

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'G': NEW DELHI**

(Through Video Conferencing)

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA Nos.6700 & 6701/DEL/2016
[Assessment Years: 2010-11 & 2011-12]**

ACIT, CC-18, Room No.102, ARA Centre, E-2, Jhandewalan Extn. New Delhi	Sh. Subhash Dabas, Prop. Tirupati Construction Co. C/o- Tirupati Buildings & Officers Pvt. Ltd. Plot No.3, Dwarka City Centre, Sector-10, Dwarka, New Delhi-110017
	PAN-AAGPD6947F
Appellant	Respondent

Appellant by	Sh. H.K. Chaudhary CIT-DR
Respondent by	Sh. Mahavir Singh, Advocate

Date of Hearing	09.09.2021
Date of Pronouncement	25.11.2021

ORDER

PER R.K. PANDA, AM,

The above two appeals filed by the Revenue are directed against the separate orders dated 24.10.2016 of the learned CIT(A)-27, New Delhi, relating to Assessment Years 2010-11 and 2011-12 respectively. For the sake of convenience, both these appeals were heard together and are being disposed of by this common order.

ITA No.6700/Del/2016

2. Facts of the case, in brief, are that the assessee is an individual and proprietor of M/s Tirupati Construction Company and engaged in the business of carrying out works as a civil contractor. A search operation u/s 132 of the Income Tax Act, 1961 (hereinafter 'the Act') was conducted on the business and residential premises of the Dabas Group of cases and simultaneously the premises of the assessee was also searched u/s 132(1) of the Act. The case of the assessee was centralized u/s 127 of the Act. In response to notice u/s 153A of the Act issued on 22.10.2012 the assessee vide letter dated 21.01.2013 stated that the return filed u/s 139(1) on 29.09.2010 declaring total income of Rs.58,90,400/- may be treated as return filed in response to notice 153A of the Act.

3. During the course of assessment proceedings, the Assessing Officer noted that there is an addition of Rs.17,37,081/- to the capital account of the assessee. In absence of any satisfactory explanation regarding the source of addition to the capital, the Assessing Officer, invoking the provisions of section 69 of the Act, made addition of Rs.17,37,081/- to the total income of the assessee.

4. The Assessing Officer further noted that the assessee has received unsecured loan of Rs.30,00,000/- from Aircon Engineers Pvt. Ltd. Since, the assessee failed to furnish the details for satisfying the three ingredients of section 68 of the Act i.e. the identity, creditworthiness of the parties and the genuineness of the transaction and there was no response to notice issued u/s 133(6) of the Act, therefore, the Assessing Officer, made addition of Rs.30,00,000/- to the total income of the assessee u/s 68 of the Act, 1961.

5. Further, the Assessing Officer invoking the provisions of section 2(22)(e) of the Act made addition of Rs.1,32,61,912/- to the total income of the assessee being accumulated profit of the current year available for distribution of dividend after tax on the ground that the assessee has received advance of Rs.14,82,00,000/- from M/s Tirupati Constwell Pvt. Ltd. in which he is a director and substantial shareholder.

5.1. The Assessing Officer noted that the assessee has claimed loss of Rs.11,70,746/- in the income tax return filed for the relevant Assessment Year. However, as per audited books of accounts, the Profit & Loss Account shows loss of Rs.10,71,446/-

only. In absence of any satisfactory explanation, the Assessing Officer added the excess loss claimed at Rs.99,300/-.

6. During the assessment proceedings, the Assessing Officer noted that the assessee has received from various co-operative group housing societies u/s 194C of the Act on which TDS have been deducted and claimed by the assessee against the tax liability. He noted that although as per the Form No.26AS amount of Rs.70,56,294/- is reflected against Chitrakoot Dham CGHS Ltd., however, the assessee has not shown the same in the Profit & Loss Account. The Assessing Officer, therefore, made addition of Rs.70,56,294/- to the total income of the assessee.

7. The Assessing Officer also made addition of Rs.3,29,761/- to the total income of the assessee being the interest received from M/s Tirupati Buildmart Pvt. Ltd. on the ground that the assessee has not declared the same, although, the same is reflected in the from 26AS.

8. The Assessing Officer further made addition of Rs.1,32,834/- being 1/5th depreciation on the motor car and Rs.13,183/- being 1/5th repair and maintenance on the ground that personal use of motor car cannot be ruled out. Thus, the

Assessing Officer determined the total income of the assessee at Rs.3,14,02,952/- as against the returned income of Rs.58,90,400/-.

9. Similarly, for the Assessment Year 2011-12, the Assessing Officer completed the assessment determining the total income at Rs.28,24,87,700/- as against returned income of Rs.58,90,400/- declared by the assessee, wherein, he made the following additions:-

1. Unsecured loan of Rs.19,71,00,000/-
2. Deemed dividend u/s 2(22)(e) of Rs.28,62,886/-
3. Amount received from Chitrakoot Dham CGHS Ltd. as per Form No.26 AS but not shown in Profit & Loss Account of Rs.7,66,08,500/-
4. Disallowance on account of personal use of motor car Rs.25,880/-

10. In appeal, the Ld. CIT(A) deleted all the additions made by the Assessing Officer for both the Assessment Years.

11. Aggrieved with such orders of the Ld. CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

Grounds of appeal of ITA No.6700/Del/2016 (AY 2010-11)

1. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in admitting additional evidence under Rule*

46A of the Income Tax Rules, 1962 as the assessee has failed to satisfy any of the conditions laid down in the above mentioned rule for admittance of additional evidence.

- 2. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. 17,37,081/- on account of unexplained sources of addition to capital u/s 69 of the I.T. Act, 1961 as the source of investment has remained unverified in view of the fact the appellant has not able to support his contention with any documentary evidence.*
- 3. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. Rs.30,00,000/- on account of unexplained unsecured loan as the loan has remained unverified in view of the fact the notice u/s 133(6) has not been replied to by the creditor.*
- 4. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. Rs.1,32,61,912/- on account of deemed dividend as the claim of the assessee it was a trade advance which is in the nature of money transacted to give effect to commercial transactions has been proved wrong by the fact that there has been- no entry in sundry creditors to establish that the assessee was engaged in any business deal with M/s Tirupati Constwell Pvt. Ltd and in the books of M/s Tirupati Constwell Pvt. Ltd. in the ledger of assessee, an amount of Rs.1,16,57,861/- has been shown as advance.*
- 5. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. Rs. 70,56,294/- on account of on account of non disclosure of receipts from co-operative housing societies as the additional evidence submitted by the appellant do no confirm to the conditions laid down in Rule 46A of the Income Tax Rules.*
- 6. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. Rs. 3,29,761/- on of on account of concealed interest income as the decision of Ld.CIT(A) in this regard has been based on evasive contention of the assessee which is devoid of any supporting evidence.*
- 7. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of. Rs. Rs. 28,204/- on account of disallowance for personal use of car cannot be ruled out as the assessee has not shown any car expense for personal use.*

Grounds of appeal of ITA No.6701/Del/2016 (AY 2011-12)

1. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in admitting additional evidence under Rule 46A of the Income Tax Rules, 1962 as the assessee has failed to satisfy any of the conditions laid down in the above mentioned rule for admittance of additional evidence.*
2. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs. Rs. 19,71,00,000/- on account of unexplained unsecured loan as the loan has remained unverified in view of the fact the notice u/ s 133(6) has not been replied to by the creditor and the assessee has failed to submit additional evidence except for a chart showing names, PAN and AO's jurisdiction of the loaner parties.*
3. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs.28,62,886/- on account of deemed dividend as the claim of the assessee it was a trade advance which is in the nature of money transacted to give effect to commercial transactions has been proved wrong by the fact that there has been no entry in sundry creditors to establish that the assessee was engaged in any business deal with M/s Tirupati Constwell Pvt. Ltd and in the books of M/s Tirupati Constwell Pvt. Ltd. in the ledger of assessee, an amount of Rs.7,88,81,709/- has been shown as advance.*
4. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs.7,66,08,500/- on account of non disclosure of receipts from co-operative housing societies as the additional evidence submitted by the appellant do no confirm to the conditions laid down in Rule 46A of the Income Tax Rules.*
5. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law in deleting the addition of Rs.25,880/- on account of disallowance for personal use of car cannot be ruled out as the assessee has not shown any car expense for personal use.”*

12. At the outset, the ld. Counsel for the assessee, invoking the provisions of Rule 27 of the ITAT Rules submitted that the order of the Ld. CIT(A), which allowed relief on merit, is also

supported on legal ground of non-application of mind by Addl. CIT while granting approval to draft assessment order u/s 153D of the Act. He submitted that this ground is purely legal in nature and goes to the root of the matter. Therefore, although the assessee has succeeded on merit, however, the assessment order being *void-ab-initio* has to be quashed.

