**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, VP**

**&**

**SHRI M.BALAGANESH, AM**

**ITA No.5292/Mum/2017**
**(Assessment Year :2012-13)**

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| ACIT 6(2)(1)<br>Room No.504/563-C, 5th Floor, Aayakar Bhavan<br>M.K.Road, Churchgate<br>Mumbai – 400020<br>Maharashtra | Vs. | M/s. CPEC Limited<br>11,211/219, P.D.Mello Road<br>Fort, Mumbai – 400 001<br>Maharashtra |
| **PAN/GIR No.AAACC2089A** | | |
| **(Appellant**) | .. | **(Respondent**) |

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| Revenue by | Shri Kumar Padmapani Bora |
| Assessee by | Shri Kumarswamy Boda |
| **Date of Hearing** | **06/03/2020** |
| **Date of Pronouncement** | **08/07/2020** |
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## आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.5292/Mum/2017 for A.Y.2012-13 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-12, Mumbai in appeal No. CIT(A)-12/ACIT-6(2)(1)/162/15-16 dated 17/05/2017 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2015 by the ld. Asst. Commissioner of Income Tax-6(2)(1) (hereinafter referred to as ld. AO).

2. The first issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in deleting the disallowance of short term capital loss on sale of shares claimed by the assessee in the sum of Rs.2,41,33,673/- in the facts and circumstances of the case.

2.1. We have heard rival submissions and perused the materials available on record. We find that assessee is a listed company incorporated in the year 1946. The company was in the engineering business of manufacturing of shafts and gears. The assessee company later diversified into renewable energy in 2011 looking to the future of this industry. The company entered the solar business with initial capital of Rs.5,00,00,000/- in February 2011. To commence the business of solar power, valid Power Purchase Agreement (PPA) of any State or Central Government is the prime requirement. However, there was no PPAs given and only option was to buy companies which had valid PPA, since PPA *per se* was not transferrable. Gujarat Government had allotted PPA in phase-1 and phase-2 which was valid till 31/12/2011 and 31/12/2012 respectively. Accordingly, in February 2011, the assessee company purchased S. J. Green Parks Pvt. Ltd., which had valid PPA under phase-2 and Euro Solar Power Pvt. Ltd., which had valid PPA under phase-1. The assessee purchased entire shareholdings of both the companies in February 2011. However, the assessee company could not get sufficient financing from the banks and hence, the project could not be started before the stipulated date. For this purpose, the assessee company had to pay heavy penalties and fearing complete losses, the assessee company in February 2012 sold the shares of the aforesaid two companies as under:-

(a) Total sale of shares of S J Green Parks Ltd., to Madhav Power Pvt. Ltd., - Baroda

(b) 50% stake sale of Euro Solar Power Pvt. Ltd to Madhav Power Pvt. Ltd. Baroda

2.2. With the support of Madhav Power Pvt. Ltd., Baroda, Euro Solar Power Pvt. Ltd successfully commissioned 5 MW power plant in December 2012. It is pertinent to note that at the time of purchase of shares of Euro Solar Power Pvt. Ltd., (ESPL) by the assessee, ESPL had 140 acres of non-NA land in Kutch, Gujarat. The assessee company paid purchase consideration of Rs.4.25 Crores for acquiring 100% stake in ESPL which was the owner of 140 acres of non-NA land and had valid PPA of 5 MW. ESPL solar project of 5 MW needed 35 acres of land and balance 105 acres spare land was to be utilised for future expansion. Though NA process was yet to be completed, it was time consuming, expensive and NA charges became payable which ranged from 75,000/- to 1,00,000/- per acre as informed by the ld. AR at the time of hearing. Assessee company sold 50% shareholding in ESPL to Madhav Power Pvt. Ltd., vide inter se shareholders agreement dated 21/02/2012. However, as per the agreement between shareholders, only 35 acres were to be retained in ESPL and balance 105 acres were to be transferred to assessee company. Hence, it was stated by the ld. AR that 50% shares of ESPL sold to Madhav Group by the assessee was without the ownership rights of 105 acres of land. Agreement of Banakhat was entered into between ESPL and assessee company to transfer 105 acres of land held by ESPL to assessee company on 24/02/2012. However, pending NA, only agreement of Banakhat without possession could be entered into and actual sale agreement could be done only after NA is done. Hence, to explain the transactions with ESPL, the assessee company acquired 100%

shareholding in ESPL alongwith 140 acres of land in Kutch, Gujarat. However, sale of 50% of the shareholding to Madhav Group was with an agreement to transfer 105 acres to assessee company and hence, share value was without the land value of 105 acres. This had substantially reduced the book value of shares of ESPL. Ultimately, the assessee could sell shares of ESPL only for Rs.50,000/- as against the corresponding acquisition cost of Rs.2,41,83,673/-, thereby resulting in short term capital loss of Rs.2,41,33,673/-.

2.3. The assessee company later resorted to sell 42 acres of land (Non-NA land) to Madhav Group which was purchased by Mrs. Neelakshi Khurana (who is related to Madhav Group Promoters). As per the agreement of Banakhat, purchaser agreed to pay Rs.4 Crores for 42 acres of land after NA is done. Hence, the deal was with NA i.e. after assessee is successful in getting the land NA done. It was submitted by the ld. AR that sale value of the deal was higher since NA had always commanded premium. As per the agreement, the purchaser paid Rs.1.75 Crores and balance was to be paid after NA and actual transfer is done. The assessee derived capital gains on sale of this land to the tune of Rs.3,20,33,576/- which was duly offered for taxation under the head capital gains.

2.4. The land NA could not be done by assessee within reasonable time. Accordingly, being the aggrieved party, purchaser Mrs. Neelakshi Khurana cancelled the transaction in May 2014 on account of assessee company selling this entire stake in ESPL to Madhav Group. The amount received from Mrs. Neelakshi Khurana by the assessee was refunded. Hence, it was submitted that the capital gains on sale of land Rs.3.20 Crores offered by the assessee in A.Y.2012-13 actually did not finally materialise. The ld. AR submitted that though these are subsequent events, which

happened after the A.Y.2012-13, till the assessee did not press for revision of income already offered for taxation.

2.5. The ld. AR also submitted that the following documents were filed before the ld. AO:-

(a) Memorandum of Understanding (MOU) dated 28/03/2011 of shareholders agreement dated 26/08/2011 between the shareholders for purchase of 100% shares by the assessee company in ESPL.

(b) Shareholders agreement for sale dated 21/02/2012 for sale of 50% stake in ESPL by the assessee company to Madhav Group.

(c) Interse agreement between shareholders dated 21/02/2012 for execution of sale of 50% stake to Madhav Group wherein it was clearly stated that except for solar power project land requirement of 35 acres, surplus land of 105 acres held by ESPL would be transferred to assessee company.

(d) Agreement of Banakhat dated 24/02/2012, when possession between ESPL and assessee company was entered for transfer of 105 acres of land to assessee company.

(e) Agreement of Banakhat dated 24/01/2012 when possession between assessee company, ESPL (as confirming party) and Mrs. Neelakshi Khurana for purchase of 42 acres of NA land by Mrs. Neelakshi Khurana from assessee company.

2.6. We find that the assessee had declared profit from sale of land amounting to Rs.3,20,33,576/- and had set off the short term capital loss on sale of shares amounting to Rs.2,41,33,673/- and had offered net short term capital gains of Rs.78,99,903/- in the return of income. We

find that the ld. AO had observed in para 8 of his order that assessee was asked to produce the valuation report for determining fair market value on shares of ESPL. We find that the ld. AO had observed that agreement for sale of land was executed on 24/12/2012 and shares were sold on 21/02/2012. The ld. AO had observed that since the shares were transferred before the agreement to transfer of land, value of shares as adopted by the assessee cannot be determined by excluding the value of land. Hence, the share sale consideration of Rs.50,000/-, adopted by the assessee was not accepted by the ld. AO. He observed that since 105 acres of land was transferred to assessee company by ESPL at book value after sale of shares, value of shares cannot be taken at less than book value. With these observations, the ld. AO had proceeded to disallow the short-term capital loss on sale of shares of Rs.2,41,33,673/- in the assessment.

2.7. We find that the ld. AR had submitted that the observations of the ld. AO as stated hereinabove are factually incorrect. All the documentary evidences together with necessary explanation were duly furnished before the ld. AO vide letter dated 19/03/2015 which is also enclosed in pages 40-45 of the paper book filed before us.

2.8. It was submitted by the ld. AR that the entire transactions of the assessee with ESPL are to be understood as under:-

(a) Madhav Group to acquire 50% stake from assessee company in ESPL
(b) ESPL to retain only land required to 5 MW solar power project (i.e. 35 acres). Balance land of 105 acres transferred to assessee company by ESPL.

(c) Madhav Group Mrs. Neelakshi Khurana purchased 42 acres of land from assessee company at a price of Rs.4 Crores which includes cost of NA permission which is the responsibility of assessee company.

2.9. It was submitted that all the above were transactions with assessee company as seller and Madhav Group as purchaser. All the agreements entered into with regard to the aforesaid transactions were submitted before the ld. AO vide letter dated 19/03/2015. It was submitted by the ld. AR that the agreement of Banakhat without possession was executed on 24/02/2012 and not on 24/12/2012 as submitted by the ld. AO and hence the premise for disallowing the loss on sale of shares on the ground that the land was sold much after the sale of shares is factually incorrect. The ld. AR also submitted that following dates would be relevant for understanding the transactions better.

(a) Shareholders agreement – 21/02/2012
(b) Inter se agreement within shareholders – 21/02/2012
(c) Agreement of transfer of 105 acres by ESPL to assessee company – 24/02/2012
(d) Sale of 42 acres of land by assessee company to Ms. Neelakshi Khurana – 24/01/2012

2.10. Accordingly, the ld. AR pleaded that all these transactions are composite transactions arising from the interse agreement between the parties which mentioned about the sale of shares and transfer of land between the same parties and so documented in the interse agreement and shareholders agreement. Hence he argued vehemently that the loss

on sale of shares of Rs.2,41,33,673/- requires to be allowed and set off against the capital gains on sale of land.

2.11. Per contra, the ld. DR vehemently submitted that the land was sold subsequent to sale of shares. Hence, book value of shares would be higher and accordingly, vehemently relied on the order of the ld. AO by showing that the entire transactions i.e. the transaction on sale of land and the sale of shares could not be construed as composite transactions.

2.12. We find from the aforesaid narration of facts and submissions from both the parties that assessee had filed various documents in the form of shareholders agreement, agreement of Banakhat etc., before the ld. AO which was not discussed by the ld. AO in his order for arriving at a conclusion that loss of shares on sale is not allowable. We find adjudication of all these documents would assist in proper decision making process of the issue involved herein. Hence, we deem it fit and proper in the interest of justice and fair play, to remand this issue to the file of the ld. AO for denovo adjudication in accordance with law. In view of this decision from our side, we refrain to give our opinion on various arguments made by the learned Counsel for the assessee and all those issues are left open. Assessee is also at liberty to furnish additional evidences, if any, in support of its contentions. Accordingly, ground No.1 raised by the revenue is allowed for statistical purposes.

3. Ground No.2 raised by the revenue is with regard to observation of the ld. CIT(A) that assessee had not made any claim of deduction towards bad debts u/s.36(1)(vii) of the Act in the sum of Rs.2,27,62,719/-.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee had reflected certain bad debts on certain receivables which were carried forward from earlier years. To get rid of possible litigation that might arise on the allowability of the said issue as deduction, it had chosen not to claim any deduction towards bad debts while filing its return of income. The bad debts arose in respect of debts receivable from the following parties as under:-

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| (a) | Barayu / Golden Rose | - | Rs.2,15,22,719/- |
| (b) | Excavator Ethopia | - | Rs. 7,40,000/- |
| (c) | Saffron Advisors | - | Rs. 5,00,000/- |
| | Total | | Rs.2,27,62,719/- |

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3.2. We find that the ld. AO had duly recorded the fact that assessee had voluntarily added back this sum of Rs.2,27,62,719/- in the return of income under normal provisions of the Act. We find that the ld. AO had observed that this very action of the assessee in voluntarily disallowing the said sum would also result in increasing the book loss before tax which would in turn have impact on the computation of book profits u/s.115JB of the Act in the form of carry forward of book loss which has to be set off in future years in the event of income getting computed u/s.115JB of the Act. Accordingly, the ld. AO goes to add back this bad debt claim of Rs.2,27,62,719/- as not an allowable item while computing the book profits u/s.115JB of the Act. We find from the computation of income for the year under consideration that even without adding these bad debts of Rs.2.27 Crores in the profit and loss account of the assessee, the assessee would not fall within the ambit of provisions of Section 115JB of the Act in view of loss. However, as rightly pointed out by the ld. AO in his order that this would certainly have an impact in the

carry forward of book loss which need to be reduced while computing the book profits u/s.115JB of the Act in future years. But at the same time, we find that this is not an item that could be added back as per the list of items required to be added back pursuant to Explanation to Section 115JB(2) of the Act. It is not the case of the revenue that this claim of bad debt of Rs.2.27 Crores is ingenuine or is not emanating from the business of the assessee company. The Hon'ble Apex Court in the case of Apollo Tyres Ltd., reported in 255 ITR 273 had categorically held that the ld. AO is not empowered to disturb the net profit as per profit and loss account which has been prepared in accordance with part II and part III of schedule-VI of the Companies Act, 1956, except in respect of specified items that could be disallowed and reduced as per Explanation to Section 115 JB(2) of the Act. In view of this, we do not appreciate the addition to book profits made by the ld. AO. We find that the ld. CIT(A) had granted relief to the assessee on a totally different footing which has already been modified by us by our observation made hereinabove. Accordingly, the ground No.2 raised by the revenue is dismissed.

4. Ground No.3 raised by the revenue is consequential and depending on the outcome of ground No.2 which has already been disposed off by us hereinabove. Accordingly, the ground No.3 raised by the revenue is also dismissed.

5. Ground No.4 & 5 raised by the revenue are general in nature and does not require any specific adjudication.

6. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this

Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by the Government was in force. The relevant observations of this tribunal in the said binding precedent are as under:-

> *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 7th January 2020, this order thereon is being pronounced today on 14th day of 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:*
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> *(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.*
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> *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 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.*

6.1. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

**7. In the result, appeal of the revenue is partly allowed for statistical purposes.**

Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on 08/07/2020.

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| Sd/- | **Sd/-** |
| **(MAHAVIR SINGH)** | **(M.BALAGANESH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai; Dated 08/07/2020
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
**ITAT, Mumbai**