

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

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 141/RJT/2018
(Assessment Year : 2013-14)

Anil Abhubhai Odedara 205-Sagar Apartment, B/h. Haria School, Jamnagar	Vs.	Income Tax Officer Ward-3(1), Jamnagar
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[PAN No. AAQ PO7 361 P]

(Appellant)

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(Respondent)

Appellant by	:	Shri Chetan Agarwal, CA
Respondent by	:	Shri Suhas Mistry, Sr. D.R.

Date of Hearing	28.02.2020
Date of Pronouncement	29.06.2020

O R D E R

PER MADHUMITA ROY JUDICIAL MEMBER:

The instant appeal filed by the assessee is directed against the order dated 23.03.2018 passed by the Commissioner of Income Tax (Appeals), Jamnagar arising out of the penalty order dated 26.07.2016 passed by the ITO, Ward - 3(1), Jamnagar under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as to "the Act") for the Assessment Year (A.Y.) 2013-14.

2. The issue regarding levy of penalty under section 271(1)(c) of the Act is the addition of Rs. 5,15,899/- as made by the Ld. AO in the assessment order on assumption basis. Hence, the case of the

assessee is this penalty cannot be levied when the order of quantum was passed on assumption basis.

3. On the other hand, the case of the Revenue is this that during the course of assessment proceeding upon perusal of the evidences in respect of profit of Rs. 2,64,700/- as disclosed in the return of income by the appellant it was found by the Ld. AO that the vouchers for expenditure were not kept upto the mark or were not maintained properly. While agreeing with the proposal on the part of the assessee for adopting profit @8% for addition the Ld. AO has never made any observation that there is any gross negligence on the part of the assessee to furnish the full details regarding his claim. On the other hand, vide order sheet entry dated 29.01.2016 an addition of Rs. 5,15,899/- being 8% of the total contract receipt of Rs. 64,48,740/- was made. However, penalty proceeding under section 271(1)(c) of the Act initiated for furnishing inaccurate particular of income. Therefore, admittedly the AO made an addition on estimated basis. It has been decided in a number of judgments that when income of assessee was determined on estimation basis of net profit, then no penalty under section 271(1)(c) could be imposed for concealment and furnishing inaccurate particulars. Furthermore, the penalty order is fully silent on the issue as to how the satisfaction of concealment/furnishing of inaccurate of particulars of income was arrived at. The quantification of the alleged concealment/inaccurate

particulars, is admittedly only an estimate. Needless to mention that it is settled principle of law that penalty is not attracted on estimated additions. In that view of the matter we find no justification imposing penalty for concealment of income or furnishing of inaccurate particulars of income by the assessee. Hence, penalty order is quashed.

4. In the result the appeal filed by the assessee is allowed.

5. Before parting we would like to make certain observation relating to the issue cropped up under present scenario of Covid-19 pandemic as to whether when the hearing of the matter was concluded on 28.02.2020 the order can be pronounced today i.e. on 29.06.2020. The issue has already been discussed by the Co-ordinate Bench in the case of DCIT vs. JSW Ltd. (ITA Nos. 6264 & 6103/Mum/2018) pronounced on 14.05.2020 in the light of which it is well within the time limit permitted under Rule 34(5) of the Appellate Tribunal Rules, 1963 in view of the following observations made therein:

“7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 8th January 2020, this order thereon is being pronounced today on the day of 14th May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate

Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein Their Lordships had, inter alia, directed that “We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the Benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of

the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile(emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”. In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

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 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 15days 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 corona virus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) may be 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 lockdown 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 re-fix 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."

6. On the basis of the observation made in the aforesaid judgment we exclude the period of lockdown while computing the limitation provided under Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963. Order is, thus, pronounced in the open court.

7. In the result the appeal filed by the assessee is allowed.

This Order pronounced in Open Court on

29/06/2020

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad; Dated 29/06/2020
TANMAY, Sr. PS

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A) –
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, राजकोट/DR, ITAT, Rajkot
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot