

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

IT(TP)A No.839/Bang/2009

Assessment year : 2003-04

Molex India Tooling Pvt. Ltd., Plot No.6(A), Sadarmangala Industrial Area, Kadugodi, Bangalore – 560 067. PAN: AAACM 6091N	Vs.	The Assistant Commissioner of Income Tax, Circle 12(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri G.R. Reddy, CIT-I(DR)

Date of hearing	:	26.10.2016
Date of Pronouncement	:	23.12.2016

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of
CIT(Appeals) *inter alia* on the following grounds which are as under:-

“I. Transfer Pricing Adjustment

1.The learned Commissioner of Income-tax (Appeals) [hereinafter referred to as "the learned CIT(A)"] erred in determining that the international transactions of Molex India Tooling Private Limited (hereinafter referred as MITPL) with its

Associated Enterprises are not at Arm's Length. The learned CIT (A) ought to have observed that the loss by MITPL was not account of Transfer Pricing consideration and was on account of genuine business reasons which are as follows:

- a. The company is in its second year of commercial operations, and it is in the process of establishing itself in the market. The company has substantial investments in plant and machinery and other start up costs.
- b. The company has a planned and installed capacity of 62 tools at the end of phase 2 of the production process, and the actual production during the year was only 21 tools, resulting in 34% of net utilization of the production capacity.
- c. Fixed costs of employees, depreciation, interest and other administration charges were however committed much earlier during the year, while the company stabilized the production for phase 2 only from February 2003.
- d. Inefficiencies in learning curve during production resulted in higher material costs due to rejects and rework.
- e. Expected orders did not materialize during the year.
- f. The lower capacity utilization and production inefficiencies of the company have led to increased administrative costs and high repairs and maintenance costs.

2. The learned CIT(A) erred in stating that the TPO has correctly considered the following expenses in calculating the gross margins:

- a. Rates and Taxes Rs. 6,428/-
- b. Repairs & Maintenance of Machinery Rs. 1,31,06,810/-
- c. Depreciation Rs. 2,27,07,331/-
- d. Salaries and Wages to the extent of Rs. 38,25,426/-

3. The learned CIT(A) ought to have observed that expenditure incurred on Repairs & Maintenance of Machinery, Rates and taxes, Depreciation and Salaries to the extent as specified above were not direct costs incurred in the

manufacture of the products. Hence these expenses ought to be excluded in calculating the gross margins of the Appellant Company.

4. The learned CIT (A) ought have observed that the Company had fully recovered its direct costs and are in line with comparable companies. Hence it is submitted that since the inference drawn by the learned CIT (A) that the Appellant Company has not recovered the direct costs does not hold good and it can be concluded that the international transactions of the Appellant Company are at arm's length price.

5. Notwithstanding and without prejudice to the above contention, the learned CIT(A) ought to have provided appropriate adjustments for under utilization of production capacity of the assessee.

II. Corporate Tax

The learned CIT(A) erred in confirming the disallowance of Rs. 33,14,764/- on account of small machine tools written off in the profit and loss account on the ground that the same is a capital expenditure. The learned CIT(A) ought to have observed that the small machine tools do not result in any advantage of enduring benefit to the appellant.

The learned CIT(A) ought to have observed from the details of the small machine tools written off that the same constitutes revenue expenditure. Further the learned CIT(A) ought to have placed reliance on the following decision:

- a) CIT v. Mahalakshmi Textile Mills Ltd - 66 ITR 710 - SC
- b) CIT v. Shri Rani Lakshmi Ginning Spinning & Weaving Mills Ltd - 256 ITR 592 - Madras
- c) CIT v. Sakthi Textiles Ltd - 262 ITR 375 - Madras
- d) Co-operative Sugars Mills v. CIT - 235 ITR 343 - Kerala
- e) Tuticorin Spinning Mills Ltd v. CIT - 261 ITR 291 - Madras
- f) CIT v. Janakiram Mills Limited - 275 ITR 403

The Appellant craves leave to add, to alter or amend all or any of the aforesaid stated grounds of appeal.”

2. During the course of hearing, our attention was invited to the fact that the CIT(Appeals) has passed an order on 30.07.2008 and this appeal was filed by the assessee on 18.08.2009, almost after a year from the order of CIT(A), therefore this appeal is barred by limitation.

3. The Id. counsel for the assessee has invited our attention to the application for condonation of delay along with the affidavit filed by the assessee on 18.11.2012, with the submission that though the order was passed by the CIT(A) on 30.07.2008 and was despatched to the assessee, but he did not find it in his record. Thereafter in the month of May, 2009 when the office of the Assessing Officer (AO) had contacted the assessee with regard to giving effect to the order of CIT(A), it came to the assessee's knowledge that the appellate order had been passed. Thereafter, it contacted the postal authorities to verify whether the appellate order was served on the assessee or not. However, the postal authorities expressed inability to provide any details of the post. Thereafter, a certified copy was sought for from the office of CIT(A) on 13.05.2009 and certified copy was furnished on 15.07.2009. and thereafter appeal was filed on 18.08.2009. Thus, the appeal is filed in time.

