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

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

आयकर अपील सं/ I.T.A. No.5999/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2016-17)

Maritime Vanguard Pvt. Ltd. C/o SRBC & Associates, LLP, 14th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (W), Mumbai-400028.	**बनाम**/ Vs.	DCIT (International Taxation)-3(2)(1) Room No.1615, 16th Floor, Air India Building, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAJCM3609F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri M. P. Lohia (AR)
Revenue by:	Shri Sanjay Singh (DR)

सुनवाई की तारीख / Date of Hearing: 06/02/2020
घोषणा की तारीख /Date of Pronouncement: 07/08/2020

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the assessment order passed u/s.144C(1) of the Income Tax Act, 1961 (in short "the Act") in pursuance of the directions of Dispute Resolution Panel – 3, Mumbai [hereinafter referred to as the "DRP"] dated 27.06.2019 relevant to the A.Y. 2016-17.

2. The assessee has raised the following grounds: -

"GENERAL

1. erred in assessing total income at Rs39,66,00,300 as against returned income of Rs Nil;

Taxability under the Income Tax Act. 1961 ('Act)

2. erred in holding that the receipts earned by the Appellant on account of provision of services through various vessels to the charterers (BGEPIL and Sapura) were for providing the 'use or 'right to use the industrial, commercial or scientific equipment, thereby treating the same as "Royalty" under section 9(1)(vi) of the Act;

3. erred in holding that the benefit of exclusion provided under explanation 2 to section 9(1)(vi) of the Act would be available only if the receipts earned by MVPL is offered to tax under section 44BB of the Act;

4. erred in treating the receipts earned by Appellant from provision of services through various vessels as royalty under section 9(1)(vi) of the Act, whereas the same is in the nature of business receipts;

5, without prejudice to the above, the Appellant submits that if the above receipts are considered as chargeable to tax, the same should be chargeable to tax in the nature of business receipts, chargeable under section 44BB of the Act ie 10% of the gross receipts deemed as profit chargeable to tax;

Taxability under the India-Singapore Double Taxation Avoidance Agreement ('DTAA')

6. erred in holding that receipts earned by the Appellant on provision of services through various vessels to the charterers shall be covered within the definition of the term "Royalty" under Article 12(3) of the India-Singapore DTAA;

7. should have appreciated that the above receipts are on account of provision of services, which is governed by Article 12(4) of the DTAA ie Fees for Technical Services ('FTS') and in absence of 'make available' of technical knowledge, experience, skill, know-how or processes, the same is not chargeable to tax;

8. should have appreciated that the above receipts are specifically excluded from the definition of FTS in accordance with Article 12(5)(g) of the DTAA and the same is not be chargeable to tax;

9. without prejudice to the above, even lithe impugned receipts are treated as Royalty/ FTS as per the Article 12 of the DTAA, the said receipts, as per Article 12(6) of the DTAA, would be governed by Article 7 of the DTAA, and due to non-satisfaction of the threshold for Permanent Establishment ('PE') as per clause 5 of Article 5, the impugned receipts would not be chargeable to tax;

Computation of total income tax payable

10. erred in computing the total income tax payable as Rs 2,12,38,549 as against total income tax payable of Rs 1,99,83,460 on the impugned income chargeable to tax

Levy of interest under section 234B of the Act of Rs 57.09,560

11. erred in levying interest under section 234B of the Act amounting to Rs57,09,560 Initiation of penalty proceedings under section 271(1)(c) of the Act

12. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to one another. The Appellant craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law.*"*

3. Brief facts of the case are that the assessee has filed the return of income on 06.10.2016 declaring total income to the tune of Rs. Nil claiming a refund of Rs.2,53,86,130/- for the A.Y.2016-17. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee company was incorporated in and tax resident of Singapore. The assessee earned the revenue from the following contract for provisions of vessels on time charter basis.

Charterers	Vessels	Amounts (Rs.)

BG Exploration Production India Ltd	PW Natuna and Posh Mulia	25,85,90,235/-
Sapura Kencana Offshore Sdn Bhd	POSH Bangka and Maritime Putra	13,80,10,023/-
	Total	39,66,00,258/-

The said amount was not offered to tax. Thereafter, the notice was given and after the reply of the assessee, the said amount was held to be taxed @ 10% of the said amount. Feeling aggrieved, the assessee has filed the present appeal before us.

4. All the issues are inter-connected, therefore, are being taken up together for adjudication. At the outset, the Ld. Representative of the assessee has argued that the issues have duly been covered with the assessee's own case bearing ITA. No.6642/M/2018 for the A.Y. 2015-16 dated 20.12.2019, therefore, the issues are liable to be decided accordingly. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. Before going further, we deem it necessary to advert the finding of the Hon'ble ITAT in the assessee's own case for the A.Y. 2015-016 dated 20.12.2019. The relevant finding is hereby reproduced as under.:-

> *"6. We have heard the rival submissions and perused the relevant materials on record. The 1st ground of appeal is general in nature. The reasons for our decisions in respect of the 2nd to 8th ground of appeal, being interrelated, are given below.*
>
> *Section 44BB is a special provision for computing profits and gains in connection with the business of exploration of mineral oil. Parliament engrafted the aforesaid provision in the Income Tax Act as a measure of simplification providing for determination of income of such taxpayers at 10% of the aggregate of certain amount. By virtue of section 44BB and because of non-obstante clause, section 28 of the Act will have no application.*

Thus section 44BB contains special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils. Under the said section, in the case of an assessee being non-resident engaged in the business of providing services or facilities in connection with or supplying plant and machines on hire for use or to be used in the prospecting of or extraction or production of mineral oils, a sum equal to 10% of the aggregate of the amounts specified shall be deemed to be the profits and gains of such business chargeable to tax under the head 'profits and gains of business or profession'. Deemed profits to the tune of 10% are taxed under the said section and it overrides the other charging sections in this regard.

The amount mentioned in section 44BB(2) clearly shows that the amount paid to the assessee on account of provision of services and facilities in connection with the extraction or production of mineral oils, whether paid in or outside India, are to be included.

The word 'services' followed by expansive phrase 'in connection with' are relatable to prospecting for and exploration of mineral oil. That means, all services associated with prospecting for and exploration activities are brought within the scope and reach of section 44BB. Another category of assessees governed by section 44BB are those supplying plant and machinery on hire.

6.1 As mentioned earlier, in the instant case the assessee is a tax resident in Singapore and consequently, a non-resident in India. It has entered into time charters contracts with BGEPIL, LTHE, Astro and Sapura during the year under consideration. To appreciate the issue, we mention below the scope of work between the assessee i.e Maritime Vanguard Pvt Ltd (in short 'MVPL') and BG Exploration & Production India Ltd (in short 'BGEPIL') as filed by the Ld. counsel:

"Scope of work

ONGC, Reliance Industries Ltd and BGEPIL are joint operators of Panna-Mukta offshore oil and gas production field situated in the Arabia sea on the west coast of India. The oil and gas is produced at these fields and treated, compressed and then exported through subsea pipeline. The contract has been entered into for offshore installation at the aforesaid oil fields for which MVPL is required to provide for accommodation, barge, AHT etc to BGEPIL. The

scope of work for the said activities have been summarized as under :

Clause 7: Employment

 The entire operation, navigation and management of the vessel shall be in the exclusive control and command of MVPL; the vessel will be operated and the services hereunder will be rendered as requested by charterers, subject always to the exclusive right of MVPL.

Clause 11: Duties of master, officers and crew

The master, officers and crew will perform the following services:

 Will connect and disconnect the water, fuel, liquid mud hoses etc and other hoses in port as well as offshore installations;

 Will operate appropriate machinery on board the vessel (i.e. loading unloading cargoes, anchor handling etc) Will hook on and unhook cargo when discharging/loading in port and offshore installation; Will be in sufficient number to allow the vessel to operate for twenty-four hours per day; Will obtain and maintain all available pilotage exemptions for port locations etc.
Clause 18 - Bunkers at delivery and redelivery

 MVPL is responsible for provision of lubricant oils, grease and other consumables throughout the charter period.

Clause 26 - Insurance

 MVPL shall be under an obligation to effect and maintain insurance policies. MVPL was also responsible for any damage of the vessel and crew therein and accordingly would bear all the costs in relation to the same.

Clause 10: Scope of work for AHT

 Apart from Anchor Handling activities the AHT would be required for intra-field transfer of personnel and material at required location (i.e. Mumbai); AHT to have positioning equipment and personnel to monitor anchor positions while anchor handling activities; Implementation of systems for anchor handling, personnel transfer, offshore installations etc.

Clause 11: Scope of work for barge

 The barges will be provided as support for carrying out work at the areas where AHT will be stationed for providing services.

Clause 12.4: Garbage Handling facility

 There will be a specified garbage area on the deck and will be provided by MVPL based on the specifications mentioned in the contract;

Clause 12.5: Compliant helideck

 A helideck would be available on the barge/workboat and would be compliant as per the specifications provided in the contract;

Clause 12.6: Laundry facilities

 MVPL would be required to provide laundry facilities for the crew working on the vessel;

Clause 12.7: Toilet facilities

 MVPL would be required to provide toilet facilities for the crew working on the vessel which has high class hygiene and cleanliness and one which is regularly maintained. Alongwith the facilities, MVPL to provide adequate competent personnel for maintaining the toilet facility;

Clause 12.8: Accommodation and conference room and client office facilities

 MVPL to provide adequate and requisite cabins as preferred for the senior personnel. In addition to the same, MVPL to provide for conference rooms with adequate seating capacity and all other necessary electronic arrangements (viz telephone, LCD TV, cables etc);

Clause 12.9: Entertainment, recreation facilities

 MVPL to provide mess rooms, smoking rooms, recreation rooms with the requisite furniture and appliances as mentioned in the contract;

Clause 12.13: Medical facilities

 MVPL to provide medical facilities i.e. certified doctor, advanced medical responder bag with medicines, oxygen cylinder etc, first aid bag and kits etc;

Further, the following clauses of the agreements between MVPL and L&T, Sapura & Astro demonstrate that the agreement was on account of provision of services and not simpliciter hire of equipment/vessel:

 Clause 14 - Insurance - MVPL shall be under an obligation to effect and maintain insurance policies. MVPL was also responsible for any damage of the vessel and crew therein and accordingly would bear all the costs in relation to the same. Clause 6 - Master and Crew - the entire operation, navigation and management of the vessel shall be in the exclusive control and command of MVPL; the vessel. The vessel will be operated and the services hereunder will be rendered as requested by charterers, subject always to the exclusive right of MVPL; and Clause 7 - Owners to provide - Remuneration of the master, officer and other crew is to be borne by MVPL."

6.2 At this juncture, we refer to the judgment of the Hon'ble Supreme Court in ONGC (supra). In that case, the assessee-company 'ONGC' and a nonresident/foreign company had entered into an agreement by which the nonresident company had agreed to make available supervisory staff and personnel having experience and expertise for operations and management of drilling rigs. The assessee-company paid amounts to non-resident assessees/foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil. The Assessing Officer held that the assessment should be made u/s 44D. However, the Appellate Commissioner and the Tribunal treated said payments u/s 44BB. The High Court, taking a view that the contract did not mention that the personnel of the non-resident company was also carrying out the work of drilling of wells, held that as the company had received fees for rendering service, therefore, the payments made to the foreign companies were liable to be taxed under the provisions of section 44D. On appeal, the Hon'ble Supreme Court held as under:

"13. The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development

and Regulation) Act, 1948. While construing the somewhat pari material expressions appearing in the Mines and Minerals (Development and Regulation) Act, 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Section 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the

appellants and placed before the Court is correct. The said details are set out below.

S. NO. Civil Appeal No Work covered under the contract

1. 4321

Drilling of exploration wells and carrying out seismic surveys for exploratory drilling.

2. 740

Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.

3. 731

Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.

4. 1722

Furnishing supervisory staff with expertise in operation and management of Drilling unit. 5. 729 Capping including subduing of well, fire fighting. 6. 738 Capping including subduing of well, fire fighting.

7. 1528

Analysis of data to prepare job design, procedure for execution and details regarding monitoring.

8. 1532

Study for selection of enhanced Oil Recovery processes and conceptual design of Pilot Tests.

9. 1520

Engineering and technical support to ONGC in implementation of Cyclic Steam Stimulation in Heavy Oil Wells.

10. 2794

Assessment and processing of seismic data along with engineering and technical support in implementation of Cyclic Steam Stimulation.

11. 1524

Conducting reservoir stimulation studies in association with personnel of ONGC.

12. 1535

Laboratory testing under simulated reservoir conditions.

13. 1514

Consultancy for optimal exploitation of hydrocarbon resources. 14. 2797 Consultancy for all aspects of Coal

15. 6174

Analysis of data of wells to prepare a job design.

16. 1517

Geological study of the area and analysis of seismic information reports to design 2 dimensional seismic surveys.

17. 7226

Opinion on hydrocarbon resources and foreseeable potential.

18. 7227

Opinion on hydrocarbon resources and foreseeable potential.

19. 7230 Opinion on hydrocarbon resources and foreseeable potential.

20. 6016 Opinion on hydrocarbon resources and foreseeable potential.

21. 6008

Evaluation of ultimate resource potential and presentations outside India in connection with promotional activities for Joint Venture Exploration program.

22. 1531

Review of sub-surface well data, provide repair plan of wells and supervise repairs.

23. 733

Repair of gas turbine, gas control system and inspection of gas turbine and generator.

24. 741 Repair and inspection of turbines.

25. 737 Repair, inspection and overhauling of turbines.

26. 736

Inspection, engine performance evaluation, instrument calibration and inspection of far turbines.

27. 1522 Replacement of choke and kill consoles on drilling rigs.
28. 1521 Inspection of gas generators.

29. 1515 Inspection of rigs.

30. 2012 Inspection of generator.

31. 1240

Inspection of existing control system and deputing engineer to attend to any problem arising in the machines.

32. 1529

Inspection of drilling rig and verification of reliability of control systems in the drilling rig.

33. 2008 Expert advice on the device to clean insides of a pipeline.

34. 2795 Feasibility study of rig to assess its remaining useful life and to carry out structural alterations.

35. 925 Engineering analysis of rig.

36. 1519

Imparting training on cased hold production log evaluation and analysis.

37. 1533 Training on well control.

38. 1518 Training on implementation of Six Sigma concepts.

39. 1516 Training on implementation of Six Sigma concepts.

40. 6023 Training on Drilling project management.

41. 2796

Training in Safety Rating System and assistance in development and audit of Safety Management System.

42. 1239

To develop technical specification for 3D Seismic APT modules of work and to prepare bid packages.

43. 1527

Supply supervision and installation of software which is used for analysis of flow rate of mineral oil to determine reservoir conditions.

44. 1523

Supply, installation and familiarization of software for processing seismic data. The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act. On the basis of the said conclusion reached by us, we allow the appeals under consideration by setting aside the orders of the High Court passed in each of the cases before it and restoring the view taken by the learned Appellate Commissioner as affirmed by the learned Tribunal."

6.3 As mentioned here-in-before, their Lordships of the Hon'ble Supreme Court have held that :

"the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder."

Under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. Once there is a pronouncement of the highest Court of the land, the same is binding on all courts, tribunals and all authorities in view of this Article. If the Hon'ble Supreme Court has construed the meaning of a section, then any decision to the contrary given by any other authority must be held to be erroneous.

In the instant case, we find that neither the AO nor the DRP has examined the applicability of section 44BB by looking into whether the pith and substance of each of the contract/agreement entered by the assessee is inextricably connected with prospecting, extraction or production of mineral oil. This is evident from the order of the DRP dated 29.08.2018 passed u/s 144C(5) and the assessment order dated 19.09.2018 passed by the AO u/s 143(3) r.w.s. 144C(5) and 144C(13) of the Act. Therefore, we set aside the order of the AO and restore the matter to him to make an order afresh after examining each of the contract/agreement and by following the ratio laid down by the Hon'ble Supreme Court in ONGC (supra) mentioned at para 6.2 hereinbefore. We direct the assessee to file the relevant documents/evidence before the AO. We make it abundantly clear that in the de novo proceedings, the AO would examine the contentions of the assessee that (i) since the receipts earned from provision of services through various vessels are covered u/s 44BB of the Act, the same should be excluded from the definition of royalty under the Act under clause (iva) of explanation 2 of section 9(1)(vi), (ii) as per section 90(2) of the Act, the assessee would be governed u/s 44BB of the Act or under the provisions of DTAA, which is more beneficial to the assessee, (iii) since the assessee does not have a PE in India as per clause 5 of Article 5 of DTAA(presence in India during AY 2015-16 for 106 days is less than 183 days), the revenues are not taxable in India.

In view of the binding nature of the above decision of the Hon'ble Supreme Court, we are not adverting to the other case-laws cited by both sides. The assessee would feel free to cite the other case-laws before the AO.

Thus the 2nd to 8th ground of appeal are allowed for statistical purposes.

7. The levy of interest u/s 234B is consequential in nature. The initiation of penalty u/s 271(1)(c) is premature."

5. Since all the issues have been discussed and decided by the Hon'ble ITAT in the assesee's own case and specifically remanded before the AO to decide afresh on certain guidelines mentioned in the order, therefore, in the said circumstances, we set aside the finding of the issues and restored the issues before the AO to decide the matter of controversy afresh in view of the decision of the Hon'ble ITAT in the assessee's own case Bearing ITA. No.6642/M/2018 by giving an opportunity of being heard to the assessee in accordance with law. Accordingly, all the issues are decided in favour of the assessee against the revenue.

Reasons for delay in pronouncement of order

6.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ***ordinarily*** exceed a period of 30 days.

6.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

6.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

> *7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:*
>
> *(5)The pronouncement may be in any of the following manners: —*

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of ***Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]*** *wherein Their Lordships had, inter alia, directed that "****We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf.*** ***We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile****(emphasis, by underlining, supplied by us now),* ***all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".*** *In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.*

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that ***"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown".*** *Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that,* ***"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"****, and also observed that* ***"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".*** *It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e.* ***force majeure*** *clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term* ***'force majeure'*** *has been defined in Black's Law Dictionary, as* ***'an event or effect that can be neither anticipated nor controlled'*** *When such is the position, and it is officially so notified by the Government of India*

and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excludingat least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of ***Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)],*** *Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed* ***"while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".*** *The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be*

any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

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

Order pronounced in the open court on 07/08/2020

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

मुंबई Mumbai; दिनांक Dated : 07/08/2020
Vijay Pal Singh/Sr. PS
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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