IN THE INCOME TAX APPELLATE TRIBUNAL, "E" BENCH MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER

I T A. No. 1318, 1319 & 1320/MUM/2024
(A.Y. 2008-09, 2009-10 & 2013-14)

K & P Enterprises CW 8021, Bharat Diamond Bourse, BKC,Bandra East, Mumbai-400051.	Vs	DCIT-22(1), Piramal Chambers Mumbai-400012.
PAN/GIR No. AADFK3421G		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by	Shri. Bhupendra Shah.AR
Revenue by	Shri. P.D Chougule.Sr.DR

सुनवाई की तारीख/Date of Hearing	13.06.2024
घोषणा की तारीख/Date of Pronouncement	25.06.2024

ORDER

PER PAVAN KUMAR GADALE, JM:

The three appeals are filed by the assessee against the separate orders of National Faceless Appeal Centre (NFAC), Delhi / (CIT(A) passed u/sec 143(3) r.w.s 147 and U/sec 250 of the Act.

2. Since issues involved in these appeals are common and identical, hence they are clubbed, heard and a consolidated order is passed. For the sake of convenience, we shall take up ITA No. 1318/Mum/2024, A.Y 2008-09 as lead case and facts narrated. The assessee has raised the following grounds of appeal

1) In the facts and the circumstances of the case and in law, the learned CIT [A] erred in dismissing the electronic appeal as time barred even though the physical appeal was filed in time.

Without prejudice to the above,

2) In the facts and the circumstances of the case and in law, the learned A.O. erred in passing and CIT[A] confirming the order u/s 143(3) r.w.s 147 and therefore rendering the whole re-assessment bad in law, that too

a) Only on the basis of borrowed satisfaction, presumption and surmises.

b) Recording reasons for reopening only on the basis of information received from the DGIT [investigation]

3) In the facts and circumstances of the case and in law, the Assessing Officer erred in passing the assessment order without confronting alleged statement of the said supplier to the appellant and merely relying upon the same even though no assessment can be made on the basis of 3rd party statement particularly when the same was not confronted.

4) In the facts and circumstances of the case and in law, the Assessing Officer erred in adding Rs. 88,29,133/- as alleged Bogus purchases being 100% of the total purchases CIT[A] erred in not deciding the same on merits,

a) Even though the payment for purchases is made from the books by A/C payee cheques and cannot be termed as bogus,

b) Only on the basis of the information on the website www.mahavat.gov.in about the dealer whose copy of statement recorded were not furnished to the appellant.

c) Without appreciating the fact that no addition can be made even if the supplier is not traceable as per the judgment of the Bombay High Court.

d) Sales cannot be made without purchases

e) Quantity records are available

f) No cash trail is established by the Assessing Officer

g) Without rejecting books of accounts

h) Without showing comparable case of GP of more than 100% in diamond trading business

i) overlooking the jurisdictional Bombay High Court in the case of M/S Haji Mohd Adam and also followed by the jurisdictional ITAT in several cases holding that only differential GP between verifiable and unverifiable purchases could only be added instead of whole amount of purchases which is not verifiable.

5) In the facts and circumstances of the case and in law, the Assessing Officer erred in initiating penalty u/s 271(1)(c) and charging interest u/s 234A, B C & D.

General:

The appellant reserve rights to add alter or delete any portion of this appeal before its conclusion.

This appeal is filed in time and may please be allowed in full.

A Detailed paper book along with case laws will be submitted at the time of hearing.

3. The brief facts of the case are that, the assessee is a partnership firm and is engaged in the business and has filed the return of income for the A.Y 2008-09 on 10.06.2008 disclosing a total income of Rs.36,14,497/- and the return of income was processed u/sec 143(1) of the Act. Subsequently the Assessing Officer (AO) has received the information from DGIT (Inv), Mumbai that the assesse was engaged in obtaining the accommodation entries/ bogus purchase bills in the F.Y 2007-08 from the B.L.Jain Group entities and the assessee is a beneficiary. The AO has reason to believe that the income has escaped the assessment and has issued notice u/sec 148 of the Act. The asssessee has filed a letter dated

18.02.2015 to treat the return of income filed on 10.06.2008 as due compliance and the asssessee was provided reasons for the reopening of the case. Subsequently, the A.O has issued notice u/sec 143(2) and u/sec 142(1) of the Act and called for various details and information. In compliance, the Ld.AR of the assessee appeared from time to time and submitted the details. The AO on perusal of the financial statements found that that the assessee has made the purchases of Rs.88,29,133/- from M/s Jewel Diam Ltd. The AO has called for detailed information on the purchase transactions and in order to test check the genuineness of the transaction, the AO has called for the production of the parties and issued notices. The assessee has submitted the additional details in support of the purchases from the party. Whereas the AO was not satisfied with the explanations and has dealt on various facts, modus operandi of the transactions and is of the opinion that purchase transactions are not genuine and has made 100% addition of alleged bogus purchases of Rs.88,29,133/- and assessed the total income of Rs.1,24,43,630/- and passed the order u/sec143(3) r.w.s 147 of the Act dated 22.02.2016.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas, the CIT(A) has considered the grounds of appeal, statement of facts and submissions and find that there is a delay of two years in filing the appeal against the order u/sec 143r.w.s147 of the Act dated

22.02.2016 and the assesee has received the order on 21.03.2016. Whereas the assessee has filed the appeal before the CIT(A) manually on 06.04.2016 and further the assessee has filed Form -35 electronically on 27.03.2018. The CIT(A) without going into the merits of the appeal has observed that the assessee has not explained the delay and dismissed the assessee appeal as not maintainable. Aggrieved by the order of the CIT(A), the assessee has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the Ld.AR of the assessee submitted that the CIT(A) has dismissed the assessee's appeal, because the assessee has not filed appeal as per the procedure laid down under Rule 45 & 46 of Income Tax Rules, 1962. Whereas, the assessee has filed the appeal manually on 6.04.2016 and again the assessee has filed Form .no 35 electronically on 27.0.2018 as per CBDT circular No.20/2016 and the amendment in filling the appeal is w.e.f 1-3-2016. The Ld.AR mentioned that the delay in filling the appeal is not an wanton act and the asssesee has filed the condonation delay application before the CIT(A).Further the assessee has a good case on merits and be provided an opportunity to substantiate the case with the material evidences and relied on the factual Paper Book and the Ld.AR prayed for allowing the appeal. Per Contra, the Ld.DR supported the order of the CIT(A).

6. We have heard the rival submissions and perused the material available on record. The sole crux of the disputed issue that the assessee has filed the appeal in paper form/ manually on21.03.2016 Further, we find that as per the amendment and procedure laid down under Rule 45 & 46 of the Income Tax Rules, 1962 w.e.f. 01.03.2016. The appeal in Form No. 35 has to be filed electronically, whereas the assessee has filed the appeal in electronic form on 27.03.2018 due to technical issues. We have considered the facts of technicalities in filing the appeal electronically and the amendment effective from 01.03.2016. We find the Honble Tribunal in the case of *Ashraf Aziz Kasmani vs ITO [2018] 92 taxmann.com 293 (Mumbai-Trib.)* on the identical issue has dealt on the facts and provisions of law and granted the relief and observed at Para 4 to 12 of the order read as under:

> *4. "Thereafter, the Id. Commissioner of Income Tax (Appeals) considered the admissibility of appeal filed in manual form on 30.6.2016. In this regard, he referred to be CBDT Notification No. SO 637(E) [No. 11/2016 dated 01.03.2016] and has referred as under:*
>
> > *"In exercise of the powers conferred by sub-section (1) of section 249, read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely*
> >
> > *1. (1) These rules may be called the Income-tax (3rd Amendment) Rules, 2016.*
> >
> > *(2) They shall come into force on the date of their publication in the Official Gazette.*
> >
> > *2. In the Income-tax Rules, 1962 (herein after referred to as the said rules), for rule 45, the following rule shall be substituted, namely:-*

45. Form of appeal to Commissioner (Appeals).-

(1) An appeal to the Commissioner (Appeals) shall be made in Form No. 35.

