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

Before Shri Pramod Kumar, Vice President
and Shri Amarjit Singh, Judicial Member

ITA No. 5254/Mum/2018
(Assessment Years: 2013-14)

M/s Unitech Marketing Services, 511, Plot No. 15, Raheja Plaza, Co. Soc. Ltd. Veera Desai Road, Shah Industrial Estate, Mumbai – 400 053	Vs.	Asst. Commissioner of Income Tax, Circle-17(3), Aayakar Bhavan, 1st Floor, Mumbai
PAN – AAAFU7279F		
(Appellant)		**(Respondent)**

Appellant by: Shri V. P. Kothari, A.R
Respondent by: Shri Padma Ram Mirdha, D.R

Date of Hearing: 04.02.2020
Date of Pronouncement: 24 .08.2020

O R D E R

PER AMARJIT SINGH, JM

The assessee has filed the present appeal against the order dated 18.06.2018 passed by the CIT(A)-28, Mumbai, relating to the assessment year 2013-14. The assessee has raised the following grounds of the appeal:

"1. The learned Commissioner of Income Tax has erred in law and on facts in dismissing the appeal on technical ground stating that appeal is not maintainable without considering the facts that the working given to the learned Assessing Officer under Rule 8D r.w.s 14A was without prejudice and claiming that there was no expenditure incurred by the appellant.

2. The learned Commissioner of Income Tax has erred in law and on facts in confirming the disallowance of Rs.1,95,953/- under Rule 8D r.w.s 14A of the Income Tax Act, 1961 without properly considering the facts and circumstances of the case that the appellant has not incurred any expenditure for earning such income.

3. Your appellants craves, leave to add, alter and / or amend the above grounds of appeal."

2. Brief facts of the case are that the assessee filed its return of income on 17.09.2013 declaring total income of Rs.1,31,23,610/- relevant to the assessment year 2013-14. The return was processed as such under Sec.143(3) of the Income Tax Act, 1961. The case was selected for scrutiny assessment under CASS. The notice under Sec.143(2) and 143(1) were issued and served upon the assessee. On verification, it was found that the assessee has earned dividend income which has been claimed exempt income. The assessee earned a sum of Rs.2,78,205/- from Long Term Capital Gain from DWS and Sundaram FMP. The assessing officer issued notice to the assessee in view of provision under Sec. 14A r.w.Rule 8D and after reply of the assessee the assessing officer assessed expenditure to earn exempt income in sum of Rs.1,95,953/-. And the total income of the assessee assessed in sum of Rs.1,35,83,700/-.

3. Aggrieved by this order, the assessee carried the matter in appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the appeal before us.

Issue No.1

4. Under these issue the assessee has challenged the addition raised in view of the provision under Sec.14A r.w. Rule 8D. At the very outset, the ld. representative of the assessee has argued that the assessee's own fund is of Rs.5.52 crores where as the investment in the tax free income security was in sum of Rs. 65,00,000/-, therefore, there should be no interest disallowance in view of the decision of the Bombay High Court in the case of Reliance Utility and Power Ltd. bearing ITA No. 1398 of 2008 and CIT Vs. HDFC Ltd. 366 ITR 505. On the other hand the ld. Representative of the department has refuted the said contention. The balance sheet as on 31.02.2013 is on the record which lies at Page 10 of the paper book. The balance sheet speaks that the assessee's own refund is more than 64.82 crores whereas the investment is to the extent of 64.82 lacs. In view of the decision relied on the ld. representative of the assessee it has been observed by the Hon'ble High Court that the investment if any made for the purpose of exempt income would be treated from its own funds. Hence, in the said circumstances there should be in no disallowance. The finding of the **Reliance Utility** **[2009] 178 Taxman 135 (Bombay)** which is hereby reproduced as under.:-

> *"**8.** We have heard learned counsel for both the parties. In our opinion the very basis on which the revenue had sought to contend or argue their case*

that the shareholder funds to the tune of over Rs. 172 crores was utilised for the purpose of fixed assets in terms of the balance sheet as on 31st March, 1999, is fallacious. Firstly, we are not concerned with the balance sheet as of 31-3-1999. What would be relevant would be balance sheet as on 31-3-2000. Apart from that, the learned counsel has been unable to point out to us from the balance sheet that the balance sheet as on 31-3-1999 showed that the shareholders funds were utilized for the purpose of fixed assets. To our mind the profit and loss account and the balance sheet would not show whether shareholders funds have been utilised for investments. The argument has to be rejected on this count also.

9. *Apart from that we have noted earlier that both in the order of the CIT (Appeals) as also the Appellate Tribunal, a clear finding is recorded that the assessee had interest-free funds of its own which had been generated in the course of the year commencing from 1-4-1999. Apart from that in terms of the balance sheet there was a further availability of Rs. 398.19 crores including Rs. 180 crores of share capital. In this context, in our opinion, the finding of fact recorded by CIT (Appeals) and ITAT as to availability of interest-free funds really cannot be faulted.*

10. *If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion the Supreme Court in East India Pharmaceutical Works Ltd.'s case (supra) had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd.'s case (supra) where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case (supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the overdraft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this* presumption is established considering the finding of fact both by the CIT (Appeals) and ITAT."

5. In the case of CIT Vs. HDFC Ltd. 366 ITR 505 which is reproduced as under.:-

*"**4.** We do not agree. In the case at hand, as recorded by the ITAT, undisputedly the Assessee's own funds and other non-interest bearing funds were more than the investment in the tax free securities. The ITAT therefore held that there was no basis for deeming that the Assessee had used the borrowed funds for investment in tax free securities. On this factual aspect, the ITAT did not find any merit in the contention raised by the Revenue and therefore, accordingly answered the question in favour of the Assessee. On going through the order of the CIT (Appeals) dated 28th March 2005 as well as the impugned order, we do not find that the CIT (Appeals) or the ITAT erred in holding in favour of the Assessee. In this regard, the submission of Mr Mistry, the learned Senior Counsel appearing on behalf of the Assessee, that this issue is squarely covered by a judgment of this Court in the case of CIT v. Reliance Utilities & Power Ltd. [2009] 313 ITR 340/178 Taxman 135 (Bom.) is well founded. The facts of that case were that the Assessee viz. M/s Reliance Utilities and Power Ltd. had invested certain amounts in Reliance Gas Ltd. and Reliance Strategic Investments Ltd. It was the case of the Assessee that they themselves were in the business of generation of power and they had earned regular business income therefrom. The investments made by the Assessee in M/s Reliance Gas Ltd. And M/s Reliance Strategic Investments Ltd. were done out of their own funds and were in the regular course of business and therefore no part of the interest could be disallowed. It was also pointed out that the Assessee had borrowed Rs.43.62 crores by way of issue of debentures and the said amount was utilised as capital expenditure and inter-corporate deposit. It was the Assessee's submission that no part of the interest bearing funds (viz. Issue of debentures) had gone into making investments in the said two companies. It was pointed out that the income from the operations of the Assessee was Rs.313.53 crores and with the availability of other interest free funds with the Assessee the amount available for investments out of its own funds were to the tune of Rs.398.19 crores. In view thereof, it was submitted that from the analysis of the balance-sheet, the Assessee had enough interest free funds at its disposal for making the investments. The CIT (Appeals) on examining the said material, agreed with the contention of the Assessee and accordingly deleted the addition made by the Assessing Officer and directed him to allow the same under the provisions of the Income Tax Act, 1961. The Revenue being aggrieved by the order preferred an Appeal before the ITAT who upheld the order of the CIT (Appeals) and dismissed the Appeal of the Revenue. From the order of the ITAT, the Revenue approached this Court by way of an Appeal. After examining the entire factual matrix of the matter and the law on the subject, this Court held as under :—*

"If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion, the Supreme Court in East India Pharmaceutical Works Ltd. v. CIT [1997] 224 ITR 627 had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. (1982) 134 ITR 219 where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true

character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case [1982] 134 ITR 219 the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there were funds available both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company if the interest-free funds were sufficient to meet the investment. In this case this presumption is established considering the finding of fact both by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal." (Emphasis supplied)

***5.** We find that the facts of the present case are squarely covered by the judgment in the case of Reliance Utilities & Power Ltd. (supra). The finding of fact given by the ITAT in the present case is that the Assessee's own funds and other non-interest bearing funds were more than the investment in the tax-free securities. This factual position is not one that is disputed. In the present case, undisputedly the Assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in the tax-free securities. In view of this factual position, as per the judgment of this Court in the case of Reliance Utilities & Power Ltd. (supra), it would have to be presumed that the investment made by the Assessee would be out of the interest-free funds available with the Assessee. We therefore, are unable to agree with the submission of Mr Suresh Kumar that the Tribunal had erred in dismissing the Appeal of the Revenue on this ground. We do not find that question (A) gives rise to any substantial question of law and is therefore rejected.*

***6.** Even as far as question (B) is concerned, we find no infirmity in the orders passed by the CIT (Appeals) or the ITAT. In deciding this issue, CIT (Appeals) and the ITAT have merely followed the judgment of this Court in the case of American Express International Banking Corpn. v. CIT [2002] 258 ITR 601/125 Taxman 488. On going through the said judgment, we find that question (B) reproduced above and projected as substantial by Mr Suresh Kumar is squarely answered by the judgment of this Court in the case of American Express International Banking Corpn. (supra). In view thereof, we do not find that even question (B) gives rise to any substantial question of law that needs to be answered by this Court.*

> ***7.*** *As far as question (C) is concerned, we find that an identical question of law was framed and answered in favour of the Assessee by this Court in its judgement dated 4-7-2014 in Income Tax Appeal No.1079 of 2012, CIT-2 v. Lord Krishna Bank Ltd. (now merged with HDFC Bank Ltd.). Mr Suresh Kumar fairly stated that question (C) reproduced above is covered by the said order. In view thereof, we are of the view that even question (C) does not raise any substantial question of law that requires an answer from us."*

6. On the basis of said decision we are of the view that there should be no disallowance in view of the provision under Sec. 8D(2)(ii). Accordingly, we delete the addition and decided the issue in favour of the assessee. Further we notice that the investment to the tune of Rs.65,05,859.23 is liable to be taken into consideration for the purpose of assessing the expenditure in view of the provision under Rule 8D (2)(iii) of the Rule and accordingly the expenditure has been assessed to the tune of Rs.32,529-30. Undoubtedly, those income which yielded exempt income is liable to be taken into consideration while application of provisions under Rule 8D(2)(iii) of the Rule Accordingly, we set aside the calculation did by the A.O as well as confirmed by the CIT(A) and restore the issue before the A.O to re-assess the expenditure to earn exempt income in view of the provision under Sec. 14A r.w. Rule 8D(2)(iii) of the Act.

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:*
>
> *(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.

7. Accordingly, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 24.08.2020

Sd/- Sd/-

(Pramod Kumar) (Amarjit Singh)
VICE PRESIDENT JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 24 .08.2020
P.S Rohit

आदेशकीप्रतिलिपिअग्रेषित/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.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)

आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**