IN THE INCOME TAX APPELLATE TRIBUNAL

"G" Bench, Mumbai

Before Shri G. Manjunatha, Accountant Member

and Shri Ravish Sood, Judicial Member

ITA No.965/Mum/2019

(Assessment Year: 2013-14)

Mr. Sammy E. Major 2nd Floor, Queens Chamber, 89, Maharshi Karve Road, Marine Lines, Mumbai.	Vs.	ACIT, Circle 17(3) Room No. 137, Aaykar Bhavan M.K Road, Mumbai – 400 020.
PAN – AAHPM0177H		
(Appellant)		**(Respondent)**

Appellant by: Shri. Ravindra Poojary, A.R

Respondent by: Shri V. Vinod Kumar, D.R

Date of Hearing: 04.03.2020

Date of Pronouncement: 09.06.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-28, Mumbai, dated 21.01.2019 which in turn arises from the order passed by the A.O under Sec.271(1)(c) of the Income Tax Act, 1961 (for

short 'Act'), dated 23.12.2017 for A.Y.2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us:

" 1. The learned Assessing Officer has erred in levying the penalty of Rs. 3,24,0000/- u/s 271(1)(c) of the Income-tax Act, 1961.

1.1 It is submitted that Commissioner of Income-tax (Appeals) has erred in upholding the same.

1.2 It is submitted that your appellant had neither concealed any income nor furnished any inaccurate particulars of income. Hence penalty ought to be deleted.

2. Your appellant craves the right to amend or alter the aforesaid ground of appeal"

2. Briefly stated, the assessee who is a life insurance agent and consultant had filed his return of income for A.Y 2013-14 on 15.07.2013, declaring a total income of Rs. 33,38,580/-. Subsequently, on the basis of information received from the Directorate of Investigation, Kolkata, that the assessee was a beneficiary of a bogus claim of deduction of Rs. 10,50,000/- u/s 35(1)(ii) in relation to a non-genuine contribution of Rs. 6,00,000/- made to School of Human Genetics & Population Health, his case was reopened under Sec. 147 of the Act. Notice under Sec. 148, dated 23.03.2017 was issued to the assessee. In compliance to the notice issued under Sec. 148 the assessee filed his return of income on 30.03.2017, wherein he after withdrawing his earlier claim of deduction u/s 35(1)(ii) of Rs. 10,50,000/- declared an income of Rs. 43,88,580/-. Income of the assessee

was assessed by the A.O under Sec. 143(3) r.w.s 147, vide his order dated 21.06.2017 at the returned income. The A.O while culminating the assessment initiated penalty proceedings under Sec. 271(1)(c) for furnishing of inaccurate particulars of income by the assessee as regards the claim of deduction under Sec. 35(1)(ii) of Rs. 10,50,000/-.

3. Subsequently, the A.O issued a 'Show cause' notice to the assessee, therein calling upon him to explain as to why penalty under Sec. 271(1)(c) for furnishing of inaccurate particulars of income as regards his claim of deduction under Sec. 35(1)(ii) may not be imposed on him. The reply filed by the assessee did not find favour with the A.O who imposed a penalty under Sec. 271(1)(c) of Rs. 3,24,450/- for raising of a non-genuine claim of deduction.

4. Aggrieved, the assessee assailed the order imposing penalty under Sec. 271(1)(c) in appeal before the CIT(A). Observing, that the assessee had intentionally raised a false claim of deduction u/s 35(1)(ii), which was withdrawn by him only after a notice u/s 148 was issued, the CIT(A) upheld the penalty imposed by the A.O u/s 271(1)(c) of the Act.

5. The assessee being aggrieved with the upholding of the penalty imposed u/s 271(1)(c) has challenged the order of the CIT(A) before us. We have heard the

authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As observed by us hereinabove, the assessee had in his 'Original' return of income raised a weighted claim of deduction u/s 35(1)(ii) of Rs. 10,50,000/- in relation to a contribution of Rs. 6,00,000/- made to School of Human Genetics & Population Health. Subsequently, information was shared by the DDIT(Inv.), Kolkata, that survey proceedings conducted on 27.01.2015 u/s 133A on School of Human Genetics & Population Health had revealed that the said institute was not carrying out genuine activities, and in connivance with donors, brokers and accommodation entry providers was into providing of bogus entries. In the backdrop of the aforesaid information the case of the assessee was reopened by the A.O under Sec. 147 of the Act. In compliance to the notice issued u/s 148 of the Act the assessee filed his return of income at Rs. 43,88,580/- i.e after withdrawing the claim of deduction that was earlier raised u/s 35(1)(ii) in the 'Original' return of income. Although, the returned income was accepted by the A.O u/s 143(3) r.w.s 147, vide his order dated 21.06.2017, however, the assessee was thereafter visited with penalty u/s 271(1)(c) for furnishing of inaccurate particulars of income by raising a non-genuine claim of donation.

6. We have given a thoughtful consideration to the issue before us and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. In our considered view, the assessee on learning about the fact that School of Human Genetics & Population Health was found to have indulged in ingenuine activities, had thus, in the return of income filed by him in compliance to Notice u/s 148, had in all fairness withdrawn the claim of deduction u/s 35(1)(ii) of the Act, that was earlier raised by him in the 'Original' return of income. At this stage, we may herein observe that though serious irregularities were found in the activities of the aforesaid institute viz. School of Human Genetics & Population Health, but then, we cannot also remain oblivious of the fact that no clinching evidence had emerged which would prove beyond doubt that the assessee had not made any genuine contribution to the said institute. In fact, we find that in a host of judicial pronouncements by co-ordinate benches of the Tribunal, as under:

1. ACIT, Mumbai Vs. Shirish Lakhamshi Keniya ITA 5385/Mum/2018, A.Y. 2013-14, ITAT Mumbai, dated 29.01.2020.
2. M/s Pooja Hardware Pvt. Ltd Vs. Assistant Commissioner of Income, Mumbai, ITA 3712/Mum/2018, A.Y. 2012-13, dated 28.10.2019.
3. Mahesh C Thakkar Vs. ACIT, Mumbai ITA 5121 5122/Mum/2018, A.Y.2012-13 and 2014-15, dated 21.08.2019.
4. Borsad Tobacco Co. Pvt. ltd. Vs. DCIT Cen Circle 8(1), Mumbai ITA 2040/Mum/2018, A.Y. 2014-15, dated 17.06.2019.
5. Urnish Jewellers Vs. Asst. CIT, Mumbai, ITA 1583/Mum/2019, A.Y. 2012-13, dated 22.05.2019.

6. M/s Motilal Dahyabhai Jhaveri & Sons vs. Asst. CIT, Mumbai ITA 3453/Mum/2018 and 1584/Mum/2019, AY.2013-14 and 2014-15, dated 24.04.2019
7. Kitchen Essential Vs. ACIT, Thane, ITA 6672 & 6673/Mum/2013, A.Y. 2013-14 and 2014-15, dated 15.01.2019.
8. M/s Avis Life Care Pvt. ltd .Vs. DCIT, Jaipur, ITA 989/JP/2018, AY 2014-15, dated 20.06.2019.
9. Narbheram Vishram Vs. DCIT Central Circle, Kolkata, ITA 42 & 43/Kol/2018, AY. 2013-14 and 2014-15, dated 27.07.2018
10. DCIT, Kolkata Vs. M/s Maco Corporation (India) Pvt. Ltd. ITA 16/Kol/2017, AY.2013-14, dated 14.03.2018.
11. Rajda Ploymers Vs. DCIT Kolkata, ITA 333/Kol/2017, AY. 2013-14, dated 08.11.2017

, the claim of the respective assesse's towards deduction u/s 35(1)(ii) in respect of the contributions made to the aforesaid institute viz. School of Human Genetics & Population Health, despite revelation of the aforesaid irregularities in the functioning of the said institute, had been held to be in order. In the case of the present assessee before us, we hold a conviction that he had after learning about the serious irregularities in the activities of the aforesaid institute, acted in a bonafide manner, and in his return filed in compliance to notice issued u/s 148 of the Act, had withdrawn the claim of deduction u/s 35(1)(ii) that was earlier raised by him in the 'Original' return of income. Apart from that, nothing has been brought to our notice from where it could be gathered that the aforesaid institute had categorically claimed to have provided a bogus/accommodation entry to the assessee before us. Be that as it may, as observed by us hereinabove, there is

nothing discernible from record which would conclusively prove to the hilt that the assessee had raised a false claim of deduction. In fact, the conduct of the assessee who had in all fairness withdrawn the claim of deduction that was earlier raised by him u/s 35(1)(ii) in his 'Original' return of income inspires substantial confidence as regards the genuineness and veracity of the said claim. As observed by the **Hon'ble High Court of Bombay** in **CIT Vs. Upendra V. Mithani [ITA (L) No.1860 OF 2009, dated 05.08.2009]**, wherein the High Court had concurred with the view taken by the Tribunal, that if the assessee gives an explanation which is unproved but not disproved, i.e it is not accepted but circumstances do not lead to the reasonable and positive inference that the assesse's case is false, then no penalty u/s 271(1)(c) could be imposed. It was observed by the Hon'ble High Court as under:

> " The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assesse's case is false. The view taken by the Tribunal is a reasonable and possible view."

In the case of the present assesse before us, his claim that he had in his 'Original' return of income made a genuine contribution to the aforesaid institute viz. School of Human Genetics & Population Health, and on the said basis had therein raised

the claim of deduction u/s 35(1)(ii), we find had not been disproved by the revenue. Accordingly, in our considered view, though the aforesaid explanation of the assessee is unproved but as it falls short of being in the nature of a disproved explanation, therefore, he could not have been visited with penalty u/s 271(10(c) of the Act.

7. Resultantly, not finding ourselves to be in agreement with the view taken by the lower authorities, we set aside the order of the CIT(A) and quash the penalty u/s 271(1)(c) of Rs, 3,24,450/- imposed by the A.O.

8. Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 04.03.2020, however, this order is being pronounced much after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income-tax Appellate Tribunal Rules, 1962, which envisages the procedure for 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. 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 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. As such, "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 High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein it was inter alia, observed as under:

> "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 rule 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 or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any "extraordinary" circumstances.

9. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate bench of the Tribunal viz. ITAT, Mumbai 'F' Bench in DCIT, Central Circle-3(2), Mumbai Vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020, wherein it was observed as under:

> "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. The epidemic situation 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 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 the Hon'ble 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."

We have given a thoughtful consideration to the aforesaid observations of the tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-	Sd/-
(G. Manjunatha)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 09.06.2020

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**