



Nextgen Construction Private Limited  
Assessment Year :2011-12

**आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“B” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.3593/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2011-12)

<b>Income Tax Officer-14(3)(4)</b> Room No.482(1), 4 <sup>th</sup> Floor Aaykar Bhavan, M.K. Road Marine Lines Mumbai- 400 020.	<b>बनाम/ Vs.</b>	<b>Nextgen Construction Pvt. Ltd.</b> (Changed to M/s.Aetius Construction Pvt.Ltd. which is further amalgamated with M/s. Supergold Properties Pvt.Ltd.) Shop No.1, Building No.2 A Wing, Shramik CHS Ltd., Tilak Ngr Chembur, Mumbai- 400 089.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. <b>AABCN-8981-F</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

**&**

**C.O. No.05/Mum/2020**

(Arising out of ITA No.3593/Mum/2019)  
(निर्धारण वर्ष / Assessment Year: 2011-12)

<b>Nextgen Construction Pvt. Ltd.</b> (Changed to M/s.Aetius Construction Pvt.Ltd. which is further amalgamated with M/s. Supergold Properties Pvt.Ltd.) Shop No.1, Building No.2 A Wing, Shramik CHS Ltd., Tilak Ngr Chembur, Mumbai- 400 089.	<b>बनाम/ Vs.</b>	<b>Income Tax Officer-14(3)(4)</b> Room No.482(1), 4 <sup>th</sup> Floor Aaykar Bhavan, M.K. Road Marine Lines Mumbai- 400 020.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. <b>AABCN-8981-F</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Dr.P.Daniel-Ld.AR
<b>Revenue by</b>	:	Shri Rahul Raman-CIT- DR

<b>सुनवाई की तारीख/ Date of Hearing</b>	:	19/02/2020
<b>घोषणा की तारीख / Date of Pronouncement</b>	:	25/06/2020



## आदेश / O R D E R

### Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [in short referred to as 'AY'] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-22, Mumbai, [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-22/ACIT-14(2)(3)/IT-302/2016-17 (ITBA No. CIT(A)-22, Mumbai/10626/2016-17) dated 28/02/2019 on following grounds: -

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the A.O. of Rs.10,20,00,000/- u/s 68 of the IT. Act.
2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not giving any finding regarding the AO's stand that mere filing of documents by the lender, does not prove identity and creditworthiness of the lender and genuineness of the transaction.
3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in overlooking the fact that the assessee failed to prove the "nature" of credit in the absence of any agreement or M.O.U between the Assessee and the lender, in respect of the alleged proposed Joint Venture towards which the amount was claimed to have been received.
4. The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored.

The assessee has filed cross-objections by raising following grounds: -

1. The Ld. CIT(A) erred in holding that the A.O. has reason to believe that income has escaped assessment and has rightly issued notice u/s. 148 whereas re-opening u/s. 147 is illegal as it is based on only conjecture and surmises.
2. We have carefully heard the arguments advanced by both the representatives and perused relevant material on record including documents placed in paper book. We have also deliberated upon judicial pronouncements cited before us during the course of hearing. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.



3.1 Briefly stated the assessee being resident corporate assessee stated to be engaged in consultancy of real estate business was assessed for year under consideration u/s. 143(3) r.w.s. 147 on 30/12/2016 wherein the assessee was saddled with addition of Rs.1020 Lacs on account of unexplained cash credit u/s 68. The original return of income was e-filed at Rs.0.27 Lacs on 27/09/2011, which was processed u/s.143(1).

3.2 Pursuant to receipt of certain information from DDIT (Investigation), Unit-2(1), Kolkata, it transpired that assessee stood beneficiary of deposits of Rs.1020 Lacs from an alleged paper company namely *M/s. Minaxi Suppliers Private Limited (MSPL)*. Accordingly, the case was reopened as per due process of law by issuance of notice u/s. 148 on 29/03/2016 which was followed by notices u/s. 143(2) and 142(1) wherein the assessee was directed to file requisite details / evidences in support of the stated transactions.

3.3 The reasons recorded for reopening the assessment has been extracted at para 5.1 of the quantum assessment order. In the reasons, it was asserted that on the basis of inquiry conducted by the investigation wing of the department in the case of *M/s KJM International (Prop. Shri Sanjoy Kumar)*, it was found that there were large value cash deposits from different branches, debits through RTGS and transfer to third party account, in one individual bank account maintained with ICICI Bank. It further transpired that monies were routed through various entities controlled by one Shri Anand Sharma who admitted to have indulged in hawala transactions. The entities floated by Shri Anand Sharma was found to be paper companies without doing any real business. *M/s*



MSPL was stated to be one such paper company. Upon further verification, it was found that the assessee was one the beneficiaries of huge deposits to the extent of Rs.1020 Lacs. Therefore, it was believed that income had escaped assessment and therefore proceedings u/s 147 were initiated against the assessee.

3.4 In defense, the assessee, vide submissions dated 13/12/2016 explained that it received the amount of Rs.1020 Lacs from M/s MSPL as part of their contribution towards a certain Joint Venture Arrangement. The assessee denied having any connection with Shri Sanjoy Kumar. The assessee submitted that the payments were received from M/s MSPL through regular banking channels. Reliance was placed on the decision of Hon'ble Bombay High Court in **Orient Trading Co. V/s CIT (49 ITR 723)** for the submissions that the assessee was not required to prove the source of source of credits appearing in its books of account. In the above background, the assessee submitted that primary ingredients as envisaged by Sec.68 were fulfilled by the assessee and therefore, the additions were unjustified.

3.5 The assessee, vide another submission dtd. 16/12/2016 submitted following documents relating to M/s MSPL in support of the transactions:-

- (i) Copy of ITR for A.Y.2011-12 showing returned income at NIL, filed on 30-09-2011;
- (ii) Copy of Directors Report, Auditors Report, Balance Sheet as at 31-03-2011; Profit and Loss Account for the year ending 31-03-2011 along with few schedules;
- (iii) Confirmation of ledger account of the assessee as appearing in the books of Minaxi Suppliers Pvt. Ltd. for the year ending 31-03-2011 showing payments on various dates between May and October 2010 and amount outstanding as at 31-03-2011 at Rs.10,20,00,000.
- (iv) Copy of assessment orders u/s.143(3)
  - a. dated 26-03-2013 for A.Y.2010-11 assessing total income at Rs.8,23,220 and



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b. dated 11 -02-2015 for A.Y.2012-13 assessing total income at Rs.1,32,500.

(v) Company master Data showing details of Minaxi Suppliers P. Ltd., showing Jashmin Ramesh Bhayani and Sagar Pankaj Bhayani as its directors

On the basis of these submissions, the assessee reiterated that M/s MSPL had no connection with Shri Sanjoy Kumar. On 23/12/2016, M/s MSPL also filed similar details as filed by the assessee.

3.6 However, relying upon the findings of the investigation wing in the case of Shri Sanjoy Kumar wherein it transpired that the individual bank account of Shri Sanjoy Kumar was used to covert cash into banking instrument which was later on transferred through various layers to reach the final beneficiaries. Upon analysis of bank account, it was found that maximum amount travelled to the accounts of 3 entities viz. M/s Maxworth Vinimay Ltd., M/s Zedco Corporation and M/s Dealcomm Private Ltd. These concerns also could not be found at the given addresses and were stated to be paper companies to provide accommodation entries. The two entities namely M/s Tanish Trade Com Pvt. Ltd. and M/s MSPL were stated to be in final layers from where the funds were stated to be transferred to ultimate beneficiaries.

3.7 The further verification by investigation wing revealed that M/s MSPL had shifted office and it was not found at the given address. Examination of its financial statements revealed that it received huge securities premium with corresponding deposits but without any business activity of sale or purchase of goods or services. Receipts were mainly in the form of interest income. Most of the entities in the last layer of the transaction was stated to controlled and managed by entry operator Shri Anand Sharma. In the above background, it was alleged that beneficiary



companies introduced their unaccounted cash in primary account maintained by Shri Sanjoy Kumar which was thereafter transferred to respective beneficiaries through various layers.

3.8 Armed with above findings of the investigation wing, Ld. AO observed that the assessee could not provide any detail about the nature of joint venture arrangement and progress thereof. The financial statement of the assessee as well as M/s MSPL was analyzed in para 5.4.3 & 5.4.4, as under: -

5.4.3 Analysis of Balance Sheet of the assessee as at 31-03-2014, revealed that its Share Capital at the beginning (01-04-2010) and end (31-03-2011) of the year, stood at Rs.3,31,00,000. Profit & Loss Account for the year ending 31-03-211 revealed that the only income of Rs.2,40,000 of the assessee company was by way of Consultancy fees, against which it claimed expenses to the extent of Rs.1,48,479, which included w/off of Miscellaneous Expenses to the extent of Rs.86,709. Other expenses largely comprised of salary of Rs.36,000, Audit Fees of Rs.16,545 and other charges including bank charges of Rs.3,864. The only asset appearing in the Balance Sheet was Computer amounting to Rs.2,15,887. This computer was also purchased only during second half of the year under assessment, as the assessee claimed depreciation of Rs.64,766, being @ 30% of Rs.2,15,887. Despite this poor performance in business, Unsecured loans of the assessee increased from Rs.4,22,45,712 (as on 01-04-2010) to Rs.28,26,30,000 (as on 31-03-2011), which included loan from Meenaxi Suppliers Pvt. Ltd. The loan amount increased from Rs.29,00,000 (as on 01-04-2010) to Rs.10,20,00,000 (as on 31-03-2011).

5.4.4 From the Balance Sheet as at 31-03-2011 of Minaxi Suppliers Pvt. Ltd., it is observed that there is no increase in the amount of share capital (Rs.8,50,38,750) or Share Premium (Rs.70,81,18,500). Loans & Advances given by the company increased from Rs.18,34,94,501 (as on 01-04-2010) to Rs.79,53,11,575 (as at 31-03-2011). Apparently, the source of extending the Loans during the year was liquidation of Investments in unquoted shares, which reduced from Rs.61,50,83,914 (as on 01-04-2010) to Rs.10,00,000 (as at 31-03-2011). As per Profit & Loss Account for the year ending 31-03-2011, major income is by way of interest on loan, which reduced from Rs.1,51,88,431 (F.Y.2009-10) to Rs.63,88,468 (F.Y.2010-11). This analysis of financial statement shows that MSPL liquidated its investments in unquoted shares just to give non-interest-bearing advances to various parties, which included the assessee company NCPL. This is anything but business prudence.

From the perusal of analysis, it is pertinent to note that it is an admitted fact by Ld. AO that the substantial source of extending the loan by M/s MSPL was liquidation of investment in unquoted shares.



3.9 In the above factual background, relying upon various judicial pronouncements, it was finally held by Ld. AO that the assessee failed to prove the genuineness of the deposit received from M/s MSPL. Therefore, the same was added to the income of the assessee as unexplained cash credit u/s 68 while framing the assessment.

4.1 Aggrieved, the assessee assailed the action of Ld. AO on legal grounds as well as on merits. However, the legal submissions challenging reassessment proceedings could not find favor with Ld. CIT(A) who observed that information received by Ld. AO was more than enough to form a belief that certain income escaped assessment in the hands of the assessee.

4.2 On merits, the assessee assailed the quantum addition by way of elaborate submissions which have already been extracted in para 6.2 of the impugned order. The assessee reiterated that it had no connection with Shri Sanjoy Kumar. The assessee submitted that after the investigation, the scrutiny proceedings u/s 143(3) in the case of M/s MSPL were completed wherein its books of accounts were accepted. The assessee, drawing attention to the documentary evidences submitted by it in support of the transactions, asserted that it had discharged the primary onus of proving identity, genuineness and creditworthiness of the lenders. Regarding the apprehension raised by Ld.AO as to the nature of projects, the assessee submitted that it was exploring various business opportunities. The proposed project could not take off since the land was declared as private forest by the government and projects were stalled.



4.3 The aforesaid factual matrix as well as assessee's submissions find favor with Ld.CIT(A) who concluded the matter in assessee's favor with following observations: -

### **6.3 Decision**

I have considered the facts of the case and submissions made by the assessee. The brief facts of the case are Kolkata Investigation Wing of the department carried out an in-depth enquiry in the case of M/s KJM International whose proprietor is Shri Sanjay Kumar. Shri Kumar had a large value of cash transactions in his personal savings bank account. It was found by the Kolkatta wing that monies were routed through various entities controlled by another person namely Shri Anand Sharma who was raided by the Department and admitted to have indulged in hawala operations through various paper companies not doing any real business. M/s Minaxi Suppliers Pvt. Ltd was one of such paper companies and the assessee was reported to have received Rs.10.2 Crores from the said company which the assessee disputed on the basis of the information received from Kolkatta Investigation Wing. During the course of appellate proceedings, the appellant stated that it entered into Joint Venture with Minaxi Suppliers Pvt Ltd to aggregate large area of land in Sindhudurg District which has been declared a first tourism district in Maharashtra and sell the same to branded Hoteliers who will be interested in tourism business. In the course of Joint ventureship with M/s Minaxi Supplier Pvt Ltd, the appellant stated to have received Rs.10.2 Crores from the Co-venturer for the purpose of business. The appellant submitted its financial statements, Confirmation letter from the investor, Company master data of the investor, and financial statements of the investor and copies of various judgements it relied upon in support of its contention and claimed that it complied with the provisions of Sec 68. During the course of appellate proceedings, the appellant filed name, address and PAN of the investor, loan confirmation, ledger account and bank statement reflecting the transaction and financial statements of the investor. It is seen from the facts available on record that the AO has disputed the fund received for failure of the assessee to prove the ingredients enshrined for complying the provisions Sec 68 of the Act. Existence of the transaction in the books of the assessee is a condition precedent before any addition u/s 68 of Income-tax Act, 1961 is contemplated. The amount is duly reflected in the books of accounts of the assessee for the year under consideration. Therefore, the A.O. has rightly invoked Sec 68 of the Act in the instant case. Provisions of Sec 68 of the Act involve three ingredients namely, the proof regarding identity of the loan creditors, their creditworthiness to give the loan and the genuineness of the transaction as a whole. Initial burden of proof lies on the assessee. The basic precondition for Sec 68 of Income-tax Act, 1961 is that the assessee should file a valid confirmation. The confirmation must contain clear identity of the creditor and indicate complete details of transactions. As far as creditworthiness or financial strength of the creditor is concerned that can be proved by producing the bank statement of the creditor or copy of return of income and balance sheet, showing it had sufficient balance in its accounts to enable it to offer the loan. Once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the A.O. to



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scrutinize the same and in case he nurtures any doubt about the veracity of these documents, to probe the matter further.

Reference is invited to the decision of Hon'ble Delhi High Court in the case of CIT vs Himalaya International Ltd, 214 CTR Del 437 (2008) in which Hon'ble Court has held vide its order dated 30.07.2007 that if the Assessing officer harbours doubt of the legitimacy of any loan, he is empowered, and duty bound to carry out thorough investigation u/s 68 of Income-tax Act, 1961. The assessee has to prima facie prove (1) the identity of the creditor (2) the genuineness of the transaction (3) Financial capacity of the person, i.e. the credit worthiness of the creditor. Further, reference is also invited to the decision of Hon'ble Calcutta High Court in the case of CIT Vs M/s Precision Finance Pvt Ltd (208 ITR 465).

In this case the appellant has produced a valid confirmation letter proving the identity of the creditor. Similarly, ledger account and bank statements prove the genuineness of the transaction. The balance sheet submitted by the appellant proves that the investor had sufficient own money to invest proving creditworthiness of the party. For increasing the evidential value, the appellant produced assessment orders passed u/s 143(3) of the Act in the case of MSPL for AY 2010-11 and AY 2012-13. Therefore, the material produced on record are adequate to comply with the provisions of Sec 68 of the Act.

The AO has rejected the submissions on the ground that the assessee failed to explain the nature and genuineness of the receipt of the funds from MSPL on the basis of report of Investigation Wing. The assessment order reveals that the addition is entirely based on the report received from Investigation Wing. The AO did not bring any corroborative evidence or supporting material to prove that the money has been routed from various hawala parties as alleged in the Investigation wing report. Similarly, concluding a transaction as non-genuine does not pass the test of legal scrutiny without proper enquiry to establish that the funds were either bogus or not utilised for business purpose. As explained in the previous paragraphs, the assessee is considered to have discharged its onus after submitting the documents like confirmation letter, financial statements of the creditor/investor and bank statements. The onus then shifts to the AO to initiate a proper enquiry and bring sufficient material on record against the appellant's submissions, if he does not accept the same. It is apparent that the AO did not initiate any independent enquiry by issuing statutory notices/summons to the co-venturer to verify the genuineness of the transactions. The reason may be that the assessee produced all the documents to the satisfaction of the AO and there is nothing that can be gathered by issuing notice u/s 133(6) or summons u/s 131 of the Act. It is the settled law that no assessee can be cast upon with tax liability on the basis of presumption, surmise and conjecture.

The AO had a finding that the assessee did not produce copy of MOD or agreement undertaken by the assessee with MSPL. The addition has been made on the ground of genuineness and it is an undisputed fact that the assessee produced the documents which comply all the three ingredients of Sec 68 of the Act. When confirmation letter, financial statements and bank statements have been produced to prove the three ingredients of Sec 68 of the Act, no evidentiary value is attached to the copy of Joint Venture agreement undertaken between the assessee and MSPL. The AO has also brought on record that the appellant failed to produce the Director of MSPL as his witness to prove the genuineness of the unsecured loan



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transaction. However, when an assessee submits all the documents, and if the AO rejects those documents, the next course of action for the AO is to put in efforts to gather evidences by conducting enquiry to examine the truth in respect of the cash credit which has not been done. As explained earlier, Hon'ble Delhi High Court in the case of CIT vs Himalaya International Ltd, 214 CTR Del 437 (2008) held vide its order dated 30.07.2007 that if the Assessing officer harbours doubt of the legitimacy of any loan, he is empowered and duty bound to carry out thorough investigation u/s 68 of Income-tax Act, 1961.

The AO has analysed the financial strength of the appellant company and also the creditor M/s. HSPL to disprove the genuineness of the transaction and has presumed that the transaction was not as per business prudence. It is already mentioned that addition cannot be made on the basis of presumption, surmise and conjecture.

The AO has also doubted the source of funds of the coventurer. The provisions of Sec 68 as stood during the year under consideration do not entail the assessee to prove the source of source of funds. Further, the AO had a finding that MSPL liquidated its investments in unquoted shares to give non-interest-bearing advances to the assessee company. Further, the disputed fund as claimed by the assessee is not an unsecured loan advanced by MSPL to the appellant company but an investment in the joint venture and an investor cannot be questioned to utilize its funds in a particular manner. Similarly, there is no case for the additions made to the total income of the assessee on the basis of dubious transactions of third parties like Shri Sanjay Kumar or Shri Anand Sharma.

As is evident, the assessee has produced all the details to prove the source and the genuineness of the transaction. The details submitted by the assessee before the AO are as under-

- a) Confirmation from the said Minaxi Suppliers (creditor).
- b) Ledger Accounts of the creditor.
- c) Books of the creditor viz. Minaxi Suppliers Pvt.Ltd..
- d) Bank Statements evidencing receipt of monies
- e) Income Tax Return of the creditor for A.Y. 2011-12.
- f) Company master data showing details of Minaxi Suppliers P. Ltd; its directors Jashmin Ramesh Bhayani and Sagar Pankaj Bhayani
- g) Copies of Assessment Orders of the creditor for A.Y. 10-11 and 2012-13
- h) Copies of Director's Report, Auditor's report, Balance Sheet, Profit & Loss A/c for F.Y. 2010-11 of the creditor

From the above, it can be said that the assessee has done everything in its control to establish the bonafides. The appellant has also relied on the following case laws wherein the facts are similar to the assessee's facts.

i. Hon'ble Bombay High Court in the case of Orient Trading Co. Ltd. V/s. (1963) 49 ITR 723 (Bom.): Where any credits are found in the books of the assessee, the onus is on the assessee to prove the genuineness of the same and on failure of the assessee, the presumption u/s. 68 becomes absolute and the credits are treated as 'income<sup>1</sup> of the assessee. The assessee can discharge the onus by producing confirmation from the creditor and proving the source of the credits. When the creditor accepts/owns the loan, the assessee is deemed to have discharged his onus and no further responsibility lies on the assessee to prove the source from where the creditor has acquired the amounts advanced to the assessee. !



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- ii. Hon'ble Patna High Court in the case of Sarogi Credit Corporation V/s. CIT1976 103 ITR 344 (Pat) and Bombay High Court in the case of Shantilal Jain ITXA/687/2004 decided on 31.7.2007: When loan is accepted through normal banking channels, the identity of the creditor stands proved. However, merely because amounts have been received through banking channels, it is not sufficient to prove the genuineness of the credits. But the existence of a bank account of the creditor itself proves the existence of the creditor. The reason is very simple. Where the amounts are owned by the creditors, then even if it be presumed that the creditor had advanced the amounts from his undisclosed sources, still it would become the income of the said creditor and not that of the debtor (the assessee).
- iii. Hon'ble Gauhati High Court in the case of Nermi Chand Kothari V/s. GIT (2003) 264 ITR 254 (Gau.): The assessee cannot be called upon to prove the source-of-source.
- iv. Hon'ble Karnataka High Court in the case of CIT V/s. Arunanda Textiles P. Ltd. (2011)333 ITR 116 (Kar.): Where the assessee has submitted confirmations & affidavits from the creditors, the onus is not on the assessee to prove the creditworthiness of the creditors.
- v. Hon. Gujrat High Court in the case of DCIT v. Rohini Builders (2002) 256 ITR 360 (Gui): When all the requirements such as complete addresses of all the Creditors along with GIR Nos/ PAN as well as Confirmations along with Copies of Returns filed by the Creditors and all loans were received and repaid by account payee cheques nothing more is required were to be filed.
- vi. In the case of Hon. Prin. Commissioner of Income Tax. Mumbai v. Veedhata Tower Pvt. Ltd., the question of law raised before Hon'ble Bombay High Court was  
*"Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in interpreting Sec. 68 to hold that the A.O. was not entitled to enquire into the source of the source to come to a finding that a particular credit was not genuine in terms of Sec. 68."*

After detailed discussion, the Hon. Court held that the assessee has submitted all the required details, the assessee is not supposed to explain the Source of Source of Receipts. Besides, the Statute by an amendment to Sec. 68 of the Act w.e.f. 1<sup>st</sup> April, 2013, effective from asstt. year 2013-14. Therefore, during the subject asstt. year there was no requirement to explain the Source of the Source. Be that as it may, the impugned order of the Tribunal held that the respondent assessee had discharged the onus placed upon it under Sec. 68 of the Act by filing confirmation letter, the Affidavits, the full address and PAN Numbers of the Creditors. Therefore, the Revenue had all the details available with it to proceed against the persons whose source of funds were alleged to be not genuine as held by the Apex Court in CIT v. Lovely Exports (P) Ltd. (2009) 319 ITR (ST) 5 (SC). Hence the Court held that the Department cannot ask the Source of the Source for years prior to 2013-14.

vii. Bombay High Court in the case of Gangadeep Infrastructure 394 ITR 680 (Bom.): This proposition can be had from the proviso inserted in sec.68 by Finance Act, 2012 from A.Y. 2013-14. Under this proviso, where the assessee receives share application monies/premium, the assessee is expected to prove source-of-source as well. Firstly, in the case in hand, the amounts received are not share investment and further this proviso would apply only from A.Y. 2013-14. However, the said proviso was inserted because, sec.68 (unamended) was incapable of obliging the assessee to prove the source-of-source and hence the proviso was



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required to be inserted. It follows that where the proviso doesn't apply, the sec.68 does not put the burden on the assessee to prove the source-of-source.

viii. Hon'ble Supreme Court in the case of GIT V/s. Daulat Ram Rawaltnull 87 ITR 349 (SC): It is not the business of the assessee to find out the source of the money of his creditors.

ix. Hon'ble Apex Court in the case of GIT vs Orissa Corporation Pvt. Ltd: 158 ITR 78 (SO): It is also possible that a creditor may have advanced funds from out of his exempted income. For eg. If the creditor has agricultural income which is exempt, then merely because the creditor is not assessed to tax, it does not follow that the credits are assessee's income."

From the above factual and the decisions of the Hon'ble Courts, it is summed up as a transaction which is supported by documentary evidences and could not be treated as bogus or non-genuine merely on the basis of doubts raised regarding the same. There is no evidence brought on record and mentioned in the assessment "rder to prove the conclusions drawn by the AO. The outcome of enquiry carried out in the case of Kolkatta based entities and the conclusions drawn therein cannot be applied *ipso facto* and in a sweeping manner to all other cases who have entered into transactions during that period without making any enquiry or investigation to examine the genuineness of the particular transaction which is under suspicion. In view of the facts and circumstances mentioned above, in my opinion, the appellant has submitted sufficient evidences to prove the genuineness of the transactions during the year under consideration. In these circumstances, in my considered opinion, the assessee's contention has considerable cogency and accordingly the AO is directed to delete the addition of Rs. 10,20,00,000/- made to the total income of the assessee u/s 68 of the Act. Therefore, these grounds of appeal are allowed.

Aggrieved as aforesaid, the revenue is under appeal before us. The assessee, in its cross-objection, has challenged the validity of reassessment proceedings.

From the impugned order as extracted above, it is evident that Ld. CIT(A) has granted relief to the assessee primarily in view of the fact that the assessee had submitted sufficient documentary evidences to prove the genuineness of the transactions. The outcome of enquiry carried out in the case of Kolkatta based entities and the conclusions drawn therein cannot be applied *ipso facto* in a sweeping manner to all other cases who have entered into transactions during that period without making any enquiry or investigation to examine the genuineness of the particular transaction, which is under suspicion.



5.1 Upon due consideration of rival submissions and material on record, we find that as per the provisions of Section 68 of the Income Tax Act, 1961, where any sum is found credited in the assessee's books and assessee offers no explanation about the nature and source thereof or the explanation furnished is found to be unsatisfactory, the sum so credited may be charged to Income-Tax as the income of the assessee of that previous year. A proviso has been inserted to the said section by Finance Act, 2012 w.e.f. 01/04/2013 to provide that where the assessee is a company and the sum so credited consists of share application money, share capital, share premium etc., the explanation furnished by the assessee shall be deemed to be not satisfactory unless the person in whose name such credit is recorded also offers an explanation about nature and source of sum so credited and such explanation is found to be satisfactory. However, this proviso is applicable only from AY 2013-14 and the same is not retrospective in nature as held by Hon'ble Bombay High Court in the case of **CIT Vs. Gagandeep Infrastructure Private Limited [80 Taxmann.com 272]**. The said position has also been reiterated by Hon'ble Bombay High Court in its recent decision tilted as **Gaurav Triyugi Singh V/s ITO (ITA No.1750 of 207, dated 22/01/2020)** which also consider its earlier decision of **Pr.CIT V/s Veedhata Towers Pvt. Ltd. (2018 403 ITR 415)**. More pertinently, the said proviso is not, at all, applicable in case of unsecured loans or deposits, which is the case of the assessee.

5.2 It is settled position of law that to avoid the rigors of Section 68, the assessee must prove the identity, creditworthiness of the lenders / investors to advance such monies and genuineness of the transactions.



Once these three ingredients are fulfilled by the assessee, the primary onus casted upon him, in this regard, could be said to have been discharged and accordingly, the onus would shift upon revenue to dislodge the assessee's claim by bringing on record material evidences and unless this onus is discharged by the revenue, no addition could be sustained u/s 68. The Hon'ble Supreme Court in the case of **Lovely Exports P. Ltd. [319 ITR 5]**, dismissing revenue's appeal, observed as under: -

2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment.
3. Subject to the above, Special Leave Petition is dismissed.

The ratio of said decision has subsequently been followed by various judicial authorities in catena of judicial pronouncements. The said decision has been followed by Hon'ble Bombay High Court in the case of **CIT Vs. Gagandeep Infrastructure Private Limited [80 Taxmann.com 272]** & subsequently in **CIT Vs. Orchid Industries Private Limited [88 Taxmann.com 502]**. The Hon'ble Delhi High Court followed the said decision in **Pr. CIT V/s Adamine Construction Pvt. Ltd. [107 Taxmann.com 84]** against which revenue's Special Leave petition was dismissed by Hon'ble Supreme Court which is reported at 107 Taxmann.com 85. Similar is the position of decision of Hon'ble Delhi High Court rendered in **Pr. CIT V/s Himachal Fibers Ltd. [98 Taxmann.com 72]** against which revenue's Special Leave Petition was dismissed by Hon'ble Supreme Court which is reported at 98 Taxmann.com 173. Similar is the decision of Hon'ble High Court of



Madhya Pradesh in **Pr. CIT V/s Chain House International Pvt. Ltd. [98 Taxmann.com 47]** against which revenue's Special Leave Petition has been dismissed by Hon'ble Supreme Court on 18/02/2019 which is reported at 103 Taxmann.com 435. Similar is the recent decision of Hon'ble Bombay High Court in **Pr. CIT V/s Ami Industries (India) Pvt. Ltd. [ITA No. 1231 of 2017, dated 29/01/2020]** which has been rendered after considering the principles laid down by Hon'ble Supreme Court in its recent decision titled as **Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. [412 ITR 161]**.

5.3 Keeping in mind the aforesaid legal position, we find that the assessee, in support of the stated transactions, furnished following documentary evidences with respect to M/s MSPL during assessment proceedings: -

- (i) Copy of ITR for A.Y.2011-12 showing returned income at NIL, filed on 30-09-2011;
- (ii) Copy of Directors Report, Auditors Report, Balance Sheet as at 31-03-2011; Profit and Loss Account for the year ending 31-03-2011 alongwith few schedules;
- (iii) Confirmation of ledger account of the assessee as appearing in the books of Minaxi Suppliers Pvt. Ltd. for the year ending 31-03-2011 showing payments on various dates between May and October 2010 and amount outstanding as at 31-03-2011 at Rs.10,20,00,000.
- (iv) Copy of assessment orders u/s.143(3)
  - a. dated 26-03-2013 for A.Y.2010-11 assessing total income at Rs.8,23,220 and
  - b. dated 11 -02-2015 for A.Y.2012-13 assessing total income at Rs.1,32,500.
- (v) Company master Data showing details of Minaxi Suppliers P. Ltd., showing Jashmin Ramesh Bhayani and Sagar Pankaj Bhayani as its directors

The Ld. AO, in its findings, has accepted the fact that the source of extending the loan by M/s MSPL was liquidation of investment in unquoted shares. Therefore, upon perusal of these documents, it could be said that the assessee had discharged the stated primary onus of



Sec.68. It is pertinent to note that the assessee has produced copy of assessment order passed by revenue in the case of M/s MSPL in scrutiny assessment u/s 143(3) for AYs 2010-11 & 2012-13 which would lead to inevitable conclusion that the said entity was a taxable entity and regularly assessed to tax. In both the years, returned income of M/s MSPL has substantially been accepted by the revenue.

5.4 The perusal of assessee's financial statements, for the year, would show that the assessee has received unsecured loans not only from M/s MSPL but also from various other entities. The aggregate of such loans accepted by the assessee is 26.26 Crores at year-end which would show that impugned transactions are not isolated transactions but regularly carried out by the assessee during the course of its business and a part of which has already been accepted by the revenue.

5.5 Undisputedly, the amount received from M/s MSPL was through banking channels. There is no allegation of immediate cash deposit in the bank account of M/s MSPL before granting loans to the assessee. In fact, it is admitted position by Ld.AO that the unsecured loans were sourced by M/s MSPL by liquidating the investment in unquote shares. The said fact has already been noted by us in preceding para 3.8 of the order.

5.6 The Ld.CIT-DR cited the decision of Hon'ble High Court of Delhi in **CIT V/s Navodaya Castles Pvt. Ltd. (367 ITR 306 25/08/2014)**. However, we find the same to be factually distinguishable since in that case, the assessment order specifically records that there were huge regular cash deposits and thereafter pay order / cheques were issued to the respondent assessee. The same is not the case here since Ld. AO



records a fact that loans were sourced by liquidating the unquoted investments.

5.7 The case law of Hon'ble Delhi High Court in the case of **CIT V/s Jansampark Advertising & Marketing Pvt. Ltd. [2015 56 Taxmann.com 286]**, would also not apply since upon perusal of para-41 of the judgment, it is quite discernible that the assessee had come up with the proof of identity of some of the entities in question but failed to establish the genuineness and creditworthiness of the transactions. Therefore, the matter was set aside by Hon'ble Court to the file of Ld. CIT(A) for fresh consideration / adjudication. The same is not the case here since the assessee has filed sufficient documentary evidences to establish the fulfillment of three primary ingredients of Sec. 68.

5.8 The case law of Hon'ble Supreme Court in **Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. [412 ITR 161]** has already been considered by Hon'ble Bombay High Court in its recent decision titled as **Pr. CIT V/s Ami Industries (India) Pvt. Ltd. [ITA No. 1231 of 2017, dated 29/01/2020]** and after considering the same, Hon'ble Court has taken the view favorable to the assessee. The relevant observations were as under: -

10. Mr. Suresh Kumar, learned standing counsel, revenue has taken us through the assessment order and submits therefrom that it cannot be said that assessee had discharged the burden to prove credit worthiness of the creditors. His further contention is that the assessee is also required to prove the source of the source. In this connection, he has placed reliance on a decision of the Supreme Court in **Pr. CIT Vs. NRA Iron & Steel Pvt Ltd**. He, therefore, submits that the finding returned by the Tribunal is wholly erroneous and requires to be interfered with by this Court.

11. Per contra, Mr. Padvekar, learned counsel for the respondent submits that from the facts and circumstances of the case, it is quite evident that assessee had discharged its burden to prove identity of the creditors, genuineness of the transactions and credit worthiness of the creditors. He submits that the legal position is very clear in as much as assessee is only required to explain the source and not source of the source. Decision of the Supreme Court in NRA Iron & Steel P Ltd (supra) is not the case law for the aforesaid proposition. In fact, the said decision nowhere states that assessee is required to prove source of the source.



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11.1. Referring to the orders passed by the authorities below, Mr. Padvekar submits that in the present case, the investigation wing of the department had carried out detailed investigation at Kolkata and found the source of the credit to be genuine. This report of the investigation wing was not taken into consideration by the Assessing Officer. Therefore, lower appellate authorities were justified in deleting the additions made by the Assessing Officer. Being a finding of fact, no substantial question of law arises in the appeal. Therefore, the appeal should be dismissed.

12. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

13. Section 68 of the Act deals with cash credits. As per Section 68, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. Simply put, the section provides that if there is any cash credit disclosed by the assessee in his return of income for the previous year under consideration and the assessee offers no explanation for the same or if the assessee offers explanation which the Assessing Officer finds to be not satisfactory, then the said amount is to be added to the income of the assessee to be charged to income tax for the corresponding assessment year.

14. Section 68 of the Act has received considerable judicial attention through various pronouncements of the Courts. It is now well settled that under Section 68 of the Act, the assessee is required to prove identity of the creditor; genuineness of the transaction; and credit worthiness of the creditor. In fact, in *NRA Iron & Steel (P) Ltd (supra)*, Supreme Court surveyed the relevant judgments and culled out the following principles:

"11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor / subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders. iii. If the inquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

15. It is also a settled proposition that assessee is not required to prove source of source. In fact, this position has been clarified by us in the recent decision in **Gaurav Triyugi Singh Vs. Income Tax Officer-24(3)(1)**.

16. Having noted the above, we may now advert to the orders passed by the authorities below.

17. In so far order passed by the Assessing Officer is concerned, he came to the conclusion that the three companies who provided share application money to the assessee were mere entities on paper without proper addresses. The three companies had no funds of their own and that the companies had not responded to the letters written to them which could have established their credit worthiness. In that view of the matter, Assessing Officer took the view that funds aggregating Rs. 34 Crores introduced in the return of income in the garb of share application money was money from unexplained source and added the same to the income of the assessee as unexplained cash credit under Section 68 of the Act.

18. In the first appellate proceedings, it was held that assessee had produced sufficient evidence in support of proof of identity of the creditors and confirmation of transactions by



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many documents, such as, share application form etc. First appellate authority also noted that there was no requirement under Section 68 of the Act to explain source of source. It was not necessary that share application money should be invested out of taxable income only. It may be brought out of borrowed funds. It was further held that nonresponding to notice would not ipso facto mean that the creditors had no credit worthiness. In such circumstances, the first appellate authority held that where all material evidence in support of explanation of credits in terms of identity, genuineness of the transaction and creditworthiness of the creditors were available, without any infirmity in such evidence and the explanation required under Section 68 of the Act having been discharged, Assessing Officer was not justified in making the additions. Therefore, the additions were deleted.

19. In appeal, Tribunal noted that before the Assessing Officer, assessee had submitted the following documents of the three creditors:

- a) PAN number of the companies;
- b) Copies of Income Tax return filed by these three companies for assessment year 2010-11;
- c) Confirmation Letter in respect of share application money paid by them; and
- d) Copy of Bank Statement through which cheques were issued.

20. Tribunal noted that Assessing Officer had referred the matter to the investigation wing of the department at Kolkata for making inquiries into the three creditors from whom share application money was received. Though report from the investigation wing was received, Tribunal noted that the same was not considered by the Assessing Officer despite mentioning of the same in the assessment order, besides not providing a copy of the same to the assessee. In the report by the investigation wing, it was mentioned that the companies were in existence and had filed income tax returns for the previous year under consideration but the Assessing Officer recorded that these creditors had very meager income as disclosed in their returns of income and therefore, doubted credit worthiness of the three creditors. Finally, Tribunal held as under:

"5.7 As per the provisions of Section 68 of the Act, for any cash credit appearing in the books of assessee, the assessee is required to prove the following (a) Identity of the creditor (b) Genuineness of the transaction (c) Credit-worthiness of the party

(i) In this case, the assessee has already proved the identity of the share applicant by furnishing their PAN, copy of IT return filed for asst. year 2010-11.

(ii) Regarding the genuineness of the transaction, assessee has already filed the copy of the bank account of these three share applicants from which the share application money was paid and the copy of account of the assessee in which the said amount was deposited, which was received by RTGS.

(iii) Regarding credit-worthiness of the party, it has been proved from the bank account of these three companies that they had the funds to make payment for share application money and copy of resolution passed in the meeting of their Board of Directors.

(iv) Regarding source of the source, Assessing Officer has already made enquiries through the DDI (Investigation), Kolkata and collected all the materials required which proved the source of the source, though as per settled legal position on this issue, assessee need not to prove the source of the source.

(v) Assessing Officer has not brought any cogent material or evidence on record to indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represent company's own income from undisclosed sources.

Accordingly, no addition can be made u/s.68 of the Act. In view of above reasoned factual finding of CIT(A) needs no interference from our side. We uphold the same."

21. From the above, it is seen that identity of the creditors were not in doubt. Assessee had furnished PAN, copies of the income tax returns of the creditors as well as copy of bank accounts of the three creditors in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were



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concerned, Tribunal recorded that bank accounts of the creditors showed that the creditors had funds to make payments for share application money and in this regard, resolutions were also passed by the Board of Directors of the three creditors. Though, assessee was not required to prove source of the source, nonetheless, Tribunal took the view that Assessing Officer had made inquiries through the investigation wing of the department at Kolkata and collected all the materials which proved source of the source.

22. In NRA Iron & Steel (P) Ltd (supra), the Assessing Officer had made independent and detailed inquiry including survey of the investor companies. The field report revealed that the shareholders were either non-existent or lacked credit-worthiness. It is in these circumstances, Supreme Court held that the onus to establish identity of the investor companies was not discharged by the assessee. The aforesaid decision is, therefore, clearly distinguishable on facts of the present case.

21. Therefore, on a thorough consideration of the matter, we are of the view that the first appellate authority had returned a clear finding of fact that assessee had discharged its onus of proving identity of the creditors, genuineness of the transactions and credit-worthiness of the creditors which finding of fact stood affirmed by the Tribunal. There is, thus, concurrent findings of fact by the two lower appellate authorities. Appellant has not been able to show any perversity in the aforesaid findings of fact by the authorities below.

22. Under these circumstances, we find no error or infirmity in the view taken by the Tribunal. No question of law, much less any substantial question of law, arises from the order of the Tribunal. Consequently, the appeal is dismissed. However, there shall be no order as to cost.

5.9 Considering the entirety of facts and circumstances, we are of the considered opinion that the assessee has discharged the primary onus to demonstrate fulfilment of primary ingredients of Sec.68 and it was incumbent upon revenue to dislodge the assessee's claim by bringing on record, cogent material to establish that the assessee's unaccounted money was routed in its books of account in the garb of unsecured loans. However, we are unable to find any such material except for the fact that additions were made merely on suspicious, conjectures and surmises. Therefore, no infirmity could be found, in the impugned order, in this regard. We confirm the appellate order. Resultantly, the revenue's appeal stands dismissed.

### **Assessee's Cross Objections**

6. The Ld. AR, in the cross-objections assailed the reassessment proceedings by submitting that the proceedings were initiated merely at



the behest of investigation wing without due application of mind by Ld. AO. However, we find that the original return was processed u/s 143(1) and the case was reopened within 4 years upon receipt of tangible information from investigation wing which suggested possible escapement of income in the hands of the assessee. In our opinion, nothing more was required at this stage since Ld. AO had sufficient reasons to form such a belief. Therefore, we do not find much substance in assessee's cross-objections and see no reason to deviate from the findings of Ld.CIT(A), in the impugned order, in this regard. Resultantly, the cross-objections stands dismissed.

### **Reasons for delay in pronouncement of order**

7.1 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 19/02/2020 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.



7.2 Although the order was well drafted 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.

7.3 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



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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 lockdown 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 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.



Drawing 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.

### **Conclusion**

8. The revenue's appeal as well as assessee's cross-objections stands dismissed.

This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

**Sd/-**

**(Mahavir Singh)**

**उपाध्यक्ष / Vice President**

**Sd/-**

**(Manoj Kumar Aggarwal)**

**लेखा सदस्य / Accountant Member**

मुंबई Mumbai; दिनांक Dated : 25/06/2020  
Sr.PS, Jaisy Varghese

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**