IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

BEFORE SHRI DINESH KUMAR AGARWAL (J.M.)
AND SHRI P.M. JAGTAP (A.M.)

ITA No. 1333/Mum/2012
Assessment Year : 2010-11

M/s Aanjaneya Lifecare Ltd., C/o Jayesh Sanghrajka & Co., Chartered Accountants, Unit No. 405, Hind Rajasthan Centre, D.S. Phalke Road, Dadar (E), Mumbai – 400 014. PAN AAGCA0851L	Vs.	Dy. Commissioner of Income-tax- Range 10(2), Aayakar Bhavan, Mumbai – 400 020.
(Appellant)		**(Respondent)**

Assessee by: Shri Harshavardhana Datar

Department by : Shri A.B. Koli

Date of hearing	03-12-2012
Date of pronouncement	03-12-2012

O R D E R

PER DINESH KUMAR AGARWAL, J.M.

This appeal preferred by the assessee is directed against the order dtd. 10-01-2012 passed by the ld. CIT(A)- 21, Mumbai for the A.Y. 2010-11 sustaining the penalty of Rs. 72,67,594/- imposed by the A.O. u/s 221 (1) of the Income tax Act, 1961 (the Act).

2. Brief facts of the case are that the assessee is a domestic company derives income from manufacturing and sale of drugs and medicines. The return was filed on 15-10-2010 declaring total income of

Rs. 19,09,47,637/- and showing self assessment tax payable at Rs. 7,26,75,944/-. The A.O. noted that the assessee has not paid self assessment tax till the date of filing of return of income and also till date even after issuance of notices u/s 140A(3) of the Act and reminders. Accordingly, the assessee was asked to show cause as to why penalty u/s 221 of the Act should not be imposed. In response, it was submitted by the assessee that self assessment tax has not been paid due to continuing financial crunch. However, the A.O. was of the view that according to section 140A of the Act which mandates that the assessee has to submit the return of income accompanied with proof of payment of tax payable by the assessee. If the assessee fails to pay the tax determined by itself i.e. self assessment tax, then it makes itself liable to be treated as assessee in default. He further observed that the main reason cited by the assessee for non-payment of tax is financial crunch, however, the assessee could not prove its contentions with cogent and relevant documentary evidence. He further observed that, in fact, substantial funds have been diverted to related concerns. Therefore, the A.O. held that there was no good or sufficient reasons for non-payment of self assessment tax and accordingly he imposed penalty of Rs. 72,67,594/- being 100% of the defaulted amount of Rs. 7,26,75,944/- vide order dtd. 30-3-2011 passed u/s 221(1) of the Act. On appeal, the ld. CIT(A) provided many opportunities to the assessee. However, there was no compliance by the assessee. The ld. CIT(A) observed that the appeal filed by the assessee deserves to be dismissed. He further observed that before the A.O. it was stated by the assessee that the self assessment tax was not paid due to financial crunch, however, the A.O. rejected the contention of the assessee as the assessee failed to prove the same by supporting documentary evidence. The ld. CIT(A) further observed that even during the appellate proceeding despite ample opportunities provided to the assessee, the assessee failed to prove that it was having a good and sufficient reason for non-payment of self assessment tax and accordingly he confirmed the penalty imposed by the A.O.

3. Being aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us taking following ground of appeal :-

> "On the facts, circumstances and judicial pronouncements; Hon'ble Commissioner of Income Tax (Appeals) erred in confirming the levy of penalty u/s 221(1) of the Act, such levy of penalty and its confirmation is bad in law and erroneous in facts and liable to be deleted."

4. At the time of hearing the ld. Counsel for the assessee filed an affidavit which reads as under:-

"AFFIDAVIT

> I, Dr. Kannan Vishwanath, Vice Chairman & Managing Director of M/s Aanjaneya Lifecare Ltd. on behalf of M/s Aanjaneya Lifecare Ltd having address at plot No. 34, Aanjaneya House, Postal Colony, Chembur, Mumbai – 400071 hereby solemnly affirm and state as under:-
>
> 1. Appeal with CIT (Appeals) for AY 2010-11 was scheduled for hearing on various dates.

2. Notices were given to consultant who could not appear before CIT (Appeals).

3. Matter is Prima Facie covered in favour of appellant.

4. Prayer for stay is made because:

   i. Demand is on account of penalty under section 221 that has been levied by the Ld. AO.

   ii. Assessee has already paid the self assessment tax dues.

   iii. Appellant had requested Ld. AO as well as Jurisdictional Addl. CIT to grant the instalments to pay the tax on account of financial difficulties.

   iv. There will be a severe hardship on the appellant if stay on recovery is not granted.

   v. Appellant gives undertaking that it will not part with any Fixed Asset till disposal of appeal at ITAT.

5. Prayer is made for stay on recovery be granted and/or matter be posted on out of turn basis for hearing.

6. Undertaking is hereby made to comply with the Income Tax Department and Government of India.

I, Dr. Kannan Vishwanath do hereby verify on oath that the contents of the affidavit above are true to my personal knowledge and nothing material has been concealed or falsely stated.

Solemnly affirmed at Mumbai, on this 10 Apr. 2012.

Signature of Deponent

Sd/-

Dr. Kannan Vishwanath

(Deponent)"

In the light of the above affidavit, the ld. Counsel for the assessee submits that since the assessee's consultant could not be appeared before the ld. CIT(A), therefore, in the interest of justice, one more opportunity be provided to the assessee to explain its case before the ld. CIT(A).

5. On the other hand, the ld. D.R. while relying on the order of the A.O. and ld. CIT(A) submits that he has no objection if the matter is set aside to the file of the ld. CIT(A).

6. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the facts are not in dispute inasmuch as it is also not in dispute that as per the return of income the assessee has determined its self assessment tax liability Rs. 7,26,75,944/- which was not paid by the assessee before filing of the return. It was explained by the assessee that due to financial crunch the assessee could not pay the liability of self assessment tax before filing of the return. In the absence of any cogent material supported by documentary evidence, the assessee's explanation was not accepted by the A.O. and the ld. CIT(A). Before us the assessee has filed an affidavit stating inter alia that the ld. CIT(A) passed ex parte order as the consultant failed to appear before the ld. CIT(A).

7. In Mahaveerprasad Jain v. CIT (1988) 172 ITR 331(M.P) it has been held (Headnote):

> "Where an applicant engages a counsel, he would be justified in presuming that the counsel would attend to the case. The applicant cannot be made to suffer for the negligence of the counsel. An appeal cannot be dismissed because the counsel failed to appear when the case was posted for hearing."

8. In CIT vs. Khemraj Laxmichand (1978) 114 ITR 75 (M.P) it has been held that (Headnotes):

> " Held, that the question whether the mistake of the counsel was bona fide being one of fact and the Tribunal having come to the conclusion that the lapse on the part of the counsel was bona fide, the Tribunal was justified in condoning the delay and upholding the registration of the firm."

9. Respectfully following the ratio of the above decisions and keeping in view that the reasons given by the assessee in its affidavit was not controverted by the Revenue, we are of the view that there was sufficient cause for not appearing before the ld. CIT(A) and, hence, we, in the interest of justice, consider it fair and reasonable that the matter should go back to the file of the ld. CIT(A) and accordingly we set aside the order passed by the ld. CIT(A) and restore the matter back to the file of the ld. CIT(A) to decide the appeal afresh and according to law after providing reasonable opportunity of being heard to the assessee. The ground taken by the assessee is, therefore, partly allowed for statistical purpose.

10. In the result, assessee's appeal stands partly allowed for statistical purpose.

Order pronounced in the open court on 03-12-2012.

Sd/-	Sd/-
(P.M. JAGTAP)	(DINESH KUMAR AGARWAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated : 03-12-2012.

RK

Copy to:
1. The Appellant
2. The Respondent
3. Commissioner of Income Tax (Appeals)- 10, Mumbai
4. DIT (International Taxation) 1, Mumbai.
5. Departmental Representative, Bench 'D', Mumbai

//TRUE COPY// BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI