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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.1836/M/2021
Assessment Year: 2010-11

M/s. Bhavya Projects Pvt. Ltd., Akruti Trade Centre, 6th Floor, Marol, MIDC, Andheri (East), Mumbai – 400 093 **PAN: AACCB5080G**	Vs.	Dy. Commissioner of Income Tax, Central Circle-36, Aayakar Bhavan, Room No.109 M.K. Marg, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Chandrakant Ambani, A.R.
Revenue by : Shri Sourabh Kumar Rai, D.R.

Date of Hearing : 10 . 01 . 2023
Date of Pronouncement : 21 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

At the very outset, it is brought to the notice of the Bench that this appeal is time barred by about 4 years and the appellant, M/s. Bhavya Projects Pvt. Ltd. (hereinafter referred to as 'the assessee') sought to condone the delay by moving an application supported with an affidavit on the grounds inter-alia that the delay in filing the appeal was beyond the control of the assessee as director of the company namely Mr. Dilip Natwarlal Parekh was sick with severe ailments and as such could not look after the taxation and accounting affairs of the assessee company; that the assessee was advised complete bed rest from 27.02.2017 by the medical superintendent Dr. B.A. Nidhi; that the assessee remained admitted in hospital in Nanavati hospital from 10.06.2017 to 17.07.2017 under the continuous treatment of Dr. Nitin M Rathod & Dr. Brian Pinto; that the assessee was diagonosed with Quadriparesis and was subsequently diagnosed for stent removal by cardiologist and assessee was also undergoing physiotherapy for two times a week by Baby Castle Team since January 2019; that other three appeals of the assessee for respective assessment years were also time barred in which delay was condoned by the Tribunal and relied upon the decision rendered by Honorable Supreme Court in case of Land Acquisition Collector vs. MST Katiji & Others 167 ITR 471 (SC).

2. However on the other hand Ld. D.R. for the Revenue opposite the application on the grounds inter-alia that the assessee has taken entire litigation at the assessment level as well as at the first appellate level very casually and; that the assessee is liable to explain delay of each and every day by way of sufficient cause and prayed for dismissal of the condonation application.

3. Keeping in view the reasons as explained by way of solemn affirmation by the assessee that he was remained sick being admitted in the ICU and was being treated for other multiple ailments during the period of delay as is also mentioned in the impugned order passed by Ld. CIT(A) wherein para 4.1 it is categorically informed by Shri Sadiq Hathiyari to the Ld. CIT(A) that he was informed by the assessee company that they would not

be able to attend the appeal hearings and hence the case was decided ex-parte even by Ld. CIT(A), we find sufficient cause to condone the delay as the entire delay was beyond the control of the assessee who suffered with multiple ailments and even remained in ICU during the period of delay and as such delay is liable to be condoned.

4. Moreover, in view of the law laid down by Honorable Supreme Court in case of MST Katiji & Others (supra) in the high interest of justice delay should be condoned by returning following findings:

> "it is on contention of delay that when substantial justice and technical considerations are pitted against each other, the case of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a non deliberate delay,"

5. In view of what has been discussed above, we are of the considered view that there is a sufficient ground to condone the delay in filing the appeal. Hence the delay of 4 years is hereby condoned and appeal is ordered to be registered and being heard on merits.

6. The assessee by filing the present appeal, sought to set aside the impugned order dated 23.10.2017 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2010-11 on the grounds inter-alia that :-

> *"1. Under the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals), erred in upholding the Assessment u/s 144 of the Income Tax Act, 1961 without appreciating the fact that the books of accounts were duly audited by practicing Chartered Accountant and the time given to the Appellant for gathering, compiling and submitting the details asked was*

extremely short knowing fully well that the Company had stopped Operation on 31.03.2012 and there was no employee on day to day basis to look into the affairs of the company and last notice being Dated 22.02.2013 calling for documents for which the date of receipt by the assessee is 27.02.2013 and forwarded to Chartered Accountant's Office on 28.02.2013 morning. On representing around 3.30- 4.00 pm before the assessing officer the AR was refused hearing stating that The Assessment Order has already been completed as the time given to assessee was 11.30 am. Assessment Order passed on 28.02.2013 effectively giving only 6 days which is less than normal period of at least 1 week given for any notice issued u/s 142 (1) to comply with the requirements showing that the order was passed in undue haste.

The very fact the Order was passed on 28/02/2013 wherein the detailed Assessment Order brings out the fact that the Order was already drafted for service.

