आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.166/Ahd/2020
Assessment Year :2014-15

Tiki Tar Industries Baroda Ltd. 8th Floor, Neptune Tower Baroda Productivity Council Alkapuri, Vadodara PAN : AADCT 8382 Q	Vs	Pr.CIT-2 Vadodara.

(Applicant)		(Responent)

Assesseeby	:	Shri Milin Mehta, AR
Revenue by	:	Shri Akhilendra Pratap Yadav, CIT-DR

सुनवाई की तारीख/**Date of Hearing** : 17/01/2024
घोषणा की तारीख /**Date of Pronouncement**: 24/01/2024

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The present appeal has been filed by the assessee against order passed by the Ld.Pr.Commissioner of IncomeTax-2,Ahmedabad (hereinafter referred to as "ld.Pr.CIT dated 26.3.2019 under section 263of the Income Tax Act, 1961 ("the Act" for short) pertaining to Assessment Year 2014-15.

2. At the outset, it was pointed out by the Registry that appeal filed by the assessee before the Tribunal is late by 262 days, and therefore, it is barred by limitation. To explain the delay, the assessee has filed a request letter dated 29.9.2023 signed by the Director of the assessee company stating *interalia* that the impugned

delay in filing the appeal before the Tribunal was caused due to preoccupation of the Finance Department of the assessee-company in relation to closing of accounts and preparation of annual reports for the year 31.3.2019 and to comply various other statutory formalities; that the top management was also busy in various meetings, negotiations, discussions with the stakeholders for finalizing various other projects expansion programmesof the assessee-company; that due to these heavy pressure on the management, the order of the ld.Pr.CIT could not be forwarded to the tax consultants of the assessee for contemplating further course of action, hence the impugned delay was caused. It is therefore prayed that the impugned delay being unintentional, the same be condoned, and the appeal may be taken for adjudication on merits. The relevant contents of the letter dated 29.9.2023 are extracted as under:

> *"3. The order of the PCIT u/s. 263 was sent to the Finance Department of the Company. The Finance Department of the Company was pre-occupied with the closing of accounts for financial reporting for the year ending 31-3-2019. The Company was required to complete several formalities pertaining to closing of books of accounts as well as GST compliances. The Finance department was under pressure for collecting various data for closing the accounts. Since the order of the PCIT was received just few days before the year end and the Finance department being busy with closing of accounts the order was inadvertently not sent to the Top Management for review. It may also be mentioned that the Top Management was not aware about the receipt of the order of the PCIT u/s. 263.*
>
> *4. It is also submitted that the Company was under the process of finalizing a Joint Venture agreement with a foreign company. For the same, the Top Management of the Company was engaged in various negotiations, discussions and meetings with the relevant stakeholders. The staff of the Company remained extremely busy and occupied for meeting the requirements of the Top Management for finalizing the said JV agreement. Moreover, the persons at the Top Management were continuously travelling and remained busy at that point in time and it was not possible for them to follow up with the tax proceedings u/s 263. It may be appreciated that the employees are required to prioritize their work and accordingly report to the urgent requirements of the Top Management and hence in such environment, complete attention of the employees is towards closing of accounts as well as the needs of the Top management towards the fmalization of the JV agreement. Consequently, the order of the PCIT u/s*

263 was overlooked by them as well as the Top Management and the same could not be forwarded to the relevant consultants for deciding the further course of action. This was not by any means an intentional act but was merely an inadvertent error.

5. Subsequently notice u/s. 143(2) rws 263 was issued by the AO in pursuance of order of PCIT u/s. 263. It was only during the course of the set aside proceedings u/s 143(3) rws 263, the Company became aware of the order passed by the PCIT u/s 263. On review of the entire facts of the case and also considering the technicalities involved the consultants advised the company to prefer appeal against the order u/s 263 before, the Hon'ble IT AT.

6. The appeal against the order of PCIT u/s. 263 was filed belated by the Company as the same was inadvertently lost site off in view of work pressure. It may be appreciated that the failure was not intentional but purely circumstantial and beyond the control of the Company. We therefore request that a liberal view may please be taken and the appeal may please be admitted. Justice should not be denied on account of procedural lapses. We therefore request to condone the delay in filing the appeal and admit the same."

3. The ld.counsel for the assessee contended that these being sufficient cause for the impugned delay, in the interest of justice the same be condoned. He relied on various case laws in this regard.

4. The ld.DR vehemently opposed the application for condonation of delay filed by the assessee stating that there was inordinate delay of 262 days and no sufficient cause was adduced by the assessee for the delay.

5. We have heard contentions of both the parties; gone through the facts relating to delay in filing of the appeal as presented before us, and have also gone through various settled decisions of higher Courts on the issue of condonation of delay.

Section 5 of the Limitation Act and section 253(5) of the Act provides power to condone delay on demonstrating sufficient cause to the satisfaction of the courts. This satisfaction accordingly has been held by Courts to be interpreted liberally, for advancement of substantial justice.

The Hon'ble Apex Court in the case of Collector, Land Acquisition Vs. Mst.Katiji& Others, 167 ITR 471 (SC) exhaustively dealt with **power conferred by the Legislature to condone the delay by enacting section 5 in the Limitation Act, holding that purpose for the same was to enable Courts to advance substantial justice to the party by disposing of the matters on merit.The Hon'ble Court in the said case held that expression "sufficient cause" for section 5 of Limitation Act was to be applied in a manner to sub-serve the ends of justice and therefore a justifiable liberal approach had to be adopted on principle.** The Hon'ble Court has given reasons for adopting a liberal approach stating that -

- ordinarily a litigant does not stand to benefit by lodging an appeal late,
- and by refusing to condone delay, a meritorious matter will be thrown out at the very threshold and cause of justice defeated,
- as opposed to that if delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties;
- that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, because either side cannot claim to have vested right in injustice being done because of non-deliberate delay
- that there was no presumption that delay was occasioned deliberately, and in fact a litigant does not stand to benefit by resorting to delay;
- 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.

6. The Hon'ble Court elucidated these aspects for adopting a liberal and justice oriented approach on the issue of condonation of delay as under:

> *"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.*
>
> *Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-*

grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on mertis in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore. set aside. Delay is condoned. And the matter is remitted to the High Court."

7. Thus, the crux of the principle laid down by Hon'ble Courts for exercising the power for condoning delays is that, there has to be sufficient and reasonable cause adduced by the assessee for the delay and the assessee should not appear to have acted negligently and in a mala fide manner.

Looking from this angle, we find that in the present case the assessee has reasonably justified the reasons as extracted hereinabove for the impugned delay. It is pertinent here to note that no benefit accrues to the assessee by not filing appeal in the first instance itself, but on the contrary, the assessee would be risked with serious consequences of huge demand raised on him on account of the consequential assessment framed against the order passed u/s. 263 of the Act.

Therefore, noting that there is no negligence or laxity attributable to the assessee for the delay in filing appeal, and to sub-serve the ends of justice we find that it is a fit case for condoning the delay of 262 days in the present appeal. The impugned delay in filing the present appeal is accordingly condoned.

8. We shall now proceed to adjudicate the appeal before us on merit.

9. The grounds of appeal filed by the assessee are not in consonance with the Rule 8 of the Income Tax (Appellate Tribunal) Rules, 1963, as they are a blend of descriptive and argumentative contents.In fact,these grounds of appeal, solely focus on challenging the validity of the revisionary order of the ld.Pr.CIT passed under section 263 of the Act and invocation of provisions of section 52(2)(viib) of the Act by debunking the calculation of fair market value of shares done by the assessee and accepted by the AO, under Rule 11UA of IT Rules. By the impugned order, the ld.Pr.CIT set aside the assessment order passed by the ld.AO under section 143(3) of the Act holding it as erroneous and prejudicial to the interest of the Revenue. Our discussions for adjudication of this issue as follows.

10. The error noted by the ld.Pr.CIT in the assessment order framed in the case of the assessee under section 143(3) of the Act was to the effect that the AO had failed to make proper inquiries regarding valuation of fair market value of shares issued by the assessee during the year at a premium, which valuation as per the ld.Pr.CIT was not in accordance with law as done by the assessee. As per the ld.Pr.CIT, the fair market value of the shares was below premium at which the shares were issued, accordinglythe provisions of section 56(2)(viib) of the Act were invocable in the present case, and addition of Rs.64,65,000/- was warranted on account of the shares being issued at a value less than its fair market value.

