

**IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No. 6573/Mum/2018
(Assessment Year: 2015-16)

Rivendell PE, LLD (formerly known as NSR PE Mauritius LLC) C/o Pricewaterhouse Coopers Pvt. Ltd. PwC House, Plot 18/A, Guru Nanak Road, Bnadra(West), Mumbai

Vs. Assistant Commissioner of Income Tax (International Taxation)-4(1)(1), Mumbai

[PAN No. AAC CN4 715 G]

(Appellant)

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(Respondent)

Appellant by : Shri Dhanneh Batang & Mr. Arpit Agarwal, AR
Respondent by : Shri Avneeth Tiwari, D.R.

Date of Hearing 08.01.2020
Date of Pronouncement 28.07.2020

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against the order dated 11.09.2018 passed by the Disputes Resolution Panel-2, Mumbai under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to ‘the Act’) for Assessment Year 2015-16.

2. The assessee, a resident of Mauritius invested in the share capital of Indian companies and seeking capital gain opportunities, filed its return of income declaring total income at Rs. Nil for the A.Y. 2015-16 on 30.09.2015. Upon scrutiny the A.O. issued the draft assessment order on 18.12.2017 under Section 143(3) r.w.s. 144C of the Act computing income of the assessee at Rs. Nil. In the said draft assessment order the Ld. AO considered the short term

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capital loss of Rs. 922/- and long-term capital loss of Rs. 1,580,601,419/- as non-genuine and the same was, therefore, held as not allowable to be carried forward.

3. Being aggrieved by and/or dissatisfied with the said draft assessment order the assessee preferred an objection along with Form No. 35A on 19.01.2018 before the Dispute Resolution Panel (in short “DRP”) in respect of the variations proposed by the AO.

4. During the course of proceedings before the DRP, it was observed by the Members of the panel that Form No. 35A filed by the assessee on 19.01.2018 was not verified as per the procedure laid down since the signature of the person on verification page in the said form was a copy of the original signature. On that premise the panel proceeded to consider the maintainability of the said objection filed by the assessee under Form No. 35A.

5. The same was brought to the notice of the Authorised Representative of the assessee on 24.08.2018 whereupon the assessee replied that the draft assessment order was received on 21.12.2017. It was submitted that the due date to file the objection on 20.01.2018 since being Saturday, the due date for filing the said objection actually, thus, become on 22.02.2018 being the next working day. It was further submitted by the appellant that at that relevant point of time since Mauritius was hit by a cyclone leading to heavy rainfall and causing devastating damage in the country, the Directors present in Mauritius were not available for signing and forwarding the original objections. To meet the deadline, therefore, the assessee got the original objections signed by one of its Director available at United States of America and filed the scanned copy on 19.01.2018. Thereafter on 22.01.2018 the original documents were

received by the assessee. A copy of the newspaper reporting in respect of the cyclone at Mauritius was also attached with such objections filed before the DRP. The case of the assessee is this that there is no difference between the scanned copy and the original. The assessee urged on the curability of the lapse/irregularity, if any, and requested to consider the original one. However, such plea of the assessee was not found acceptable by the DRP and the same was rejected in limine. Hence, the instant appeal before us.

6. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that on a similar set of facts the Coordinate Bench has passed an order in the matter of MSM Satellite (Singapore) Pvt. Ltd. vs. JDIT(IT) Mumbai where the similar action of dismissing the application in limine treating the Form No. 35A filed by the assessee as non-est held to be not sustainable. A copy of the said order has also been submitted before us. He, therefore, prays for the same relief before us. On the other hand, the Ld. DR failed to controvert such contention made by the Ld. AR.

7. We have heard the respective parties, we have also perused the relevant materials available on record.

8. It appears that in the order impugned, the DRP has observed that submitting a verification form with the scanned copy of the signature is as good as submitting of unsigned paper since the scanned copy of the signature has no legal sanctity. Furthermore, it is obvious that the person scanning signature in this manner was other than the original signatory and hence if this is allowed as a mode of validation of the document, anyone can act on behalf of some other person by scanning others signature as also observed by the DRP. The said Form No. 35A claimed to be filed in terms of Rule 4 of the

DRP rules had not mentioned whether the same was verified with original signature for the reason as claimed by the assessee and hence the said application has been rejected in limine by the DRP.

After careful reading of the order passed by the DRP we find no observation as regards the reason explained by the assessee for filing the Form No. 35A with the scanned signature. Rather, we find that when the concerned Director was not available at Mauritius, the assessee with bona fide intention got the said form signed by the other Director of the company available in United States of America and filed the scanned document thereon in due date. Even it is a defect in the eyes of law, according to us, it is procedural defects and curable in nature, since procedures are handmade of justice. On this issue we have considered the judgment passed by the Hon'ble Tribunal in the matter of MSM Satellite (Singapore) Pte. Ltd. vs. JCIT (2016) 75 taxmann.com 216 (Mumbai) as relied by the Ld. AR in support of his case. The relevant portion whereof is as follows:-

“14. We have analysed the conduct and mind of the assessee and find the activities suggest inescapably that assessee wants to make use of the benefits of the office of DRP. They are: preparedness of the relevant papers in Form no. 35A, signed the same in time, scanned them, sent the office in India for filing before the DRP and ensured filing them before the expiry of the due date i.e. within 30 days from the date of the draft order of the AO. In that case, why the same was not replaced by the assessee by filing Original Form No. 35A. As discussed above, we find, the same is not without reason and the same being the change in the Representative. As such, the furnishing of the scanned papers and replacing them with hard copies or soft copies, if any, is now not new to the Department. Further, now, the Revenue started accepting the e-filing of application/appeals these days. Why not this also should not be deemed as such but for the procedural defects, if any.

Considering the same, we are of the view that the both decisions of the first appellate authority in treating the application non-est and dismissing the same as in limine are unsustainable in law. We order accordingly. Thus, grounds no. 1 to 4 raised by the assessee are allowed. Considering our decisions on the preliminary issues raised in grounds no. 1 to 4, we are of the view that the rest of the grounds raised in the appeal are required to be remanded to the file of the DRP/AO for want of speaking order on each of the issues raised in Grounds no. 5 to 20 of the grounds

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of appeal. Revenue shall grant a reasonable opportunity of being heard to the assessee as per the set principles of natural justice. Accordingly, Grounds no. 5 to 20 raised by the assessee are allowed for statistical purposes.

In the result, appeal filed by the assessee is allowed.”

It appears that the Ld. Tribunal pleased to observe that when the Revenue is accepting the e-filing of documents then the rejection of the Form 35A submitted by the assessee is unsustainable in the identical issue.

In that view of the matter, respectfully relying upon the ratio laid down in the above judgment we find no merit in rejecting the Form 35A filed by the assessee and thus we quash the order impugned.

Consequently, we allow the submission of Form 35A filed by the assessee. The instant appeal is, thus, allowed with the direction upon the DRP to accept the original Form No. 35A submitted by the assessee and to proceed with the matter upon giving an opportunity of hearing to the assessee and to pass a reasoned order in accordance with law.

9. In the result, assessee’s appeal is allowed for statistical purposes in the terms indicated above.

10. Before parting we would like to make certain observation relating to the issue cropped up under present scenario as to whether when the hearing of the matter was concluded on 08.01.2020 the order can be pronounced today i.e. on 28.07.2020. The issue has already been discussed by the Co-ordinate Bench in the case of DCIT vs. JSW Ltd. (ITA Nos. 6264 & 6103/Mum/2018) pronounced on 14.05.2020 in the light of which it is well within the time limit permitted under Rule 34(5) of the Appellate Tribunal Rules, 1963 in view of the following observations made therein:

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“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 8th January 2020, this order thereon is being pronounced today on the day of 14th 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 **“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 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 15days 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 corona virus “should be considered a case of natural calamity and FMC (*i.e. force majeure clause*) may be 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

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

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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.”

11. On the basis of the observation made in the aforesaid judgment we exclude the period of lockdown while computing the limitation provided under Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963. Order is, thus, pronounced under Rule 34(4) of the said Rule by placing the details on the Notice Board.

12. In the result, assessee’s appeal is allowed for statistical purposes in the terms as indicated above.

This Order pronounced in Open Court on	28/07/2020
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Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Mumbai; Dated 28/07/2020
TANMAY, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

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