# IN THE INCOME TAX APPELLATE TRIBUNAL
# "F" BENCH, MUMBAI

## BEFORE SHRI PAWAN SINGH, JM &
## SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 5285 & 5286/Mum/2016
(**निर्धारणवर्ष** / Assessment Year: 2009-10 & 2010-11)

| | | |
|---|---|---|
| M/s Patel L & T Consortium<br>L& T House, N. M. Marg, Ballard Estate, Mumbai-400 001 | **बनाम**/<br>Vs. | ACIT 17(2),<br>Mumbai,<br>Pin- |
| स्थायीलेखासं./जीआइआरसं./PAN No. | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

आयकरअपीलसं./ I.T.A. No. 5352 & 5353/Mum/2016
(**निर्धारणवर्ष** / Assessment Year: 2008-09 & 2009-10)

| | | |
|---|---|---|
| ACIT 17(2),<br>Mumbai,<br>Pin- | **बनाम**/<br>Vs. | M/s Patel L & T Consortium<br>L& T House, N. M. Marg, Ballard Estate, Mumbai-400 001 |
| स्थायीलेखासं./जीआइआरसं./PAN No. | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

| | | |
|---|---|---|
| अपीलार्थीकीओरसे/ **Appellant by** | : | Shri Vipul Joshi/DinkleHariya, AR |
| प्रत्यर्थीकीओरसे/**Respondentby** | : | ShriRahul Raman, DR |

| | | |
|---|---|---|
| सुनवाईकीतारीख/ **Date of Hearing** | : | 19.02.2020 |
| घोषणाकीतारीख / **Date of Pronouncement** | : | 08.07.2020 |

आदेश / O R D E R

**PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):**

The present four appeals have been filed by the assessee and revenue against the order of Ld. Commissioner of Income Tax (Appeals)-28, Mumbai, dated 17.06.2016 for AY 2008-09 to 2011-12 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. Firstly, we are taking ITA No. 5285/Mum/2016 for AY 2008-09 filed by the assessee.

3. Brief facts of the case are, assessee filed its return of income declaring total income of Rs. Nil/– on dated 27.09.2008. The return was processed under section 143 (1) of the Income Tax Act 1961 (in short Act). Subsequently, the case was selected for scrutiny and notices under section 143(2) and 142(1) were issued and served on the assessee. In response, authorized

representative of the assessee attended and filed the relevant information as called for.

4. The assessee is an un-Incorporated joint venture concern between Patel Engineering Ltd and Larsen & Tubro Ltd, which is formed only for the execution of contract awarded by National Hydro Electric Power Corporation Ltd (NHNP) dated 25.01.2006 for the construction of Parvati Hydro Electric Project III Lot I Sainj in District of Kullu (Himachal Pradesh).

5. During assessment proceedings, Assessing Officer observed that assessee has declared income from construction and project related activities at Rs. 107.64 crores and the same was shown under expenditure head manufacturing, construction and operating expenses. The assessee was asked to explain as to why no income is offered to tax. In response, assessee filed a detailed explanation submitting that assessee is doing a contract and as per recognize accounting method, i.e., Accounting Standard – 7 was followed and as per its partners, who are having extensive experience in dealing with projects and considering the complexities of the project, it was decided to recognize the

revenue only after 50% completion of project. Since the assessee has completed only 31.94%, therefore it has not recognized the revenue for this AY. Further assessing officer observed that as per the records filed before him, the total contract is Rs. 501 crores and the total estimated cost is Rs. 486 crores. The grass margin is Rs. 15 crores which is 3% of the total contract. He observed that assessee has created a contingency cost to the extent of Rs. 3 percent of the job cost. When the assessee was asked to explain, the assessee submitted that the project undertaken by the assessee involves a large number of variable factors which are generally associated with the project of this size and magnitude, with the experience of the partners of this consortium, it is decided to provide for the contingencies at the rate of 3% on the contract revenue. Further, assessee relied on the case law of Hon'ble Supreme Court in the case of Rotork Controls Private Limited (314 ITR 62). The assessing officer after considering the submissions of the assessee rejected the contentions of the assessee and proceeded to estimate the income of the assessee based on percentage of completion method to the extent of Rs. 4,80,11,343/–.

6. Aggrieved with the above order, assessee preferred an appeal before the Ld CIT(A). Before him, assessee filed a detailed submission similar to the submissions made before assessing officer. After considering the submissions of the assessee, Ld CIT(A) sustained the additions made by the assessing officer by rejecting the ground raised by the assessee.

7. Aggrieved with the above order, assessee is in appeal before us raising following grounds of appeal:-

***Rejection of Method of Accounting.***

*a) The Commissioner of Income Tax (Appeals)-28 [Ld. CIT(A)] has erred in not appreciating the fact that the revenue of the appellant for the year is recognized in accordance with the provisions of section 145 of the Act, based on the method of accounting regularly and consistency followed by the appellant which is stipulated in Accounting Standard (AS-7).*

*b) The appellant respectfully prays that the directions of the CIT to the AO be quashed and the AO be directed to follow the widely accepted and mandatory AS7 for recognition of revenue.*

***Disallowance of Provsion for Contigency of Rs. 15,03,36,000/-***

*The CIT(A) has erred in disallowing the provision for contingency of Rs. 15.03 crores (being 3% of the total contact revenue), though the said is neither dragged to Profit & Loss Account nor claimed as deduction.*

***Request for leave to add, alter, amend and /or supplement the grounds of appeal.***

*The appellant craves leaves to add, alter, amend and /or supplement any ground or grounds, if necessary, at the time of hearing of the appeal.*

8. Before us learned AR submitted that for the assessment year 2008–09 and 2009–10 in which assessee is in appeal with the common issue that assessing officer has not accepted the method of accounting as adopted by the assessee in recognizing the revenue in which the assessee has a standard method of declaring the income once the project reaches 50% stage of completion. Further it is submitted that the assessee also is in appeal in assessment year 2008–09 in which assessee has considered contingency cost as part of the total estimated cost for

the project, which assessing officer has rejected the estimated cost for contingency.

9. Further he submitted that for the assessment year 2010–11 and assessment year 2011–12, the revenue is in appeal against the order of Ld CIT(A) in which he directed the assessing officer to take into consideration the revised estimate of contractual revenue and contractual cost inconsistent with the revised estimate adopted by the assessing officer with respect to assessment year 2008-09, while estimating the income for those 2 years.

10. With regard to method of accounting adopted by the assessee, he submitted that the method adopted by the assessee to offer income/revenue to the extent of expenses incurred during the year till the project reaches 50% stage of completion, he submitted that it is perfectly in accordance with the Accounting Standard-7. He brought to notice Accounting Standard 7 which is placed on record at page 60 to 85 of the paper book, further he brought to notice page 71 and 72 of the paper book in which definition of contract revenue and contract cost were defined in A.S. 7. He also brought to our notice the accounting standard in

recognition of contract revenue does not provide specific percentage of completion to recognize the revenue. He submitted that contract completion expenses should be based on the estimates and also change in estimates, for that purpose, he brought to our notice page 79 of the accounting standard. He also brought to our notice that the accounting treatment adopted by the assessee also certified by the statutory auditor. Further he submitted that the above accounting treatment was based on, keeping in mind the peculiar, highly complex and extremely sensitive project for the hydro project in Himalayan range. He also brought to notice the chart demonstrating year-to-year variation in the estimates and final reconciliation, which shows that there was negative variation of about 12% at the end of the project, in other words, the revisions in estimates year to year shows the actual work ultimately executed was less predictable i.e., that is less by 52 crores of the original contract value.

11. He brought to our notice the assessment order of another assessee, International Metro Civil Contractor, it is also a joint venture and undertaken a contract for constructing tunnel *et cetera*. This joint venture had adopted the same method as the

assessee and not recognized the revenue till 50% of the contract is completed and the Department therein had accepted such method. However in the above case the only issue was that ITO has not given credit of TDS on the ground that no corresponding income was assessable. However in the appeal, assessee was found to be eligible for the credit of TDS on the ground that it can set to have assessable income. He brought to our notice order of CIT (A) and order of ITAT. Further he submitted that such estimation of income will have tax neutralizing effect vis-a-vis the ultimate result. In this regard he relied in the case of **ITO vs Kasturi Construction (2012 – 24 Taxmann.com 331 (mum)).**

12. With regard to ground No. 2 on contingency cost, he submitted that for estimating the project revenue and cost as per AS-7, when the project is complex and geologically sensitive, the best way to create a contingency so that it can absorb future loss and the assessing officer has not brought any cogent material before rejecting the claim of the assessee. He submitted that in the immediately succeeding year, the assessee had to revise the estimated direct cost from Rs.486.08 crores to Rs. 543.64 crores, an increase of Rs. 60 crores therefore it is for the point that

assessee has estimated contingency cost of Rs. 15.03 crores in assessment year 2008–09 which is not only justified but is far less.

13. On the other hand, learned DR supported the findings of the tax authorities, but on the other hand he is of the view that considering the subsequent year results submitted by the assessee, he submitted that it may be remitted back to the assessing officer for verification of the actual results submitted by the assessee.

14. Considered the rival submissions and material on record. We notice that assessee is an un-incorporated joint venture between Patel Engineering Ltd and L & T Ltd. From the record we notice that this company is formed to secure the order from NH NP in order to construct Spill-way Tunnel with diversion in Himachal Pradesh. The consortium partners who agreed to complete the contract with 40% and 60% share among them. From the financial statement we also noticed that the assessee does not have any capital or bank borrowings in order to complete the project and we also noticed that the contracts were executed by L & T (refer point No. 16 of notes forming part of

accounts). In the financial statement we can notice that the partner L&T executes the work and raises the bill to the assessee, the assessee accounted the same by debiting the to its profit and loss account. From the current financial statement it is clear that assessee has not executed any work and not incurred any expenditure except incurred few administration expenditures. It clearly indicates that the consortium partners created this company only to secure the order and complete the project by giving back-to-back contract to the consortium partners(themselves). From the record we notice that the notes forming part of accounts clearly indicate that contract were executed by consortium partners as per their agreed terms. But we notice that assessee has not submitted any joint venture agreement before any authority below, neither it submitted before us. It is clear from the record that this entity is only a pass through entity or special purpose vehicle to execute the contract.

15. Considering the above facts, in our view, assessee is not doing any construction activity but just completes the contract by giving back-to-back contract to the consortium partners. The record clearly indicates that all the works during this assessment

year were executed by the consortium partner and claimed the same as job work cost or subcontract cost. When assessee is only a special purpose vehicle just to secure the order and give back-to-back contract to consortium partners, apart from that it collects payments from the principal and in turn distributes the same to the consortium partners. This sort of arrangements is very common in infrastructure development industries. Since this entity is formed only as a pass through entity, therefore expecting this entity to declare income may not be proper or practical. What is relevant is substance over form, the real profit from the project will be reflected only in the books of consortium partners. Therefore in our considered view the assessing officer has presumed that assessee will earn the projected profit and the same will be reflected in its books. This is not practical or realistic presumption made by the assessing officer/Ld CIT(A).

16. What is relevant is the actual result and actual profit, not the profit based on presumptions. The assessee has brought on record the total results of the project which was executed by the consortium partners as per which assessee has not achieved the projected results. We clearly brought the facts of the reasons for

formation of the consortium and its role and functions. We do not agree with the assessee that assessee will declare the profit as and when it reaches 50% of stage of completion, nowhere in the notes forming accounts or in its accounting policy it has declared its intentions. It is relevant to note that the assessee is not a registered venture and it is not obligated to follow any accounting principle and it follows only a basic accounts to track the execution of work by the consortium partners and realises the RA bill submitted to the principle.

17. Considering the above facts, we are directing the assessing officer to verify the books of account of the assessee vis-a-vis corresponding financial statement of the consortium partners and if they have declared the above contract and declared the profit in their books of account then in our view the purpose of bringing real profit is achieved. Accordingly we are remitting this issue back to the file of assessing officer to complete the assessment without making any addition in the hands of the assessee when the above contract results were already declared by the consortium partners in their books of account. With regard to contention of the assessee, we do not agree with their book result

and method of accounting adopted by them. Considering the facts in this case we are partly allowing the ground raised by the assessee with the above direction to assessing officer.

18. With regard to ground No. 2, as explained above, the assessee is only a pass through entity and not expected to declare any profit in its books of account and all the eligible profit will be declared only in the books of consortium partners. Therefore there is no obligation on the part of the assessee to create any contingency liabilities. Accordingly ground raised by the assessee is **dismissed**.

19. In the net result, appeal filed by the assessee is **partly allowed.**

20. With regard to appeal filed by the assessee in assessment year 2010-11, the facts in this year are similar to the facts in the assessment year 2009–10. Accordingly appeal filed by the assessee is **partly allowed** as per the direction in assessment year 2009-10.

**Now we come to appeal filed by the revenue in ITA No. 5352 & 5353/Mum/2016.**

21. With regard to appeal filed by the revenue in these assessment years 2011–12 and 2012–13, at the time of hearing, the Ld. DR brought to our notice that these appeals are covered by the CBDT circular No. 3 of 2018, the tax effect in these appeals are below 50 lakhs. Therefore these appeals are **dismissed**.

22. In the net result, both the appeal filed by the assessee are **partly allowed** and both the appeals filed by the revenue are **dismissed**.

23. 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 Raj (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.*

24. 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.

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

| | |
|---|---|
| *Sd/-* | *Sd/-* |
| (Pawan Singh) | (S. Rifaur Rahman) |
| न्यायिकसदस्य / Judicial Member | लेखासदस्य / Accountant Member |

मुंबई Mumbai;दिनांक Dated 08.07.2020
*Sr.PS. Dhananjay*

**<u>आदेशकीप्रतिलिपिअग्रेषित</u>/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**