

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI
BEFORE SHRI R.C.SHARMA, AM AND SHRI RAVISH SOOD, JM**

ITA No. 6340/Mum/2014
(निर्धारण वर्ष / Assessment Year:2001-02)

Nokoda Granite & Marmo Pvt. Ltd. 17-1 Mathuradas Colony, HN8 PIPRDA, Rajsamand, Rajasthan	बनाम/ Vs.	ITO-10(1)(2) Mumbai-400002
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACN6937C		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Rajesh S. Shah, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Shri Suman Kumar, D.R

सुनवाई की तारीख / Date of Hearing	:	24.04.2018
घोषणा की तारीख / Date of Pronouncement	:	23.07.2018

आदेश / O R D E R
PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 24.06.2014, which in itself arises from the order passed by the A.O under Sec.144 r.w.s. 263 of the Income tax Act, 1961 (for short ‘Act’), dated 30.10.2006 for A.Y 2001-02. The assessee has assailed the order of the CIT(A) by raising before us the following grounds of appeal:

“Under the facts and circumstances of the ease CIT (A) has erred in dismissing the appeal on account of late filing of the appeal and erred in not condoning the delay. CIT (A) has erred in not considering the fact that the addition made by A.O on merits were not maintainable and therefore he should have given due regards to merit as against technical fault of the assessee.

CIT(A) has erred in not considering the proposition of supreme court in case of Improvement trust V/S Ujagar Singh supreme court civil appeal

no 2395 of 2008, where it has been held that unless the delay is writ large and assessee has good case on merit the delay should be condoned. CIT (A) has erred in not considering the fact that if the matter was decided on merits the addition made by A.O were to be deleted as per the remand report submitted by AO in respect to the appeal filed.

CIT(A) has erred in brushing aside remand report of the A.O called for by him where the AO had admitted that addition could not be made in the year under consideration and merely deciding the appeal on technical Breach.

RELIEF CLAIMED

- 1. Looking to the facts and circumstances of the case the additions made by A.O be deleted and Income be assessed at income of Rs.nil/- as returned by the appellant.*
- 2. Addition made under the head unexplained cash credit amounting to Rs.18,24,500/- be deleted.*
- 3. The appeal may be decided on merit as against technical Breach.*

The appellant craves right to add, amend, alter, delete or modify any of the Grounds of Appeal at the time of hearing.”

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of marble slabs and tiles had filed its return of income for A.Y 2001-02 declaring total income at Rs.Nil. Original assessment under Sec.143(3) of the Act was framed on 31.12.2003 accepting the returned income of the assessee. Subsequently, the CIT-10, Mumbai observed that the assessee had taken unsecured loans of Rs.18,24,500/- from four parties for which confirmations were not filed at the time of passing of the original assessment order. Still further, it was noticed by the CIT that unsecured loans aggregating to Rs.38,70,982/- (including Rs.34,500/- received from the director) were also not examined by the A.O while framing the assessment. Accordingly, the CIT-10, Mumbai after hearing the assessee passed an order under Sec. 263 and revised the assessment order dated 31.12.2003 by holding the same as erroneous and prejudicial to the interest of the revenue. The CIT directed the A.O to make a fresh assessment after allowing the assessee a proper opportunity of being heard.

3. On the basis of the directions of the CIT the A.O issued a notice under Sec.143(2) and 142(1) to the assessee. However, as the assessee failed to comply with the directions of the A.O, thus the latter framed assessment under Sec.144 r.w.s. 263 on the basis of the material available on record. The A.O while framing the assessment observed that the assessee had

shown an amount aggregating to Rs.18,24,500/- as unsecured loans in its balance sheet on 31.03.2001, as under:

Particulars	Dr. Amount	Cr. Amount
M/s B.B.G. Builder & Dev P. Ltd.		13,90,000.00
Shri Shantilala Maroo		1,00,000.00
Smt. Neema Pagrika		3,00,000.00
Smt. Prem Devi Badala		34,500.00
Total		18,24,500.00

However, as the assessee failed to prove the genuineness of the transactions and the creditworthiness of the aforementioned parties, hence the A.O added the amount of Rs.18,24,500/- as an unexplained cash credit under Sec.68 of the Act. On the basis of the aforesaid deliberations, the A.O after setting off the brought forward losses and unabsorbed depreciation assessed the income at Rs.19,10,650/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The assessee submitted before the CIT(A) that the aforesaid amount of Rs.18,24,500/- which was brought to tax by the A.O as an unexplained cash credit under Sec.68 were not fresh credits, but the brought forward closing balances of the previous years. In the backdrop of the aforesaid contentions advanced by the assessee the CIT(A) called for a remand report from the A.O. The AO submitted his remand report, which read as under:

“2. In this case the assessee has filed an appeal before you contending that the addition of Rs.18.24 lakhs u/s.68 during the year in question is bad in law. The A.O. has made an addition on account of various loans amounting to Rs. 18.24 lakhs which were appearing as outstanding at the year end. The assessee further contended that he had not received the assessment order dt.30.10.2006 passed u/s.144 r.w.s. 263.

3. Facts in brief

In this case the assessment u/s. 143(3) of the I. T. Act was completed on 31.12.2013 assessing a total income of Rs.Nil after allowing unabsorbed depreciation of Rs.8,40,126/-. Subsequently, the CIT-10, Mumbai finds that the assessee had taken unsecured loans amounting to Rs,.18.24 lakhs from 4 parties for which confirmations were not filed at the time of assessment. Further, the unsecured loans at Rs.38,70,982/- including Rs.34,500/- from the Director, as per balance sheet also remained to be examined at the time of framing the assessment. Accordingly, the CIT-10, Mumbai passed an order u/s.263 of the I. T. Act and cancelled the assessment order dt.31.12.2003 treating

the same as "erroneous and prejudicial to the interest of revenue. The CIT-10 directed A.O. to make the fresh assessment after allowing the assessee proper opportunity of being heard.

- 3.1 Accordingly, notices were issued and served upon the assessee. In response to this, the assessee filed some details and thereafter, there was no compliance from the assessee. Therefore, after giving show cause notice, the assessment u/s. 144 r.w.s.263 was completed on the basis of material available on record. On perusal of details and ledger account, the A.O. finds that the cash credit appearing in the books of accounts of the assessee is not genuine one and assessee failed to prove the creditworthiness and genuineness of the creditors. Accordingly, Rs. 18.24 lakhs being unexplained cash was added in total income of the assessee and assessment was completed u/s.144 r.w.s. 263 of the I. T. Acton 30.10.2006 raising a demand of Rs. 10,65,458/-. The assessment order alongwith demand notice were duly served on the assessee.*
- 3.2 Now after period of 6-7 year Assessee preferred an appeal before your honour and submitted details inform of additional evidence. After going through the said details, the opportunity of hearing had given to the assessee and asked to file required details in support of their contention. In response to this, C.A. Mr. Salil Lodha on behalf of assessee attended and submitted required details and explained the matter.*
- 4. During the course of proceeding the assessee has contended that in the year 2007-08, Mr. Mahendra Kothari purchased the said company and accordingly, changed the old directors. Now the new Director are Mahendra Kothari and Smt. Snehlata Kothari. As per their contention, the assessee company came to know regarding income tax dues only after pressing the recovery of income tax.*
- 5. On perusal of details submitted by the assessee before your honour and also during the course of remand proceeding, it is seen that no new loan were taken by the assessee during the year and the amount which were added is the closing balance of previous year. The copy of ledger account of all the parties and confirmation thereof were perused and primfacie it appears to be correct.*

In view of the above, the appeal may be decided on the facts and merit of the case."

5. The CIT(A) on a perusal of the remand report and on further verifications gathered that the assessee had filed the appeal after a lapse of a period of about six years from the date of the assessment order passed by the A.O under Sec.144 r.w.s. 263 of the Act. The assessee in its rebuttal though submitted before the CIT(A) that it had not received the original assessment order, but no evidence in support of his said claim was filed. The CIT(A) taking cognizance of the fact that as no affidavit was filed by the assessee explaining the reason for delay in filing of the appeal before him,

thus concluded that the same was backed by total negligence on the part of the assessee to file the same within the statutory time period. The CIT(A) was also not persuaded to accept the contention raised by the assessee that the assessment order passed under Sec.144 r.w.s. 263 was not received by the assessee. On the basis of his aforesaid deliberations the CIT(A) declined to condone the delay and dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that the CIT(A) loosing sight of the specific claim of the assessee that the original assessment order passed under Sec.144 r.w.s 263 of the Act was not received by the assessee, had thus most arbitrarily dismissed the appeal. It was submitted by the Id. A.R that on merits the assessee had a good case as the A.O in his remand report had himself admitted that the amount of Rs.18,24,500/- which was assessed as an unexplained cash credit under Sec.68 in the hands of the assessee pertained to the closing balances of the previous year and no fresh loan was taken by the assessee during the year under consideration. The Id. A.R submitted that the assessee company which was incorporated on 18.01.1995 had its registered office at NH-8, Piparda-Kankoroli, Rajsamand. The Id. A.R further submitted that the assessee had its head office at Badala House, 175/1, Fatehpura, Udaipur and was carrying out its business in Mumbai from 17-1, Mathuradas Colony, Kalina, Santacruz (E). The Id. A.R taking us through the facts of the case (Page 2-6) of APB submitted that the directors of the assessee company were Mr. Sampatlal Badala, Shri Sampat Badala and Smt. Prem Devi Badala (wife of Shri Sampat Badala). It was submitted by the Id. A.R that the aforesaid properties were owned by the directors of the assessee company. Mr. Sampat Badala who owned the property at Mumbai, had allowed an income tax practitioner viz. Mr. N. Shiva Rao who was looking after affairs of the company and filing its returns of income to carry on his profession from the premises of the assessee at 17-1, Mathuradas Colony, Kalina, Santacruz (E), Mumbai. The Id. A.R submitted that due to heavy business losses suffered by the assessee

company, the aforesaid properties situated at Mumbai and Udaipur were sold by Sh. Sampat Kumar Badala. However, Mr. N. Shiva Rao continued to file the returns of income of the assessee company mentioning the aforesaid Mumbai address. The business of the assessee company was sold in the year 2007-08 to Mr. Mahindra Kothari and Smt. Snehlata Mahindra Kothari, who as the new directors substituted the old directors, with an understanding from the latter that all pending income tax work would be completed till the year 2009-10 and no disputed amount would be payable after that date. It was submitted by the Id. A.R that in the backdrop of the aforesaid facts Mr. N. Shiva Rao gave an undertaking to the directors of the assessee company that he would clear all the pending income tax matters of the assessee company. The Id. A.R submitted that during the absence of the aforesaid directors of the assessee company, viz. Sampat Kumar Badala, Shri Sampatlal Badala and Smt Prem devi Badala from Mumbai, the correspondences pertaining to the assessment proceedings which were initiated by the A.O under Sec.143(2) pursuant to the directions given by the CIT under Sec.263 were probably served on Mr. N. Shiva Rao, however the same were never communicated to the aforesaid directors of the assessee company. It was submitted by the Id. A.R that in the backdrop of the aforesaid facts assessment was framed by the A.O under Sec.144 treating the entire outstanding balance of Rs.18,24,500/- as an unexplained cash credit under Sec.68 in the hands of the assessee. It was submitted by the Id. A.R that as the property of the assessee at Mumbai viz. 17-1, Mathuradas colony, Santacruz (E), Mumbai, was sold by the old directors of the assessee company in the year 2005, therefore, the revised assessment order passed by the A.O on 30.10.2006 at the said Mumbai address of the assessee was not received by the said directors, as they were no more available at the said address. It was further submitted by the Id. A.R that not only the representative of the assessee Mr. N. Shiva Rao had failed in communicating the notices which were received from the department, but even the A.O had erred in failing to appreciate that as all the correspondences of the assessee with the CIT-10, Mumbai in the course of the revision proceedings, as well as the order passed by him under Sec.263 clearly mentioned the registered

office address of the assessee, viz. NH-8, Piparda-Kankoroli, Rajsamand, Rajasthan, therefore, there was no reason for him to have passed the order under Sec. 144 r.w.s. 263 at the Mumbai address of the assessee company viz. 17-1, Mathuradas Colony, Kalina Santa Cruz (E), Mumbai. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that as the assessment order was passed on the wrong address, therefore, the same was never communicated to the assessee. The ld. A.R in order to impress upon us that the A.O had passed the order under Sec. 144 r.w.s. 263 at a wrong address, as well as the fact that the revenue was well aware of the fact that the directors of the assessee company viz. Sh. Sampatlal Badala, Sh. Sampat Badala and Smt. Prem Devi Badala were available at the registered office address of the assessee company viz. NH-8, Piparda Rajsamand, Rajasthan, took us through a chart which was filed during the course of the proceedings before us, as under:

Sr. No.	Particulars	Date	Address
1.	Original Assessment Order passed u/s 143(3)	31 st December, 2003	1/1, Mathuradas Colony, Santacruz (E), Mumbai
2.	Order u/s 263 passed on	12 th July, 2005	NH8, Piparda, Rajsamand, Rajasthan
3.	Assessment Order passed in pursuant to order u/s 263 under Sec.144 of the Act	30 th October 2006	1/1, Mathuradas Colony, Santacruz (E), Mumbai
4.	Appeal filed before the CIT(A) 21	6 th March, 2013	NH8, Piparda, Rajsamand, Rajasthan
5.	Remand Report	5 th December 2013	
6.	Order passed by CIT(A) 21	24 th June, 2014	NH8, Piparda, Rajsamand, Rajasthan

The ld. A.R further took us through an affidavit of Smt. Snehlata Mahindra Kothari, one of the new directors of the assessee company. The aforesaid director had in her affidavit deposed that the exparte order passed by the A.O for A.Y 2001-02 on 30.10.2006 was never received by the company. It was further deposed by her that the likelihood of the assessment order having been served on the earlier tax consultant of the assessee company, viz. N. Shiva Rao who was in the past looking after the latters tax affairs and was carrying on his profession from the said address could not be ruled out. It was further stated by her that it was only when the new representative of the assessee company who was looking after the tax affairs of the company, in the course of the latters scrutiny assessment for A.Y 2009-10 and A.Y 2010-11 was made aware of the outstanding arrears against the company

for A.Y 2001-02, that it was for the very first time on making of further enquiry that it was gathered by him that an exparte assessment order for A.Y 2001-02 was way back passed in the case of the assessee company. It is further deposed that the said tax consultant immediately on learning about the said factual position applied for a copy of the assessment order, which was made available to him on 20.02.2013. The director had further deposed that immediately on obtaining the assessment order an appeal was filed on 06.03.2013 involving no further delay. The ld. A.R in the backdrop of the aforesaid facts submitted that as the original assessment order passed by the A.O under Sec.144 r.w.s 263 on 30.10.2006 was never made available to the assessee company, but rather the same had been delivered only as on 20.02.2013, therefore, the appeal filed by the assessee with the CIT(A) on 06.03.2013 being well within the stipulated time period did not involve any delay. The ld. A.R further submitted that the assessee even otherwise has a good case on merit. It was submitted by the ld. A.R that as admitted by the A.O in his remand report filed with the CIT(A) that the amount of Rs.18,24,500/- was the opening balance of the outstanding loans and no new loan was taken by the assessee during the year under consideration viz. A.Y 2001-02, therefore, the addition made under Sec. 68 could not be sustained. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the order passed by the CIT(A). It was submitted by the ld. D.R that as the appeal filed by the assessee before the CIT(A) involved a delay of about six and a half years, thus the latter taking cognizance of the inordinate delay had rightly declined to admit the appeal. It was further averred by the ld. D.R that the CIT(A) while dismissing the appeal had observed that the assessee had not even filed any affidavit explaining the unreasonable delay involved in filing of the appeal.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find from a perusal of the order passed by the CIT(A) that the appeal of the assessee was dismissed by him for the reason that the same involved a delay of a period of more than six years. We have deliberated on

the facts in context of the impugned delay in filing of the appeal by the assessee before the CIT(A). We find that as averred by the ld. A.R and on the basis of the facts gathered from the affidavit of Smt. Snehlata Mahindra Kothari, director of the assessee company (with effect from 19.02.2008), the earlier directors of the assessee company viz. Shri Sampatlal Badala, Shri Sampat Badala and Shri Prem Devi Badala had due to heavy business losses suffered by the assessee company had resigned as directors and had walked out of the business and transferred the same to Shri Mahindra Kothari and Smt. Snehlata Kothari, who were inducted as the new directors of the company. We find that as Shri Sampat Badala had sold his property at Mumbai from where the company was earlier functioning, viz. 17-1 Mathuradas Colony, Kalina, Santacruz (E) in the year 2005, thus there could have been no occasion for the assessee to have received the order passed by the A.O under Sec.144 r.w.s. 263, dated 30.10.2006 at the address which was mentioned by the A.O in the assessment order. We are of the considered view that the CIT-10, Mumbai being aware of the fact that the directors of the assessee company were no more available at the aforementioned address viz. 17-1 Mathuradas Colony Kalina, Santacruz (E), had thus passed the order under Sec.263 dated 12.07.2005 at the registered address of the assessee company, viz. NH-8, Piparda-Kankoroli, Rajsmand, Rajasthan. We find it beyond comprehension that now when the order was passed by the CIT-10, Mumbai at the registered address of the assessee company at NH-8, Piparda Rajsmand, Rajasthan, thus there could be no valid reason on the part of the A.O to have passed the order under Sec. 144 r.w.s 263 at the Mumbai address of the assessee, viz. 17-1, Mathuradas Colony Kalina, Santacruz (E). We thus, are of the considered view that as the A.O had passed the assessment order under Sec. 144 r.w.s. 263 making a wrong mention of the address of the assessee, which as observed by us hereinabove was clearly in contradiction of the address at which the order under Sec.263 was passed by the CIT-10, Mumbai, thus the probability that the assessment order was not served on the directors of the assessee company, in the absence of any material proving to the contrary, cannot be ruled out. We may herein observe that even during the course of the hearing

of the appeal before us the ld. D.R had failed to place on record any such material which could conclusively prove to the hilt that the assessment order passed by the A.O under Sec. 144 r.w.s. 263, dated 30.10.2006 was validly served upon the assessee. We are of a strong conviction that in the backdrop of the aforesaid facts it emerges that the assessment order passed by the A.O under Sec.144 r.w.s. 263 was not served on the assessee company. Rather, it was only after the new tax consultant of the assessee company was made aware of the outstanding tax liability, that at his request a copy of the assessment order was made available to him. We thus, are of the considered view that it can safely be concluded that as the assessment order was made available to the assessee only as on 20.02.2013 (as deposed by the director in her affidavit), thus the appeal filed by the assessee with the CIT(A) on 06.03.2013 was well within the stipulated time and did not involve any delay. Before parting, we may herein observe that as observed by us hereinabove, no material had been placed on record by the ld. D.R which could have persuaded us to conclude that the order passed by the A.O under Sec. 144 r.w.s. 263, dated 30.10.2006 was earlier validly served on the assessee.

8. We thus, in the backdrop of the aforesaid facts restore the matter to the file of the CIT(A) with a direction to readjudicate the issue on merits. We may herein observe that as the matter has been set aside by us for fresh adjudication, thus we refrain from adverting to the merits of the case.

9. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 23.07.2018

Sd/-

Sd/-

(R.C. Sharma)
ACCOUNTANT MEMBER

(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.07.2018

Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai**