



IN THE INCOME TAX APPELLATE TRIBUNAL
“D”BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.155/Mum./2018
(Assessment Year : 2009–10)

Income Tax Officer
Ward–26(2)(3), Mumbai

..... Appellant

v/s

Mohd. Irsad Mohd. Samiullah Alam
D–103, Penat Galaxy, Fire Brigade
Antop Hill, Mumbai 400 037
PAN –AHHPA4000G

..... Respondent

Revenue by : Shri Sunil Kumar Jha
Assessee by : Shri Shubham Rathi

Date of Hearing – 25.02.2020

Date of Order – 13.07.2020

O R D E R

PER SAKTIJIT DEY. J. M.

The captioned appeal has been filed by the Revenue challenging the order dated 24th October 2017, passed by the learned Commissioner of Income Tax (Appeals)–38, Mumbai, pertaining to the assessment year 2009–10.

2. Briefly the facts are, the assessee is an individual carrying on business as a labour contractor. For the assessment year under dispute, the assessee filed his return of income on 30th September 2009, declaring total income of Rs.7,47,050. Assessment in assessee’s case was completed under section 143(3) of the Income Tax Act, 1961 (for short "the Act") vide order dated 23rd October 2011, accepting the returned income. Subsequently, the aforesaid

assessment order was subjected to proceedings under section 263 of the Act and the revisional authority set aside the assessment order with a direction to frame denovo assessment keeping in view the observations made in the order passed under section 263 of the Act. Pursuant to the directions of the revisional authority, the Assessing Officer took up the assessment proceedings again and in the course of such proceedings conducted enquiry on the specific issue raised by the revisional authority in the order passed under section 263 of the Act. After calling upon the assessee to furnish various information/documents, the Assessing Officer ultimately completed assessment under section 143(3) r/w section 263 of the Act making the following additions.

1.	Difference in receipt as per TDS certificate and P&L A/c	Rs 17,59,509
2.	Interest income not offered to tax	Rs. 31,814
3.	Capital introduction added u/s 68	Rs 22,75,552
4.	Unexplained investment in house property u/s 69	Rs 10,89,000
5.	Addition u/s 68 on account of sundry creditors	Rs 2,15,92,724

3. The assessee contested the additions made by filing an appeal before the first appellate authority. After considering the submissions of the assessee in the context of the facts and material on record,

learned Commissioner (Appeals) deleted some of the additions made by the Assessing Officer. Being aggrieved, the Revenue is in appeal before the Tribunal.

4. In ground no.(1), the Revenue has challenged the deletion of addition of Rs 17,59,509.

5. As discussed earlier, the aforesaid addition was made on account of difference in receipt shown in the Profit & Loss account and as per TDS certificate. The Assessing Officer observed that as per TDS certificate, the assessee has received an amount of Rs 3,52,36,706, from Unity Infra Projects Ltd., towards labour charges. Whereas, in the Profit & Loss account, the assessee has shown an amount of Rs 3,34,77,197. Alleging that the assessee failed to reconcile the difference with supporting evidence and proper explanation, the Assessing Officer added back the amount of Rs17,59,509. While deciding the issue in appeal, learned Commissioner (Appeals) deleted the addition being convinced with the supporting evidences filed by the assessee as well as the submissions made.

6. We have considered rival submissions and perused the material on record. It is evident that the Assessing Officer has added back the amount of Rs 17,59,509, merely on conjecture and surmises that the assessee has received an amount of Rs 3,52,36,706, from Unity Infra Projects Ltd. While doing so, the Assessing Officer has observed that though notice under section 133(6) of the Act was

issued to Unity Infra Projects Ltd., however, no reply/information was received from the said party. Whereas, learned Commissioner (Appeals) after verifying the evidences and submissions furnished by the assessee, has found that during the year under consideration, the Assessee has raised total bill of Rs 3,43,21,350, on Unity Infra Projects Ltd., which included service tax component of Rs. 8,44,153. She further noted that the assessee has accounted Rs. 3,34,77,197, in Profit & Loss account and the amount of Rs. 8,44,153, has been shown as service tax payable with duties and tax under the head current liabilities. The learned Commissioner (Appeals) has also noted the fact that the assessee has claimed TDS of Rs 3,88,860, corresponding to the receipt of Rs 3,43,21,350. On verification of the TDS certificate in Form no.16A, by Unity Infra Projects Ltd., learned Commissioner (Appeals) has also recorded a finding of fact that such certificate shows labour charges of Rs 3,34,77,197. As rightly observed by learned Commissioner (Appeals), the Assessing Officer has not made any in-depth enquiry to ascertain the correctness of assessee's claim regarding the receipt of labour charges. By simply issuing a notice under section 133(6) of the Act to Unity Infra Projects Ltd., the Assessing Officer has finished his part of the job without pursuing the concerned party any further even after not receiving any reply. Thus, the facts on record clearly show lack of proper enquiry by the Assessing Officer. It is a well settled legal principle that without making proper enquiry and bringing contrary material on record to falsify assessee's claim, the Assessing

Officer cannot make addition purely on conjecture and surmises. That being the case, we do not find any infirmity in the decision of the learned Commissioner (Appeals) on the issue. Accordingly, ground raised is dismissed.

7. In ground no.2, the Revenue has challenged the deletion of addition of Rs 10,89,000, made under section 69 of the Act. During the assessment proceedings, the Assessing Officer noticed that as per the details available, the assessee had purchased immovable property during the year by investing an amount of Rs 10,89,000, and also deposited cash of the very same amount. Accordingly, he called upon the assessee to furnish necessary details and his explanation regarding the source of such investment and cash deposit. In reply, it was submitted by the assessee that cash deposit of ` 50,000, was made during the year and as regards the investment in house property, it was submitted that the assessee along with his wife has entered into an agreement for purchase of property at Sultanganj, Patna, for Rs10,89,000. To explain the said investment, it was submitted by the assessee through supporting evidence by way of affidavit that a total amount of Rs 5,00,000, was received from two persons. Further, it was submitted that the source of investment in the property having properly explained, there cannot be any addition under section 69 of the Act. The Assessing Officer was, however, not convinced with the explanation furnished by the assessee. Alleging that the assessee failed to properly explain the source of investment of Rs 10,89,000, he

added back the amount to the income of the assessee. While deciding the issue in appeal, learned Commissioner (Appeals) deleted the addition.

7. We have considered rival submissions and perused the material on record. The first allegation of the Assessing Officer that the assessee had deposited cash of Rs 10,89,000, ultimately turned out to be incorrect. As regards the investment made in sale and purchase of house property, it has been observed by learned Commissioner (Appeals) that as per the agreement, the property was purchased for a consideration of Rs 8,00,000, whereas, the value of the property was determined at Rs 10,80,000 for stamp duty purposes. Further, it has been factually found that the investment of Rs 8,00,000, was made by way of demand draft of Rs 7,50,000 dated 31st March 2008 and cash payment of Rs 50,00,000, which has been mentioned in the sale agreement. It has been also found by learned Commissioner (Appeals) that the payments were made from the current account standing in the name of Rounaq Construction, a proprietary concern of the assessee. Thus, it was established from the facts on record that the investments in house property were out of business income of the assessee. To substantiate such claim, copy of bank statements was also furnished by the assessee. The aforesaid factual finding of the learned Commissioner (Appeals) remains uncontroverted before us. Thus, it is established on record that source of investment in house property amounting to Rs 10,89,000, has been properly explained by the

assessee. That being the case, the addition made has been rightly deleted by learned Commissioner (Appeals). This ground is dismissed.

8. The common issue raised in grounds no.3 and 4, relates to the deletion of addition made of Rs 2,15,92,724, on account of unexplained sundry creditors. Brief facts are, during the assessment proceedings, the Assessing Officer called upon the assessee to furnish the details of sundry creditors shown at Rs 2,34,57,196. He found that out of the aforesaid, amount of Rs 2,15,55,802, relates to suppliers which works out to almost 92% of the total sundry creditors. He, therefore, called upon the assessee to prove the genuineness of the sundry creditors. In response to the query raised, the assessee furnished a detailed submission vide letter dated 18th August 2015, to establish its claim of sundry creditors. It was submitted by the assessee that out of the total sundry creditors an amount of Rs 2,23,73,670, was on account of wages and salary and out of that an amount of Rs 2,15,55,802, remains payable. Alleging that the assessee failed to furnish supporting evidence to prove the outstanding labour charges. Further, alleging that 96% of the total labour expense cannot remain outstanding, the Assessing Officer concluded that outstanding labour charges of Rs 2,15,55,802, cannot be allowed. However, estimating an amount Rs 18,64,472, as reasonable amount of labour charges which can be allowed, the Assessing Officer treated the balance amount of Rs 1,96,91,330, as unexplained and added back to the income of the assessee. Further an amount of Rs 19,01,394, shown

as sundry creditors other than labour charges was also added back to the income of the assessee. The assessee contested the aforesaid additions before the first appellate authority.

9. After considering the submissions of the assessee in the context of facts and material on record as well as judicial precedents cited before her, learned Commissioner (Appeals) observed that in the books of account the assessee has shown an amount of Rs 3,34,77,197, as labour charges received from Unity Infra Projects Ltd. She observed that as against the amount received towards labour charges from Unity Infra Projects Ltd., it has booked an amount of Rs 2,15,55,802, as expenses towards labour charges which is included in the sundry creditors. She observed, when the assessee had received quite substantial amount towards labour charges, it will be natural to conclude that the assessee must have expended substantial amount towards labour charges considering the fact that the assessee is a labour contractor. As regards allegation of the Assessing Officer that details of labourers could not be furnished by the assessee, learned Commissioner (Appeals) observed that labourers are men of small means, therefore, cannot be expected to furnish details like PAN, bank account, copy of return of income, etc. Further, from the material available on record, she found that the assessee had, in fact, entered into a contract with Unity Infra Projects Ltd., towards labour works. She also noted that as per the material available, there was dispute between the assessee and Unity Infra Projects Ltd., and ultimately this

dispute has to be settled with the intervention of the principal employer/contractee. Thus, she concluded that considering the nature of work executed by the assessee, the outstanding labour charges shown as sundry creditors cannot be treated as unexplained and added to the income of the assessee. She observed, even if the claim of the assessee regarding outstanding labour charges is not acceptable, the best can be done is to tax the profit element in the business and not the entire amount when the fact remains that the assessee has shown receipt of labour charges from Unity Infra Projects Ltd., for an amount of Rs 3,34,77,197. Accordingly, she directed the Assessing Officer to estimate profit @ 8% on the labour charges received of Rs 3,34,77,197, and add to the income of the assessee. Accordingly, she sustained the addition made by the Assessing Officer to the extent of Rs.26,78,176.

10. The learned Departmental Representative drawing our attention to the observations of the Assessing Officer and other material on record, submitted that various documentary evidences furnished before the first appellate authority were never furnished before the Assessing Officer. Therefore, there is a violation of rule 46A. Further, he submitted that the assessee having failed to furnish the details of the sundry creditors and the persons to whom the outstanding labour charges were payable, the addition made was justified.

11. The learned Authorised Representative submitted, B.W. Highway Stars Pvt. Ltd., and Kamat Hotels India Ltd. have entrusted certain construction work to Unity Infra Projects Ltd. Since, the assessee used to regularly execute work of Unity Infra Projects Ltd. as a sub-contractor, Unity Infra Projects Ltd. sub-contracted the labour component of the aforesaid contract to the assessee. He submitted that during the year under consideration, the assessee had raised bills amounting to Rs 3,43,21,350, inclusive of tax towards supply of labour. Whereas, for the same period, the assessee had incurred labour expenses of Rs 2,23,73,670, and an amount of Rs 1,01,00,596, towards incidental material to be used in the contract. He submitted that during the year under consideration, the assessee had received Rs 2,21,07,389, from Unity Infra Projects Ltd. As regards the balance amount receivable, there was some dispute as the Unity Infra Projects Ltd. did not pay to the assessee. Since the assessee continued paying labour charges from his own source and could not pay them further, he expressed his inability to continue the work. Thus, ultimately, the dispute between the assessee and Unity Infra Projects Ltd., had to be resolved by intervention of B.W. Highway Stars Pvt. Ltd., and Kamat Hotels India Ltd., the contractees. As per the settlement reached between the parties, out of the outstanding receivables of Rs 2,94,98,563, Unity Infra Projects Ltd. paid some amount in financial year 2009-10 to 2011-12; whereas, the balance amount of Rs. 2,08,56,148, was still receivable. Again, with the intervention of the contractees, Unity Infra Projects Ltd., agreed to pay the amount of

Rs 56,24,532, towards full and final settlement which also he did not pay fully. Whereas, the assessee continued to pay outstanding labour charges and in the process has incurred huge loss. The learned Authorised Representative submitted that Unity Infra Projects Ltd. defaulted on payment to various other creditors and lenders and ultimately the company was under corporation insolvency resolution process under Insolvency and Bankruptcy Code 2016. Thus, he submitted that under these circumstances, the addition made by the Assessing Officer was totally unjustified.

12. We have considered rival submissions and perused the material on record. On a perusal of record, it is very much clear that the assessee is engaged in the business of labour contractor. This fact has also been admitted by the Assessing Officer in the assessment order. It is also a fact that in the books of account as well as in the Profit & Loss account, the assessee has shown an amount of Rs 3.34 crores towards labour charges received from Unity Infra Projects Ltd. Facts available on record also establish that the assessee had entered into a contract with Unity Infra Projects Ltd. for supply of labour. Thus, it is quite natural and logical for the assessee to incur substantial expenditure towards labour, considering the fact that the work entrusted to the assessee was labour intensive. It is also a fact on record that in the course of proceedings before the Departmental Authorities, the assessee had furnished various documentary evidences to substantiate its claim of labour charges. Merely because

some details of payees / labourers such as PAN, address, bank account copy, return of income copy, etc., could not be furnished, the Assessing Officer has treated the labour charges as unexplained and added to the income of the assessee. On one hand, the Assessing Officer does not dispute the fact that the assessee has received quite substantial amount from Unity Infra Projects Ltd. towards labour charges, whereas, on the other hand, he disbelieves the expenditure incurred by the assessee towards labour charges. This, in our view, is completely unreasonable and illogical. When the work entrusted to the assessee is labour intensive and the assessee has shown receipt towards labour charges, it has to be accepted that the assessee must have incurred quite substantial amount towards labour charges. It further appears from record that the Assessing Officer has not made any in-depth enquiry except making certain general queries with regard to the labour charges. In these circumstances, the addition made purely on conjecture and surmises cannot be sustained. Therefore, we are inclined to agree with the conclusion reached by the learned Commissioner (Appeals). As regards the contention of the learned Departmental Representative that the assessee has furnished various evidences before learned Commissioner (Appeals) which were not submitted before the Assessing Officer, hence, the provision of rule-46A has been violated, we are unable to accept it. Firstly, the Revenue has not raised any specific ground challenging violation of rule 46A; secondly, the Revenue has failed to point out as to what is the fresh evidence filed before learned Commissioner (Appeals) which

was not available before the Assessing Officer. In these circumstances, we have no hesitation in upholding the decision of learned Commissioner (Appeals) by dismissing the grounds raised by the Revenue.

13. In the result, Revenue's appeal is dismissed.

14. Before we part, it is necessary for us to deal with a procedural issue relating to pronouncement of the order. The hearing of this appeal was concluded on 25.02.2020. As per rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963, ordinarily the appeal order has to be pronounced before expiry of ninety (90) days from the date of conclusion of hearing of appeal. However, on 24.03.2020 a nationwide lockdown was enforced by the Government of India in view of COVID-19 pandemic. Due to the unprecedented situation arising out of such lockdown all activities ceased and no normal official work could be done. For this reason only the appeal order could not be pronounced within the period of 90 days. Being faced with a similar situation the Tribunal in case of DCIT V/s JSW Limited, ITA Nos.6264 & 6103/Mum/2018, dated 14th May 2020, after interpreting rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963 as well as various decisions of the Hon'ble Supreme Court as well as the Hon'ble Jurisdictional High Court held that keeping in view the extraordinary situation prevailing due to the pandemic, the lockdown period has to be excluded for the purpose of time limit fixed for pronouncement of order as per rule 34(5). The

relevant observation of the Bench in this regard is reproduced hereunder for better clarity:—

“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:

(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 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 work 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 be 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 timebound 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 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 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.’’

15. Following the aforesaid decision of the Coordinate Bench, we proceed to pronounce the order today the 13th day of June, 2020 by placing in the notice board in terms of rule 34(4) of the Income Tax (Appellate tribunal) Rules, 1963.

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 13.07.2020

Copy of the order forwarded to:

- (1)The Assessee;
- (2)The Revenue;
- (3)The CIT(A);
- (4)The CIT, Mumbai City concerned;
- (5)The DR, ITAT, Mumbai;
- (6)Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar,
ITAT, Mumbai