IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' G ' BENCH
MUMBAI BENCHES, MUMBAI

BEFORE SHRI VIJAY PAL RAO, JM & SHRI RAJENDRA, AM

ITA No. 5994/Mum/2010
(Asst Year 2005-06)

Shri Y P Trivedi 23 Atlanta - Nariman Point Mumbai	Vs	The Jt Commr of Income Tax Range 11(3), Mumbai
(Applicant)		**(Respondent)**

PAN No.	**AAFPT3468G**
Assessee by	Ms Usha Dalal
Revenue by	Sh A K Nayak
Dt.of hearing	3rd July 2012
Dt of pronouncement	**11th July 2012**

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the order dated 20/01/2009 of the CIT(A) for the assessment year 2005 -06.

2 The assessee has raised the following effective grounds as under:

> i*) The CIT(A) erred in upholding the addition of ₹ 32,200/- under the head "income from house property' without appreciating the fact that the shops were the commercial asst of the appellant, and since no rent was received, there was no question of determining the notional income and no question of taxing the same under the head 'income from house property.*
>
> *ii) The CIT(A) erred in upholding the computation of long term capital loss of ₹. 7,47,290/- done by the Assessing Officer as against the computation of long term capital loss of ₹16,66,173/- done by the appellant."*

3 There is a delay of 496 days in filing the present appeal. The assessee has filed an application for condonation of delay as well as affidavit of assessee and his Chartered Accountant Mr Sunil Hirawat explaining the reasons for delay in filing the present appeal.

4 We have heard the learned A.R of the assessee as well as the learned DR and considered the relevant material on record for condonation of delay. The learned A.R of the assessee has submitted that after receiving the order of the learned CIT(A) by the Chartered Accountant of the assessee, the same was given to one Shri Shri Balakrishna Mohite, who is maintaining the records of appeal matters for taking the photo copy and sending to the assessee's office for filing appeal. However, inadvertently the impugned order of CIT(A) got mixed up with the other papers in the office of Chartered Accountant of the assessee and therefore, the appeal could not be filed within the period of limitation. Subsequently, Shri Bakrishna Mohite came across to the impugned order and realise that the appeal against the said order could not be filed. Accordingly, the present appeal was immediately filed after the tracing out of the said order. The learned A.R of the assessee has further submitted that the delay in filing the appeal is neither deliberate nor wilful; but due to the misplacement of the order in the office of Chartered Accountant and therefore, it was a bonafide mistake. She has relied upon the decision of honourable Supreme Court in case of Collector, Land Acquisition v. Mst. Katiji reported in 167 ITR 471(SC) and submitted that Justice oriented approach has to be taken by the Court while deciding the matter of condonation and the case should be decided on merit and not on technicalities.

4.1 On the other hand, the learned DR has vehemently objected to the condonation of delay and submitted that the circumstances show that there is a gross negligence on the part of the assessee for not filing the appeal within the period of limitation. He has further submitted that the assessee has not explained a sufficient cause to explain the delay in filing the appeal. The reasons explained by

the assessee are vague and not sufficient; therefore, the assessee is not entitled for condonation of delay.

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.

6 Ground number 1 is regarding addition under the head 'income from house property'.

6.1 Apart from residential flat owned by assessee's HUF, the assessee also owned two shops at Ashoka Shopping Centre and one at Kalpak Development, Wadala.

The assessee has not offered income from house property. The Assessing Officer asked the assessee as to why the income from house property be not assessed in respect of these shops as well as the flat at Kandhivali.

6.2 In response, the assessee submitted that the flat at Kandhivali may be taken as self occupied property and notional income from three soaps may be taken at ₹. 12, 000/-each. The Assessing Officer was of the view that the value of ₹ 12,000/- each for the shop is very low and accordingly, the Assessing Officer estimated the ALV at ₹ 16,000/-per shop. Accordingly, the Assessing Officer computed the income from house property in respect of three shops at ₹ 32, 200/-. The assessee challenged the action of the Assessing Officer before CIT(A) , who has confirmed the addition made by the Assessing Officer.

7 Before us, the learned A.R of the assessee has submitted that these shops were never let out by the assessee and remained vacant. She has further submitted that even otherwise, the Assessing Officer has not computed the annual letting value as per the provisions of law and the municipal rateable value of the shops has to be taken into consideration. Thus, the learned A.R of the assessee has submitted the annual letting value as estimated by the Assessing Officer is against the settled law on the point.

7.1 On the other hand, the learned D.R has submitted that the Assessing Officer has computed the annual letting value as per the provisions of section 23 (1) (a) of the Income Tax Act; therefore, the action of the Assessing Officer is justified. He has relied upon the orders of the authorities below.

8 We have considered the rival submissions as well as relevant material on record. Section 23 contemplates the manner in which the annual value of the

property has to be determined. As per subsection 1 of section 23, the Assessing Officer has to first determine the sum for which the property might reasonably be expected to fetch the rent from year to year and then if the property is let out, it is to be compared with the animal actual rent received or receivable. Thus, for determination of ALV under section 23 (1), the Assessing Officer has first to find out the reasonable expected rent which the property might fetch by letting out from year to year and then this reasonable expected rent has to be compared with the annual rent received or receivable.

8.1 In the case in hand, when the property was never let out, than the Assessing Officer has to consider all the relevant factors including the standard rent, if any as determined under the provisions of Rent Control Act or Municipal Rateable Value of the property for computing the Annual Letting Value.

8.2 Since the Assessing Officer has not carried out such an exercise; therefore, in the interest of Justice, we set aside this issue to the record of the Assessing Officer for deciding this issue after considering all the relevant factors including the standard rent or Municipal Rateable Value and then determine the fair rent expected to be fetched by this property.

9 Ground number 2 is regarding computation of long term capital loss at ₹. 7,47, 290/- against the claim of the assessee at ₹ 16, 66,173/-.

10 We have heard the learned A.R as well as learned D.R and considered the relevant material on record. During the year under consideration, the assessee sold 2 shops and claimed long term capital loss of ₹ 16, 66,173/-. The assessee has claimed the expenditure incurred towards the property in question as part of cost of acquisition and thereafter took the benefit of indexation of cost while computing

the long term capital loss. The Assessing Officer denied the claim of expenditure incurred by the assessee on the improvement of the property. On appeal, the CIT(A) confirmed the action of the Assessing Officer.

10.1 Before us, the learned A.R of the assessee has submitted that an identical issue has been considered and decided by the CIT(A) for the assessment year 2006-07 vide order dated 25/3/2011 and the claim of the assessee has been allowed. She has further submitted that the department has not filed appeal against the order of the CIT(A) for AY 2006-07.

10.2 On the other hand, the learned D.R has submitted that for the assessment year 2006-07, the CIT(A) has taken note of the fact that the assessee has capitalised the entire expenditure incurred on the improvement of the property and therefore, the claim of the assessee was allowed; whereas in the year under consideration, the assessee has not brought out this fact on record.

10.3 In rebuttal, the learned A.R. of the assessee has submitted that the entire cost of improvement, stamp duty and interest has been capitalised and shown in the balance sheet for the relevant assessment years.

11 After considering the rival submissions, we note that the CIT(A) for the assessment year 2006-07 has considered and decided this issue in para 6 as under.:

> *"6. My attention has also been drawn, in the course of appellate proceedings, that the expenditure incurred from time to time have been capitalised over the years, spread almost 25 years, and, in the balance sheet the entire expenditure so incurred has been capitalised year after year to the cost of the property. In the last balance sheet, the cost is consequently shown to be the enhanced value rejected by assessing officer for indexation Today, when the property has been sold, assessing officer has -no jurisdiction to disturb that capitalised cost of the property. Today, after 25 years assessing officer cannot disturb the capitalised amount so capitalised 25 years back. I agree with the contention. In law, assessing officer does not have jurisdiction to disturb the earlier years results. This jurisdiction is limited to the current, the*

previous• year under consideration. Therefore if an expenditure had been incurred and capitalised to the cost of the property in any earlier assessment year, assessing officer today does not have jurisdiction to disturb that capitalisation.

11.1 Since it is not clear from the records available before us whether the assessee has capitalised the cost of improvement and shown in the balance sheet for the respective assessment years; therefore, in the interest of Justice, we remit this issue to the record of the Assessing Officer for deciding the same afresh after considering the aspect of capitalisation of the expenditure incurred on the improvement, stamp duty and interest etc., as well as the decision of CIT(A) for the assessment year 2006-07.

12 In the result the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on the 11th day of July 2012.

Sd/- Sd/-

(RAJENEDRA) Accountant Member	**(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 11th, July 2012
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

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BY ORDER

Dy /AR, ITAT, Mumbai