

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI K BENCH, MUMBAI**

[Coram: Pramod Kumar VP and Saktijit Dey JM]

ITA Nos. 3911/Mum/15, 4771/Mum/16 and 3709/Mum/17
Assessment year: 2007-08, 2010-11 and 2011-12

Hamon Cooling Systems Pvt LtdAppellant
(earlier known as Hamon Shriram Cotrell Pvt Ltd)
3A-8A, Main Frame, Ground floor, Royal Palms Complex
Near Aarey Milk Colony, Goregaon (East)
Mumbai 400 065 [PAN:AAACT2254Q]

Vs

Dy Commissioner of Income TaxRespondent
Circle 9(2), Mumbai

Appearances by

Sanjay R Parikh for the appellant
Ujjawal Kumar for the respondent

Dates of hearing of the appeal : February 18th, 2020
Date of pronouncing this order : May 27th, 2020

O R D E R

Per Pramod Kumar, VP:

1. These three appeals pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, all the three appeals are being disposed of by way of this common order.

2. We will first take up the ITA No. 3911/Mum/15. This is an appeal directed against the order dated 28th April 2015 passed by the Assessing Officer, giving effect to the order dated 24th March 2015 passed by the Dispute Resolution Panel, as a result of matter being remitted to the file of the DRP by this Tribunal, in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2007-08. Vide order dated 19th April, 2013, this Tribunal had remitted the matter to the file of the Dispute Resolution Panel by observing as follows:

10. The learned Counsel for the assessee contended through ground no.1 that the DRP did not give reasonable opportunity of being heard to the assessee. Here it is relevant to note that the show cause notice dated 27th July, 2011 was issued by the DRP for enhancement of income fixing the date of hearing as 8th August,

2011. The said notice as received by the assessee on 1st August, 2011. The assessee appeared before the DRP on the scheduled date requesting for further time to compile the relevant details which were quite voluminous. Only one week's time was given. On 16th August, 2011 the assessee furnished some details and sought further time of 10 days for furnishing complete details. However, the DRP passed order on 18th August, 2011 itself directing the AO to make adjustment of Rs 1.17 crore instead of Rs 63.69 lakh as originally made in the draft order. The learned AR submitted that it was very difficult to compile the documents required by the DRP in such a short span of time. It was prayed that one more opportunity be granted to the assessee since the process of collection of all the necessary documents stood completed by the assessee as of now. No serious objection was taken by the learned Departmental Representative in this regard. In the facts and circumstances of the present case, we are of the considered opinion that it would be in the fitness of things if the impugned order is set aside and the matter is restored to the DRP for giving an effective opportunity to the assessee to present its case. We order accordingly and direct the DRP to issue directions u/s 144C(5) afresh as per law after allowing a reasonable opportunity of being heard to the assessee. Needless to say the assessee will be at liberty to file any fresh evidence / documents in support of its case before the DRP in such de novo proceedings.

3. As a result of these directions of the Tribunal, the matter was heard again by the Dispute Resolution Panel and the directions have been given, as a result of this fresh hearing, on 24th March 2015. The Assessing Officer has given effect to these directions vide his order dated 28th April 2015, aggrieved by which the assessee is once again in appeal before us. Grievances raised by the assessee, in this appeal, are as follows:

A) Enhancement of adjustment /disallowance without show cause notice -Principles of natural justice violated

1) *The learned Dispute Resolution Panel (DRP) erred on facts and in law in enhancing the adjustments /disallowances suggested by Transfer Pricing Report (TPO) in the Remand Report without giving a show cause notice to the appellant to the said effect. Hence, the principles of natural justice have been violated.*

2) *The appellant prays that yours hold that the enhancements made by the DRP without giving a show cause notice to the appellant is bad in law and hence the enhancements so made may be deleted.*

