



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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA no.2366/Mum./2018  
(Assessment Year : 2009-10)

M/s. Deekay Gears  
15, Dee Kay Industrial Estate  
Lake Road, Bhandup West  
Mumbai 400 021  
PAN – AACFD1150C

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-29(1), Mumbai

..... Respondent

Assessee by : Shri Dharmesh Shah  
Revenue by : Shri Chaitanya Anjaria

Date of Hearing – 03.01.2019

Date of Order – 16.01.2019

**ORDER**

Aforesaid appeal has been filed by the assessee challenging the order dated 21<sup>st</sup> September 2017, passed by the learned Commissioner (Appeals)-40, Mumbai, pertaining to assessment year 2009-10.

2. There is a delay of 116 days in filing the present appeal. The assessee has filed a petition seeking condonation of delay accompanied by an affidavit sworn by Shri Prithipal Singh Sachdev, a Partner of the assessee firm. On the basis of the averments made in

the delay condonation petition and the affidavit, the learned Authorised Representative submitted, Shri Prithipal Singh Sachdev is a Partner of the firm who was looking after the Income Tax matters, finance and accounting affairs of the firm. He submitted, the said Partner, being 75 years old, is suffering from various old age related medical and health issues like ischemic Heart diseases with poor cardiac function, peripheral neuropathy, prostate, diabetes and erratic high blood pressure, hence, is under constant medication. He submitted, due to the continuous ill health, particularly from August 2017 to April 2018, the said Partner was instructed by the doctor to take complete bed rest and not to attend office. He submitted, due to his absence, the other partner who was unaware of the Income Tax matters could not take necessary steps as he was completely occupied with the business affairs. Thus, he overlooked / lost sight of filing of appeal against the order of the learned Commissioner (Appeals). The learned Authorised Representative submitted, since the delay is for bona fide reasons and due to reasonable cause, it should be condoned and the appeal be admitted for hearing on merits. In support of his contentions, the learned Authorised Representative relied upon a number of decisions including the decision of the Hon'ble Supreme Court in Collector of Land Acquisition v/s Mst. Katiji & Ors., 167 ITR 471 (SC).

3. The learned Departmental Representative opposed condonation of delay.

4. I have considered rival submissions and perused material on record. Upon verifying the averments made in the delay condonation petition and the affidavits of the partners filed before me along with the medical certificates, I am of the view that the delay in filing the present appeal is due to reasonable cause. Accordingly, I am inclined to condone the delay of 116 days and admit the appeal for adjudication on merit.

5. Brief facts are, the assessee a Partnership firm is engaged in the business of manufacturing of industrial gear and gear boxes. For the assessment year under consideration, the assessee filed its return of income on 30<sup>th</sup> September 2009, declaring total income of ₹ 17,90,190. Assessment in case of the assessee was originally completed under section 143(3) of the Income Tax Act, 1961 (for short "*the Act*") on 21<sup>st</sup> October 2011, by determining the total income at ₹ 18,96,742. Subsequently, on the basis of information received from the DGIT (Inv.), Mumbai, and Sales Tax Department, Government of Maharashtra, that certain purchases claimed to have been made by the assessee are not genuine, the Assessing Officer re-opened the assessment under section 147 of the Act. During the re-assessment proceedings, the Assessing Officer called upon the

assessee to prove the genuineness of purchases of ₹ 52,22,979, claimed to have been made from five parties by furnishing necessary documentary evidences. Though, the assessee produced some documentary evidences to prove the genuineness of purchases made, however, the Assessing Officer did not find them convincing or acceptable. Therefore, he treated the purchases of ₹ 52,22,979, as non-genuine and proceeded to estimate profit @ 12.5% on such purchases which worked out to ₹ 6,52,870. The aforesaid amount was added to the income of the assessee. Being aggrieved with such addition, the assessee preferred appeal before the first appellate authority.

6. It is evident, in the course of hearing before the learned Commissioner (Appeals), the assessee filed letter dated 19<sup>th</sup> September 2017, seeking withdrawal of the appeal. Taking note of the aforesaid letter filed by the assessee, learned Commissioner (Appeals) dismissed the appeal as withdrawn. Against the aforesaid order of the learned Commissioner (Appeals), the assessee is in further appeal before Tribunal.

7. Explaining the reason for withdrawal of appeal filed before the first appellate authority, the learned Authorised Representative submitted, as the Partner looking after the Income Tax matters was not able to attend to it due to his continuous illness, the other Partner

since was completely occupied with the main business activity and was not aware of Income Tax compliances and pending litigations, decided to withdraw the appeal filed before the learned Commissioner (Appeals). He submitted, he filed the letter of withdrawal before the first appellate authority without properly knowing the merits of the issue and the consequences which may follow after withdrawal of appeal. He submitted, for the very same reason the said partner also decided against filing any appeal challenging the order of the learned Commissioner (Appeals) which resulted in delay in filing the present appeal. He submitted, only after the main Partner who was looking after the Income Tax matters partly recovered from his illness, he came to know about withdrawal of appeal and decided to contest the issue on merit by filing the appeal before the Tribunal. The learned Authorised Representative submitted, notwithstanding the fact that the assessee has filed a letter seeking withdrawal of the appeal, however, as per the provisions of section 251 of the Act, the learned Commissioner (Appeals) was incompetent to dismiss the appeal in limine without deciding it on merits. Therefore, he submitted, since learned Commissioner (Appeals) has not decided the appeal of the assessee on merit, the order passed has to be set-aside with a direction to decide assessee's appeal on merit. In support of his contention, the learned Authorised Representative relied upon the following decisions:-

- i) CIT v/s Rai Bahadur Hardtroy Motilal Chamaria, [1967] 66 ITR 443 (SC);*
- ii) Biswaranjan Bysack v/s CIT, 1967] 66 ITR 452 (SC);*
- iii) CIT v/s Premkumar Arjundas Luthra (HUF), ITA no.2336 of 2013, dated 25.04.2016; [2017] 297 CTR 614 and*
- iv) M. Loganathan v/s ITO, [2013] 350 ITR 373 (Mad.).*

8. The learned Departmental Representative submitted, since the assessee filed a letter seeking withdrawal of appeal, it was not necessary for the learned Commissioner (Appeals) to decide the appeal on merit.

9. I have considered rival submissions and perused material on record. I have also applied my mind to the decisions relied upon by the learned Authorised Representative. Undisputedly, in the course of proceedings before the first appellate authority the assessee had filed letter dated 19<sup>th</sup> September 2017, seeking withdrawal of the appeal. Taking note of the said letter, learned Commissioner (Appeals) dismissed assessee's appeal in limine without deciding it on merit. Therefore, the issue which arises for consideration before me is, whether as per the provisions of section 251 of the Act, learned Commissioner (Appeals) can permit withdrawal of the appeal by dismissing it in limine without deciding on merits. As per the provisions of section 251(1)(a) of the Act, the first appellate authority is

conferred with the powers to decide an appeal against an order of assessment by confirming, reducing, enhancing or annulling the assessment. Even, the power to set-aside an assessment order was taken away from the first appellate authority by the amendment brought to the statute in Finance Act, 2001, w.e.f. 1<sup>st</sup> June 2001. Therefore, while deciding an appeal filed by the assessee under section 246A of the Act, learned Commissioner (Appeals) has to act within the parameters laid out in section 251(1)(a) of the Act. Interpreting the aforesaid statutory provision, the Hon'ble Jurisdictional High Court in Premkumar Arjundas Luthra (HUF) (supra) has held as under:-

*"8. From the aforesaid provisions, it is very clear once an appeal is preferred before the CIT(A), then in disposing of the appeal, he is obliged to make such further inquiry that he thinks fit or direct the Assessing Officer to make further inquiry and report the result of the same to him as found in Section 250(4) of the Act. Further Section 250(6) of the Act obliges the CIT(A) to dispose of an appeal in writing after stating the points for determination and then render a decision on each of the points which arise for consideration with reasons in support. Section 251(1)(a) and (b) of the Act provide that while disposing of appeal the CIT(A) would have the power to confirm, reduce, enhance or annul an assessment and/or penalty. Besides Explanation to sub-section (2) of Section 251 of the Act also makes it clear that while considering the appeal, the CIT(A) would be entitled to consider and decide any issue arising in the proceedings before him in appeal filed for its consideration, even if the issue is not raised by the appellant in its appeal before the CIT(A). Thus once an assessee files an appeal under Section 246A of the Act, it is not open to him as of right to withdraw or not press the appeal. In fact the CIT(A) is obliged to dispose of the appeal on merits. In fact with effect from 1st June, 2001 the power of the CIT(A) to set aside the order of the Assessing Officer and restore it to the Assessing Officer for passing a fresh order stands withdrawn. Therefore, it would be noticed that the powers of the CIT(A) is co-terminus with that of the Assessing Officer i.e. he can do all that Assessing Officer could do. Therefore just as it is not open to the*

*Assessing Officer to not complete the assessment by allowing the assessee to withdraw its return of income, it is not open to the assessee in appeal to withdraw and/or the CIT(A) to dismiss the appeal on account of non-prosecution of the appeal by the assessee. This is amply clear from the Section 251(1)(a) and (b) and Explanation to Section 251(2) of the Act which requires the CIT(A) to apply his mind to all the issues which arise from the impugned order before him whether or not the same has been raised by the appellant before him. Accordingly, the law does not empower the CIT(A) to dismiss the appeal for non-prosecution as is evident from the provisions of the Act.”*

10. Similar view was expressed by the Hon'ble Madras High Court in M. Loganathan (supra). If the ratio laid down in the aforesaid decisions is carefully examined, it clearly emerges that learned Commissioner (Appeals), notwithstanding the fact that the assessee has filed an application seeking withdrawal of the appeal, is obliged and duty bound under the Act to decide the appeal on merits within the parameters of section 251(1)(a) of the Act. Thus, following the ratio laid down in the aforesaid decision, I have to hold that while dismissing assessee's appeal in limine without deciding on merit, learned Commissioner (Appeals) has not exercised his power in consonance with the provisions of section 251(1)(a) of the Act. Accordingly, I am inclined to set-aside the impugned order of the learned Commissioner (Appeals). However, since, the issues raised in the said appeal have not been decided on merit, I restore all the issues raised in the present appeal to the learned Commissioner (Appeals) for de novo adjudication. Consequently, the appeal filed by the assessee before the learned Commissioner (Appeals) is restored back to its

original position. It is open for the assessee to raise all such issues before the first appellate authority for contesting the assessment order passed by the Assessing Officer. Needless to mention, the learned Commissioner (Appeals) must afford reasonable opportunity of being heard to the assessee before deciding the appeal. With the aforesaid observations, the grounds raised are allowed for statistical purposes.

11. In the result, appeal is allowed for statistical purposes.

Order pronounced in the open Court on 16.01.2019

**SD/-  
SAKTIJIT DEY  
JUDICIAL MEMBER**

**MUMBAI, DATED: 16.01.2019**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

By Order

(Sr. Private Secretary)  
ITAT, Mumbai