IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1502/MUM/2015
Assessment Year: 2010-11

Johnson Controls (India) Pvt. Ltd.,401, 4th Floor, B Wing, Business Square, Andheri-Kurla Road, Opp. Apple Herirage Andheri (East), Mumbai-400093. **PAN No. AAACJ3132B** **Appellant**	Vs.	Deputy Commissioner of Income Tax, Range 10(2)(1), Room No. 209, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020. **Respondent**

ITA No. 689/MUM/2016
Assessment Year: 2011-12

Johnson Controls (India) Pvt. Ltd.,401/501, Business Square, Opposite Apple Herirage, Chakala Andheri (East), Mumbai-400093. **PAN No. AAACJ3132B** **Appellant**	Vs.	Assistant Commissioner of Income Tax-10(2)(1), Room No. 509, Aayakar Bhavan, New Marine Lines, Mumbai-400020. **Respondent**

Assessee by : Mr. Nikhil Tiwari, AR
Revenue by : Mr. Anand Mohan, CIT DR

Last Date of Hearing : 13/03/2020
Date of pronouncement: 27/07/2020

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order passed by the Deputy Commissioner of Income Tax-10(2)(1), Mumbai [hereinafter 'the AO'] u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience. We begin with the AY 2010-11.

2. The 1st and 2nd ground of appeal are general in nature. The 3rd to 7th grounds of appeal which relate to 'Direct Sales Compensation' read as under :

Based on the facts and circumstances of the case and in law, the appellant submit that the AO/TPO/DRP:

3. erred in disregarding the fact that the commission of 2 % of sales made by the associated enterprises ('AE') in India charged by the Appellant was consistent with the group pricing policy and practice followed globally by other group entities, and hence, the same is at arm's length.

4. erred in disregarding the corroborative benchmarking analysis undertaken by the Appellant by applying transactional net margin method (TNMM).

5. erred in benchmarking the transaction by applying Profit Split Method (PSM) even if the same was not applicable since the conditions prescribed in the Rule 10B(1)(d) of the Income-tax Rules, 1962 ('Rules') for application of the method were not satisfied.

6. erred in considering the differential price charged by AEs to the Appellant *vis-a-vis* third parties in India attributable to marketing activities performed by the

Appellant and applying PSM by allocating the differences on an ad-hoc basis between the Appellant and the AE.

7. Without prejudice to the above, while applying PSM, erred in allocating unusual and excessive profits as compared to the functions performed by the Appellant while undertaking marketing activities on behalf of the AEs.

3. Briefly stated, the facts of the case are that the appellant is engaged in the business of contracting for integrated intelligent building automation management systems and providing integrated facilities management, real estate management, engineering services and trading in air-conditioning equipments and chillers.

For the year under consideration, the appellant filed its return of income on 15.10.2010, declaring total income at Rs. Nil after claiming set off of brought forward business loss and unabsorbed depreciation to the extent of Rs.32,52,101/-.

During the course of assessment proceedings, the AO referred the case to the Transfer Pricing Officer (TPO) for determination of arm's length price (ALP) for the international transactions entered into by the appellant during the financial year (FY) 2009-10. For the purpose of establishing the ALP of its international transactions with its Associated Enterprises (AEs), the appellant had undertaken a transfer pricing study. However, the TPO was not convinced with the comparability analysis undertaken by the appellant in respect of certain international transactions entered into with the AEs and made the following adjustment :

- Direct sales compensation (Rs.7,93,37,989/-)

- Bad debts written off (Rs.72,97,922/-) and
- Royalty payment (Rs.1,57,96,209/-)

The AO followed the order of the TPO in the draft assessment order. Against the aforesaid adjustment, the appellant filed objections before the Dispute Resolution Panel (DRP). However, the DRP upheld the application of profit split method (PSM) by the TPO/AO stating that (i) an additional sale consideration received from third party customers as compared to the price charged by the AEs to the appellant for the same products would be a reliable indicator for the additional profits earned on account of the marketing functions performed and thereby confirmed the additions, (ii) PSM envisages the contributions of both the appellant as well as the AEs involved in the said transaction and a combined profit split taking into consideration the respective contributions of both the parties is the most appropriate approach.

The DRP also rejected the allowance of any economic adjustments as contended by the appellant.

Further, the DRP upheld the disallowance of bad debts and payment of royalty.

In the final assessment order dated 19.12.2014, the AO observed that since the appellant has already disallowed the royalty payment to the extent of Rs.52,65,403/- u/s 40(a)(i), relief of the said amount is to be provided. Consequently, the AO made the following adjustments :

S. No.	**Nature of International transaction/adjustment**	**Amount (Rs)**
1.	Adjustment in respect of direct sales commission	7,93,37,989/-

2.	Adjustment in respect of bad debts written off	72,97,222/-
3.	Adjustment in respect of royalty payment	1,05,30,806/-
	Total	9,71,66,017/-

4. Before us, the Ld. counsel for the assessee submits that the appellant received direct sales compensation @ 2% from its AEs of the FOB value of product sales of its AEs to Indian customers as per the respective Sole Concessionaire Agreements. The details of the commission received by the appellant for the impugned assessment year is as under :

AY	Direct Sales Compensation (A)-2% of (B)	Sales by AEs to Indian third parties on which compensation is received (B)
2010-11	2,40,05,443/-	1,20,02,72,150/-

It is further stated by him that the appellant is an indenting agent of the AEs engaged in installation services of control systems for which it received direct sales compensation from its AEs and the appellant is required to receive the requirements such as hardware, machinery etc. from the clients in India and put orders to the AEs abroad. It is further elaborated that for these services, the appellant received commission @ 2%. Thus it is explained by him that the appellant plays the role of a co-ordinator/canvasser only for AEs and the functions are minimal and no significant expenses or risks are incurred by the appellant.

The Ld. counsel further explains that the direct sale compensation has been benchmarked as per the group policy of Johnson Controls group and the appellant has benchmarked the said transaction using Transactional Net Margin Method (TNMM) by aggregating the same with its project business.

Further, the Ld. counsel argues that this issue is recurring and started from AY 2006-07 onwards and the Tribunal in appellant's own case for AYs 2006-07 and 2007-08 has upheld CUP as the most appropriate method for benchmarking the transaction in direct sales compensation. The Tribunal further upheld the CUP rates submitted by the appellant i.e. the rate confirmed at arm's length in the case of *Sumitomo Corporation India Pvt. Ltd. v. Addl. CIT* (ITA No. 5095/Del/2011) and *Bayer Material Science Pvt. Ltd*. (ITA No. 7977/Mum/2010) and the same is illustrated as under :

Particulars	Rate of commission accepted
Sumitomo Corporation India Pvt. Ltd. v. Addl. CIT (ITA No. 5095/Del/2011)	2.26%
Bayer Material Science Pvt. Ltd. (ITA No. 7977/Mum/2010)	5%
Average	3.63%

It is stated that accordingly the Tribunal held that CUP method is the most appropriate one and upheld the arm's length rate at 3.63%. Further, it is brought to our notice that in appellant's own case for AYs 2008-09 and 2009-10, the Tribunal relied on order passed by the Co-ordinate Bench in appellant's own case for AYs 2006-07 and 2007-08 and upheld CUP as the most appropriate method and confirmed the rates adopted by the Tribunal.

Computing the average at 3.63% for AY 2008-09 and 3.93% for AY 2009-10, the Ld. counsel explains that based on the order of the Tribunal for AYs 2006-07, 2007-08, 2008-09 and 2009-10, the average comes to 3.42%. It is further clarified that there is no transfer pricing adjustment in the current year i.e. AY 2010-11 and the rate of 5% has been accepted as arm's length commission.

Thus it is summed up by the Ld. counsel that as against the rate of commission of 8.61%, the rate that should be used should be 3.42% and therefore, a relief should be granted to the appellant to such an extent.

5. On the other hand, the Ld. Departmental Representative (DR) submits that the AO/TPO has rightly applied profit split method ('PSM') to the transaction of receipt of direct sales commission wherein he compared the price at which the AEs have sold products to the third parties in India *vis-à-vis* the rate at which they have sold the appellant. Thus it is explained by him that the TPO has rightly arrived at a difference of 17.22% between the sales made by the AEs to the third parties *vis-à-vis* the appellant and the difference was split in the ratio of 50:50 and therefore, the TPO arrived correctly at a rate of 8.61% thereby making an adjustment between 8.61% and 2% (i.e. the rate at which the compensation was received by the appellant). Thus it is stated by him an additional sale consideration received from the third party customers as compared to the price charged by the AEs to the appellant for the same products would be a reliable indicator for the additional profits earned on account of the marketing functions performed. Finally, it is stated by him that PSM envisages the contributions of both the appellant as well as the AEs involved in the said transaction and a combined profit split taking into consideration the respective contributions of both the parties is the most appropriate method.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

Similar issue arose before the Tribunal in AYs 2006-07, 2007-08, 2008-09 and 2009-10. We may fruitfully refer to the order of the Tribunal for the AY 2008-09 and 2009-10 below:

"AY 2008-09

13. We have heard the Authorized Representatives for both the parties, perused the orders of the lower authorities and the material produced before us. We have given a thoughtful consideration to the facts of the case and are of the considered view that the Tribunal while disposing of the appeals of the assessee for A.Y. 2006-07 and A.Y. 2007-08, vide order dated 31.12.2013, had held that CUP and TNMM were the most appropriate methods for benchmarking the transaction of Direct Sales Compensation ('DSC'). We find that the assessee had submitted before the Tribunal in respect of its appeals for the aforesaid preceding years, viz A.Y. 2006-07 and A.Y. 2007-08 certain case laws, where on similar facts the ALP of commission was decided by the Tribunal. We find that the Tribunal after deliberating on the following case laws relied upon by the assessee, had therein taken the arm's length commission rate of 3.63% :-

Particulars	Rate of commission accepted
Sumitomo Corporation India Pvt. Ltd. v. Addl. CIT (ITA No. 5095/Del/2011)	2.26%
Bayer Material Science Pvt. Ltd. (ITA No. 7977/Mum/2010)	5%
Average	3.63%

We have perused the facts of the case and are of the considered view that the issue involved in the present appeal is squarely covered by the order passed by the Tribunal in the assessee's own case for the A.Y. 2006-07 and A.Y. 2007-08 (ITA No. 8722 & 8855/Mum/2011, dated 31.12.2015), wherein the Tribunal had directed the A.O to adopt 3.63% as the appropriate rate of ALP for benchmarking the Direct Sales Compensation ('DSC') in the hands of the assessee. We find that the assessee by relying on the rates of commission which had been accepted in the case of the said two concerns, viz. M/s Sumitomo Corporation India Pvt. Ltd. and M/s Bayer Material

Science Pvt. Ltd., in their respective assessment/appeals for the year under consideration, viz. A.Y. 2008-09, had therein submitted that the aforesaid average rate of commission of 3.62% (supra), in all fairness, be taken as the arm's length commission rate in the hands of the assessee. We have also observed that the assessee while arriving at the average commission rate of 3.62% in respect of the aforesaid two concerns, viz. M/s Sumitomo Corporation India Pvt. Ltd. and M/s Bayer Material Science Pvt. Ltd., for the year under consideration, viz. A.Y. 2008-09, had in respect of M/s Bayer Material Science Pvt. Ltd.(supra) adopted the commission rate of 5% that was upheld by the Tribunal in the assesses own case for A.Y. 2006-07 and A.Y. 2007-08, as there was no transfer pricing adjustment in the hands of the said concern during the year under consideration. We have given a thoughtful consideration to the aforesaid facts and are of the considered view that the contention of the assessee in the light of the order passed by the Tribunal in its own case for the preceding years, therein warrants acceptance. We, thus in the light of our aforesaid observations direct the A.O. to adopt 3.62% as the appropriate rate for benchmarking the Direct Sales Compensation ('DSC') received by the assessee from its AEs. The Ground of appeal No. 1 to 1.3 raised by the assessee before us are thus allowed in terms of our aforesaid observations."

AY 2009-10

"11. We have heard the Authorized representatives for both the parties, perused the orders of the lower authorities and the material produced before us. We are of the considered view that the identical issue was involved in the appeal of the assessee marked as ITA No. 638/Mum/2013 before us. We thus going by our observations and reasoning adopted while disposing of the appeal of the assessee for A.Y. 2008-09, therein direct the A.O to take the average commission rate of 3.93% which had been worked out by looking into the commission rates of the aforesaid concerns, viz. M/s Sumitomo Corporation India Private Ltd. and M/s Bayer Material Science Private Ltd., for benchmarking the Arms length compensation (DSC) in the hands of the assessee. Thus in the backdrop of our aforesaid observations, we herein

adjudicate the present issue in terms of our order passed while disposing of the 'Grounds of appeal No. 1 to 1.3' in the appeal of the assessee for A.Y. 2008-09, marked as ITA No. 638/Mum/2013, and our decision passed in context of the issue under consideration in the said appeal shall principally in light of our aforesaid observations, apply *mutatis mutandis* in the present appeal also."

6.1 Facts being identical, we follow the above order of the Co-ordinate Bench for the immediate previous assessment year 2009-10 and direct the AO to adopt rate of commission @ 3.93% in place of 8.61% done by him and pass consequential order after due verification. Needless to say, the AO would give reasonable opportunity of being heard to the appellant before passing the order. Thus the 3rd, 4th, 5th, 6th and 7th ground of appeal are partly allowed.

7. Then we turn to the 8th and 9th ground of appeal which relate to bad debts written off of Rs.72,97,222/-. These grounds read as under :

Based on the facts and circumstances of the case and in law, the appellant submit that the AO/TPO/DRP:

8. erred in disregarding the fact that such bad debts written-off were considered as operating expenses for the purposes of computing operating margin of the Centre of Excellence in Engineering ('COEE') segment of the Appellant which was accepted to be at arm's length by the TPO.

9. The TPO erred in exercising his jurisdiction by not computing the ALP of the international transaction by applying one of the prescribed methods under the Act.

During the year under consideration, the appellant had written off certain invoices as bad debts amounting to Rs.72,92,222/- in the context of engineering segment. Those invoices were written off on account of the dispute between the appellant and its AEs, wherein the work done by the

appellant was not in accordance with the agreed scope of work with the AEs. The appellant claimed that it had raised bills on the AE on the hourly rate of compensation for rendering services and in cases where the AE disputed the rendering of service on account of variation with the agreed scope, the invoices were to be reversed. Such reversals were written off as bad debts in the books of accounts. However, the TPO was not convinced with the above explanation of the appellant and made an adjustment of Rs.72,97,222/- . Also the DRP in its directions stated that in absence of adequate justification and supporting evidence for the write off of specific entries receivable by the appellant from its AE, the TPO would be justified in computing the ALP of the said transaction as Nil. Accordingly, the AO computed the ALP of the said transaction as Nil.

8. Before us, the Ld. counsel submits that the appellant raised bills on the AEs based on the agreed hourly rate of compensation of rendering services. However, in certain cases, the AE disputed the rendering of service on account of variation with the agreed scope. Accordingly, such invoices were to be reversed and such reversals were written off as bad debts in the books of accounts. The AEs also stated that since such scope was not included as a part of agreed scope of work, no payment could be made in this regard. Further, it is stated that the amount of bad debts written off has been considered as a part of operating expenses for the Engineering Segment, which has been benchmarked by the appellant using TNMM method.

The Ld. counsel further submits that as per the benchmarking exercise undertaken in the transfer pricing study, four comparable companies were identified who have earned an arithmetic mean operating margin of 10.24%

vis-à-vis operating margin earned by the appellant under 'Engineering Services Segment' of 42.99%. The TPO has accepted the operating margin of 'Engineering Services Segment' to meet the arm's length test. In this regard, it is explained by the Ld. counsel that even if the bad debts written off are considered as non-operating in FY 2009-10, the appellant's 'Engineering Segment' would still meet the arm's length test.

Finally, it is submitted by the Ld. counsel that the TPO has not applied any method while disallowing bad debts written off and has done the same on ad-hoc basis.

9. On the other hand, the Ld. DR submits that in the absence of adequate justification and supporting evidence for the write off of specific entries receivable by the appellant from its AEs, the AO/TPO is justified in computing the arm's length price of the said transaction as Nil.

10. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the instant case, the amount of bad debts written off by the appellant has been considered as a part of operating expenses for the 'Engineering Segment', which has been benchmarked by the appellant using TNMM method. This is evident from the documents filed before the TPO. As per the benchmarking exercise undertaken in the transfer pricing study, four comparable companies were identified who have earned an arithmetic mean operating margin of 10.24% *vis-à-vis* operating profit margin earned by the appellant under 'Engineering Services Segment'. The TPO has accepted the operating margin of 'Engineering Services Segment' to meet the arm's length

test, after considering the impact of bad debts written off. It is found that even if bad debts are considered as non-operating in FY 2009-10, the appellant's 'Engineering Segment' would still meet the arm's length test. Further, we find that the TPO has not applied any method while disallowing the bad debts written off and has done the same on an ad-hoc basis.

In view of the above reasons, we delete the adjustment of Rs.72,97,222/- made by the AO towards bad debts written off and allow the 8th and 9th ground of appeal.

11. Then we come to the 10th and 11th ground of appeal pertaining to adjustment of royalty payment. These grounds read as under :

> Based on the facts and circumstances of the case and in law, the appellant submits that the AO/TPO/DRP:
>
> 10. erred in disregarding the benchmarking analysis undertaken by the Appellant by applying Comparable Uncontrolled Price method ('CUP') and determining the ALP of the payment of royalty to AE as NIL.
>
> 11. The Ld. TPO erred in exercising his jurisdiction by not computing the ALP of the international transaction by applying one of the prescribed methods under the Act.

The appellant has been using the trade-mark and brand name of its AE for the sales made by it locally. During the impugned assessment year, the appellant has paid royalty amounting to Rs.1,57,96,209/- to its AE i.e. Johnson Controls Technology Company, US (in short 'JCTC'). As per the agreement, royalty will be paid @ 1.5% of net sales. The appellant has benchmarked the said transaction considering CUP as the most appropriate method and as per

the said analysis, the arithmetic mean of rate of royalty paid by the comparable company worked out to 1.83% (for domestic sales) and 2% (for export sales). Therefore, it is argued that since the rate of royalty paid by the appellant (i.e. 1.5%) was lower than that of the comparables, the transaction was concluded to be at arm's length from an Indian transfer pricing perspective.

However, the TPO held that since 'Earnings Before Interest and Tax' ('EBIT') of the 'Project Activity' segment is negative, no royalty is required to be paid by the appellant. The DRP further agreed with the TPO by stating that :

- The EBIT of the 'Project Activity' segment is negative and hence no payment of royalty is warranted.
- The appellant did not file the accounts which were called by the TPO.
- The RBI guidelines mention that royalty for trademarks cannot be paid in access of 1% of the net sales under the automatic route whereas the appellant has paid royalty @ 1.5% and no specific approval has been obtained by the appellant in this regard.

The AO by following the direction of the DRP made an adjustment of Rs.1,05,30,806/-.

