

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.577/Viz/2013
(निर्धारण वर्ष/A.Y : 2007-08)**

Smt. Sofia Sadique
Legal Heir of Late Syed
Mohammed Shariff
C/o I.Kamasastry
Sri Sai Lalitha Ramam
9-16-29/1, CBM Compound'
Near Rama Talkies
Visakhapatnam

Vs. Dy.Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

**आयकर अपील सं./I.T.A.No.578/Viz/2013
(निर्धारण वर्ष/A.Y : 2007-08)**

Sri Syed Yakub Shariff
C/o I.Kamasastry
Sri Sai Lalitha Ramam
9-16-29/1, CBM Compound
Near Rama Talkies
Visakhapatnam

Vs. Dy.Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

**आयकर अपील सं./I.T.A.No.579/Viz/2013
(निर्धारण वर्ष/A.Y : 2007-08)**

Sri Syed Ibrahim Shariff
C/o I.Kamasastry
Sri Sai Lalitha Ramam
9-16-29/1, CBM Compound'
Near Rama Talkies
Visakhapatnam

Vs. Dy.Commissioner of
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Syed Ibrahim Shariff and Syed Rehman Shariff, Visakhapatnam*

**आयकर अपील सं./I.T.A.No.581/Viz/2013
(निर्धारण वर्ष/A.Y : 2007-08)**

Smt.Hazara Begum
Legal Heir of Late Sri Syed Rehman
Shariff
Krishna Nagr, Dabagardens
Visakhapatnam

Dy.Commissioner of
Income Tax
Central Circle-1
Visakhapatnam

अपीलार्थी की ओर से/ Appellant by
प्रत्यार्थी की ओर से / Respondent by

Shri I Kamasastry, AR
Smt. Suman Malik, DR


सुनवाई की तारीख / Date of Hearing : 19.08.2019
घोषणा की तारीख/Date of Pronouncement : 25.09.2019

आदेश /ORDER

Per Bench :

These appeals are filed by the assesseees and the legal heirs in the case of Late Shri Syed Mohammed Shariff and Shri Syed Rehman Shariff against the order of the Commissioner of Income Tax (Appeals) [CIT(A)], Visakhapatnam in I.T.A. No.170-173/11-12/DCIT, C-C-1/VSP/2013-14 dated 28.06.2013. Since the grounds raised in these appeals are common, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under:

2. The assessee raised common grounds in all the above appeals which reads as under :

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1. *The Ld. AO is not correct in making an assessment under section 143(3) r.w.s.147 of Income-tax Act, instead of under section 153A r.w.s, 143(3).*
 2. *The Notice issued under section 148 has been served on Shri Ambika Prasad, Chartered Accountant instead of on the assessee, hence the entire assessment is void ab initio.*
 3. *The Notice issued under section 148 is vague as the irrelevant portions of the notice are not struck off, hence the entire assessment is void ab initio.*
 4. *The entire assessment is based on the statement obtained from Shri. Ambika Prasad, Chartered Accountant in the section 131 summons issued by the ADIT (Inv), Visakhapatnam. The statement cannot be binding on the assessee as the authorised representative is prohibited to be present in proceedings under section 131.*
 5. *The entire assessment is ab initio void for the reason that the reasons recorded for reopening the assessment have not been communicated to the .assessee though the same have been specifically asked for by the appellant / assessee.*
 6. *The entire assessment is ab initio void for the reason that the assessment has been made in the status of a resident whereas the assessee is a non-resident and the return of income has been filed in that status only.*
 7. *The entire addition made by the Ld. AO to the long term capital gains returned by the appellant/assessee and confirmed by the Ld. CIT(Appels) is erroneous and is against the provisions of law and also against the judicial opinion on the same.*
 8. *The appellant craves leave to add to, amend or alter the above grounds of appeal and all the above grounds are without prejudice to one another.*
3. For the sake of convenience, the facts of the case are extracted from the appeal of Smt. Sofia Sadique, legal heir of Late Syed Mohammed Shariff and are identical to all other appeals. A search and seizure operation was conducted in the residential premises of Sri Belagam Srinivasa Rao and

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survey u/s 133A was conducted in the office premises of M/s Srinivasa Associates, Visakhapatnam and Vizianagaram on 05.09.2008. The assessee along with his four brothers, Mr.Syed Abdulla Shariff, Mr.Syed Yakub Shariff, Mr.Syed Ibrahim Shariff and Mr.Syed Rehman Shariff have sold the land admeasuring 650 sq.yds at Dabagardens, Visakhapatnam for a sale consideration of Rs.82,25,000/- as per the registered sale deed. During the course of survey conducted in the premises of M/s Srinivasa Associates, Vizianagaram, certain documents evidencing the payments of on money to the assessee and four others were found and impounded as page No.9 of BS/Office/Vzm/6 and page No.65 of BS/Off/Vzm/4. During the course of survey in the premises of M/s Srinivasa Associates, Visakhapatnam office also hand written documents indicating the said transactions were found and impounded as Page No.52 of BS/Off/Vsp/18. In a statement recorded on 05.09.2008, Mr.B.Srinivasa Rao, the Proprietor of M/s Srinivasa Associates had stated that the property was purchased by him for a sum of Rs.1,26,75,000/- and registered the same at Rs.82,25,000/-. The AO had issued summons u/s 131 to the assessee and his brothers. In response to the summons, Sri Ambika Prasad, Chartered Accountant appeared on behalf of the assessee and four others and accepted the receipt of

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Rs.1,26,75,000/- as sale consideration for sale of 650 sq.yds of land owned by Shariff family at Dabagardens. He has also stated that the share of Shri Syed Rehman in the land was 80% and the remaining 20% was held by other four brothers including the assessee Late:Shri Syed Mohammed Shariff. The assessee's representative has also agreed to file the return of income adopting the total sale consideration of Rs.1,26,75,000/- and admit the income proportionate to the shares of co-owners. The AO also extracted the relevant part of the statement recorded from Shri Ambika Prasad u/s 131 on 18.09.2008 in the assessment order. Subsequently, the AO had issued the notice u/s 148 of the Act on 07.06.2010 to all the co-owners and the same was served on the assessee on 23.06.2010. In response to which the assessee's A.R. filed a letter dated 18.01.2010 stating that the return filed earlier may be treated as return in response to the notice u/s 148 of the Act. The AO verified the returns and found that the assessee had admitted his 5% share of sale consideration for capital gains which worked out to Rs.1,59,808/- and the same was as per the original consideration as per the sale deed for Rs.82,21,000/- instead of admitted sale consideration of Rs.1,26,75,000/- in the statement recorded u/s 133A. The AO called for explanation from the assessee as to why the difference amount should not

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be brought to tax as capital gains and in response to which the assessee filed a letter before the AO with revised capital gains admitting the sale consideration of Rs.6,33,750/- towards his 5% share of 1,26,75,000/-. However, while computing the capital gains, the assessee has taken the fair market value of the asset as on 01.04.1981 at Rs.9,70,950/-. For the purpose of computation of capital gains the assessee has taken the prevailing sale consideration in F.Y.1984-85 as per the SRO and applied the cost inflation index in the reverse order for arriving at the FMV as on 01.04.1981 as under :

Fair market value as on 01.04.1981

a) cost inflation index for F.Y.1985-85 (which is calculated having regard to 75% rise in consumer price index	125
b) Less : cost inflation index for F.Y.1981-82 (base index)	100
	25
100% rise in cost inflation index = (25/75%)	33.33
Add : Base index in 1981-82	100.00
Fair market value in 1984	1950
Fair market value as on 01.04.1981 worked out (1950 x 100/133.33)	1463
Cost of acquisition as the property is acquired before 01.04.1981 Fair market value as on 01.04.1981 is worked out as under :	
(Rs.1463 x 650 sq.yards)	Rs.9,50,950
Cost of improvement	Rs.20,000
	Rs.9,70,950

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3.1. Accordingly the assessee adopted the cost of acquisition at Rs.1463/- per square yard and worked out the cost of acquisition at Rs.9,70,950/- as on 01.04.1981 and worked out the capital gains. Since the AO did not find favour in the method of computation worked out by the assessee for estimation of fair market value as on 01.04.1981, requested the SRO, Visakhapatnam to provide the market value of the property as on 01.04.1981 . The SRO, Visakhapatnam vide letter dated 14.12.2010 furnished the market value of the subject property at Rs.65 per sq.yard as assessed in SRO. Accordingly, the AO had issued the show cause notice to the assessee proposing to adopt fair market value as on 01.04.1981 at Rs.65/- per sq.yd and recomputed the capital gains. In response to which, the assessee filed objections stating that long term capital gains has to be computed by applying cost inflation index in the reverse order and the method is approved by ITAT Agra Bench in the case of Jahnganj Cold Storage Vs. ACIT (2010) 133 TTJ (Agra) 278 and also relied on the decision of Hindustan Motors Ltd. Vs. Members, the Appropriate Authority (IT Department) & Ors (2001) 249 ITR 424 (Mad) and the decision of Rajasthan High Court in the case of Krishna Kumar Rawat & Ors Vs. Union

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of India and others (1995) 214 ITR 610 (Raj). The AO held that the case laws relied upon by the assessee are distinguishable and not on similar facts, accordingly rejected the contentions of the assessee and adopted the fair market value as per the rates of SRO, Visakhapatnam @Rs.65/- per sq.yd. as on 01.04.1981 and recomputed the capital gains at Rs.1,23,51,922/-, out of which the share of the assessee being 5%, assessed the income at Rs.6,17,596/- and completed the assessment u/s 143(3) r.w.s. 147 of the Act dated 31.12.2010.

3.4. In other cases also, the AO completed the assessment adopting the fair market value as on 01.04.1981 at Rs.65/- per sq.yd and assessed the long term capital gains as under :

I.T.A. No.	Name of the assessee	% of share	Capital Gains assessed (Rs.)
578/Viz/2013	Sri Syed Yokub Shariff	5	6,17,596
579/Viz/2013	Sri Syed Ibrahim Shariff	5	6,17,596
581/Viz/2013	Smt.Hazara Begum Legal Heir of Late Sri Syed Rehman Shariff	80	98,81,593
580/Viz/2013	Sri Syed Abdullah Shariff	5	6,17,596

The common grounds No.1, 5 and 7 in all the appeals are as follows:

1. *The Ld. AO is not correct in making an assessment under section 143(3) r.w.s.147 of Income-tax Act, instead of under section 153A r.w.s, 143(3).*

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5. *The entire assessment is ab initio void for the reason that the reasons recorded for reopening the assessment have not been communicated to the assessee though the same have been specifically asked for by the appellant / assessee.*

7. *The entire addition made by the Ld. AO to the long term capital gains returned by the appellant/assessee and confirmed by the Ld. CIT(Appeals) is erroneous and is against the provisions of law and also against the judicial opinion on the same.*

4. The remaining grounds raised by the assessee in ground No. 2 to 4, 6 and 8 are not pressed by the Ld.AR during the appeal hearing, Therefore, ground No. 2 to 4, 6 and 8 are dismissed as not pressed.

5. Ground No.1 is related to the assumption of jurisdiction u/s 147 instead of 153A. During the appeal hearing, the Ld.AR submitted that a search u/s 132 was carried out in the case of Sri Belagam Srinivasa Rao, the proprietor of M/s Srinivasa Associates and simultaneous surveys were conducted in the business premises of the assessee. During the course of survey u/s 133A, incriminating material was found and impounded from the business premises. Since the survey u/s 133A was conducted in the business premises simultaneous along with the search in the residence of Sri Belagam Srinivasa Rao, the survey has to be considered as an extension of search conducted u/s 132, thus, argued that the assessment required to be made u/s 153A in the assessee's case, but not u/s 143(3) r.w.s. 147 of

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the Act. Therefore, submitted that the correct course of action for making assessment in the assessee's case is 153C but not 147. Thus, argued that AO assumed wrong jurisdiction, therefore, argued that the assessment made u/s 147 r.w.s. 143(3) is *void ab initio*, hence, requested to quash the assessment made u/s 147 r.w.s. 143(3) of the Act. This issue was also raised before the Ld.CIT(A) and the Ld.CIT(A) dismissed the appeal of the assessee on this ground and upheld the action of the AO in reopening the assessment u/s 148 of the Act.

5.1. During the appeal hearing before us, the Ld.AR reiterated the submissions made before the Ld.CIT(A) and relied on the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax, Chennai Vs. S.Ajit Kumar in Civil Appeal No.10164 of 2010 dated 02.05.2018. The Ld.AR also relied on the decision of ITAT Pune Bench in the case of Shri Vyankatesh Vasudev Mandke Vs. DCIT, HQ(IV), Pune in I.T.A. No.751/Pun/2016 dated 26.06.2019 and argued that in the instant case also search u/s 132 was conducted in the residential premises and survey u/s 133A was conducted in the business premises of the assessee, hence the survey was an extension of the search proceedings, hence, the AO ought to have taken action u/s 153C, but not u/s 147 of the Act. therefore,

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argued that the assessment framed u/s 147 is *void ab initio*, hence, requested to quash the assessment order. The Ld.AR submitted that the facts of the assessee's case are squarely covered by the decision of ITAT Pune Bench (supra).

6. On the other hand, the Ld.DR relied on the orders of the lower authorities.

7. We have heard both the parties and perused the material placed on record. A search u/s 132 was conducted in the residential premises of Sri Belagam Srinivasa Rao and survey operation u/s 133A was conducted in the business premises of M/s Srinivasa Associates at Visakhapatnam and Vizianagaram on 05.09.2008. The material was found during the course of survey conducted in the business premises of M/s Srinivasa Associates, but not during the search conducted in the searched premises of Sri Belagam Srinivasa Rao. No material was found belonging to the assessee in the searched premises by the department. As per the provision of section 153C of Income Tax Act, the AO is permitted to assume the jurisdiction u/s 153C of the Act only in case if any money, bullion, jewellery or books of accounts or documents seized or requisitioned belongs to or relates to a person other

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than the searched person in the proceedings initiated u/s 132 of the Act. In the instant case, no search was initiated u/s 132 of the Act in the business premises of the searched person and the material was found during the survey with regard to under statement of sale consideration. Therefore, we hold that the Ld.CIT(A) has rightly upheld the action of the AO and upheld the validity of notice u/s 148 of the Act. The Ld.AR relied on the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax, Chennai Vs. S.Ajit Kumar (supra). The issue in the cited case for consideration was the use of material found during the course of survey in the premises of the builder in erstwhile block assessment proceedings. Hon'ble Supreme Court decided the issue in favour of the revenue and held that the material found during the course of survey also can be used for making the block assessment. The assessments were related to block assessments u/s 158BB and 158BH of the Act and the language used in section 158BB r.w.s. 158BH was such other materials or information as are available with the Assessing Officer. Whereas in the instant case, the assessments in question was made u/s 143(3) r.w.s.147 and the contention of the assessee for assumption of jurisdiction u/s 153C, but not block assessment. Therefore, the case law relied upon by the assessee has no application in the assessee's

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case, further the issue before the Hon'ble Supreme Court is not whether the assessment to be framed u/s 158BB or 153A or 153C vis-à-vis 147 of the Act. The issue was related to the usage of material found during the course of survey in the block assessment. Therefore, the case law has no relevance to the assessee's case and distinguishable from the facts of the present case. The assessee also relied on the decision of coordinate bench of ITAT 'A' in the case of Shri Vyankatesh Vasudev Mandke Vs. DCIT, HQ(IV). In the cited case, search u/s 132 was conducted in the Pinnacle Kalpataru, Pune and the information was received from the DDIT Investigation Unit-2, Pune stating that during the course of search and seizure operation in the premises of Sri Gajendra D Pawar, certain loose papers were seized and accordingly Sri Gajendra D Pawar made a statement u/s 132(4) of the Act accepting that he had received cash of Rs.87,07,500/- over and above the agreement value. The material was found during the course of search but during the survey u/s 133A. Therefore, Hon'ble ITAT held that the assessment required to be made u/s 153C of the Act but not u/s 147. Whereas in the instant case, during the course of search nothing was found and the material was found in the business premises of Sri B.Srinivasa Rao during the survey u/s 133A. Therefore, the case laws relied upon by the assessee have no application in

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the instant case. On perusal of the provisions u/s 153C of the Act in case any document relating to any other person is found during the course of search of a person other than the searched person, then the said documents to be forwarded to the AO in charge of the person, other than the searched person. The proceedings have to be initiated against such other person on the basis of such document found and seized. Section 153C of the Act clearly provides assumption of jurisdiction only when the conditions mentioned in the said section are satisfied. In the instant case, there was no search conducted in the case of Srinivasa Associates and it was only survey conducted in the business premises of Srinivasa Associates, wherein the document was found. The AR did not place any copy of Panchanama evidencing the incriminating material found and seized during the course of search. Therefore, the case laws relied upon by the assessee has no application. Hence we, hold that the AO has rightly initiated the action u/s 147 of the Act. Accordingly, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the assessee on this ground.

8. Ground No.5 which is being pressed by the Ld.AR during the appeal hearing is related to the validity of assessment framed u/s 147 r.w.s. 143(3) of the Act for non communication of reasons recorded for reopening the

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assessment. During the appeal hearing, the Ld.AR submitted that the assessee had requested for supply of reasons for reopening the assessments, after having responded to the notice, but the AO had completed the assessment without having supplied the reasons, thus, argued that the assessment made u/s 147 is null and void. The said issue was raised before the CIT(A) also and the Ld.CIT(A) had dismissed the appeal of the assessee. stating that non communication of reasons would tantamount to violation of natural justice and hence, it is a procedural mistake and there was no error regarding the jurisdiction. The Ld.CIT(A) relied on the decision of Areva T&D India Ltd., Vs. ACIT 294 ITR 333 (Mad.) and the CIT(A) also viewed that as per the decision of Hon'ble Apex Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO, the only requirement to be complied with by the AO is to supply the reasons, but does not make the orders passed u/s 147 r.w.s. 143(3) as invalid.

9. Against the order of the Ld.CIT(A), the assessee is in appeal before us. During the appeal hearing, the Ld.AR submitted that the assessee had replied to the notice issued by the AO requesting to treat the return of income already filed as return in response to notice u/s 148 vide letter submitted before the ACIT dated 18.10.2010 and requested for supply of

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reasons for reopening the assessment. The AO completed the assessment without communicating the reasons recorded for reopening the assessment. The assessee referred page No.4 of the paper book and shown copy of the letter submitted before the AO in all the impugned appeals. The Ld.AR further submitted that completion of assessment without communicating the reasons is fatal to the assessment and accordingly argued that the assessment made u/s 147 is invalid. He has invited our attention to page No.189 of the paper book, the decision of Hon'ble High Court of Andhra Pradesh in the case of Commissioner of Income Tax-III Vs. N.Surya Prakash Rao in ITAT Appeal No.156 of 2014 dated 06.03.2014, wherein Hon'ble jurisdictional High Court upheld the order of the ITAT holding that the assessment order passed without communicating the reasons recorded for reopening the assessment is null and void. The Ld.AR referring the decision of this Tribunal in the case of Alapati Kasi Subrayan in I.T.A. No.113-116/Viz/2018 dated 21.12.2018 submitted that the ITAT has also taken the view that the order passed without communicating the reasons is invalid. Accordingly, the Ld.AR argued that in the instant case, the AO had passed the order without communicating the reasons, therefore, argued that the order passed by the AO is void ab initio, hence,

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requested to set aside the order of the Ld.CIT(A) and quash the assessment order passed by the AO.

10. On the other hand, the Ld.DR supported the orders of the lower authorities.

11. We have heard both the parties and perused the material placed on record. In the instant case, the AO had issued the notice u/s 148 for which the assessee submitted the reply requesting to treat the return of income already filed as return in response to the notice u/s 148 of the Act. The assessee also requested vide letter dated 18.10.2010 for supply of reasons recorded for reopening the assessment. The AO proceeded to complete the assessment without communicating the reasons. During the appeal hearing, the Ld.DR heavily placed reliance on the notice issued u/s 142(1) by the AO, wherein, the AO had called for certain information from the assessee. However, the information called for by the AO vide notice u/s 142 does not indicate the reasons for reopening the assessment. In the instant case, it is a fact that the AO had not communicated the reasons for initiating the assessment u/s 148 of the Act. The coordinate Bench of Hyderabad in the case of N.Surya Prakash Rao Vs. DCIT, Circle-13(1), Hyderabad dated

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28.06.2013 in I.T.A No.300 & 301/Hyd/2013 for the A.Ys 2005-06 and 2006-07 held that the assessment order passed without communicating the reasons recorded for reopening the assessment has to be held as null and void. The said order was confirmed by the jurisdictional High Court in ITAT Appeal No.156 of 2014 (supra). Similarly, this Tribunal in the case of Alapati Kasi Subrayan Vs. ITO, 54 CCH 0426 also taken similar view. Hon'ble Supreme Court in the case of GKN Driveshafts held that the AO is bound to supply the reasons. In the instant case, though the assessee had responded to the notice issued u/s 148 and requested for the reasons, the AO did not communicate the reasons. Therefore, respectfully following the decision of Hon'ble Jurisdictional High Court and the decision taken by this Tribunal in the case of Alapati Kasi Subrayan (supra) we hold that the assessment order passed without communicating the reasons is invalid and accordingly, we set aside the orders passed by the Ld.CIT(A) and annul the assessments made u/s 147 r.w.s. 143(3) of the Act.

12. Since we have held that the assessment order framed u/s 147 r.w.s. 143(3) as invalid, we consider it is not necessary to adjudicate the other grounds raised by the assessee (i.e. Ground No.7 which is reproduced

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in the earlier paragraphs) in this order. Accordingly, appeals of the assesseees are allowed on ground No. 5 and 7.

13. In the result, appeals of the assesseees are allowed.

Order pronounced in the open court on 25th September, 2019.

Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH)	Sd/- (वी.दुर्गा राव) (V. DURGA RAO)
लेखा सदस्य/ ACCOUNTANT MEMBER	न्यायिक सदस्य/ JUDICIAL MEMBER
विशाखापटणम /Visakhapatnam	
दिनांक /Dated : 25.09.2019	
L.Rama, SPS	

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – i) Smt. Sofia Sadique, Legal Heir of Late Syed Mohammed Shariff,(ii) Sri Syed Yakub Shariff, (iii)Sri Syed Ibrahim Shariff (iv) Smt.Hazara Begum, Legal Heir of Late Sri Syed Rehman Shariff, C/o I.Kamasastry, Sri Sai Lalitha Ramam, 9-16-29/1, CBM Compound Near Rama Talkies, Visakhapatnam
2. राजस्व/The Revenue - Dy.Commissioner of Income Tax, Central Circle-1 Visakhapatnam
3. The Commissioner of Income Tax (Central), Hyderabad
4. The Commissioner of Income Tax (Appeals), Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam