IN THE INCOME TAX APPELLATE TRIBUNAL

"D"BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBERAND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.7584/Mum./2019
(Assessment Year : 2010–11)

Rak Construction Project Co. Pvt. Ltd.
113–A, Mittal Tower, Nariman Point ……. Appellant
Mumbai 400 021 PAN – AACCK8147P

v/s

Income Tax Officer
Ward–3(3)(1), Mumbai ……. Respondent

Assessee by : Shri Bhupendra Shah
Revenue by : Smt. Jyothilakshmi Nayak

Date of Hearing – 26.02.2020	Date of Order – 13.07.2020

O R D E R

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the assessee challenging the order dated 12th September 2019, passed by the learned Commissioner of Income Tax (Appeals)–8, Mumbai, for the assessment year 2010–11.

2. In ground no.1, the assessee has challenged the assessability of lease rent received under the head income from house property. Whereas, in ground no.2, the assessee has challenged the validity of

re–opening of assessment under section 147 of the Income Tax Act, 1961 (for short *"the Act"*).

3. Ground no.3, is more or less general in nature and ground no.4, is challenging levy of interest under sections 234A, 234B, 234C and 234D of the Act as well as initiation of penalty proceedings under section 271(1)(c) of the Act.

4. Brief facts are, the assessee, a resident company, is engaged in construction business. For the assessment year under dispute, the assessee filed its return of income on 13th October 2010, declaring loss of ₹ 4,93,963. Initially, the return of income filed by the assessee was processed under section 143(1) of the Act accepting the loss returned. Subsequently, the Assessing Officer found that the assessee had received compensation from M/s. National Textile Corporation Ltd. (NTCL) vide a decree passed by the Court of Small Causes at Bombay on 19th July 2007. He further found that while completing assessment for the assessment year 2012–13, the Assessing Officer had brought such compensation to tax as income under the head house property. The aforesaid decision of the Assessing Officer was not contested by the assessee. Whereas, in the impugned assessment year, the assessee has not offered such compensation to tax under the head income from house property. Therefore, alleging escapement of

income, the Assessing Officer re–opened the assessment under section 147 of the Act. During the assessment proceedings, the Assessing Officer called upon the assessee to explain as to why compensation received from NTCL should not be assessed as income under the head house property. In response to the query raised by the Assessing Officer, the assessee filed its objection on 15th September 2017, firstly objecting to the re–opening of assessment under section 147 of the Act and secondly also objecting to the treatment of the compensation received as house property income. The Assessing Officer disposed off all the objections of the assessee separately vide order dated 18th September 2017. Thereafter, the Assessing Officer proceeded to complete the assessment. While doing so, he found that in assessment year 2012–13, similar compensation received by the assessee was assessed under the head income from house property and the assessee accepted the same. Further, he found that similar compensation received by the assessee in assessment years 2013–14 and 2014–15 was voluntarily offered by the assessee as income under the head income from house property by filing revised returns of income. Though, the assessee relied upon various judicial precedents in support of its claim that the compensation received is not assessable under the head income from house property, the Assessing Officer was not convinced. Taking note of the fact that the assessee

itself has offered such income under the head income from house property in assessment year 2012–13, 2013–14 and 2014–15, the Assessing Officer ultimately concluded that the compensation received bythe assessee during the year cannot be adjusted against work–in–progress as the same is not incidental to the carrying of the business of the assessee. Accordingly, he assessed the compensation received under the head income from house property. In the process, he also held that various decisions cited by the assessee would not be applicable to the present facts. Accordingly, he determined the net house property income at ₹ 28,87,869 and added back to the income of the assessee.

5. Though, the assessee challenged the assessment order so passed before the first appellate authority, however, it did not get the desired relief.

6. Learned Counsel for the assessee submitted that the assessee is basically engaged in the business of construction and development activity and is following project completion method of accounting. He submitted that while accumulated cost is taken to the WIP account but the rent receivable is reduced from the said account. He submitted, the assessee has not entered into any rent agreement with NTCL. He submitted that for this reason only, the NTCL was directed to pay

compensation to the assessee as per the order of the Hon'ble Jurisdictional High Court. He submitted, the compensation received by the assessee since is incidental to carrying on the business and there was no intention of earning any rental income, the compensation received was rightly set–off against work–in–progress. In support of his contention, the learned Counsel relied upon the following decisions:–

i) *Chennai Properties& Investments Ltd. v/s CIT, [2015] 373 ITR 673 (SC); and*

ii) *Rayala Corporation Pvt. Ltd. v/s ACIT, [2016]386 ITR 500 (SC)*.

7. The learned Authorised Representative further submitted that the compensation received by the assessee is in the nature of mesne profits received by the assessee on account of damages for deprivation and use of occupation. Hence, the compensation received is capital in nature. In support of such contention, he relied upon the following decisions:–

i) CIT v/s Bokaro Steel Ltd., [1999] 236 ITR 315 (SC); and

ii) CIT v/s Karnal Co–operative Sugar Mills Ltd., [2000] 243 ITR 002 (SC).

8. As regards the validity of re–opening of assessment under section 147 of the Act, the learned Counsel for the assessee submitted

that merely relying upon the assessment order passed for the assessment year 2012–13, the Assessing Officer has re–opened the assessment under section 147 of the Act. He submitted that since the re–opening of assessment is on borrowed satisfaction, it is invalid. In support of such contention, the learned Counsel for the assessee relied upon the decision of the Tribunal, Delhi Bench, in Col. Jaspal Singh v/s ITO, ITA no.6321/Del./2016, dated 15th March 2017. He submitted that merely because the assessee did not contest the issue in assessment year 2012–13, it cannot be said that the assessee has accepted the compensation received as income from house property. Further, the learned Counsel for the assessee submitted that in the assessment year 2012–13, penalty under section 271(1)(c) of the Act on the addition made under income from house property has been deleted by the Tribunal while considering assessee's appeal.

9. Learned Departmental Representative strongly relying upon the observations of the Assessing Officer and learned Commissioner (Appeals) submitted that the assessee itself having offered the compensation received as income from house property in three subsequent assessment years, the rule of consistency would apply, therefore, there is no valid ground for the assessee to challenge the decision of the Assessing Officer. As regards the re–opening of assessment, learned Departmental Representative submitted that the

return of income filed by the assessee was only processed under section 143(1) of the Act and there was no scrutiny. Therefore, when the Assessing Officer came to know about the escapement of income due to non–offering of house property income, he has validly re–opened the assessment under section 147 of the Act.

10. We have considered rival submissions and perused the material on record. As it appears, assessee's property was leased to NTCL and subsequently there was some dispute between the assessee and NTCL. The matter ultimately came up before the Small Causes Court, Bombay, and the Court directed NTCL to pay compensation to the assessee for the period for which it was occupied. As per the directions of the Court, NTLC paid compensation to the assessee from the assessment year 2012–13 onwards. As it appears from the facts on record, like in the impugned assessment year, in other assessment years also the assessee did not offer the compensation received as house property income, but adjusted it against WIP. In assessment year 2012–13, the Assessing Officer noticing the aforesaid fact in course of assessment proceedings, brought the compensation received to tax under the head income from house property. Undisputedly, the aforesaid decision of the Assessing Officer in assessment year 2012–13 was accepted by the assessee. Further, in assessment years 2013–14 and 2014–15 also, the assessee offered the compensation received

under the head income from house property by revising its return of income filed earlier. Thus, the aforesaid conduct of the assessee clearly shows that in three subsequent assessment years the assessee have accepted the rental income as income from house property. That being the case, the rule of consistency would clearly apply insofar as treatment of compensation received in the impugned assessment year as well. Therefore, in our opinion, the compensation received by the assessee has been correctly assessed under the head income from house property.

11. The decisions relied upon by the learned Authorised Representative would not be applicable to the facts of the present case as in the instant case, the assessee itself in the subsequent assessment years has offered the compensation as income from house property. The assessee cannot be permitted to change the head of income according to his own sweet will and convenience. The contention of the learned Counsel for the assessee to explain the reasons for offering of compensation under the head house property income in subsequent years, in our view, stands on thin ice, hence not acceptable.

12. As regards the validity of re–opening of assessment under section 147 of the Act, admittedly, the return of income filed by the

assessee was initially processed under section 143(1) of the Act and was not subject to scrutiny. Therefore, the Assessing Officer never had occasion to verify various claims made by the assessee in the return of income. When in the course of assessment proceedings for the assessment year 2012–13, the Assessing Officer was informed about the receipt of compensation from NTCL, he verified all the relevant fact and thereafter concluded that the compensation received by the assessee is assessable under the head income from house property. On the basis of such information received in assessment year 2012–13, the Assessing Officer has re–opened the assessment under section 147 of the Act in the impugned assessment year. We do not find any legal infirmity in the action of the Assessing Officer in re–opening the assessment under section 147 of the Act. When the Assessing Officer on the basis of information received subsequently has come to know that a particular item of income has escaped assessment, he is well within his power to re–open the assessment under section 147 of the Act. In the aforesaid view of the matter, we are not inclined to accept assessee's contention challenging the validity of re–opening of assessment under section 147 of the Act.

13. As regards the allegation of the assessee in ground no.3, that the learned Commissioner (Appeals) has sustained the addition by rejecting all the submissions and has not properly decided the issue on

merits, we find such allegation of the assessee as vague and general in nature and without any substance.

14. As regards levy of interest under section 234A, 234B, 234C and 234D as well as initiation of penalty proceedings under section 271(1)(c) of the Act, these issues are either consequential or premature at this stage. Hence, there is no need to adjudicate this ground. Accordingly, this ground is dismissed.

15. In the result, appeal is dismissed.

16. 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 26.02.2020. 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 due to the extraordinary situation prevailing due to the pandemic, the lockdown period has to be excluded for the purpose of limitation in respect of 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 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 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 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."*

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

Sd/-	**Sd/-**
MANOJ KUMAR AGGARWAL	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**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.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar,
ITAT, Mumbai