IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

Before: Shri Waseem Ahmad, Accountant Member and Ms. Madhumita Roy, Judicial Member

ITA No. 190/Rjt/2019
Assessment Year 2015-16

Shri Manish Punjabhai Odedara Nr. Dr. JayeshHathi, Khodiyar Colony, Porbandar, PAN: AAEPO0057B (Appellant)	Vs	The ITO, Ward-2(4), Porbandar (Respondent)

Revenue by: **Shri Suhas Mistry, CIT-D.R.**
Assessee by: **Shri Chetan Agarwal, A.R.**

Date of hearing : 28-02-2020
Date of pronouncement : 02-06-2020

आदेश/ORDER

PER BENCH:-

This assesseeôs appeal for A.Y. 2015-16, arises from order of the Principal CIT(A), Jamnagar dated 24-06-2019, in proceedings under section 271B of the Income Tax Act, 1961; in short ñthe Actò

2. The assessee has raised following ground of appeal:-

"1. Learned A.O. erred in law as well on facts by levying penalty u/s. 271B of the Act."

3. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the penalty levied by the AO under section 271B of the Act on account of not getting the accounts audited and not furnishing the audit report as specified under section 44AB of the Act.

4. The assessee in the present case is an individual and engaged in the activity of water supply contractor, commission agent etc. The AO during the assessment proceedings found that the assessee has carried out the business of sale of option in securities (derivatives) where the transactions were completed without delivery of the shares and securities. The assessee has carried out the transaction in such business for a value of Rs. 17,03,16,845/- only but the assessee failed to get its account audited as well as furnished the tax auditor report under section 44AB of the Act. Accordingly, the AO found that the assessee has contravened the provisions of section 44AB of the Act, which attracts the penalty under section 271B of the Act. Accordingly the AO sought clarification from the assessee.

5. The assessee during the assessment proceedings submitted that he has incurred a loss of Rs. 60,68,230/- out of such business of dealing in options(derivatives). However he did not include such loss in the income tax return as he filed belated return of income. The assessee also claimed that he was under the bona fides believe that the net income of sale and purchase of derivatives shall only be treated as turnover for the applicability of the provisions of section 44AB of the Act which was less than Rs. 1 crores. Accordingly the assessee failed to get the accounts audited and furnish the tax audit report.
However, the AO disregarded the contention of the assessee by holding that the assessee has defaulted in complying of the provisions of section 44AB of the Act.

Accordingly he levied the penalty of Rs. 1.5 lakhs on the assessee under section 271B of the Act.

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

7. The assessee before the learned CIT (A) reiterated the contention as made before the AO during the penalty proceedings. But the learned CIT (A) disregarded the contention of the assessee by observing that the assessee failed to establish whether the net result of sale of option (derivatives) was not known and whether the net amount represents the turnover more than or less than of Rs. 1 crores. As per the learned CIT (A), the assessee has not furnished the figure of the net result of sale of option (derivatives) except the loss at Rs. 60,68,230/-. Thus the learned CIT (A) confirmed the order of the AO.

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

8. The learned AR before us submitted that the net result of sale of option (derivatives) does not exceed Rs. 1 crores. As per the learned AR the net result should be seen whether it exceeds Rs. 1 crores or not in order to find out the applicability of the provisions of section 44 AB of the Act. Accordingly the learned AR claimed that there cannot be any penalty under section 271B of the Act, on account of not getting the accounts audited and furnishing the same as per the provisions of section 44 AB of the Act.

9. On the other and, the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the learned CIT (A) has admitted the contention of the assessee that in case of the business without delivery, the net result should be seen to apply the provisions of section 44AB of the Act. But the learned CIT (A) held that the assessee has not furnished any detail about the net result whether it exceeds Rs. 1 crore or not except the amount of loss of Rs. 60,68,230/- which does not represent the net result of the business of the assessee. Accordingly, the learned CIT (A) in the absence of sufficient information levied the penalty by confirming the order of the AO.

11. Now, the question arises to ascertain whether the net result of the business of the assessee exceeds Rs. 1 crores or not. Indeed the onus lies on the assessee. But it was possible to find out the net result from the details furnished by the assessee during the assessment proceedings. The assessee during the proceedings has furnished the following details:-

> *"(i) Bank book for F.Y. 2014-15*
> *(ii) In respect to source of cash deposited in the bank account the assessee has stated that "We have submitted the will (which was received from Shri Punjabhai Karsanbhai Odcdara- Father (after hs accidental death in April 2014 (death certificate attached herewith]) as an in heritage. And the cash amount was step by step deposited in my bank account which was received from his tizori."*
> *(iii) Profit and loss account .balance sheet and personal capital account for F.Y. 2013 M and 2014-15.*
> *(iv) Cash book for F.Y. 2013-14 and 2014-15*
> *(v) In respect (o total turnover details for F.Y. 2014-15 contract notes/bills."*

From the above, we note that the assessee has discharged his onus imposed upon him by furnishing the details as discussed above. As such the onus shifted upon the Revenue to find out from such business whether the net result was exceeding Rs 1 crores. But the learned CIT (A) has not done so despite having the requisite information available with him. Accordingly, we are of the view that the assessee in such a situation cannot be visited with the penalty on account of not getting the accounts audited and furnishing the audit report as

prescribed under the provisions of section 44 AB of the Act. Hence the ground of appeal of the assessee is allowed.

12. 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.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 02-06-2020

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 02/06/2020

आदेश क□□ितिल□प अ□ेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot