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

BEFORE SHRI C. N. PRASAD, JM & SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 7211/Mum/2018
(**निर्धारणवर्ष** / Assessment Year: 2011-12)

M/s Paras Steel Corporation 505, Gupta Bhawan, Ahmedabad Street, CarnacaBunder, Mumbai-400 009	**बनाम**/ Vs.	ITO 13(2)(4) R.No. 412, 4th floor AayakarBhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AAAFP1172A		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Gajendra Golechha, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Kiran Unavekar, DR
सुनवाईकीतारीख/ **Date of Hearing**	:	25.02.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	23.07.2020

आदेश / O R D E R

Per S. Rifaur Rahman, Accountant Member:

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals) – 58 in

short referred as 'Ld. CIT(A)', Mumbai, dated 04.09.2018 for Assessment Year (in short AY) 2011-12.

2. The brief facts of the case are,assessee filed its return of income on 27.09.2011 along with audit report under section 44AB by declaring total income of ₹ 20,410/–. The return was processed under section 143(1) of the Act, subsequently selected for scrutiny under section 143(3) of the Act. The notices under section 143(2) and 142(1) of the Act, were issued and served on the assessee. In response, AR of the assessee attended and furnished the relevant information as called for.

3. During assessment proceedings, assessing officer observed that assessee is carrying on the business of dealing in Iron and Steel. Assessee has declared a turnover of ₹ 2,30,59,382/– and declared a gross profit of ₹ 24,68,439/- and net profit of ₹ 9,408/–

4. AO observed that assessee has claimed commission of ₹ 2,99,272/– in its profit and loss account. He noticed that assessee has paid to Shri Kamalakar Jain ₹ 1,66,415/– at the rate of 5% and paid to Shri Tarun Kumar Jain ₹ 78,245/– at the rate of 3%

as commission and similar payments were given to other parties @ 0.44% to 0.47%. The assessee was asked to explain the variations in giving commissions. After considering the submissions of the assessee that it has paid sales commission to Mr Kamal Kumar Jain and Mr. Tarun Kumar Jain and to other parties paid as purchase commission. It also submitted that the above parties are not related to any partners and TDS has been deducted as applicable. After considering the submissions of the assessee, assessing officer disallowed commission over and above 1.5% and opined that considering the business of the assessee 1.5% is normal commission.

5. He further observed that assessee has debited ₹ 64,465/– as motor car expenses and noticed that in the depreciation schedule, there is no car belongs to the assessee. After considering the submissions of the assessee, he disallowed 50% of the expenses claimed by the assessee as non business expenditure.

6. Further he observed that assessee has claimed telephone expenses of ₹ 40,093/–. After verification of the telephone bills,

he observed that there is element of personal use cannot be ruled out, accordingly he disallowed 20% of the telephone expenses.

7. Aggrieved with the above order, assessee preferred an appeal before Ld CIT(A). Since, there was no representation before Ld CIT(A) in several occasions, Ld CIT(A) dismissed the appeal of the assessee by sustaining the additions made by the assessing officer. Aggrieved with the above order, assessee is in appeal before us rising following grounds of appeal.

> *1) The learned CIT (Appeals) has erred in confirming the addition of Rs.1,55,614/- on account of commission paid. The reasons assigned by him for doing the same are wrong and insufficient. Provisions of the act ought to have been properly construed before doing the same. Regard being had to the facts and circumstances of the case, the said addition ought not to have been made.*
>
> *2) Addition made on account of commission is also wrong and highly excessive as the same was wholly and exclusively incurred for the purpose of the business.*
>
> *3) The A.O, has further erred in not summoning the parties to whom commission was paid when complete*

details of the commission so paid along with the addresses of the parties to whom the commission was paid specifying their PAN no. were furnished to the A.O

4) The learned CIT (Appeals) has erred in confirming the disallowing motor car expenses at50% at Rs.32,232/-. The reasons assigned by him for doing the same are wrong and insufficient. Provisions of the act ought to have been properly construed before disallowing the same. Regard being had to the facts and circumstances of the case, the said dis-allowance ought not to have been made.

5) The learned CIT (Appeals) has erred in confirming the disallowing 20% telephone

expenses at Rs.8,019/-. The reasons assigned by him for doing the same are wrong and insufficient. Provisions of the act ought to have been properly construed beforedisallowing the same. Regard being had to the facts and circumstances of the case, the said dis-allowance ought not to have been made.

6) The learned CIT (Appeals) has erred in confirming the interest u/s 234D at Rs. 10,217/-Reasons assigned by him for doing the same are wrong and insufficient. Provisions of the Act ought to have been properly construed before levying the same.

7) Order passed is bad in law and contrary to the provisions of the Act.

8) Appellant leaves to add/modify/ delete/alter any/all grounds of Appeal.

8. Assessee has filed 8 grounds of appeal, in which grounds 1,2, 3 are on commission, ground No. 4 is on motor car expenses, ground No. 5 is on telephone expenses, ground No. 6 on interest under section 234D and ground numbers 7 and 8 are general. The ground No. 6 is consequential, ground numbers 7 and 8 are general, accordingly ground No. 6, 7 and 8 are dismissed.

8. At the time of hearing, Ld AR brought to our notice findings of assessing officer and submitted that assessing officer has not considered the submissions of the assessee that assessee has paid commission in different percentages on purchase and sales. He submitted that assessee has paid as per the industry norms and the percentage of commission on sales is different than purchase commission, none of the parties to whom assessee has paid commission are not relatives. It is purely a business transaction. He brought to our notice debit notes and documents in support of payment of commission to all the parties. He

submitted that the payment is purely for business purpose and he brought to our notice ITA No. 2069/Delhi/2016 in support of his contention.

9. With regard to ground No. 4 and No. 5, he submitted that the ad hoc disallowance is made by the assessing officer is excessive and submitted that reasonable percentage may be considered.

10. On the other hand Ld DR submitted that assessee is not maintaining consistency in giving commission to its agents and he submitted that the case relied by the assessee are distinguishable. With regard to disallowance on cost of maintenance of car, he submitted that there is no car owned by the assessee, therefore the matters of car expenses on which assessing officer has disallowed 50% of the expenditure which according to him, is proper and reasonable considering the fact that assessee have utilised for personal purposes. He also submitted that similar reason applicable for telephone expenses also.

11. Considered the rival submissions and material on record. We noticed that assessee is in business of dealing in Iron and Steel. As per the bills and vouchers submitted before us, we noticed that assessee has paid commission on purchases as well as sales. It is not necessary that the commission applicable on purchase and sales should be similar and equal. It is the business of the assessee and it has decided to incur the above said expenditure for the purpose of its business and it is the assessee who is responsible for earning the income of the business. It is in better position to decide on the relevant expenditure to be incurred for the purpose of earning the above said income. Further it is brought to our notice that none of the agents who are in receipt of commission are related to the assessee or its partners. Therefore the expenditure incurred by the assessee is incurred purely for the purpose of business. We noticed that the coordinate bench of ITAT, Delhi has held in the similar circumstances as below in the case of **Kay Dee Industries versus Joint Commissioner of Income Tax ITA No. 2069/Delhi/2016**, for the sake of clarity it is reproduced below:

6. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The assessee has paid commission to one M/s. Ashapura Associates, Ahmedabad, @ 7% of the sales at Ahmedabad Depot. For the payment of the commission the assessee has entered into an agreement on 1st April, 2006 with the commission agent, who is also responsible for the recovery of saleproceeds as per clause 7 of the agreement. This is not the first year of the payment of commission to that party. The recipient of the commission income is also not related party under provisions of section 40A(2) of the Act. The learned lower authorities have disallowed the payment without showing any reason except stating that there is no business exigency shown by assessee. It is an established law that in what manner the assessee should carry on his business should be left to the assessee only. The Revenue authorities are only authorized to see whether the expenditure has been laid out or expended by the assessee for the purposes of the business or not. In the present case, the amount of commission for this year have been paid @ 7% and total commission paid is Rs.32,61,849/- out of which the disallowance of Rs.9,31,957/- has been made holding that 2% of the total commission paid is excessive. Such powers are only available when the payment is made to a related party. It is not the case of

the Revenue that the party has not rendered services to assessee. In view of this, we reverse the finding of the lower authorities and direct the learned Assessing Officer to delete the disallowance of Rs.9,31,957/-.

7. In the result, appeal filed by the assessee, is allowed.

12. Respectfully following the above decision, we direct assessing officer to delete the addition made on payment of commission.

13. With regard to disallowance of car expenditure and telephone expenditure, we noticed that the car may be belongs to partners and since it is used for the purpose of business, there may be chance that assessee might have used for personal purposes and it is proper and reasonable to disallow 20% of the expenditure. Accordingly ground No. 4 is partly allowed.

13.1 With regard to telephone expenditure, we do not have the opportunity to verify the bills nor it is submitted before us. Therefore, if the telephone bills are in the name of the assessee, then AO cannot disallow the expenditure. If the telephone are installed in the residence of the partners, then the action of the AO is justified. Accordingly, we are remitting this issue to the

file of AO to verify and allow the expenditure as per above direction. As a result, this ground is partly allowed for statistical purposes.

14. Accordingly appeal filed by the assessee is **partly allowed.**

15. 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 thehearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date forpronouncement.

*(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 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 limitationhasexpired 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 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",inthelightoftheaboveanalysisofthelegalposition, theperiodduringwhich 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.

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.

16. 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.

17. Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on 23.07.2020.

Sd/-	*Sd/-*
(C. N. Prasad)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumbai;दिनांकDated : 23.07.2020
Sr.PS. Dhananjay

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

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**