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

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 1538/Ahd/2018
(Assessment Year: 2013-14)

Balji Electrical Insulators P. Ltd. (Since merged with Golf Ceramics Ltd), Block-G, 42/494, Shivam Apartment, Nr. Vyas Wadi, Nava Wadaj, Ahmedabad-380013	Vs.	DCIT Circle-1(1)(1), Ahmedabad
[PAN No. AACCB9879R]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1539/Ahd/2018
(Assessment Year: 2014-15)

Balji Electrical Insulators P Ltd. (Since merged with Golf Ceramics Ltd), Block-G, 42/494, Shivam Apartment, Nr. Vyas Wadi, Nava Wadaj, Ahmedabad-380013	Vs.	Income-Tax Officer, Ward-1(1)(2), Ahmedabad
[PAN No. AACCB9879R]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri Sakar Sharma, AR
Respondent by :	Shri Lalit P Jain, Sr. DR

Date of Hearing	20.02.2020
Date of Pronouncement	11.09.2020

O R D E R

PER Ms. MADHUMITA ROY - JM:

Both the appeals filed by the assessee are directed against the separate orders dated 06.02.2018 & 03.01.2018 passed by the Commissioner of Income Tax (Appeals)-5, Ahmedabad for Assessment Years 2013-14 & 2014-15 respectively.

ITA Nos. 1538&1539/Ahd/2018 (A.Y. 2013-14 & 2014-15):-

2. There is delay in filing appeal in ITAT. It appears find from the records, that the appellate order was served at the office of the authorized representative of the appellant only on 22.02.2018. Thereafter, the order was made available to the assessee substantially late by the said representative. It is the further case of the assessee that only upon receiving the order passed by the Ld. Tribunal he could approach the Chartered Accountant for preparation of the appeal before us and ultimately the appeal could be filed on 22.04.2018. Thus, there is an approximate delay of 50 days in preferring the instant appeal. The explanation given by assessee as narrated above seems to be genuine. We do not find any intentional lacks on the part of the assessee. Hence the delay is condoned.

ITA No. 1538/Ahd/2018(A.Y. 2013-14):-

3. The assessee has raised the relevant grounds are as under:-

"1. The Ld. CIT(A) erred on facts and in law in not condoning the delay in filing of appeal by placing reliance on Notification No 11/2016[F No. 149/150/2015-TPL dated 01/03/2016 and CBDT Circular No 20/2016 dated 26/05/2016.

2. The Ld. CIT(A) erred on facts and in law in not adjudicating ground relating to disallowance of interest amounting to Rs. 23,36,125/- u/s 36(1)(iii).

3. The Ld. CIT(A) erred on facts and in law in not adjudicating ground relating to disallowance of delayed payment of Employee's Contribution to Provident Fund amounting to Rs. 3,650/- u/s. 36(1)(va)."

Ground No.1:-

4. The main issue raised in the appeal is this that the Ld. CIT(A) has not condoned the delay in filing appeal in view of the Notification being No. 11/2016 (F. No. 149/150/2015-TPL dated 01.03.2016 and CBDT Circular

No. 20/2016 dated 26.05.2016 which has claimed to be not followed by the assessee. It is the case of the Revenue that by and under this notification dated 01.03.2016 and the CBDT amended Rule 45 of the Income Tax Rules, 1962 whereby the appeal before the CIT(A) is required to be filed electronically in the new Form No. 35. Subsequently by and under a further Circular No. 20/2016 dated 26.05.2016 the time period was extended the window for filing e-appeals who has not been successful in filing their appeals through electronic media and therefore to file paper appeals upto 15.06.2016 but the assessee filed the appeal only on 30.08.2016 that too without any prayer for condonation of delay in filing such e-appeal. No reasonable or sufficient cause, which prevented the assessee to file such appeal within the stipulated time, has been shown by the appellant and therefore, the delay does not deserve to be condoned as of the opinion of the Ld. CIT(A). The appeal has been finally rejected on this preliminary ground of limitation. While doing so the Ld. CIT(A) relied upon the judgment passed in the matter of Prashant Projects Ltd. vs. DCIT (2013) 37 taxmann.com 137.

5. On the other hand the assessee relied upon the judgment passed by the Co-ordinate Bench in ITA No. 3151/Ahd/2016 A.Y. 2013-14 Eagel Steel Industries P. Ltd. vs. ITO where the assessee while filing appeal beyond the stipulated time as prescribed by the CBDT Circular brought it to the notice of the Ld. CIT(A) that delayed in filing the said appeal on electronic mode was due to unintended technical lapse. In the said matter the Co-ordinate Bench has observed that since the online file was newly introduced during the year under consideration due to which the assessee

has faced difficulty in uploading the appeal electronically in the system. It was further observed that the issuing of Circular of CBDT for extending the date of filing the appeal implicit constraint and elucidate the hiccup in uploading the prescribed appeal in the system electronically. In that particular case though the appeal was filed earlier the same could not be uploaded electronically due to ignorance of technical knowledge. Since there is a bona fide reasonable cause for not filing the appeal electronically by the assessee, in turn the Co-ordinate Bench has not appreciated the dismissal of appeal made by the Ld. CIT(A).

6. Having regard to the identical fact, in the instant case, we find no reason but to appreciate the difficulty faced by the assessee in preferring such appeal electronically within the prescribed time period and dismissal of the appeal by the Ld. CIT(A) in not considering the same is grossly irregular and arbitrary. Hence, the order of dismissal of the appeal on the ground of limitation by the Ld. CIT(A) as impugned before us is hereby quashed.

Ground No. 2:-

7. On merits the assessee has challenged the disallowance of interest amounting to Rs. 23,36,125/- under Section 36(1)(iii) of the Act.

8. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that the issue is entirely covered by the judgment passed by the Co-ordinate Bench in ITA No. 73/Ahd/2017 for A.Y. 2012-13 in favour of the assessee. The order whereof was also submitted before us.

The Ld. DR failed to controvert such submission made by the Ld. AR.

9. We have heard the rival submissions made by the respective parties, we have also perused the relevant materials available on record.

It appears that the AO has disallowed the proportionate interest expenses assuming the interest bearing fund used for making interest free advances in other ways. The AO has calculated the interest on interest free advances on notional basis and disallowed the same from interest expenses without considering the actual basics of some availability of interest free funds, unsecured loans, capital and background of the advances given. The assessee has made some interest free advances to the tune of Rs. 2,37,02,673/- to various person for business purposes. The same was not accepted by the AO and treating the same as diversion of borrowed funds, proportionate interest was disallowed from interest expenditure. It is the case of the assessee that the company is having sufficient own interest free funds out of which some was utilized for such interest free advances and thus the question of diversion does not arise at all. Upon perusal of the records it appears that the net interest free funds available with the assessee company was of Rs. 11,60,08,021/- on 31.03.2004. It further appears that the net interest free fund and capital available was of Rs. 2,37,02,673/- which was advances to six parties. Thus, it is a fact that the company has made interest free advances to the tune of Rs. 237.02 lakhs i.e. 20.43% of total interest free funds available.

The assessee has also been able to show that such advances of Rs. 2,37,02,673/- was made for the purpose of smooth functioning of business of the assessee company in view of the close linkage of the business of parties and the assessee company. It is also relevant to mention that the Ld. CIT(A) decided the matter against the assessee relying upon the order passed by his predecessor in assessee's own case for A.Y. 2012-13. Admittedly said order was quashed by the Coordinate Bench in appeal preferred by the assessee in ITA No. 73/Ahd/2017 for a.Y. 2012-13. The relevant portion whereof is as follows:-

> *"3. At the time of hearing of the appeal, the Learned Advocate appearing for the assessee submitted before us that the appellant's own funds have been utilized for the purpose of advances to various parties and not the borrowed funds. The appellant company has huge surplus funds at its disposal. The company had given interest free loans and advances out of interest free funds which consists of capital fund, free reserve, interest free unsecured loans, provisions for deferred tax liabilities created out of surplus and accumulated depreciation reserve created out of profit and trade payable. Details of the same was already provided to the Learned AO. It was further contended that the funds available with the company as on 31.03.2012 was of Rs.3723.57 lacs out of which interest free advance of Rs.358.34 lacs i.e. 9.62% of total interest free funds available were given. The balance of Rs.3365.23 lacs interest free funds were used in business for various fixed assets and movable current assets i.e. Stocks, debtors balance with bank and cash and other assets. It was, therefore, submitted that the interest bearing funds were utilized for other specific purpose and advances given to parties was out of the own funds of the appellant company. Since the interest on borrowed fund is allowable as business expenditure by virtue of income tax provision u/s 36(1)(iii) hence payment made for interest on borrowed fund should be allowed as interest expenses in its totality and interest free loans and advances granted out of the interest free own funds even not used for business and no actual interest is received by the assessee than notional interest on such fund cannot be disallowed by interest expenses. If that be so, disallowance of proportionate notional interest expenses of Rs.20,78,380/- on the basis of interest free advances i.e. Rs.353.34 lacs is not in terms of law and liable to be deleted. The Learned AR also contended that interest expenses has to be allowed as deduction where interest bearing fund are advanced without interest. It is necessary that advances given by the businessman at all times must be for earning interest. The reasonableness of the expenditure would be covered into only for the purpose of the determining whether, in fact, the amount was spent. Once it is established that the nexus between the expenditure and the purpose of business, the revenue cannot justifiably claim to put itself in the armchair of a businessman or in the position of the board of directors and assume the said role to decide how much is a reasonable expenditure having*

regard to the circumstances of the case. In support of his contention he relied upon the judgment passed by the Hon'ble Delhi High Court in the case of Dalmia Cement (B) Ltd. (2002) 254 ITR 377. On the other hand, Learned DR relied upon the order passed by the authority below.

4. Heard the representative of the respective parties, perused the relevant materials available on record. It appears from the record that during the appellant proceeding, the assessee made submissions before the Learned CIT(A) wherefrom it reveals that assessee's own fund have been utilized for the purpose of advances to various parties. The assessee company has huge surplus funds at its disposal.

The details of the party wise advance and owned funds as submitted by the assessee is as follows:

Sr. No.	*Name of the Party*	*Amount in Rs.*
1.	*Dineshchandra A Patel*	*14379486.00*
2.	*Shree Balaji Corporation*	*70000.00*
3.	*Subhaubhai M. Shah (Real Estate)*	*13791000.00*
4.	*Subhaubhai M. Shah*	*1093660.00*
5.	*Vibrat P Patel (Real Estate)*	*1000000.00*
6.	*Shree Shyam Distributors (Real Estate)*	*4500000.00*
7.	*Shakarbhai Chaturbhai Patel (Real Estate)*	*1000000.00*
	Total	*35834146.00*

Following details of interest free fund consisting of capital fund, free reserves, interest free unsecured loans, provision for deferred tax liabilities created out of surplus and accumulated depreciation reserve out of the company had given interest free loan and advances:

Fund	***Amount***
Share Capital	*139320000*
Share Application money	*500000*
Reserve and surplus	*25158606*
Interest free unsecured loans	*8562459*
Deferred Tax liabilities Net of	*22132121*
Depreciation reserve	*35395402*
Trade payable	*141288991*
Total	*372357579*

We have also gone through the other financial details of the assessee company. We find sufficient interest free fund was available with the assessee out of which interest free loan and advances were provided to parties. Whether the decision as to how

much is a reasonable expenditure ought to have been decided by the assessee company; the revenue cannot question that once the nexus between the expenditure and the purpose of business has been established as already decided by the number of judgments pronounces by different legal forum including the judgment passed by the Hon'ble Delhi High Court in the case of CIT-vs-Dalmia Cement (P.) Ltd. (2002) 254 ITR 377.

In that view of the matter, we do not find any reason for disallowance u/s 36(1)(iii) of the Act as made by the authorities below. The addition is thus deleted.

5. In the result, assessee's appeal is allowed."

Keeping in view the factual position of the matter on the basis of the details available before us and the decision made by the Co-ordinate Bench in assessee's own case on the identical issue as narrated above. We find no reason to deviate from the same having regard to the same set of facts. We find no reason to disallow such interest amounting to Rs. 23,36,125/- under Section 36(1)(iii) of the Act. Thus, the addition is hereby deleted.

Ground No. 3:-

10. The Ground of appeal relates to non-adjudication of relating disallowance of delayed payment of employees' contribution to Provident Fund amounting to Rs. 3,650/- under Section 36(1)(va) of the Act.

We have heard the rival submissions made by the respective parties, we have also perused the relevant materials available on record.

11. Admittedly the assessee has made delayed payment in Provident Fund account after the expiry of due date provided under the concern Provident Fund Act. Such expenses, therefore, is not allowable in view of the ratio laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Gujarat State Road Transport Corporation [2014] 41

taxmann.com 100 (Gujarat), which, according to us was rightly taken into consideration while rejecting the case of the assessee by the Revenue. Hence, we find this ground of appeal has no legs to stand and thus dismissed.

ITA No. 1539/Ahd/2018(A.Y. 2014-15):-

12. The assessee has challenged confirming disallowance of interest amounting to Rs. 6,78,045/- u/s. 36(1)(iii) of the Act.

Ground No.1:-

13. This ground of appeal is identical to that of the ground already been dealt with by us in ITA No. 1538/Ahd/2018 for A.Y. 2013-14 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, the ground preferred by the assessee is also allowed upon deleting the impugned addition.

14. In the combined result, assessee's appeal is partly allowed.

15. Before parting we would like to make certain observation relating to the issue cropped up under present scenario of Covid-19 pandemic as to whether when the hearing of the matter was concluded on 20.02.2020 the order can be pronounced today i.e. on 10.09.2020. The issue has already been discussed by the Co-ordinate Bench in the case of DCIT vs. JSW Ltd. (ITA Nos. 6264 & 6103/Mum/2018) pronounced on 14.05.2020 in the light of which it is well within the time limit permitted under Rule 34(5) of the Appellate Tribunal Rules, 1963 in view of the following observations made therein:

"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 8th January 2020, this order thereon is being pronounced today on the day of 14th 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 notice board.*

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 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 15days 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 corona virus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) may be 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 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 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 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."

16. On the basis of the observation made in the aforesaid judgment we exclude the period of lockdown while computing the limitation provided under Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963. Order is, thus, pronounced in the open court.

17. In the combined result, assessee's appeal is partly allowed.

This Order pronounced in Open Court on	**11/09/2020**

Sd/-	Sd/-
(AMARJIT SINGH)	(Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 11/09/2020
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad