OD-10

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/111/2022
IA NO:GA/1/2022 , GA/2/2022
NIRMAN CONSTRUCTION
VS.
ADDITIONAL COMMISSIONER OF INCOME TAX, RANGE – 1,
DURGAPUR & ORS.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE BIVAS PATTANAYAK

Date : 21st July, 2022.

Appearance :-
Mr. Sumit Ghosh, Adv.
….for appellant.
Mr. Tilak Mitra, Adv.
….for respondent

The Court : We have heard Mr. Sumit Ghosh, learned Advocate appearing for the appellant and Mr. Tilak Mitra, learned standing Counsel appearing for the respondent.

There is a delay of 737 days in filing the appeal. On perusal of the relevant dates we find that the appellant would be entitled to the benefit of the order passed by the Hon'ble Supreme Court by which the period of limitation in filing the appeal under various statutes was extended by the Hon'ble Supreme Court. For such reason the delay in filing the appeal is condoned. The application for condonation of delay is allowed.

ITAT/111/2022 :

This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 21st February, 2020 passed by the Income Tax Appellate Tribunal, Kolkata, "B" Bench, Kolkata in ITA No.2067/Kol/2017 for the assessment years 2007-08.

The appellant/assessee has raised the following substantial question of law for consideration:

i) *Whether the Learned Tribunal was justified in treating the outstanding liabilities of sundry creditors as unexplained cash credit when no sum was found credited in the books of the appellant during the relevant previous year, as such offering of explanation or satisfaction to the same does not arise ?*

ii) *Whether verification, at any point of time much after the transactions made for Assessment Year 2007-08, so as to find out the existence of sundry creditors, can have any effect to decide the genuineness of the transactions ?*

iii) *Whether it is not incumbent on the part of the concerned authority to grant a copy of the report of verification (if any) conducted by the Assessing Officer to the petitioner, to which the petitioner is prejudiced ?*

iv) *Whether the Learned Tribunal was justified in blindly supporting the order passed by the CIT(Appeals) wherein the order of addition made by the AO was upheld even though finding that the sundry creditors were paid to the extent of Rs.20,000/- which is within the limit as prescribed in Section 40A(3) of the Income Tax Act, 1961 ?*

v) *Whether the Learned Tribunal was justified that during the Financial Year 2006-07 (A.Y 2007-08) the authorities below never doubted and/or disallowed the purchases/expenditures and the payments made in respect of the same but once this outstanding balances were paid by cash but within the statutory limit, the same was doubted ?*

We have heard Mr. Sumit Ghosh, learned Advocate appearing for the appellant/assessee and Mr. Tilak Mitra, learned standing counsel appearing for the respondent/revenue.

The assessment for the year under consideration, A.Y. 2007-08 was completed under Section 143(3) of the Act by order dated 31st December, 2009. The first issue which was taken up for consideration by the assessing officer was with regard to the sundry creditors. Explanation was called for from the assessee which was furnished and the assessing officer partially accepted the explanation and in respect of certain other parties, he came to the conclusion that the explanation offered by the assessee was not satisfactory as there was no evidence and, accordingly, the transaction was held to be bogus and treated as unexplained cash-credit and, accordingly, the same was taxed.

The second issue was with regard to excess cash payment made by the assessee in the sundry creditor to the tune of Rs.6,82,658/-. Once again, the assessing officer was not satisfied with the explanation offered and, accordingly treated the balance as unexplained and taxed the same. However, in respect of two of the cases namely, that of Neha Enterprises and Purnima Trading Company relief was granted to the assessee.

The next issue which was taken up was with regard to cash payment exceeding Rs.20,000/-. Once again, the explanation offered by the assessee was found to be not convincing and a sum of

Rs.7,61,511/- being 20% of such payment of Rs.38,07,557/- was disallowed under Section 40A(3) of the Act.

The next issue which was taken up by the assessing officer was with regard to the employees' contribution to the Provident Fund and the assessing officer found that the amount was not deposited within the statutory due date and held it to be includible in the assessee's income in terms of Section 2(24)(x) read with Section 36(1)(va) of the Act.

The next issue was with regard to hire charges. The assessing officer held that the assessee has violated the provision of Section 40A(ia) of the Act and the entire amount of Rs.3,31,222/- was added back to the total income of the assessee. Aggrieved by such order the assessee preferred appeal before the Commissioner of Income Tax (Appeals), Durgapur (CIT(A).

Only two issues were canvassed by the assessee before the first appellate authority namely, with regard to sundry creditors and alleged inflated sundry liabilities. The CIT(A) considered the submission and partly allowed the appeal. The assessee being aggrieved by such order, had preferred an appeal before the tribunal and the revenue also preferred appeal before the tribunal as against that portion of the order passed by CIT(A) which went in favour of the assessee.

From the order passed by the tribunal, we find that the assessee was not represented. Mr. Ghosh, learned Advocate appearing for the appellant/assessee would submit that notice of hearing of the appeal was not served on the assessee. However, we find there is nothing to substantiate the said submission nor such a specific plea has been raised before us in this appeal. Be that as it may, the learned advocate appearing for the appellant would contend that the learned tribunal rejected the assessee's case by referring to two pages of the order passed by the CIT(A). However, the explanation offered by the assessee which has been recorded by the CIT(A) in respect of sundry creditors was not noted and since the assessee was not represented, they were in a disadvantageous position and facts could be placed before the tribunal which were already on record. Further, the learned Advocate appearing for the appellant would submit that the appellant is a works contractor and in the course of their activities, they are compelled to make cash payment and those cash payments have been less than Rs.20,000/-. To substantiate the genuineness of the same, ledgers were produced before the CIT(A) and, if one more opportunity is granted to the assessee, they will be able to substantiate before the tribunal with the records which were placed by the assessee before the CIT(A). It is further submitted that the tribunal, being the last fact finding authority, the assessee may be granted an opportunity to go before the learned tribunal.

We have heard Mr. Tilak Mitra, learned sanding counsel for the respondent in reply to the above submission.

We find from the order passed by the CIT(A) that each of the sundry creditors have been specifically dealt with by the CIT(A). Though there were total 20 sundry creditors, the addition was only in respect of 17 of them. Thus, the issue before the tribunal would be whether the explanation offered by the assessee before the CIT(A) was justified and was the CIT(A) right in rejecting the explanation. Such an exercise appears to have not been done in the instant case largely due to the fact that the assessee did not appear before the tribunal. Therefore, we are of the view, that one more opportunity can be granted to the assessee to go before the tribunal.

In the result, the appeal filed by the assessee (ITAT/111/2022) is allowed and the order passed by the tribunal is set aside and the matter is remanded to the tribunal for fresh consideration. The assessee is directed to appear before the tribunal on the date fixed without seeking for unnecessary adjournment and, they will also be entitled to file paper book containing documents which were placed before the CIT(A). After affording an opportunity to the assessee, the learned tribunal shall consider and decide the matter afresh on merits and in accordance with law. Consequently, the substantial questions of law are left open.

Consequently, the connected application for stay (GA/2/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)

SN/GH/Sdas/As.
AR(CR)