

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.5242/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

Enigma Construction Pvt. Ltd. (Now Merged with Keystone Realtors Pvt. Ltd.) 702, Natraj, M. V. Road, Junction W.E. Highway, Mumbai-400069.	बनाम/ Vs.	DCIT Central Circle-2(4) Income Tax Office, Old CGO Building, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCE9090J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Naresh Kumar
Revenue by:	Shri V. Justin

सुनवाई की तारीख / Date of Hearing: 03/03/2020
घोषणा की तारीख /Date of Pronouncement: 25/08/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee had filed the present appeal against the order dated 28.06.2018 passed by the Commissioner of Income Tax (Appeals) -48, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2012-13.

2. The assessee has raised the following grounds: -

- "1. The Hon'ble CIT(A) has erred in ignoring the fundamental accounting assumption of accrual which states that "revenues and cost are recorded when they are earned incurred (and not as money is received or paid) in the periods to which they relate". view of the above, the said order passed should be squashed and necessary direction should be given in this regard.*
- 2. Without Prejudice to the Ground no. 1 the Hon'ble CIT(A) has erred in confirming the order of learned assessing officer with regards to disallowance of selling and marketing expenses paid*



ITA No. 5242/M/2018

A.Y.2012-13

of Rs.1,20,19,260/- stating that the receipt from sale of FSI is not offered to tax, hence corresponding expenses also cannot be allowed for the year under consideration. It is therefore submitted that such disallowance of selling & marketing expenses is unreasonable and unjustified and therefore, such disallowance should be deleted.

3. *Without Prejudice to the above, it is submitted that if the said expenses is disallowed for the year under consideration then the same should be allowed to take the deduction in the subsequent year when the revenue for sale of FSI is recognized.*
4. *Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal.”*

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2012 declaring total loss at Rs. Nil for the A.Y.2012-13. The return was processed u/s 143(1) of the Income Tax Act, 1961. The case was selected for scrutiny. Notices u/s 143(2) & 142(1) of the I. T. Act, 1961 were issued and served upon the assessee. The assessee company was incorporated to construct, purchase, acquire, hire, operate, manage and develop land of any real and personal estate property. During the year under consideration, the assessee company was engaged in the development of a real estate residential and commercial project in Virar, Thane. During the assessment year under consideration, the assessee company has shown the loss from its core business activity. The assessee company has claimed deduction of Rs.1,27,18,900/- on account of Selling and Marketing expenses. Out of it a sum of Rs.1,20,19,262/- was shown as commission expenses in the name of one Shri Soham Gopal Narang. The amount was shown outstanding in the Balance-Sheet as on 31.03.2012. Thereafter, notice was given and after the reply of the notice, the commission in sum of Rs.1,20,19,260/- was disallowed and added to the income of the assessee. The total income of the assessee was assessed as Nil. Feeling aggrieved, the



ITA No. 5242/M/2018
A.Y.2012-13

assessee filed an appeal before the CIT(A) who confirmed the order of the AO, therefore, the assessee has filed the present appeal before us.

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. In brief, the claim of the assessee was declined by the AO on the basis of this fact that the receipt from the sale of FSI was not offered to tax, therefore, the expenses was not liable to be allowed. The Ld. Representative of the assessee has argued that the assessee has paid 2% commission on sale of FSI 53.33 crores for the year under consideration and accordingly it is well-settled principle of the real estate sector/business that when the deals for sale of land/building/FSI or whatever named called takes place i.e. in A.Y.2012-13, at that time commission/brokerage was required to be paid by the assessee company to the broker irrespective of whether the sales agreement was registered or nor during the year under consideration. It is also argued that the commission or brokerage expenses are accrued and the liabilities towards such expenses are created as soon as the deal takes place between the assessee company and the party and accordingly the brokerage/commission is due, hence, the claim of the assessee is liable to be allowed. In support of these contention, the Ld. Representative of the assessee has placed reliance upon the decision of Bangalore Tribunal in the case of **Mysore Tobacco Co. Ltd. Vs. CIT (1978) 115 ITR 698 (Kar)**. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. The factual position is not in dispute. The assessee company has paid 2% commission on sale of FSI 53.33 crores for the year under consideration. The commission has been booked against these transactions in the year under consideration. Since the FSI was not offered in the current year, therefore, the AO has declined the claim. It nowhere seems justifiable in



view of the decision in the case of **Mysore Tobacco Co. Ltd. Vs. CIT (1978) 115 ITR 698 (Kar)** in which it is held that the accepting certain specific provisions relating to amortization of initial expenses in certain cases, there is no other statutory provision for allowing revenue expenses in a phased or spread out manner. On the other hand, the expenses are required to be claimed and allowed only in the year in which the expenses are incurred or the liability towards such expenses accrued. Revenue expenditure is essentially allowable in the year to which it pertains or in which it is incurred. However, to support his claim, the assessee has also relied upon the decision in the case of **Calico Dyeing & Printing Works Vs. CIT (1958) 34 ITR 0265**. In the said case, the claim of the assessee was allowed in similar circumstances. Taking into account of all the facts and circumstances, we are of the view that the declining of the claim of commission expenses is nowhere justifiable, hence, we set aside the finding of the CIT(A) on the issue. The claim is hereby allowed in the relevant year. Accordingly, we allowed the claim of the assessee.

Reasons for delay in pronouncement of order

6.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a



ITA No. 5242/M/2018
A.Y.2012-13

day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ordinarily exceed a period of 30 days.

6.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

6.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded



ITA No. 5242/M/2018

A.Y.2012-13

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**



ITA No. 5242/M/2018

A.Y.2012-13

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 **“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 lockdown 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



ITA No. 5242/M/2018
A.Y.2012-13

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.

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

5. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 25/08/2020.

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 25/08/2020

Vijay Pal Singh/Sr. P.S.

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Assistant Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai