

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 192 OF 2014

Prashanth Projects Ltd.
Navi Mumbai

.. Appellant

v/s.

The Deputy Commissioner of Income
Tax-10(3), Mumbai

.. Respondent

Mr. Atul Jasani for the appellant
Mr. Arvind Pinto for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 19th JULY, 2016.

PC.

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 4th September, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2005-06.

2. The appeal is admitted on the following substantial question of law urged by the appellant assessee :-

“(i) Whether on the facts and circumstances of the case, the

Tribunal was justified in law in upholding the order of Commissioner of Income Tax (Appeals), rejecting the Appellant's prayer for condonation of delay in filing the appeal and thereby dismissing the appeal on the grounds of limitation ?”

3. As the dispute is within a very narrow compass, the learned Counsel for the parties request that the appeal itself could be disposed of at the stage of admission. At the request of the learned Counsel, the appeal itself is taken up for consideration for final disposal.

4. Briefly, the facts leading to this appeal are as under :-

(a) On 31st December, 2007, the Assessing Officer passed an order under Section 143(3) of the Act, relating to the subject assessment year determining the appellant's income at Rs.1.11 crores. Being aggrieved, the appellant assessee prepared an appeal in the proforma Form No.35 for filing appeal before Commissioner of Income Tax (Appeal) [CIT(A)]. However, by mistake instead of the appeal being filed in the office of the CIT(A), it was filed on 8th February, 2008 (within the period of limitation) with the office of the Assessing Officer i.e. Deputy Commissioner of Income Tax-10(3), who accepted the same.

(b) The appellant had thereafter on 19th August, 2008 filed an application seeking a stay of the demand pending the disposal of its

appeal before the CIT(A) as 50% of the demand had already been paid. By an order dated 12th November, 2008, the Commissioner of Income Tax granted a stay of the demand to the extent of 50% of the still unpaid taxes on the appellant further depositing 50% of the unpaid demand raised consequent to the order of the Assessing Officer. This order dated 12th November, 2008 was passed after recording and considering the fact that the appellant's appeal for the subject Assessment Year is pending before the CIT(A).

(c) On 23rd March, 2010, the appellant addressed a communication to the CIT(A) seeking a hearing in respect of its pending appeal for A.Y. 2005-06. It is at that time, while pursuing the issue with the CIT(A) for fixing a hearing that the appellant realized that the appeal in Proforma-35 was incorrectly filed with the office of the Assessing Officer, instead of the office of the CIT(A). Therefore, on 12th May, 2011 the appellant requested the Assessing Officer to forward its appeal filed in its office to the CIT(A) to enable its disposal on merits. However, it was refused. This resulted in the appellant having to file a fresh appeal on 9th June, 2011 to the CIT(A) from the order of the Assessing Officer dated 31st December, 2007. This appeal was accompanied alongwith an application for condonation of delay listing out the aforesaid circumstances leading to the delay.

(d) However, the CIT(A) by his order dated 4th August, 2011, rejected the appeal for condonation of delay and did not admit the appeal for consideration.

(e) Being aggrieved, the appellant filed a further appeal to the Tribunal. By the impugned order, the Tribunal after citing various decisions of the Courts indicating the manner in which the application for condonation of delay have to be dealt with proceeded to reject the appeal. Thus, upholding the order of the CIT(A) *inter alia* on the ground that the appellant was represented by a Chartered Accountant and, therefore, they ought to have been more vigilant. Further, noting the fact that as in nature, the consequences of inaction have to be faced, so also in human conduct as under :-

“We have avoided using adjectives before the words inaction and negligence, which are generally used by the higher forums of judiciary when they find that delay is result of total lack of prudence. Timely action is the essence of day-today activities of human being – a farmer not sowing his fields in time after the rains has to suffer. Principles of nature are equally applicable to human behaviour, including the judicial system. No action was taken by the assessee for a long period to follow up his appeal.”

On the aforesaid ground, the appeal was rejected.

5. It is an undisputed position that the appeal from order dated 31st December, 2007 of the Assessing Officer was prepared and filed in the prescribed Proforma viz. Form No.35. It was addressed to CIT(A). However, by mistake the same was tendered to the office of the Assessing Officer and the office of the Assessing Officer also accepted the same. In fact, as the appeal pertained to the CIT(A) and not its office, the Assessing Officer ought to have immediately returned the appeal which was filed in the office of the Assessing Officer. This would have enabled the appellant to take appropriate steps and file the appeal with the office of the CIT(A). It is not the case of the Revenue that the appeal addressed to the CIT(A) was not filed with the Office of the Assessing Officer on 8th February, 2008 i.e. within the period of limitation. In case, the Assessing Officer had returned the appeal immediately to the appellant or had forwarded it to the office of the CIT(A) as would be expected of the State no delay would have taken place. This would have resulted in the appeal being considered on merits. Further, from the application made for stay on 19th August, 2008 as well as from the order dated 12th November, 2008 passed thereon, it is very clear that the appellant as well as the department bonafide proceeded on the basis that its appeal before the CIT(A) is pending. The lapse on the part of the assessee was unintentional.

Further, the analogy made in the impugned order with nature is inappropriate. Human interaction is influenced by human nature. Inherent in human nature is the likelihood of error. Therefore, the adage “to err is human”. Thus, the power to condone delay while applying the law of limitation. This power of condonation is only in view of human fallibility. The laws of nature are not subject to human error, thus beyond human correction. In fact, the Apex Court in *State of Madhya Pradesh Vs. Pradip Kumar 2000(7) SCC 372* has observed to the effect that although the law assists the vigilant, an unintentional lapse on the part of the litigant would not normally close the doors of adjudication so as to be permanently closed, as it is human to err. In this case, we have found that it is an unintentional lapse on the part of the appellant. We are, therefore, of the view that the impugned order is not sustainable and the question as framed is answered in favour of the appellant assessee.

6. However, the appellant should have taken care to ensure that the appeal is correctly filed with the office of the CIT(A). Although, we are satisfied that there was a mistake / error on the part of appellant in filing it with the wrong office, the appellant has not been able to explain the delay between 23rd March, 2010 to 12th May, 2011 i.e. the

period when it addressed a communication to the CIT(A) for hearing of its appeal till the date it requested the Assessing Officer to transfer the appeal to CIT(A). The explanation stated across the bar is that it was pursuing its appeal but no particulars are given. Therefore, although we set aside orders dated 4th September, 2013 of the Tribunal and 4th August, 2011 of the CIT(A) and restore the appeal to the file of the CIT(A) for fresh disposal in accordance with law, it is subject to the appellant paying all tax dues payable for the subject Assessment Year, if not already paid and additionally on payment of costs of Rs.10,000/- by a pay order drawn in the name of “The Principal Commissioner of Income Tax-15, Mumbai” within a period of four weeks from today.

7. The appeal is disposed of in the above terms.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)