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

BEFORE SHRI S. RIFAUR RAHMAN, AM &
SHRI RAVISH SOOD, JM

आयकरअपीलसं./ I.T.A. No. 35 & 36/Mum/2017
(**निर्धारणवर्ष** / Assessment Year: 2007-08 & 2008-09)

K. J. Khilnani Education Trust, Mori Road, Mahim Mumbai-400 016	**बनाम**/ Vs.	ITO (E) - 1(4), Mumbai Pin-
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAATK3073F		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri N. M. Porwal, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Brajendra Kumar, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	04.02.2021
घोषणाकीतारीख / **Date of Pronouncement**	:	11.02.2021

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present two appeals have been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals) -1 in short referred as 'Ld. CIT(A)', Mumbai, dated 19.10.2016

for Assessment Year (in short AY) 2007-08 & 2008-09 respectively.

2. Since the issues raised in both the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. First, we are taking appeal in ITA No. 35/Mum/2017 for AY 2007-08.

3. In the present case, assessee has filed original grounds of appeal and additional grounds. At the time hearing, Ld. AR submitted that assessee does not press for the original grounds and first additional ground. Accordingly, the original grounds and first set of additional grounds are dismissed as not pressed. Assessee filed the second additional grounds of appeal no. 1 & 2 objecting to the reopening of assessment by issuing notice u/s 148 with the approval of Commissioner of Income Tax which is not as per section 151 of the Act. As per the provisions of section 151, AO should have recorded the satisfaction of JCIT /ACIT instead of CIT. Assessee prayed that these additional grounds are purely legal issue which goes

to the roots of the matter, therefore the same may be considered for adjudication. In this regard, he relied on the decision of Hon'ble Supreme Court in the case of NTPC vrs. CIT (1996) 64 CCH 1401 ISCC.

4. On the other hand, Ld. DR objected to the admission of additional grounds.

5. Considered the submissions, we admit the additional ground, which goes to the roots of the issue under consideration. Accordingly, we proceed to adjudicate the jurisdictional issue. For the sake of convenience, the additional grounds raised by the assessee are reproduced below:-

> *1. On the facts and in the circumstances of the case and in law, the Ld. A.O. erred in re-opening the assessment by issue of Notice u/s.148 r.w.s. 147 and approval by commissioner of income tax u/s.151 is bad in law.*
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> *2. The Ld. A.O. erred in passing an assessment order U/S 143(3) r.w.s. 147 for the A.Y. 2007-08 and 2008-09 on the basis of satisfaction recorded by CIT and the approval granted u/s.151 by the said Authority,*

whereas the satisfaction u/s. 151 (2) should have been recorded and approval for issuance of notice u/s. 148 should have been granted by the Jt. Commissioner of Income-tax.

6. At the time of hearing, Ld. AR brought to our notice page 207 and 208 of the paper book in which copy of the notice issued u/s 148 is filed as part of paper book. From the notice issued u/s 148 of the Act, he brought to our notice last para in which AO has not notified in the notice that satisfaction of the ACIT is obtained. But, as per the notice, AO has obtained satisfaction of the Commissioner of Income Tax. Similarly, for the next assessment year also, the same notice format followed. He submitted that as per section 151(2), the AO should have obtained the satisfaction of JCIT. In this regard, he relied in the case of Mrs. Taruna Kataria vrs. ITO (ITA No. 584/Mum/2013 - Mumbai Tribunal), wherein the identical issue was decided by the Coordinate Bench in favour of the assessee by accepting the plea on jurisdiction.

7. Meanwhile, Ld. DR filed letter dated 25.01.21 from the AO. With reference to above letter, Ld. AR submitted that AO has followed the due process and enclosed the approval of Addl. CIT Exemption. He further submitted that at page no. 2 & 3 of the said letter, it shows that the approval /satisfaction was obtained from ACIT of the exemption. He submitted that the notice as well as letter submitted by Ld. DR are of dated 31.03.14 and if the Ld. AO obtained the satisfaction from ACIT, he should not have issued the notice u/s 148 as he has obtained the satisfaction from CIT(E). He further submitted that AO cannot get the satisfaction from CIT(E), but it should have been from CIT (Administration). He further submitted that AO recorded the reasons for reopening u/s 148 also obtained the approval of CIT which shows that AO has taken the approval only from CIT, which is bad in law. He relied on the decision of Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd. Vrs. CIT (2007) 295 ITR 0466 (SC) and submitted that as per the decision, the ITAT has to follow

the rule of precedent and follow the decision of the Coordinate Bench of IT AT.

8. On the other hand, Ld. DR submitted that AO has followed the proper procedure and got the approval of ACIT, however he submitted in the show cause notice, it is wrongly mentioned Commissioner of Income Tax, which is only a clerical mistake. Therefore, the show cause notice issued by AO is proper and as per law.

9. Considered the rival submissions and material placed on record. We notice that the show cause notice issued by the AO which is placed on record at page no. 207 and 208 of the paper book, which clearly indicates that the satisfaction of the Commissioner of Income Tax was obtained not the satisfaction of ACIT as per the provisions of section 151(2) of the Act. Meanwhile, Ld. DR submitted a letter alongwith enclosure that the AO has obtained the satisfaction of ACIT and AO followed the due procedure as per the provision of section 151(2) of the Act. On careful verification of the record shows that AO has issued the show cause notice u/s 148 with the approval of

Commissioner of Income Tax not only in this assessment year under consideration i.e. 2007-08 and 2008-09, but he has issued similar notices in the subsequent assessment years i.e. 2010-11 and 2012-13. Therefore, it clearly shows that AO has obtained satisfaction only from Commissioner of Income Tax and the pattern shows that he habitually takes the permission from Commissioner of Income Tax, which is against the provision of section 151(2) of the Act. However, we notice that Ld. DR brought to our notice the internal communication which shows that AO has taken permission from ACIT. Since Ld. DR has not brought any other documents other than this letter and it is brought to our notice that the reasons for reopening of the assessment also issued by the AO by taking approval only from CIT in the subsequent AYs i.e. 2010-11 & 2012-13. Therefore, in our considered view that AO has not followed the due process of law. Accordingly, we notice that the identical issue has already been decided by the Coordinate Bench of ITAT in the case of Mrs. Taruna Kataria vrs. ITO

(ITA No. 584/Mum/2013) and for the sake of clarity, which is reproduced below:-

> *11. From the records, we find that notice dated 25.03.11, which is at page no. 62 of the paper book, the said noticed was issued u/s 148 of the Act. In the last line of the said notice, it is clearly mentioned that the said notice is being issued after obtaining necessary satisfaction of the Commissioner of Income Tax. In this respect, we notice that Hon'ble Bombay High Court in the case of* ***Ghanshyam K. Khabrani Vrs. ACIT & Ors. (2012) 346 ITR 0443,*** *wherein it was held as under:-*
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> *In favour of: Assessee*
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> ***Reassessment—Notice u/s 148—Sanction u/s 151(2)—Reopening was challenged on the ground that the mandatory requirement of Section 151(2) has not been fulfilled—The ACIT forwarded the proposal for reassessment submitted by the AO to the CJT and the approval which has been granted is not by the ACIT but by the CIT—Held, there Is merit In the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the***

issuance of a notice under Section 148—Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner—The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C) —Powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another—Reassessment proceedings not cancelled

Held :

Section 151 requires a sanction to be taken for the issuance of a notice under Section 148 in certain cases. In the present case, an assessment had not been made under Section 143(3) or Section 147 forA.Y. 2004-05. Hence, under sub section 2 of Section 151, no notice can be Issued under Section 148 by an Assessing officer who is below the rank of Joint Commissioner after the expiry of 4 years from the end of the relevant Assessment Year unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. The expression "Joint Commissioner" is defined in Section 2(28C) to mean a person

appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under Section 117(1).

There is merit in the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under Section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in Section 2(28C). The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C).

There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates t/ie satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of Section 147 and

151(2), the notice reopening the assessment cannot be sustained in law. - ***Commissioner of Income Tax Vs. SPL'S Siddhartha Ltd. (TTA No.836 of 2011*** *decided on 14 September 2011)* ***followed***

Conclusion :

Powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another.

12. After having gone through the above judgment, we find that facts contained in the above judgment is identical to the facts of the present case, wherein the notice was also issued on the basis of satisfaction of the Commissioner of Income Tax. Whereas as per the provision of section 151(2) of the I.T. Act, the satisfaction of Jt. Commissioner of Income Tax was required, thus it was held that section 151(2) of the Act mandates that the satisfaction has to be of the Jt. Commissioner of Income Tac. The Commissioner of Income Tax is not a Jt. Commissioner within the meaning of section 2(28C). Hence, the powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct

authority cannot be substituted by the satisfaction of another.

13. Apart from that, we draw strength from the judgment of Hon'ble Supreme Court in the case of ***CIT vrs. Kurban Hussain Ibrahimji Mithiborwala (1971) 82 ITR 0821 (SC),*** *wherein it was held as under:-*

> Reassessment *under s. 34 of* 1922 *Act—Notice—ITO's Jurisdiction depends upon Issuance of valid notice—If It Is Invalid for any reason the entire proceeding would become void—In the notice under s. 34 the ITO sought to reopen assessment for asst. yr. 1948-49 but In fact reopened the assessment for asst. yr. 1949-50—Notice In question was Invalid—ITO had no Jurisdiction to reopen the assessment.— Kurbanhusseln Ibrahimil Mithlborwala vs. CIT (1968) 68 ITR 4O7 (GuJ) : TCS1R.S96 affirmed*

14. We also draw strength from the judgment of Hon'ble Supreme Court in the case of P.G. & W. Sawoo Pvt. Ltd. &ANR Vrs. ACIT & Ors (2016) 239 taxmann 0257 (SC), wherein it was held as under:-

> *Reassessment—Issue of notice of reassessment—Validity of notice u/s 148—Income In question being Income from house property was liable to be computed In accordance with provision of ss 22 and 23—Premises belonging to Assessee was let out on rent to Government of India—Rent was*

enhanced from Rs.4.00 to Rs.8.11 per sq.ft. per month effective from 01.09.1987—Said enhancement of rent was made by letter of Estate Manager of Government of India—Said letter made it clear that enhancement was subject to conditions Including execution of fresh lease agreement and communication of acceptance of conditions Incorporated therein—Such acceptance was communicated by Assessee—AO Issued notice u/s 148 to assessee for reopening of assessment— Assessee challenged validity of notice issued u/s 148 on ground that no Income accrued or arose and no annual value which was taxable u/s 22 and 23 was received or receivable by assessee at any point of time during previous year corresponding to AY 1989-1990—Hence, impugned notice seeking to reopen assessment In question was without Jurisdiction or authority of law—Held, it was clear that no such right to receive rent accrued to assessee at any point of time during assessment year In question, Inasmuch as such enhancement though with retrospective effect, was made only In year 1994—Contention of Revenue that enhancement was with retrospective effect did not alter situation as retrospectivity was with regard to right to receive rent with effect from anterior

date—Right, however, came to be vested only In year 1994—It held that notice seeking to reopen sment for AY 1989-1990 was without Jurisdiction and authority of law—Said notice Issued u/s 148 was liable to be Interfered with and order of High Court set aside—Asssessee's appeal allowed

15. After having gone through the aforementioned decisions as well as facts of the present case, we find that in the present case, there is a defect in the notice issued u/s 148 of the Act. Thus, by relying upon the aforesaid decision, we hold that notice issued u/s 148 of the Act dated 25.03.11 is a defective one and thus any proceedings on the basis of said notice is bad in law. Therefore, we allow the additional grounds raised by the assessee.

10. Therefore, respectfully following the above decision, we are inclined to accept the submission of Ld. AR. Accordingly, the additional grounds raised by the assessee on the reopening of assessment order passed u/s 147 of the Act is allowed. Resultantly, the assessment order passed u/s 143(3) r.w.s. 147 of the Act is set aside.

11. Since we have already allowed the similar additional grounds raised by the assessee for Assessment Year 2007-08,

therefore the additional grounds raised in this Assessment Year 2008-09 are also **allowed.**

12. In the net result, both the appeals filed by the assessee are **partly allowed.**

Order pronounced in the open court on 11.02.2021.

Sd/-	*Sd/-*
(Ravish Sood)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumbai;दिनांकDated : 11.02.2021
Sr.PS. Dhananjay

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

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/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**