4. Strongly objecting to the contentions of the assessee, the Id. DR has contended that assessee has not specifically stated about the service of the order of CIT(A). The assessee simply made a vague statement that order was not available in his record. Whereas, in the order of CIT(A), the Office of CIT(A) has mentioned that certified copy of the original order was despatched on 12.08.2008 vide Docket No. EK3074467591IN. Since the order of CIT(A) was issued and served upon the assessee in time, that too in the month of August 2008, the appeal should have been filed within a period of 60 days from the date of receipt of the order. Since the appeal is not filed in time, the appeal is barred by limitation and deserves to be outrightly rejected.

5. The Id. DR further contended that though assessee has mentioned in his application that he was contacted by the Office of AO with regard to giving effect to the order of CIT(A), but it has not made any specific assertion as to who has approached assessee from the Office of the AO. All these assertions are vague and only raised to cover the delay in filing of the appeal. Since the delay is intentional, it should not be condoned and application be rejected.

6. Having carefully examined the rival submissions in the light of the record, we find that CIT(A) has passed his order on 30.07.2008 and before the CIT(A) the assessee was duly represented by the professional. The assessee is also a private limited company, therefore it cannot be said that

it is ignorant about the proceedings before the CIT(A). In the order of CIT(A), it has been mentioned by the Office of CIT(A) that certified copy of the original order was despatched on 12.8.2008 vide Docket No.EK3074467591IN. After the conclusion of the appellate proceedings before the CIT(A), the assessee should have been vigilant about the fate of its appeal and to make necessary enquiry from the Office of the CIT(A) with regard to disposal of the appeal. But it appears that no effort was made by the assessee in this regard.

7. Though the assessee has taken a plea that it did not find the order in its record and only came to know when the Office of the AO contacted it with regard to giving effect to the order of CIT(A), but in the application for condonation of delay, the assessee has not specifically contended that order of the CIT(A) was not served upon it. The assessee simply stated that it did not find the order in its record. Non-availability of the order of CIT(A) in its record does not mean that the order of CIT(A) was not communicated to him. Whereas, in the order of CIT(A), it has been categorically mentioned by the Office of the CIT(A) that certified copy of the order was dispatched on 12.08.2008 vide Docket No.EK3074467591IN.

8. We do not wish to miss one important fact that this appeal was filed on 18.08.2009. Though assessee knew it very well that the appeal was late and he is required to file application for condonation of delay along with the appeal, but it did not file any application for condonation of delay. This

application was filed on 18.11.2012 after a number of hearings having taken place before the Tribunal. It shows that the assessee is not vigilant towards its right and interest. Since it has not been established by the assessee that the order of the CIT(A) was not served upon him, it has to be presumed in the light of the noting of the Office of the CIT(A) that order of CIT(A) was duly served upon him in the month of August, 2008, when it was dispatched on 12.08.2008. Thus, the onus is upon the assessee to explain the delay in filing of appeal from August, 2008, but we do not find any plausible explanation in the application for condonation of delay in filing the appeal.

9. We have also examined the relevant legal position while dealing with the application for condonation of delay and we find that it has been repeatedly held through various judgments that the appellant must show that he was diligent all along for taking appropriate steps and delay was caused notwithstanding his due diligence. If he appears to be guilty of lapses and negligence and does not take proper steps for pursuing his remedy till about the close of period prescribed for filing of appeal, he must be deemed to have his remedy barred without accepting the condonation. This view was expressed by the Hon'ble Patna High Court in the case of *Baldleo Lal Roy v. State of Bihar, 1960 11 STC 104*. Similar views were also expressed by the different High Courts in the following cases:-

Jahar Mahal v. Pritchand (G.M.) AIR 1919 Pat. 503

Kedarnath v. Zumberlal, AIR 1916 Nag. 39

Hakimia v. Gammon (J.C.), AIR 1930 Nag. 121

10. It was also held by the Hon'ble Orissa High Court in *Radharaman Store v. Orissa Sales Tax Tribunal (1998) 108 STC 284* that even though a liberal approach is to be adopted, that does not mean that any plea without any plausible or acceptable basis, and not even bearing semblance or rationality has to be accepted, and delay has to be condoned. That shall be against the very spirit of law. Prescription of time limit for filing of appeals would become meaningless in such event. Merely because the State is involved, that does not mean that any lethargic or supine inaction has to be condoned or ignored and even if no reason is indicated, that would be inconsequential.

11. In the light of the aforesaid judicial pronouncements, we are of the view that assessee has not made out a case that the order of CIT(A) was not served upon it and it only came to know about the order of CIT(A) when the Office of the AO has contacted it for giving effect to the order of CIT(A), in the absence of any cogent evidence. Therefore, we are of the view that delay in filing of appeal is not duly explained and we accordingly decline to condone the delay. Once the delay is not condoned, the appeal cannot be admitted for hearing. Hence the appeal is dismissed being not admitted.

12. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on this 23rd day of December, 2016.

Sd/-

(S. JAYARAMAN)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 23rd December, 2016.

/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.