

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 290/Ind/2024(AY: 2015-16)

ITA No. 291/Ind/2024(AY: 2015-16)

BSM Shelter Estate India Private Limited, 27/2/3, Gram Bhangarb, Near MR-10, Indore (PAN: AAFCB3409E)	<u>बनाम/</u> Vs.	ITO 1(3), Indore
(Assessee/Appellant)		(Revenue/Respondent)

Assessee by	Shri Gagan Tiwari, AR
Revenue by	Shri Ashish Porwal, Sr.DR

Date of Hearing	19.09.2024
Date of Pronouncement	27.09.2024

आदेश / ORDER

Per B.M. Biyani, AM:

The captioned two appeals are filed by assessee. The details of appeals are as under:

- (i) *I.T.A. No. 290/Ind/2024* is a quantum-appeal directed against appeal-order dated 09.02.2023 passed by Commissioner of Income-tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of assessment-order dated 30.12.2017 passed by ITO-1(3), Indore ["AO"] u/s 143(3) of the Income-tax Act, 1961 ["Act"].

(ii) *I.T.A. No. 291/Ind/2024* is a penalty-appeal directed against appeal-order dated 24.01.2024 passed by CIT(A) which in turn arises out of penalty-order dated 26.06.2018 passed by AO u/s 271(1)(c) of the Act.

2. Since these appeals are inter-related, they were heard together and are being disposed of by this common order for the sake of convenience, brevity and clarity.

3. The background facts leading to these appeals are such that the assessee-company filed return of income for AY 2015-16 declaring a total income of Rs. Nil. The case of assessee was selected for scrutiny and the AO passed assessment-order dated 30.12.2017 u/s 143(3) determining a total income of Rs. 1,05,00,000/- after making certain additions. The AO also imposed penalty of Rs. 31,75,000/- qua those additions u/s 271(1)(c) vide penalty-order dated 26.06.2018. Aggrieved by both orders, the assessee filed two separate appeals to CIT(A). The CIT(A) disposed assessee's quantum-appeal vide order dated 09.02.2023 and penalty-appeal vide order dated 24.01.2024 wherein the assessee's appeals were dismissed. Now, the assessee has come in these appeals assailing the orders of CIT(A).

I.T.A. No. 290/Ind/2024 – Quantum appeal:

4. The registry has informed that this appeal is filed on 05.04.2024 against impugned order dated 09.02.2023 after a delay of 361 days beyond statutory period and therefore time-barred. Ld. AR for assessee submitted that the assessee has filed a condonation-application supported by an affidavit. Referring to Para 4 to 13 of condonation application, Ld. AR submitted that the delay has occurred due to the fact that the assessee's previous counsel failed to keep the track of the assessee's first-appeal before CIT(A) and did not attend hearings fixed by CIT(A) and even the counsel was not aware of the impugned order which was passed ex-parte by CIT(A). That the CIT(A) sent communication of impugned ex-parte order to the email id vinayverma543@gmail.com which belonged to Mr. Vinay Verma, director of assessee-company despite the fact that the assessee clearly denied email service by mentioning "No" against "Whether notices/ communication may be sent on email?" in Form No. 35 filed to CIT(A) and that no physical communication of impugned order was made to assessee. It is further submitted that the email id of director remains overloaded with thousands of emails relating to business of assessee due to which the communication of impugned order left unread. Subsequently, when the order dated 24.01.2024 passed by CIT(A) dismissing penalty-appeal of assessee was received, the assessee contacted earlier counsel and came to know that its quantum-appeal had already been dismissed ex-parte vide impugned order dated 09.02.2023. Thereafter, the assessee was in trust that the earlier counsel would take suitable legal action but, however, in the month of

March, 2024 when the recovery proceeding were initiated by department against assessee, the assessee contacted another counsel for handling the matter who arranged to file appeal before ITAT. Therefore, the delay in filing appeal is attributed to the lapse and negligence on the part of earlier counsel. To explain the negligence of earlier counsel, Ld. AR pointed out that there were two separate appeals before CIT(A) one by way of quantum-appeal and other by way of penalty-appeal. Vide notice dated 23.10.2023, the CIT(A) fixed hearing of penalty-appeal on 31.10.2023 but the earlier counsel carelessly filed reply relating to the issues of quantum-appeal, this carelessness is clearly recorded by CIT(A) in order dated 24.01.2024 relating to penalty-appeal as under:

"6.2 The reply filed by the appellant has been perused and it is seen that the submission of the appellant is in relation to the grounds of appeal raised by it in the appeal filed by the appellant against the order dated 30.12.2017 passed u/s 143(3). The said appeal has since been dismissed by the CIT(A) vide his order ITBA/NFAC/S/250/2022-23/1049588231(1) dated 9.2.2023. The appellant has not filed any submission in relation to the grounds of appeal raised by it in the present appeal. The Hon'ble J&K High Court in its decision in the case of CIT vs. Hotel High Park (2000) 164 CTR 610 (J&K) has held that:

"The validity of an assessment order which has attained finality cannot be challenged in an appeal against penalty. The appellate authority cannot entertain any challenge to the validity of the assessment order in an appeal against the order of penalty and appellate authority cannot declare a settled order as illegal and invalid in an appeal against penalty."

In the absence of any submission from the appellant in regard to the grounds of appeal raised in the present appeal, I have gone through the penalty order passed by the AO and I am in complete agreement with the action of the AO in imposing a penalty u/s 271(1)(c) of the Income Tax Act. In view of the same the penalty imposed by the AO is upheld.

7. The appeal is dismissed".

The above para, Ld. AR submitted, noted by CIT(A) is clearly indicative that the earlier counsel did not take care even to keep track that the quantum-appeal had already been dismissed by CIT(A) vide order dated 09.02.2023.

5. Thus, it is submitted that the assessee was not at all aware about passing of ex-parte order by CIT(A) and fully dependent on earlier counsel handling the matter. Ld. AR pointed out that at Page 22 of Paper-Book, the assessee has also filed a copy of authorisation dated 22.03.2019 given by assessee to earlier counsel for representing its cases before CIT(A). Ld. AR submitted that these facts undoubtedly show that not only the non-representation before CIT(A) but also the delay in filing present appeal before ITAT is due to counsel's lapse only. Ld. AR submitted that there is no deliberate lethargy, negligence, mala fide intention or ulterior motive of assessee in making delay and the assessee does not stand to derive any benefit because of delay. Accordingly, he prayed that in the interest of equity and justice and having regard to the view taken by Hon'ble Supreme Court in **Collector, Land Acquisition Vs Mst. Katiji and others 1987 AIR 1353, 1987 2 SCC 387**, the delay ought to be condoned in present case.

6. Ld. DR for Revenue strongly opposed the prayer of assessee. He submitted that the assessee itself is accepting that the email communication of impugned order was made by CIT(A) to director's email id provided in Form No. 35, therefore there is no deficiency in the service of order by

CIT(A). He submitted that in present times, the email communication is one of the modes adopted by department. He submitted that the assessee has to give importance to statutory communications and the overloading of email account with thousands of emails cannot be an excuse or reason to neglect departmental communication. He submitted that the delay should not be condoned in present case.

7. In rejoinder, Ld. AR re-iterated that the assessee has specifically mentioned "No" for email communication in Form No. 35 which is evident from copy of Form No. 35 available in case-record. He pointed out that the assessee had to provide email id in Form No. 35 due to mandate of Form No. 35 but clearly denied email service in the option provided in Form No. 35 for the very reason that its email a/c remains overloaded with business emails and statutory communication should not remain missed or unattended.

8. We have considered rival contentions of both sides and perused the documents to which our attention has been drawn. We *firstly* find that the impugned order dated 09.02.2023 in quantum-appeal of assessee was passed by CIT(A) ex-parte to assessee for non-prosecution of the notices of hearing. *Secondly*, we find that the penalty-appeal of assessee has also been dismissed by CIT(A) by assigning the reason that the reply filed by assessee's AR was in relation to the grounds raised in quantum-appeal despite the fact that the quantum-appeal had already been dismissed vide order dated 09.02.2023. The revenue cannot dispute both of these facts

clearly transpired by the orders of CIT(A). Thus, from these two facts, it is clearly discernible that the assessee's authorised counsel, who was dealing matters before CIT(A), failed to keep the track of first appeals before CIT(A) and failed to take note of the impugned order dated 09.02.2023 having been passed ex-parte by CIT(A) against assessee. So far as the contention of Ld. DR that there was a direct email service of impugned order by CIT(A) to the email id supplied by assessee in Form No. 35 is concerned, we suffice it to note that the assessee has made a clear-cut denial to email service by mentioning "No" in the option prescribed in Form No. 35. The assessee further claims that when the penalty-appeal was dismissed by CIT(A) vide a subsequent order dated 24.01.2024, the assessee approached earlier counsel and trusted that the counsel shall take an appropriate measure in the matters but the earlier counsel still did not take suitable action which came to assessee's notice subsequently when recovery proceedings were started by department in March, 2024. This resulted in a persisting delay of some days which was again due to lapse of earlier counsel. This claim of assessee for persisting delay of some days deserves credence having regard to the careless approach of counsel in handling appeals of assessee before CIT(A). Therefore, the facts of present case shows that there was a delay in filing present appeal due to negligence of earlier counsel and not attributable to assessee. The AR of assessee has cited certain judicial decisions in Case Law Paper-Book wherein the lapse of counsel has been considered as a 'sufficient cause' for condoning delay. We find that section

253(5) of the Act empowers the ITAT to admit an appeal after expiry of prescribed time, if there is a 'sufficient cause' for not presenting appeal within prescribed time. It is also a settled position by Hon'ble Supreme Court in **Collector, Land Acquisition Vs Mst. Katiji and others 1987 AIR 1353, 1987 2 SCC 387** that whenever substantial justice and technical considerations are opposed to each other, the cause of substantial justice must be preferred by adopting a justice-oriented approach. Thus, taking into account the provision of section 253(5) and the decision of Hon'ble Supreme Court, we take a judicious view, condone delay, admit appeal and proceed with hearing.

9. We next find that the CIT(A) has decided first-appeal *ex-parte* qua assessee for the reason that the assessee did not make any submission before him despite opportunities given. It is further observed that the CIT(A) has simply confirmed the order passed by AO and thereby upheld the additions but the grounds/issues raised by assessee in first-appeal requires an apt adjudication by CIT(A) on merit in accordance with provisions of 250(6) of the Act which provides *"The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision."*. Ld. AR for assessee submits that the assessee is ready and willing to make representation before CIT(A) if an opportunity is given and hence prays that the present matter should be remanded to CIT(A) for an apt adjudication. Ld. DR for revenue agrees that if the bench condones the delay in filing

appeal, it may remand matter to CIT(A) but makes a request to direct the assessee to represent case before CIT(A) and do not seek unnecessary adjournments. Since we have condoned delay, we accept the prayer for remanding this appeal to CIT(A) for adjudication afresh after giving opportunity to assessee. The assessee is directed to make representations before CIT(A) failing which the CIT(A) shall be at liberty to pass appropriate order in accordance with law. This appeal is accordingly allowed in these terms.

10. At this stage, we may mention that the assessee has also filed certain additional grounds claiming the same to be of legal nature and allowed to be admitted as per decision of Hon'ble Supreme Court in *NTPC Vs. CIT (1998) ITR 383 SC*. Since we have remanded matter to CIT(A), the assessee may raise similar grounds before CIT(A) and the CIT(A) shall consider in terms of decision of Hon'ble Supreme Court.

I.T.A. No. 291/Ind/2024 - Penalty-appeal:

11. The registry has informed that this appeal had been filed on 05.04.2024 against impugned order dated 24.01.2024 after a delay of 12 days beyond statutory period and therefore time-barred. Ld. AR for assessee submitted that the assessee has filed a condonation-application supported by an affidavit according to which the reason of 12 days' delay is the same as narrated for 'persisting delay' in ITA No. 290/Ind/2024 i.e. after receipt of penalty-order, the assessee approached earlier counsel and trusted that the

counsel shall take an appropriate measure in the matter but the earlier counsel still did not take suitable action which came to assessee's notice when recovery proceedings were started by department in March, 2024. This very explanation of assessee has already been given credence by us in foregoing para while condoning delay in said appeal. Adopting the very same adjudication, we condone the delay of 12 days in this appeal.

12. The issue involved in this appeal is the penalty imposed by AO u/s 271(1)(c). The said penalty is based on quantum addition made in assessment-order. Since we have already remanded quantum-appeal to CIT(A), we also remand penalty-appeal in very same terms to CIT(A) for adjudication afresh.

13. Resultantly, these appeals are allowed for statistical purposes.

Order pronounced in open court on 27.09.2024

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER
Indore
दिनांक/ Dated : 27.09.2024
Dev/Sr. PS

Sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore