IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBERAND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.3739/Mum./2011
(Assessment Year : 2007–08)

Shri Raju J. Soomaney
103/104, Cliff Tower
Lokhandwala, 3rd Cross Lane ……. Appellant
Andheri (West), Mumbai 400 053
PAN – AANPS0787M

v/s

Dy. Commissioner of Income Tax
Central Circle–40, Mumbai ……. Respondent

Assessee by : Shri Dharan Gandhi
Revenue by : Shri Sunil K. Shah

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 assessee challenging the order dated 17thJanuary 2011, passed by the learned Commissioner of Income Tax (Appeals)–38, Mumbai, pertaining to the assessment year 2001–02.

2. Before we proceed to deal with the issue arising for consideration before us, it is necessary to briefly discuss certain facts.

3. This appeal along with other connected appeals of the assessee came up for hearing before the Tribunal on 7th August 2018. By a consolidated order of even date, the Tribunal disposed off all the appeals including the present appeal. Subsequently, the assessee filed a miscellaneous application no.334/Mum./2019, stating that ground no.3, raised in the appeal has remained undecided. Having found the aforesaid fact to be correct, the Tribunal, vide order dated 26th July 2019, recalled the appeal order passed for assessment year 2001–02 only for the limited purpose of deciding ground no.3. This is how the present appeal has come up before us.

4. Be that as it may, ground no.3, raised by the assessee reads as under:–

> *"3. The learned Commissioner of Income Tax (Appeals) erred in directing the Assessing Officer to enhance assessed income by ₹ 10,73,406, being sale consideration of shares, without allowing any opportunity to the appellant as provided in section 251(2) of the Act. Provisions of the Act ought to have been properly construed and regard being had to facts of the Assessing Officer should not have been directed to enhance assessed income by ₹ 10,73,406. Reasons assigned by him are wrong and insufficient to justify enhancement of ₹ 10,73,406, to the total income of the appellant."*

5. Brief facts are, for the assessment year under dispute, the assessee filed its return of income under section 139(1) of the Income Tax Act, 1961 (for short *"the Act"*) within the prescribed time.

Subsequently, a search and seizure operation under section 132(1) of the Act was conducted in assessee's case as well as other related persons on 30th November 2006. In pursuance thereof, the Assessing Officer initiated proceedings under section 153A of the Act and accordingly issued notice requiring the assessee to file his return of income. In the course of assessment proceedings, the Assessing Officer called for various details and after examining them ultimately completed the assessment under section 143(3) r/w section 153A of the Act vide order dated 27th November 2008, by determining the income at ₹ 8,13,641, after making a couple of additions. The assessee challenged the assessment order so passed by filing an appeal before the first appellate authority.

6. In the course of appellate proceedings, the assessee furnished various documentary evidences along with submissions. Observing that such evidences and submissions furnished by the assessee requires verification by the Assessing Officer, learned Commissioner (Appeals) forwarded them to the Assessing Officer with a direction to examine them and furnish his report. During such verification, the Assessing Officer found that during the year, the assessee had sold shares and received an amount of ₹ 10,73,406. Alleging that the assessee was unable to prove the source of investment in shares, the Assessing Officer recommended for addition of the said amount in the

remand report. On the basis of such recommendation of the Assessing Officer in the remand report, learned Commissioner (Appeals) enhanced the income of the assessee by adding an amount of ₹ 10,73,406.

7. Before us, learned Authorised Representative has challenged the addition made by learned Commissioner (Appeals) leading to enhancement of income basically on three propositions. Firstly, his submission is, before enhancing the income, learned Commissioner (Appeals) has not issued any show cause notice to the assessee as mandated under section 251(2) of the Act. Secondly, he submitted that this is a case of unabated assessment. Therefore, in the absence of any incriminating material found as a result of search, no addition can be made. To impress upon the fact that there was no incriminating material found during the search to show existence of undisclosed income, the learned Authorised Representative submitted, various other additions made by the Assessing Officer were deleted by the Tribunal on the reasoning that in the absence of incriminating material, no addition can be made in an unabated assessment. In this regard, he specifically drew our attention to Para–6 of the earlier appeal order passed by the Tribunal (supra). Thirdly, learned Authorised Representative, drawing our attention to various documents placed in the paper book, submitted that the source of

various investments in shares has been properly explained. Therefore, it cannot be treated as unexplained investment.

8. The learned Departmental Representative relied upon the observations of learned Commissioner (Appeals) and the Assessing Officer.

9. We have considered the rival submissions and perused the material on record. Undisputedly, the issue relating to assessee's investment in shares which were sold during the year was not the subject matter of the assessment order passed under section 153A r/w section 143(3) of the Act. This issue cropped up only in the course of proceedings before learned Commissioner (Appeals) wherein he directed the Assessing Officer to verify various evidences and submissions made by the assessee and submit his report. In the remand report, the Assessing Officer has suggested for the disputed addition. It is evident, on the basis of such suggestion of the Assessing Officer, learned Commissioner (Appeals) has added the sale consideration of the shares by treating it as unexplained investment. The primarily contention of the assessee as articulated in the grounds raised as well as in the submissions made before us is, without following the mandate of section 251(2) of the Act, learned Commissioner (Appeals) cannot enhance the income. It is relevant to

observe, section 251 of the Act empowers the first appellate authority to confirm, reduce, enhance or annul the assessment for deciding the appeal against an order of assessment. However, sub–section (2) of section 251 makes it clear that the first appellate authority shall not enhance an assessment or a penalty order or reduce the amount of refund, unless, the appellant has had reasonable opportunity of showing cause against such enhancement or reduction. The facts available on record do not indicate that before enhancing the income of the assessee, learned Commissioner (Appeals) had issued a show cause notice to the assessee as mandated under section 251(2) of the Act. The learned Departmental Representative was also unable to establish before us that learned Commissioner (Appeals) has complied with the conditions of section 251(2) of the Act. That being the case, enhancement of income without following the mandatory/statutory requirement cannot survive. Therefore, the decision of learned Commissioner (Appeals) in respect of enhancement of income of ₹ 10,73,406, is legally unsustainable. In view of the aforesaid, we set aside the order of learned Commissioner (Appeals) on the issue and restore the matter back to his file for deciding afresh after complying with the provisions of section 251(2) of the Act. As regards second contention of the assessee that in the absence of any incriminating material, the disputed addition could not have been made, we must

observe that since we have restored the issue back to the file of learned Commissioner (Appeals) for not complying with the provisions of section 251(2) of the Act, it is not desirable for us to express any conclusive opinion on the aforesaid contention of the assessee. However, it is trite law, in absence of any incriminating material found as a result of search, no addition can be made in an unabated assessment completed under section 153A r/w section 143(3) of the Act. We may further observe that the aforesaid contention of the assessee has found favour with the Tribunal in respect of some other additions made by the Assessing Officer which has been observed by the Tribunal in its finding in Para–6 of the appeal order dated 7th August 2018 (supra). Therefore, while deciding this issue, learned Commissioner (Appeals) must also take note of assessee's submissions and keep in view the observations of the Tribunal in the aforesaid order. As regards the merits of the issue, the same has to be adjudicated by learned Commissioner (Appeals), if required, after due opportunity of being heard to the assessee. With the aforesaid observations, this ground is allowed for statistical purposes.

10. In the result, appeal is allowed for statistical purposes.

11. 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 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 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."

12. Following the aforesaid decision of the Coordinate Bench, we proceed to pronounce the order today the 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/-	**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