IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3321/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2012-13)

DCIT, Cir, 6(3)(1) R. No. 506, 5th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	**बनाम**/ Vs.	M/s. Jayvik Foresight Innovations and Solutions Pvt. Ltd. Marathon Innova, Ganpatro Kadam Marg, Lower Parel, Mumbai-400013.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCJ4085H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Shishir Dhamija (DR)
Assessee by:	Shri R. Murlidhar (AR)

सुनवाई की तारीख / Date of Hearing: 06/02/2020
घोषणा की तारीख /Date of Pronouncement: 24/08/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 03.02.2017 passed by the Commissioner of Income Tax (Appeals) -12, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2012-13.

2. The revenue has raised the following grounds: -

" 1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.16,50,08,000/- u/s 68 of the Act on the account of Unexplained Share Premium.

2. On the facts and in the circumstances of the case and in law the Ld CIT(A) erred in deleting the addition of Rs.16,50,08,000/- without appreciating the fact that the genuineness of the share

premium amount and the credit worthiness of the company has not been established by the assessee and demerger of the finance division of M/s. Homan! Tools Pvt. Ltd. does not satisfy the conditions laid down in section 2(19AA) of the income Tax Act."

3. The appellant prays that the order 'of the Ld. CIT(A) on 4he above grounds be set aside and confirm the order of the AO.

4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The brief facts of the case are that the assessee filed its return of income on 26.09.2012 declaring total income to the tune at Rs.1,50,52,094/-. The assessee revised his return of income on 01.10.2012 declaring total income to the tune of Rs.1,50,52,094/-. The return was processed u/s 143(1) of the I. T. Act, 1961. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee company was engaged in the business of Rent Income, Investing Funds for earning interest. During the year under consideration, the assessee has credited the share premium of Rs.16,50,08,000/-. The notice was given. The assessee replied that the company was the resulting company and received various assets as a result of demerger of finance division. All assets and liabilities received were recorded at book value as contained in the scheme. As per the scheme, consideration for such demerger was issue of shares to shareholders of demerged company in the mirror image of its own shareholding amounting to Rs.49,92,000/- Difference between the book value of assets transferred and share capital issued of Rs.16 crores Fifty Lacs Eight thousand was credited to share premium account. The AO was of the view that the assessee company was receiving the funds continuously from Hemant

Tools Pvt. Ltd. during the year. Thus making it is crystal clear that no assets whatsoever was ever transferred to the resulting company from the demerged company thereby beating the provisions of demerger provisions of de-merger as defined of Section 2(19AA). The AO also treated the said transaction as share transaction and accordingly the share premium in sum of Rs.16,50,08,000/- was brought to tax u/s 68 of the I. T. Act 1961. The total income of the assessee was assessed to the tune of Rs.18,00,60,094/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who deleted the addition, therefore, the revenue has filed the present appeal before us.

ISSUE NOs.1 & 2

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. Both the issues are in connection with the allowance of the claim of the assessee by deleted the addition of Rs.16,50,08,000/- u/s 68 of the Act on account of unexplained share premium. The Ld. Representative of the revenue has argued that the CIT(A) has wrongly deleted the said addition whereas the AO passed the order correctly, therefore, the finding of the CIT(A) is not justifiable, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

> *''6.4 I have carefully considered the appellant's view but/it is observed that investment activity of M/s Hemant Tools Pvt ltd is not separate from its trading activity and that the investment activity has never treated it as its business activity. It is only the incidental activity through*

which the appellant has made investment out of its own profit. The income from the so called investment activity is not from the activity from business but its income is from other sources as well as capital gain. Therefore, the investment activity cannot be treated as business activity of M/s. Hemant Tools Pvt. Ltd.

In such circumstances, the demerger of the M/s. Hemant Tools Pvt. Ltd. with the appellant cannot be held that it was within the preview of section 2(19AA) of the Act.

But, it is true that the Hon'ble Mumbai High Court had sanctioned the scheme of demerger of investment division of Hemant Tools Pvt Ltd with Jayvik Foresight Innovation and solution Companies Act, 1956. Further, M/s Hemant Tools Pvt. Ltd has large reserve & such on account demerger the appellant has shown receivables from Hemant Tools Pvt. Ltd. and interest received thereon is offered for taxation under the head income from other sources. Further, the appellant has shown income from sale of investment as capital. Thus, the identity and creditworthiness of M/s Hemant Tools Pvt Ltd and genuineness of the transaction is proved as the scheme of demerger is approved by the Hon'ble Mumbai High Court as sought by the appellant under section 391 to 395 of the Companies Act. Therefore, the addition cannot be upheld under section 68 of the Act.

In my opinion, the only action that is to be taken in such circumstances is that the appellant is not eligible to claim exemption u/s 47 of the Act. In this case the appellant has received only one property, ie, HDFC Mutual fund which is only the taxable element. Though the AO noted in the assessment order that " the demerger was done just to infuse unexplained money of the appellant into the business channelizing it by means of demerger and creating unjustified share premium account to infuse the money as and when required and at the same time to avoid levy of tax. "but the AO has not brought out on record that the appellant has unexplained money which is brought into the appellant's business in the garb of demerger of investment division of Hemant Tools Pvt Ltd. From the records itself, it is found that M/s Hemant tool; Pvt Ltd has large Reserve and surplus. The AO himself noted in the assessment order that" on perusal of the bank statement of the assessee it was fond that

the assessee had received funds continuously form Hemant Tools Pvt Ltd".

This makes clear that the AO has complete knowledge of receipt of fund and facts of the case. The AO did not bring on record any evidence of unexplained money of the appellant received. in the garb of demerger of these companies. 'Therefore, no addition u/s 68 of the Act is called for. Accordingly ground no 1 of the appeal is partly allowed."

5. On appraisal of the above mentioned finding, we noticed that the Hon'ble Mumbai High Court had sanctioned the scheme of demerger of investment division of Hemant Tools Pvt. Ltd. with Jayvik Foresight Innovation and Solution Pvt. Ltd. in view of Section 391 to 394 of the Companies Act, 1956. Further, M/s. Hemant Tools Pvt. Ltd. was having reserve and surplus fund and on account of demerger the appellant has shown the receivable from Hemant Tools and received interest thereon which was offered for taxation under the head income from other sources. The assessee has also shown the income from sale of investment as capital gain. Identity and creditworthiness is not doubted. There is nothing on record to which it can be assumed that the own money has been introduced on account of demerger of the investment division of Hemant Tools Pvt. Ltd. The assessee was also receiving the funds continuously from the Hemant Tools. What was not explained by assessee is not on record. The transaction has been properly explained and there is no iota evidence on record to which it can be assumed that the own money has been introduced which liable to be addition u/s 68 of the Act. Moreover, we noticed that the Hemant Tools Pvt. Ltd. during the investing activity which was never treated as business activity. The investment was from other sources as well as from capital gain. The investment activity was not liable to be treated as

business activity of M/s. Hemant Tools Pvt. Ltd. Accordingly, demerger of the Hemant Tools Pvt. Ltd. with the appellant cannot be held within the provisions of Section 2(19AA). The facts are not distinguishable at this stage. We nowhere found illegality and infirmity and the order passed by the CIT(A) in question. Taking into account all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, all these issues are decided in favour of the assessee against the revenue.

Reasons for delay in pronouncement of order

6.1 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.

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

6.3 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:*
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> *(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 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 excludingat 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.

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.

6. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 24/08/2020

Sd/-	Sd/-
(PRAMOD KUMAR)	**(AMARJIT SINGH)**
VICE PRESIDENT	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 24/08/2020
Vijay Pal Singh/Sr.PS

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.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**