

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

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

आयकर अपील सं/ I.T.A. No.463/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

Federal Mogul Anand Bearing India Ltd. (Formerly Known as Federal Mogul Bearings India Ltd.) Paras Twin Towers, 10 th Floor, Tower B, Golf Course Road Sector-54, Gurgaon-122002.	बनाम/ Vs.	DCIT, ITO Ward 2(1)(3) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCA3784Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Ms. Bhavya Goyal	
Revenue by:	Shri Anand Mohan (DR)	

सुनवाई की तारीख / Date of Hearing: 13/02/2020
घोषणा की तारीख /Date of Pronouncement: 09/07/2020

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(5) of the Income Tax Act, 1961 (in short “the Act”) in pursuance of the directions of Dispute Resolution Panel – I, Mumbai [hereinafter referred to as the “DRP”] dated 20.10.2015 relevant to the A.Y. 2011-12.

2. The assessee has raised the following grounds: -

“1. On facts and circumstances of the case, the final assessment order passed by the learned Assessing Officer



('learned AO') / learned Transfer Pricing Officer ('learned TPO') under the directions of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') is bad in law.

2. *Transfer Pricing Adjustment.*

The learned AO / TPO has erred in law and on facts in making transfer pricing adjustment of Rs.1,44,22,000 to the total income of the Appellant oil basis of various presumption and surmises:

- 2.1. *The learned DRP/TPO have erred in law and facts by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules"), and holding that the Appellant's international transaction is not at arm's length;*
- 2.2. *The learned AO has erred in law and facts by upholding the action of DRP! TPO in determination of the arm's length margin/ price using only single year data i.e. for FY 2010-11, and not allowing the use of multiple year data as applied by the Appellant in the transfer pricing documentation;*
- 2.3. *The learned AO / TPO has erred in law and on facts in selecting ABC Rearing Ltd. as an additional comparable to the Appellant without carrying out a methodical and scientific search of comparables and rejected the assessee's contentions to exclude the same as a comparable company.*
- 2.4. *The learned AO / TPO have erred in law and on facts in not allowing the working capital adjustment for comparable companies.*
- 2.5. *The Ld AO/TPO have erred in law and on facts in their calculations to restrict transfer pricing adjustment to the level of international transactions entered into by the company.*
- 2.6. *the Ld. DRP/TPO have erred in law and facts in computing the ALP without giving benefit of +/-5 percent under the proviso to section 92C(2) of the Act.*



3. *The Ld. AO has erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act against the assessee.*

The above grounds are distinct and separate, and without prejudice to each other.”

3. Brief facts of the case are that the assessee filed its return of income on 25.11.2011 declaring total income to the tune of Rs. Nil. Thereafter, the assessee company filed a revised return of income on 19.01.2012 declaring total income to the tune of Rs. Nil. The return was processed u/s 143(1) of the I. T. Act, 1961. Thereafter, 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 engaged in the business of manufacturing and trading of components for commercial vehicles like bi-metal bearings, bushes, washers, flanges for automotive, industrial, agricultural, earthmoving, marine and stationary engines. The assessee company declared turn-over of Rs.65.03 crores. The assessee company also filed the Form No. 3CEB declaring international transactions of Rs.19.11 crores. Since the amount involved in International transactions exceeded Rs.15 crores, the case was referred to Transfer Pricing Officer for determining the Arm's Length Price (ALP) of the International Transactions entered into by the assessee company with its Associated Enterprises (AE). Thereafter, the TPO passed the order dated 30.01.2015 suggested the addition of Rs.3,34,21,000/-. The TPO has determined that the net profit margin of the assessee company was lower than net profit margins of the comparable companies. The copy of the order passed u/s 92CA(3) was given to the assessee. The assessee filed the reply and thereafter, the draft assessment order u/s 143(3) r.w. Section 144C of the I.



T. Act dated 19.02.2015 was passed. The assessee company preferred an appeal to the DRP u/s 144C of the I. T. Act. The DRP has given the partial relief and has given the following directions.:-

“3.5 In Ground 5, the assessee has claimed that the TP adjustment should be restricted to the value of International transactions with AE alone and should not be made at entity level. The assessee also highlighted the fact the assessee's claim for proportionate adjustment was also accepted by this Panel in assessee's own case for A.Y 2009-10. The relevant extract of ORP order for A.Y 2009-10 is provided below:

"However, the TPO is directed to compute the adjustment at transaction level only. The objection is therefore allowed."

3.5.3 Considering the facts of the case and submissions made, the TPO is directed to compute the TP adjustment at transaction level and not entity level. It is so held by Bombay High Court also in the case of Firestone International (P) Ltd. in ITA No 1354 of 2013 order dated 15.06.201, this objection is thus allowed.

7. In view of the above, The Deputy Commissioner of Income Tax, Transfer Pricing 2(1)(2), Mumbai was requested vide this office letter dated 30/10/2015 to provide a working of the TP adjustment as per the directions of Hon Dispute Resolution Panel. The DCIT Transfer Pricing 2(1)(2), Mumbai, vide letter dated 24/11/2015, received in this office on 26/11/2015, has provided a revised working as per the aforementioned directions of the Hon Dispute Resolution Panel. The working of proportionate adjustment is as mentioned hereunder.

Particulars	Reference	Amount
Operating Revenue	A	68,08,47,000
Operating Cost	B	65,52,68,000
Operating Profit	C=A – B	2,55,79,000
Arm's Length Margin of the Comparables (Proposed by TPO)	D	8.67%



ALP of Profit	$E = D * A$	5,90,00,000
Proposed Adjustmet	$F = E - C$	3,34,21,000
Value of International Transactions with AEs	G	28,27,59,000
Proportion	$H = G/B * 100$	43%
Revised Proportionate Adjustment	$I = F * H$	1,44,22,000

The assessee was not satisfied, therefore, filed the present appeal before us.

ISSUE NOS. 1, 2.1 TO 2.3

4. Under these issues the assessee has claimed the exclusion of ABC Bearings from the list of comparable company. It is argued that the ABC Bearing Company is quite different from every sphere with the working/transactions of the assessee company, therefore, the same is not liable to be included while comparing the transaction with the assessee company. The ABC company had been established more than 5 decades ago and was the market leader in the field and the sale was 200.27 crores representing a 24% of the growth, therefore, the said company is liable to be excluded from the list comparable while assessing the international transaction in the interest of justice. The Ld. Representative of the assessee has placed reliance upon the decision of the Hon'ble ITAT Mumbai Bench in the case of **DHL Express (India) Pvt. Ltd. (2011- TII-59-ITAT-Mum-TP) and Maersk Global Service Centre India Pvt. Ltd. (ITA. No.3774/M/2011 and Lubrizol Advanced Material Vs. DCIT (ITA. No. 2811/Ahd/2011.** It is also argued that the ABC Bearing does not feature in detailed search undertaken by the assessee on the database Prowess and



Capitaline, therefore, the said company is nowhere justifiable competent from the bench marking and international transaction. It is also argued that the TPO nowhere rejected the comparable given by the assessee and there was no requirement to add a new comparable and the process was not adopted by the addition of the said company, hence, the ABC Bearing company is not liable to be taken into consideration for the comparable of the international transaction of the assessee. The Ld. Representative of the assessee has placed reliance upon the decisions in the case of **Bayer Material Science P. Ltd. Vs. The ACIT and CIT Mentor Graphics (Noida) Ltd.** It is specifically argued that the no research was done by the TPO who randomly cherry picked the comparable company having high margin company 20.5%, therefore, the same is not liable to be added in view of the decision in the case of **Toshiba India Pvt. Ltd. and Allscripts India Pvt. Ltd.** The sale of the company was 200.24 crores which was not comparable to the assessee company's sale of Rs.54.94 crores. However, on the other hand, the Ld. Representative of the Department has strongly relied upon the order passed by the AO as well as direction by the DRP. It is correct that the company of the assessee was established in the year 2006 and was its first year of functioning. The ABC Bearing had been established nearly 5 decades above. The company was leading entrepreneurial entities in this field. The BSE report on the file speaks that the ABC is one of the market leaders in the tapered roller bearing(TRB) market, driven by its established relationships with auto OEMs. Page 8 of the Annual Report also speaks that the company has posted its best ever sale of Rs.200.27 crores representing a 24% growth. The ITAT Mumbai Bench in the case of **DHL Express (India) Pvt. Ltd.** has held as under:-



“It is a universal fact that there are lot of difference between the large business and small business operating in the same field. In the case of small business economics of scale are not available and, therefore, generally less profitable.”

5. The ITAT Mumbai Bench in the case of Maersk Global Service Centre India Pvt. Ltd. has held that the company having such a high brand value along with much higher turnover, in our considered opinion has been rightly excluded by the CIT(A). Undoubtedly, in the said circumstances, the ABC Company nowhere seems comparable with the company of the assessee. Moreover, the ABC had an exceptional year of performance which shows its best ever sale of Rs.200.27 crores representing 24% of the growth. The said margin seems non comparable in view of the decision of the Hon’ble ITAT Ahmedabad bench in the case of Lubrizol Advanced Material Vs. DCIT. We also find that the ABC does not feature in the details search undertaken by the assessee on the database Prowess and Capitaline. The TPO nowhere rejecting the selection by assessee and no reason were given for the inclusion of ABC bearing. The process of identifying a new comparable has been discussed in the case of Bayer Material Science Pvt. Ltd. Vs. The ACIT which is hereby reproduced as under:-

“14. The Id. counsel argued that the TPO erred in rejecting the comparable cases given by the assessee and choosing comparable cases at his own. From the facts recorded above, we find that the assessee did not give any comparable case in the indenting activity alone. Since the benchmarking was to be done in respect of such activity alone, it was for the assessee to initially submit a list of comparable cases. Not having done so, the TPO was left with no option but to find out suitable comparable cases at his own. But for the comparable cases chosen by the TPO, the determination of ALP in respect of indenting activity would have become impossible. In our considered opinion the following are the essential steps in the selection of comparable cases:-



i. As the assessee knows the nature of its business well, it is he who always has the prerogative of choosing the comparable cases.

ii. Once the assessee has chosen the comparable cases, then it becomes the duty of the TPO to find whether these cases are, in fact, comparable or not. If he finds that the cases given by the assessee are comparable on the basis of FAR analysis, the matter ends. He will accept them and then determine the average profit.

iii. If the TPO is not satisfied as to the comparability of some of the cases given by the assessee, he will exclude such cases from the final list of comparables, after giving cogent reasons.

iv. The TPO may possibly find that the assessee has done cherry picking and ignored the comparable cases giving higher profit margins. In such a case he may himself find out such comparable cases and after taking objections from the assessee include them also in the final list of comparables along with those left out of the assessee's list as per step iii. above. Here it is important to mention that the voluntary selection of comparable cases by the TPO is his power and not the duty. He may or may not exercise his power in given circumstances. If he gets satisfied with the cases left out from the assessee's list, he may skip the exercise of voluntarily finding the comparable cases at his end. Thus it is the aggregate of such cases being those short-listed from the assessee's list and those voluntarily included by the TPO, which are considered to find out the average profit for the purposes of comparison.

v. It may also happen that all the cases chosen by the assessee turn out to be incomparable and as such the basket of comparable cases is emptied. As the exercise of determining ALP is inconceivable without any comparable case, the TPO will have to afford one more opportunity to the assessee enabling it to give certain other cases which are really comparable. On the receipt of details of such comparable cases, the steps at ii. to iv. shall be undertaken by the TPO.

vi. If despite being put to notice as per step v., the assessee fails to give any list of comparable cases or the cases given are again found to be incomparable, then the power of the TPO in voluntarily selecting comparable cases as discussed in step iv. above shall get converted in to his duty. He will have to undertake the exercise of finding comparable cases so as to complete his job."



6. The similar finding has been given in the case of **CIT Vs. Mentor Graphics (Noida) Ltd. and ACIT Vs. Toshiba India Pvt. Ltd.** Anyhow without any details search process for identifying the comparable. It is assumed that it is a case of cherry picked which is not justifiable in view of the decision in the case of **Toshiba India Pvt. Ltd** and **All scripts India Pvt. Ltd.** Moreover, the sale of the ABC company was 200.24 crores whereas the assessee company was 54.9 crores which nowhere seems comparable to each other. In the said circumstances, we direct the DRP for the exclusion of the ABC Bearing for comparing from the list of comparable and to assess the transaction with the available comparable on record in accordance with law. Accordingly, the issue is decided in favour of the assessee against the revenue.

ISSUE NO.2.4

7. The Ld. Representative of the assessee has challenged the finding of the AO for not allowing the working capital adjustment for comparable companies on the basis of the difference. The assessee has raised the TNMM method in determining the ALP for the international transaction entered into during the year 2011-12 Rule 10B(1) details the issue which is hereby reproduced as under.:-

“Determination of arm’s length price u/s 92C.

10B(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:-

(e) transactional net margin method, by which, -



(i) the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base:

(ii) the net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to taken into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market (emphasis supplied)

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii).

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction."

8. At the time of argument, the Ld. Representative of the assessee has strongly relied upon the decision in the case of **Demag Cranes & Components (India) Pvt. Ltd. and IKA India Pvt. Ltd. Vs. DCIT** etc. In the case of Demag Cranes & Components (India) Pvt. Ltd. Hon'ble ITAT Pune Bench has given the following finding:-

"In our opinion, it is the duty of the TPO to apply the provisions of rule 10B(1)(e) to establish the ALP in relation to international transaction as per the TNMM which is an undisputed method found applicable to the present case by both the parties. It is a settled accounting principle that the net margins can be influenced by some of the same factors which can influence price or gross margins. Further, it is the requirement of the rules / provisions that any difference which is likely to materially affect the NPM in open



market has to be eliminated. TPO must know that the TNMM visualizes the undertaking of the thorough comparability analysis and elimination of the differences through the requisite adjustments. Therefore, we dismiss the revenue's contention that no further adjustment ((any is entertained once the comparables are supplied by the assessee and when they are accepted by the TPO. Thus. working capital is a factor which influence the price in the open market and therefore the net profit margin of the business segment of the assessee which is targeted by the TPO/AO/DRP. Hence, in principle, we hold that the TPO/AO/DRP has failed to entertain the objections of the assessee on the 'working capital' adjustments issue. Therefore, we direct them to allow the requisite adjustment on account of the impugned 'working capital' while determining the Arm's Length operating Margin of the Comparables." (emphasis supplied)."

9. In the case of **Capgemini India Pvt. Ltd.** has given the following finding:-

"In our view, working capital adjustments are required to be made because these do impact the profitability of the company. Rule 108(2)(d) also provides that the comparability has to be judged with respect to various factors including the market conditions, geographical conditions, cost of labour in the market. Accounts receivable/payable effect the cost of working capital. A company which has a substantial amount blocked with the debtors for a long period cannot be fully comparable to the case which is able to recover debt promptly..."

In our view, working capital adjustment will improve the comparability. We, therefore, direct the AO/TPO to make the working capital adjustment after necessary examination in the light of the observations made above and after allowing opportunity hearing to the assessee."

(emphasis supplied)

10. In the case of **IKA India Pvt. Ltd.** has given the following finding:-

"In the case of IKA India Pvt. Ltd. Vs. DCIT (IT/TP)A. No.2192/Bang/2017) (ITEM 3 of the caselaws paper book, the Hon'ble Bangalore ITAT held as follows:



"...the TPO/AO is directed to consider the claim of the assessee and allow adjustment to profit margins towards working capital adjustment in accordance with the law, after affording assessee the opportunity of being heard."

11. Therefore, we direct them to allow the requisite adjustment on account of the impugned 'working capital' while determining the Arm's Length operating Margin of the Comparables." Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NO. 2.5

12. The Ld. Representative of the assessee has argued that this issue has wrongly been raised in the appeal while this issue has already been allowed by AO/DRP, hence, not pressed.

ISSUE NO. 2.6

13. This issue has not been pressed by the Ld. Representative of the assessee, therefore, this issue is being decided in favour of the revenue against the assessee being not pressed.

ISSUE NO. 3

14. Since the issue no.3 is pre-mature, hence, is not required to be adjudication.

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 excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a



period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that 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 refile 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.

15. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 09/07/2020

Sd/-

(PRAMOD KUMAR)
VICE PRESIDENT

मुंबई Mumbai; दिनांक Dated : 09/07/2020
Vijay Pal Singh/Sr. PS

Sd/-

(AMARJIT SINGH)
JUDICIAL MEMBER



ITA No.463/M/2016
A.Y.2011-12

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**