

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

**(BEFORE SHRI WASEEM AHMED, ACCOUNTANT
MEMBER & SHRI MADHUMITA ROY, JUDICIAL MEMBER)**

**ITA. No: 95/RJT/2016
(Assessment Year: 2011-12)**

M/s. Phoenix Project Pvt. Ltd. 3rd floor, Sakar, Dr. radhakrishnan Road, Nr. Kathiawad Gymkhana, Rajkot	V/S	Income Tax Officer, Ward- 3(2), Jamnagar
(Appellant)		(Respondent)

PAN: AACCP9998F

**Appellant by : Shri D. M. Rindani, AR
Respondent by : Shri Ranjeet Singh, Sr. DR.**

(आदेश)/ORDER

Date of hearing : 17 -02-2020
Date of Pronouncement : 01-06-2020

PER BENCH,

1. This appeal filed by the Assessee is directed against the order of the Ld. CIT(A), Rajkot-I dated 14.03.2016 pertaining to A.Y. 2011-12.

2. The assessee has raised the following grounds of appeal:

1. The Hon'ble Principal Commissioner of Income Tax, Rajkot-1, Rajkot has erred in wrongly passing the order u/s. 263 of the IT Act is unwarranted, unjustified and bad in law.

3. The issue raised by the assessee is that the learned principle CIT erred in holding that the order passed by the AO under section 143(3) of the Act, as erroneous insofar prejudicial to the interest of revenue on account of non-verification of the difference in the amount of gross receipts shown by the assessee in the books of accounts viz a viz the gross receipts shown in the form 26AS.
4. The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of civil constructions. The assessee for the year under consideration has filed its return of income declaring income at Rs. 1,75,27,310/- which was assessed under section 143(3) of the Act, at Rs. 1,77,21,620/- after making the addition for Rs. 1,51,000/- to the total income of the assessee vide order dated 28.03.2014.
5. However, the learned principle CIT subsequently on verification of the assessment records found that the assessee has shown less amount of gross receipts in comparison to the amount of gross receipt shown in the form 26AS. Such amount of difference was of Rs. 32,35,658/-. As per the learned principle CIT this fact for the difference in the amount of gross receipt was not verified by the AO during the assessment proceedings. Accordingly, he held that the order passed by the AO under section 143(3) of the Act, is erroneous insofar prejudicial to the interest of Revenue. Hence he directed the AO to make fresh assessment in the light of the above discussion after making necessary enquiries.
6. Being aggrieved by the order of the learned principle CIT the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 44 and submitted that the assessment was framed by the AO under section 143(3) of the Act, after making due verification and the application of mind. As per the learned AR there was an enquiry raised by the AO in the notice issued under section 142(1) of the Act which was duly replied by the assessee. The learned AR in support of his contention drew our attention on pages 6 and 10 of the paper book where the relevant question raised by the AO and the reply by the assessee was placed.
8. On the other hand the learned DR vehemently supported the order of the authorities below.
9. We have heard the rival contentions of both the parties and perused the materials available on record. In the instant case the assessment framed by the AO under section 143(3) of the Act, was held as erroneous insofar prejudicial to the interest of revenue on account of non-verification of the difference in the amount of gross receipts shown by the assessee in the books of accounts viz a viz the gross receipts shown in the form 26AS.
10. However, the Id. AR before us claimed that the relevant queries were raised by the AO during the assessment proceedings. Therefore we find pertinent to refer to the queries raised by the AO during the assessment proceedings and the reply of the assessee qua to such queries. The relevant queries raised by the AO as per the assessee in the notice issued under section 142(1) of the Act, dated 5-9-2013 read as under:

6. Furnish the TDS credit with reconciliation statement for the financial year under consideration.

8. Please furnish the copy of work orders of contract and work completion certificates of the contracts carried out during the year under consideration.

11. The above queries were answered by the assessee vide letter dated 5th October 2013 as detailed under:

6. Details of TDS credit with reconciliation statement for the financial year under consideration is enclosed herewith.

8. copy of work orders of contract and work completion certificates of the work contracts carried out during the year under consideration is enclosed herewith.

12. We also note that the assessee has filed the statement before the AO during the assessment proceedings reconciling the amount of TDS credit shown in its books of accounts viz a viz the amount of TDS credit reported in form 26AS. The copy of such reconciliation statement is placed on page 11 of the paper book.

13. From the above, it is transpired that the queries were raised by the AO during the assessment proceedings about the mismatch of the TDS credit claimed by the assessee viz a viz the TDS credit reported in the form 26AS. Similarly, the query was raised regarding the contracts which were completed in the year under consideration. Thus we note that there was no enquiries raised by the AO about the mismatch in the amount of gross receipts shown by the assessee viz a viz reported in the form 26AS on which TDS was deducted. Accordingly, we are of the view that there was no verification carried out by the AO during the assessment proceedings with respect to the amount of gross receipt shown by the assessee viz a viz the gross receipt reported in the form 26AS. It is the settled law that the order of the AO can be held as erroneous insofar prejudicial to the interest of revenue if there was no enquiry conducted by the AO during the assessment proceedings. In this regard we find support and guidance from the judgment of Hon'ble Supreme Court in case of Malabar Industries Co. Ltd. vs. CIT reported in 243 ITR 83, where it was held as under:

A bare reading of section 263(1) makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent -if the order of the ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1).

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue

The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopts one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by the Supreme Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue.

In the instant case, the Commissioner noted that the ITO passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the ITO failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appeared that the resolution passed by the board of the appellant-company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the ITO was erroneous was irresistible. Therefore, the High Court had rightly held that the exercise of the jurisdiction by the Commissioner under section 263(1) was justified.

14. In view of the above, we do not find any infirmity in the order of the learned Principle CIT. Accordingly we uphold the same. Hence, the ground of appeal of the assessee is dismissed.
15. Before we part with the issue/appeal as discussed above, it is pertinent to note that the clause (c) of rule 34 of the Appellate Tribunal Rules 1963 requires the bench to make endeavour to pronounce the order within 60 days from the conclusion of the hearing. However the period of 60 days can be extended under exceptional circumstances but the same should not ordinarily be further extended beyond another 30 days. In simple words the total time available to the Bench is of 90 days upon the conclusion of the hearing.

However, during the prevailing circumstances where the entire world is facing the unprecedented challenge of Covid 2019 outbreak, resulting the lockdown in the country, the orders though substantially prepared but could not be pronounced for the unavoidable reasons within the maximum period of 90 days. In such circumstances we find that the Hon'ble Mumbai Tribunal in the case of **JSW Limited Vs Deputy Commissioner of Income Tax in ITA No. 6103/MUM/2018 vide order dated 14-5-2020** extended the time for pronouncing the order within 90 days of time by observing as under:

*9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the***

jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**, and also observed that **"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020"**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure...". The term '**force majeure**' has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**'. When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **"while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**. The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Considering the above, we express to pronounce the order beyond the period of 90 days. Accordingly, we proceed to pronounce the order as on date.

16. In the result appeal of the assessee is dismissed

Order pronounced in Open Court on	01 - 06- 2020
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Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER

Dated 01/06/2020

Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

True Copy

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Rajkot
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT, Rajkot