IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

Before Shri L. P. Sahu, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No. 196/Asr./2018
(Assessment Year: 2014-15)

M/s. S. B. Global H. No. 44, Gali No. 11, Gopal Nagar, Majitha Road, Amritsar	Vs.	Income Tax Officer Ward 4(5), Amritsar

PAN– ABOFS 6622B

(Appellant) **(Respondent)**

Appellant by: Shri Ashwani Kalia,C.A.
Respondent by: Shri Charan Dass, D.R.

Date of Hearing: 04.02.2020
Date of Pronouncement: 30.06.2020

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)-2, Amritsar, dated 30.01.2018, which in turn arises from the order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (for short 'IT Act'), dated 30.12.2016 for A.Y. 2014-15.

2. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "1. That the Ld. CIT(A)-2, Amritsar has erred in dismissing the appeal of the assessee ex-parte on the ground that notice dated 09.01.2018 fixing the date for 22.01.2018 remained uncomplied.
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> 2. That the Ld. CIT(A)-2, Amritsar has erred in law in deciding the appeal on merits of the case on the ground that the assessee firm did not file any evidence for the difference in the sale as per the books and sale as per the custom dept.

3. That the order is bad in law and on facts.

4. That the appellant craves leave to add or amend the ground of appeal before the appeal is heard and disposed off."

3. Briefly stated, the assessee firm which is engaged in the business of export of fresh vegetables to Pakistan had filed its return of income for AY 2014-15 on 21.11.2014, declaring its total income at Rs.11,56,090/-. Return of income filed by the assessee firm was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

4. During the course of assessment proceedings it was observed by the A.O. that the export sales of the assessee as shown in its profit and loss account did not match with the export sales figures as was gathered by him from the customs authorities. On a perusal of the record, it was noticed by the AO that while for the export sales reflected by the assessee in its profit and loss account amounted to Rs.22,85,08,874/-, those gathered from the customs authority amounted to Rs.24,14,54,073/-. On being confronted with the aforesaid mismatch the assessee reconciled the difference to the extent of Rs.34,63,139/- along with supportive evidence. As regards the balance variance of Rs.1,06,18,731/-, it was submitted by the assessee that the same pertained to the shipping bills which were cancelled. On the basis of necessary verifications carried out from the customs authority, it was observed by the AO that two export bills viz. (i) bill no. 171 dated 02.09.2013 (Rs.552980/-) and (ii) bill no. 781 dated 21.03.2014 for (Rs.3,66,596/-) were not confirmed as cancelled shipping bills. On the basis of the aforesaid details the AO added the aggregate of the aforesaid unconfirmed bills aggregating to amount of Rs.9,19,576/- as the unexplained sales of the assessee for the year under consideration. Apart from that, the AO inter-alia disallowed 1/5th of the Car depreciation and Car expenses and made an addition/disallowance of Rs.43,483/- to the returned income of the assessee. Also, an adhoc disallowance of Rs.20,000/- out of telephone expenses was made in the hands of the assessee.

5. Aggrieved, the assessee carried the matter before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the aforesaid additions/disallowances.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Ld. Authorized Representative (for short 'AR') for the assessee, at the very outset of the hearing of the appeal submitted that as the notices issued by the office of the CIT(A) were not received by the assessee, therefore, no appearance could be put forth by the assessee in the course of the proceedings before him. In fact, it was vehemently submitted by the Ld. AR that the aforesaid notices were issued by the CIT(A) on a wrong address viz. "M/s. S. B. Global, H. No. 44, Gali No. 11, Gopal Nagar, Majitha Road, Amritsar." It was averred by the AR that the actual address of the assesse was "M/s. S. B. Global, H. No. 44, Gali No. II, Gopal Nagar, Majitha Road, Amritsar." It was submitted by the Ld. AR that as the assessee had remained divested of a sufficient opportunity of being heard, therefore, the appeal was disposed off on the basis of an ex-parte order. Apart from that, it was submitted by the Ld. AR that in the course of the last hearing of the appeal the tribunal had vide an "interim order" dated 13.05.2018 called for a remand report from the AO. It was submitted by the Ld. AR that the AO had thereafter furnished a 'remand report' on 18.09.2019, wherein he had once again upheld the addition in respect of the impugned variance of export sales amouting to Rs.9,19,576/- (Rs.5,52,980+3,66,596). It was submitted by the Ld. AR that though the assessee had duly reconciled the mismatch/variance in the export sales as shown in its profit and loss account as against that gathered by the AO from the custom authority, however, addition to the said extent was once again made by the AO on th basis of a pre-determined approach in the course of the remand proceedings. It was submitted by the Ld. AR that as the assessee had remained divested of a sufficient opportunity of substanting its claim before the first appellate authoirty, therefore, the matteer in all fairness may be restored to his file for a denovo adjudication.

7. Per contra, the Ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Ld. DR that as the assessee had failed to reconcile the mismatch/variance of the export sales both in the course of original assessment proceedings as well as in the remand proceedings, therefore, the addition of the variance of Rs.9,19,576/- was rightly made in its hands. On the basis of his aforesaid contention, it was averred by the Ld. DR that as the appeal of the assessee was devoid of any merit, therfore, the same did not merit acceptance and was liable to be dismissed.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the orders of the lower auhorities, a difference of Rs.1,29,45,199/- between the export sales reported by the assessee in its profit and loss account as against those gathered by the AO from the custom authories did initially emerge. As the assessee could not reconcile on the basis of supportive evidence the variance in respect of two export bills viz. (i) bill no. 171 dated 02.09.2013 (for Rs.552980/-) and (ii) bill no. 781 dated 21.03.2014 for Rs.3,66,596/-, therefore, the AO had added the aggregate of the aforesaid two bills amounting to Rs.9,19,576/- as the unexplained sales of the assessee for the year under consideration. As observed by us hereinabove, the tribunal in the course of earlier hearing of the appeal had vide its "interim order" dated 13.05.2018 called for a 'remand report' from the AO as regards the impugned variance of Rs.9,19,576/- in the export sales of the assessee. On a perusal of the records, we find that the AO had furnished the 'remand report' dated 18.09.2019. As per the 'remand report', it was claimed by the AO that as the assessee had failed to produce his account books/necessary documents for reconciliation of the export sales made against bill no. 1663 dated 01.09.2019 for Rs. 5,52,980/- and bill no. 9415 dated 21.03.2014 for Rs.3,66,596/-, therefore, for the said reason it could safely be concluded that the assessee had suppressed its export sales to the extent of Rs.9,19,576/-.

9. We have given a thoughtful consideration to the aforesaid issue before us. Admittedly, on a perusal of the order of the CIT(A), we find substantial force in the claim of the Ld. AR that as the notices were issued by the office of the first appellate authority at a wrong address, therefore, the assessee for no fault on its part had remained divested of a sufficient opportunity for substantiating its claim in the course of the proceedings before the CIT(A). Our aforesaid view is fortified from the fact that while for the address of the assessee as can be gathered from the assessment order is "……Gali No. II", however, the same is mentioned in the order of the CIT(A) as …….. "Gali No. 11". Apart from that, it would be relevant to point out that the Ld. DR could not rebut the aforesaid claim of the assessee. As such, we are of the considered view that there is substantial force in the claim of the Ld. AR that no notice intimating the fixation of the appeal for certain dates viz. 26.09.2017, 15.11.2017 and

22.01.2017 was ever served upon the assessee. Although the AO in compliance to the direction of the tribunal vide its "interim order", dated 13.05.2018, had furnished a 'remand report' dated 18.09.2019, however, we find that the assessee in the course of the remand proceedings also had not been able to lead any tangible material which would dislodge the adverse inferences that were drawn by the lower authority as regards the unrecorded/suppressed sales of the assessee. At the same time, we also cannot remain oblivious of the fact that the CIT(A) without validly putting the assessee to notice had disposed off the appeals on the basis of an ex-parte order. In our considered view, in the totality of the facts of the case the matter in all fairness requires to be restored to the file of the CIT(A) for denovo adjudication in context of the aforesaid issue under consideration. Needless to say, the assessee shall remain at a liberty to adduce additional material in order to substantiate its claim that there was no suppression of export sales in its profit and loss account for the year under consideration. Also, the issues pertaining to viz. (i) disallowance of Car depreciation and expenses; and (ii) disallowance of telephone expenses, as had been assailed by the assessee before us are also restored to the file of the CIT(A), on the same terms for fresh adjudication.

10. Before parting, we may herein deal with the issue that though the hearing of the captioned appeal was concluded on 04/02/2020, 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.

11. 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.

12. Resultantly, the appeal filed by the assessee is allowed for statistical purposes in terms of our aforesaid observations.

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

Sd/-	Sd/-
(L. P. Sahu)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Date 30.06.2020

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. DR, ITAT, Amritsar Bench, Amritsar
6. **गार्ड फाईल** / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण/ITAT, Amritsar. Bench, Amritsar.