(2) Form No. 35 shall be furnished in the following manner, namely:-

(a) in the case of a person who is required to furnish return of income electronically under sub-rule(3) of rule 12,-

(i) by furnishing the form electronically under digital signature, if the return of income is furnished under digital signature;

(ii) by furnishing the form electronically through electronic verification code in a case not covered under sub-clause (1); (b) in a case where the assessee has the option to furnish the return of income in paper form, by furnishing the form electronically in accordance with clause (a) of sub rule(2) or in paper form.

(3) The form of appeal referred to in sub-rule (1), shall be verified by the person who is authorized to verify the return of income under section 140 of the Act, as applicable to the assesses, (4) Any document accompanying Form No. 35 shall be furnished in the manner in which the said form is furnished. (5) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall-

(1) specify the procedure for electronic filing of Form No. 35 and documents;

(i) specify the data structure, standards and manner of generation of electronic verification code, referred to in sub-rule(2), for the purpose of verification of the person furnishing the said form, and

(iii) be responsible for formulating and implementing appropriate security, archival and retrieval of policies in relation to the said form so furnished."

5. Thereafter, be referred to the amendment to Rule 2(3) of the Income Tax Act, 1962 where the mode of filing of the return income in electronically form is specified. Thereafter, the ld. Commissioner of Income Tax (Appeals) referred to another CBDT Circular whereby the CBDT has subsequently extended the period of filing of appeal electronically till 15.06.2016, the said CBDT Circular No. 20 dated 26.5.2016 reads as under:

> *"Rule 45 of the Income Tax Rules, 1962 mandates compulsory e-filing of appeals before ld. Commissioner of Income Tax (Appeals) with effect from 01.03.2016 in respect of persons who are required to furnish return of income electronically. It has come to the notice of the Central Board of Direct Taxes (hereinafter referred 1 as the Board) that in some cases the taxpayers who were required to e-file Form 35, were unable to do so due to lack of knowledge about e-filing procedure and/or technical issues in e-filing. Also, the EVC functionality for verification of e-appeals was made operational from 12.05.2016 for individuals and from 19.05.2016 for other persons. Word limit for filing grounds of appeal and mapping of jurisdiction of Commissioners of Income Tax (Appeals) were also a cause of grievance in some cases.*
>
> *2. The matter has been examined by the Board. While the underlying issues relating to e-filing of appeals have since been addressed and resolved, in order to mitigate any inconvenience caused to the taxpayers on account of the new requirement of mandatory e-filing appeals, it has been decided to extend the time limit for filing of such e-appeals. E-appeals which were due to be filed by 15.05.2016 can be filed upto 15.06.2016. All e-appeal's filed within this extended period would be treated as appeals filed in time.*
>
> *3. In view of the extended window for filing e-appeals, taxpayers who could not successfully e-file their appeal and had filed paper appeals and required to file an e-appeal in accordance with Rule 45 before the extended period i.e. 15.06.2016. Such e-appeals would also be treated as appeals filed within time."*

6. From the above, the Id. Commissioner of Income Tax (Appeals) noted that the assessee was required to file this appeal only in electronic form latest by 15.06.2016. However, since the appeal was filed manually as a paper appeal, the ld. Commissioner of Income Tax (Appeals) held that since the same was not electronically filed, he treated the appeal is not maintainable.

7. Against the above order, the assessee is in appeal before the ITAT.

8. I have heard the Id. Departmental Representative. None appeared on behalf of the assessee. The notice for hearing has also returned unserved. Hence, I proceeded to adjudicate the case by hearing the Id. Departmental Representative and perusing the records. From the grounds of appeal in this case, it transpires that the assessee has raised a ground that the CBDT Circular which mandated appeals before the Id. Commissioner of Income Tax (Appeals) to be filed electronically was dated 01.3.2016 and, hence, it is the plea of the assessee that the appeals against the assessment order passed on or before 01.03.2016 can be filed manually and all the appeals in respect of assessment order passed on or after 01.3.2016 to be filed electronically. 9. First of all I note that the ld. Commissioner of Income Tax (Appeals) has himself noted in the first paragraph of his order that the appeal is "well within time". Thereafter, the ld. Commissioner of Income Tax (Appeals) has opined that the assessee should have filed the appeal electronically by referring the CDBT Circular.

10. I find that there is no clarification in the said CBDT Circular, regarding the applicability of the same with regard to the date of assessment order passed. In the present case, admittedly the assessment order has been passed before 01.03.2016, so the claim of the assessee that the said Circular is applicable to assessment orders passed after 01.03.2016, cannot be brushed aside summarily. When this question was put to the ld. Departmental Representative, she replied that since the assessment order has been served to the assessee after 01.03.2016, the assessee's ground taken cannot be sustained.

11. Upon careful consideration, I find that in the above CBDT Circular, admittedly there is no discussion about the date of

assessment order, with respect to which the said Circular is applicable. A construction that the said Circular is not applicable to assessment orders passed prior to 01.3.2016, cannot be said to be totally unsustainable. The Hon'ble Apex Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 has expounded that if two constructions are possible, one in favour of the assessee should be applied. On the facts of the present case, and on the touch stone of the above said Hon'ble Apex Court decision, I am of the considered opinion that the assessee's plea that the appeal filed manually for assessment order passed prior to 01.03.2016, should be admitted by the ld. Commissioner of Income Tax (Appeals), is cogent. More so, when the ld. Commissioner of Income Tax (Appeals) in his earlier paragraph has accepted that the appeal is well within time. Accordingly I direct the ld. Commissioner of Income Tax (Appeals) to admit the aforesaid appeal of the assessee and pass an order on the merits of the case. Needless to add, the assessee should be granted adequate opportunity of being heard.

12. In the result, the appeal by the assessee stands allowed for statistical purpose."

7. We find the facts in the present case, are similar and identical as discussed in the above judicial decision and fallow the judicial precedence as the assessement order was passed on 22.02,2016 and the filing of appeal electronically as per the amendment is effective from 01.03.2016. Further we find that there is no benefit is derived in causing delay in filing appeal before the CIT(A). Whereas the Hon'ble Supreme Court in the case of B. Madhuri Goud vs. B. Damodar Reddy (2012) 12 SCC 693, has held that the following principles must be kept in mind while considering the application for condonation of delay;

(i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate cause of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii)There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.

(xi) It is to be borne in mind that no one gets away with fraud, is representation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

8. The Hon'ble supreme court in the case of Collector, Land Acquisition Vs. MST Katiji & others (167 ITR 471) (SC) has observed as under :

" The legislature has conferred the power to condone delay by enacting s. 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice—that being the life-purpose of the existence of the institution of Courts. 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 inherent 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 of 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 merits in preference to the approach which scuttles a decision on merits."

9. We respectfully follow the observations and ratio of the decisions of Hon'ble Supreme Court and find that the delay in filing the appeal before the CIT (Appeals) by the assessee is supported with sufficient cause and pragmatic approach should be considered for condonation of delay and accordingly the delay is condoned.We considering the principles of natural

justice and to meet the ends of justice, set aside the order of the CIT(A) and restore the disputed issues to the file of the CIT(A) to adjudicate afresh on merits and the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information and comply with appeal filling rules. Accordingly, we allow the grounds of appeal of the assessee for statistical purposes.

10. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

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11. As the facts and circumstances in these appeals are identical to ITA No 1318/Mum/2024, for the A.Y 2008-09 (except variance in figures) and the decision rendered in above paragraphs would apply mutatis mutandis for these appeal also. Accordingly, we allow the grounds of appeal of the assessee for statistical purpose.

12. In the result, the appeals filed by the assesses are allowed for statistical purposes.

Order pronounced in the open court on 25.06.2024.

Sd/-	Sd/-
(RATNESH NANDAN SAHAY) ACCOUNTANT MEMBER	(PAVAN KUMAR GADALE) JUDICIAL MEMBER

Mumbai, Dated: 25/06/2024

KRK.PS

Copy of the Order forwarded to: