आयकर अपीलीय अधिकरण
कोलकाता 'सी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

श्री राजेश कुमार, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष
Before
SRI RAJESH KUMAR, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER

I.T.A. No.: 380/KOL/2023
Assessment Year: 2012-13

Zulu Merchandise Pvt. Ltd.....Appellant
[PAN: AAACZ 1156 D]

Vs.

PCIT-2, Kolkata.....Respondent

Appearances by:

Sh. S.K. Pransukha, FCA, appeared on behalf of the Assessee.

Sh. Subhrajyoti Bhattacharjee, CIT (D/R), appeared on behalf of the Revenue.

Date of concluding the hearing : June 1st, 2023
Date of pronouncing the order : July 11th, 2023

ORDER

Per Rajesh Kumar, Accountant Member:

The only issue raised by the assessee in the various grounds of appeal is against the exercise of revisionary jurisdiction u/s 263 of the Act by ld. Pr. CIT revising the assessment order passed u/s 147 r.w.s. 144 of the Income Tax Act, 1961 (in short the 'Act')

which is beyond the limitation as provided in Section 263 sub-Section 2 of the Act.

2. At the outset, we observe that there is a delay of 353 days in filing the appeal. Ld. A/R submitted that Sh. Ram Gopal Sadani, Director of the assessee company, residing at 5B, Russel Street, Kolkata-71, is an aged person of about 80 years. Ld. A/R submitted that said person received the order passed by ld. Pr. CIT dated 26.03.2022 for AY 2012-13 on 26.03.2022. Ld. A/R further submitted that the said person upon wrong understanding of the provisions of the Act as advised by the Counsel that ld. AO would pass the fresh assessment u/s 143(3) of the Act under the direction from ld. Pr. CIT would be appealable and that the order passed u/s 263 of the Act by ld. Pr. CIT is not appealable. Ld. A/R stated that the order u/s 143(3) r.w.s. 263 of the Act dated 25.03.2023 was passed in pursuance to the directions given by ld. Pr. CIT and thereafter, having consulted Mr. Sushil Kumar Pransukha on 13.04.2023 the assessee was advised to file the appeal against the assessment order dated 25.03.2023 and also against the order of ld. Pr. CIT dated 26.03.2022. Ld. A/R also submitted that accordingly the appeal was filed on 20.04.2023. Ld. A/R submitted that the assessee is not benefitted in any manner by filing the appeal late by 353 days and therefore, the assessee cannot be penalized for the wrong advice given to the assessee by his counsel. Ld. A/R submitted that the substantial justice must prevail over technicalities of the matter and the assessee should not be denied justice for technical reason that the appeal was not filed on time. Finally, the ld. AR prayed that appeal of the assessee may be admitted for adjudication by condoning the delay.

3. Ld. D/R on the other hand submitted that the assessee has failed to explain the reasons for delay caused in filing the appeal. Ld. D/R contended that the non-filing of appeal under the wrong advice of a tax consultant is not a reasonable cause for condonation of delay. The ld. D/R therefore submitted that appeal of the assessee may kindly be dismissed as being time barred.

4. We have duly considered the rival contentions and gone through the record carefully. We are mindful of the provisions of sub-section 5 of Section 253 which contemplates that the Tribunal may admit an appeal or permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient reasons/cause for not presenting the appeal within that period. This expression "sufficient cause" employed in this Section has also been used identically in sub-Section 3 of Section 249 of the Act, which provides power to the Id. Commissioner to condone the delay in filing of the appeal before the Commissioner. Similarly, it has been used in Section 5 of the Indian Limitation Act, 1963. Whenever interpretation and consideration of this expression has fallen for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court then, the Hon'ble Courts were unanimous in their conclusion that this expression has to be construed liberally. We may make reference to the following observations of the Hon'ble Supreme court from the decision in the case of *Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353:*

> *"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 out 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 common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, 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 judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

5. Similarly, we would like to make reference to authoritative pronouncement of Hon'ble Supreme Court in the case of *N.Balakrishnan Vs. M. Krishnamurthy (supra).* It reads as under:

"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but

seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi lain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749]. It must be remembered tliat in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a ITA No.201, 202 and 203/Ahd/2020 salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

6. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Hon'ble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the delay, then such reasons are to be construed with a justice oriented approach.

7. In the light of above, if we examine the facts of the present case, then it would reveal that basically the appeal has been filed after 353 days of the ld. CIT's order. We have perused the affidavit of the assessee and find that the delay is because of wrong professional advice to the assessee. Moreover, making the appeal

time-barred has not been used by the assessee as a tactics to avoid the litigation with the Revenue because such strategy would not give any benefit to the assessee in this type of litigation. Therefore, we condone the delay and proceed to decide the appeal on merit.

8. Facts in brief are that the assessee filed return of income on 29.09.2012 declaring total income of Rs. 97,245/-. The return of the assessee was processed u/s 143(1) of the Act on 18.06.2013. Thereafter, case of the assessee was reopened u/s 147 of the Act by issuing notice u/s 148 of the Act. Finally, the assessment was framed u/s 147 r.w.s. 144 of the Act vide order dated 29.09.2021. It is pertinent to state that case of the assessee was reopened on the ground that share price of M/s. Banas Finance Limited rose from Rs. 9.40 on 27.01.2011 to Rs. 562/- on 01.02.2012 and Rs. 99.50 on 28.05.2012 to Rs. 682/- on 29.10.2013 and thereafter, fell back to Rs. 13.30 on 22.12.2015. Ld. AO recorded in the reasons that the financials of the company did not show any substantial strength/change and therefore, company without having any business worth to justify the rise and fall in the share price is nothing but manipulation and rigging and therefore to this extent the assessee has escaped assessment on account of bogus business gain to the tune of Rs. 7,16,800/- and accordingly the addition was made in the assessment framed u/s 147 r.w.s. 144 of the Act dated 12.02.2021 and the order is under challenge before ld. CIT(A).

9. Ld. A/R submitted that ld. Pr. CIT has exercised jurisdiction u/s 263 of the Act beyond the time as contemplated u/s 263(2) of the Act which provides that any jurisdiction can be exercised

within two years from the end of the financial year in which the order proposed to be revised or set aside is passed by ld. AO. The Ld. A/R stated that in the present case initially the order u/s 143(1) of the Act was passed on 18.06.2013 and thereafter the reassessment was framed vide order dated 29.09.2021. Ld. A/R contended that the issues were raised by ld. Pr. CIT of dealing in by the assessee in two penny scrips Clarus Fianance and Security Ltd and Blue Circle Services Ltd. in the revisionary proceedings and came to the conclusion that there was non-enquiry by ld. AO into the transactions done by the assessee by trading in Clarus Finance & Securities Ltd. and Blue Circle Services Ltd. The ld. AR contended that these scripts were not the subject matter of the reasons recorded nor the reassessment proceedings before the AO. Ld. A/R stated that in the revisionary proceedings the issue was two penny scrips Clarus Fianance and Security Ltd and Blue Circle Services Ltd. and A/R therefore, submitted that the jurisdiction u/s 263(1) of the Act could have been exercised by ld. Pr. CIT from the end of financial year in which the order u/s 143(1) of the Act dated 18.06.2013 was passed meaning thereby that limitation of two years shall be taken from 31.03.2014 and this limitation would be over by 31.03.2016. Ld. A/R submitted that ld. Pr. CIT has wrongly revised the assessment framed u/s 147 r.w.s. 144 of the Act dated 29.09.2021 as the limitation has to be reckoned from the order passed u/s 143(1) of the Act dated 18.06.2013. Ld. A/R therefore, prayed that the revisionary jurisdiction exercised by ld. AO is hopelessly barred by limitation by relying on the following decisions:

(i) CIT –vs.- Alagendran Finance Limited (2007) 293 ITR 1 (SC);

(ii) CIT –vs.- ICICI Bank Limited (2012) 343 ITR 74 (Bom.).

10. The Ld. D.R. on the other hand relied heavily on the order of LD. PCIT by submitting that the assessee is not put to any loss by the exercise of jurisdiction as the assessee would be given sufficient time and enough opportunity to present its case, therefore the appeal of the assessee may kindly be dismissed.

11. We have heard the rival contentions and perused the materials on records. We note that initially the assessment was framed u/s 143(1) of the Act vide order dated 18.06.2013. Thereafter the case of the assessee was re-opened by the AO after recording the reasons to believe that the M/s. Banas Finance Limited rose from Rs. 9.40 on 27.01.2011 to Rs. 562/- on 01.02.2012 and Rs. 99.50 on 28.05.2012 to Rs. 682/- on 29.10.2013 and thereafter, fell back to Rs. 13.30 on 22.12.2015. Ld. AO recorded in the reasons that the financials of the company did not show any substantial strength/change and therefore, company without having any business worth to justify the rise and fall in the share price is nothing but manipulation and rigging and therefore to this extent the assessee has escaped assessment on account of bogus business gain to the tune of Rs. 7,16,800/- and accordingly the addition was made in the assessment framed u/s 147 r.w.s. 144 of the Act dated 12.02.2021 which the order is under challenge before ld. CIT(A). Now the Ld. PCIT set aside and revised the re-assessment order dated 29.09.2021 passed u/s 144 r.w.s. 147 of the Act because two penny scrips namely Clarus Finance and Security Ltd and Blue Circle Services Ltd. were not examined by the AO and therefore the order u/s 144/147 of the

Act dated 29.09.2021 is erroneous and prejudicial to the interest of the revenue. In our opinion the action of the ld. PCIT is not tenable in law. The ld. PCIT could have lawfully revised the assessment s 143(1) dated 18.06.2013 which in our opinion is barred by limitation in terms of provisions of Section 263(2) of the Act. Considering the facts of the case vis a vis the and the provisions of section 263(2) of the Act and also the citations made by the ld. Counsel before us, we are of the considered view that it is the original assessment order passed under section 143(1) of the Act which could be considered as erroneous and prejudicial to the interest of the Revenue but not the assessment as framed in the re-assessment proceedings u/s 144/147 of the Act dated 29.09.2021, in which these two penny scrips were not subject matter of reasons recorded nor did these come to the notice of the AO during the course of re-assessment proceedings. In our opinion, the limitation runs from the end of the financial year in which the original order under section 143(1) of the Act was framed, i.e. 18.06.2013 and the limitation period expired on 31.03.2016, whereas the ld. PCIT has set aside and revised the assessment order as framed u/s section 144 read with section 147 of the Act dated 29.09.2021 and consequently the revisionary jurisdiction of the ld. PCIT cannot be sustained. The case of the assessee finds force from the decision in the case of CIT –vs.- Alagendran Finance Limited (supra), wherein the Hon'ble Apex Court has held that the period of limitation has to run from the date of order of original order and not from the date of order of reassessment, where the item/issue in respect of which order is revised under section 263 of the Act by the ld. PCIT is not the

subject matter of reassessment proceedings. The facts before the Hon'ble Apex Court were that, the ld. PCIT had sought to revise the part of the order of assessment, which related the lease equalization fund. The reassessment proceeding was initiated and culminated under section 143(3) read with section 147 of the Act in which the issue of lease equalization fund was not the subject matter and the Hon'ble Court has, therefore, held that doctrine of merger did not apply in the case of this nature and the period of limitation commences from the date of original assessment and not from the date of reassessment since the latter had not anything to do to lease equalization fund and this was not a case where subject matter of assessment and subject matter of re-assessment were same. The Hon'ble Apex Court while passing the order has relied on the decision of Coordinate Bench in the case of CIT –vs.- Arbuda Mills (1998) 231 ITR 50 (SC). Similar ratio as laid down by the Hon'ble Bombay High Court in the case of CIT –vs,- ICICI Bank Limited(Supra) wherein the Hon'ble Bombay High Court has held that where the jurisdiction under section 263(1) of the Act is sought to be exercised with reference to an issue which is covered by the original order of assessment under section 143(3) of the Act and which does not form the subject matter of the reassessment, the limitation must necessarily begin to run from the date of order passed under section 143(3) by observing and holding as under:-

> ***"Held, dismissing the appeal, that neither in the first reassessment nor in the second reassessment was any issue raised or decided in respect of the deductions under section 36(1)(vii), (viia) and the foreign exchange rate difference. The order of the Commissioner under section 263(2) had not been*** *passed with reference to any issue which had been decided either in the order of the first reassessment or in the order of second*

reassessment but sought to revise issues decided in the first order of assessment passed under section 143(3) on March 10, 1999, which continued to hold the field as regards the three issues in question. The order dated March 10, 1999, did not merge with the orders of reassessment in respect of issues which did not form the subject matter of the reassessment. Consequently, Explanation 3 to section 147 would not alter that position. Explanation 3 only enables the Assessing Officer, once an assessment is reopened, to assess or reassess the income in respect of any issue, even an issue in respect of which no reasons were indicated in the notice under section 148(2). This, however, will not obviate the bar of limitation under section 263(2). The invocation of the jurisdiction under section 263(2) was barred by limitation".

12. In the instant case before us also the issue on which the ld. PCIT proposed the revision of order framed u/s 144 r.w.s. 147 of the Act dated 29.09.2021, in which these two scrips were not the subject matter of re-assessment proceedings. Therefore, the period of limitation has to run from the date of assessment as framed under section 143(1) dated 18.06.2013 i.e. from the end of financial year 31.3.2016. In view of this, we incline to hold that the revisionary jurisdiction exercised by the ld. PCIT is hopelessly barred by limitation. In view of the ratio laid down by the Hon'ble Courts as discussed herein above, the appeal of the assessee is allowed.

13. In the result, the appeal of the assessee is allowed.

Kolkata, the 11th July, 2023.

Sd/-	*Sd/-*
[Sonjoy Sarma]	[Rajesh Kumar]
Judicial Member	Accountant Member

Dated: 11.07.2023

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Zulu Merchandise Pvt. Ltd., 3rd Floor, Narayani Building, 2A, Sarat Bose Road, Kolkata-700 020.***
2. ***PCIT-2, Kolkata.***
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata