

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

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

आयकरअपीलसं./ I.T.A. No. 695 to 701/Mum/2011
(निर्धारणवर्ष / Assessment Year: 2002-03 to 2008-09)

Jhunjhunwala Distributors Pvt. Ltd. Flat no. 41/42, 5 th floor, Megha Apartment, S. V. Road, Santacruz (W), Mumbai-400 054	बनाम/ Vs.	ACIT CC-11, Aaykar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AAACJ9152Q		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Prakash G. Jhunjhunwala & Shri Nitin Jain, ARs
प्रत्यर्थीकीओरसे/ Respondent by	:	Mrs. Leena Shrivastava, DR

सुनवाईकीतारीख/ Date of Hearing	:	24.02.2020
घोषणाकीतारीख / Date of Pronouncement	:	23.07.2020

आदेश / ORDER

PER BENCH:

The present seven appeals have been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-37, Mumbai, dated 18.11.10 for AY 2002-03 to 2008-09 respectively.

2. Since the issues raised in these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order.

3. At the time of hearing, Ld. AR submitted that there was a search and survey action u/s 132 and 133(A) of the Income Tax Act 1961 (in short 'Act') was carried out on 13.03.08 in the case of Shri Sudhir Jhunhunwala Group and its associate concern and residential and office premises of directors and other members of the group were also searched. He submitted that certain documents were found during search relating to undisclosed sales for the period 30th June 2004 to 2nd Aug 2004. He brought to our notice table showing year-wise additions made by the AO estimated suppression profit @ 10% on undisclosed sales and

disallowance of cash purchases u/s 14A(3) @ 20% and also there was additions made u/s 41(1) of the Act. He submitted that the AO made the additions irrespective of the fact whether that the assessment were abated or not. Further, he submitted that the documents found by the AO was relating to one month i.e. 30th June 2004 to 2nd Aug 2004. He also brought to our notice the affidavit submitted by the assessee dated 9th October 2018, in which assessee has explained the reasons for non-appearance before the tax authorities in this case. In the affidavit, he brought to our notice various litigation cases of civil and criminal matters pending in various courts for which assessee has to attend during this period. He also brought to our notice his Late son Mr. Varun S. Jhunjhunwala, CA, who was handling the tax related matter, has fell in serious illness of chronic pancreatitis and during this period, he was hospitalized for several times and undergone major surgery due to hemorrhage and went into coma and ultimately expired on 19.11.13. Since Late Varun was handling the matter, could not attend to various dates of hearing during tax authorities, therefore he prayed in the affidavit that this matter

may be remitted back to the file of Ld. CIT(A) to adjudicate the issue on merit.

4. Ld. AR further brought to our notice that the assessment passed by the AO invoking the provision of section 144 and completed the assessment by presuming that during the search proceedings, the department found suppressed cash sales register only for a month and AO presumed that assessee was suppressing the sales in almost every month. Accordingly, he has calculated the undisclosed cash sales for the total period of 84 months and divided the undisclosed sales for each year and accordingly, estimated the income @ 10%. He further submitted that on the similar line, AO also estimated the corresponding undisclosed sales u/s 40A(3) and accordingly made the additions. He submitted that since none represent the case of assessee before tax authorities, AO has completed the assessment by adopting wrong method for estimating the income of the assessee in the respective years. Therefore, he prayed that this matter may be remitted back to the file of Ld. CIT(A) to adjudicate the issue on merit.

5. On the other hand, Ld. DR was in agreement that none represented the case on behalf of the assessee before the lower authorities and however, he submitted that there is a clear proof that assessee has suppressed the cash sales in its books of accounts and investment wing has unearthed the sales register for the period from 30.06.2004 to 02.08.2004, which clearly indicates that assessee is indulged in suppressing the cash sales. He supported the findings of AO and relied upon the orders passed by tax authorities.

6. Considered the rival submissions and material placed on record. We notice that the assessment order passed by the AO u/s 144 r.w.s. 153A and none appeared on behalf of the assessee before AO, even though the AO has given several opportunities. Similarly, none appeared on behalf of the assessee before Ld. CIT(A) and Ld. CIT(A) has confirmed the additions made by the AO due to non-compliance by the assessee in representing the case before him. Since, the assessee has submitted before us by way of affidavit explaining the reasons for non-appearance before the tax authorities and the reasons given by the assessee are seems to be genuine. Therefore, for the sake of justice, we are

inclined to remit this issue back to the file of Ld. CIT(A) with a direction to decide the adjudicate on merit. At the same time, we are directing even the assessee to cooperate with the tax authorities to complete the proceedings. Therefore, we direct the Ld. CIT(A) to consider the submission of assessee and decide the issue on merit and as per law. Accordingly, grounds raised by the assessee are **allowed for statistical purposes.**

6.1. The facts are similar in all other appeals, therefore all the appeals filed by the assessee are **allowed for statistical purposes.**

7. In the net result, all the appeals filed by the assessee are **allowed for statistical purposes.**

8. 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 wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon’ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **“In case the limitation has expired after 15.03.2020 then**

*the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure...". The term '**force majeure**' has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.*

*10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392***

ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made 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 lockout 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 re-fix 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.

9. 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.

10. 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/-

(C. N. Prasad)

न्यायिकसदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :

Sr.PS. Dhananjay

Sd/-

(S. Rifaur Rahman)

लेखासदस्य / Accountant Member

23.07.2020

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