2. Under the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals), erred in upheldіng the addition of 43,60,180/- (being Gross Profit @ 8% of Turnover) made during the Assessment u/s 144 of the Income Tax Act, 1961 without appreciating the fact that the books of accounts were duly audited by practicing Chartered Accountant and the time given to the Appellant for gathering, compiling and submitting the details asked was extremely short knowing fully well that the Company had stopped Operation on 31.03.2012 and there was no employee on day to day basis to look into the affairs of the company and last notice being served on 22.02.2013 calling for documents and the Assessment Order passed on 28.02.2013 effectively given only 6 days to comply with the requirements showing that the order was passed in undue haste.

3. The Learned Commissioner of Income Tax (Appeals), erred in upholding the view of levying interest u/s 234A, 234B, 234C and in initiating penalty proceedings u/s 271 (1) (c) of the Act.

4. The Appellant craves leave to add, amend, modify, alter or delete any of the above grounds of appeal."

7. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : assessee filed the return of income for the year under consideration declaring income at Nil which comprised of a loss of Rs.10,14,545/- which was subjected to scrutiny. Notice under section 143(2) of the Income Tax Act, 1961 (for short 'the Act') was served upon the assessee. Then notice under section 142(1) along with questionnaire was also served but

no response has been given by the assessee after being served with the notices under section 143(2) and notice under section 142(1) and consequently Assessing Officer (AO) initiated the penalty proceedings under section 271B of the Act and also levied the penalty. Then one Shri Sadiq Hathiyari, Chartered Accountant appeared on behalf of the assessee and filed tax audit report under section 44AB, financial statement, computation of income and ITR-V on 14/12/2012. The assessee also submitted copy of bank statements of Canara Bank and Bank of Maharashtra-Annexure 1, Form 26 AS along with reconciliation statement with TDS claimed in ITR and shown in Form 26AS-Annexure II, Schedule K of Balance Sheet as at 31-03-2010-Annexure III, Copies of Sales bills and work order-Annexure IV, Copies of purchase bills-Annexure V, Transport charges ledger account-Annexure VI, Ledger account of all Transport Creditors- Annexure VII, Month-wise Summary of wages-Annexure VIII. The AO called for copy of agreement, work order for the different works executed by the assessee company.

8. During the assessment proceedings the AO also called for separate P&L account in respect of work carried out at 8 sites showing gross profit generated from each site, date of commencement, date of final completion of each project. The AO also called for bills of electricity charges debited to P&L account, sample copy bills of parties provided, copy of wage register for verification which the assessee has failed to furnish and consequently the AO framed the assessment under section 144 of the Act by estimating the GP @ 8% on the turnover of the assessee company which is Rs.5,45,02,260/- and thereby computed the total

taxable income of Rs.25,89,204/- by framing the assessment under section 144 of the Act.

9. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

10. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

11. Perusal of the impugned order passed by the Ld. CIT(A) goes to prove that despite issuing numerous notices to the assessee, initially none appeared but subsequently one Shri Sadiq Hathiyari, C.A. moved a letter dated 21.01.2016 informing that the assessee has appointed M/s. Hathiyari & Associates to represent them and made a request for adjournment for 15 days. Then case was finally fixed for 03.02.2016 but on 01.02.2016 M/s. Hathiyari & Associates intimated that complete details and orders were not on record in the file submitted in their office and requested for another adjournment. Then case was adjourned to 12/02/2016. Another adjournment letter was received then again adjournment letters were filed. Ultimately final notice was issued on 29.09.2017 to which no response was filed and as such the Ld. CIT(A) decided to dispose of the appeal ex-parte. The Ld. CIT(A) decided the appeal on the basis of findings returned by the AO made under section 144

of the Act on best judgment assessment. It is apparent on record that at both the stages i.e. during assessment proceedings as well as first appellate proceedings the assessee has failed to furnish the details.

12. When the factum of not furnishing the requisite details by the assessee before the AO as well as the Ld. CIT(A) is examined in the light of the fact that the assessee remained sick with multiple ailments during the period under assessment as well as first appellate proceedings we are of the considered view that to impart justice and to decide the issue once for all one more opportunity is required to be given to the assessee to furnish entire details. The assessee has also filed additional documents to be considered by the assessing authority. In these circumstances we are of the considered view that the case is required to be remitted back to the AO to decide afresh after providing opportunity of being heard to the assessee. The Ld. A.R. for the assessee assured the Bench that the assessee would be appearing on each and every date of hearing to be fixed by the AO.

13. Resultantly, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 21.02.2023.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 21.02.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.