12. Before us, the Ld. counsel for the assessee submits that as per agreement dated 01.10.2006 titled 'Technical Support and License Agreement', JCTC has licensed technology and trademarks to the appellant. The same is intended to apply to appellant's "Building Efficiency" business and that such royalty was payable only if it had a positive EBIT. Further, it is stated that the financial statements of the appellant report three segments viz.

project activity, global workplace solutions and engineering services. The details as submitted are as under :

- The 'Project Activity' consists of Building Automation and Fire Alarm Systems, Access Control and Security Surveillance System.
- The 'Engineering Services' segment consists of rendering associated services relating to manufacture of mechanical and electrical systems that control energy use, heating, ventilating, air-conditioning, lighting, security and fire management for non-residential buildings.

It is further clarified that the 'Project Activity' and 'Engineering Services' segment make up the aforementioned 'Building Efficiency' business. It is further elaborated that the EBIT from the 'Building Efficiency' business is derived by reducing EBIT of the 'Global Workspace Solutions' segment Company from the entity wide EBIT of the Company, as prescribed in clause 6.6 of the above mentioned Agreement.

The Ld. counsel explains that the appellant has submitted a certificate from the management stating that the "Building Efficiency" segment comprises of "Project Activity" segment as well as "Engineering segment" and the same was submitted before the Tribunal *vide* letter dated 11.12.2017. Further, it is stated that the appellant has filed additional evidence before the Tribunal *vide* letter dated 03.07.2019 i.e. a certificate from Chartered Accountant which supports the contention of the appellant which were clarified in the letter from the Managing Director that Building Efficiency segment (i.e. aggregate of Project Activity segment and Engineering segment) had a positive EBIT and accordingly royalty is paid as per the royalty agreement.

Further, the Ld. counsel submits that the 'Department of Industrial Policy and Promotion' of the Ministry of Commerce and Industry have issued Press Note 8 of 2009, which amended the earlier notification issued on the subject of requirement of approval for payment of royalty to the foreign collaborator under different circumstances. The said notification waived all the restrictions in this regard and payment of royalty for transfer of technology or for use of trademark/brand was put under the automatic route completely and no approval of Government of India was required for making such payment.

To sum up, the Ld. counsel submits that as the margins earned by the appellant from its 'Building Efficiency' segment is positive, payment of royalty made by it to its AEs is justifiable and therefore, relief should be granted to the appellant.

13. On the other hand, the Ld. DR supports the order passed by the AO on the ground that (i) the EBIT of the 'Project Activity' segment is negative and hence no payment of royalty is warranted, (ii) the appellant did not file the accounts which were called for by the TPO.

Thus the Ld. DR submits that the order passed by the AO be confirmed.

14. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

As mentioned earlier, the appellant has filed before the Tribunal on 11.12.2017 a certificate from the management stating that the "Building Efficiency" segment comprises of "Project Activity" segment as well as "Engineering Segment". Further, it is stated by him that the appellant has filed

additional evidence *vide* letter dated 03.07.2019 i.e. a certificate from Chartered Accountant supporting the contentions of the appellant that 'Building Efficiency' segment (i.e. aggregate of Project Activity segment and Engineering Segment) had a positive EBIT and accordingly royalty is paid as per the Royalty Agreement.

In the instant case, we are of the considered view that the above documents filed on 11.12.2017 and 03.07.2019 are quite relevant for the purpose of deciding the issue arising before us. Therefore, we admit the above additional evidence. However, we find that in the instant case, the AO has passed the order u/s 143(3) r.w.s. 144C(13) for AY 2010-11 on 19.12.2014 and for AY 2011-12 on 30.11.2015. Therefore, we deem it fit to remit the matter to the file of the AO/TPO to pass an order after examining the above documents. Needless to say, the AO would give reasonable opportunity of being heard to the appellant before finalizing the order. Thus the 10th and 11th ground of appeal are allowed for statistical purposes.

15. The 12th ground of appeal relates to short grant of taxes deducted at source.

The Ld. counsel submits that in the revised return of income filed by the appellant electronically on 31.03.2012 for AY 2010-11, credit in respect of TDS of Rs.5,12,86,407/- was claimed. In the assessment order passed u/s 143(3), the AO has granted credit for TDS only to the extent of Rs.5,08,13,940/-, thereby resulting in short granting of credit for TDS to the extent of Rs.4,72,467/-. Therefore, the Ld. counsel explains that directions be given to the AO to grant the credit for the balance TDS of Rs.4,72,467/-. It is

stated that the appellant has filed a rectification application dated 03.07.2017 before the AO for short grant of TDS of Rs.4,72,467/-.

Having examined the relevant documents, we direct the AO to grant the credit for balance TDS amounting to Rs.4,72,467/- to the appellant, after due verification.

16. The 13th ground of appeal relates to non-grant of credit of advance tax. It is stated by the Ld. counsel that in the revised return of income filed by the appellant electronically on 31.03.2012, the appellant has claimed credit for advance tax amounting to Rs.3,47,503/-, whereas in the assessment order passed u/s 143(3), the AO has not granted any credit in respect of advance tax paid by the appellant for the AY 2010-11. Further, it is stated that the payment of advance tax could be evidenced from the Form 26AS of the impugned assessment year and the appellant has also filed a rectification application dated 03.07.2017 before the AO for non-grant of credit of advance tax amounting to Rs.3,47,603/-.

Having examined the relevant documents, we direct the AO to grant the credit for advance tax paid by the appellant of Rs.3,47,603/- for the impugned assessment year, after due verification.

17. The 14th ground of appeal on levy of interest u/s 234D is consequential in nature. As penalty has been initiated only, the 15th ground of appeal against initiation of penalty u/s 271(1)(c) is premature.

18. The appellant has filed an additional ground stating that the AO has erred in not setting off the brought forward business loss and unabsorbed

depreciation, as claimed in the return of income filed u/s 139(1) of the Act and erred in not granting carry forward of balance business loss and unabsorbed depreciation to the subsequent years, while computing the total income.

As the above additional ground of appeal is closely linked with the original ground of appeal, we admit the former for adjudication.

The Ld. counsel submits that in the return of income for the impugned assessment year the appellant has reported income from business and profession amounting to Rs.32,52,102/-, which had been set off by the brought forward business loss of Rs.4,67,91,561/- pertaining to AY 2006-07, resulting in Nil income. It is stated by him that the AO held in his draft assessment order for AY 2010-11 that as per the assessment order of earlier years, there were no carried forward business losses or unabsorbed depreciation quantified for set off in AY 2010-11. Further, it is stated by him that (i) the ITAT *vide* order dated 31.12.2015 for AY 2006-07 directed to allow relief on certain grounds to the appellant ; thereafter, the AO passed an order giving effect to the order of the ITAT for AY 2006-07 determining brought forward business loss and unabsorbed depreciation of Rs.5,26,28,518/-, (ii) the ITAT *vide* order dated 17.05.2017 for AY 2008-09 and AY 2009-10 also directed to allow part relief to the appellant; the appellant has filed an application to pass an order giving effect to the ITAT's order which shall result in a further brought forward business losses and unabsorbed depreciation to the appellant for AY 2009-10.

Stating that the appellant has filed a rectification application dated 03.07.2017 before the AO for set off of brought forward business loss/unabsorbed depreciation against the total income computed for AY 2010-11, it is submitted by the Ld. counsel that direction be given to the AO to set off available brought forward business loss and unabsorbed depreciation against the total income computed for AY 2010-11.

Having examined the relevant documents, we direct the AO to set off available brought forward business loss and unabsorbed depreciation against the total income computed for the impugned assessment year, after due verification and as per the provisions of the Act.

19. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 13.03.2020, this order thereon is being pronounced today, 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. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, a nationwide lockdown was imposed 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".

The Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that "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".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

20. In the result, the appeal filed by 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.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 27/07/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai