

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'सी' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH,
AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1510/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2010-11)

Gujarat State Energy Generation Ltd. Pankar R. Shah & Associates, Charged Accountants, 7 th Floor, Regency Plaza, Opp. Rahul Tower, Nr. Madhur Hall, Anandnagar Cross Road, Satellite, Ahmedabad - 380015	बनाम/ Vs.	ACIT Gandhinagar Circle, Gandhinagar Block No.14, 4 th Floor, Udhog Bhavan, Sector - 11, Gandhinagar - 382011
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCG1359A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No. 1532/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2010-11)

Jt. Commissioner of Income Tax (OSD) Gandhinagar 4 th Floor, 14 th Block, Udhog Bhavan, Sector - 11, Gandhinagar - 382011	बनाम/ Vs.	Gujarat State Energy Generation Limited 3 rd Floor, Block No.15, Udhog Bhavan, Sector - 11, Gandhinagar - 382011
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCG1359A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Assessee by :	Shri S. N. Soparkar, Sr. Advocate with Shri Parin Shah, A.R.
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राजस्व की ओर से/Revenue by :	Shri Aarsi Prasad, CIT. D.R.
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सुनवाई की तारीख / Date of Hearing	21/01/2020
घोषणा की तारीख / Date of Pronouncement	04/06/2020

आदेश/O R D E R

PER WASEEM AHMED - AM:

Both captioned appeals have been filed at the instance of the assessee & Revenue against the order of the Commissioner of Income Tax (Appeals)-7, Ahmedabad (CIT(A) in short) dated 12/03/2016 relevant to Assessment Year (AY) 2010-11.

2. The 1st issue raised by the assessee is that the learned CIT (A) erred in part confirming the disallowance made by the AO for Rs. 87,544/- under the provisions of section 14A read with rule 8D of Income Tax Rule.

3. The AO during the assessment proceedings found that the assessee has made investments in the shares of other companies worth of Rs. 50 lakhs and at the same time the assessee has claimed interest expenses in its profit and loss account amounting to Rs. 12,84,88,704/- only. But the assessee has not made any disallowance of the expenses under the provisions of section 14A read with rule 8D. Accordingly the AO invoked the provisions of section 14A r.w. rule 8D and made the disallowance as under:

i. Direct expenses	nil
ii. Interest expenses	Rs. 75,602/-
iii. Administrative expenses	Rs. 25,000/-

Total	Rs. 1,00,602/-

4. Aggrieved assessee preferred an appeal to the learned CIT (A), who has partly confirmed the order of the AO by observing as under:

"The appellant has earned exempt income and therefore the disallowance made by the AO was correct. However, it has been claimed by the appellant that the interest expenses considered by the AO while making the impugned disallowance included financial charges which was not an interest expense. If these expenses are not considered, the disallowance works out to Rs.87,544/-. I am inclined to agree with the appellant in this regard and the AO is directed to verify the figure of disallowance and give relief accordingly. Ground of appeal No2 is partly allowed, subject to verification by the AO."

5. Being aggrieved by the order of the learned CIT (A), both the assessee and the Revenue are in appeal before us in appeal before us. The assessee is in appeal against the confirmation of the addition for Rs. 87,544/- whereas the Revenue is in appeal against the deletion of the addition for Rs. 13,058/- only.

6. The learned AR before us filed a paper book running from pages 1 to 345 and claimed that the own fund of the assessee exceeds the amount of investments as evident from the financial statement of the assessee which is placed on pages 303 to 345 of the paper book. Accordingly, the learned AR for the assessee claimed that there cannot be any disallowance of interest expenses.

7. On the other and the learned DR vehemently supported the order of the authorities below.

8. Both the learned AR and the DR before us relied on the order of the authorities below to the extent favourable to them.

9. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly the own fund of the assessee exceeds the amount of investment. Accordingly presumption can be drawn that the borrowed fund was not utilised for such investments. Accordingly There cannot be any disallowance of any interest expenses in view of the judgment of the

Hon'ble Gujarat High Court in the case of PCIT vs. Shreno Ltd. reported in 409 ITR 401 wherein it was held as under:

"12. The exposition of law made by the Supreme Court in case of S. A. Builders Ltd. (supra) and observation made therein have been applied by this court on various occasions, particularly in connection with the disallowance to be made under Section 14A of the Act. It has been held that if the assessee can demonstrate availability of surplus interest free funds for making investment generating tax free income, disallowance under Section 14A of the Act would not be justified. "

Regarding the disallowance of administrative expenses of Rs. 25,000/- we find that there was no argument advanced at the time of hearing on such disallowance. Accordingly we confirm the addition for Rs. 25,000/- towards the administrative expenses. Hence the ground of appeal of the assessee is partly allowed and the ground of appeal of the revenue is dismissed.

10. The 2nd issue raised by the assessee is that the learned CIT (A) erred in confirming the disallowance of Rs. 17,59,880/- on account of prior period expenses.

11. The AO during the assessment proceedings found that the assessee has claimed the deduction on account of prior period expenses amounting to Rs. 17,59,880/- only. As per the AO such deduction was not available to the assessee. Accordingly the AO disallowed the same and added to the total income of the assessee.

12. Aggrieved assessee preferred an appeal to the learned CIT (A) who also confirmed the order of the AO by observing as under:

*"6.2 I have considered the assessment order and the submissions made by the appellant. A perusal of the submissions made by the appellant shows that it has claimed that the prior period expenses actually pertained to the current year i.e, year under consideration and that the liability had actually crystallized during the year. However, this has not been substantiated by the appellant by bringing on record any documentary in support of its claim. In view of the same, the disallowance made by the AO is **confirmed. Ground of appeal No. 3 is accordingly dismissed.**"*

13. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

14. The learned AR before us submitted that this tribunal in the own case of the assessee in identical facts of circumstances has decided this issue in its favour in ITA No. 307/AHD/2014 pertaining to the assessment year 2009-10.

15. On the other hand the learned DR vehemently supported the order of the authorities below.

16. We have heard the rival contentions of both the parties and perused the materials available on record before us. At the outset we note that this tribunal in the own case of the assessee (*supra*) involving identical facts and circumstances has decided the issue in the favour of the assessee. The relevant extract of the order is reproduced as under:

"11. Heard the respective parties, perused the relevant materials available on record. It appears from the records that while rejecting the case of the assessee, the Learned AO observed that the assessee is following mercantile system where expenditure is recorded if it is due during the previous year irrespective of fact whether it is paid during the previous year or not. Under the above circumstances, since the assessee is consistently following the mercantile system of accounting, expenses incurred prior to relevant accounting period are not allowable as expenses in subsequent years. On this issues he relied upon the judgment passed in the matter of Indermani Jatia vs. CIT, 351 ITR 298 (SC). The view has been reiterated by the Ld. CIT(A) as well.

12. It is a settled principle of law that when the assessee followed the mercantile system of accounting, expenditure incurred during the previous year though pertaining to an earlier period is deductible. We have carefully considered the judgment passed in the matter of Kedarnath Jute Mfg. Co. Ltd.-vs-CIT reported in 82 ITR 363 (SC) where it was held that where the assessee has followed mercantile system of accounting and distributing the liability to pay to sales tax and not making provision in its books of accounts particularly when the demand raised on the basis of the sales made during the accounting year the assessee entitled to deduct the amount of sales tax on the basis of the liability incurred and even in the absence of entries in the books of accounts, the same is admissible. We have further carefully considered the order passed by the Jurisdictional High Court in the matter of Saurashtra Cement & Chemical Industries Ltd.-vs-CIT reported in 213 ITR 523 (Guj. High Court) where it has been held that liability is allowable only in the year in which it has crystallized and determined particularly when the mercantile system of accounting is practiced by the assessee. The expenditure is not to be disallowed merely because it related to earlier previous year. In short under mercantile system of accounting the liability is allowable in the year it crystallized and thus the claim of the assessee seems to be justified and hence allowable. The addition made in this respect is, therefore, deleted."

17. The facts of the case on hand are identical to the facts of the case as discussed above. The learned DR at the time of hearing has also not brought anything on record contrary to the argument advanced by the learned AR. Hence respectfully following the principle laid down in the own case of the assessee by this tribunal, we set aside the finding of the learned CIT (A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

18. The 3rd issue raised by the assessee is that the learned CIT (A) erred in directing the set off of the unabsorbed depreciation of Rs. 2,82,96,976/- against the income of the current year.

19. At the outset the learned AR for the assessee before us submitted that the unabsorbed depreciation of the earlier years amounting to Rs. 2,82,96,976/- cannot be set off against the income of the current year as the appeal for the immediate preceding assessment year is before the ITAT in ITA No. 307/AHD/2014. Accordingly the learned AR before us prayed to direct the AO to allow the set off of the unabsorbed depreciation after considering the outcome of the appeal pending before the ITAT for the assessment year 2009-10. The learned DR raised no objection if the matter is set aside to the file of the AO for fresh adjudication as per the provisions of law.

20. We heard the rival contentions of both the parties and perused the materials available on record. We find merit in the argument advanced by the learned AR for the assessee. Accordingly we set aside the issue to the file of the AO with direction to allow the set off of the unabsorbed depreciation of the earlier years after considering the appeal of the assessee for the assessment year 2009-10. Hence the ground of appeal of the assessee is allowed for the statistical purposes.

21. The next issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by sustaining the addition of Rs. 25,42,00,000/- for the advance against depreciation.

22. At the outset the learned counsel for the assessee submitted that the identical issue has been decided by this tribunal in the own case of the assessee for the assessment year 2009-10 in ITA No. 307/AHD/2014 vide order dated 27th December 2019 against the assessee. Accordingly, the learned AR prayed to us to dismiss the ground of appeal raised by the assessee after providing the same direction.

23. On the other hand, the learned DR vehemently supported the order of the authorities below.

24. We have heard the rival contentions of both the parties and perused the materials available on record before us. At the outset we note that this tribunal in the own case of the assessee (*supra*) involving identical facts and circumstances has decided the issue against the assessee. The relevant extract of the order is reproduced as under:

"15. At the time of hearing of the instant appeal the Learned Sr. Counsel appearing for the assessee submitted before us that when the query was raised as regard such advance depreciation the assessee stated as follows as it appears at page 128 of the Paper Book filed before us:

"Reply: As per Power Purchase Agreement - PPA with Gujarat Urja Vikas Nigam Ltd. - GUVNL, GSEG raised invoices to GUVNL based on the calculation of Fixed Charge as mentioned in PPA. One of the components of Fixed Charge is Depreciation. Now, as per Re-negotiated Power Purchase Agreement - PPA with Gujarat Urga Vikas Nigam Ltd. - GUVNL it was agreed that the year in which GSEG will be facing heavy cash out flow due to repayment of debentures, GUVNL will give some amount in advance to GSEG by way of advance depreciation and shall recover it against the future bills. However for the year under assessment, there is a "maximum ceiling of Rs. 14.92 Cr as per calculation attached, i.e. GUVNL will not pay more than Rs. 14.92 Cr by way of Advance Depreciation. Thus, in the current year, GSEG made repayment of Rs. 98.81 Crores as per repayment schedule. As agreed GUVNL paid 14.92 Cr. as advance and the same was shown under the H- Long Term Liability by GSEG, which will be adjusted against future bills. (Annexure - 7)."

Further that, the Schedule 'L' Column 2.2 of the Balance sheet of the company also specifies that during the year the company has received an amount of Rs.14.92 Cr.

towards advances against depreciation which has shown long term liability and was to be adjusted in respective years. However, the Learned CIT(A) has been pleased to direct the Learned AO to verify the claim of the appellant in the event the appellant is able to prove that any income has been taxed in the subsequent assessment year is in fact adjusted against advance of Rs.14.92 crores, such income would not be liable to be taxed in the year in which the appellant company has shown any income. Being aggrieved by the same the assessee is before us.

16. *We have heard the respective parties perused the relevant materials available on record. In terms of the power projects agreement as it appears from the records the appellant company has been raising invoices to Gujarat Urja Vikas Nigam Ltd. (GUVNL) on the calculation of fixed charges as mentioned therein. One of such components of fixed charges is depreciation. It was further agreed between the two parties that in the year the appellant since has been facing heavy cash flow due to repayment of debenture, Gujarat Urja Vikas Nigam Ltd. (GUVNL) will give amount in advance to the appellant by way of advance depreciation and the same would be recovered against future bill. Hence, the amount of Rs.14.92 has been received as advance by the appellant. However, as it appears from the orders that the appellant has not been able to prove that advances received are in fact adjusted against future bills or how this particular amount has been received in current year and treated as advance is ultimately settled in the subsequent assessment year. In that view of the matter, the Learned CIT(A) passed the following orders:*

"The Appellant in its alternate submission has argued that if addition made by Assessing Officer is upheld, same may be allowed to be reduced from income of the future year in which such advance is actually set off against electricity bill and considered as income of that particular future year as the same cannot be taxed twice. In this reference Assessing Officer is directed to verify the claim of Appellant and if Appellant is able to prove that any income has been taxed in subsequent assessment year is in fact adjusted against advance of Rs. 14.92 crores, such income would not be liable to be taxed in the year in which Appellant has shown any income. Thus, the related ground of appeal is partly allowed."

However, it is the case of the assessee that such advances to be adjusted with the power so supplied in the future. We, thus, having regard to the facts and circumstances of the case find no infirmity in the order passed by the Learned CIT(A) in making such direction upon the Ld. AO with the guidelines framed therein in order to grant relief to the assessee if permissible under the law, so as to warrant interference. Hence, we confirm the order passed by the Ld. CIT(A).

25. The facts of the case on hand are identical to the facts of the case as discussed above. Hence respectfully following the principles laid down in the own case of the assessee by this tribunal, we confirm the finding of the learned CIT (A). Hence the ground of appeal of the assessee is dismissed.

26. The next issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by upholding the disallowance of depreciation amounting to Rs. 1,69,46,634/- on account of change in accounting method.

The assessee to the immediate preceding assessment year was showing the capital spares as inventory and claiming the depreciation thereon by way of amortizing the same on straight line method overall useful life of the spares i.e. 14 years. However the assessee from the year under consideration has changed its accounting policies and classified capital spares under the head fixed assets. Thus the assessee claimed depreciation at the rate of 15% on the value of such capital spares for the year under consideration amounting to Rs. 3,23,52,664/-.

However, the AO found that the amount of amortization comes to Rs. 1,54,06,030/- as per the previous model of accounting used by it in the immediate preceding assessment year. Thus the AO found that the assessee by switching the policy of treating the capital spares as fixed assets has claimed excessive depreciation amounting to Rs. 1,69,46,634/-. Accordingly the AO disallowed the excess amount of depreciation by adding to the total income of the assessee.

27. Aggrieved assessee preferred an appeal to the learned CIT (A).

28. The assessee before the learned CIT (A) submitted that there is no provision under the Act, allowing the amortization on the capital spares over a period of 14 years. As such the provisions of the Act mandates to claim the depreciation on the capital spares at the rate of 15% which has been corrected by the assessee from the year under consideration.

The assessee also challenged the working of the disallowance made by the AO. As per the assessee the excess amount of depreciation comes at Rs. 53,57,970/- only and not the amount as computed by the AO at Rs. 1,69,46,634/- only.

29. However the learned CIT (A) disagreed with the contention of the assessee and confirmed the order of the AO by observing as under:

"9.2 I have considered the assessment order and the submissions made by the appellant. A perusal of the submissions made by the appellant shows that it has merely been stated that the appellant had changed its accounting policy during financial year 2009-10 i.e. for the relevant Asst. Year. However, it has not given any explanation with respect to the excess depreciation that has accordingly been claimed and which has been disallowed by the AO. In view of the same, I find no reason to disagree with the stand by the AO and the disallowance of depreciation of Rs.1,69,46,634/- is confirmed. Ground of appeal No.6 is dismissed."

30. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

31. The learned AR before us submitted that the assessee has correctly claimed the depreciation under the provisions of section 32 of the Act with respect to the capital spares.

32. On the other hand the learned DR vehemently supported the order of the authorities below.

33. We have heard the rival contentions of both the parties and perused the materials available on record before us. The issue in the present case relates whether the assessee can claim depreciation on the capital spares under the provisions of section 32 of the Act, instead of amortizing the same. The assessee can claim the depreciation as per the provisions of section 32 of the Act. The assessee is entitled for the depreciation on the capital spares at the rate of 15% whereas there is no provision under the statute to amortize the capital spares over the period of 14 years. Thus we are of the view that the assessee has changed the accounting policies with respect to the capital spares within the provisions of law. Thus, such change does not contravene any of the provisions of section 32 of the Act. Accordingly we hold that there is no infirmity in the action of the assessee for changing its method of depreciation with respect to capital spares. We also find support and guidance from the judgement of Hon'ble Gujarat High Court in the case of CIT vs. Ganga Charity Trust reported in 162 ITR 612 wherein it was held as under:

"Regarding the change in the system of accounting, the assessee-trust experienced difficulty in the assessment year 1971-72 because of non-receipt of interest from

parties with which it had placed its funds by way of deposits and so it decided to switch over to cash system of accounting, so that it might not be required to pay income-tax on notional income. There is nothing in the Act which precludes the assessee, who bona fide desires to switch over to another system of accounting, from doing so. There was no finding of fact that the switch over to the cash system of accounting in the previous year relevant to the assessment year 1972-73 was not bona fide. Besides, it was not shown by the department that the change lacked durability or regularity and was merely a stop-gap arrangement to avoid payment of tax. In such a situation one failed to understand why a bona fide assessee should be precluded from switching over to another system of accounting which he found convenient and which would reflect his real income. Circumstances had compelled the trustees to switch over to cash system of accounting which was the only course open to a prudent trustee for preserving the property of the trust. Thus, the assessee was entitled to switch over to the cash method of accounting."

34. In view of the above we hold that the order of the learned CIT (A) is not sustainable. Accordingly, we set aside the same and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

35. The next issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by sustaining the disallowance of Rs. 1,00,602/- while computing the profit under section 115JB of the Act .

36. The AO during the assessment proceedings has made the addition to the book profit for the amount of disallowance of Rs. 1,00,602/- made under normal computation of income under section 14A read with rule 8D of Income Tax Rule. On appeal, the learned CIT (A) also confirmed the order of the AO.

37. Being aggrieved by the order of the Id. CIT(A) the assessee is in appeal before us.

38. The Id. AR before us claimed that there cannot be any addition of the expenses disallowed under section 14A r.w.r. 8D of the Rules while determining the book profit under section 115JB of the Act.

39. On the other hand the Id. DR vehemently supported the order of the authorities below.

40. We have heard the rival contentions of both the parties and perused the materials available on record. Regarding the addition in the book profit under section 115JB of the Act, we note that the AO in the instant case has made the disallowance u/s 14A r.w.r. 8D of the Income Tax Rules while determining the income under normal computation of income. Further, the AO while determining the income under Minimum Alternate Tax (MAT) as per the provisions of section 115JB of the Act, has added the disallowance made under the normal computation of Income under section 14A r.w.r. 8D of Income Tax Rule - in pursuance to the clause (f) of explanation 1 to section 115JB of the Act.

However, we note that in the recent judgment of Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the book profit u/s 115JB of the Act. The relevant portion of the said order is reproduced below:

"In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962."

The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case on hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under clause (f) of explanation 1 to section 115JB of the Act.

However, it is also clear that the disallowance needs to be made with respect to the exempted income in terms of the provisions of clause (f) to section 115JB of the Act while determining the book profit. In holding so, we draw support from the judgment of Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. in GO No.1501 of 2014 (ITAT No.47 of 2014) dated 19.11.14 wherein it was held that the disallowance regarding the exempted income needs to be made as per the clause (f) to Explanation-1 of

Sec. 115JB of the Act independently. The relevant extract of the judgment is reproduced below:-

"We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the Ld. Tribunal.

We accept the submission of Mr.Khaitan, Ld. Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

In view of the above, we hold that the disallowances made under the provisions of Sec. 14A r.w.r. 8D of the IT Rules, cannot be applied to the provision of Sec. 115JB of the Act as per the direction of the Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. (*Supra*).

41. Now the question arises to determine the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. In this regard, we note that there is no mechanism/ manner given under the clause (f) to Explanation-1 of Sec. 115JB of the Act to workout/ determine the expenses with respect to the exempted income. Therefore in the given facts & circumstances, we feel that ad-hoc disallowance will serve the justice to the Revenue and assessee to avoid the multiplicity of the proceedings and unnecessary litigation. Thus we direct the AO to make the disallowance of 1% of the exempted income as discussed above under clause (f) to Explanation-1 of Sec. 115JB of the Act. We also feel to bring this fact on record that we have restored other cases involving identical issues to the file of AO for making the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. But now we note that there is no mechanism provided under the clause (f) to Explanation-1 of Sec. 115JB of the Act to make the disallowance independently. Therefore our action for restoring back the issue to the file of AO would unnecessarily cause further litigation. Thus we limit the disallowance on an ad-hoc basis @ 1 % of the exempted income under the clause (f) to Explanation-1 of Sec. 115JB of the Act subject to the condition that the

disallowance shall not exceed the amount of disallowance determined by the authorities below under the provisions of section 14A r.w.r. 8D of Income Tax Rules. Hence, the ground of appeal of the assessee is partly allowed.

42. In the result, appeal of the assessee is partly allowed for statistical purposes.

Coming to the ITA No. 1532/AHD/2016, an appeal by the revenue.

43. The 1st issue raised by the revenue is that the learned CIT (A) erred in deleting the disallowance made by the AO under section 14A read with rule 8D of Income Tax Rule.

44. At the outset we note that the issue raised by the revenue has already been adjudicated along with the appeal of the assessee bearing ITA No. 1510/AHD/2016 vide paragraph number 9 of this order. For the detailed discussion, please refer the relevant paragraph. Respectfully following the same we dismiss the ground of appeal raised by the revenue.

45. The next issue raised by the revenue is that the learned CIT (A) erred in allowing the claim of the assessee under section 80-IA (4) of the Act though there was no claim made in the income tax return.

46. The assessee in the year under consideration has not claimed any deduction under section 80-IA(4) of the Act, as there was no positive business income for the year under consideration. However the assessee before the learned CIT (A) has claimed the deduction under section 80-IA(4) of the Act if its income turns to be positive on account of disallowances made by the AO. The contention of the assessee was accepted by the learned CIT (A). Accordingly he directed the AO allow the deduction under section 80-IA(4) of the Act, if there is the positive income of the assessee.

47. The revenue against the direction of the learned CIT (A) preferred an appeal before us. However, we note that the assessee did not claim the deduction under section 80-IA (4) of the Act, for the reason that there was no positive income. However, in our considered view if there any positive income in the hands of the assessee on account of the disallowances made by the AO in the assessment proceedings then the assessee in our considered view should be entitled for the deduction under section 80-IA(4) of the Act, as per the provisions of law. As such we do not find any infirmity in the direction of the learned CIT (A). Hence the ground of appeal of the revenue is dismissed.

48. Before we part with the issue/appeal as discussed above, it is pertinent to note that the clause © of rule 34 of the Appellate Tribunal Rules 1963 requires the bench to make endeavour to pronounce the order within 60 days from the conclusion of the hearing. However the period of 60 days can be extended under exceptional circumstances but the same should not ordinarily be further extended beyond another 30 days. In simple words the total time available to the Bench is of 90 days upon the conclusion of the hearing.

However, during the prevailing circumstances where the entire world is facing the unprecedented challenge of Covid 2019 outbreak, resulting the lockdown in the country, the orders though substantially prepared but could not be pronounced for the unavoidable reasons within the maximum period of 90 days. In such circumstances we find that the Hon'ble Mumbai Tribunal in the case of **JSW Limited Vs Deputy Commissioner of Income Tax in ITA No. 6103/MUM/2018 vide order dated 14-5-2020** extended the time for pronouncing the order within 90 days of time by observing as under:

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 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 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 notice board.

Considering the above, we express to pronounce the order beyond the period of 90 days. Accordingly, we proceed to pronounce the order as on date.

49. In the combined result, the appeal of the assessee is partly allowed for statistical purposes whereas the appeal of the revenue is dismissed.

This Order pronounced in Open Court 04/06/2020

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT
Ahmedabad: Dated 04/06/2020

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।