



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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A no.1906/Mum./2015
(Assessment Year : 2010-11)

BNP Paribas India Solutions Pvt. Ltd.
Unit no.601, Infirinity Building no.4
Off Film City Road, Near Nagari Nivara
Malad (East), Mumbai 400 097
PAN – AACCB5717E

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-12(1)(2), Mumbai

..... Respondent

Assessee by : Shri Farookh V. Irani
Revenue by : Shri Sanjay Singh

Date of Hearing – 20.02.2020

Date of Order – 30.06.2020

ORDER

The captioned appeal has been filed by the assessee challenging the order dated 30th March 2015, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2010-11 in pursuance to the directions of the Dispute Resolution Panel (for short "*the DRP*").

2. Ground no.1, being general in nature does not require specific adjudication.

3. In ground no.2, the assessee has challenged addition made on account of adjustment to the arm's length price of back office support service / Information Technology Enabled Services (ITES).

4. Brief facts are, the assessee, a resident company, is a wholly owned subsidiary of BNP Paribas S.A. France and is registered under the Software Technology Parks of India (STPI). As stated by the Transfer Pricing Officer in his order passed under section 92CA(3) of the Act, the assessee operates as a captive service provider for BNP Paribas group and it provides software support services such as routine software development service, system and requirement analysis, system architecture, coding, testing and implementation which are routine patches of the software development life cycle. Further, it also provides routine back office support services such as account payable service, nostro reconciliation, trade finance, back office data processing, etc. During the year under consideration, the assessee provided back office support services to its overseas associated enterprises (AEs) and received an amount of ₹ 24,45,87,894. In the transfer pricing study report, the assessee benchmarked such transaction by adopting Transactional Net Margin Method (TNMM) as the most appropriate method with operating profit/operating cost (OP/OC) as the profit level indicator (PLI). Conducting a search process in the databases on the basis of function,

assets, risk (FAR) analysis, the assessee selected nine companies as comparables with weighted average of three years worked out at 15.7%. The margin shown by the assessee at 13.4% being within $\pm 5\%$ of the weighted average margin of the comparables, the aforesaid transaction with the AEs was claimed to be at arm's length. Further, in response to the query raised by the Transfer Pricing Officer, the assessee furnished updated single year margin of the selected comparables which worked out to 8.88%. The Transfer Pricing Officer was not satisfied with the benchmarking of the assessee. Pointing out various defects and deficiencies in the transfer pricing study report, the Transfer Pricing Officer rejected the same and proceeded to benchmark the transaction in the ITES segment independently, though, he accepted TNMM as the most appropriate method. In the process, the Transfer Pricing Officer rejected many of the comparables selected by the assessee and introduced fresh comparables. Finally, the Transfer Pricing Officer shortlisted following seven comparables with arithmetic mean @ 26.22%:-

<i>Sr. no.</i>	<i>Name of the Company</i>	<i>NCF % F.Y. 2009-10</i>
1.	<i>Aditya Birla Minacs Worldwide Ltd.</i>	<i>3.85</i>
2.	<i>Accential Technologies Ltd.</i>	<i>4.62</i>
3.	<i>Cosmic Global Ltd.</i>	<i>16.59</i>
4.	<i>Infosys B.P.O.</i>	<i>31.38</i>
5.	<i>Informed Technologies India Ltd.</i>	<i>24.96</i>
6.	<i>Nittany Outsourcing Services Pvt. Ltd.</i>	<i>21.01</i>
7.	<i>E-Clerx Services Ltd.</i>	<i>42.14</i>
	<i>Arithmetic Mean</i>	<i>26.22</i>

5. By applying the arithmetic mean of the comparables to the operating cost, he determined the arm's length price of back office support service at ₹ 27,28,70,612, which resulted in an upward adjustment amounting to ₹ 2,82,82,719. The adjustment proposed by the Transfer Pricing Officer was added back to the income of the assessee in draft assessment order. The assessee objected to the aforesaid addition before the DRP primarily on the ground of selection / rejection of certain comparables.

6. After considering the submissions of the assessee, learned DRP upheld rejection of Caliber Point Business Solution Ltd. and R. Systems Ltd. Further, accepting assessee's contention, learned DRP directed the Transfer Pricing Officer to exclude Aditya Birla Minacs Worldwide Ltd., as its related party transaction (RPT) exceeded the threshold limit of 25%. Thus, to this extent, the DRP modified the order of the Transfer Pricing Officer.

7. On the basis of the aforesaid directions of learned DRP, Assessing Officer passed the final assessment order which is now under challenge before us.

8. Shri Farookh V. Irani, the learned Sr. Counsel for the assessee has restricted his argument to selection/rejection of certain comparables before us. Hereinafter, we will deal with the issues

relating to the selection/rejection of specific comparables urged before us.

ACCENTIA TECHNOLOGIES LTD.

9. Objecting to the selection of this comparable, the learned Sr. Counsel for the assessee submitted, this company is functionally dissimilar to the assessee as it provides data analytics which comes within the ambit of knowledge process outsourcing (KPO) services. He submitted, this company has gone a long way from being a single location, a single service firm to a multi location, diversified KPO company operating from multiple locations in India, USA, U.K. and the Middle East. He submitted, the company provides healthcare receivable cycle management service including medical transcription, medical billing and receivable management and medical coding. It is also involved in developing software products under the "*Software as a Service Delivery Model*". Drawing our attention to Schedule-IX of the Annual Report of the company, he submitted, it incurred abnormal high business expenditure compared to the total operating cost which indicates that it is engaged in trading of service instead of providing service on its own. In other words, it has outsourced significant part of its business to third parties. Further, he submitted, segmental information relating to various stream of services are not available. Further, he submitted, during the year under consideration, the

company has acquired other companies which must have impacted its profitability. Thus, he submitted, for these reasons, the company cannot be treated as comparable to the assessee. In support of such contention, he relied upon the following decisions:–

- i) *Avineon India P. Ltd. v/s DCIT, [2016] 157 ITD 483/65 taxmann.com 306 (Hyd.);*
- ii) *Cognizant Technology Services P. Ltd. v/s DCIT, [2016] 67 taxmann.com 99 (Hyd.);*
- iii) *Amba Research India Pvt. Ltd. v/s DCIT, [2016] 67 taxmann.com 342 (Bang.);*
- iv) *Aptara Technologies Pvt. Ltd. v/s ACIT, [2016] 72 taxmann.com 352 (Pune);*
- v) *Sun Life India Service Centre Pvt. Ltd. v/s DCIT, [2016] 71 taxmann.com 189 (Del.);*
- vi) *Equant Solutions India Pvt. Ltd. v/s DCIT, [2016] 66 taxmann.com 192 (Del.);*
- vii) *FIL India Business Service Pvt. Ltd. v/s DCIT, [2016] 70 taxmann.com 43 (Del.);*
- viii) *Maersk Global Services Centres (India) Pvt. Ltd. v/s ITP, ITA no.1082/Mum./2015, dated 29.07.2016;*
- ix) *Torus Business Solutions Pvt. Ltd. v/s DCIT, ITA no.1974/Del./2015, dated 10.08.2018;*
- x) *M/s. Avaya India Pvt. Ltd. v/s ACIT, ITA no.1904/Del./2015, dated 03.12.2018;*
- xi) *Morningstar India Pvt. Ltd. v/s DCIT, ITA no.1520/Del./2015, dated 06.05.2019;*
- xii) *KPIT Technologies Ltd. v/s DCIT, ITA no.506/Pun./2016, dated 24.05.2019; and*

*xiii) BMC Software India Pvt. Ltd. v/s DCIT, ITA no.189/Pun./
2014, dated 22.08.2019.*

10. Shri Sanjay Singh, the learned Departmental Representative, strongly relied upon the observations of the Transfer Pricing Officer and learned DRP.

11. We have considered rival submissions and perused the material on record. From the annual report of Accentia Technologies Ltd. as well as other materials placed on record, we find that this company is providing healthcare receivable cycle management service which includes medical transmission, medical billing and receivable management and medical coding. Thus, the aforesaid activities carried on by this company come within the category of KPO services. Whereas, as per the Transfer Pricing Officer's own statement, the assessee provides routine back office support services to the AE. Further, the facts available on record indicate that this company is also engaged in development of software as well as in trading activities, whereas, segmental details regarding all its transactions are not available in the financial report. It is also a fact that during the year under consideration, the company is involved in merger and acquisition which might have impacted the profitability. Keeping in view the aforesaid facts, the Tribunal in case of a number of other assesseees engaged in providing services in ITES segment has rejected

this company as a comparable. Notably, a number of these decisions as cited before us by the learned Sr. Counsel for the assessee, relate to the impugned assessment year. Following the consistent view of the co-ordinate benches as expressed in the decisions cited before us, we direct the Assessing Officer to exclude this company from the list of comparables.

INFOSYS BPO LTD.

12. Objecting to the selection of this company, the learned Counsel for the assessee submitted, the turnover of the company during the year under consideration is very high and more than forty-six (46) times the turnover of the assessee. Therefore, this company being a giant company, keeping in view its turnover, cannot be compared to the assessee. Further, he submitted, the company has huge goodwill and brand value as it belongs to the Infosys Group. He submitted, during the year under consideration, this company has acquired another company namely Mccamish Systems LLC, which not only increased its client base in existing markets, but also opened new markets for its existing and new service offerings, post acquisition. Its manpower also increased accordingly. Therefore, the financials of the company cannot be relied upon. He submitted, the Annual Report of the company shows substantial sales and marketing and selling expenses including brand building and diversification expenditure. He

submitted, all these factors make this company incomparable to the assessee. In support of such contention, he relied upon the following decisions:-

- i) *Avineon India P. Ltd. v/s DCIT, [2016] 157 ITD 483/65 taxmann.com 306 (Hyd.);*
- ii) *Cognizant Technology Services P. Ltd. v/s DCIT, [2016] 67 taxmann.com 99 (Hyd.);*
- iii) *Sun Life India Service Centre Pvt. Ltd. v/s DCIT, [2016] 71 taxmann.com 189 (Del.);*
- iv) *Equant Solutions India Pvt. Ltd. v/s DCIT, [2016] 66 taxmann.com 192 (Del.);*
- v) *FIL India Business Service Pvt. Ltd. v/s DCIT, [2016] 70 taxmann.com 43 (Del.);*
- vi) *Maersk Global Services Centres (India) Pvt. Ltd. v/s ITP, ITA no.1082/Mum./2015, dated 29.07.2016;*
- vii) *Torus Business Solutions Pvt. Ltd. v/s DCIT, ITA no.1974/Del./2015, dated 10.08.2018;*
- viii) *M/s. Avaya India Pvt. Ltd. v/s ACIT, ITA no.1904/Del./2015, dated 03.12.2018; and*
- ix) *Morningstar India Pvt. Ltd. v/s DCIT, ITA no.1520/Del./2015, dated 06.05.2019.*

13. The learned Departmental Representative strongly relying upon the observations of the Transfer Pricing Officer and learned DRP submitted, high turnover was never taken as a ground either before the Transfer Pricing Officer or before the DRP. Therefore, the assessee cannot bring in such fresh argument at this stage.

14. We have considered rival submissions and perused the material on record. We agree with the learned Sr. Counsel for the assessee that the turnover of this company is much higher than the assessee. In fact, as rightly submitted by the learned Authorised Representative, it is more than forty-six times the assessee's turnover. Thus, as could be seen, this company is a giant compared to the assessee. Additionally, the company has created substantial goodwill and is driven by Infosys brand. All these factors certainly make this company incomparable to the assessee. The decisions cited by the learned Sr. Counsel for the assessee also support this view. In view of the aforesaid, we direct the Assessing Officer to exclude this company from the list of comparables.

CALIBER POINT BUSINESS SOLUTIONS LTD. AND R. SYSTEMS LTD.

15. This company was selected by the assessee but was rejected by the Transfer Pricing Officer. Before us, the assessee seeks inclusion of this company.

16. As could be seen from the order of the Transfer Pricing Officer, it was rejected primarily on the ground that it follows a different financial year as compared to the assessee and is also functionally dissimilar.

17. The learned Sr. Counsel for the assessee submitted, this company is engaged in providing process management, outsourcing

and transitioning services which are essentially in the nature of BPO services. He submitted, the company has two reportable segments namely, BPO service and others. Segmental information is also available in the annual report. Drawing our attention to the annual report, he submitted, the revenue earned from the BPO segment constitutes 90% of the total revenue earned. Thus, he submitted, this company is basically an ITES provider. Further, the learned Sr. Counsel for the assessee submitted, when the company is functionally similar merely because the financial year is different, it cannot be excluded as a comparable. In support of his contention, the learned Sr. Counsel for the assessee relied upon the following decisions:-

- i) *CIT v/s Mckinsey Knowledge Centre India Pvt. Ltd., ITA no.217/2014, dated 27.03.2015 (Del.); and*
- ii) *Xchanging Technology Services India Pvt. Ltd. v/s DCIT, [2015] 62 taxmann.com 253 (Del.).*

18. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and learned DRP.

19. We have considered rival submissions and perused the material on record. As could be seen from the observations of learned DRP in Para-2.4 of the order, the rejection of these companies was upheld only on the ground of having different financial year. As per rule 10B(4), what is needed to be compared is the financial result of the

comparables for the same financial year wherein the international transaction had taken place. In other words, if the financial results of the comparables relating to the financial year followed by the assessee is available or can be accurately ascertained, then there is no harm in selecting such companies as comparable if otherwise they are functionally similar to the assessee. Therefore, merely because the company is having a different financial year other than the financial year followed by the assessee, it cannot be rejected. The decisions cited by the learned Sr. Counsel for the assessee also expresses similar view. In view of the aforesaid, if the financial results of these two companies for the financial year followed by the assessee are available and can be ascertained correctly, then these two companies should be considered as comparable.

20. In the course of hearing, it has been submitted by the learned Sr. Counsel for the assessee that in the event of exclusion of Accentia Technologies Ltd. and Infosys BPO Ltd. as well as inclusion of Caliber Point Business Solutions Ltd. and R. Systems Ltd., the arithmetic mean of the comparables would be 6.27% as against assessee's margin of 13.14%. Hence, There would be no need to examine the suitability of the other comparables. In view of the aforesaid submissions, we do not intend to express any view in respect of any other comparables

which have not been specifically agitated before us. Thus, ground no.2, is disposed off accordingly.

21. In ground no.3, the assessee has challenged the addition made on account of adjustment to the arm's length price of software support services provided to the AE.

22. Brief facts are, as discussed earlier, apart from providing service in ITES segment, the assessee also provides software support service to its AEs. in the transfer pricing study report, the assessee benchmarked such transaction by applying TNMM as the most appropriate method. The assessee had selected 15 comparables with three years weighted average margin of 14.79% as against its own margin of 15%. Therefore, the transaction with AEs was claimed to be at arm's length.

23. During the proceedings before the Transfer Pricing Officer, the assessee furnished single year updated margin of the comparables which worked out to 14.68%. The Transfer Pricing Officer, however, was not satisfied with the transfer pricing analysis made by the assessee. After rejecting the transfer pricing study report, he proceeded to independently benchmark the transaction. In the process, he rejected some of the comparables selected by the assessee and introduced fresh comparables. Ultimately, the Transfer

Pricing Officer shortlisted 14 companies as comparables with arithmetic mean of 21.35%. Applying the arithmetic mean of the comparables to the operating cost, he determined the arm's length price of the transactions with the AEs at ₹ 120,91,86,446, as against the price charged by the assessee of ₹ 116,48,43,379. Resultantly, he made an upward adjustment to the ALP. The adjustment proposed by the Transfer Pricing Officer was added to the income of the assessee in the draft assessment order. The assessee challenged the aforesaid adjustment primarily on the ground of selection/rejection of some comparables. However, learned DRP more or less upheld the decision of the Transfer Pricing Officer. Of-course, learned DRP granted partial relief to the assessee in respect of some of the comparables. Being aggrieved, the assessee is in appeal before us.

24. At the very outset, the learned Sr. Counsel for the assessee submitted, if only one comparable viz. Infosys Technologies Ltd. is excluded, the assessee's margin would be within the acceptable range of the rest of the comparables, hence, there is no need to examine the acceptability or otherwise of them.

25. Objecting to the inclusion of Infosys Technologies Ltd., the learned Sr. Counsel for the assessee submitted, under no circumstances, it can be compared with the assessee as the assessee is merely a captive service provider to its AEs. He submitted, the

entire conceptualization of the software development is done by the AEs and the assessee provides routine services only. Whereas, he submitted, Infosys Technologies Ltd. is a giant company doing end-to-end solution involving development of software, services and all other related matters. He submitted, even the turnover of Infosys Ltd. at ₹ 21,140 crore is much higher than the turnover of the assessee at ₹ 181.49 crore. He submitted, in assessee's own case in assessment year 2011-12, the Tribunal in ITA no.2046/Mum./2016, dated 10th July 2019, has excluded this company on the ground of high turnover. Thus, he submitted, this company should be excluded.

26. The learned Departmental Representative strongly relied upon the observations of the Transfer Pricing Officer and learned DRP.

27. We have considered rival submissions and perused the material on record. Undisputedly, the Transfer Pricing Officer himself admits that the assessee provides routine software development service to its AEs as a captive service provider. Whereas, Infosys Technologies Ltd. does not stand on the same footing. It provides end-to-end solution with regard to the development of the software. Further, the turnover of the assessee compared to the turnover of this comparable is miniscule. It goes without saying that Infosys Technologies Ltd. is a giant company in the field of software development and over the years it has built up a massive reputation, brand value and goodwill. It is

also a fact that Infosys Technologies Ltd. owns substantial intangibles and is a risk bearing entity. Whereas, the assessee being a captive service provider bears minimum risk. All these factors certainly make Infosys Technologies Ltd. incomparable on FAR analysis. It is relevant to observe, in assessee's own case for the assessment year 2011-12 (supra), the Tribunal has rejected this company as a comparable due to its high turnover. In view of the aforesaid, we direct the Assessing Officer to exclude this company from the list of comparables.

28. Keeping in view the submissions of the learned Sr. Counsel for the assessee that on exclusion of this comparable, assessee's margin would fall within $\pm 5\%$ of the margin of the rest of the comparables, we desist ourselves from expressing any opinion on the acceptability or otherwise of the rest of the comparables. However, the issues relating to the acceptability or otherwise of these comparables are left open for adjudication if they arise in any other assessment year in future. This ground is disposed off accordingly.

29. Ground no.4, is not pressed, hence dismissed.

30. Ground no.5, 6 and 7, since are inter-connected, they are taken up for disposal together.

31. In ground no.5, the assessee has challenged the disallowance of ₹ 6,55,11,689, under section 40(a)(i) of the Act.

32. It is evident that the Assessing Officer made the aforesaid disallowance under section 40(a)(i) of the Act due to non-deduction of tax at source.

33. Learned DRP also sustained such disallowance.

34. The learned Sr. Counsel for the assessee submitted, the amount paid of ₹ 6,55,11,689, to BNP Paribas S.A., Hong Kong Branch is nothing but repayment of advance which is in the nature of loan. He submitted, ignoring of evidences submitted and brought on record both the Assessing Officer and the DRP have wrongly disallowed the payment under section 40(a)(i) of the Act. To emphasize upon the fact that the payment made to BNP Paribas S.A., Hong Kong Branch is nothing but refund of advance, learned Sr. Counsel for the assessee drew our attention to various documentary evidences placed in the paper book including the authorization letter issued by the Reserve Bank of India. Rebutting the charge of the Revenue that the amount does not tally with the figures in the Balance Sheet, the learned Sr. Counsel for the assessee submitted, it is a running account with BNP Paribas S.A., Hong Kong Branch and the advance received is one of the components out of many other entries. He also drew our attention to the ledger account copy to demonstrate that the amount received is nothing but advance. Thus, he submitted, the disallowance made

under section 40(a)(i) of the Act is unsustainable. In support, he relied upon the decision of the Hon'ble Supreme Court in G.E. India Technology Ltd. v/s CIT, [2010] 193 Taxman 234 (SC) and the decision of the Hon'ble Andhra Pradesh high Court in Hyderabad Industries v/s ITO, [1991] 59 Taxman 202 (AP).

35. As regards the disallowance of ₹ 46,43,558 contested in ground no.6, being payment made to various foreign parties, learned Sr. Counsel for the assessee submitted, such payment is not in the nature of fees for technical service as defined either under the Act or under the applicable double taxation avoidance agreements. He submitted, even if they are technical service, they do not make available technical knowledge, skill, knowhow, etc. Hence, the payments made are not liable to tax in India. Therefore, there is no need for deduction of tax under section 195 of the Act. Without prejudice to the aforesaid submissions, the learned Sr. Counsel for the assessee submitted, in case the disallowance under section 40(a)(i) of the Act is made, the deduction under section 10A of the Act should be enhanced to the extent of such disallowance.

36. Per contra, the learned Departmental Representative submitted that the assessee failed to furnish any evidence to show that the amount paid to BNP Paribas S.A., Hong Kong Branch, is in the nature

of loan. Thus, he submitted, the factual aspect of the issue needs to be verified.

37. We have considered rival submissions and perused the material on record. As regards the payment of ₹ 6,55,11,689, to BNP Paribas S.A., Hong Kong Branch, on perusing various documentary evidences placed on record and brought to our notice by the learned Sr. Counsel for the assessee, including the permission granted by the Reserve Bank of India, prima facie it appears that the payment made is towards refund of advance received. However, the documentary evidences furnished by the assessee showing the aforesaid factual aspect, as it appears, have not been examined properly either by the Assessing Officer or by learned DRP. Therefore, we direct the Assessing Officer to verify assessee's claim qua the documentary evidences filed and in case the assessee is able to establish that the payment made is towards refund of advance received, certainly it cannot be subjected to TDS. Consequently, no disallowance under section 40(a)(i) of the Act could be made.

38. As regards the payment of ₹ 46,43,558, to various foreign parties, we direct the Assessing Officer to verify assessee's claim that they are not in the nature of fees for technical service, as such services do not make available knowledge, skill, knowhow, etc. If the

assessee is able to establish its claim, no disallowance under section 40(a)(i) of the Act can be made.

39. As regards the issue raised in ground no.7, it is now fairly well settled that any statutory disallowance made would automatically go to enhance the profit of the assessee, hence, various deductions eligible under the statute would be available to the assessee. In this context, we may refer to the decision of the Hon'ble Jurisdictional High Court in CIT v/s Gem Plus Jewellery Ltd., [2010] 194 Taxman 192 (Bom.). Thus, if ultimately the Assessing Officer makes any disallowance under section 40(a)(i) of the Act, such disallowance would go to enhance the profit of the assessee. Therefore, the assessee would be eligible to avail deduction under section 10A of the Act in respect of such enhanced profit. Grounds are accordingly disposed off.

40. Ground no.8, having not been pressed is dismissed.

41. In the result, appeal is partly allowed.

42. Before we part, it is necessary for us to deal with a procedural issue relating to pronouncement of the order. The hearing of this appeal was concluded on 20.02.2020. As per rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963, ordinarily the appeal order has to be pronounced before expiry of ninety (90) days from the date of conclusion of hearing of appeal. However, on 24.03.2020 a nationwide

lockdown was enforced by the Government of India in view of COVID-19 pandemic. Due to the unprecedented situation arising out of such lockdown all activities ceased and no normal official work could be done. For this reason only the appeal order could not be pronounced within the period of 90 days. Being faced with a similar situation the Tribunal in case of DCIT V/s JSW Limited, ITA Nos.6264 & 6103/Mum/2018, dated 14th May 2020, after interpreting rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1963 as well as various decisions of the Hon'ble Supreme Court as well as the Hon'ble Jurisdictional High Court held that due to the extraordinary situation prevailing due to the pandemic, the lockdown period has to be excluded for the purpose of limitation in respect of pronouncement of order as per rule 34(5). The relevant observation of the Bench in this regard is reproduced hereunder for better clarity:–

"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 excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of*

our justice delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made 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 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 re-fix 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."

43. Following the aforesaid decision of the Coordinate Bench, we proceed to pronounce the order today the 30th day of June, 2020 through circulation in notice board in terms of rule 34 of the Income Tax (Appellate tribunal) Rule, 1963.

**Sd/-
PRAMOD KUMAR
VICE PRESIDENT**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 30.06.2020

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

Assistant Registrar
ITAT, Mumbai