



ITA No.3442/Mum/2017
Bellissimo Hi Rise Builder Pvt. Ltd.
Assessment Year-2011-12

आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.3442/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2011-12)

Bellissimo Hi Rise Builders Private Ltd. (Formerly known as Lodha Hi-Rise Builders Pvt. Ltd.) 412, Floor-4, 17G Vardhman Chamber, Cawasji Patel Road, Horniman Circle Fort, Mumbai-400 001.	बना म/ Vs.	DCIT-Central Circle-7(3) Room No.655, Aaykar Bhavan, M.K. Road, Mumbai-400 020.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AABCL-2637-A		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	S/Shri Vijay Mehta & Anuj Kisnadwala-Ld. ARs
प्रत्यर्थीकीओरसे/ Respondent by	:	Ms. Kavita P. Kaushik & Shri Amit Pratap Singh - Ld. DRs

सुनवाईकीतारीख/ Date of Hearing	:	07/02/2020
घोषणाकीतारीख / Date of Pronouncement	:	26/05/2020

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-52, Mumbai, [in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-*



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52/IT/DCIT-CC-7(3)/296/2016-17 dated 02/03/2017 on following grounds of appeal: -

1. On the facts of the case and in law, the CIT(A) erred in confirming the disallowance of interest expenses of Rs.5,01,43,016/- u/s.36(1)(iii) on the ground that it was not incurred for business purposes.

1.2 The assessee has also raised an additional ground of appeal on 26/09/2018 which reads as under: -

The Learned Commissioner of Income-Tax (Appeals) ought to have held that the disallowance of interest amounting to Rs.27,50,62,799/- suo moto made by the appellant is not required in accordance the provisions of the Income tax Act but is actually an allowable deduction under the provisions of Section 36(1)(iii)/37(1) of the Act."

Since the additional ground is inter-connected / legal ground, the same is taken on record as ground no.2. As evident from grounds of appeal, the sole subject matter of dispute before us is interest disallowance u/s 36(1)(iii).

1.3 For ease of understanding, the underlying amounts have been rounded -off to *Rupees in Lacs* except where the figure are fully expanded.

1.4 We have carefully heard the arguments advanced by respective representatives. We have also perused relevant material on record including documents placed in the paper-book. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

2.1 Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged in development and construction of real estate properties was assessed for year under consideration u/s 143(3) on 31/03/2014 wherein the income of the assessee was determined



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at Rs.20.81 Lacs after interest disallowance of Rs.501.43 Lacs u/s 36(1)(iii) as against returned loss of Rs.480.62 Lacs e-filed by the assessee on 30/09/2011. The assessee is stated to be 100% subsidiary of an entity namely M/s Cowtown Land Development Private Ltd. (CLDPL). During financial year 2007-08, the assessee issued 16180 secured, non-marketable, non-transferable 15.25% optionally convertible debentures of Rs.10 Lacs each aggregating to Rs.1618 Crores to M/s CLDPL.

2.2 The name of the assessee has undergone change from Lodha Hi-Rise Builders Private Limited to M/s Bellissimo Hi-Rise Builders Private Limited w.e.f. 06/01/2016 which is evident from certificate of incorporation pursuant to change of name, issued by The Registrar of Companies, Mumbai.

2.3 The perusal of assessee's financial statements as placed on record would reveal that the assessee has earned commission / brokerage revenue of Rs.36.20 Lacs. Against the same, aggregate expenditure of Rs.3265.66 Lacs has been claimed which include interest and finance charges (net) Rs.1633.57 Lacs. The net interest & finance charges have been arrived as under: -

No.	Particulars	Amount (Rs.)
1.	Interest on Debentures	444,86,11,700/-
2.	Interest on late payment of TDS	4,737/-
3.	Professional fees- finance	17,65,348/-
4.	Reimbursement of finance cost given to holding company	41,64,847/-
	Total	445,45,46,632/-
5.	Less: Interest Income on loans given	429,11,89,321/-
	Net Interest & Finance Charges	16,33,57,311/-



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2.4 The other major expenditure debited to Profit & Loss Account include *misc. expenditure written-off* for Rs.1618.48 Lacs which represent amortization of debenture discount & debenture issue expenses. The assessee has reflected loss of Rs.3229.45 Lacs in its Profit & Loss Account. However, in the computation of income, it has made various adjustments to the said losses and arrived at loss of Rs.480.62 Lacs as per the provisions of Income Tax. One of the major suo-moto disallowances made by the assessee is for Rs.2750.62 Lacs which is interest disallowance u/s 36.

2.5 The aforesaid interest disallowance is nothing but rate of 37.93% on investment of Rs.7251.85 Lacs stated to be made by the assessee in shares of two associated companies i.e. *M/s Ajinath Hi-Tech Builders Pvt. Ltd. & M/s Macrotech Constructions Pvt. Ltd.* The said disallowance was made since the investments were stated to be made out of borrowed funds. The rate of 37.93%, as per para 4.3 of the assessment order, is interest rate earned by the assessee on loans and advances.

2.6 As per the Balance Sheet, the assessee has issued debentures of Rs.161800 Lacs which are the same as in preceding year. The assessee has made investments of Rs.7251.85 Lacs which have also remained constant during the year. The same has already been elaborated in preceding para 2.5. The assessee has year-end loans and advances of Rs.76912.20 Lacs as against previous year figures of Rs.151909.02 Lacs. The majority of year-end loans are in the shape of loans to subsidiaries / fellow subsidiaries. The accumulated losses stand at Rs.4372.55 Lacs. The cash and bank balances have been reflected to be Rs.73910.93 Lacs. From



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the perusal of its Balance Sheet, it is quite discernible that the assessee has not carried out any real estate projects either in this year or in the preceding year, which is stated to be its primary business,

Proceedings before Ld.AO

3.1 During assessment proceedings, it transpired that the assessee reflected loss of Rs.3229.45 Lacs in its Profit & Loss Account, after debiting following expenditure: -

No.	Nature of Expenditure	Amt. (R/o in Lacs)
1.	Interest & Finance Charges	Rs.1633.57 Lacs
2.	Misc. Expenditure written-off	Rs.1618.48 Lacs
3.	Office & Administrative Expenses	Rs.2.34 Lacs
4.	Employees Expenses	Rs.11.26 Lacs

The interest & finance charges of Rs.1633.57 Lacs as already been elaborated in preceding para 2.3. As against the above expenditure, the assessee reflected receipt of Rs.36.20 Lacs under the head *other income*.

The assessee, while computing its taxable income, made disallowance to the extent of Rs.2750.62 Lacs u/s 36. During the course of assessment proceedings, the assessee was show-caused to explain the nature of interest expenditure as well as misc. expenditure written-off and explain the business need for the same.

3.2 As per assessee's submissions, it earned interest income of Rs.42911.89 Lacs @37.93% and against the same, it claimed total interest expenditure of Rs.44545.46 Lacs. The difference of the two i.e. Rs.1633.57 Lacs was claimed as interest expenditure during the year.

3.3 However, not convinced, it was noted by Ld. AO that the assessee was



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in the business of real estate development and no business activity was carried out by the assessee during the year under consideration. The assessee simply borrowed money by way of debentures to the extent of Rs.161800 Lacs and invested / advanced the same to group concerns. The assessee was forwarding loans at the same effective rate at which it was paying interest for the debentures and it incurred losses only because the assessee could not fully lend the money available with him. Therefore, the assessee, in the opinion of Ld. AO, could not establish the business expediency or the business need for incurring such huge financial expenses which was evident from the fact that accumulated business losses amounted to Rs.4372.55 Lacs. A conclusion was drawn that part of interest expenditure would go towards funding of accumulated losses. The said losses were due to the fact that the assessee made investment in group concerns. Those investments earned nothing and secondly, the assessee was not able to lend the money available with him for full time during the year. Therefore, these losses were not allowable to the assessee. The assessee did not carry out any business activity rather it was merely acting as a middleman in disbursing the money to the group concerns. Therefore, the amount of Rs.3252.05 Lacs as incurred for interest and discount / expense on debentures was to be disallowed u/s 36(1)(iii). The said amount comprised-off of net interest expenditure of Rs.1633.57 Lacs and misc. expenditure written-off for Rs.1618.48 Lacs. Since the assessee had already made suo-moto disallowance of Rs.2750.62 Lacs, the differential amount i.e. Rs.501.43 Lacs was disallowed and loss was reduced to that



extent.

3.4 From the assessment order, it could be observed that Ld. AO has erred in noting down the correct factual matrix since miscellaneous expenditure incurred by the assessee on account of debenture discount and debenture issue expenses was not a claim u/s 36(1)(iii) rather it represent amortization of these expenditure over the life of debentures i.e. 39 months for which a separate claim was made in the Profit & Loss Account and no *suo-moto* disallowance was offered by the assessee on this account, in its computation of income. The details of amortization were already filed by the assessee vide its submissions dated 20/01/2014. Further, the suo-moto disallowance made by the assessee u/s 36(1)(iii) was interest disallowance on investments of Rs.7251.85 Lacs computed @37.93%, being interest rate earned by the assessee. The same is quite evident from assessee's submissions dated 21/03/2014, a copy of which has been placed on record. The relevant submissions have also been extracted in the assessment order in para 4.3. Upon perusal of the same, quite clearly the *suo-moto* disallowance of Rs.2750.62 Lacs is nothing but interest disallowance, computed @37.93% on interest free investments of Rs.7251.85 Lacs.

Proceedings before Ld. CIT(A)

4.1 Aggrieved, the assessee contested the said disallowance before Ld. CIT(A) vide impugned order dated 02/03/2017. However, during appellate proceedings, the assessee took a different stand in its submissions which are extracted on page no. 4 of the impugned order. It was submitted that out of net finance expenses of Rs.1633.57 Lacs, an amount of Rs.1132.14



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Lacs i.e. total suo-moto disallowance of Rs.2750.62 Lacs Less Rs.1618.48 Lacs (misc. expenditure) was incurred in relation to exempt income and the same has already been disallowed. It was further claimed that the remaining interest of Rs.501.43 Lacs was claimed as deduction u/s 36(1)(iii) since the same were incurred for business purposes.

4.2 Therefore, it could be noted that two different stands were taken by the assessee during the course of assessment proceedings and the appellate proceedings. On the basis of the same, a conclusion could be drawn that the correct factual matrix could not be appreciated by both the lower authorities.

4.3 In support of claim of interest expenditure, the assessee raised a plea that similar methodology of disallowance as adopted in earlier years was accepted by revenue in assessments framed u/s 143(3). In other words, a plea of rule of consistency was raised. It was also submitted that the facts were identical in earlier years and the funds were borrowed in earlier years without there being any change in the same during the year and therefore, no disallowance could be made. The assessee also relied upon various judicial pronouncements in support of its claim.

4.4 However, Ld. CIT(A) concurred with the stand of Ld. AO by observing that the assessee did not carry out any business activity and the proceeds of debentures were diverted towards interest-free investments in sister concerns. Even if simple interest of 12% is applied on these investments, the disallowance would be Rs.8.50 Crores as against disallowance of Rs.5.01 Crores made by Ld. AO. Therefore, the aforesaid



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interest disallowance was confirmed, against which the assessee is under further appeal before us.

5.1 The Ld. Authorized Representative for assessee (AR), drawing our attention to assessee's financial statements as well as assessment orders of earlier years, submitted that similar methodology as adopted by assessee in those years has been accepted by the revenue. This methodology is stated to have been accepted in subsequent years also. It has been submitted that the interest income has been assessed as business income. To support the same, copy of assessee's Memorandum and Articles of Association has been placed on record. A plea of Rule of consistency has been raised to submit that since the assessee fulfilled the conditions laid down in Sec.36(1)(iii), entire interest-disallowance including suo-moto disallowance made by the assessee, was to be deleted. The Ld. AR also submitted that the investment made by the assessee in subsidiaries companies have been used by them for the purpose of their business and therefore, the interest expenditure would be allowable from this angle also. To support the same, the financial statements of both the investee entities have been placed on record.

5.2 *Au Contraire*, Ld. DR supported the disallowance as confirmed in the impugned order.

Our finding and Adjudication

6. Upon careful consideration of factual matrix as enumerated by is in



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preceding paragraphs, the bench formed an opinion that the correct facts need to be ascertained and brought on record in view of our observations in paras 3.4 & 4.2. Therefore, we are left with no option but to set-aside the impugned order and remit the issue back to the file of Ld.AO for adjudication *de-novo*. The Ld. AO is directed to reappraise assessee's claim in the light of our observations in paras 3.4 & 4.2. The assessee, in turn, is directed to substantiate its claim. All the issues are kept open.

Reasons for delay in pronouncement of order

7.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ordinarily exceed a period of 30 days.

7.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide



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lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

7.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners: —

- (a) The Bench may pronounce the order immediately upon the conclusion of 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



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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 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**



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continues to operate shall be added and time shall stand extended accordingly”, and also observed that **“arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure...”. The term ‘**force majeure**’ has been defined in Black’s Law Dictionary, as **‘an event or effect that can be neither anticipated nor controlled’** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an “ordinary” period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon’ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon’ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **“while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**. The extraordinary steps taken suo motu by Hon’ble jurisdictional High Court and Hon’ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words “ordinarily”, in the light of the above analysis of the legal position, the period during which lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to 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.



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Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

Conclusion

8. The appeal stands allowed for statistical purposes in terms of our above order. This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 26/05/2020

Sr.PS:-Jaisy Varghese

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त/ CIT
- concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,



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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai

Sr. No.	Details	Date	Initials	Designation
1	Draft dictation sheets are attached	Directly Typed on Computer / Laptop		Sr.PS/PS
2	Draft dictated on			Sr.PS/PS
3	Draft Placed before author			Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on			Sr.PS/PS
8	File sent to the Bench Clerk			Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			