

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

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

आयकर अपील सं/ I.T.A. No.755/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2012-13)

Malabar Hill Club Ltd. B. G. Kher Marg, Malabar Hill, Mumbai-400006.	बनाम/ Vs.	DCIT, Circle-5(2)(2) Aayakar Bhavan, Maharashi Karve Road, Mumbai- 400020.
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आयकर अपील सं/ I.T.A. No.3592/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2010-11)

ITO 5(2)(3) Room No.566, 5 th Floor, Aayakar Bhavan, Mumbai- 400020..	बनाम/ Vs.	Malabar Hill Club Ltd. B. G. Kher Marg, Malabar Hill, Mumbai-400006.
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACW3868M

(अपीलार्थी /Appellant) .. (प्रत्यर्थी / Respondent)

Assessee by:	Shri J. D. Mistry/ Niraj Sheth
Revenue by:	Shri Jothilakshmi Nayak (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 13/02/2020

घोषणा की तारीख /Date of Pronouncement: 24/08/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee as well as revenue has filed the above mentioned appeals against the different order passed by the Commissioner of Income Tax (Appeals)-10, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the assessment years 2010-11 & 2012-13.

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3. The assessee has filed the present appeal against the order dated 28.10.2016 passed by the Commissioner of Income Tax (Appeals)-10, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the assessment year 2012-13.

4. The assessee has raised the following grounds: -

"1 : 0 Re.: Addition of Rs.47,55,956/- being part of fees received from life members:

The Commissioner of the Income-tax (Appeals) has erred in confirming the view of the Assessing Officer that SOS/c of the fees received by the Appellant from life members is taxable and in not following the decision of the Jurisdictional High Court and the Income-tax Appellate Tribunal in the Appellant's own case on the same issue for the preceding assessment years.

1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the addition made by the Assessing Officer from the fees received from life members is misconceived , erroneous, incorrect and bad- in-law and the Commissioner of Income-tax (Appeals) ought to have held as such.

1 : 3 The Appellant submits that the Assessing Officer be directed to delete the addition so made and to re-compute its total income accordingly.

2 : 0 Re.: Treating entrance fees received from the ordinary members as taxable receipt:

2 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the view of the Assessing Officer that 800/c of the entrance fees received by the Appellant during the year from ordinary members is a revenue receipt forming part of the taxable income for the year.

2 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the entire entrance fees received from the ordinary members is a capital receipt and hence is not liable to tax and the stand taken by the Assessing Officer in this regard is misconceived, erroneous, incorrect and bad- in-law and the Commissioner of Income-tax (Appeals) ought to have held as such.



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2 : 3 The Appellant submits that the Assessing Officer be directed to delete the addition so made and to re-compute its total income accordingly.

3 : 0 Re.: Addition of Rs. 35,23,353/- towards the entrance fees received from the corporate members:

3 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the view of the Assessing Officer that 800/c of the entrance fees received during the year by the Appellant from the corporate members is a part of Appellant's taxable income for the year.

3 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, following the matching principle only 1/10th of the entrance fees received from the corporate members is taxable income for the year and the balance of the entrance fees have been offered to tax in the subsequent years and hence the addition made by the Assessing Officer of the fees received from the corporate members is misconceived , erroneous, incorrect and bad-in-law and the Commissioner of Income-tax (Appeals) ought to have held as such.

3 : 3 The Appellant submits that the Assessing Officer be directed to delete the addition so made and to re-compute its total income accordingly.

Without Prejudice to the above:

3 : 4 The Appellant submits that in the event it is held that entire 80% of entrance fees received from the corporate members is taxable income for the year then consequential relief be granted in subsequent years when the same have been offered to tax by the Appellant.

4 : 0 Re.: Considering redemption/switch-out of units of mutual fund as business income

4 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer of considering redemption / switch-out of units of mutual funds by the Appellant as business income.

4 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject redemption / switch-out of units of mutual funds cannot be treated as business income and the stand taken by the Assessing Officer in this regard is erroneous, misconceived and ought to be struck down and the Commissioner of Income-tax (Appeals) ought to have held as such.



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4 : 3 The Appellant submits that the Assessing Officer be directed to consider redemption / switch-out of units of mutual funds as capital gain / (loss) and to re-compute its total income accordingly.

5 : 0 Re.: Credit for self - assessment tax of Rs. 11,84,695/- not granted:

5 : 1 The Commissioner of Income-tax (Appeals) has erred in not deciding on the issue relating to not granting by the Assessing Officer of credit for the tax paid on self- assessment amounting to Rs. 11,84,695/-.

5 : 2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject the Appellant is entitled to credit for tax paid on self -assessment during the year and the Commissioner of Income-tax ought to have directed the Assessing Officer to grant credit for the same.

5 : 3 The Appellant submits that the Assessing Officer be directed to grant the credit for tax paid on self- assessment and to re-compute its tax liability accordingly

6 : 0 Re.: Non-granting of deductions under Chapter VI-A from Gross Total Income

6 : 1 The Commissioner of Income-tax (Appeals) has erred in not deciding on the issue relating to not granting by the Assessing Officer of deduction of Rs.45,000/- u/s. 80G of the Income-tax Act, 1961.

6 : 2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is entitled to deduction u/s. 80G of the Income Tax Act, 1961 and the Commissioner of Income-tax ought to have directed the Assessing Officer granted deduction for the same.

V6 : 3 The Appellant submits that the Assessing Officer be directed to re-compute its total

income after granting deductions u/s. 80G of the Income-tax Act, 1961.

7 : 0 Re.: Non granting set off of brought forward unabsorbed depreciation

7 : 1 The Commissioner of Income-tax (Appeals) has erred in not deciding on the issue relating to not granting by the Assessing Officer a set off of brought forward unabsorbed depreciation against the business income assessed for the year.



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7 : 2 The Appellant submits that considering the facts and circumstances of her case and the law prevailing on the subject it is entitled to a set off the brought forward unabsorbed depreciation against the business income assessed for the year and the Commissioner of Income-tax ought to have directed the Assessing Officer to set off the same.

7 : 3 The Appellant submits that the Assessing Officer be directed to set off of the brought forward unabsorbed depreciation and to re-compute the Appellant's total income accordingly.

8 : 0 Re.: Not quantifying the brought forward 'long term capital loss' and 'short term capital loss' to be carried forward to subsequent Assessment Years:

8 : 1 The Commissioner of Income-tax (Appeals) has erred in not deciding on the issue relating to not quantifying/notifying by the Assessing Officer they brought forward 'long term capital loss' and 'short term capital loss' to be carried forward to the subsequent years as laid down in section 157 of the Income-tax Act, 1961.

8 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to carry forward the brought forward 'long term capital loss' and 'short term capital loss' in terms of section 74 of the Income-tax Act, 1961 and the Commissioner of Income-tax ought to have directed the Assessing Officer to quantify the same.

8 : 3 The Appellant submits that the Assessing Officer be directed to quantify the brought forward 'long term capital loss' and 'short term capital loss' to be carried forward to the subsequent years in accordance with law.

9 : 0 Re.: General

9 : 1 The Appellant craves leave to add, alter, amend and/or substitute and/or modify in any manner whatsoever modify all or any of the foregoing grounds of appeal at or before the hearing of the appeal.”

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2012 declaring total loss to the tune of Rs.(-) 3,66,68,601/-. The return was processed u/s 143(1) of the I. T. Act, 1961. Thereafter, the case was selected for scrutiny and notice u/s 143(2) of the Act dated 06.08.2013 was issued and served upon the assessee. Thereafter,



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notices u/s 142(1) of the Act dated 22.09.2014 & 08.12.2014 were also issued and served upon the assessee. The assessee company was engaged in the business of Club with catering, games and other recreational facilities available to members. During the year under consideration, it was noticed in the computation of income that the company has deducted a sum of Rs.11,40,649/- from Net Profit to derive Business income being interest on Tax Free Bonds. On the perusal of the details of interest on Tax Free Bonds filed on 08.01.2015, it was seen that it includes the interest which was not in nature of Tax Free Bonds. The details are hereby mentioned as under.:-

S. No.		
1	Interest on Saving Bank	6,41,558
2	Interest on Application Money	2,42,266
3	Interest on Deposits given- Best	58,458
4	Interest on Deposits Bank	3,767
		9,46,049

The notice was given and after the reply of the assessee, the interest in sum of Rs.8,50,344/- was added to the income of the assessee. After some disallowance of fees receipt from the members and u/s 14A of the Act 1961 and capital gain etc, the total income of the assessee was assessed to the tune of Rs.7,35,61,530/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) 10, Mumbai who partly allowed the claim of the assessee but assessee was not satisfied, therefore, the assessee has filed the present appeal before us.

4. We have heard the argument advanced by the Ld. Representative of the Department and has gone through the case carefully. The assessee did not appear before us. We find that Ld. CIT(A) has dismissed the appeal for



non-prosecution. We find that it is incumbent upon the Ld. CIT(A) to pass an order on the merits of the case and not to dismiss the appeal for non-prosecution.

5. For this proposition we placed reliance upon the following case laws.

(1) CIT Vs. Premkumar Arjundas Luthra (HUF) (2017) 154 DTR (Bom) 302

(2) CIT Vs. S Chenniappa Mudaliar (1969) 74 ITR 1 (SC)

6. Accordingly in the interest of justice we remit the issue raised in the appeal the file of the Ld. CIT(A). Ld. CIT(A) is directed to consider the issue afresh and pass an order on the merits of the case after giving an opportunity of being heard to the assessee in accordance with law. Therefore, in the said circumstances, we are of the view that the order of the CIT(A) is not liable to be sustainable in the eyes of law, therefore, we set aside the finding of the CIT(A) on all the issues and restored the matter before the CIT(A) to decide the matter afresh by giving an opportunity of being heard to the assessee in accordance with law.

In the result, the appeal filed by the assessee is hereby allowed for statistical purposes.

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7. The present appeal has been filed by the Revenue against the order of the CIT(A)- 10, Mumbai dated 02/03/2015 pertaining to the AY 2010-11.

8. We have heard the Ld. Representative of the parties and perused



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materials available on record. During course of hearing, ld. DR for the revenue submitted that tax effect involved in this appeal filed by the revenue is less than Rs. 50 lacs and in view of latest CBDT circular No. 3/2018 dated 11-7-2018, and also modified circular No. 17/2019 dated 08/08/2019, appeal filed by the revenue is not maintainable and needs to be dismissed. The Ld. DR, further argued that, the issue involved in this appeal is appears to be covered by exception provided under clause (e) of subsequent circular and therefore, if required the revenue shall be allowed to file miscellaneous application to re-call the order. We, find that, the CBDT, recently had issued a circular no. 3/2018 dated 11-7-2018, superseding its earlier circular no. 21/2015 and enhanced monetary limit for filing appeal before various appellate authorities and accordingly, enhanced monetary limit to Rs.20,00,000/- for filing appeal before the Tribunal. Further, the board has issued one more circular vide **Circular no.17/2019 dated 08/08/2019** and enhanced monetary limit for filing appeal before appellate Tribunal to Rs. 50,00,000/-. Further, in the said circular, the CBDT had instructed its officer's to file application for withdrawal of appeal already filed or not to pursue pending appeals. We, therefore, by taking into account the CBDT circular No. 3/2018 dated 11-7-2018 and Circular no.17/2019 dated 08/08/2019 and also considering the fact that tax effect involved in the present appeal is less than the amount of monetary limit fixed by the CBDT for not filing appeal, dismissed appeal filed by the revenue as not maintainable. We, further noted that the **Co-ordinate bench of ITAT, Ahmedabad 'A' Bench in ITA. No. 1398/Ahd/2004, vide order dated 14/08/2019** has passed detailed order considering new circular issued by the CBDT and held that except amendment to para 3 of the circular



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No.3/2018 dated 11/07/2018, all other portions of the circular No.03/2018 (supra) have remain in fact, therefore, this circular is applicable even for pending appeals and accordingly, rejected the arguments of the revenue that the effect of the circular shall come into force from the date of issue of this circular. Therefore, considering the facts and circumstances of this case and also taken note of circulars issued by the CBDT including circular No. 17/2019 dated 08/08/2019, and also by following the decision of Co-ordinate Bench, we dismissed appeal filed by the revenue as not maintainable. However, we keep open option to the revenue to file a miscellaneous application, if necessary, in case the issues involved in the present appeal comes within 3 exceptions as provided in para 10 of said circular and clause (e) of subsequent circular.

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



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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



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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 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 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 be 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 **“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 lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the



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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.

9. In the result, the appeal filed by the assessee is hereby allowed for statistical purposes and appeal filed by the revenue is hereby dismissed.

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

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

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



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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,

सत्यापित प्रति //True Copy//

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