IN THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai

Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.293/Mum/2018
(Assessment Year: 2012-13)

DCIT – 9(3)(2), Mumbai, 418, 4th Floor, Aaykar Bhawan, Maharishi Karve Marg Mumbai – 400 020.	Vs.	M/s Godfrey Phillips India Ltd Macropolo Building; Ground Floor Next to Kala Chowky Post Office Dr. Babasaheb Ambedkar Road, Lalbaug, Mumbai – 400 033.
PAN – AABCG4768K		
(Appellant)		**(Respondent)**

Appellant by: Shri V. Vinod Kumar D.R
Respondent by: S/shri Manish V. Shah & Parveen Jain A.R's

Date of Hearing: 05.03.2020
Date of Pronouncement: 09.06.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-16, Mumbai, dated 30.10.2017 which in turn arises from the order passed by the A.O under Sec.143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 23.03.2015 for A.Y. 2012-13. The revenue has assailed the impugned order on the following effective grounds of appeal before us:

"1. Whether in the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in delting the disallowance of interest made u/.s 36(1)(iii) where the assessee has utilized the interest bearing fund for

capital work in progress by the A.O relying on the ground that the owned fund available with the assessee were more than the capital work in progress whereas on the similar issue the department has not accepted the decision of Hon'ble Mumbai High Court in the case of HDFC Bank Ltd. and has moved SLP before Supreme Court.

2. Whether the ld. CIT(A) is correct in stating that the seized document does not have any documentary evidentiary value with respect to unexplained investment in any property.

3. Whether the ld. CIT(A) is correct in deciding that the addition cannot be upheld/confirmed merely on the basis of seized paper in the absence of corroborative evidence. "

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of cigarettes and chewing products, trading of tobacco products, tea and other retail products had e-filed its return of income for A.Y 2012-13 on 30.09.2012, declaring a total income of Rs. 242,60,95,470/-. The return of income was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. In the course of the assessment proceedings the A.O inter alia made the following two additions/disallowances :

Sr. No.	Particulars	Amount
1.	Disallowance u/s 36(1)(iii) of interest attributable to the borrowed funds utilised towards capitalised value of work-in-progress.	Rs. 94,80,600/-
2.	Addition of 'Unexplained Investment' u/s 69B made towards suppressed purchase value of a property.	Rs. 1,00,00,000/-

After inter alia making the aforesaid addition/disallowance the income of the assessee company was assessed by the A.O at Rs. 246,61,73,540/-, vide his order passed u/s 143(3), dated 23.03.2015.

4. Aggrieved, the assessee inter alia assailed the aforesaid addition/disallowance made by the A.O before the CIT(A). Observing, that the assessee had sufficient self-owned funds of Rs. 920.91 crores available with him to justify funding of the capitalised value of work-in-progress whose closing balance for the year under consideration stood reflected at Rs. 137.40 crores, the CIT(A) drawing support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom), therein concluded that it could safely

be presumed that the investment was made by the assessee out of its self-owned funds. In the backdrop of his aforesaid observations the CIT(A) deleted the disallowance of interest expenditure of Rs. 94,80,600/- made by the A.O. As regards the addition of Rs. 1 crore made towards suppressed investment that was made by the A.O u/s 69B, it was observed by the CIT(A) that the impugned addition was merely backed by hand written rough notings on a piece of paper that was found and seized during the course of the search proceedings conducted at the residential premises of the president of the assesee company, and not on the basis of any corroborative evidence. Also, it was noticed by the CIT(A) that a consequential addition of Rs.1 crore that was made in the hands of the seller of the property viz. M/s Ganesh Paper Mills was on appeal vacated in its case by the CIT(A)-29, New Delhi, vide his order dated 05.02.2016. On the basis of his aforesaid observations, the CIT(A) deleted the addition of Rs. 1 crore that was made by the A.O towards suppressed purchase consideration in the hands of the assessee u/s 69B of the Act.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Departmental representative (for short 'D.R') relied on the assessment order. Per contra, the ld. Authorised representative relied on the CIT(A) order and took us through the observations recorded by him in context of the issues under consideration.

6. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record as well as the judicial pronouncements relied upon by them. We shall first advert to the disallowance by the A.O of the interest expenses which as per him were attributable to the borrowed funds utilised towards capital work-in-progress. It was observed by the A.O that the details of the 'fixed assets' revealed that the assesee had a capital WIP of Rs. 137.40 crore on 31.03.2012 as regards its new factory at Rabale. It was noticed by the A.O that the assessee in its Profit & loss account had claimed interest expenditure of Rs. 15.26 crores on long term/short term borrowings aggregating to Rs. 266.24 crores. Also, it was observed by him that the assessee had self owned funds of Rs. 920.90 crores. It was gathered by the A.O that no part of the interest expenditure was capitalised by the assessee to the capital WIP of its new upcoming factory at Rabale. Observing, that the assessee had both self-owned and interest bearing borrowed funds the A.O held a conviction that interest expenditure pertaining to

the capital WIP was required to be capitalised and consequently disallowed the same to the said extent u/s 36(1)(iii) of the Act. In the backdrop of the aforesaid facts, the A.O after considering the availability of both self-owned and interest bearing borrowed funds with the assessee, therein worked out the average rate of interest at 1.38% (15.96 crs/Rs. 1152.72 crs X 100). Adopting the average rate of interest of 0.69% on the capital WIP of Rs. 137.40 crore the A.O worked out the interest expenditure which was required to have been capitalised to the capital WIP at Rs. 94,80,600/-. Resultantly, interest expenditure of Rs. 94,80,600/- was disallowed u/s 36(1)(iii) by the A.O. As observed by us hereinabove, the disallowance of interest expenditure on capital WIP was vacated by the CIT(A).

7. We have given a thoughtful consideration to the issue before us and are in agreement with the view taken by the CIT(A) that no disallowance of the interest expenditure of Rs. 94,80,600/- was called for in the hands of the assessee. Admittedly, the assessee had self-owned funds of Rs. 920.90 crores which would sufficiently justify the investment of Rs. 137.40 crore that was made by it towards capital WIP. In our considered view, if an assessee possesses sufficient interest free funds of its own, then the presumption would be that the advancing of interest free advances by it was sourced out of such interest free funds and no part of the interest pertaining to the interest bearing borrowings was liable to be disallowed. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom)**. Also, a similar view has been taken by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom).** It was observed by the High Court that where the assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it would have to be presumed that investment made by the assessee was out of the interest-free funds available with it and no disallowance was warranted u/s 14A. In the backdrop of the aforesaid settled position of law, we are of the considered view that no infirmity emerges from the order of the CIT(A) who had rightly observed that as the assessee had sufficient self-owned funds to justify the investment made towards capital WIP, therefore, no part of the interest expenditure pertaining to interest bearing borrowed funds could have been disallowed u/s 36(1)(iii) of the Act. Insofar the claim of the

revenue that they had not accepted the judgment of the Hon'ble High Court in the case of **CIT Vs. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom)** and had filed a SLP before the Hon'ble Supreme Court is concerned, we are afraid that the same does not find favour with us. As the operation of the order of the Hon'ble High Court in the case of HDFC Bank Ltd. (supra) had not been stayed by the Hon'ble Apex Court, therefore, the same holds the ground till date and continues to be binding. **Ground of appeal No. (i) is dismissed.**

8. We shall now take up the addition of Rs. 1 crore that was made by the A.O u/s 69B of the Act, which however was vacated by the CIT(A). Succinctly stated, the assessee during the year had made an investment towards purchase of land at Ghaziabad for a consideration of Rs. 13.01 crore. On a perusal of the contents of a hand written paper that was seized during the course of search proceedings from the residential premises of the president of the assessee company as Annexure -1 – Page 53, it was gathered by the A.O that the assessee had purchased the aforesaid land from M/s Ganesh Paper Mills for a consideration of Rs. 14.01 crores. Also, it was noticed by him that while framing the assessment in the case of the seller i.e M/s Ganesh Paper Mills an addition of Rs. 1 crore was already made in respect of the transaction under consideration. Accordingly, the A.O holding a conviction that the assessee had suppressed the purchase consideration of the aforesaid property by an amount of Rs. 1 crore, therein made an addition to the said extent u/s 69B of the Act. On appeal, the CIT(A) observed that the contents of the seized document viz. Annexure-1 – Page 53 only revealed certain rough notings and there was no corroborative evidence to support the claim of the revenue that the assessee had purchased the property in question for a consideration of Rs. 14.01 crores. It was also observed by the CIT(A) that the addition of Rs. 1 crore that was made in the hands of the seller i.e M/s Ganesh Paper Mills, on appeal in its case was deleted by the CIT(A)-29, Delhi, vide his order dated 05.02.2016. Also, it was noticed by him that the landed cost of the property (inclusive of stamp duty and other charges) was recorded by the assessee at Rs. 14.14 crores in its books of accounts i.e in excess of the impugned purchase consideration of Rs. 14.01 crore. In the totality of the aforesaid facts the CIT(A) vacated the addition of Rs. 1 crore that was made by the A.O u/s 69B of the Act.

9. We have deliberated at length on the issue under consideration in the backdrop of the contentions advanced by the authorized representatives for both the parties, and have also perused the observations of the lower authorities. As is discernible from the records, a piece of paper on the stationery of the assessee company was seized during the course of the search proceedings from the residence of its president, which thereafter was marked as Annexure-1 – Page 53. On a perusal of the said seized document which is placed on our record by the assessee at Page 1 of its 'Paper book', we find that there are certain figures which are rounded off as Rs. 13.51, Rs. 13.56, 14/78 and 14.01@11,355. On a perusal of the records, it emerges that the A.O had adopted the impugned purchase consideration of the property in question at Rs. 14.01 crores merely on the basis of one of the aforesaid rough noting de hors any corroborative evidence. In sum and substance, the adoption of the purchase consideration of the property in question by the A.O was only on the basis of an unsubstantiated and dumb rough notings on a piece of paper seized during the course of the search proceedings. On a perusal of the aforesaid seized document, we find, that the same only refers to a set of figures which on a standalone basis could not have been adopted as the purchase consideration of the property in question. Apart from that, we find that the support drawn by the A.O from the fact that while framing the assessment in the case of the seller i.e M/s Ganesh Paper Mills an addition of Rs. 1 crore was made in respect of the transaction under consideration looses all the force as the said addition on appeal had already been deleted by the CIT(A)-29, Delhi, vide his order dated 05.02.2016. Lastly, we find that the landed cost (inclusive of stamp duty and other charges) had been recorded by the assessee in its books of accounts at Rs. 14.14 crores i.e an amount in excess of the impugned purchase consideration of Rs. 14.01 crores. Accordingly, we are persuaded to subscribe to the view taken by the CIT(A) that in the totality of the facts of the case the addition of an amount of Rs. 1 crore made by the A.O towards suppressed purchase consideration of the property in question cannot be sustained and is liable to be vacated. Accordingly, we uphold the view taken by the CIT(A) in context of the issue under consideration. **Grounds of appeal Nos. (ii) and (iii) are dismissed**.

10. Resultantly, the appeal filed by the revenue is dismissed.

11. Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 05.03.2020, however, this order is being pronounced after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income-tax Appellate Tribunal Rules, 1962, which envisages the procedure for 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. 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 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. As such, "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 High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein it was inter alia, observed as under:

> "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 rule 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 or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any "extraordinary" circumstances.

12. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate bench of the Tribunal viz. ITAT, Mumbai 'F' Bench in DCIT, Central Circle-3(2), Mumbai

Vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020, wherein it was observed as under:

> "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. The epidemic situation 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 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.
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> 10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by the Hon'ble 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."

We have given a thoughtful consideration to the aforesaid observations of the tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-	Sd/-
(G. Manjunatha)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 09.06.2020

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**