IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.288/Coch/2017
Assessment Year : 2006-07

M/s. Midas Polymer Compounds Pvt. Ltd., Midas Marketing Building, Varisserry, Mariathuruthu P.O. Kottayam-686 027. [PAN:AACCM 0080H]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1, Kottayam.
(Assessee-Appellant)		**(Revenue-Respondent)**

Assessee by	Shri Mathew Joseph, CA
Revenue by	Shri A. Dhanaraj, Sr. DR

Date of hearing	31/05/2018
Date of pronouncement	25/06/2018

O R D E R

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the CIT(A)-IV, Kochi dated 02/06/2009 and pertains to the assessment year 2006-07.

2. The facts of the case are that the assessee claimed deduction u/s. 80IB amounting to Rs. 67,52,946/- and had filed certificate in Form 10CCB in support of its claim. It was observed by the Assessing Officer that apart from sales income, the assessee had included mixing charges in the income eligible for deduction u/s. 80IB of the Act. According to the Assessing Officer deduction

u/s. 80IB was available to the profits derived from manufacturing activity. Mixing charges represent the assessee's receipts from doing mixing on a job work basis for other units. Mixing does not represent the complete manufacturing process; it is only one of the several processes involved in the manufacture of tread rubber. The other processes involved are: (1) Master batch mixing, (2) Sulphur mixing, (3) Warming & extrusion, (4) Moulding, (5) Deflashing, (6) Machine Buffing, (7) Hand Buffing, (8) Inspection, (9) Rolling, (10) Packing, (11) Weighing. Thus, he observed that the assessee was not entitled for deduction u/s. 80IB of the Act on job work basis.

3. On appeal, the CIT(A) confirmed the same.

4. Against this, the assessee is in appeal before us. It was noticed that there was delay of 2819 days in filing the appeal before the Tribunal. The assessee has filed condonation petition accompanied by an affidavit stating that his income tax representation upto the level of CIT(Appeals) was handled by CA Unnikrishnan Nair N., a Practising Chartered Accountant and all the appellate proceedings before the Tribunal were handled by CA Mathew Joseph. It was stated that during this period about nine appeals of the group concerns were pending before the ITAT on the same issue and all the appeals were represented by CA Mathew Joseph. It was stated that the present appeal ought to have been filed on or before 16th September 2009. The entire taxation matters at that time

was handled by CA Unnikrishnan Nair N and the assessee was under the impression that necessary arrangements were made for filing the appeal before the ITAT and since so many appeals were in the ITAT during this period, by inadvertence, he omitted to hand over the file to the Authorised Representative at Cochin. It was stated that the non filing was noticed only last week of May, 2017 when the Assessing Officer called for the status of the appeal and payment of tax and immediately, the documents and records were verified and the appeal was filed. It was stated that there was a delay of seven years and 263 days which was caused due to the above facts and there was no willful negligence on their part. It was stated that if the delay of seven years and 263 days is not condoned and the appeal taken on records, it will cause irreparable harm, loss and injury to the assessee.

4.1 Further, Shri Unnikrishnan Nair N, CA has filed an affidavit dated 5th June 2017, stating that the appeals for the AY 1999-2000 to 2004-05 in respect of the group concern and appeal for the AY 2005-06, 2007-08 and 2008-08 of the assessee were filed and represented by the AR at Cochin, Shri Mathew Joseph, FCA and he was under the impression that the appeal for the AY 2006-07 was also filed by him. It was also stated that the issue in all these appeals were covered in favour of the assessee by the order of the High Court of Kerala for the assessment years 2005-06 to 2008-09 . The non-filing of the appeal was noted only when the Assessing Officer had enquired about the status of the case and

payment of tax in the last week of May, 2017. The assessee was under the impression that the deponent, Shri Unnikrishnan Nair N had already made arrangements for filing the appeal and as so many appeals were pending before the ITAT, he was under the impression that the appeal for this year also was filed. It was submitted that the non-filing of the appeal was due to an inadvertent omission on his part in handing over the file to the AR at Cochin. Hence, it was prayed that the delay of seven years and 263 days caused in filing the appeal may be condoned.

4.4 The Ld. AR relied on the Judgment of the Supreme Court in the case of N.Balakrishnan vs. M. Krishnamurthy (AIR 1998 SC 3222) wherein it was held 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. The Ld. AR also relied on the decision of the Mumbai Benches of the Tribunal in the case of Y.P. Trivedi vs. JCIT in ITA No. 5994/Mum/2010 dated 11/07/2012 wherein it was held that delay in filing the appeal due to CA's fault is bona fide and must be condoned and the delay of 496 days was condoned by observing as follows:

> *"5 After considering the rival submissions and carefully gone through the affidavit filed by the assessee as well as the affidavit of Shri Sunil Hirawat, CA of the assessee, we note that the facts of the case do not suggest that the assessee has acted in a malafide manner or the reasons explained is only a device to cover an ulterior purpose. It is settled proposition of law that the Court should take a lenient view on the matter of condonation of delay.*

However, the explanation and the reason for delay must be bonafide and not merely a device to cover an ulterior purpose or an attempt to save limitation in an underhand way. The Court should be liberal in construing the sufficient cause and should lean in favour of such party. Whenever substantial Justice and technical considerations are opposed to each other, cause of substantial Justice has to be preferred.

5.1 In the case in hand, when the reasons explained by the assessee are not found as malafide or a device to cover up ulterior purpose, then a liberal approach has to be taken for considering the sufficiency of course. We are satisfied with the reasons explained by the assessee that due to bonafide mistake and inadvertence, the appeal could not be filed within the period of limitation. Accordingly, in the interest of Justice we condone the delay of 496 days in filing the present appeal."

4.5 The Ld. AR also relied on the decision of the ITAT, Delhi Benches in the case of Vishu Impex Pvt. Ltd. vs. Department of Income Tax in ITA No. 2765 and 3703/Del/2011 dated 31/12/2015 wherein it was held that wrong advice by the CA is a reasonable and bonafide reason for the delay in filing the appeal and the delay of 1297 and 1244 days was condoned by observing as follows:

"5. On a careful consideration of the above submissions of the rival parties, we note that in the case of Perfect Scale Company [supra], the ITAT, Mumbai Bench has held as under:

"After considering the submission and perusing the material on record, I found that the assessee was bonafide in not filing the appeals in time. Copy of the affidavit of the Director of the company is placed on record. It has been explained that the company received the order ITA Nos.3228 to 3234/2013 of CIT(A) dated 1-10-2011 and the appeal should have been filed before the Tribunal within 60 days. It is further explained that the appeal matters of the assessee were looking after by Mr. P.K.Tandon, Chartered Accountant and on his advice the appeals were not filed. However, when the assessee transferred the case to Mr. S.S. Gajja, Chartered Accountant, who advised that appeals are to be filed before the Tribunal as the order of the CIT(A) is not as per the provisions of law. I noted that due to wrong advice of the Chartered Accountant, appeals could not be filed in time, therefore, I am of the view that there is a reasonable cause in not filing the appeals in the time. The decision in

the case of The Phoenix Mills Ltd (supra), on which reliance has been placed, is in favour of the assessee. In this case the ratio of the decision of the Hon'ble Apex Court in the case of Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and others, reported in (1979) 118 ITR 507(SC), has been considered, wherein it has been held that the mistake of the counsel may in certain circumstances be taken into account in condoning the delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. Accordingly, the Hon'ble Apex Court has held that there is a mistake of the counsel and, therefore, the delay in filing the appeal has been condoned. I further noted that similar finding has been expressed by the Hon'ble Supreme Court in the case of N. Balakrishnan Vs. Krishnamurthy, reported in AIR 1998 SC 3222. The Tribunal has also considered the vision in the case of Mela Ram and sons Vs. ITA Nos.3228 to 3234/2013 CIT, reported in 29 ITR 607 (SC) and accordingly, the delay in filing appeal was condoned. The facts in the present case are also similar as in this case also due to mistake of Chartered Accountant the assessee could not file the appeals in time. In view of the above facts and circumstances of the case and in view of the various decisions mentioned above, which was considered by the Tribunal in the case of The Phoenix Mills Ltd (supra), I condone the delay in filing the present appeals before the Tribunal for all the years. Also heard on merit of the case".

6. In view of the above, it was held by the Coordinate Bench of the Tribunal that where it was due to wrong advice of the Chartered Accountant that the appeal was not filed on time, then it was to be held that there was reasonable cause in not filing appeals in time and the same was to be condoned. In the present case also, the assessee company has clearly stated in the application for condonation of delay and affidavit of the Director that earlier the case was handled by Shri Satish Agarwal, Chartered Accountant and he did not advice to raise legal objection and when Shri R.K. Gupta, CA appointed on 22.1.2015 then adviced for filing cross objection. Since the delay was caused in this situation, we are inclined to hold that there was a bonafide reason and cause due to which cross objections could not be filed on time and delay was caused which cannot be attributed as wilful omission or negligence on the part of the assessee. Therefore, respectfully following the dicta of ITAT, Mumbai in the above mentioned case, the application for condonation of delay in filing the appeals are hereby allowed."

4.6 The Ld. AR also relied on the judgment of the Mumbai Bench (SMC) of the Tribunal in the case of Perfect Scale Company vs. DCIT in ITA Nos. 3228 to

3234/Mum/2013 dated 06/09/2013 wherein it was held that the delay of 513 days in filing the appeals before the Tribunal on account of mistake of the Counsel may in certain circumstances be taken into account in condoning the delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. The Ld. AR also relied on the judgment of the Supreme Court in the case of Mela Ram and Sons vs. CIT (29 ITR 607) for the same proposition.

5. The Ld. DR submitted that there was inordinate delay of 2819 days and the reason given by the assessee for filing the appeal belatedly cannot be considered as bona fide. It was submitted that the assessee was very negligent in its action and it could have been vigilant to avoid delay in filing the appeal before the Tribunal. Therefore, he submitted that the delay cannot be condoned in this case. The Ld. DR relied on the judgment of the Supreme Court in the case of State of Punjab and Another vs. Shamlal Murari & Anr (1976 AIR 1177) and submitted that the discretionary power of exercise is available only in exceptional case and only when there is something perverse or irrational in the exercise of that power by the lower authorities. According to the Ld. DR in this case, the assessee was sleeping over the matter and not keen to take remedial measures against the order of the CIT(A). Hence, the appeal is to be dismissed in limine.

6. We have heard the rival submissions and perused the record. There was a delay of 2819 days in filing the appeal before the Tribunal. The assessee has stated the reasons in the condonation petition accompanied by an affidavit which has been cited in the earlier para. The assessee filed an affidavit explaining the reasons and prayed for condonation of delay. The reason stated by the assessee is due to inadvertent omission on the part of Shri Unnikrishnan Nair N, CA in taking appropriate action to file the appeal. He had a mistaken belief that the appeal for this year was filed by the assessee as there was separate Counsel to take steps to file this appeal before the ITAT. Therefore, we have to consider whether the Counsel's failure is sufficient cause for condoning the delay. The Madras High Court considered an identical issue in the case of Sreenivas Charitable Trust v. Dy. CIT (280 ITR 357) and held that mixing up of papers with other papers are sufficient cause for not filing the appeal in time. The Madras High Court further observed that the expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, advancement of substantial justice is the prime factor while considering the reasons for condoning the delay.

6.1 On merit the issue is in favour of the assessee. But there is a technical defect in the appeal since the appeal was not filed within the period of limitation. The assessee filed an affidavit saying that the appeal was not filed because of the Counsel's inability to file the appeal. The Revenue has not filed any counter-affidavit to deny the allegation made by the assessee. While considering a similar issue the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji and

Ors. (167 ITR 471) laid down six principles. For the purpose of convenience, the principles laid down by the Apex Court are reproduced hereunder:

(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 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, commonsense and pragmatic manner.

(4) When substantial justice and technical consideration are pitted against each other, the 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 the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

6.2 When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right for injustice being done because of nondeliberate delay. In the case on our hand, the issue on merit regarding allowability of deduction u/s. 80IB of the Act was covered in favour of the assessee by the binding Judgment of the jurisdictional High Court. Moreover, no counter-affidavit was filed by the Revenue denying the allegation made by the assessee. It is not the case of the Revenue that the appeal was not filed deliberately. Therefore, we have to prefer substantial justice rather than technicality in deciding the issue. As observed by Apex Court, if the application of the assessee for condoning the delay is rejected, it would amount to legalise injustice on technical ground when the Tribunal is capable of removing injustice and to do justice. Therefore, this Tribunal is bound to remove the injustice by condoning the delay on technicalities. If the delay is not condoned, it would amount to legalising an illegal order which would result in unjust enrichment on the part of the State by retaining the tax relatable thereto. Under the scheme of Constitution, the Government cannot retain even a single pie of the individual citizen as tax, when it is not authorised by an authority of law. Therefore, if we refuse to condone the delay, that would amount to legalise an illegal and unconstitutional order passed by the lower authority. Therefore, in our opinion, by preferring the substantial justice, the delay of 2819 days has to be condoned.

6.3 The next question may arise whether 2819 days was excessive or inordinate. There is no question of any excessive or inordinate when the reason stated by the assessee was a reasonable cause for not filing the appeal. We have to see the cause for the delay. When there was a reasonable cause, the period of delay may not be relevant factor. In fact, the Madras High Court in the case of CIT v. K.S.P. Shanmugavel Nadai and Ors. (153 ITR 596) considered the delay of condonation and held that there was sufficient and reasonable cause on the part of the assessee for not filing the appeal within the period of limitation. Accordingly, the Madras High Court condoned nearly 21 years of delay in filing the appeal. When compared to 21 years, 2819 days cannot be considered to be inordinate or excessive. Furthermore, the Chennai Tribunal by majority opinion in the case of People Education and Economic Development Society (PEEDS) v. ITO (100 ITD 87) (Chennai) (TM) condoned more than six hundred days delay. It is pertinent to mention herein that the view taken by the present author in that case was overruled by the Third Member.

6.4 The Madras High Court in the case of Sreenivas Charitable Trust (supra) held that no hard and fast rule can be laid down in the matter of condonation of delay and the Court should adopt a pragmatic approach and the Court should exercise their discretion on the facts of each case keeping in mind that in construing the expression "sufficient cause" the principle of advancing substantial justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. Therefore, this Judgment of the Madras High Court

(supra) clearly says that in order to advance substantial justice which is of prime importance, the expression "sufficient cause" should receive a liberal construction. In this case, the issue on merit regarding granting of deduction u/s. 80IB was covered in favour of the assessee by the Judgment of the jurisdictional High Court. Therefore, for the purpose of advancing substantial justice which is of prime importance in the administration of justice, the expression "sufficient cause" should receive a liberal construction. In our opinion, this Judgment of the jurisdictional High Court is also squarely applicable to the facts of this case. A similar view was taken by the Madras High Court in the case of Venkatadri Traders Ltd. v. CIT (2001) 168 CTR (Mad) 81 : (2001) 118 Taxman 622 (Mad).

6.5 The Mumbai Bench of this Tribunal in the case of Bajaj Hindusthan Ltd. v. Jt. CIT (AT) (277 ITR 1) has condoned the delay of 180 days when the appeal was filed after the pronouncement of the Judgment of the Apex Court. Furthermore, the Revenue has not filed any counter-affidavit opposing the application of the assessee for condonation of delay. The Apex Court in the case of Mrs. Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi (AIR 1978 SC 537) held that non-filing of affidavit in opposition to an application for condonation of delay may be a sufficient cause for condonation of delay. In this case, the Revenue has not filed any counter-affidavit opposing the application of the assessee, therefore, as held by the Apex Court, there is sufficient cause for condonation of delay. The Supreme Court observed that when the delay was of short duration, a liberal view should be taken. "It does not mean that when the delay was for

longer period, the delay should not be condoned even though there was sufficient cause. The Apex Court did not say that longer period of delay should not be condoned. Condonation of delay is the discretion of the Court/Tribunal. Therefore, it would depend upon the facts of each case. In our opinion, when there is sufficient cause for not filing the appeal within the period of limitation, the delay has to be condoned irrespective of the duration/period. In this case, the non-filing of an affidavit by the Revenue for opposing the condonation of delay itself is sufficient for condoning the delay of 2819 days

6.6 . In case the delay was not condoned, it would amount to legalise an illegal and unconstitutional order. The power given to the Tribunal is not to legalise an injustice on technical ground but to do substantial justice by removing the injustice. The Parliament conferred power on this Tribunal with the intention that this Tribunal would deliver justice rather than legalise injustice on technicalities. Therefore, when this Tribunal was empowered and capable of removing injustice, in our opinion, the delay of 2819 days has to be condoned and the appeal of the assessee has to be admitted and disposed of on merit.

6.7 . In view of the above, we condone the delay of 2819 days in filing the appeal and admit the appeal for adjudication.

6.8 Coming to the merits of the issue raised by the assessee with regard to the deduction u/s.80IB on the job work income earned in mixing of rubber compounds, which came up before this Tribunal in assessee's own case in ITA

No. 665/Coch/2013 dated 17/01/2014 for the assessment year 2008-09, it was held as under:

"7. We have heard rival contentions and perused the record. The short controversy is whether the income earned by the assessee on processing of rubber on job work basis for others would fall under "production or manufacturing" in order to become eligible for deduction u/s 80IB of the Act. We notice that the assessee as well as the Ld CIT(A) has placed reliance on the decision of Hon'ble jurisdictional High Court in the assessee's own case (referred supra). For the sake of convenience, we extract below the relevant observations made by the Hon'ble Kerala High Court in the assessee's own case referred supra.

> *"1….. However, the Division Bench prima facie doubted whether processing of goods done for another party by the assessee could be treated as manufacture or production of any article or thing for the purpose of deduction under section 80IB of the Act. Accordingly, for a detailed consideration of correctness of said decision, the matter was referred to the Full Bench….*
>
> *2. The assessee is engaged in manufacture of procured tread rubber and is also engaged in the job work of mixing of rubber with chemicals, process oils etc., to make compound rubber for tyre manufacturing companies….. The assessing officer held that the job work done by the assessee by mixing rubber with chemicals, process oils etc., to make compound rubber does not amount to "manufacture or production of any article or thing" within the meaning of section 80-IB and so much so assessee is not entitled to any deduction…*
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> *4. The only question to be considered is whether production of compound rubber on job work for the tyre manufacturing companies by the assessee amounts to "production of an article or thing" qualifying for deduction u/s. 80IB of the Act. The Division Bench decision of this Court above referred is clearly on the point, though in the context of investment allowance u/s. 32A, because assessee in that case also was engaged in making of compound rubber for tyre manufacturing companies. This Court held that compound rubber is an article or thing produced by the assessee in their factory entitling it for investment allowance. We notice that section 80IB is worded in the same way as section 32A and therefore, the Division Bench decision of this Court squarely applies to the facts of this case also. It is also seen from the two decisions of the Supreme Court that Supreme Court has given a wide meaning to the expressions "manufacture or production*

of any article or thing", occurring in section 32A, 80IB, etc. In the Sesa Goa Ltd.'s case (supra), the Supreme Court held that processing of iron ore amounts to manufacture or production of any article or thing. In N.C. Budharaja & Co.'s case (supra), the Supreme Court held as follows:

> *"The word "production" or "produce" when used in juxtaposition with the word manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture, it also taken in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods."*

What is made clear by the Supreme Court is that even production of intermediary products is sufficient to entitle the assessee for deduction available to new industrial unit. Compound rubber produced by the assessee on job work for the tyre manufacturing companies is an intermediary from which tyre is manufactured. If processing of iron ore which is only raw material for producing iron therefrom, amounts to manufacture or production of any article or thing, ***then we see no reason why compound rubber cannot be treated as an article produced by the assessee though for the tyre manufacturing company under contract. In other words, there is nothing in the section to indicate that article or thing produced or manufactured should be final product in itself.*** *So much so, the activity of the assessee in their new industrial unit, which is mixing rubber with chemicals, process oil etc., making compound rubber, is covered by section 80IB of the Act. We notice that the Tribunal has disallowed the claim by following the decision of the Supreme Court in CIT v. K. Ravindranathan Nair (2007) 295 ITR 228. What was considered in that case was assessee's entitlement to treat processing charges received as part of export profit for the purpose of deduction u/s. 80HHC of the Act. We do not think the said decision has any application to the facts of this case. We therefore hold that assessee is entitled to deduction under section 80IB in respect of profit derived by the industrial unit where compound rubber is made."*

We notice that the issue contested before us has already been decided by the full bench of Hon'ble jurisdictional Kerala High Court in the assessee's own case for an earlier assessment year. We have already noticed that the Ld CIT(A) has followed the above said binding decision of Hon'ble High Court. Under these circumstances, we do not find any reason to interfere with his order on this issue.

8. In the result, the appeal filed by the revenue is dismissed."

6.9 In view of the above order of the Tribunal, we are inclined to decide the issue in favour of the assessee and against the Department. Thus, this ground of appeal taken by the assessee is allowed.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 25th June, 2018.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place:
Dated: 25th June, 2018
GJ
Copy to:
1. M/s. Midas Polymer Compounds Pvt. Ltd., Midas Marketing Building, Varisserry, Mariathuruthu P.O., Kottayam-686 027.
2. The Assistant Commissioner of Income-tax, Circle-1, Kottayam.
3. The Pr. Commissioner of Income-tax(Appeals), Kochi
4. The Pr. Commissioner of Income-tax, Kochi
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin