of the case, it is clear that the statutory right to appeal which was vested with the appellant was not exercised within the stipulated time u/s.249(2). Thus, this clearly is a case of laches and is directly the result of deliberate inaction on the part of the appellant.*

*23. This is not a case of change in law which is beneficial to the appellant and hence the delay in seeking such remedy may be condoned in the furtherance of substantial justice. Therefore, there is no denial or destruction of a statutory right in this case, by adhering to the prescribed period of limitation as otherwise it will only lead to protract the matter endlessly and will undoubtedly render the legislative scheme and intention behind the concerned provision otiose as held by the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada &Ors. v. MIs Glaxo Smith Kline Consumer Health Care Limited 2020[36] G.S.T.L. 305.*

*24. For these reasons, the delay of 387 days in filing of appeal in this case is not condoned as no "sufficient cause" has been shown u/s. 249(3) of the Income Tax Act, 1961 for the appellant's failure to file the appeal within the prescribed period of limitation us.249(2) of the Income Tax Act, 1961 r.w.s. 5 of Limitation Act and hence the appeal sought to be instituted belatedly is hereby rejected.*



25. *In the result, as delay in filing of appeal is not condoned, the appeal is not admitted and is rejected accordingly.”*

3. Before us, the Ld. Counsel of the assessee has submitted that delay was not deliberate or malafide. He referred to the submissions made before the Ld. CIT(A) and submitted that assessment order was received by the assessee on 12.01.2017 but due to dispute with one of its members, the assessee society could not reply of the notice. It was also submitted that being diverse views of the members, it took time in bringing everyone along for preferring appeal. Before us, the assessee has also filed an affidavit in support of reasons for the delay in filing the appeal before the Ld. CIT(A). It has been stated by the assessee that relevant assessment order was forwarded to the Chartered Accountant dealing with the matter and the assessee came to know about delay only on receipt of the order of the Ld. CIT(A). The assessee has also filed an affidavit from the relevant Chartered Accountant explaining the reason for the delay. The relevant part of the Explanation of the Chartered Accountant is reproduced as under:

*“I Bharat Rughani, chartered accountant, having my address at Premises No. 4, Shilpam CHS Ltd, Chincholi Bunder Road, Malad West, Mumbai 400064 hereby state on solemn affirmation as under:*

*1. I was the chartered accountant and the authorised representative before Ld. AO and Id. CIT-A of Shree Swamy Shree Swamy Samartha Prassana Oshiwara (E) Unit 3 Co operative Housing Society Limited ("Assessee") earlier to and during the year 2015, 2016 and 2017 when the notices for A Y 2009-10 and A Y 2013-14 and the reassessment*



order for A Y 2013-14 were received by the assessee society.

2. I say that the assessee had in its income and expenditure account only the collections from members towards maintenance expenses and payments for the maintenance and interest from co operative bank was not taxable and that there was no taxable income and therefore in my considered view the assessee was not required to file the return of income.

3. I say that a notice dated 20.10.2015 under section 148 was received by the assessee for A. Y. 2009-10. When I read the provisions of section 151 of the income tax Act 1961 for assessment year 2009-10 it transpired that the notice under section 148 could be issued by assessing officer who should not be below the position of joint commissioner of income tax and sanction also has to be of the officer of the level of joint commissioner of income tax and above. Even otherwise as the society had no taxable income therefore I advised not to file the return of income.

4. I say that I am in practice of audit and compliances under the incor tax law. I am not in the practice of appellate proceedings and litigatio When the reassessment order was received by the assessee society for A Y 2013-14 initially I had taken a view that since the society did not hai taxable income therefore no tax was applicable and that the assessment order was erroneous. I had also filed the financial statements of the assessee society on 30.12.2016 during the course of assessment proceedings and I thought that even though the financial statements were not considered by Ld AO as he had already passed the assessment order, but Id CIT-A will consider the financials and will see that the society had no taxable income. I took some time in digesting the appellate provisions and was not aware of the time limits applicable for filing appeal. I also believed that in a cooperative society the delay would be condoned. For various other reasons in my office, the appeal was delayed. I expected that in case of an assessee being a society the delay would be condoned as there was no taxable income. However, the delay was not condoned and the Ld CIT -A order was passed confirming the assessment order. Thereafter I have willingly left the work



*of the assessee society so that it can be handled by someone who can deal with the serious situation. I have executed this affidavit so that because of delay on my part in filing the appeal at Id CIT-A, the assessee society should not suffer.”*

3.1 The Ld. Counsel of the assessee relied on the decision of the Hon’ble Bombay High Court in the case of **Vijay VishinMeghani v. DCIT [2017] 86 taxmann.com 98 (Bombay)**, wherein delay of 2984 days has been condoned by Hon’ble Bombay High Court. The relevant finding of the Hon’ble High Court is reproduced as under:

*“21. We find from paragraph 13 of the order, but for this relevant factors and tests, everything else has been brought into the adjudication by the Tribunal. The Tribunal though aware of these principles but possibly carried away by the fact that the delay of 2984 days is incapable of condonation. That is not how a matter of this nature should be approached. In the process the Tribunal went about blaming the assessee and the professionals and equally the Department. To our mind, therefore, the Tribunal's order does not meet the requirement set out in law. The Tribunal has completely misdirected itself and has taken into account factors, tests and considerations which have no bearing or nexus with the issue at hand. The Tribunal, therefore, has erred in law and on Facts in refusing to condone the delay. The explanation placed on affidavit was not contested nor we find that from such explanation can we arrive at the conclusion that the assessee was at fault, he intentionally and deliberately delayed the matter and has no bona fide or reasonable explanation for the delay in filing the proceedings. The position is quite otherwise.”*

3.2 The Ld. Counsel also relied on the decision of the Hon’ble Bombay High Court in the case of **Subhkaran & Sons v. N.A. Kazi, 5<sup>th</sup> ITO and Others [1985] 152 ITR 231 (Bombay)** wherein the Hon’ble High Court has held that a party should not suffer for no



fault on his part and for a sheer mistake or oversight on the part his legal or tax advisers. The relevant finding of the Hon'ble Bombay High Court is reproduced as under:

*“6. In these circumstances, the better order, and one more in consonance with justice, should have been to accept the firm's request and condone the delay in filing Form No. 11A. Refusal to do so resulted in technicality triumphing over justice. A party may not suffer for no fault on his part and for a sheer mistake or oversight on the part of his legal or tax advisers. All that was necessary for the firm to do was in fact by it and its partners. That the chartered accountants made a mistake through oversight should not have been considered a fatal circumstance outweighing all the other facts and circumstances in favour of the assessee. Though to be perfect is divine, this mortal world has not as yet come across one so perfect and divine as to make no mistake at all.”*

3.3 The Ld. Counsel also relied on the decision of the Hon'ble Karnataka High Court in the case of **Mrs. PremalathaPagaria v. ITO [2021] 130 taxmann.com 403 (Karnataka)**, where in delay of 310 days has been condoned. The relevant finding of the Hon'ble Bombay High Court is reproduced as under:

*“9. In the backdrop of the well settled legal principles, the facts of the case on hand may be examined.*

*10. The reasons assigned by the assessee for the delay in filing the appeal is that the impugned order dated passed by the Commissioner of Income-tax (Appeals) was delivered to the assessee some time in the September 2015 and immediately after receipt of the said order, the assessee had supplied the order passed by the Commissioner of Income-tax (Appeals) to the office of the Auditor so far as to take action for filing of an appeal. It is the case of the assessee that the aforesaid order was not brought to the notice of the Chartered Accountant namely*



*RAjendraKaravat by his staff, and the same remained in his office files without any action. The appellant thereupon made an enquiry and learnt about the fact on 7-10-2016 that the appeal has not been filed and the appellant took action to contact another Chartered Accountant and filed the appeal thereon.*

*11. The appellant in the facts and circumstances of the case should not suffer on account of inadvertence on the part of her Chartered Accountant.*

*12. Thus, in the facts and circumstances of the case, the assessee has made out sufficient cause to condone the delay of 310 days in filing the appeal before the Tribunal.*

*13. The aforementioned substantial questions of law framed by this Court is answered in favour of the assessee.*

*14. In the result, order dated 23-2-2017 passed by the Tribunal is hereby quashed and delay in filing the appeal is condoned.”*

4. We have heard rival submission of the parties and issue-in-dispute and perused the relevant material on record on the issue of condonation of delay in filing appeal before the Ld. CIT(A). We find that the delay has been caused mainly due to the dispute of the assessee society with one of its members and thereafter in taking decision by the Society involving many members. Thereafter delay has occurred in filing appeal due to mistake on the part of the Chartered Accountant. Relying on the decision cited above, we are of the opinion that there is no malafide or deliberate in action on the part of the assessee in filing the appeal with delay of 387 days before the Ld. CIT(A). Accordingly, we direct the Ld. CIT(A) to condone the delay in filing appeal before him and admit the appeal for adjudication on merit in accordance with law after considering



the submission of the assessee. The grounds of appeal by the assessee are allowed for statistical purposes.

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

**Order pronounced in the open Court on 22/05/2023.**

**Sd/-**  
**(KAVITHA RAJAGOPAL)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Mumbai;

Dated: 22/05/2023

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)  
**ITAT, Mumbai**