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

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT (MZ) AND
SHRI D. KARUNAKARA RAO, ACCOUNTAT MEMBER

I.T.A. NO. 8490/M/2011
ASSESSMENT YEAR: 2007-2008

M/s. Smith & Sharks Projects (I) Pvt. Ltd., 201/202, Sonal Link Heavy Indl. Estate, Link Road, Malad –(W), Mumbai – 400 062. **PAN: AABCS6733L**	Vs.	Income Tax Officer-9(3)(2), Aayakar Bhavan, M.K. Road, Mumbai – 400 020.
(Appellant)		(Respondent)

I.T.A. NO. 3687/M/2011
ASSESSMENT YEAR: 2007-2008

Income Tax Officer-9(3)(2), Aayakar Bhavan, M.K. Road, Mumbai – 400 020.	Vs.	M/s. Smith & Sharks Projects (I) Pvt. Ltd., 201/202, Sonal Link Heavy Indl. Estate, Link Road, Malad –(W),Mumbai – 400 062. **PAN: AABCS6733L**
(Appellant)		(Respondent)

Assessee by	:	Shri R.R. Lingsur, AR
Revenue by	:	Shri V. Krishnamurthy, DR

Date of Hearing: 29.11.2012 **Date of order: 7.12.2012**

<u>O R D E R</u>

<u>Per D. KARUNAKARA RAO, AM:</u>

There are two cross appeals under consideration. The assessee's appeal relates to merits of additions and is against the order of CIT (A)-20, Mumbai dated 20.6.2011 for AY 2007-2008. Whereas, the Revenue's appeal is in connection with the penalty order u/s 271(1)(c) of the Act and is against the order of the CIT (A) dated 14.3.2011 for the same AY 2007-2008. But the subject matter in both the appeals relates to the addition of Rs. 14.82 lakhs and concealment penalty thereon. We shall take up each of the appeal in the following paragraphs.

<u>ITA NO. 8490/M/2011 (By Assessee)</u>

2. In this appeal assessee raised the following effective grounds:

> "*1. Ld CIT (A) erred in **not admitting the appeal** on the ground that as being out of time ignoring the petition filed by the company condoning delay.*
> *2. Ld CIT (A) further erred in not allowing the appellant's claim for **bad debts at Rs. 14,82,000/-."***

3. Briefly stated relevant facts of the case are that the assessee filed the return of income declaring income of Rs. 9,82,390/- and the same was scrutinised u/s 143(3) of the Act determining the assessed income at Rs. 25,06,745/- vide order dated **23.12.2009.** Aggrieved with the increase in assessment, Assessee filed an appeal before the CIT (A) and it was filed belatedly on **12.1.2011**. While adjudicating the said appeal of the assessee, CIT (A) mentioned that the assessee waited till the rectification application u/s 154 of the Act was dismissed by the CIT (A) on 17.8.2010 and thereafter lapse of 4 months, assessee filed the regular appeal against the order of the AO on **12.1.2011**. Thus, while the assessment order was dated 23.12.2009, the appeal against the said assessment order was filed only on 12.1.2011 i.e. with a gap of 13 months. The reason given for the delay is said to be the wrong advice of Chartered Accountants (CAs) who said to have suggested that the assessee needs to exhaust the remedy available u/s 154 of the Act before filing the appeal before the CIT (A) on the assessment order of the AO. After granting opportunity to the assessee, CIT (A) did not condone the delay in filing the appeal and did not admit the same by relying on the old legal maxim "**law favours the vigilant".** Since the CIT (A) did not admit the appeal, the issue on the merits of the addition of Rs. 14.82 lakhs made on account of bad debts was adjudicated by him.

4. Aggrieved with the non-admission of the appeal as well as the non-adjudication on account of issue of bad debts, assessee filed the present appeal before us. The present appeal is also filed belatedly with the delay of 98 days. At the outset, on the preliminary issue of condonation of delay, Ld Counsel brought our attention to the assessee's letter dated 30.11.2011 i.e. the petition for condonation of delay as well as the affidavit of Shri N.P. Mani, MD of the company. In the said petition. Shri N.P. Mani, Managing Director of the company mentioned that the assessee was ill-advised by the CAs ie *M/s. Anil Thakarar & Co and M/s. Bharat & Co* to first exhaust the rectification route u/s 154 of the Act and finally the assessee filed the appeal before the CIT(A) only on **12.1.2011** rejecting the admission of the

appeal by the assessee. This order was received by the assessee on **09.07.2011** and the same was sent to the said CAs for necessary action on their part. On seeing their inaction in the matter, the assessee engaged other CAs namely M/s. R.R. Lingsur & Associates, who finally filed the present appeal before the Tribunal with the delay of 98 days. Relevant paragraphs from the petition are extracted here for the sake of completeness of the order.

> "*As advised by its earlier Chartered Accountants M/s. Anil Thakarar & Co and M/s. Bharat & Co, appellant company* ***filed rectification*** *application u/s 154 of the Act instead of preferring appeal under section 246A of the Act. After almost* ***lapse of twelve months*** *from the receipt of the original order u/s 143(3) of the Act, based on the advice of its erstwhile CA, appellant company preferred appeal before the CIT (A) against the order passed u/s 143(3) of the Act. The learned CIT (A) did not admit the appeal on the ground that it is barred by limitation ignoring the petition for condoning the delay filed by the appellant company. An affidavit filed by the appellant company in this regard was also not considered by the learned CIT (A). Copy of the said affidavit is enclosed to this petition.*
> *The said order of the learned CIT (A) was received by the appellant company on 9th July, 2011. Copy of the said order was sent to the erstwhile CA of the appellant company for necessary action on their part. However, they did not take any action on the matter for the reasons known to them…………. On realizing the fact that its* ***erstwhile CA are not taking any corrective steps*** *in this regard the appellant* ***company approached its present CA M/s. R.R. Lingsur & Associates,*** *being represented Mr. Ramakrishna R. Lingsur. On advice received from its present CA, the appellant company is performing this appeal before your honours.*
> *The only point of grievance in the said appeal is non allowance of claim of bad debts by the AO. The appellant company is otherwise having case on merits but* ***due to negligence on the part of its erstwhile CA****, it could not submit the appeal in time.*
> *It is carefully submitted that for wrong advice and negligence of its erstwhile CA, appellant company should not be denied the justice which otherwise is due to it. Non admission of the said appeal may invite avoidable financial hardships to the appellant company. It can be seen from the above that the appellant company was prevented from sufficient / genuine grounds for not filing the present appeal in time and hence your honours are requested to* ***condone the delay of 98 days*** *in filing the present appeal and admit the same."*

5. From the above write up, the assessee admits that there is negligence in filing appeal before the CIT(A) and also in filing appeal before the ITAT. Referring to the delay in filing appeal before the CIT(A), assessee has raised the pointing finger against his erstwhile CAs namely M/s Anil Thakarar & Co and M/s. K. Bharat & Co

and mentioned that the negligence is attributable to them. When the same should constitute reasonable cause for admission of the appeal, the CIT(A) erred in not admitting the appeal. Assessee has not filed any affidavit from his erstwhile CAs owning the responsibility of inaction in filing appeals belatedly before the CIT(A). Then, referring to the 98 days delay in filing appeal before the ITAT, assessee repeated the allegation of negligence against his CAs. Neither the petition for condonation for delay nor the affidavit of Sri N.P. Mani refers to the efforts initiated by the assessee's accounting/legal department in pursuing the CAs to comply with the procedures of filing appeals in time. Assessee has not filed any affidavit from his erstwhile CAs owning the responsibility of inaction in filing appeals belatedly before the CIT(A). The affidavit of N.P. Mani does not enlist the efforts made by the assessee in pursuing filing the appeal in time. Further, in the affidavit dated 19.3.2011, it was mentioned that the delay should be condoned in view of the judgment of Hon'ble Bombay High Court in the case of CIT vs. Indian Gospel Fellowship Trust (2011) 331 ITR 283. Ld Counsel also mentioned that the Managing Director of the company is a technocrat and he is not well versed with the legal procedures. Therefore, CAs has rendered wrong advice to the assessee and their negligence should sufficient reason for condonation of delay and in admitting of the appeal by the CIT(A). Further, the assessee claims the same inaction of the CAs constitute a sufficient / genuine grounds for not filing the present appeal before ITAT in time and the assessee requests for condoning the delay of **98** days in filing the present appeal and admit the same.

6. On the other hand, Ld DR for the Revenue narrated the facts leading delay of more than one year in filing the appeal before the CIT (A) and the delay of 98 days before the Tribunal and mentioned that the assessee is given the right of appeal and said right has not been availed admittedly due to negligence. Allegation of negligence of the CAs are not substantiated by the assessee and in such circumstances, it is merely a case of conveniently shifting the responsibility of filing appeal in time to the CAs. He also mentioned that the CAs have not concurred with the allegation of the assessee. Where there is no affidavit atleast from his erstwhile CAs, in alternative, the assessee should be held responsible for the delay in filing the

appeal before the CIT(A) and the Tribunal. Therefore, there is no case for condonation of delay either by the CIT(A) or Tribunal. Ld DR also mentioned that it is a case of repeated delay and the assessee is a habitual defaulter of legal procedures and he does not deserve lenient approach the Tribunal.

7. We have heard both the parties, perused the order of the Revenue and considered relevant facts leading to the double requests for the condonation of delay before the CIT(A) and Hon'ble Tribunal. There is no dispute on the facts as well as on the issue of existence of negligence in filing appeals in time before the CIT(A) and Tribunal. Core issue which is relevant for adjudication relates to if the said negligence is attributable to the assessee or to the CAs ie M/s. Anil Thakarar & Co and M/s. Bharat & Co and further, the said negligence constitutes sufficient ground for condoning the delay.

8. In this regard we have perused the available material placed before us. It is an admitted position that the assessee does not have evidence to suggest that the CAs accepted the allegation of negligence. Further, the CAs have not filed an affidavit owning the responsibility of the stated negligence in filing appeal in time before us and also the CIT(A). Similarly, there is no evidence placed before us to suggest that the CAs have given advice to exhaust first the remedy available u/s 154 of the Act. This is not the first year of commencement of business of the assessee that it is not well versed with the Income tax Procedures. In our opinion, the assessee-company is led by a Technocrat is no defense as he has got a team of employees to render the legal advise and to comply with the procedure of law. Assessee has not filed any evidence in the form of board resolutions if any to suggest that the company applied its mind on the issue of following the advise of the CAs to first exhaust the remedy available u/s 154 of the Act. In our opinion, no Counsel shall advise his client against the filing of regular appeal, when the law is unambiguous in such matters. Ld Counsel has not informed the Bench of any evidence to suggest that the stated negligence is attributable to the CAs only. It is also a fact the alleged negligence continued even after the rectification was

dismissed by the CIT(A) as evident from the date of the order of CIT (A) and the date of filing of appeal.

9. Now, we shall deal with the issue of delay of 98 days in filing appeal before us. The case of the assessee is that the assessee sent the copy of the order of the CIT(A) in the month of July 2011 to the same CAs and they have not acted upon it. The assessee has to outsource the services of present CAs namely M/s. R.R. Lingsur & Associates, who filed the present appeal before the Tribunal. The case of the assessee’s Counsel before is that M/s Anil Thakarar & Co and M/s. K. Bharat & Co ie erstwhile CAs have continued to be negligent till M/s. R.R. Lingsur & Associates got into the job of filing appeals. In response to the query from the Bench regarding the duties and vigilant approach of the assessee, Ld Counsel has nothing to comment. In our opinion, the assessee is not transparent. It is not known why the assessee continued to rely on the CAs, who are declared negligent as evident from the experience with the appeal before CIT (A). In the condonation petition before the CIT(A), the assessee alleged that M/s Anil Thakarar & Co and M/s. K. Bharat & Co are negligent. In that case, why the assessee continued to depend on such negligent CAs or why assessee failed to pursue with the same CAs to file the present appeal before the Tribunal in time. Is not the assessee responsible for the delay in filing appeal? In our opinion, the answer is affirmative and is against the assessee. Under these circumstances, we are of the opinion, the explanation given by the assessee is not substantiated and the assessee does not have adequate/sufficient ground for condonation of delay in filing appeal before us. The CAs-centric reasons given by the assessee are not substantiated and therefore, not sustainable. Hence, the appeal filed belatedly by the assessee should not be admitted. Thus, the preliminary ground raised by the assessee relating to condonation is dismissed. Consequentially, the adjudication of other issues on merits becomes academic and, therefore, dismissed as not admitted. We order accordingly.

10. In the result, appeal of the assessee is **dismissed** as not admitted.

I.T.A. NO. 3687/M/2011 (By Revenue)

11. This appeal filed by the Revenue is against the order of the CIT (A)-20, Mumbai dated 14.3.2011 for the assessment year 2007-2008. The main issue in this appeal relates to the levy of penalty u/s 271(1)(c) of the Act of Rs. 4,98,841/-.

12. Briefly stated relevant facts that lead to the levy of penalty u/s 271(1)(c) are that the assessee debited an amount of Rs. 16,50,428/- on account of doubtful debts and an amount of Rs. 14,82,000/- is part of the said debit written off against M/s. Magnum Infra Projects P. Ltd. AO disallowed the said claim of deduction stating that the assessee failed to fulfill the conditions envisaged u/s 36(1) of the Act and initiated the penalty by issue of statutory notices. In response to the penalty notices, assessee submitted that the assessee is not supposed to establish that the debt has become bad and non-recoverable and relied on the judgment of Hon'ble Supreme Court judgment in the case of TRF Limited vs. CIT (323 ITR 397) (SC). It is also submitted before him that when all the particulars regarding claim of bad debts were disclosed, when the said particulars are not correct penalty is not exercisable u/s 271(1)(c) of the Act. On considering the submissions of the assessee, CIT (A) granted relief by holding that the assessee is not doubtful in matters of disclosure of particulars of income and have not furnished inaccurate particulars. By relying on the Hon'ble Apex Court judgment in the case of CIT vs. Atul Mohan Bindal (317 ITR 1) (SC) and CIT vs. Reliance Petro Products Pvt. Ltd (322 ITR 158), CIT (A) deleted the penalties. Aggrieved with the same, Revenue filed the present appeal before us.

13. Before us, Ld DR for the revenue argued stating that the CIT (A) erroneously relied on the judgments of the Apex Court in the cases of Reliance Petro Products P. Ltd. (surpa) and Atul Mohan Bindal (supra), which are distinguishable on facts.

14. On the other hand, Ld Counsel for the assessee mentioned that the assessee furnished all the particulars regarding the doubtful debts / bad debts. He also mentioned that the assessee need not to establish that the debts in question

become bad and irrecoverable and relied on the cited judgment of the Hon'ble Supreme Court in the case of TRF Limited (supra).

15. We have heard both the parties, perused the orders of the Revenue on the facts available before us. It is an undisputed fact that the assessee disclosed bad debts in the return filed before the Assessing Authority. The AO disallowed the claim hold that the said debts have not become bad and are not evidenced as irrecoverable debts. In our opinion, this line of argument is not sustainable in law in view of plethora of judgments in force. The assessee is no longer under obligation to prove that the debts in question are bad and irrecoverable. Further, there is no bar on the assessee in writing off the bad debts of the year as allowable expenditure when the corresponding credits are showing in the accounts of the year. It is for the businessmen to manage his affairs and accounts in such a way which are suited to his business. Considering the fact that the assessee has disclosed the relevant facts necessary for making assessment, the allegation of concealment does not have strength to stand. Therefore, we are of the opinion that the order of the CIT (A) deleing the penalty should not call any interference. Accordingly, grounds raised by the Revenue are **dismissed**.

16. In the result, appeal of the Revenue is **dismissed**.

Order pronounced in the open court on this 7th day of December, 2012.

Sd/-	Sd/-
(D. MANMOHAN)	(D. KARUNAKARA RAO)
VICE PRESIDENT	ACCOUNTANT MEMBER

Date : 7.12.2012
At :Mumbai
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Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR " E", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai