IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI

[Coram: Justice P P Bhatt (President) and
Pramod Kumar (Vice President)]

ITA No. 6974/Mum/17
Assessment year: 2011-12

Ashapura Minichem Limited **.....Appellant**
c/o H N Motiwala & Co, 50 Sharda Chambers,
33 New Marine Lines, Mumbai 400 020
[PAN: AAACA0957F]

Vs

Deputy Commissioner of Income Tax
Central Circle 3(3), Mumbai **.....Respondent**

Appearances by
H N Motiwala *for the appellant*
Anadi Verma *for the respondent*

Date of concluding the hearing: : February 19th ,2020
Date of pronouncement : May 27th, 2020

O R D E R

Per Bench:

1. This appeal, filed by the assessee, is directed against the order dated 4th October 2017 passed by the CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2011-12.

2. In the first ground of appeal, grievance of the appellant, in substance, is that the learned CIT(A) erred in "confirming the order of the Assessing Officer in respect of reopening the assessment, particularly when the Assessing Officer had no reason, to believe that any income chargeable to tax has escaped the assessment, except communication from Director General of Income Tax (Investigation) Kolkata to the effect that Hon'ble Justice M B Shah Commission has determined that the appellant has under invoiced the export of iron core to the extent of Rs 11,04,27,609"

3. To adjudicate upon this appeal, only a few material facts need to be taken note of. The assessee before us is a listed public limited company engaged in the business of mining bauxite and selling the same in domestic as well as international market. The assessee had filed an income tax return disclosing total loss of Rs 509.11 crores whereas the assessment under

section 143(3) was completed at an assessed income of Rs 56.15 lakhs, which after setting off the brought forward losses of earlier years, resulted in a NIL income. The matter, however, did not end here. On 15th October 2015, however, the Assessing Officer recorded the following reasons to reopen the assessment:-

Ashapura Minechem Ltd is assessed to tax under the jurisdiction of this office. The return of income for A.Y. 2011-12 was filed on 29.09.2011 at a total loss of Rs. 5,09,11,18,104. The assessment was completed on 28.03.2014 at a total income of Rs. 56,15,41,962 and after setting off b/f losses of earlier total income became Nil. The total income for the tax purposes was determined at Rs. 55,02,40,678 u/s 155JB of the Income Tax Act. The assessee's appeal against the assessment order was disposed of by learned CIT (A) on 31.08.2015.

A communication dated 17.7.2014 received from the office of Director General of Income tax (Inv.) Kolkata stated that a commission headed by Retd. Supreme Court Justice M.B. Shah was set up to detect illegal mining activities on iron ore and manganese ore in the States of Odisha, Jharkhand and Goa. The committee has submitted its report and it was noticed that one of the assessee of this charge M/s Ashapura Minechem Ltd. PAN: AAACA0957F has conducted illegal/unaccounted mining activity in various F.Ys.

Retd. Justice M.B. Shah commission report is also available on the website of Ministry of Mines, Govt. of India. It is noticed that in the said report the commission has summarized the under invoicing of the export of iron ore from the State of Goa:

Sr. No	*SHIPPING BILL DATE*	*NAME & ADDRESS OF EXPORTER*	*FE CONTENT (K)*	*QUNTITIY EXPORTED (WMT)*	*FOB VALUE (RS.)*	*FOR RATE PER WMT (RS.)*	*COUNTRY TO WHCH EXPORTEDI*	*% of under invoicing*
1	*8.12.2010*	*M/s Ashapura Minechem Ltd Mumbai*	*54*	*474000*	*102631073*	*2165.21*	*CHINA*	*38*
2	*3.2.2011*	*-DO-*	*54*	*51300*	*136260392*	*2655.15*	*CHINA*	*41*
3	*14.2.2011*	*-DO-*	*54*	*200*	*531230*	*2656.15*	*CHINA*	*41*
4	*14.3.2011*	*-DO-*	*49*	*25300*	*27896792*	*1102.64*	*U.A.E*	*45*

In the chapter II of the commission's report, the commission has noted as under:

a. It appears that while export there is large scale under invoicing committed by some companies. The export data have been analyzed by comparing the export of one company with the others. The comparison is based on export of iron ore of the same grade (Fe) on the same date.

b. Export of ore different prices by the same company to the different importers on the same date and for the same grade Fe.

c. Some companies are having their own front of associated companies registered outside India. They import the ore from their mother companies at low rate.

Based on the commission's report it is seen that total under invoicing of export value in the case of assessee was as under:

8.12.2010	***102631073*38%***	***=38999808***
3.02.2011	***136260392*41%***	***=55866761***
14.02.2011	***531230*41%***	***=217804***
14.03.2011	***27896792*55%***	***=15343236***
		.....
Total under invoicing		***=11,04,27,609***

The commission has also noted that the export price fixed by some companies are beyond imagination, when compared with the cost of production (Rs. 250. per metric ton) royalty, cost of transportation, loading and unloading charges, port handling charges, export duty, charges of sampling and analysis, rent of Plots at stocking yards (various stages), etc. The prudent exporter can't afford such low prices. The exporter cannot sell the iron ore at the rate of Rs. 500 to Rs. 600 per MT.

In view of the methodology adopted by the Commission and data analysis of the export material and value, the assessee has under invoiced the export of iron ore of Rs. 11,04,27,609. The perusal of assessment folder, submissions made by the assessee during the course of original assessment clearly shows that assessee has suppressed the information regarding under invoicing of export of iron ore as mentioned above.

Hence in terms of the provisions of section 147 of the Income tax I have reason to believe that assessee has engaged in under invoicing of export or iron ore and income of Rs. 11,04,27,609 chargeable to assessment has escaped assessment for the A.Y.2011-12.

4. Armed with these reasons recorded for reopening the assessment, the Assessing Officer proceeded to refer the matter to his Additional Commissioner of Income Tax who approved the action of the Assessing Officer by observing as follows:

> In view of the findings of under-invoicing the exports as pointed out by M B Shah Commission, I am satisfied that this is a fit case for issuance of notice under section 148.

5. The Assessing Officer thus proceeded to reopen the completed assessment. The assessee did raise the objections to reopening of the assessment, but the same were rejected, vide letter dated 25th October 2016, by the Assessing Officer. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We find that, as rightly pointed out by the learned counsel for the assessee, the issue in appeal, so far as validity of the reassessment proceedings is concerned, by Hon'ble

jurisdictional High Court's judgment, in the case of Sesa Sterlite Limited Vs ACIT [(2019) 417 ITR 334 (Bom)], wherein Their Lordships have, inter alia, observed as follows:

> **15. Let us now see what was the information or material available to the Assessing Officer and which is disclosed in the reasons to believe stated in the original order sheet. The information is said to be the Shah Commission report, which inter alia reported under-invoicing of exports by the exporters of iron ore mentioned in it including the Assessee herein. If one has regard to the Shah Commission report and its use made in the reopening notice, it is at once apparent that under-invoicing in the concerned exports is nothing but a matter of expression of opinion by the commissioner. As this Court has explained in the case of Fomento Resources (P.) Ltd. v. Union of India [Writ Petition NO.606 of 2014, decided on 2-7-2019] where this very report of Shah Commission was a matter of direct challenge by the mining lessees and exporters, including the Assessee herein, facts found, as also conclusions drawn, by a Commission of Inquiry are not judicial pronouncements. The report of the Commission neither constitutes a binding judgment nor a definitive pronouncement. The Commission, as held by the Supreme Court in the State of Karnataka v. Union of India [1977] 4 SCC 608, is required to submit its report, which may or may not be accepted by the appointing authority. If it is not accepted, it has no legal consequences. The Commission, in other words, has no power to adjudicate in the sense of passing an order which can be enforced. What the Commission says is merely an expression of its opinion; it lacks both finality and authoritativeness. The differences in export prices of various exporters, so far as iron ore is concerned, maybe matters of fact, which are said to have been derived by Shah Commission from the material available in public domain, but the Commission's conclusion on the basis of these differences in prices that there was under-invoicing, is a matter of conclusion drawn by the commission. This conclusion is purportedly drawn on the basis of the primary facts of differences in export prices; and it is a deduction by the Commissioner by way of an expression of his opinion, as we have explained above. That per se cannot be treated as a primary fact, on the basis of which any belief can be formed by the assessing authorities. Besides, it must be noted that when the Shah Commission matters were argued before this Court, the Union of India made an express statement on the same lines as was made before the Supreme Court in the Goa Foundation petition. Learned Counsel appearing for the Union stated before this Court, and which statement has been noted in our orders dated 02/07/2019, that the Union would not take any action against mining lessees or traders for exports of ore only on the basis of the Commission's report without making its own assessment of facts and without first giving opportunity of producing evidence to the affected parties. For the reasons stated above, which bear generally on the status of the Commission's report and its findings, as well as the statement made by the Union of India as noted above, it is impermissible to the department to act exclusively on the basis of the Commission's report. It must make its own assessment of facts before any action is initiated. In the present case, since it is a reopening notice under Section 148, it may not be necessary to give any pre-notice opportunity of hearing or producing of evidence to the affected parties. The notice itself admits of a cause being shown by the affected parties, namely, in the present case, the Assessee. It is, however, imperative that the Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice under Section 148.**
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> **16. In the present case, as we have noted above, the only primary fact which was available in public domain and which is made part of the Shah Commission report is the differences in export prices charged by the Assessee to its counter parties abroad as compared to other exporters, in the cases referred to in Shah Commission report, and noted in the**

reopening notice; the Assessee's prices were lower than other exporters. Even if it is assumed that so far as this fact is concerned, the information contained in the report of Shah Commission by itself can be treated as information available to the Assessing Officer within the meaning of Section 147, the further information, however, that there was therefore under-invoicing of exports by the Assessee does not simply follow from this primary information. There is nothing whatsoever in the impugned notice issued by the Assessing Officer to indicate that he has applied his mind to this aspect of the matter. Learned counsel for the Revenue relies on the case of Calcutta Discount Company Ltd., v. ITO [1961] 41 ITR 191 (SC) to support his contention that it is not only the primary facts but inference to be drawn from such facts which also can form part of the material on which the Assessing Officer may form his belief. Learned counsel is right there. As the Supreme Court has explained in this case, from the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the Assessing Authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw a proper legal inference on whether any income has escaped assessment. But then, any inference to be drawn from the primary facts in possession of the Assessing Officer must be such as might follow from those primary facts; it cannot be a matter of conjecture or surmise and in any event, the officer has to apply his mind to arrive at such inference.

17. As the Supreme Court has explained in the case of A. Raman and Co. (supra), the law does not oblige a trader to make maximum profit out of his trading transactions. It is the income which accrues to a trader which is taxable in his hands; not the income which he could have, but has not earned. No doubt, by adopting a device, if it is made to appear that income which really belonged to the assessee had been earned by some other person or by the Assessee in some other form or means, that income may be brought to tax in the hands of the Assessee and if such income has escaped tax in a previous assessment, a case for reassessment under Section 147(b) maybe made out. There is nothing, however, in the reasons indicated by the Assessing Officer in the present case to suggest that any such income has accrued to any person or the Assessee. The reasons do not indicate that the Assessing Officer has formed any belief that under-pricing was adopted by the Assessee as a device by which income had accrued to any other person or the Assessee himself in any other form and such income had escaped assessment.

18. In any event, as we have explained above, there must be a direct nexus or live link between the information found by the Assessing Officer and the escapement of income arising in the case. In the present case, all that was available to the Assessing Officer was the information that the export prices recovered by the Assessee were less in some cases than the market prices said to be prevailing on those days. This information itself is highly doubtful, since there is nothing to indicate that there was any particular market price as at the relevant date which ruled or which alone was the correct price. The export prices of other exporters, considered in Shah Commission report, do not suggest even a trend to indicate any particular market price. Besides, the price in an individual export contract is a function of various parameters as claimed by the Assessee, and as indicated whilst noting the Assessee's objections to the reopening notice. But, these are matters of merit and need not engage us today, except the fact that the Commission's conclusion that any particular price was the market price was itself a matter of conjecture and hardly a primary fact. For our purposes, even if we assume that the Assessee's export prices were in fact so less, there is nothing to indicate that any particular income has accrued to anyone as a result of such difference in prices. There is, thus, no direct nexus or live link between the difference in prices and escapement of income. There is, in other words, no way the Assessing Officer could have formed a belief that any income has escaped

assessment simply on the basis of the differences in the export prices of the Assessee when compared to others.

19. Learned Counsel for the revenue places strong reliance on the case of Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 59 Taxman 17/191 ITR 662 (SC). Relying on this case, it is submitted that based on export prices showing a systematic lesser value as compared with the prevailing market prices for the same quality of goods, a reopening notice could indeed be issued under Section 148. In Central Provinces Manganese Ore Co. Ltd. (supra), the facts were quite peculiar. The appellant before the Court was a non-resident company having its office in London. It also had an office in India at Nagpur and was assessed to income tax in Nagpur. It had been the practice of the appellant to produce before the Income Tax Officer relevant books kept at its local office at Nagpur and balance sheets, trading accounts and profit and loss accounts at its head office in London. The customs authorities came to know that the appellant had declared very low prices in respect of all its consignments of manganese ore exported out of India. It was also found that most of its export was only to 2 to 3 buyers, who in turn did not purchase ore from any other company except the appellant. After due inquiry/investigation, customs authorities had found that the appellant was systematically showing lesser value for the manganese ore exported as compared with the prevailing market prices for the same grade of manganese ore. The customs authorities accordingly came to a definite conclusion that the prices mentioned in the relevant contracts between the Assessee and its buyers were lesser than contemporaneous market prices and it was found as a fact that the appellant company was indulging in under-invoicing. Final orders were accordingly passed under the Customs Act. It is in the context of these facts that the Supreme Court countenanced a reopening notice under Section 148 in that case. It is to be noted, firstly, that what the customs authorities found was by way of an order passed under law; it was a final order of Collector of Customs, and it found under-invoicing as a matter of fact. Secondly, the facts disclosed peculiar circumstances such as all consignments of exports being systematically priced at lesser value. Thirdly, it must be noticed that these exports were made to related parties who did not buy from any other source. In the light of these circumstances, which were found as matters of fact, and that in a quasi, judicial order, which had attained finality, the Supreme Court found formation of belief by the Assessing Officer as having a reasonable connection with the information available to him and did not find fault with the reopening notice. These facts are entirely distinguishable. In our case, there is no systematic undervaluation of export prices. In fact, as pointed out by Mr. Pardiwala, there have been cases where the export prices of the petitioner are taken to be market prices and on the basis of those prices, under-invoicing has been claimed vis-a-vis other exporters. So much for systematic under-valuation. There is no finding by a court of law or a statutory authority as a matter of fact that there was any under-invoicing. The so-called finding is by a commission of inquiry; that commission has itself made it clear in its very opening statement that it was not in a position to finalize illegalities or irregularities with regard to the export of iron ore by individual lessees or their representatives or traders comprehensively due to time constraints. It is at best a tentative opinion expressed by a Commission of inquiry without affording any opportunity to the concerned exporters to explain the material used against them. Besides, there is no case of related parties to whom such exports were made. At least, the reopening notice and the reasons indicated by the Assessing Officer do not indicate any of these things. In the absence of these and such other materials, the simple and bare primary fact of the Assessee having charged lesser export prices from its counter-parties as compared to some other exporters, is no basis for formation of any belief that any income has escaped assessment to tax.

20. The judgments in cases of Phool Chand Bajrang Lal v. ITO [1993] 69 Taxman 627/203 ITR 456 (SC), I.P. Patel & Co. v. Dy. CIT [2012] 27 taxmann.com 200/346 ITR 207 (Guj.), ITO v. Selected Dalurband Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC), Rattan Gupta v. Union of India [1998] 234 ITR 220 (Delhi), AGR Investment Ltd. v. Addl. CIT [2011] 9 taxmann.com 62/197 Taxman 177/333 ITR 146 (Delhi), Raymond Wollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC) and Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 (SC), cited by learned Counsel for the revenue, bear on the aspect of sufficiency or otherwise of the material used for formation of belief. These judgments make it clear that what can be submitted to judicial scrutiny is whether or not there was material on the basis of which belief could have been formed about escapement of income from assessment, and not whether the material was actually adequate or sufficient for formation of such belief. There is no quarrel with this proposition here. Here, we are precisely concerned with whether or not such belief could have been formed on the basis of such material as was available with the Assessing Officer. In every State action or order submitted to judicial scrutiny, the matter is assessed from the point of view of Wednesbury unreasonableness. The focus of the scrutiny is, firstly, on whether the authority has kept itself within the four corners of law and, secondly, and even if it has so kept itself, whether it has nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. A reopening notice issued under Section 148 of the Income Tax Act is no exception to this rule. The Courts have made it clear time and again that belief under Section 147 of the Act is not a matter of a mere opinion of the Assessing Officer. It must be demonstrably shown that the material used by Assessing Officer is reasonably capable of formation of his belief that income has escaped assessment. As the Supreme Court observed in Lakhmani Mewal Das(supra), belief does not mean a purely subjective satisfaction on the part of the Income Tax Officer. It must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reason has a rational connection with or relevant bearing on the formation of the belief; it must not be extraneous or irrelevant for the purpose. In the present case, as we have noted above, the reason has no such bearing or rational connection with the formation of the belief. It is purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of lesser export prices charged by the Assessee. There is no material or even suggestion that any income corresponding to the so-called under-invoicing of exports was in fact received by any party or by the Assessee through any backdoor method. In the premises, there is no legitimate reason to believe which can sustain the impugned notice issued by the Assessing Officer.

21. The other main objection of the Assessee is that there was no belief on the part of the Assessing Officer that escapement of income had arisen by reason of any failure on the part of the Assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully or truly all material facts necessary for the assessment. It is not good enough for the Assessing Officer to simply make a bald assertion that escapement of income is as a result of failure on the part of the assessee to fully and truly disclose all material facts. He must indicate, however briefly, what is it that was not disclosed and which gives the Assessing Officer reason to believe that income has escaped assessment. The entire case of the revenue is founded on the so-called under-invoicing of exports. It is difficult to fathom what information or particulars was the Assessee expected to disclose in its assessment insofar as the export prices charged by it are concerned and which is now available to the Assessing Officer so as to enable him to form a belief that income has indeed escaped assessment.

22. When we come to the third reason alleged by the Assessing Officer for reopening the case, namely, illegality of the business and taxation of income derived from it as income

from other sources, the department is on an even thinner ground. In the first place, when the income from the activity of mining and export of ore arose and also when it was assessed to tax, there was nothing to suggest that the activity was illegal. Six years later, when the Supreme Court decided the case of Goa Foundation, and declared that deemed mining leases had already expired and mining carried out thereafter was illegal, the question of illegality of the activity arose for the first time. But be that as it may, even if it is assumed that at all times the activity carried on by the Assessee, through which income was said to have accrued to it, was in violation of law, that does not alter the character of the activity. Income earned from the activity is still very much business income and any expenditure made for the activity is business expenditure. Section 37(1) of the Act refers to expenditure incurred by an Assessee "for any purpose which is an offence" or "which is prohibited by law". Such expenditure is not deemed to be incurred for the purpose of business and no deduction or allowance can be made in respect of such expenditure. This does not imply that the character of the very activity itself changes having regard to the legality or otherwise of the activity. It is submitted on behalf of the revenue at the Bar that the mining activity itself being an illegal activity, expenditure incurred by the Assessee for it is not deductible. There is no such ground alleged in the reopening notice or the reasons indicated in support of the notice. For the first time, a faint suggestion to this effect was made in the order passed by the Assessing Officer on the objections communicated by the Assessee. As our Court in the case of Hindustan Lever Ltd. v. R.B. Wadkar [2004] 137 Taxman 479/268 ITR 332 (Bom.) has made it clear, the reasons, with a view to assess their reasonableness, are required to be read as they are recorded by the Assessing Officer; no substitution or deletion is permissible; no addition can be made to those reasons; and no inference can be allowed to be drawn based on these reasons which is not recorded. It is for the Assessing Officer to form an opinion as to whether there was escapement of income from assessment and whether such escapement occurred from failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year; and it is for him to put his opinion on record in black and white. The reasons recorded must disclose his mind and they should be self-explanatory. The reasons recorded cannot be supplemented by the time the matter reaches the Court by filing of any affidavit or making any oral submission. In the premises, it is not open to the revenue to seek to sustain the re-opening notice on a new reason, namely, disallowance of deduction of expenditure since the whole activity was illegal.

23. In the premises, the impugned notice issued by the Assessing Officer under Section 148 of the Act cannot be sustained and must be set aside.

8. The material facts of the present case being identical inasmuch as the reopening, beyond any doubt or controversy, is entirely based on the Hon'ble Justice M B Shah Commission report, as in the case that Hon'ble Bombay High Court were dealing with, the ratio of the aforesaid judgment clearly applies on the facts of this case. As a plain look at the reasons recorded for reopening the assessment, as also for the approval by the Additional Commissioner of Income Tax, the only basis for reopening of the present assessment, as in the judgment cited above, was report submitted by Hon'ble Justice M B Shah Commission report. Respectfully following the binding judicial precedent, extracts from which are extensively reproduced above, we must hold that the initiation of reassessment proceeding itself, on the facts of this case as evidenced by the reasons recorded by the Assessing Officer, is unsustainable in law. We, therefore, quash the reassessment proceedings.

9. Ground no. 1 is thus allowed.

10. As reassessment proceedings stand quashed, all other issues raised in the appeal, with respect to merits of the additions made in the course of reassessment proceedings, are entirely academic as on now, and donot call for any adjudication. We need not deal with these grievances at this stage.

11. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 19th February 2020, this order thereon is being pronounced today on th 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 notice board.

12. 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.

13. 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.

14. 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 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.

15. In the result, the appeal is allowed. Pronounced in the open court today on the 27th day of May, 2020.

Sd/-	Sd/-
Justice P P Bhatt	**Pramod Kumar**
(President)	(Vice President)

Mumbai, dated the 27th day of May 2020

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai