

आयकर अपीलीय अधिकरण
IN THE INCOME TAX APPELLATE TRIBUNAL
मुंबई पीठ "एसएमसी"
MUMBAI BENCH "SMC", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
SHRI G.MANJUNATHA, ACCOUNTANT MEMBER
आअसं. 5929/मुं/2018 (नि. व.2011-12)
ITA NO.5929/MUM/2018 (A.Y.2011-12)

M/s. H.P.Associates,
120, Laxmikunj, Mahant Road,
Vile Parle (East), Mumbai 400 056.
PAN:AAFFH3495K

..... अपीलार्थी /Appellant

बनाम Vs.

The ITO – 25(3)(2),
Bandra Kurla Complex, Bandra(E)
Mumbai 400 051

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Haridas Bhatt

प्रतिवादी द्वारा/Respondent by : Ms. R. Kavitha

सुनवाई की तिथि/ Date of hearing : 20/02/2020

घोषणा की तिथि/ Date of pronouncement : 12/06/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-45, Mumbai (in short 'the CIT (A)) dated 06/06/2018 for the assessment year 2011-12.

2. The assessee in appeal has raised four grounds:

- In grounds No.1 to 3 the assessee has assailed disallowance of brokerage paid to:

- | | |
|----------------------------|------------------|
| (i) M/s. Vijaya Associates | - Rs. 9,00,000/- |
| (ii) Ms. Shaili Savla | - Rs.4,50,000/- |
| (iii) Bipin Savla HUF | - Rs.3,43,980/- |

- In ground of appeal No.4, the assessee has assailed disallowance of share of profit transferred to M/s. Lakshmi Construction Rs.61,800/-.

3. Shri Haridas Bhatt, appearing on behalf of the assessee submitted that the assessee is a partnership firm engaged in the business of redevelopment of real estate. The assessee developed solitary housing project, "Vijaya Bhavan" jointly with M/s. Lakshmi Construction. During the course of assessment proceedings the Assessing Officer disallowed payment of brokerage to M/s. Vijaya Associates and Ms. Shaili Savla under section 37(1) of the Income tax Act, 1961 (in short 'the Act'). The Assessing Officer further disallowed brokerage paid to Bipin Savla HUF invoking provisions of section 40A(2)(b) of the Act stating payments made to be excessive. The Id. Authorized Representative of the assessee submitted that the brokerage payments were made as per prevalent market norms. The Id. Authorized Representative of the assessee contended that the Assessing Officer in the assessment order has mentioned that standard rate of brokerage is 2% in the given line of business. The brokerage paid by the assessee to M/s. Vijaya Associates is 2.16% of the agreement value and the percentage of brokerage paid of Ms. Shaili Savla is 3.43% of the agreement value. Similarly, the brokerage was paid to Bipin Savla

as per market rate. The rate of commission is market driven and vary depending on various condition. There is no thumb rule to fix the rate of commission. The Id. Authorized Representative of the assessee submitted that the brokerage was paid to the aforesaid parties for facilitating sale of flats in the housing project 'Vijaya Bhavan'.

As regards sharing of profits with M/s. Lakshmi Construction, the Id. Authorized Representative of the assessee submitted that the assessee had jointly developed project with M/s. Lakshmi Construction for which there was joint development agreement. Though there is no formal written agreement between co-developers for sharing profits in equal ratio, however, there was oral understanding between the parties that the profits will be shared in equal ratio. The Id. Authorized Representative of the assessee further contended that the share of profit transferred by assessee to M/s. Lakshmi Construction has not resulted in any loss of the revenue, as the recipient has offered the same to tax and has paid taxes on such profits. Merely, for the reason that there was no formal written agreement to share profit in equal ratio, the disallowance was made.

6. On the other hand, Ms. R. Kavitha, representing the Develoartment vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that the assessee has not been able to show actual services that were rendered by the parties for which brokerage was paid to them.

7. We have heard the submissions made by rival sides and have perused the orders of the authorities below. We have also examined the documents

filed by the assessee in the form of paper book. In ground No.1 and 2 of appeal, the assessee has assailed disallowance of brokerage commission u/s 37 of the Act, paid to M/s. Vijaya Associates Rs.9,00,000/- and Ms. Shaili Savla Rs.4,50,000/-, respectively. The brokerage commission has been paid for facilitating sale of flats in the housing project. The assessee had filed confirmation from the parties, the same are available on record at pages 2 and 26 of the Paper Book. Both the aforesaid parties have admitted that the brokerage has been received and the same has been offered to tax in their respective return of income. The Assessing Officer has disallowed payment of commission primarily on the ground that there was no written agreement between the assessee and the parties for rendering of services and payment of commission. M/s. Lakshmi Construction, joint developer of the project has confirmed that M/s Vijaya Associates was appointed for liaising and to provide support services in connection with the housing project 'Vijaya Bhavan'. After examining the documents available on record we are satisfied that commission has been paid by the assessee to the parties in connection with the housing project 'Vijay Bhavan' jointly developed by the assessee and M/s. Lakshmi Construction. The findings of the CIT (A) on this issue are reversed and the disallowance of brokerage paid to M/s. Vijaya Associates and Ms. Shaili Savla is deleted. Consequently, grounds No.1 and 2 of the appeal are allowed.

8. In ground No.3 of appeal, the assessee has assailed disallowance of commission Rs.3,43,980/- paid to Bipin Savla HUF under section 40A(2)(b) of the Act. We observe that the Assessing Officer while invoking the provisions of section 40A(2)(b) of the Act has mentioned that brokerage paid is on the

higher side. The maximum rate of brokerage prevalent in the market as per the Assessing Officer is 2% of the agreement value. The assessee paid brokerage to Bipin Savla HUF Rs.4,50,000/- as against alleged market rate of Rs.1,06,020/-. The Assessing Officer disallowed alleged excessive commission i.e. Rs.3,43,980/-. The contention of the assessee is that there is no thumb rule for payment of commission at 2%. The rate of commission is market driver and fluctuates depending on the market conditions. The recipient has offered commission received to tax. After considering the submissions of the assessee we find merit in the same. In the facts of the case we find that the disallowance of payment of commission to Bipin Savla HUF by invoking provisions of section 40A(2)(b) is uncalled for. The disallowance made is deleted and ground No.3 of the appeal is allowed.

9. In ground No.4 of the appeal, the assessee has assailed disallowance of share of profits paid to M/s. Lakshmi Construction Rs.61,800/-. The contention of the assessee is that the assessee and co-developer M/s. Lakshmi Construction has developed a housing project "Vijay Bhavan". There was oral understanding between the parties with respect to sharing of profit in equal ratio. The Id.Authorized Representative of the assessee has pointed that the share of profit paid by the assessee to M/s. Lakshmi construction has been offered to tax by the recipient and there is no revenue loss. To substantiate this contention, the assessee has placed on record Income Tax return of M/s Lakshmi Construction. Both the firms are assessed to same marginal rate of tax. Therefore, the transaction is tax neutral, no loss is caused to the Government exchequer. The addition of Rs.61,800/- is deleted and ground

No.4 of the appeal is allowed. The assessee succeeds on ground No.4 of the appeal.

10. In the result, appeal of the assessee is allowed.

11. This appeal was heard on 20/02/2020. As per Rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963, (ITAT Rules, 1963), the order was required to be “ordinarily” pronounced within a period of 90 days from the date of conclusion of the hearing of appeal. The instant appeal was heard prior to the lockdown declared by the Hon’ble Prime Minister on 24-03-2020 in view of COVID-19 pandemic. The lockdown was forced due to extra ordinary circumstances caused by world wide spread of COVID-19. Thereafter, the lockdown was extended from time to time. Therefore, the pronouncement of order beyond the period of 90 days from the date of hearing is not under “ordinary” circumstances. The Co-ordinate Bench of the Tribunal in the case of DCIT vs. JSW Ltd., ITA No.6264/Mum/2018 for A.Y 2013-14 decided on 14/05/2020, under identical circumstances, after considering the provisions of Rule 34(5) of the ITAT Rules, 1963, judgements rendered By Hon’ble Apex Court and the Hon’ble Bombay High Court on the issue time limit for pronouncement of orders by the Tribunal and the circumstances leading to lockdown held:-

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 inconsonance 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 ITA No. 6103 and 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 refer 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.

Thus, in light of above facts and the decision of coordinate Bench, the present order is pronounced beyond the period of 90 days.

12. The appeal of the assessee is allowed. Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Order pronounced on Friday the 12th day of June, 2020.

Sd/-

(G.MANJUNATHA)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 12/06/2020

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai