

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

**BEFORE SHRI VIKAS AWASTHY, JM &  
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 504/Mum/2018  
(निर्धारणवर्ष / Assessment Year: 2009-10)

ITO 6(3)(3), Room No. 524, 5 <sup>TH</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	<b>बनाम/ Vs.</b>	M/s Kalash Metals Pvt. Ltd. 41, 4 <sup>th</sup> floor, Kalpataru CHS, Seth Motisha, Lane Byculla, Mumbai-400 010
स्थायीलेखासं./जीआइआरसं./PAN No. AACCK8464F		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri K. Bhoopati, DR
प्रत्यर्थीकीओरसे/ <b>Respondentby</b>	:	Shri S.C. Tiwari & Ms. Rutuja N Pawar, ARs
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	29.01.2020
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	26.06.2020

आदेश / ORDER

**Per S. Rifaur Rahman, Accountant Member:**

The present Appeal has been filed by the revenue against the order of Ld. Commissioner of Income Tax (Appeals) – 24 in short referred as ‘Ld. CIT(A)’, Mumbai, dated 27.10.17 for Assessment Year (in short AY) 2009-10.

2. Brief facts of the case are, assessee filed its return of income for AY 2009 – 10 on 03.11.2010 declaring total income of Rs. 1,14,490/-. Thereafter, the case was processed u/s 143(1) of the Act. Later on, the case was reopened u/s 147 of the Act after issuing the notice u/s 148 of the Act and the reasons for reopening was sent to the assessee that as per the information of DIT(Inv.), Mumbai, it was found that the account of Mr. Amarchand Premchand Walmiki was credited with an amount of Rs. 13,25,000/- on 21.02.2009 from M/s Kalash Metals Pvt. Ltd. through RTGS and assessee was asked to explain the above transaction. Accordingly, the assessment was reopened. Further, AO issued notice u/s 142(1) and 143(2) to the assessee and served. In the above notice, assessee was asked to provide information about payment to Mr. Amarchand Premchand Walmiki and further AO observed that assessee has issued share application with premium and assessee was asked to provide the necessary information and documentation on issue of shares during this year.

3. In response, assessee vide its submission dated 19.12.16 submitted on 26.12.16 furnished the details of share application

received from 12 subscribers alongwith their income tax returns and PAN details. AO observed that assessee has only furnished the name, address and amount received from the above parties alongwith acknowledgement copies of the return of income and single page bank statement. The AO verified the 6 parties by deputing the ward inspector and based on this report, he treated the above said parties as not genuine and by relying on various judicial pronouncements in the case of **M/s Bhola Shankar Cold Storage Pvt. Ltd. vrs. JCIT (2004) 270 ITR 487 (Cal)**, **Durga Prasad More 82 ITR 540**, **Roshan Di Hatti vrs. CIT (1977) 107 ITR 937 (SC)** and **Kale Khan Mohammad Hanif vrs. CIT (1963) 50 ITR 1(SC)**, has dismissed the contention of the assessee and made the addition u/s 68 of the Act for the subscription value of shares Rs. 2.85 crores.

4. Further, assessee filed the details of payment of Mr. Amarchand Premchand Walmiki to the extent of Rs. 13,25,000/- and submitted that the above payment was made at the behest of the creditor M/s Raj Laxmi Metals & Alloys against the credit balance and running payment towards the supply of goods. AO rejected the above submission of the assessee and observed that

no confirmation was received from M/s Raj Laxmi Metals & Alloys and accordingly, he made the addition u/s 69C of the Act.

5. Aggrieved with the above order, assessee preferred an appeal before Ld. CIT(A) and filed before him a detailed submission. Ld. CIT(A) after considering the detail submissions of the assessee, observed that assessee company has issued 1,42,500 equity shares of Rs. 10 each at the premium of Rs. 190 per share and this was subscribed by total 12 subscribers. All the above parties are third parties and un-related to the assessee. As contended by assessee, this was not an issue for which assessment was reopened and this issue was taken up in the course of re-assessment, therefore it could be construed that AO has no information that the shares issued at premium are bogus transaction. As stated above, there are total 12 subscribers out of which, 4 subscribers are based in Kolkata and remaining are in Mumbai. The AR argued that the assessee has furnished all the relevant and basic details in respect of issue of shares to all the parties. He observed that the assessee has furnished evidences such as Form-2 filed with ROC wherein the details of fresh shares issued during the year are given and in this Form, the

details of all the subscribers are given and stated that shares are allotted to them.

6. Apart from this, Ld CIT(A) observed that assessee has also furnished the financial statements i.e balance sheet with annexure of all the subscribers and all the funds received through banking channel. He further observed that the copies of the bank statements of the subscribers, in which, it is revealed that there are no cash deposits in the bank accounts prior to the issue of cheque to the assessee company for investing. He further observed that assessee has filed the return of income, acknowledgement of all the parties giving the details of their PAN No. thereby proving the identity of the subscribers and assessee has also provided the other information of subscribers like Memorandum of Association and certificate of incorporation, etc.

7. He further observed that in the re-assessment order, AO has not made any sort of inquiry in respect of 6 parties out of the 12 subscribers. This cannot be understood as to how the AO without making any sort of inquiry regarding 6 subscribers, came

to the conclusion that shares issued at premium is sham and colorable transaction to introduce own undisclosed income in the garb of share application. He further observed that inquiry made by AO by deputing the field inspector and the inspector's report was never shared with assessee and it is a matter on record that assessee has filed return of income, acknowledgement of all the subscribers wherein their PAN no. are mentioned. AO has not made any fresh verification from the PAN data base about their current address. Since, AO has not made proper inquiry in these transactions, he relied on the judgment in the case of **M/s Gagandeep Infrastructure P. Ltd. and CIT Vs. Lovely Exports Pvt. Ltd. 317 ITR 218 (SC)** and observed that where the revenue urges that the amount of share application money has been received from bogus share holders then it is for the Income Tax officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the revenue to add the same to the assessee's income as unexplained cash credit. Further, he observed that AO opined that assessee has not proved the source of source of investment made by the subscribers. In the case of M/s

**Gagandeep Infrastructure Pvt. Ltd. (supra)**, Hon'ble Bombay High Court clearly held that the amendment brought out by the Finance Act 2012 w.e.f. AY 2013-14 is prospective and not retrospective. Accordingly, he deleted the additions made u/s 68 by AO.

8. With regard to addition u/s 69C of the Act, Ld. CIT(A) observed that AO opined that assessee has not filed any supporting documents in respect of payment of Mr. Amarchand Premchand Walmiki at the behest of their creditors M/s Raj Laxmi Metals & Alloys. He observed that assessee has contended that during the re-assessment proceedings, copy of ledger account of M/s Raj Laxmi Metals & Alloys was filed alongwith copy of payment vouchers. Ld. CIT(A) verified the ledger account and the payment vouchers and it was seen by Ld. CIT(A) that there was opening balance of Rs. 8,29,543/- payable to M/s Raj Laxmi Metals & Alloys. The assessee during the year made further purchases from these parties of about Rs. 32 lakhs and against this, assessee has made to this party to the extent of Rs. 23 lakhs and one payment of Rs. 13.25 lakhs was made to Mr. Amarchand Premchand Walmiki at the behest of this party as

per the payment vouchers. He observed that AO has not doubted the purchases made from M/s Raj Laxmi Metals & Alloys and accepted the same purchases made from the above party as genuine and he doubted only the payment was made on their behest to Mr. Amarchand Premchand Walmiki and assessee has reduced the amount of Rs. 13.25 lakhs from the balance of M/s Raj Laxmi Metals & Alloys, therefore he found that the transactions are genuine and deleted the additions.

9. Aggrieved with the above order, revenue is in appeal before us.

10. At the time of hearing, Ld. DR brought to our notice findings of AO and heavily relied on the findings of AO, submitted that Ld. CIT(A) has not appreciated the onus was on the assessee to prove the creditworthiness and genuineness of all the subscribers and assessee has merely submitted the documents and has not proved the genuineness of the transactions. With regard to addition u/s 69C of the Act, he brought to our notice the observation of AO at para 10.1 of the assessment order and submitted that assessee has not proved the payment made to Mr.

Amarchand Premchand Walmiki is genuine and assessee has not submitted any documentary evidence to prove that the payment was made at the behest of M/s Raj Laxmi Metals & Alloy and he strongly submitted that the payment is not genuine and supported the findings of AO.

11. On the other hand, Ld. AR submitted that assessee has given all the relevant details of all the subscribers who has subscribed to the shares in the assessee company. He brought to our notice page 56 to 297 of the paper book and submitted that these transactions are genuine and all the subscribers was invested only through banking channel and AO merely relying on the basis of Inspector report, further submitted that the report was never shared with the assessee, rejected the contention of assessee without giving opportunity to the assessee. He further submitted that amendment to section 68 of the Act was made in Finance Act 2012 w.e.f. AY 2013-14 and it is not for the assessee to prove the source of source of the subscribers, it is for the AO to investigate all the subscribers and their source. For that proposition, he relied on the decision in the case of **CIT vrs. Steller Investment Ltd. 115 taxman 99 (SC), CIT vrs. Lovely**

**Exports Pvt. Ltd.(supra) and CIT vs. Gagandeep Infrastructure Pvt. Ltd. (supra).**

9.1 With regard to addition u/s 69C, he brought to our notice Page 299 of paper book and findings of Ld CIT(A). He submitted that the payment made to Mr. Walmiki is genuine.

10. Considered the rival submissions and material placed on record. We notice from the record and appeal memo, the revenue filed objection in the grounds of appeal that the onus was on the assessee to prove the creditworthiness and genuineness of the subscribers. The assessee has failed in all counts. We notice from the findings of the Ld CIT(A) that assessee has filed return of income, PAN and bank statement of all subscribers. Further it also submitted the Form 2, which was filed with ROC. These information clearly indicate that the transaction is genuine. The ward inspector report gave a information that the 6 subscribers are not traceable in the given address. It was not shared with the assessee and AO relied only on this report. It is for the AO to give opportunity to the assessee and he should have investigated on all the subscribers. In our considered view, the assessee has submitted all the relevant information to prove the genuineness of the transaction and are inclined to accept the findings of the Ld CIT(A), which in line with the decisions of hon'ble supreme court in Lovely Exports (supra) and hon'ble Bombay High court decisions in Gagandeep Infrastructure (supra) and CIT vs Orchid Industries P.Ltd case.

11. With regard to payment made to Mr. Walmiki, we notice that the assessee has made the payment thru cheque and it is debited in the Raj Laxmi Metals & Alloys account. We do not see any reason to doubt the transaction made thru banking channel and we are in agreement with Ld CIT(A) that AO is not doubting the purchase transaction and only doubts the payment. AO reopened the assessment based on the information from Investigation wing and he should have investigated the transaction thoroughly.

Merely making addition on suspicion. We do not see any reason to interfere with the findings of Ld CIT(A) and accordingly the ground raised by revenue is dismissed.

11. In the result appeal filed by the revenue is **dismissed**.

12. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by the Government was in force. The relevant observations of this tribunal in the said binding precedent are 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 14<sup>th</sup> 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 noticeboard.

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 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 19<sup>th</sup> 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 15<sup>th</sup> 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 *suomotu* 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 be 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 refer 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. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.*

13. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

14 Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on

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*Sd/-*

(Vikash Awasthy)

न्यायिकसदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :

Sr.PS. Dhananjay

*Sd/-*

(S. Rifaur Rahman)

लेखासदस्य / Accountant Member

26.06.2020

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
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आदेशानुसार/ BY ORDER,

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