# आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।

# IN THE INCOME TAX APPELLATE TRIBUNAL
# "C" BENCH, MUMBAI

**माननीय** श्री विकास अवस्थी, न्यायिक सदस्य **एवं**
**माननीय** श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

**BEFORE HON'BLE SHRI VIKAS AWASTHY, JM AND**
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकरअपील सं./ I.T.A. No.549/Mum/2019
(**निर्धारणवर्ष** / Assessment Year: 2009-10)
&
आयकरअपील सं./ I.T.A. No.550/Mum/2019
(**निर्धारणवर्ष** / Assessment Year: 2010-11)

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| **Shri Ilesh Amrutlal Gadhia**<br>201, 2nd Floor, Vyapar Bhavan<br>368/370, Narsi Nath Street<br>Masjid Bunder (West), Mumbai-400 009. | **बनाम**/<br>Vs. | **DCIT-Central Circle-4(2)**<br>Room No.1918, Air India Building<br>Nariman Point<br>Mumbai-400 021. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AJHPG-8596-P** | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

&
आयकरअपील सं./ I.T.A. No.540/Mum/2019
(**निर्धारणवर्ष** / Assessment Year: 2009-10)
&
आयकरअपील सं./ I.T.A. No.541/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2010-11)

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|---|---|---|
| **DCIT-Central Circle-4(2)**<br>Room No.1918, Air India Building<br>Nariman Point<br>Mumbai-400 021. | **बनाम**/<br>Vs. | **Shri Ilesh Amrutlal Gadhia**<br>201, 2nd Floor, Vyapar Bhavan<br>368/370, Narsi Nath Street<br>Masjid Bunder (West), Mumbai-400 009. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AJHPG-8596-P** | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

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| **Assessee by** | : | Shri Mayur Kishnadwala-Ld. AR |
| **Revenue by** | : | Shri Hemant Kumar-Ld. CIT-DR |

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| सुनवाई की तारीख/ **Date of Hearing** | : | 18/03/2020 |
| घोषणा की तारीख / **Date of Pronouncement** | : | 13/07/2020 |

## आदेश / O R D E R

**Manoj Kumar Aggarwal (Accountant Member): -**

1.1 Aforesaid cross-appeals for Assessment Years [AY] 2009-10 & 2010-11 contest separate orders of learned first appellate authority on certain common grounds of appeal. The only issue involved in the cross-appeals is estimated additions on account of *alleged bogus purchases.* Facts are stated to be pari-materia the same in both the years and therefore, adjudication in any one of the years would equally apply to the other year as well.

1.2 The Ld. Authorized Representative for Assessee (AR) demonstrated urgency of hearing of the appeals by submitting that the Revenue is hard-pressing for payment of outstanding tax liabilities and the assessee's plea for stay of demand, has already been rejected. The Ld. AR also submitted that facts in the stated appeals are exactly the same to the facts of the case of assessee's son Shri Mitesh Ilesh Gadhia, whose appeal has already been disposed-off by the co-ordinate bench of this Tribunal vide ITA No.354/Mum/2019 order dated 12/04/2019. In the above background, the matter was placed before us for disposal and accordingly, we proceed to dispose-off the cross-appeals as per rival arguments made before us.

1.3 As stated in preceding para 1.2, Ld. AR has urged that since facts in both the years are pari-materia the same as in ITA No.354/Mum/2019 order dated 12/04/2019, similar view may be taken in the matter. The copy of the order has been placed on record. The Ld. AR also placed on record a tabulated chart to submit that the purchases made from one suspicious entity namely M/s Ragini Trading & Investments Private Limited (RTIPL) were genuine and not unsubstantiated / bogus purchases. A working of Gross Profit rate on suspicious transactions as well as on other transactions has also been placed on record for both the years. The Ld. CIT-DR relied on the order of Ld. AO to support the quantum additions.

1.4 We have carefully heard the arguments advanced by both the representatives and perused relevant material on record including the cited order of the Tribunal. Our adjudication to the cross-appeals would be as given in succeeding paragraphs. First, we take up cross-appeals for AY 2009-10.

**Cross-Appeals for AY 2009-10**

2.1 The grounds raised by the assessee read as under: -

> 1. On the facts and circumstances of the case and in law, the Ld. CIT[A) erred in confirming an addition of Rs.47,47,602/- being alleged bogus purchases from M/s. Ragini Trading & Investments P Ltd.
> 2. On the facts and circumstances of the case and in law, the Ld.CIT erred in levying interest u/s 234B of the Act.
> 3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the ground pertaining to initiation of penalty u/s 271(l)(c) is premature in nature.

Ground nos. 2 & 3 relating to interest & penalty, being mandatory and consequential in nature, would not require any specific adjudication on our part.

2.2 The grounds raised by the revenue read as under: -

> 1. On the facts and circumstances of the case and in law, the ld CIT(A) has erred in restricting the addition to the extent of 12.5% of the bogus purchases of Rs. 3,81,02,747 booked by the assessee related to purchases from M/s Ragini Trading and Investments Pvt. Ltd. after setting off the GP shown by the assessee.
> 2. On the facts and circumstances of the case and in law, the ld CIT(A) has erred in restricting the addition to the extent of 12.5% of the bogus purchases of Rs.3,81,02,747 booked by the assessee related to purchase from M/s Ragini Trading and Investments Pvt. Ltd. without considering the decision of Hon'ble Apex Court in the case of CIT-vs-Durga Prasad 82 ITR 540 in the case N K Proteins Ltd. Vs DCIT SLP CC No 769 of 2017 even when the assessee failed to prove the genuineness of transaction or produce the purchase parties.

It is apparent that the only substantive ground that arises for our consideration is estimated additions on account *of alleged bogus purchases.*

3.1 Facts on record would reveal that the assessee being resident individual stated to be engaged in trading of steel and metal items under proprietorship concern namely M/s Balaji Trading Company was assessed for year under consideration u/s. 143(3) r.w.s. 153C of the Act on 30/11/2016 wherein the income of the assessee was determined at Rs.385.07 Lacs after sole addition of bogus purchases of Rs.381.02 Lacs as against assessed income of Rs.4.04 Lacs.

3.2 The said assessment stem from search and seizure action u/s. 132(1) carried out by the department in the case of *Ushdev group of companies* on 11/09/2014. The assessee's concern is stated to be a part of the group. The search operations revealed that M/s Ushdev International Ltd. and its various group concerns obtained accommodation entries from various entities. The statement of key controller of Ushdev Group namely Shri Prateek Gupta was recorded on various dates. The relevant portion of these statements have already been extracted in the quantum assessment order.

3.3 In the above background, notice u/s 153C was issued to the assessee as per due process of law which was followed by statutory notice u/s 143(2). The allegations of Ld. AO were that the assessee inflated its expenses by booking bogus purchases from various entities and therefore, the purchases were to be disallowed.

3.4 The primary argument of assessee was that there was one-to-one correlation between the purchases and corresponding sales and the payment for purchases were through banking channels. The assessee had reflected certain purchases from an entity namely M/s Ragini Trading & Investments Private Limited (RTIPL). As per conclusion of Ld. AO, the assessee failed to prove the fact of dispatch, transportation and delivery of goods. The survey operations on M/s RTIPL revealed that the said entity indulged in making purchases from various hawala parties without taking actual delivery of material. The said party was not maintaining any warehouse or godown and the goods purchased by said entity were sold on back-to-back basis to many other entities including assessee. During assessment of that entity, its books were rejected u/s 145(3) and the profit was estimated @0.25%.

3.5 Armed with above material / information, Ld. AO show-caused assessee as to why the purchases made from M/s RTIPL were not to be treated as non-genuine purchases. In defense, the assessee submitted ledger extracts, copies of bills, details of sales and corresponding profit booked on these purchases, bank statements etc. But the assessee failed to submit the inward-outward register for traded goods and also failed to establish the movement / delivery of goods. A plea was also raised that sales made by M/s RTIPL were not doubted by the revenue. The account confirmation from M/s RTIPL was placed on record.

3.6 However, Ld. AO opined that the assessee failed to discharge the primary onus of proving the genuineness of the transactions and therefore, these purchases remained unverified. Weighing the factual matrix in the light of various judicial pronouncements, the books of accounts were rejected u/s 145(3). A conclusion was drawn that it was a case of inflation of expenses and routing of cash through hawala parties and therefore the entire amount of suspicious purchases was to be disallowed and added to the income of the assessee. Accordingly, adding the same to the income of the assessee, an assessment was framed determining the income at Rs.385.07 Lacs.

4.1 Aggrieved as aforesaid, the assessee assailed the additions by way of elaborate written submissions before Ld. CIT(A), which have already been extracted in the impugned order. The assessee, *inter-alia,* drew attention to the fact that quantitative details of purchases made from M/s RTIPL and corresponding sales were duly submitted to Ld.AO which was backed by confirmation of accounts. The payments to the said party were through banking channels. Therefore, the assessee proved the genuineness of the transactions. The assessee also submitted that there were no allegations of bogus sales by M/s RTIPL since only the purchases made by that entity were under suspicion. The assessee, in the alternative, pleaded for reasonable estimation of profit element against these purchases. It was also submitted that full disallowance of purchases would increase the Gross Profit (GP) rate to an unrealistic level of 4.7% as against normal GP rate of less than 1% reflected by the assessee in preceding as well as in succeeding years.

4.2 The Ld.CIT(A) noticed that the business model of the assessee was that after receipt of orders from the clients, the material was procured from the market from various suppliers. The suppliers would arrange for the material and deliver the material to the client. The delivery would be monitored by the assessee. The payment to the transporter was directly done by the clients. After the delivery of the material, the invoice would be received by the assessee who, in turn, would generate invoice against its own clients. This business model was not found to be incorrect.

4.3 Further, the soft copies of books of accounts impounded during survey action contained quantitative details of corresponding sales booked against the purchases so made. The assessee had booked back-to-back sales against the purchases made from various suppliers including M/s RTIPL. Therefore, it the entire purchases were to be treated as non-genuine, corresponding sales should also be ignored.

4.4 Finally, Ld.CIT(A) proceeded to estimate the additions against these purchases by observing as under: -

> 5.7 Since there is a one to one co-relation between the purchases and the sales, the entire amount of purchases cannot be added to the income of the assessee but only the profit element embedded in the transactions can added to the income of the assessee. There cannot be any dispute about a well settled legal proposition that tax can be levied only on real income. It is an elementary rule of accountancy as well as of taxation laws that profit from business cannot be ascertained without deducting cost of purchase from sales, otherwise it would amount to levy of income tax on gross receipts or sales. Such a recourse is not permissible unless it is specifically authorized to do so under any particular provisions contained in the Act. The Hon'ble Jurisdictional High Court in the case of **Hariram Bhambhani (ITA No. 313 of 2013)** has held that only the profit attributable to the unaccounted sales can be brought to tax. The relevant portion of the order of the Hon'ble Jurisdictional High Court is reproduced as under:
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> > "5. *Being aggrieved, Respondent-Assessee filed an appeal before the CIT(A). In its order, the CIT(A) recorded that during the course of survey, no unaccounted invoices were impounded. Although, there was unaccounted sale bills which were not recorded in the books of account on the date of survey, no document was impounded. However, later in its return filed with the Revenue, it declared turn over at Rs 3.27 crores, showing a net profit of Rs 36.76 lakhs. The CIT(A) relied upon its decision to hold that the Assessing Officer cannot add the amount of Rs 35 lakhs only on the statement made without considering the surrounding circumstances and evidence to uphold the addition. In the circumstances, the CIT(A) held that in the facts of the case, that only 4% being the profit earned on sales of Rs 35 lakhs can be added to net profit of the applicant. Therefore, only Rs 1.40 lakhs was the profit on unaccounted sales which could be added. Thus, the balance addition of Rs 33.63 lakhs was deleted.*
> > *6. On further appeal, the Tribunal by the impugned order held that the entire sales which are unaccounted cannot be undisclosed income of the assessee, particularly as the purchase had been accounted for. It was held that only net profit which would arise on such unaccounted sales can rightly be taken as the amount which could be added to the Respondent-Assessee's income for the purpose of tax.*
> > *7. The grievance of the Revenue is that Section 69C of the Act is to be invoked and entire amount of undisclosed sales has to be brought to tax. We are unable to appreciate how section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal. We are not concerned with any unexplained expenditure in this case.*
> > *8. In any view of the matter, the CIT(A) and Tribunal have come to the concurrent finding that the purchases have been* recorded and only some of the sales are unaccounted. Thus, in the above view, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income-tax. The view taken by the authorities is a reasonable and a possible view. Thus, no substantial question law arises for our consideration.*
> > *9. Appeal dismissed,"*

5.8 In this regard, it will be apt to refer to certain decisions dealing with this issue. The Hon'ble Gujarat High Court in the case of **Bholanath Poly Fab Pvt. Ltd. 355 ITR 290 (Guj)** was battling with the finding of Hon'ble ITAT that purchases were made from bogus parties. The Tribunal had held that though purchases were made from bogus parties, nevertheless, the purchases were not as such bogus as the entire quantity of opening stock, purchases and sales were tallying and hence, only the profit margin embedded in such amount would be subject to tax. The Hon'ble Gujarat High Court held that whether purchases themselves were bogus or whether parties from whom such purchases were made were bogus, is essentially a question of fact and the Tribunal having examined the evidence on record and concluded that the assessee did procure cloth and sell finished goods, the entire amount covered under such purchase cannot be subjected to tax and only the profit element embedded therein was to be taxed, no interference is called for in the order of the Tribunal. While coming to the above conclusion, the Hon'ble Gujarat High Court also relied on the decision in the case of **Sanjay Oil Cake Ind. 316 ITR 274** (Guj).

5.9 From the aforesaid discussion, it is clear that in view of the business model followed by the assessee wherein there is one to one co-relation between the purchases and the sales and also considering the legal position on the issues as discussed, it is only the profit embedded in the transaction which can be brought to tax and not the entire purchases from M/s. Ragini Trading & Investment P. Ltd. (RTIPL).

5.10 It is well known that unaccounted material may be available in the market at much lower price as compared to the purchases made from genuine dealers on the strength of genuine bills. The real suppliers may be willing to sell those products at a much lower rate in view of manifold reasons. There may be savings on account of excise duty, sales-tax or other taxes which may be leviable in respect of manufacture and sale of such goods. The real suppliers may derive substantial savings on account non-payment of government taxes which will be shared with the wholesalers, dealers and the end-users.

5.11 To have an idea as to what can be considered to be reasonable profit margin in respect of the purchases from the alleged hawala/bogus suppliers, it will be of help if the decisions of the Hon'ble Courts on the issue of bogus purchases in respect of assessees which are engaged in the business of trading in iron & steel which is similar to our assessee, are examined.

5.12 The Hon'ble Gujarat High Court in the case of **CIT vs. Simit Sheth (2013) 38 Taxmann.com 385 (Guj),** was seized with an issue where the A.O. had found that some of the alleged suppliers of iron & steel to the assessee had not supplied any goods but had only provided sale bills and hence, purchases from the said parties were held to be bogus. The A,O, in that case added the entire amount of purchases to gross profit of the assessee. The Ld. CIT(A) having found that the assessee had indeed purchased though not from named parties but other parties from grey market, partially sustained the addition as probable profit of the assessee. The Tribunal however, sustained the addition to the extent of 12.5%. Taking into account the above facts the Hon’ble Gujarat High Court held that since the purchases were not bogus, but were made from parties other than those mentioned in books of accounts, only the profit element embedded in such purchases could be added to the assessee's income and as such no question of law arose in such estimation. The Tribunal while estimating the profit embedded in the transactions @ 12.5% held as under;

> *"Having heard the submissions of both the sides, we have been informed that the malpractice of bogus purchase is mainly to save 10% sales tax etc,. It has also been informed that in this*

*industry about 2.5% is the profit margin. Therefore, respectfully following the decisions of the co-ordinate bench pronounced on identical circumstances, we hereby direct that the disallowance is required to be sustained at 12.5% of the purchase from those parties. With these directions, we hereby decide the grounds of the rival parties which are partly allowed."*

5.13 Similarly, the Hon'ble ITAT, Mumbai had an occasion to adjudicate this issue in the case of M/s **Ratnagiri Steels (80 taxmann.com 265)** which was engaged in the business of trading in steel. During the year, information was received from the Sales Tax Authorities about purchases from alleged hawala/bogus suppliers. After due consideration of all the relevant facts, the Hon'ble ITAT confirmed the addition of profits arising from the alleged hawala/bogus purchases by adopting a rate of 12.5%. It was further held by the Hon'ble ITAT that the AO should give credit for the book GP shown by the assessee in respect of the alleged hawala/bogus purchases against the said rate of 12.5%. The relevant portion of the order of the Hon'ble ITAT is reproduced as under:

*"The authorities below in the instant* case *did not make any industry comparisons to arrive at fair, honest and rational estimation of GP ratio, rather applied GP ratio of 12.5% on alleged bogus purchases which estimation was in addition to the normal GP ratio declared by the* assessee *in return of income filed with 'Revenue. The Revenue made aforesaid additions relying on the presumption that the material was in fact purchased from grey market at a lower rate and to cover deficiencies on record, the invoices were procured from these entry operators to reduce the profit. It was also considered that there will be savings on account of taxes while procuring material from grey market. The authorities below relied upon decision of Hon' ble Gujarat High Court in the* case of *CIT v. Simit P. Sheth (2013) 356 ITR 451/219 taxman 85 Mag./38 taxmann.com 385, which has estimated disallowance @*f 2.5% of *the disputed bogus purchases to meet the end of justice. The authorities below has not brought on record industry comparables nor any rational comparability vis a vis preceding years GP ratio are brought on record. There is no allegation brought on record by Id.DR that similar additions* were a/so *made in the immediately preceding year. The assessee earned GP ratio as detailed hereunder for last three years;-*

| *Financial* Year | *%GP* |
|---|---|
| *2007-08* | *4.3%* |
| *2008-09* | *5.45%* |
| *2009-10* | *4.9%* |

The *books of accounts were not rejected u/s. 145(3) of the 1961 Act by the Revenue. In the immediately preceding year. Ie. A. Y. 2008-09, the* assesses *earned GP ratio of 4.3% on total turnover, while for the year under consideration GP ratio earned was 5.45%. In our considered view and based* on *facts and circumstances of the case as discussed by us in details above, end of justice will be met in this case if GP ratio of 12.5% on alleged bogus purchases is added to income of the assessee against which credit for the declared GP ratio on the alleged bogus purchases will be granted by the AO after verification by the AO because of failure of the assessee to come forward to discharge primary onus cast upon him as detailed above for which assesses is to be blamed and in the midst of aforestated unrebutted allegation against the assessee and non-discharge of primary onus, the declared lower GP ratio of 5.45% in the instant previous year under appeal cannot be accepted. Thus, in nut-shell we are inclined to adopt GP ratio of 12.5% on alleged bogus purchases in the instant case which in our considered view is fair, reasonable and rational keeping in view the factual matrix of the case, while the assessee shall be granted credit of GP ratio declared on this bogus purchases in the return of income filed with the Revenue. The assessee gets part relief. We order accordingly."*

5.14 From the aforesaid two decisions, it can be observed that the appropriate percentage for computing the unaccounted profits from the purchases from the suspicious suppliers should factor the savings of taxes etc due to the unaccounted sales and the GP already shown in the regular books. The ratio of the decision of the

> Gujarat High Court in the case of **Simit P Sheth (supra)** cannot be squarely applied since the sales tax rate prevalent in Gujarat was 10% as against only 4% applicable in Maharashtra for the relevant period. However, the facts of the case of the assessee are quite similar to that of **Ratnagiri Steels (supra)** since the sales tax rate of 4% of Maharashtra itself is applicable. In the case of Ratnagiri Steels(supra), the Hon'ble ITAT directed the AO to allow set off of the book GP against the rate of 12.5% for computing the additional profits from the purchases from the alleged hawala/bogus suppliers. Therefore, as was done by the Hon'ble ITAT, Mumbai in the case of Ratnagiri Steel (supra), it will be appropriate if the rate of 12.5% is applied and against this set off of the GP shown in the regular books is allowed. Accordingly, the AO is directed to compute the additional profit in respect of the purchases from the suspicious supplier - M/s Ragini Trading & Investment P. Ltd (RTIPL) by applying the rate of 12.5%. However, the AO will allow a set off of the GP already shown by the assessee in the regular books in respect of the purchases from the said suspicious supplier while computing the additional profit. **Accordingly, ground No. 1 of the appeal is partly allowed.**

As evident, Ld.CIT(A) has directed Ld.AO to apply GP rate of 12.5% with benefit of set-off of GP already shown by the assessee in the regular books in respect of purchases made from M/s RTIPL.

The aforesaid adjudication has given rise to cross-appeals before us.

5. Upon due consideration of rival submissions and material on record, we are of the considered opinion that there could be no sale without actual purchase of goods considering the fact that the assessee was engaged in trading activities. The quantitative details were placed on record. There was one-on-one correlation of purchase and sale. The payment to the suppliers was through banking channels. The confirmation of M/s RTIPL was placed on record. The business model of the assessee, as noted by Ld. CIT(A), would explain the non-existence of stock movement register. The GP rate reflected by the assessee *qua* other years was not abnormal. *Prima-facie,* there is no change in the nature of business or business model. However, at the same time, the assessee failed to produce the supplier for

confirmation of account. While framing the assessment of M/s RTIPL, the books were rejected and an adhoc estimation of profit was made by revenue authorities. The stated factual matrix, in our considered opinion, would make it a fit case to make estimated additions to account for profit element embedded in these suspicious / unverified purchases to factorize for profit earned by assessee against possible purchase of material in the grey / unorganized market and undue benefit of VAT against such bogus purchases, which Ld.CIT(A) has rightly done so. However, keeping in view the fact that the assessee was dealing in low-margin commodity like iron & steel which attracts lower VAT rate, the estimation of 12.5% with set-off of already declared GP was on higher side. The coordinate bench in the cited decision of assessee's son, on identical facts and circumstances, found merits in the contentions of the assessee and observed that the assessee took all possible steps and produced relevant documents to prove the genuineness of the purchases made from M/s RTIPL. The evidences furnished by Ld.AO were not disproved by Ld.AO and therefore, the view taken by Ld. AO was not based on any material. In the said background, the bench directed Ld.AO to restrict the estimation to 0.11% on purchases made from M/s RTIPL. This rate was nothing but the GP rate earned by the assessee on other purchases. Drawing analogy from the same & keeping in view the GP rates reflected by assessee in preceding as well as in succeeding years, we direct Ld. AO to estimate the additions against suspicious / unverified purchases @1% on net basis, without any other benefit. The additions would come to Rs.3,81,027/-. The balance additions would stand deleted. Accordingly, the revenue's appeal stands dismissed whereas the assessee's appeal stands partly allowed.

**Cross-Appeals for AY 2010-11**

6. Facts are pari-materia the same in cross-appeals for AY 2010-11. An assessment was framed u/s 143(3) on same date i.e. 30/11/2016 wherein the purchases made by the assessee from M/s RTIPL were disallowed in its entirety. The Ld. CIT(A) estimated the same @12.5% with benefit of set-off of declared GP. Aggrieved, the assessee as well as revenue is under further appeal before us with similar grounds of appeal. Facts being pari-materia the same, our findings as well as adjudication as for AY 2009-10 shall *mutatis-mutandis* apply to this year also. Accordingly, the net additions as sustained by us would be 1% (net) of suspicious / unverified purchased made by the assessee from M/s RTIPL. Accordingly, the revenue's appeal stands dismissed whereas the assessee's appeal stands partly allowed.

**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 18/03/2020 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 before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide 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 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 "**<u>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.</u> 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. <u>In the meanwhile</u>** (emphasis, by underlining, supplied by us now), **all the revisional and appellate authorities under the Income-tax Act are <u>directed to decide matters heard by them within a period of three months from the date case is closed for judgment</u>".** 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 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.

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 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 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.

Deriving 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 revenue's appeals stand dismissed whereas the assessee's appeals stand partly allowed to the extent indicated in the order.

*Order pronounced in the open court on 13th July,2020.*

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|---|---|
| **Sd/-** | **Sd/-** |
| **(Vikas Awasthy)** | **(Manoj Kumar Aggarwal)** |
| न्यायिक सदस्य / **Judicial Member** | लेखा सदस्य / **Accountant Member** |

मुंबई Mumbai; दिनांकDated : 13/07/2020
*Sr.PS:-Jaisy Varghese*

**आदेश की प्रतिलिपि  ग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार**/ BY ORDER,

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