The assessee had issued 5,00,000 equity shares, having face value of Rs.10/- at premium of Rs.50/- per equity share. As a consequence it had received Rs.2,50,00,000/- as premium. The assessee had justified the premium received by calculating the fair market value of the shares under Rule 11UA of the Income Tax Rules as per the formula prescribed therein. The ld.Pr.CIT noted

that the assessee had wrongly taken the value of assets and liability while calculating the fair market value under Rule 11UA. He noted that the assessee had not considered the unsecured loans in its working FMV of shares. As per the ld.Pr.CIT, after considering the unsecured loans, the valuation of shares came to Rs.47.07 per equity shares, while the assessee had issued shares at a premium of Rs.50/- resulting in extra amount or premium of Rs.12.93 per share received by the assessee, which tantamounted in all to Rs.64.65 lakhs in relation to issue of 5,00,000 equity shares in excess of its FMV, and thus the amount received by the assessee was, as per the ld.Pr.CIT, liable to be added to the income of the assessee under section 56(2)(viib) of the Act. His calculationof the FMV of shares at Rs.47.07 per share is noted at page no.10 to 13 of its order as under:

Statement of computation of FMV of unquoted equity shares as on 31.03.2013.

Particulars	*Amount*
Book Value of Assets (A) (Refer to Note No.1)	*65,77,08,480/-*
Book Value of Liabilities (L) (Refer to Note No.2)	*49,94,01,776*
Amount of paid up equity shares (PE) (Refer to Note No.3)	*4,00,00,000/-*
Paid up value of equity shares (PV)	*10*
(A-L)	*18,83,06,714*
*Fair market value of unquoted equity shares [(A-L)/PE*PV)*	*47.07*

Note No.1 Calculation of Book value of assets:

Particulars	*Amount*
Total value of assets	*66,22,66,701*
Less:	

Preliminary Expenses to the extent not written off	*10,18,361*
Advance Tax/Tax deducted at Source/TCS	*35,39,859*
Book value of Assets	*65,77,08,480*

Note No.2 Calculation of Book value of liabilities

Particulars	*Amount*
Total value of liabilities	*66,22,66,701*
Less:	
Paid up share capital	*4,00,00,000*
Reserves & Surplus	*14,33,64,935*
Provision for taxation	*95,00,000*
Amount set apart for equity and preference dividend	*0*

Any amount representing provisions made for unascertained liabilities	*0*
Any amount representing contingent liabilities	*0*
Book value of liabilities	*49,94,01,766*

Note No.3 – Calculation of amount of paid up of equity shares	*46,94,01,766*
Particulars	*Amount*
Paid up share capital	*4,00,00,000*
Amount of paid up share capital	*4,00,00,000*

11. Before us, the assessee has not raised any contention or contested the calculation of the FMV of the shares by the ld.Pr.CIT at Rs.47.07 per shares. His argument before us, against revisionary order passed by the ld.Pr.CIT is that, the ld.Pr.CIT has held the assessment order erroneous causing prejudice to the Revenue

without dealing with the contention raised by the assessee, and without dealing with and/or distinguishing the case laws referred by the assessee in support of its contention before him.

12. The ld.counsel for the assessee, in this regard, pointed out that during revisionary proceedings, the assesseehad contended to the ld.Pr.CIT that these 5,00,000 shares issued by the assessee were Rights Issue, which was given to the existing shareholders in their existing shareholding ratio against unsecured loanswhich were given by them to the assessee-company; that there was no change in the shareholding ratio after the issue of these Right shares, no new or outside shareholders were introduced in the company, the shares were not issued against any cash consideration. That in the light of these facts, it was contended to the ld.Pr.CIT, that the provisions of section 56(2)(viib) of the Act could not be invoked since it was a deeming provision brought on the statute with specific purpose of deterring the generation and use of unaccounted money through infusion of fund from unconnected persons or shareholders at a substantial premium. It was contended that the assessee had referred to him the decision of the ITAT, Mumbai Bench in the case of Sudhir Menon HUF Vs. ACIT, (2014) 45 taxmann.com 176 (Mum-Trib.) which had ruled on an identical issue in favour of the assessee, and also the decision of the ITAT, Chennai Bench in the case of Vaani Estates (P.) Ltd. Vs. ITO, (2018) 98 taxmann.com 92 in support of its contention; that the ld.counsel for the assessee contended that the assessee had also submitted the calculation of FMV of shares justifying it at premium at which the shares have been issued by the assessee by an alternative method prescribed under the Rule i.e. Rule 11UA by furnishing certificate of a chartered accountant who had justified the premium using discounted cash flow (DCF) method. The ld.counsel for the assessee drew our

attention to the submissions made before the ld.CIT(A) that stand reproduced in the order of the ld.CIT.

14. The ld.counsel for the assessee contended that the ld.Pr.CIT did not deal with any of the contentions of the assessee while finding the assessment order to be erroneous for having accepted incorrect valuation of shares submitted by the assessee as noted by him.

15. During the course of hearing before us, the ld.counel for the assessee contended that in a recent decision of the ITAT, Raipur Bench in the case of Chhatisgarh Metaliks and Alloys P.Ltd. Vs. ITO, (2023) 147 taxmann.com 441 (Tri-Raipur) has held the provision of section 56(2)(viib) not invocable in the case of Right Issue.

16. The ld.DR per contra pointed out that the ld.Pr.CIT had adequately dealt with the above contentions of the assessee, and also case laws referred to before him in the case of Vaani Estates (P.) Ltd. Vs. ITO (supra) at para-6 of his order as under:

> *"The submission of the assessee has been considered and not found tenable. The assessee company has converted the amount of unsecured loans of Rs.3,00,00,000/-- in the name of existing share holders, in Equity shares at a premium of 50 Rs. Per share. The main contention of the assessee is that no fresh money has been brought in through this issuance of equity shares and the shares have been issued to the existing share holders in the same proportion in their pre issuance share holding pattern. The assessee has referred various judicial pronouncements and mainly relied upon the decision of Madras ITAT in the case of Vaani Estates. In the instant case, the fact are totally different from the facts present in the case of the assessee company. The ITAT has held in that case as the shares have been transferred from the mother to her daughter and no fresh money has been introduced in the balance sheet, the provisions of section 52(2)(vii) are not attracted in this case."*

He therefore stated that the argument of the ld.counsel for the assessee that his contention wasnot considered by the ld.Pr.CIT, was not correct.

17. We have heard boththe parties and have carefully gone through the orders of the authorities below.

As noted above, the error noted by the ld.Pr.CIT in the assessment order was the acceptance by the AO of the calculation of the fair market value of the shares submitted by the assessee in terms of Rule 11UA of the Act to justify the premium at which the shares were issued by it during theyear, which calculation, as per the ld.Pr.CIT was incorrect resulting in fair market value of shares being less i.e Rs.47.07 per share as opposed to the value at which they were issued by the assessee at Rs.60/- per equity shares (Rs.10 face value plus Rs.50/- premium); which resulted in excess amount of Rs.12.93 per share being calculated by the Ld.PCIT which ought to have been added to the income of the assessee in terms of provision of section 56(2)(viib) of the Act.

18. As noted by us above, the assessee does not dispute the incorrectness in the calculation of fair market value by the assessee and as noted by the ld.Pr.CIT. The assessee has not challenged this finding of the ld.Pr.CIT that its justification of the FMV of the shares submitted to the AO was incorrect as noted by the ld.Pr.CIT. His only challenge to the order of the ld.Pr.CIT is that, the ld.Pr.CIT held that the assessment order was erroneous without dealing with the arguments made by the assessee before him. He has also drawn our attention to recent decision of the ITAT, Raipur Bench (supra) holding that the provisions of section 56(2)(vib) is not invocable in the case of Right Issue, as is the facts in the present case.

19. We are not in agreement with the contention of the ld.counsel of the assessee that the contentions made by the assessee before the ld.Pr.CIT were not dealt with by him while holding the assessment

order to be erroneous. He has specifically referred to the contentions made regarding non-applicability of section 56(2)(viib) to the Right Issue issued, that there is no *mala fide* intention involved in the Right shares which is said to be brought in the ambit and scope of the deeming provision of section 56(2)(viib) of the Act, and he has referred to the decision of the ITAT, Chennai Bench in the case of Vaani Estates (P.) Ltd. Vs. ITO (supra) before the ld.Pr.CIT, which as per the ld.counsel for the assessee, the ld.Pr.CIT has not dealt with. We find that para-6.1 to 6.3 of the ld.Pr.CIT order deals with the above contentions of the assessee. The same is extracted hereunder for brevity:

6.1 In the case of the assessee company, the valuation of share premium has been made on Net Asset Method prescribed under rule 11UA of I.T Rules, 1962. While making the calculation of 'Book value of Liabilities' under Net asset method, the assessee company has reduced the amount of unsecured loans from the value of Liabilities in the Balance sheet. It is clearly mentioned in the calculation prescribed under rule 11UA that the following items would be reduced from the total amount of liabilities for calculation of fair market value unquoted equity shares:-

i. the paid-up capital in respect of equity shares;

ii. the amount set apart for payment of dividends on preference shares and equity shares whereas such dividends have not been declared before the date of transfer at a general body meeting of the company;

iii. reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

iv. any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference of the book profits in accordance with the law applicable thereto;

v. any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

vi. any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares

6.3 The assessee company has submitted in its reply that they have reduced the amount of unsecured loans by considering it as quasy-equity and made the calculation of share premium. There is no discussion of quasy-equity in the rules of calculation and Assessee Company has taken it for their own convenience of valuing the share premium at a higher value. The basic question in this case is that the fair calculation of Share Premium value in Net Asset Method, as prescribed under rule 11UA of the IT Rules, has

not been made and the assessee, in its submission has discussed that section 56(2)(vii) is not applicable as the money has not changed hands and hence no unaccounted money has been brought into the books of the assessee company. The rationale behind reducing the amount of unsecured loans from the Book value of Liabilities has not been discussed by the assessee company in its submission and only the applicability of section 56(2)(vii) has been discussed. The case laws discussed by the assessee in its submission have no direct relation with the facts of the case of the assessee company hence not discussed in detail. No doubt section 56(2)(vii)b creates a deeming fiction and hence its scope is limited. However, it is also an accepted legal principal that an interpretation cannot be given to such deeming fiction as to bring it to naught section 56(2)(vii)b does not provide for adjustments made by the assessee.

20. As is evident from the above, the ld.Pr.CIT has noted above contentions of the assessee, as also taken note of the case laws cited by the assessee, and has rejected the same stating that it is acceptable legal principle that an interpretation cannot be given to a deeming fiction so as to bring to naught. He has also stated that the case laws referred to by the assessee have no direction relation to the case of the assessee-company. We have also noted that the ld.Pr.CIT has clearly distinguished on facts the decision of Chennai Bench of the ITAT and the ld.counsel for the assessee was unable to point out any infirmity in distinction so made by the ld.Pr.CIT.

21. As for the decision cited by the ld.counsel in the case of Sudhir Menon HUF (supra), we have noted from the ld.Pr.CIT order, from where gist of the case is reproduced at page no.7 of the order that the issue in the said case related to the invocation of the provisions of 56(2)(vii) of the Act which relates to the receipt of any money or property without any consideration or without adequate consideration. While in the present case, the issue relates to the provisions of section 56(2)(viib) of the Act which deems the amounts received in lieu of the issue of shares in excess of their FMV as

income of the assessee. The ld.Pr.CIT, therefore, has rightly found the facts of the case to be different and distinguishable from that in the present case before us. Therefore, we do not agree with the ld.counsel for the assessee that the ld.Pr.CIT has held the assessment order erroneous without dealing with averments made by the assessee before it.

22. Now coming to the aspect of the decision of the ITAT, Raipur Bench in the case of Chhatisgarh Metaliks and Alloys P.Ltd. (supra) holding the provision of the section 56(2)(viib) of the Act not applicable on Right Issue, and its impact on revisionary order passed in the present case, it is evident that in the absence of any contrary decision cited by the Revenue before us, the entire exercise of revision in the present case on identical set of facts fails considering the categorical findingof the ITAT that section 56(2)(viib) of the Act cannot be invoked on a Rights Issue. The finding of the error in the assessment order by the ld.Pr.CIT on account of an identical issue clearly does not survive.

In view of the above discussion, the impugned order of the ld.Pr.CIT passed under section 263 of the Act is set aside, and the appeal of the assessee is allowed.

23. In the result, the appeal of the assessee is allowed as above.

Order pronounced in the Court on 24th January, 2024 at Ahmedabad.

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad,dated 24/01/2024

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