IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

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

ITA. No: 230/RJT/2018 **(Assessment Year: 2015-16)**

Raj KishorBachu Yadav Office No. S-33, City Arcate, Nr. DSP Bunglow, Jamnagar	**V/S**	**Income Tax Officer, Ward-3(2), Jamnagar**
(Appellant)		**(Respondent)**

PAN: ABTPY0826E

Appellant by	**: Shri Chetan Agarwal, AR**
Respondent by	**: Smt. Suhas Mistry, Sr. DR.**

(आदेश)/ORDER

Date of hearing : 27 -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), Jamnagar dated 26.08.2019 pertaining to A.Y. 2015-16.

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

> *1.The ld. CIT(A), Jamnagar has erred in law as well as on facts in confirming addition of gross receipts of Rs. 13,51,300/-.*

3. The only issue raised by the assessee is that the learned CIT (A) erred in confirming the addition made by the AO for Rs.13,51,300/- on account of difference between the turnover shown by the assessee viz a viz turnover reported in form 26 AS.

4. The facts in brief are that the assessee in the present case is an individual and engaged in the business of contracts. The AO during the assessment proceedings found that the assessee has shown turnover in his books of accounts amounting to Rs. 2,72,94,735/- whereas the turnover reported in form 26AS stands at Rs. 2,86,46,035/- leading to a difference of Rs.13,51,300/- as under reporting of sales. On question by the AO, the assessee among other submissions contended that only the element of profit embedded in such turnover can be brought to tax.

5. However the AO disagreed with the contention of the assessee and made the addition of Rs. 13,51,300/- being representing the amount of under reporting of sales and added to the total income of the assessee.

6. Aggrieved assessee preferred an appeal to the learned CIT (A).

7. The assessee before the learned CIT (A) submitted that the impugned amount of difference has been offered to tax in the subsequent year. However he is not able to provide the reconciliation due to complexity involved in the accounts. Accordingly the assessee claimed that only the profit element embedded in such amount can be brought to tax. The assessee in support of his contention filed a chart of different assessment years showing the rate of net profit declared by

him. As such the assessee offered to tax the impugned amount of difference at the average rate of 3.25% of Rs. 13,51,300/-.

8. However the learned CIT (A) disregarded the contention of the assessee by observing as under:

> *The undisputed fact is that there was difference of Rs. 13,51,500/- between the receipts as shown by the appellant as per return of income and the receipt as reflected as per 26AS. Thus this part of receipt of Rs. 13,51,500/- was not shown by the appellant in the return of income. Again the AR of the appellant has not filed any evidence and materials to show that the expenses related to this differential receipt of Rs. 13,51,500/- were not debited to the P & L ' account. In other words, there is nothing on record to show that the expenses related to such receipt have not been considered in the return of income. In my opinion the net profit of this receipt of Rs. 13,,51,500/-can be considered only when the expenses related to such receipt are not claimed in the P & L account. However, in absence of this details and evidence, the plea of AR of the appellant that only net profit be considered for taxation cannot be accepted. In view of these facts, it is held that the AO has correctly made addition of this amount of Rs. 13,51,500/- to the total income of the appellant and therefore, the same is confirmed. Thus the ground of appeal of the appellant is reproduced in initial paragraph of this appeal order is dismissed.*

9. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

10. The learned AR before us argued that the impugned difference represents the business receipts and therefore only the amount of profit embedded therein can be brought to tax.

11. On the other hand the learned DR vehemently supported the order of the authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record before us. Admittedly, the amount of difference as discussed above between the books of accounts and reported in 26AS represents the business receipts. Now the question arises whether the amount of difference

as discussed above represents the income in its entirety or percentage of profit embedded in such receipts. In this regard we note that it is the only percentage of profit embedded in such receipts can be added to the total income of the assessee for the reasons that it represents the business receipts. In holding so, we also draw support and guidance from the judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. Samir Synthetics Mill reported in 326 ITR 410 where it was held as under:

> *As a result of search by the Excise Department in the business premises of the assessee, various discrepancies were noted in the production of the assessee. The assessee could not even be able to reconcile the production, sales and the closing stock although the specific opportunity was provided by the Assessing Officer. Accordingly addition to the assessee's income was made on account of suppression of sale consideration.*
>
> *Held that, the addition was justified on account of suppression of sale consideration but only to the extent of profit.*

13. We further draw support and guidance from the order of the Jurisdictional High Court in the case of CIT vs. Gurubachhan Singh J Juneja reported in 302 ITR 63. The relevant extract of the judgment is reproduced as under:

> *6. Hence, in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged unaccounted sales the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference. The Tribunal was, therefore, justified in deleting the addition of Rs. 10,85,003 made on account of unaccounted cash sales.*

14. In view of the above and after considering the facts in totality we hold that it is the only element of profit embedded in such business receipts which can be added to the total income of the assessee.

15. Now the next controversy arises what rate of profit should be adopted for determining the income in the given facts and circumstances. In this regard we note that the assessee has given a chart showing the amount of profit for earlier and subsequent assessment years where the average profit was shown at 3.25% of the turnover.In view of the above, we set aside the finding of the learned CIT (A) and direct the AO to tax the element of profit embedded in such business

receipts at the rate of 3.25% by treating the same as net profit chargeable to tax. Thus the assessee gets relief in part. Hence, the ground of appeal of the assessee is partly allowed.

16. 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 wok 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 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 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.

17. In the result, the appeal of the assessee is partly allowed.

Order pronounced in Open Court on 01 - 06 - 2020

Sd/- Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad: Dated 01/06/2020 *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, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad