आयकर अपीलीय अधिकरण
कोलकाता 'ए' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)
एवं
श्री राजेश कुमार, लेखा सदस्य
के समक्ष
Before
SRI RAJPAL YADAV, VICE PRESIDENT
&
SRI RAJESH KUMAR, ACCOUNTANT MEMBER

I.T.A. No.: 608/KOL/2019
Assessment Year: 2012-13

M/s. Goldline Dealers Pvt. Ltd.....Appellant
[PAN: AAECG 0745 M]

Vs.

ITO, Ward-9(2), Kolkata.....Respondent

Appearances by:

Sh. Siddarth Agarwal, Adv., appeared on behalf of the Assessee.

Sh. Vijay Kumar, Addl. CIT, Sr. D/R, appeared on behalf of the Revenue.

Date of concluding the hearing : June 7th, 2023
Date of pronouncing the order : July 3rd, 2023

ORDER

Per Rajpal Yadav, Vice-President (KZ):

The assessee is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax (Appeals)-3, Kolkata [in short ld. 'CIT(A)'] dated 03.08.2018 passed for AY 2012-13. The Registry has pointed out that appeal is time barred by 165 days.

In order to explain delay in filing the appeal, assessee has filed an affidavit of Sh. Satish Shaw aged 41 years. In his affidavit he deposed that he is one of the directors of the assessee company. The taxation matters of the company were being looked into by one Sh. Mukesh Gupta, Chartered Accountant having his office at 7A, Bentink Street, 2nd Floor, Kolkata. In Form no. 35, filed before ld. CIT(A). Address of Sh. Mukesh Gupta & Company was given for communication purposes. However, Sh. Mukesh Gupta did not pursue the litigation before ld. CIT(A) and therefore, the appeal of the assessee was decided ex-parte. The assessee came to know about the status of this appeal in the month of March, 2019 and after obtaining the papers, the appeal is being filed. It is further submitted that the assessee had contacted with Sh. Raunak Jain who prepared the appeal and filed before the ITAT.

2. Along with the appeal, the assessee has filed an application for condonation of delay which is also available on the record. This application is under the signature of Sh. S.K. Bose, one of the directors who also pleaded that the company has requested the tax consultant to prepare an appeal to the Hon'ble Tribunal. However, due to some miscommunication and improper advice at the end of the tax consultant, the appeal could not be filed well in time. The affidavit of Sh. S.K. Bose is also available.

3. On the other hand, ld. D/R submitted that assessee should be more vigilant in pursuing its remedy before the higher appellate authority. He also pointed out that not only before the Tribunal assessee did not submit relevant details before the first appellate

authority as well as ld. Assessing Officer (in short ld. 'AO'). According to ld. D/R, assessee is negligent throughout i.e. from ld. AO up to the second appellate authority. Therefore, no sympathetic view be taken in favour of the assessee.

4. We have duly considered the rival contentions and gone through the record carefully. Sub-section 5 of Section 253 contemplates that the Tribunal may admit an appeal or permit filing of memorandum of cross-objections after expiry of relevant period, if it is satisfied that there was a sufficient cause for not presenting it within that period. This expression sufficient cause employed in the section has also been used identically in sub-section 3 of section 249 of Income Tax Act, which provides powers to the ld. Commissioner to condone the delay in filing the appeal before the Commissioner. Similarly, it has been used in section 5 of Indian Limitation Act, 1963. Whenever interpretation and construction of this expression has fallen for consideration before Hon'ble High Court as well as before the Hon'ble Supreme Court, then, Hon'ble Court were unanimous in their conclusion that this expression is to be used liberally. We may make reference to the following observations of the Hon'ble Supreme court from the decision in the case of *Collector Land Acquisition vs. Mst. Katiji & Others, 1987 AIR 1353*:

> *"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 condoned 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.

4.1. Similarly, we would like to make reference to authoritative pronouncement of Hon'ble Supreme Court in the case of *N. Balakrisknan vs. M. Krishnamurtky (supra)*. It reads as under:

"Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching

the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi lain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal Vs. The Administrator, Howrah Municipality [AIR 1972 SC 749]. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss".

4.2. We do not deem it necessary to re-cite or recapitulate the proposition laid down in other decisions. It is suffice to say that the Hon'ble Courts are unanimous in their approach to propound that whenever the reasons assigned by an applicant for explaining the condonation of delay, then such reasons are to be construed with a justice oriented approach.

5. In the light of above, let's examine the facts of the present case. The stand of the assessee is that their tax consultant, Sh. Mukesh Gupta did not communicate the notices received by him from the office of ld. CIT(A). Therefore, they could not prosecute their remedy before the first appellate authority and similarly, he has not communicated the order of ld. CIT(A) as well as prepared the appeal further. It is pertinent to observe that no litigant would gain anything by making an appeal time barred. Therefore, such a

step can never be taken at the end of the assessee to delay the disposal of the appeals. The demand has already been raised against the assessee and it is an adverse order against it unless it is deleted, no benefit would be there to the assessee. Therefore, to our mind, it was not adopted as a strategy to litigate with the Department. We condone the delay and proceed to decide the appeal on merit.

6. The assessee has taken 7 grounds of appeal. However, all the grounds are theoretical and peripheral in nature without specifically pointing out the grievance. In brief, the grievance is that ld. CIT(A) has erred in confirming the addition of Rs. 4,70,26,000/- added by ld. AO with the aid of Section 68 of the Act by way of an *ex-parte* order.

7. Brief facts of the case are that assessee has filed its return of income electronically on 29.03.2013 declaring total income NIL. Ld. AO has passed a scrutiny assessment and determined the taxable income of the assessee at Rs. 4,70,26,000/-. The assessment order is a very brief order running into two and a half page. For the facility of reference, we take note of the complete assessment order which read as under:

> *"The assessee e-filed its return of income for the A.Y. 2012-13 on 29.03.2013 disclosing return income of Rs. NIL/-. The case was selected for scrutiny through CASS with reason for selection of large share premium received. Accordingly notice u/s 143(2) of the Income Tax Act, 1961, was generated and issued to the assessee at the address mentioned in the I.T. Return. Notice u/s 142(1) of the Act was also issued and in compliance none appeared but seen assessee filed some documents. Later summons u/s 131 of the Act were issued to the directors of the assessee company for personal attendance and*

for production of some source of investment documents on 25/02/2015 but till date compliance was not made in terms of summons u/s 131 of the Act. The assessee was also made inadequate compliance in terms of notice u/s 142(1) of the Act. In such circumstances, I have no option but to assess the income of the assessee on the basis of information available on record.

From the record, it was noticed that during the financial under contention, the assessee company had raised fresh paid up share capital of Rs 4,70,26,000/-including share premium by issue of fresh shares during the instant previous year. Whenever a sum is credited in the books of the assessee, the onus lies on the assessee company to prove three criteria: -

(i) Identity,

(ii) Creditworthiness, and

(iii) Genuineness of the transaction.

Under section 68 the onus is on the assessee to prove the three ingredients, i.e., identity and creditworthiness of the person from whom the monies were taken and the genuineness of the transaction. Reliance is being placed on the decision of the jurisdictional High Court in the case of CIT-vs-Precision Finance Pvt Ltd [208 ITR 463] wherein it was observed that -

It is for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. The inquiry of the ITO revealed that either the assessee was not traceable or there was no such file and accordingly the first ingredients to the identity of the creditors had not been established. If the identity of the creditors had not been established, consequently the question of establishment of the genuineness of the transactions or the creditworthiness of the creditors did not arise. It is not for the ITO to find out by making investigation from the bank accounts unless the assessee proved the identity of the creditors and their creditworthiness.

As to how the onus can be discharged would depend on the facts and circumstances of each case. It is expected of both the sides - The assessee and the assessing authority - to adopt a reasonable approach. This view had been taken in the case of CIT v M/s Nipun Builders & Developers Pvt. Ltd. 30 Taxmann.com 292 (Delhi)[2013],

The assessee was a private limited company, which cannot issue shares in the same manner .in which a public limited company does. It has to generally depend on persons known to its directors or shareholders directly or indirectly to buy its shares. There must be some positive evidence to show the nature and source of the resources of the share-subscriber himself.

In this case, there was no compliance either on the part of the assessee company. When the finding is that the assessee company have not been found existing at the addresses given in the return of income, it is open to the AO to hold that the identity of the share-subscribers, their creditworthiness and the genuineness of the transactions has not been proved. Section 68 of the Act provides for charging to income-tax any sum credited in the books of the assessee maintained for any previous year if the assessee offers no explanation about the nature and source thereof or the explanation offered is not, in the opinion of the Assessing Officer, satisfactory. It places no duty upon the Assessing Officer to point to the sources from which the money was received by the assessee. Where an assessee fails to prove satisfactorily the source and nature of certain amount of credit during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. This view was adopted in the case of A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807. Similar view was also taken in the case of

(i) CIT v. Devi Prasad Vishwanath Prasad [1969] 72 ITR 194 (SC), and

(ii) Commissioner of Income-tax v. Independent Media (P.) Ltd. [2012] 25 taxmann.com 276 (Delhi).

In the light of the facts of the case and aforesaid exposition of the legal position, with regard to the identity and creditworthiness of the subscriber-companies and the genuineness of the transactions, I am of the opinion that the credit of Rs 4,70,26,000/-in the books of the assessee shall be considered as income of the assessee of the instant previous year and charged to income-tax.

Hence, the entire amount of Rs 4,70,26,000/-which including share premium is being added as unexplained credit in the books of the assessee company and added to the total income u/s 68 of the IT Act, 1961.Penalty u/s 271(1)(c) is also initiated for such undisclosed income.

In view of the discussion made above income of the assessee is assessed as per computation of income made below.

Computation of Income.

Total Income as per return	*Rs NIL/-.*
Add: Income considered u/s 68 of the Act	*Rs 4,70,26,000/-*
Assessed Total Income	*Rs 3,32,53,100/-*

Income of the assessee is assessed u/s 143(3) of the Income Tax Act, 1961, at Rs 4,70,26,000/- Income tax is calculated on ITD Application. Computation-sheet annexed herewith forms part of this order."

8. Appeal to ld. CIT(A) did not bring any relief to the assessee.

9. On due consideration of both these orders would reveal that neither of the authorities has specifically applied its mind. Ld. AO in second paragraph of first page observed that assessee had raised fresh paid-up share capital of Rs. 4,70,26,000/-. Thereafter, ld. AO recorded finding in one and a half page which has no coherence with the subject. It is just a jurisprudence taken out from some commentary or we do not know whether he has kept it as a readily available material. The order does not disclose who are the share applicants, how much money has been received by the assessee from these share applicants whether they are taxable entities or individuals. In the computation of income, ld. AO has made addition of Rs. 4.70 Cr but in the next line observed that assessed total income is Rs. 3.32 Cr. In the next line, he again made taxable income at Rs. 4.70 Cr. All these things are discernible from perusal of the assessment order extracted *(supra)*.

10. Ld. CIT(A), though, devoted 13 pages to record the finding that additions made by ld. AO deserves to be upheld but out of those 13 pages, he also reproduced the readily available material from some earlier discussions in some other case. In other words, page nos. 3 to 12 are just cut & paste from a readymade available material. It does not show any application of mind. It is pertinent to observe that order of the first appellate authority is an *ex-parte* order but sub-Section 6 of Section 250 of the Act contemplates that ld. first appellate authority would state the points in dispute and thereafter record reasons in support of his conclusion on those points. Both the authorities have not framed the points or explained who are the share applicants, how much money has been received by the assessee from each share applicant. A total figure has just been mentioned and which has been included in the taxable income of the assessee. Therefore, we are of the view that factual investigation is not complete on the record. In the absence of these details, it is very difficult to adjudicate this issue. On the first date of hearing, ld. Counsel for the assessee pointed out about these irregularities in the impugned order but we emphasized that assessee should place on record the copies of the accounts exhibiting these details of share applicants etc. The assessee has filed a paperbook running into 128 pages. It has shown that its share applicants are six in numbers whose details have been placed in the paperbook. Considering the above material, which has been placed for the first time before the Tribunal, we deem it appropriate that we set aside the impugned orders of the authorities below and institute these proceedings to

the file of ld. AO for afresh adjudication. We direct the assessee to cooperate with ld. AO and submit the requisite details. Ld. AO shall grant reasonable opportunity of hearing to the assessee and the assessee will be at liberty to submit any details in support of its explanation.

11. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Kolkata, the 3rd July, 2023

Sd/-	*Sd/-*
[Rajesh Kumar]	[Rajpal Yadav]
Accountant Member	Vice-President

Dated: 03.07.2023

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***M/s. Goldline Dealers Pvt. Ltd., 5/1 Clive Row, 4th Floor, Room No. 125, Kolkata-700 001.***
2. ***ITO, Ward-9(2), Kolkata.***
3. CIT(A)-3, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata