IN THE INCOME TAX APPELLATE TRIBUNAL,
HYDERABAD 'A' BENCH, HYDERABAD

[Coram: Pramod Kumar (Vice President) and P Madhavi Devi (Judicial Member)]

SA No. 34/Hyd/2019
ITA No.: 2043/Hyd/18
Assessment year: 2012-13

R.A.K. Ceramics, UAE …………………….. **Appellant**
c/o R A K Ceramics India Pvt Ltd
PB No 11, IDA Peddapuram, ADB Road,
Samalkot, East Godavari District 533440
[PAN: AAECR7848E]

Vs

Deputy Commissioner of Income Tax
International Taxation (2), Hyderabad ……………..….......**Respondent**

Appearances by
Amit Mishra and **Swapnil Deshmukh** *for the appellant*
Satya Pinisetty and **YVST Sai,** *for the respondent*

Date of concluding the hearing : February 22, 2019
Date of pronouncing the order : March 29, 2019

O R D E R

Pramod Kumar VP:

1. By way of the stay petition, the assessee appellant seeks a stay on collection/ recovery of the tax and interest demands aggregating to Rs 9,83,640 impugned in appeal before us for the assessment year 2012-13. On this stay petition being taken up for hearing, and upon perusal of material on record, we put it to the parties whether the issue in appeal being a short legal issue, within narrow compass of material facts, the appeal itself can be disposed of today. Learned representatives were gracious enough to accept the suggestion and argued the matter on merits. It is in this backdrop that the related appeal was taken up for hearing.

2. The appeal filed by the assessee is directed against the order dated 11th September 2018 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.

3. It is, at the outset, important to note the fact that the CIT(A) has summarily dismissed the appeal as time barred, and that he has declined to condone the delay in filing of appeal

before him. The assessment order under section 143(3) in this case was passed on 31st March 2016. The assessee filed a rectification petition under section 154 in respect of levy of surcharge and cess on the tax rates prescribed under the tax treaties. The stand of the assessee was thus such a levy is a mistake apparent on record. The Assessing Officer rejected the said petition and held that there is no mistake apparent on record. Aggrieved, assessee carried the matter in appeal before the CIT(A) who declined relief to the assessee on the ground that it is a debatable issue and thus outside the scope of inherently limited scope of Section 154. This order was passed on 22nd September 2017 by the CIT(A), and served on the assessee on 24th November 2017. It was within 29 days of receiving this order that the assessee filed the appeal before the CIT(A) on 27th December 2017. The CIT(A) declined to condone this delay on the ground that the assessee had best possible professional advice, that ignorance of law is not an excuse, that the delay can be condoned only when it was beyond the control of the assessee to file the appeal that it was a conscious decision of the assessee to seek remedy by way of rectification petition and that the assessee can be allowed to abandon his earlier stand and follow an altogether different course. The appeal was thus summarily dismissed. Aggrieved, *inter alia,* by this action of the CIT(A), the assessee is in appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. The powers conferred upon the CIT(A) under section 249(3), for condoning the delay in filing of appeal if he is satisfied that the appellant had sufficient cause for not presenting it within that period, are statutory power to alleviate genuine suffering of taxpayers, so far as their grievance redressal by way of appeals are concerned, within framework of law. When a public authority has the powers to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify—a legal position which has the approval of Hon'ble Supreme Court. The question then arises as to what should be the circumstances which ordinarily warrant or justify the relaxation of the rigour of limitation provisions. Let us in this light look at the facts of the present case, and examine as to what should have been right considerations for taking a call on whether or not delay in filing of appeal should be condoned. We find guidance about the considerations on which such powers are required to be exercised in the provisions of the Limitation Act, 1963 itself and unambiguous thrust of scheme of things therein. As we deal with this aspect of the matter, it is useful to take note of Section 14 of the Limitation Act which is titled "**Exclusion of time of proceeding *bona fide* in court without jurisdiction**" Section 14(1) of the Limitations Act provides that, "**In computing the period of limitation …………. the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it**". It is also only elementary that while interpreting a statutory provision one has to go from red to the black (*a rubro ad nigrum)* which essentially lays

down the principle that the heading must hold key to the text. Translated literally, the latin maxim *a rubro ad nigrum* implies that one has to read from the red to the black; from the rubric or title of a statute, (which, in ancients times used to be written in red letters) to its body, which was in the ordinary black. The provisions of this exclusion clause are required to be interpreted in a liberal manner in consonance with the object indicated by the heading of the section. Essentially, therefore, when the delay in filing of an appeal is on account of the fact that the person filing the appeal was pursuing his case before the wrong forum, the scheme of law requires such a delay to be condoned. When we thus interpret the provisions of Section 14(1), there is no ambiguity about the scheme of things envisaged by this statutory provision. What essentially follows from this provision is that when someone is pursuing the matter in a forum, whether original or appellate, which, on account of "defect of jurisdiction or other cause of a like nature" is unable to entertain the grievance of the applicant, the time so spent by that person is to be excluded. The same logic, as set put in section 14(1) must, therefore, apply to the present proceedings as well. There is no dispute that the assessee was *bonafide* exploring the other legal option available to it, and, accepting the availability of that course of option to the assessee but rejecting it on a peculiar factual ground, that the Assessing Officer did not entertain the said challenge. In the proceedings before the CIT(A), it was reiterated that so far those proceedings are concerned, i.e. rectification of mistake under section 154, debatable issues cannot be rectified and the issues raised by the assessee were held to be debatable in nature. The relief was declined on the ground of, to borrow the words from Section 14(1), "defects of jurisdiction" or at best "other causes of similar nature". When such is the scheme of things in the Limitations Act and the factual matrix of this case, it is futile to even plead that present case was not a fit case for the CIT(A) to condone the delay. The only question that we must carefully examine is whether such an action of the assessee appellant, in pursuing the matter before the wrong forum, was *bonafide* action or not. Given the nature of grievance of the assessee, it was reasonable to expect that the remedy will be available under section 154 as well. There are large number of decisions holding that cess and surcharge can be levied on tax charged at the rate prescribed in the tax treaties, and in our humble understanding, that is an open and shut issue in favour of the assessee. That was perhaps the reason that at the stage of hearing of appeal itself, though with the consent of the parties- which they extended graciously, this appeal was picked up for out of turn hearing here and now. In these circumstances, the approach of the assessee in filing a rectification petition against the levy of cess and surcharge, in addition to the tax rate prescribed under the India UAE Double Taxation Avoidance Agreement, in our humble understanding, cannot be said to be lacking *bonafides.* Viewed thus, the CIT(A) was clearly in error in not condoning the delay in filing of appeal which was, in our humble understanding, a result of a *bonafide,* even if overoptimistic and erroneous, assessment about efficacy of section 154 to seek redressal of his grievance in question. The assessee had followed an inappropriate course, and, with the benefit of hindsight, there is no dispute about this error. The delay in filing of appeal before the CIT(A), against the assessment under section 143(3), therefore, indeed deserves to be condoned. We reverse the stand of the CIT(A) on this point. The order of the CIT(A) thus stands vacated. In this view of the matter, it is not even necessary to examine

whether the time spent by the appellant in pursuing the remedy under section 154 is required to be excluded, under section 14(1) of the Limitations Act, in computation of time limit, and whether when that period is so excluded, whether the appellant can be found to be at fault so far as limitation aspect is concerned. Let us now take up the issue in appeal on merits.

6 The assessee before us is a company fiscally domiciled in, and tax resident of, the United Arab Emirates. During the relevant previous year, the assessee earned an income of Rs 11,96,02,711, on account of royalty income received from R.A.K. Ceramics India Pvt Ltd, and of Rs 2,00,29,683, on account of interest income received from R.A.K. Ceramics India Pvt Ltd. There is no dispute that under the provisions of the applicable tax treaty, i.e. under article 12(2) and 11(2)(b) of the India UAE Double Taxation Avoidance Agreement, these incomes are taxable @ 10% (royalty) and @ 12.5% (interest) respectively. The tax so computed, that aggregated to Rs 1,44,63,981, was duly deducted tax at source and paid over to the Government. Upto this point, there were no issues. The disagreement, however, arose when the Assessing Officer also levied 2% surcharge and 3% education cess on the tax so computed. The assessee's grievance against these levies was summarily rejected by the CIT(A). The assessee is aggrieved and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

8. We find that the expression 'taxes covered' in India has been defined under article 2(2) of the applicable India UAE Double Taxation Avoidance Agreement as "(i) the income-tax including any surcharge thereon ; (ii) the surtax ; and (iii) the wealth-tax". Article 2(3) further adds that "this Agreement shall also apply to any identical or substantially similar taxes on income or capital which are imposed at Federal or State level by either Contracting State in addition to, or in place of, the taxes referred to in paragraph 2 of this Article….". In the light of this factual position, we may usefully refer to the following extracts from a decision of the coordinate bench in the case of DIC Asia Pacific Pte Ltd Vs ADIT [(2012) 18 ITR(T) 358 (Kol)] wherein, speaking through one of us (i.e. the Vice President), the coordinate bench has observed as follows:

> *5. We find that the provisions of Articles 2, 11 and 12, which are relevant for our present purposes, are as follows:*
>
> *ARTICLE 2 : TAXES COVERED*
>
> *1. The taxes to which this Agreement shall apply are :*
>
> *(a) in India :*
>
> *income-tax including any surcharge thereon (hereinafter referred to as "Indian tax") ;*

(b) in Singapore :

the income-tax (hereinafter referred to as "Singapore tax").

2. The Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1. The competent authorities of the Contracting States shall notify each other of any substantial changes which are made in their respective taxation laws.

ARTICLE 11 : INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) 10 per cent of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company) ;

(b) 15 per cent of the gross amount of the interest in all other cases.

(remaining portion of this article is not relevant for the present purposes)

ARTICLE 12 : ROYALTIES AND FEES FOR TECHNICAL SERVICES –

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.

(remaining portion of this article is not relevant for the present purposes)

6. A plain reading of these provisions show that while interest and royalties can indeed be taxed in the source state, the tax so charged on the same, under Articles 11

and 12, cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and is stated to include 'surcharge' thereon, so far as India is concerned. Article 2(2) further extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1".

7. We find that education cess was introduced in India by the Finance Act, 2004, and Section 2(11) of the Finance Act, 2004 described it as follows:

(11) The amount of income-tax as specified in sub-sections (4) to (10) and as increased by a surcharge for purposes of the Union calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", so as to fulfil the commitment of the Government to provide and finance universalised quality basic education, calculated at the rate of two per cent of such income-tax and surcharge. [Emphasis supplied]

8. It is thus clear that the education cess, as introduced in India initially in 2004, was nothing but in the nature of an additional surcharge. It was described as such in the Finance Act introducing the said cess.

9. We have also noted that Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once we come to the conclusion that education cess is nothing but an additional surcharge, it is only corollary thereto that the education cess will also be covered by the scope of Article 2. Accordingly, the provisions of Articles 11 and 12 must find precedence over the provisions of the Income Tax Act and restrict the taxability, whether in respect of income tax or surcharge or additional surcharge – whatever name called, at the rates specified in the respective article. In any case, education cess was introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India Singapore tax treaty on 24th January 1994. In view of the specific provisions to the effect that the scope of Article 2 shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1", and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess.

9. The view so taken by the coordinate bench, with which we are in complete agreement, has also been adopted in a large number of cases and including in the context of the India UAE Double Taxation Avoidance Agreement. These cases include Capgemini SA vs. Deputy

Commissioner of Income-tax (International Taxation)-2 (1) (1), Mumbai [13-07-2016] [2016] 72 taxmann.com 58 (Mumbai - Trib.), Deputy Director of Income-tax-3(1), Mumbai vs. J.P. Morgan Securities Asia (P.) Ltd. [23-10-2013] [2014] 42 taxmann.com 33 (Mumbai - Trib.), Deputy Director of Income-tax (IT)-1(1), Kolkata vs. BOC Group Ltd. [30-11-2015] [2015] 64 taxmann.com 386 (Kolkata - Trib.), Everest Industries Ltd. vs. Joint Commissioner of Income-tax, Range-1 [31-01-2018], [2018] 90 taxmann.com 330 (Mumbai - Trib.), Soregam SA vs. Deputy Director of Income-tax, Circle- 3 (2), Int. Taxation, New Delhi [30-11-2018] [2019] 101 taxmann.com 94 (Delhi - Trib.), and Sunil V. Motiani vs. Income-tax Officer (International Taxation)-4(1) [27-02-2013] [2013] 33 taxmann.com 252 (Mumbai - Trib.). We may add that no contrary decision was cited before us nor any specific justification assigned for the levy of surcharge and education cess. The provisions of the India UAE Double Taxation Avoidance Agreement are in *pari materia* with the provisions of India Singapore DTAA which was subject matter of consideration in DIC Asia Pacific's case *(supra)*. We, therefore, have no reasons to take any other view of the matter than the view so taken by the coordinate benches. Respectfully following the same, we uphold the plea of the assessee and direct the Assessing Officer to delete the levy of surcharge and education cess on the facts of this case. Once this relief is allowed, the taxes payable by the assessee are the same as taxes deducted at source and no other grievances survive.

10. In the result, the appeal is allowed in the terms indicated above.

11. As the appeal itself is allowed, the stay petition before us is rendered infructuous, and is dismissed as such. Pronounced in the open court today on the 29th day of March, 2019.

Sd/-
P Madhavi Devi
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Hyderabad, dated the 29 th day of March, 2019

Copies to:

(1)	The Applicant	(2)	The respondent
(3)	CIT	(4)	CIT(A)
(5)	DR	(6)	Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Hyderabad benches, Hyderabad