

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD ' B ' BENCH, HYDERABAD.**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER
(Through Virtual Hearing)**

**ITA No.235/Hyd/2020
(Asst. Year : 2015-16)**

M/s. GSRVPL – RVNIPL – JV,
Hyderabad.
PAN AABAG 8487D

....Appellant.

Vs.

Income Tax Officer,
Ward 6(3), Hyderabad.

.....Respondent.

Appellant By : Shri K. C.Devdas.
Respondent By : Shri A.P. Babu (D.R.)

Date of Hearing : 19.07.2021.
Date of Pronouncement : 26.07.2021.

O R D E R

Per Smt. P. Madhavi Devi, J.M. :

This is assessee's appeal for the Assessment Year 2015-16 against
the order of Commissioner of Income Tax (Appeals)-6, Hyderabad
dt.17.10.2019.

2. At the outset, it is noticed that there is a delay of 70 days in filing of this appeal and the assessee has filed an application requesting condonation of delay stating as under :

Sub: Petition for condonation for delay in filing the appeal- AY 2015-16 – PAN
AABAG8487D-Reg:-

The present appeal is filed against the order of the CIT(A) -6, Hyderabad. The said order was received by us on 19.10.2019. There is a delay of 70 days in filing the appeal. The reasons for the delay are summarized below:

1. For the subject AY, M/s. GSRVPL-RVNIPL-JV (**'The Appellant'**) had filed its return of income admitting "Nil" income and claimed TDS of Rs 27,53,590 as refund.
2. The return was processed under section 143(1) of the Income Tax Act 1961 (**'the Act'**) by the Assistant Commissioner of Income Tax, CPC, Bangalore vide intimation dated 31.10.2015 granting the refund of Rs 28,77,499 along with interest.
3. The return was selected for scrutiny and the assessment was completed under section 143(3) of the Act vide order dated 29.12.2017 assessing "Nil" income and the refund of Rs 28,77,500 was determined which was already paid vide intimation processed under section 143(1) of the Act.
4. Subsequently, the Assessing Officer (**'the AO'**) issued a notice under section 154 of the Act proposing to amend the order passed under section 143(3) of the Act. The said notice was dated 20.02.2019.

5. Within a span of 8 days i.e. on 28.02.2019, the AO passed the rectification order under section 154 of the Act directing the Appellant to pay the TDS refund of Rs 25,33,614 along with the interest.
6. On the same day, the Appellant had filed its objections in response to the proposed rectification along with supporting documents. However, the AO intimated that he has already passed the 154 order raising the demand.
7. Aggrieved by the order passed under section 154 of the Act, the Appellant filed an appeal before the CIT (A)-6, Hyderabad and also filed a rectification petition under section 154 of the Act before the AO with all the documents.
8. In the interim, vide notice dated 16.09.2019, the AO posted the hearing for disposal of the rectification petition and persuaded the Appellant to withdraw the appeal filed to process the rectification petition. Further, the case was also discussed with the Addl.CIT, Range 6 who approved for the rectification petition to be allowed in the favor of the Appellant. Copy of the letter of 16.09.2019 issued by the AO is enclosed to the petition (Page No.5).
9. Accordingly, the Appellant vide letter of 16.10.2019 filed an application for withdrawal of the appeal before the CIT(A)-6 on a bonafide belief that the rectification petition would be allowed by the AO. However, the CIT (A)-6 dismissed the appeal on merits vide order dated 17.10.2019.
10. Since the Appellant was positive that the AO would allow the rectification petition, the Appellant did not file an appeal against the order of the CIT (A)-6, Hyderabad before the Hon'ble ITAT. However, to Appellant's surprise, the AO rejected the 154 order considering the order passed by the CIT (A)-6. The rejection order was passed on 24.01.2020.
11. In view of the above, the Appellant is now filing an appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT') against the order of the CIT(A) with a prayer for condonation of delay in filing the appeal .
12. The Appellant submits that it was under bonafide belief based on the assurance from the AO that the rectification petition would be allowed. Further, it was on the insistence from the Department that the Appellant had withdrawn the appeal before the CIT(A) and could not present its case on merits.

13. If the delay in filing the appeal is not condoned, it will render gross injustice to a meritorious case. The Hon'ble Supreme Court in the case of **Collector, Land Acquisition vs. Mst.Katiji & Ors [167 ITR 471]** in context of condonation of delay held that the State should stand by a technical plea of limitation if a citizen's case was otherwise meritorious. The observation of the Hon'ble Supreme court is extracted below:-
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 con- doned 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.*
14. The same view was also upheld by the jurisdiction High Court in the case of *Surya General Traders vs. Commercial Tax Officer [1997 ALT -3-110]* wherein it was held that when a person has a good case on merits, defeat of his claim on technical plea of limitation would ultimately lead to injustice.
15. Further , the Hon'ble Madras High Court in the case of **CIT vs. K.S.P Shanmugavel Nadar & Ors [153 ITR 596]** held that where assessee has been prosecuting other remedies before filing an appeal, the time taken by those proceedings should be taken into account while determining the question whether the assessee had sufficient cause for not presenting the appeal in time.

16. Thus, the Appellant was prevented by reasonable and sufficient cause from filing the appeal on time. Therefore in the interest of equity and justice, the Appellant humbly request the Hon'ble ITAT to admit the appeal and condone the delay of 70 days in filing the appeal.
17. The Appellant prays that if the delay is condoned both the Appellant and the Department would have their respective rights being submitted for adjudication and on the contrary, if it is rejected, a meritorious case would be thrown out at the threshold violating the principles of natural justice and fair play.
18. The Appellant has enclosed an affidavit to this petition affirming the above facts.

Being satisfied with the reasons given by the assessee, we condone the delay of 70 days and proceed to adjudicate the appeal as under.

3. The brief facts of the case are that the assessee is an Association of Persons (AOP) and filed its Return of Income for Assessment Year 2015-16 on 26.09.2015 admitting NIL income. The return was initially processed u/s.143(1) of the Income Tax Act, 1961 ('the Act'). Subsequently, it was selected for complete scrutiny through CASS for verification of –

- i) interest expenses;
- ii) certificate for nil or lower rate of TDS;
- iii) contract receipts/Fees Mismatch;
- iv) sales turnover mismatch;

- v) low income and high loans / advance / investments;
- vi) refund claim; and
- vii) Tax Credit mismatch.

Accordingly, a Notice u/s.143(2) was issued to the assessee on 19.09.2016 and Notice u/s.142(1) was also issued. In response thereto, the assessee filed details and after verification of the details, the Assessing Officer accepted the returned income of the assessee.

4. Thereafter, the Assessing Officer found that the assessee had claimed TDS of Rs.27,53,591 as refund which includes TDS of Rs.25,33,614 on mobilization of advance of Rs.12,66,80,683 and TDS of Rs.2,19,977 on contract receipts of Rs.1,09,98,855. He observed that the entire TDS credit is claimed in this year in violation of provisions of section 199 of the Income Tax Act, 1961 ('the Act') r.w. rule 37BA(3) of I.T. Rules, 1962. Therefore, he was of the opinion that there is a mistake apparent from record. Hence a Notice u/s. 154 of the Act dt.20.02.2019 was issued to the assessee and thereafter, since the assessee did not appear before the Assessing Officer, he passed the rectification order disallowing the TDS credit claimed by the assessee. Aggrieved by the order passed u/s. 154 of the Act, the

assessee preferred an appeal before the CIT(A) which was dismissed by the CIT(A). The assessee is in second appeal before the Tribunal by raising the following grounds :-

“ 1. The order of the Learned Commissioner of Income Tax -Appeals-6, Hyderabad [the Ld. CIT (A)] in confirming the order of the Income Tax Officer, Ward 6(3) is unsustainable both in law and on facts.

2. The Ld.CIT(A) failed to appreciate that the issue which is subject matter of 154 order is a debatable issue and does not constitute a mistake apparent from record. Therefore erred in confirming the demand of Rs 29,78,570 being TDS refund withdrawn under section 154 of the Act.

3. Without prejudice to the above grounds, the Ld.CIT (A) having rejected the Appellant's withdrawal of appeal petition ought to have provided opportunity to present its case on merits. Therefore, the order passed by the CIT(A) without providing opportunity is against principles of natural justice and bad in law.

4. Any other ground(s) that may be urged at the time of hearing.”

5. At the time of hearing, the learned counsel for the assessee filed written submissions stating that the mobilization advance received by the assessee has been returned / refunded in the subsequent year and

therefore the disallowance of TDS in its entirety in the relevant assessment year is not justified. He submitted that even with regard to the income offered during the relevant assessment year, no TDS credit was given by the assessee and thus sought remand of the issue to the file of the Assessing Officer. When these facts were brought to the knowledge of the Tribunal, we directed the learned counsel for the assessee and also the learned DR to go through the material available on record and come to an understanding as to the issue which needs verification by the Assessing Officer. Accordingly both, the learned counsel for the assessee and the learned DR of 'A' Bench together have filed the Memorandum stating as under :-

"1. The subject appeal filed by the Appellant M/s.GSRVPL-RVNIPL-JV was heard by the Hon'ble Bench on 12.07.2021.

2. During the course of hearing, the Hon'ble Bench directed both the Parties to the appeal to file a joint note on eligibility of credit for TDS on advance paid by TATA - Aldesa (JV) ("Tata") under the Income Tax Act 1961.

3. The DR and the assessee's AR have agreed that Rule 37BA(3) is squarely applicable in this case.

4. It is requested that the Hon'ble Tribunal may consider setting aside the file to the AO to verify the claim of the

assessee and give credit for TDS as per 37BA(3) considering the following points by the Assessing Officer :

a) The TDS credit should be given in the year in which the revenue receipts are offered for taxes out of the mobilization advance or any other advance received by the assessee.

b) It is also noticed that the AO has not given credit for TDS in respect of contract receipts offered during the subject AY.

c) The TDS credit given in any particular Assessment Year shall not be more than the amount calculated at applicable rate of TDS (in this particular case @ 2% for AOP/Firm and applicable Cess, if any) on revenue receipts offered in that particular Assessment Year. However, in case if the assessee has returned part of the any advance received to the payer on which TDS was already done by the payer, refund of TDS may be given in the year of such refund subjected to the examination of the evidences such as bank statements by the Assessing Officer. This TDS credit may be in addition to the TDS credit admissible on the Revenue Receipts in that particular Assessment Year.

d) It is the claim of the Appellant of that all the Mobilization advance, Material advance, Adhoc Advance received during the subject AY were recovered during subsequent AYs by Tata and part of the mobilization advance was refunded by the assessee to Tata. Further, the assessee's AR has stated that the material advance was also refunded to Tata, though the same was mistakenly represented as recoveries from RA bills in the confirmation letter given by Tata. The Departmental Representative opines that the assessee's claim need to be verified by the AO independently.

5. In view of the above, it is requested that the Hon'ble Tribunal may consider setting aside the file to the AO to verify the claim of the assessee and give credit for TDS on the above three advances in the year when such advance is recovered from the gross contract receipts that is offered to tax or refunded back to Tata in accordance with Rule 37BA(3) of the Income Tax Rules 1962."

Taking the above Memorandum into consideration, we deem it fit and proper to remand the matter to the file of Assessing Officer with a direction to verify the points mentioned in the above Memorandum and pass the consequential order in accordance with law. Needles to mention that the assessee shall be given a fair opportunity of hearing.

6. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced in the open court on 26th July, 2021.

Sd/-
(A. MOHAN ALANKAMONY)
Accountant Member

Sd/-
(SMT. P. MADHAVI DEVI)
Judicial Member

Hyderabad, Dt.26.07.2021.

* Reddy gp

Copy to :

1.	M/s. GSRVPL – RVNIPL – JV, 103, D.No.6-3-1187, Srinivasa Towers, Begumpet, Hyderabad-500 016
2.	ITO, Ward 6(3), Hyderabad.
3.	Pr. C I T-6, Hyderabad.
4.	CIT(Appeals)-6, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.