

**IN THE INCOME TAX APPELLATE TRIBUNAL “H”
BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 6920/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2012-14)

Shri Kishore Shivaram Shenoy, 03, Shalom Heritage, Opp-RBK School, Phase- 6, Indralo, Bhayandar (east), Thane - 401105.	बनाम/ Vs.	ITO Ward 4(2) Ashar IT Park, 6 th floor, A- wing, Room no. 4, Road No. 16Z, Wagle Industrial Estate, Thane – 400 604
स्थायीलेखासं./जीआइआरसं./PAN No. AVMPS7372Q		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	None
प्रत्यर्थीकीओरसे/ Respondentby	:	Shri Drop Singh Meena, DR
सुनवाईकीतारीख/ Date of Hearing	:	06.02.2020
घोषणाकीतारीख / Date of Pronouncement	:	08.07.2020

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax - 3 in short

referred as 'Ld. CIT(A)', Mumbai, dated 03.10.2017 for Assessment Year (in short AY) 2013-14.

2. At the outset, it is noticed that none appeared on behalf of assessee in spite of calls and even no application for adjournment was moved. On the other hand, Ld. DR is present in the court and is ready with arguments. Therefore, we have decided to proceed with the hearing of the case ex-parte with the assistance of the Ld. DR and the material placed on record.

3. The brief facts of the case are, assessee is an individual in the profession of accountancy and consultancy run under the name and style 'Kishor S. Shenoy & Associates' and filed its return of income on 26.09.13 declaring total income of Rs. 30,83,330/-. Further, the case was selected for scrutiny under CASS and notices u/s 143(2) and 142(1) were issued and served upon the assessee. In response, AR of the assessee filed the relevant information and attended to the proceedings of the case.

4. After considering the submission of assessee, AO has made two additions i.e. a) Rs. 63,93,330/- i.e 40% out of total

retainership expenses of Rs. 1,59,83,328/- , according to AO, it is excessive and not supported by the evidences and b) Rs. 3,77,971/- on account of difference in the income as per TDS claimed in return of income and 26AS. Accordingly, AO completed the assessment u/s 143(3) of the Act. The AO has also initiated the penalty proceedings u/s 271(1)(c) of the Act.

5. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and based on the submission of assessee, Ld. CIT(A) sustained 30% of disallowance instead of 40% of total retainership at Rs. 1,59,83,328/- which works out to Rs. 47,94,998/-. Ld. CIT(A) further sustained the addition made by AO on the discrepancy found in the TDS as per return of income and 26AS. Accordingly, Ld. CIT(A) partly allowed the appeal of the assessee.

6. Aggrieved with the above order, assessee is in appeal before us on the grounds mentioned herein below:-

1. The assessing officer erred in disallowing 40% of retainer ship expenses (out of total retainership expenses

at Rs.1,59,83,328/-) based on surmise and guess at Rs.63,93,330/-

2. The assessing officer erred in treating the income attributable to the undisclosed TDS at Rs.3,77,971/-

3. The assessing officer erred in levying penalty u/s. 271(1)(c) and interest under sections 234A/B of the Income Tax Act 1961.

4. The appellant craves leave to amend, alter or delete any of the above grounds of appeal.

7. Considered the rival submission and material placed on record, we notice from the records that Ld. CIT(A) has given his findings in his order and for the sake of brevity, which is reproduced below:-

5.0. Ground No.1 is directed against the addition of Rs.63,93,330/-, being 40% of retainer ship expenses out of total retainer ship expenses at Rs.1,59,83,328/-.

I have carefully considered the submissions of the appellant, the observations of the AO in the assessment order; case laws relied upon by the appellant and the facts of the case.

i.). The AO has made addition of Rs.63,93,330/- out of total retainer ship expenses of Rs.1,59,83,328/-i.e. 40% of Rs.1,59,83,328/- as baseless, excessive and devoid of necessary supporting evidence, In this regard, the AO has elaborately discussed from Para 6.1 to 6.5 in the assessment order.

ii). On the other hand, the AR of the appellant has stated that the payments are genuine and paid to hired temporary staff for doing the liaison work of his client M/s. Atlanta Pharma Pvt. Ltd. and paid towards remuneration, out of pocket expenses etc in cash and self made cash vouchers were presented before the AO. The AR of the appellant has also placed reliance on the following judicial pronouncements viz, Balbir Singh vs. CIT(ITAT Jaipur) reported in ITA No.121 of 2013 order dtd. 21.10.2015; M/s,Vijay Infrastructure Limited vs. ACIT (ITAT Lucknow) in ITA No.254 of 2015 & cross appeal nos. 12 & 13 of 2015 order dtd. 30.10.2015; ACIT vs. Ganpati Enterprises Ltd. in ITA No.6112 of 2012 order dtd. 15.02.2013. After considering the above stated facts of the case, it is observed that the supporting evidences filed before the AO are not conclusive as the appellant failed to submit the purpose and nature of expenditure etc incurred on the temporary hired staff, which could have helped in determining the approximate expenditure. The AO has also

noticed that the appellant failed to submit the evidences such as bank statements, identity proof, copy of return with computation of the temporary hired staff and the AO has also pointed out some common anomaly features as discussed in Para 3, A to K , page 6 in the assessment order.

Keeping in mind the above facts, the disallowance is restricted to 30% instead of 40% of Rs.1,59,83,328/- which works out to Rs.47,94,998/- and the same is added to the total income of the appellant. The appellant gets relief of Rs.15,98,332/- i.e. Rs.63,93,330-47,94,998. The appeal of the appellant is partly allowed.

6.0. Ground No.2 is directed against the addition of Rs.3,77,971/- on account of discrepancy as per TDS in return income and TDS reflected in 26AS.

In this regard, the AO has made addition on the basis of the discrepancy found in the TDS as per return income and 26AS, therefore, the addition made by the AO is confirmed and it is not a case that, the TDS receipts has been brought to tax twice.

In view of the above stated facts, the appeal of the appellant on this ground is dismissed and the addition made by the AO is sustained.

7.0. Ground No.3 is directed against levying penalty u/s.271(1)(c) and interest under sections 234A & 234S of the Act.

The appeal filed by the appellant is not on penalty imposed u/s.271(1)(c), therefore, the appeal is dismissed.

As far as levy of interest u/s 234A & 234B, no submission has been made and therefore, this ground is treated to be rejected for statistical purpose. However, the AO is directed to levy consequential and mandatory interest if/as applicable under these and other sections of the Act while giving effect to this order.

8.0 In the result, appeal of the appellant is partly allowed. Order passed under section 250 read with section 251 of the Income Tax Act, 1961.

8. After considering the findings of Ld. CIT(A) and keeping in view the conduct and nature of the assessee that he has filed the appeal, but failed to appear before us on the aforementioned dates nor submitted any documents in support of his appeal nor appointed any authorized representative to appear on his behalf. Therefore, there are no reasons for us to interfere into or deviate from the findings so recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld.

CIT (A) are judicious and are well reasoned. Resultantly, the grounds raised by the assessee stands **dismissed**.

9. In the net result, the appeal filed by the assessee stands **dismissed**.

10. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by the Government was in force. The relevant observations of this tribunal in the said binding precedent are 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 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 noticeboard.*

8. Quite clearly, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** (emphasis, by underlining, supplied by us now), **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”**. In the ruled so framed, as a result of these

directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

*9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **“In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”**. Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **“It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**, and also observed that **“arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. force*

majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...”. The term ‘**force majeure**’ has been defined in Black’s Law Dictionary, as ‘**an event or effect that can be neither anticipated nor controlled**’ When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an “ordinary” period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon’ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon’ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed “**while calculating the time for disposal of matters made 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**”. The extraordinary steps taken *suomotu* 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 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.

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the noticeboard.

11. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

12 Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on 08.07.2020.

<p><i>Sd/-</i> (Vikas Awasthy) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : Sr.PS. Dhananjay</p>	<p><i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 08.07.2020</p>
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)

4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai