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

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

ITA NO.2823/MUM/2022 (A.Y: 2013-14)

Ajay Parasmal Kothari 202, Prateek Apartment Main Mamlatdarwadi Road Mumbai - 400064 **PAN: AACPK4073B**	*v.*	Income Tax Officer –30(1)(1) Bandra Kurla Complex Bandra (E), Mumbai -400051
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Ashwin Chhag**
Department Represented by	**:**	**Shri Ashish Kumar Deharia**
Date of Hearing	**:**	**04.01.2023**
Date of Pronouncement	**:**	**03.04.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-41, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 23.05.2018 for the A.Y.2013-14.

2. At the outset, we observe that the present appeal is filed by the assessee with a delay of 1566 days and assessee also filed an affidavit in

this regard and prayed for condonation of delay. In the affidavit assessee has submitted as under: -

> *"(1) It is evident from the order of assessment completed u/s 143(3) of the Income Tax Act, 1961 that there were two addition made in the course of assessment u/s.143(3) on account of drawings Rs 1,90,000 and on account of rent received Rs.3,73,191/ from the builders on the property under redevelopment.*
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> *(ii) That the aggrieved by the aforesaid both the additions appeal was contested before CIT(A)- 41, Mumbai u/s.250 Of the Act wherein the 1st addition of Rs 1,90,000 was deleted whereas the 2nd addition was confirmed, vide order CIT(A)-41/IT/152/16-17 dated 23.05.2018, distinguishing the order of Coordinate Bench of this Tribunal, relied upon by me, in the case of Kishore B Bangia vide ITA 2349/M/2011 vide dated 31.01.2012.*
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> *(iii) That both the proceedings, proceeding u/s 143(3) aswell as proceeding u/s.250 of the Income Tax Act, were represented by the Bharat B Shah and CO., Chartered Accountants which advised me that addition confirmed is based on the order of the Co-ordinate Bench of the ITAT, Mumbai and hence, there is little merit in the case to take it before the 2nd appellate authority and this advice was followed in view of fiduciary relation have had with the CA Shri Bharat B Shah.*
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> *(iv) That following the aforesaid order of the CIT(A)-41, Mumbai, penalty proceeding was initiated u/s.271(1)(c) and eventually levied, vide Order DIN ITBA/PNL/F/271(1)(c)/2021- 22/1038515609(1) dated 07.01.2022 and the same is contested before the NFAC, Delhi.*
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> *(v) That while challenging the aforesaid penalty order I'm advised by CA Ashwin S Chhag that the order of the Id.CIT(A) is erroneous as the decision cited has wrongly been distinguished as in the said case identical nature of income, rent for the alternate accommodation, was not taken as income chargeable to tax only. I'm also advised that the rent received for the alternate accommodation is hardship money not chargeable tax as decided by the Jurisdictional Tribunal and that Revenue is precluded to collect tax on this account as it would be without authority of the law under Article 265 of the Constitution of India.*
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> *(vi) In view of the aforesaid reasons the filing of the appeal was delayed by 1376 days from the receipt of the order, presumed to have served on the same day of order made i.e. 23.05.2018 as I do not have date of physically service of the order of the CIT(A)-41,*

Mumbai. Appeal against this Order was made before this H'ble Tribunal electronically on 01.03.2022.

(vii) Later this E-filing of appeal acknowledgement and all the appeal papers were filed physically to the registry of this H'ble tribunal on 04.11.2022 in view of which delay worked out was 1566 days.

(viii) In view of the above, I pray this H'ble Bench of the Tribunal to condone the delay and admit my aforesaid appeal, ignoring the technicality and considering the substantial justice, as the delay is not caused by the negligence but under the bonafide belief that the order of the ld. CIT(A) was as per the law and following the binding precedent which found to have missed. That whatever I have stated above is true to the best of my knowledge, except vide para no. v which is based on information received from CA Ashwin S Chhag and which I believe it to be true."

3. Ld. DR objected for the condonation of delay and however, he has not filed any submissions against the affidavit and the facts described in the above affidavit.

4. Considered the submissions of both parties, we observe that in the case of M/s. Midas Polymer Compounds Pvt. Ltd., *v.* ACIT in ITA.No. 288/Coch/2017 the Coordinate Bench of the Tribunal has considered the issue of condonation of delay and by following various judicial precedents along with the decision of the Hon'ble Supreme Court in the case of Collector, Land Acquisiont *v.* Mst Katiji and ors. (167 ITR 471) condoned the delay of 2819 days observing as under: -

"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.*
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> *(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."

5. Respectfully following the above said decision and also considering the overall facts on record that the assessee was not properly guided by his counsel and for the sake of overall justice we condone the delay with such delay.

6. Brief facts of the case are, assessee filed its return of income for the A.Y. 2013-14 on 27.03.2013 declaring total income of ₹.16,90,830/-. The return was processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In

response AR of the assessee attended and submitted the relevant information as called for.

7. Assessee is an individual and dealing in shares, trading business and also receives commission and consultancy income. During the assessment proceedings, Assessing Officer observed from the capital account submitted by the assessee that assessee has shown a receipt of of ₹.3,73,191/- as a capital accounts receipt from the builders. It was submitted that assessee was having a flat in Satsang Bharti CHS Ltd., Malad (E), Mumbai and the said building has given for redevelopment and this amount is basically a monthly rental compensation from the builder for rent of alternate accommodation. The assessee was asked to why the said amount received from the builders for alternate accommodation should not be treated as income from other sources and brought to tax. In response, Ld. AR of the assessee submitted that the amount received from builder is in the nature of hardship compensation and it is a capital receipt and thus not taxable in the hands of the assessee.

8. The Assessing Officer rejected the submissions of the assessee and held that it is not a capital receipt. He observed that it is clearly a revenue receipt in the form of alternate accommodation rent provided by the

builder for development of his residences. Further, he observed that assessee has not utilized any amount of its receipt for his alternate accommodation. Accordingly, he treated the above amount as income of the assessee and taxed under the head "income from other sources".

9. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and submitted as under: -

> *"During the year under consideration, assessee has received compensation of Rs.3,73,191 from Rohan Infrastructure. Assessee is having a flat in Satsang Bharti CHS Limited. The said building has gone for redevelopment. Thus the assessee had to move forcefully to new place for his stay. This resulted inconvenience and hardship to the assessee. So, the assessee claimed that the amount received from the builder is on account of hardship compensation & thus it is a capital receipt in nature. Thus the same amount is not added to total income at the time of filing Income Tax Return.*
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> *Also assessee at the time of assessment proceedings submitted case law decided in Mumbai ITAT of Kushal k Bangia v/s ITO 21(1)(2), I.T.A No.2349/Mum/2011 where it is clearly held that compensation received is of capital nature (as the flat is a capital asset).*
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> *Without prejudice to the above, if the receipt is not treated as capital receipt then receipt may be treated as income from house property and then deduction of 30% under section 24(a) of the Income Tax Act be given to the assessee."*

10. After considering the submissions of the assessee Ld.CIT(A) rejected and distinguished the case laws relied on by the assessee in the

case of Kushal K. Bangia *v.* ITO in ITA.No. 2349/Mum/2011 and sustained the addition made by the Assessing Officer.

11. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

> *"Ground No.1 Ld. CIT(A) is erred to confirm the addition made, despite this being a covered issue by the decision of the Co- Ordinate Bench of this H'ble ITAT whereby it is made clear that impugned addition made is capital receipt and hence, not chargeable to tax.*
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> *Ground No.2 Appellant craves to add, amend alter to the grounds raised above"*

12. Considered the rival submissions and material placed on record, it is fact on record that assessee has received ₹.3,73,191/- from the builder for alternate accommodation. However, assessee has not utilized these funds for any accommodation. However, he adjusted and lived with his parents. It clearly indicates that even though assessee has not utilized the rent received for his accommodation, however, he has faced hardship by vacating the flat for redevelopment and also adjusted himself during the period. We observe that Coordinate Bench has considered the similar issue and adjudicated the same in the case of Smt Delilah Raj Mansukhani *v.* ITO (ITA.No. 3526/Mum/2017 dated 29.01.2021) as under: -

> *"5. After hearing the rival submissions and perusing the material on record, we find that compensation received by the assessee*

towards displacement in terms of Development Agreement is not a revenue receipt and constitute capital receipt as the property has gone into redevelopment. In such scenario, the compensation is normally paid by the builder on account of hardship faced by owner of the flat due to displacement of the occupants of the flat. The said payment is in the nature of hardship allowance / rehabilitation allowance and is not liable to tax. The case of the assessee is squarely supported by the decision of the Co-ordinate Bench in the case of Shri Devshi Lakhamshi Dedhia vs. ACIT in ITA No.5350/Mum/2012 wherein similar issue has been decided in favour of the assessee, the relevant operative portion is reproduced hereunder:-

> *15. We have considered the rivals submissions and perused the materials on records. We note that the assessee received compensation of Rs. 19,50,873/- from the developer when the building in which the assessee owned flat went for re-development as per the agreement between the developers and flat owners dated 28.03.2008. The said compensation was paid towards hardship Rs, 13,45,278/-; rehabilitation Rs, 5,90,625/- and for shifting Rs. 15,000/-.We also note that the assessee paid Rs. 18,63,000/- to Joys Developers for acquiring additional area of 138 Sq Ft. It was also noted that the assessee shifted to his own house when the building went for re-development. Now the question before is whether the compensation upon re-development of property towards hardship, rehabilitation and shifting received by the assessee is taxable if the potential TDR/FSI is available to the land owner or society which owns the (and depending upon the terms of the de-development agreement without transferring the land . In the present case the assessee who was flat owner in the building was member of the society, As per the agreement each member of the society including the assessee was to be given a flat in lieu of the old one and the each member including the assessee was given compensation. We also note that In the decisions in 1TA No 72/Mum/2012 assessment year 2008-09 Bench E and ITA No 5271/Mum/2012 assessment year 2008-09 Bench "D" the Tribunal held that the amounts received as compensation for hardship , rehabilitation and for shifting are not liable to tax We, therefore , respectfully , the above decisions are of the considered view that the amounts received by the assessee as hardship compensation, rehabilitation compensation and for shifting are not liable to tax and the order passed by the*

first appellate authority cannot be sustained. Thus the order of CIT(A) is reversed and ground is allowed in favour of the assessee.

16. In the result, appeal of the assessee is partly allowed, as above.

6. Respectfully following the co-ordinate Bench decision, we set aside the findings of the ld. CIT(A) on this issue and direct the AO to delete the addition made of Rs.2,60,000/-. Accordingly, the ground No.6 is allowed."

13. Respectfully following the above said decision, we also hold that the above receipt of compensation for hardship is in the nature of capital receipt. Accordingly, the addition made by the Assessing Officer is deleted. Ground raised by the assessee is allowed.

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

Order pronounced in the open court on 03rd April, 2023

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

Mumbai / Dated 03/04/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum