

आयकर अपीलिय अधिकरण  
मुंबई पीठ "जे", मुंबई  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "J", MUMBAI  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री नवीन कुमार प्रधान, लेखा सदस्य के समक्ष  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER  
आअसं. 3078/मुं/2016 (नि.व.2011-12)  
ITA NO.3078/MUM/2016(A.Y.2011-12)

M/s. Powernetics Equipments India Pvt. Ltd.  
7C, Bindya, Bandra Reclamation,  
Bandra(W), Mumbai 400 050  
PAN: AAACP9311Q

..... अपीलार्थी /Appellant

बनाम Vs.

The Income Tax Officer 9(2)(4),  
Aaykar Bhavan, M.K.Road,  
Mumbai 400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Hari S. Raheja

प्रतिवादी द्वारा/Respondent by : S/Shri A.Mohan & Uodal Raj Singh

सुनवाई की तिथि/ Date of hearing : 16/01/2020

घोषणा की तिथि/ Date of pronouncement : 22/06/2020

आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals) -21, Mumbai (in short 'the CIT(A)') dated 25/02/2016 for the assessment year 2011-12.

2. The brief facts of the case as emanating from records are: The assessee company is engaged in the business of manufacturing of UPS, primarily for Indian Railways. The assessee filed its return of income for the impugned assessment year on 29/09/2011 declaring total income of (-) Rs.20,36,175/-.. During the period relevant to assessment year under appeal, the assessee had also entered into international transaction with its Associated Enterprise (AE) M/s. Powernetics Ltd. (UK) for supply of UPS. In scrutiny assessment proceedings the Assessing Officer made additions/disallowances on following counts:

(i) Disallowance u/s 43B	-	Rs.13,79,823/-
(ii) Unexplained cash credit u/s 68	-	Rs. 4,60,000/-
(iii)Unproved expenditure	-	Rs. 3,77,965/-
(iv)Transfer Pricing Adjustment	-	Rs. 17,60,966/-

Aggrieved against the additions made in the assessment order dated 22/03/2014, passed under section 143(3) of the Income Tax Act, 1961 (in short 'the Act'), the assessee filed appeal before the CIT (A). The CIT (A) dismissed the appeal of assessee in toto. Hence, the present appeal by the assessee /appellant.

3. Shri Hari S. Raheja, appearing on behalf of the assessee submitted at the outset that he is not pressing ground No.1 of the appeal relating to disallowance of Rs.13,79,823/- made under section 43B of the Act.

3.1. In respect of ground No.2, relating to addition on account of unexplained cash credit under section 68 of the Act, the Id. Authorized Representative of the assessee submitted that the addition has been made in respect of loans taken by assessee from Ms. Titli Thind- Rs.1,50,000/- and Ms. Anita Chavan – Rs.3,10,000/-. The assessee had filed complete details of the loans along with confirmations from the lenders. Since, the assessee in first instance merely failed to file PAN of the lenders, the Assessing Officer rejected assessee's contention. Subsequently, vide letter dated 18/03/2014, the assessee filed PAN of the lenders. However, the Assessing Officer rejected the same holding that the assessee has not discharged its burden. The Id. Authorized Representative of the assessee submitted that Ms. Anita Chavan is the primary member of the appellant company. She retired as Joint Director, Agriculture and Co-operative Department of Government of Maharashtra. She passed away in the year 2010 and before her demise she filed her return of income for AY 2010-11. The assessee filed copy of return of income of Ms. Anita Chavan for assessment year 2010-11 and copy of bank statement reflecting loan amount advanced to the assessee as additional evidence before the CIT(A). The assessee also filed copy of PAN and bank statement of Ms. Titli Thind, before the CIT (A) as additional evidences. The assessee discharged its onus to prove genuineness of the loan transactions and creditworthiness of the lenders. The CIT (A) did not take into cognisance additional evidences filed by the assessee and confirmed the addition.

3.2. In respect of ground No.3, relating to disallowance of expenditure Rs.3,77,965/-, the Id. Authorized Representative of the assessee submitted that the assessee manufactured proto type Transformers for Indian Railways as

per pre-drawn specifications provided to it. However, due to change in the specifications by Railways, the assessee had to stop the project. The assessee decided write off accumulated cost of the project expenses that was shelved due to change in the specifications by Railways. The assessee write off 10% accumulated cost in the impugned assessment year. The Assessing Officer disallowed writing off of such accumulated cost by invoking provisions of section 35D of the Act. At first appellate stage, the CIT(A) did not approve Assessing Officer's action of invoking provisions of section 35D, however, the CIT(A) disallowed write off expenditure on the ground that since project is on hold there is no reason to claim expenditure. The Id. Authorized Representative of the assessee pointed that in the immediately succeeding assessment year i.e. assessment year 2012-13 similar disallowance was claimed. The issue travelled to the Tribunal. The Tribunal in assessee's case in ITA No.1393/Mum/2017 decided on 26/03/2019 allowed assessee's claim of amortization of expenditure on the project in ten equal instalments.

3.3. The Id. AR submitted that in ground No.4 of the appeal, the assessee has assailed addition made on account of Transfer Pricing (TP) adjustment. The assessee had entered into transaction for supply of transformers with its AE in UK. The assessee filed audit report under section 92ECB of the Act. The assessee had computed profit margin on transaction with its AE at cost plus 10%. The Assessing Officer rejected the submissions of the assessee and estimated profit margin not only in respect of sale transaction but also in respect of service charges at cost plus 15%. The Id. Authorized Representative of the assessee pointed that the Assessing Officer has erred in computing profit margin in respect of international transaction by adopting margins of

subsequent Financial Year. It was explained that profit margin on goods sold to the AE was 12% and the computation of the same was filed before the Assessing Officer. The Assessing Officer rejected the same on the basis of the GP declared by the assessee in subsequent assessment year. The Assessing Officer has failed to consider the fact that 15% GP in subsequent assessment year also consists of gain on sale of assets i.e. factory building and sundry balances written back along with fixed deposit interest. The Id. Authorized Representative of the assessee pointed that if above non-operating balances are reduced, there would be loss. The Id. Authorized Representative of the assessee submitted that the margin of cost plus 10% declared by the assessee is fair and reasonable in the light of the fact that even in current assessment year the assessee has suffered losses.

4. On the other hand, Shri A.Mohan, CIT-DR , representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of the assessee. The Id. Departmental Representative submitted that assessee has not produced any document in the form of agreement, etc. to substantiate that for supply of Transformers to its overseas AE the mark up of cost plus 10% is at arm's length. The assessee has also not filed any list of comparables in TP study for FAR analysis.

5. We have heard the submissions made by rival sides and have perused the orders of authorities below. We have also examined the paper book filede by the assessee. The assessee in appeal has raised five grounds.

5.1. The ground No.1 of the appeal, is with respect to disallowance made under section 43B of the Act. The Id. Authorized Representative of the assessee stated at the Bar that he is not pressing ground No.1. Thus, in view of the statement made **ground No.1 of the appeal is dismissed.**

5.2. In ground No.2 of the appeal, the assessee has assailed confirming of addition made under section 68 of the Act amounting to Rs.4,60,000/-. The contention of the assessee is that assessee had taken loans from Ms. Titli Thind Rs.1,50,000/- and Ms. Anita Chavan Rs.3,10,000/-. The assessee had filed additional evidences before CIT(A) to substantiate genuineness of the loan transactions and the lenders. The assessee filed bank statements of the creditors along with PAN details and confirmations. The CIT (A) has brushed aside evidences filed by the assessee and confirmed the addition. Taking into consideration entirety of facts, we deem it appropriate to restore this issue back to the file of Assessing Officer for deciding the issue afresh after considering additional evidences filed by the assessee before the CIT (A). The Assessing Officer before re-adjudicating this issue shall grant reasonable opportunity of hearing to the assessee in accordance with law. **The ground No.2 of the appeal is allowed for statistical purpose.**

5.3. The ground No.3 of the appeal is with respect to rejection of assessee's claim of write off of project expenses Rs.3,77,965/-. The assessee has amortized project cost that was shelved due to change in specifications, over a period of ten years. We find that similar claim was made by the assessee in AY 2012-13. The Assessing Officer disallowance the same for similar reasons. After being unsuccessful before the Assessing Officer and the CIT (A), the assessee

carried the issue in appeal before the Tribunal in ITA NO.1393/Mum/2017 (supra). The Co-ordinate Bench after considering the facts allowed the assessee's claim of amortization. The facts in the impugned assessment year are identical. For parity of reasons we direct the Assessing Officer to delete the addition and allow write off of proportionate (10%) expenditure. **The ground no. 3 of the appeal is allowed, accordingly.**

5.4. In ground No.4 of the appeal, the assessee has assailed addition of Rs.17,60,966/- made by the Assessing Officer by way of TP adjustment. The assessee has declared cost plus @10% margin on the sales made to its AE in UK. During the course of assessment proceedings the Assessing Officer made TP adjustment by estimating profit margin @15% on the basis of GP declared in subsequent assessment year i.e. assessment year 2012-13. The AO applied profit margin of 15% on sales and service charges to AE. The contention of the assessee is that 15% profit margin adopted by the Assessing Officer is wrong as in the subsequent assessment year the profit margin of 15% includes gain on sale of assets being factory building and sundry balances written back including interest on fixed deposits. In fact in the subsequent assessment year there is negative GP as the assessee has suffered losses. We are of considered view that merely for the reason that the assessee has declared higher GP in subsequent year, current year GP should not be estimated by adopting the same. Further, the case of assessee is that 15% GP in subsequent year has been computed after inclusion of sale of assets, etc. and hence, it does not depict correct picture of operating profits. We further observe that the assessee has also failed to furnish complete details as required under transfer pricing provisions. Arm's Length Price of the transaction with AE has to be determined

by applying one of the method prescribed under the provisions of section 92C of the Act. Under the facts of the case, we deem it appropriate to restore the issue back to the file of Assessing Officer for de-novo adjudication after affording reasonable opportunity of hearing to the assessee, in accordance with law. The findings of authorities below on this issue are set aside and **the ground No.4 of the appeal is allowed for statistical purpose.**

5.5. The ground No.5 of the appeal is general in nature and, hence, require no adjudication.

**6. In the result, appeal of the assessee is partly allowed.**

7. This appeal was heard on 16/01/2020. As per Rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963, (ITAT Rules, 1963), the order was required to be “ordinarily” pronounced within a period of 90 days from the date of conclusion of the hearing of appeal. The instant appeal was heard prior to the lockdown declared on 24-03-2020 in view of COVID-19 pandemic. The lockdown was forced due to extra ordinary circumstances caused by world wide spread of COVID-19. Thereafter, the lockdown was extended from time to time. Therefore, the pronouncement of order beyond the period of 90 days from the date of hearing is not under “ordinary” circumstances. The Co-ordinate Bench of the Tribunal in the case of DCIT vs. JSW Ltd., ITA No.6264/Mum/2018 for A.Y 2013-14 decided on 14/05/2020, under identical circumstances, after considering the provisions of Rule 34(5) of the ITAT Rules, 1963, judgements rendered By Hon’ble Apex Court and the Hon’ble Bombay

High Court on the issue of time limit for pronouncement of orders by the Tribunal and the circumstances leading to lockdown held:-

*“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 be interpreted. The interpretation so assigned by us is not only inconsonant 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 ITA No. 6103 and lockout 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 refer 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.”*

Thus, in light of above facts and the decision of coordinate Bench, the present order is pronounced beyond the period of 90 days.

8. The appeal of the assessee is partly allowed. Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Order pronounced on Monday the 22nd day of June, 2020.

Sd/-

(N.K.PRADHAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 22/06/2020  
Vm, Sr. PS (O/S)

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

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