B) Disallowance of Research & Development expenses –Rs. 47,72,982/-

3) *The learned AO erred on facts and in law in disallowing Research & Development expenses (wrongly mentioned by AO as Management Fees) of Rs. 47,72,982/- as per the directions of the learned DRP, who held that the services provided as stated are vague and that it is also not shown whether the assessee has received any services or benefit from such services as stated in the Agreement.*

4) *The appellant prays that the disallowance made by the AO on account of Research & Development expenses of Rs. 47,72,982/- as per the directions of the learned DRP may be deleted.*

5) *Without prejudice to the above, the learned AO erred in disallowing the entire amount of Rs. 47,72,982/- without appreciating the hon'ble DRP had directed him to verify the disallowance on account of Research & Development expenses made by the appellant and disallow only the balance.*

6) *If your honours are not inclined to delete the entire disallowance on account of Research & Development expenses, your honours may direct the AO to reduce the disallowance to the extent of Rs. 18,74,000/- already disallowed by the appellant in the computation of income.*

C) *Disallowance of management fees – Rs. 22,52,219/-*

7) *The learned AO erred on facts and in law in disallowing a sum of Rs. 22,52,219/- out of Management Fees (wrongly stated by the AO as Reimbursement of Tender Costs) as per the directions of the learned DRP.*

8) *The appellant prays that the disallowance as made by the AO of Management Fees of Rs. 22,52,219/- as per the directions of the learned DRP may be deleted.*

D) *Disallowance of Tender cost – Rs. 28,61,598/-*

9) *The learned AO erred on facts and in law in disallowing the entire tender cost (wrongly mentioned by AO as Research & Development Expenses) of Rs. 28,61,598/- as per the directions of the learned DRP.*

10) *The appellant prays that the disallowance as made by the AO of tender cost of Rs. 28,61,598/- as the directions of the learned DRP may be deleted.*

4. The factual backdrop of the case has been very well summed up in the first round of proceedings as follows:

2. Briefly stated the facts of the case are that the assessee is a part of Hamon Group, which is headquartered in Belgium with its original and core business of design, manufacture, supply, erection and servicing of Cooling Systems, Heat Exchangers and Air Pollution Control systems. The assessee-company is engaged in the business of manufacturing, designing, engineering and supply of cooling towers, spares and providing engineering services. The assessee filed its return declaring total income of Rs 11,42,254. The assessee entered into six types of international transactions with its Associated Enterprises (AEs). Because of such international transactions, the Assessing Officer made reference u/s 92CA(1) to the Transfer Pricing Officer (TPO) for determination of Arms Length Price (ALP). First transaction which is disputed in the present appeal is the payment of Management Fees amounting to Rs 40,65,733 to its AE. The ALP of this transaction was determined by applying Comparable Uncontrolled Price (CUP) method. The assessee claimed to have paid the said amount at the rate of 1.5% of the turnover. The TPO observed that the total turnover of the assessee was at Rs 16.21 crore. Even if the rate of 1.5% was accepted at ALP, still a Transfer Pricing (TP) adjustment of Rs 16,34,091 was called for as 1.5% rate on the turnover would work out Management fees at Rs 24.31 lakh as against the amount paid at Rs 40,65,733. The second item which is disputed is Tender cost reimbursed. The assessee paid Rs 28,61,598. The TPO observed that this amount was paid on behalf of AE (Belgium) and the same was not paid back to the assessee. As such the ALP of this

payment was treated as Nil thereby proposing an adjustment of equal amount at Rs 28.61 lakh. The third item is R&D expenses paid by the assessee to the tune of Rs 47,72,982. The assessee determined ALP of this transaction by applying the CUP method. It was observed by the TPO that a sum of Rs 18.74 lakh out of this amount was a mere provision and further a sum of Rs 13.91 lakh pertained to the year 2005. An adjustment of Rs 18.74 lakh was recommended in respect of the amount of provision. That is how a total adjustment of Rs 63,69,689 was proposed in respect of the above referred three items. There is no controversy in respect of the remaining international transactions. The amount as proposed by the TPO was added by the A.O. in the draft order passed u/s 143(3) read with section 144C(1) on 15.11.2010. The assessee agitated the TP adjustments made through the draft order before the Dispute Resolution Panel (DRP). The DRP noticed that the payments by the assessee to its parent AE in respect of Management fees, Tender cost reimbursed and R&D expenses were in the nature of intra group transactions. It was opined that no payment in respect of intra group services could be justified unless it was shown that some tangible and direct benefit was derived as a result of such payment or that the payment made was commensurate with the benefit derived or expected to be derived. As such a letter dated 27.07.2011 was sent by the DRP to the assessee seeking written explanation, documentation and evidence as to whether any specified services were rendered; and if rendered, whether two independent parties would be willing to pay for such services; and if two independent parties would be willing to pay, what would be the basis and amount of such payment. The assessee was further directed to furnish details in respect of Management fees which the TPO had considered at 1.5% of the turnover as at the ALP. Since the TPO, in the opinion of the DRP, did not examine as to whether any R&D services were rendered by the foreign AE for which a sum of Rs 28.98 lakh was allowed, the DRP requested the assessee to furnish necessary details in this regard also. Similar direction was given qua the "Tender cost". The assessee filed a reply on 16.08.2011 which the DRP considered to be a simple reiteration of what was submitted before the TPO. In the absence of any additional information given by the assessee justifying these payments, the DRP held that no tangible and direct benefit was derived by such payment made by the assessee to its AE. As such, the DRP proposed an adjustment of Rs 1,17,00,313 to the total income as against lower amount proposed by the TPO. The A.O. vide the impugned order passed u/ss 143(3) read with 144C(13) on 26.09.2011 made an addition of Rs 1.17 crore as suggested by the DRP. The assessee is in appeal.

5. When the matter went back to DRP this time, the DRP noted that so far as management fee is concerned, the assessee has given certain emails to support the contention that the management services are indeed rendered by the AE to the assessee but none of these emails can be regarded as evidence for rendition of services set out in the agreement. The DRP further directed that the disallowance be enhanced in respect of prior period expenses of Rs 6,18,128 and that rather than disallowing Rs 11,95,183 under section 40(a)(i), which will then be allowable in the year of actual payment, the entire amount should be treated as disallowed for want of rendition of any services. As regards the research and development fees, the TPO noted that the assessee has received any benefit or services from the AE or whether the AE has incurred any costs for providing these services. As regards the tender fees, the DRP was of the view that the evidences furnished by the assessee are not sufficient to establish that any services were actually rendered and that the assessee has indeed benefited from these services. It was also noted that the expenses pertained to the previous years and that these expenses cannot be disallowed in the present year. The entire payment was thus directed to be disallowed. The AO has accordingly given effect to these directions. The assessee is aggrieved and is in 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. The adjustment proposed by the TPO has been on anything but the arm's length price consideration. As a matter of fact he has not even disputed the arm's length price for the management services but has suggested the ALP adjustment on the ground that a part of the payment is pertaining to provision for another year. The DRP has confirmed the ALP adjustment by observing that 'receipt of benefit in lieu of payment of service charges is sine qua non to allow the deduction for such payment to compute the income'. It is also noted that "we also hold that the assessee has failed to explain and justify the allowability of R&D charges of prior years on merits and has also failed to show that it has benefit for such charges in the earlier years though the provision has been made in this year, and also failed to explain why the provision for the same was not made in the respective earlier years". On tender fees, the ALP is not disputed and yet ALP adjustment is confirmed on the ground that the evidences furnished by the assessee are not sufficient to establish that any services were actually rendered and that the assessee has indeed benefited from these services, and that the expenses pertained to the previous years and that these expenses cannot be disallowed in the present year. What is, however, completely lost sight of is what was before the DRP was an ALP adjustment and that they have, even going by their own words, "**enhanced**" the ALP adjustments determined by the TPO, on the grounds which are wholly irrelevant for determination of the ALP by the TPO. It is not the case that the DRP has cancelled the ALP adjustments and taken up the matter, on altogether different ground, afresh. They have only approved the action of the TPO and enhanced the quantum of disallowance. While on this subject, it is useful to bear in mind the observations made by Hon'ble jurisdictional High Court, in the case of **CIT Vs Lever India Exports Ltd [(2017) 78 taxmann.com 88 (Bombay)]**, as follows:

.....it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc

determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained.....

8. On a similar note, Hon'ble Delhi High Court, in the case of **CIT Vs Cushman and Wakefield (India) Pvt Ltd [(2014) 367 ITR 730 (Del)]**, and approving the path followed by a decision of Mumbai bench of the Tribunal in the case of **Dresser Rand India Pvt Ltd Vs Additional CIT [(2012) 13 ITR (Trib) 422 (Mum)]**, had observed :

33. The TPO, in this case, noted that the services of the Client Solutions Group did not create any specific benefit for the assessee, but rather, that the relationship between Cushman & Wakefield, United States and IBM predated the assessee's involvement. The assessee thus received only an incidental benefit from that relationship. The TPO further noted that no independent enterprise would be willing to engage a third party for such a transaction, and in any case, the AE's means to conduct market research vis-à-vis the Indian market was questionable in the absence of any evidence to the contrary. Moreover, the TPO noted that the assessee itself had many offices in India which conducted market research, and in that sense, this was merely a duplication of services. The ITAT reversed this finding:

"The assessee has been shown to have earned substantial revenues from IBM and that cannot be the result of only incidental benefit received by the assessee and IBM. If one wants to obtain revenue upon dealing in real estate, certain work has to be done. All the primary facts were submitted to the Assessing Officer as well as the TPO. The names of the parties were mentioned. Without examining any such details, it cannot be said that the revenue earned by the assessee was only on account of incidental benefit. There is a force in the claim of the assessee that to enable it to earn revenue from IBM, it was necessary to provide services to IBM outside India. If such services are provided by employees of the assessee company, then, it has to incur the cost of its employee who has to travel to the destination and that would result in extra expenditure ..."

34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in *Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.)*:

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an

Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure.

9. In the present case, the ALP adjustment has been made by the TPO and the DRP has "enhanced" the same. In the DRP order itself, it has been stated that "**the TPO has suggested that the adjustment/ disallowance [Emphasis, by underlining, supplied by us now] of is justified**". That, however, is factually incorrect and legally unsustainable in law. Neither the ALP adjustments can be equated with disallowances of expenses, even though effect may be same, nor the TPO has the authority to disallow the expenses. Clearly, the impugned ALP adjustments are vitiated in law for this short reason alone. In any case, the observations with

respect to the lack of evidence in support of the benefits is based on sweeping generalizations and is incapable of sustaining legal scrutiny.

10. In the light of the above discussions, as also bearing in mind entirety of the case, all the three ALP adjustments – namely (a) Research & Development expenses – Rs. 47,72,982/-; (b) Management fees – Rs. 22,52,219/-; and (c) Tender cost – Rs. 28,61,598 stand deleted. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above.

12. We will now take up ITA No. 4771/Mum/2016 i.e. appeal of the assessee against the order dated 28th March 2016, passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2010-11.

13. Grievances raised by the assessee, in this appeal, are as follows:

A) Disallowance of Research & Development Expenses – Rs. 67,40,868/-

1) The learned Commissioner of Income-Tax (Appeals) –56 Mumbai [CIT (A)] erred on facts and in law in confirming the order of the Deputy Commissioner of Income-Tax 9(2), Mumbai (AO) disallowing a sum of Rs. 67,40,868/- on account of Research & Development Expenses by holding that the appellant failed to justify whether any benefits have been derived by the appellant by incurring the said expenses.

2) The appellant prays that the disallowance of Rs. 67,40,868/- on account of Research & Development Expenses, as made by the AO and as confirmed by the CIT(A) may be deleted.

B) Disallowance of Management Fees – Rs. 72,35,588/-

3) The learned CIT(A) erred on facts and in law in confirming the order of the AO disallowing a sum of Rs. 72,35,488/- on account of Management Fees by holding that the appellant failed to justify the benefits accrued to them due to such management expenses.

4) The appellant prays that the disallowance of Management Fees of Rs. 72,35,588/- as made by the AO and as confirmed by the CIT(A) may be deleted.

14. Learned representatives fairly agree that whatever we decide for the assessment year 2007-08 will be equally applicable in this assessment year as well, inasmuch as in this case the ALP adjustments are quantified by the TPO though on the grounds of non rendition of services rather than the arm's length price of the services, adopted by the Assessing Officer in entirety without any further addition or contribution by him, and confirmed by the CIT(A). In view of this factual position, and in the light of the observations made in paragraphs 7, 8 and 9 above, we uphold the plea of the assessee and direct the Assessing Officer to delete the ALP adjustments of Rs 67,40,868 on account of R&D expenses and of Rs 72,35,588 on account of management fees. The assessee gets the relief accordingly.

15. In the result, the appeal for the assessment year 2010-11 is also allowed in the terms indicated above.

16. We will now take up ITA No. 3709/Mum/17 i.e. assessee's appeal against the learned CIT(A)'s order dated 28th February 2017 in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2011-12.

17. Grievances raised by the assessee, in this appeal, are as follows:

A) Disallowance of Research & Development Expenses – Rs. 1,08,88,295/-

1) The learned Commissioner of Income-tax (Appeals) – 56, Mumbai [CIT(A)] erred on facts and in law in confirming the order passed by the Deputy Commissioner of Income Tax- 10 (1)(1), Mumbai (AO) disallowing the appellant's claim of Research & Development Expenses of Rs. 1,08,88,295/- as per order u/s. 92CA(3) of the Income-tax Act.

2) The appellant prays that the disallowance of Rs. 1,08,88,295/- on account of Research & Development Expenses, as made by the AO and as confirmed by the CIT(A), may be deleted.

B) Disallowance of Management Fees – Rs. 1,06,42,258/-

3) The learned CIT(A) erred on facts and in law in confirming the order of the AO disallowing the appellant's claim of Management Fees of Rs. 1,06,42,258/- as per the order u/s. 92CA(3) of the Income-tax Act.

4) The appellant prays that the disallowance of Management Fees of Rs. 1,06,42,258/- as made by the AO and as confirmed by the CIT(A) may be deleted.

18. Learned representatives fairly agree that whatever we decide for the assessment year 2007-08 will be equally applicable in this assessment year as well, inasmuch as in this case the ALP adjustments are quantified by the TPO though on the grounds of non rendition of services rather than the arm's length price of the services, adopted by the Assessing Officer in entirety without any further addition or contribution by him, and confirmed by the CIT(A). In view of this factual position, and in the light of the observations made in paragraphs 7, 8 and 9 above, we uphold the plea of the assessee and direct the Assessing Officer to delete the ALP adjustments of Rs 1,08,99,295 on account of R&D expenses and of Rs 1,06,42,258 on account of management fees. The assessee gets the relief accordingly.

19. In the result, the appeal for the assessment year 2010-11 is also allowed in the terms indicated above.

20. As we have decided the above appeals on the short point regarding the powers of TPO, and in respect of considerations for which the ALP adjustments can be made, we did not see the need of dealing with all other issues raised in these appeals at this stage.

21. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 18th February 2020, this order 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.

22. 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.

23. 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.

24. 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 lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refer 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.

25. In the result, all the three appeals are allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-
Saktijit Dey
(Judicial Member)

Sd/-
Pramod Kumar
(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