13. The Ld. DR strongly objected to the arguments advanced by the ld. Counsel for the assessee. He submitted that the assessee is making an oral application under Rule 27 of the ITAT Rules and is urging the additional ground pertaining to the issue of approval of draft assessment order u/s 153D of the Act. He submitted that since, the assessee did not file any cross appeal or cross objection u/s 253(4) of the Act, he cannot invoke Rule 27 of the ITAT Rules to question the validity of the approval given u/s 153D of the Act, which has attained finality. Therefore, now the assessee cannot challenge the same by invoking the Rule 27 of the ITAT Rules. He submitted that permitting the assessee to do so would leave the Revenue worse of its own appeal. He further, argued that Rule 27 cannot be invoked to expand the scope of the appeal and assail the decision on issues which are beyond the subject matter of the appeal.

14. The ld. Counsel for the assessee, on the other hand, referring to the decision of the Hon'ble Delhi High Court in the case of Sanjay Sawhney vs Pr. CIT vide ITA No.834/2019, order dated 18.05.2020 submitted that the Hon'ble High Court after considering the various decisions has held that the assessee can urge any ground by way of oral application under Rules 27 of the ITAT Rules. He submitted that ground raised by the assessee invoking Rule 27 is in accordance with law and therefore, the Tribunal should adjudicate the same.

15. We have considered the rival arguments made by both the sides and perused the record. The ground raised by the assessee in the application under Rule 27 of the ITAT Rules reads as under:-

“The order of the CIT(A) which allowed relief on merit is also supported on legal ground of non-application of mind by Addl. CIT while granting approval to draft assessment order u/s 153D.”

16 Before deciding the ground raised by the assessee under Rule 27, we have to first adjudicate the admissibility of the same in view of the objections raised by the Ld. DR. We find an identical issue had come before the Hon'ble Delhi High Court in the case of Sanjay Sawhney vs Pr. CIT (supra). In that case also,

a search u/s 132 of the Act was initiated on Kouton Group of cases on 19.02.2009. The Assessing Officer completed the assessment and determined the total income Rs.1,46,15,445/- against the returned income of Rs.8,90,760/- in the order passed u/s 153C of the Act. In appeal, before the Ld. CIT(A), the assessee besides challenging the additions made by the Assessing Officer on merits, also raised legal grounds qua the validity of the reassessment proceedings undertaken by the Revenue u/s 153C of the Act. The Ld. CIT(A) rejected the legal ground but allowed the appeal in favour of the assessee by deleting all the additions.

17. The Revenue contested the order passed by the Ld. CIT(A) by filing an appeal before the Tribunal challenging the deletion of the additions. In the said proceedings, the appellant-assessee made an oral application under Rule 27 of ITAT Rules and urged additional grounds against the findings of the CIT(A) pertaining to the issue of recording of satisfaction note, and the necessary condition of existence of nexus between assessment and incriminating material by contending that these findings were in the teeth of the law as settled by various courts in respect of the said issues. The Tribunal disagreed with the assessee and on a technical ground refused to consider the legal issues there were

premised on Rule 27 of the ITAT Rules. However, at the same, on merit, the Tribunal overturned the decision of the CIT(A) and allowed the appeal in favour of the Revenue and restored the issues to the file of the Assessing Officer for deciding afresh.

17.1. The assessee approached the Hon'ble High Court challenging the findings of the Tribunal pertaining to Rule 27. The appeal was admitted vide order dated 16.09.2019 and following question of law was framed.

“What is the scope of Rule 27 of the Appellate Tribunal Rules, 1964 in the context of Section 253(4) of the Income Tax Act, 1995?”

18. After considering the various decisions, the Hon'ble High Court held that order passed by the ITAT refusing the oral ground raised by the assessee by invoking provisions of Rule 27 of the ITAT Rules suffers from perversity in so far as it refused to allow the appellant-assessee to urge the grounds by way of an oral application under Rule 27. The relevant observations of the Hon'ble High Court from Para 10 onwards read as under:-

Analysis

“10. The facts of the case reveal that the Revenue challenged the order of the CIT (A) dated 20.03.2015 before the ITAT on the grounds pertaining to deletion of additions on account of unexplained cash credits, unexplained investments, interest paid on cash borrowings, personal expenses, long term capital

gains etc. The assessee [Respondent before ITAT], admittedly did not file a cross appeal or cross objections under [section 253\(4\)](#) of the Act and sought to invoke Rule 27 to question the validity of the proceedings under [Section 153C](#). Thus, in the above noted factual background, we have to consider whether the approach adopted by ITAT in declining the Appellant-assessee [Respondent before ITAT] the right to question the findings of the CIT(A) is correct or not?

11. The Tribunal has taken a pedantic view on the interpretation of Rule 27 by holding that for availing the remedy under the said provision, an application in writing is necessary. In our opinion, this surmise is fallacious and we cannot countenance the same. We agree with Mr. Krishnan that Rule 27, as it stands today, does not mandate for the application to be made in writing. Revenue has not brought to our notice any particular Form notified for filing such an application. Revenue also does not controvert the contention of the Appellant that the draft Appellate Tribunal Rules 2017 proposing to insert a proviso to Rule 27, providing for an application to be made in writing, have not been notified, as yet. Therefore, the reasoning of the Tribunal for rejecting Appellant's contentions is palpably wrong. If the provision does not specify any defined structure for making an application in a particular manner, the Tribunal ought not to have deprived the Appellant of an opportunity to raise a fundamental question of jurisdiction, taking a hyper technical viewpoint. The Tribunal has plainly refused to consider the additional grounds on an erroneous premise which is contrary to the statutory scheme of the Act, that permits the Respondent to urge all grounds in support of the order appealed, as provided under Rule 27. The appeal deserves to be allowed on this short ground and we would have no hesitation in doing so with a consequential direction to ITAT to reconsider the matter afresh on the additional grounds urged by the Appellant. However, that direction would not take the controversy to a logical conclusion. Mr. Hossain raises a more fundamental issue by arguing that in absence of an appeal by the Petitioner, or cross objections by it, the issue of validity had attained finality, and cannot be raked up by taking recourse to the said Rule putting them in a more disadvantageous position. He persists that irrespective of the format of the application and regardless of the reasons given in the impugned order, the appellant cannot be permitted to urge jurisdictional objections before ITAT. We feel clarity is required on this vital ground, particularly, since Mr. Hossain has attempted to substantiate his submissions by contending that this court has already taken a view that supports his line of arguments. In fact, this prompted the learned counsels for

both the parties to cite plethora of case laws dealing with this jurisdictional question.

12. Before we proceed with our analysis, let us first examine the said provision and then consider the relevant case laws that deals with the interpretation of the said provision. Rule 27 of the ITAT Rules reads as under:

"Respondent may support order on grounds decided against him.

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

There are certain other provisions which are also germane to the question of law framed in the present appeal viz Rule 6 which provides for filing of appeal, Rule 22 which provides for numbering of cross objections and sub Section 4 of Section 253 of the Act. The said provisions read as under:-

"Rule 6. Procedure for filing appeals.

(1) A memorandum of appeal to the Tribunal shall be presented by the appellant in person or by an agent to the Registrar at the headquarters of the Tribunal at Bombay, or to an officer authorised in this behalf by the Registrar, or sent by registered post addressed to the Registrar or to such officer. (2) A memorandum of appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar or to the officer authorised by the Registrar, on the day on which it is received in the office of the Tribunal at Bombay, or, as the case may be, in the office of such officer.

Rule 22. Cross-objections.

A memorandum of cross-objections filed under sub-section (4) of section 253 shall be registered and numbered as an appeal and all the rules, so far as may be, shall apply to such appeal.

Section 253. Appeals to the Appellate Tribunal.

(1) xxxx

(2) xxxx

(3) xxxx

(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals), has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3)."

13. The Rule 27, has been a subject matter of interpretation of several decisions of various High Courts and many of those have been relied upon by both the counsels. We do not perceive the need to elaborately advert to each and every case cited before us by the respective counsels. In-depth analysis is necessary of only those decisions that are strongly relied upon by the Revenue to support the impugned order of the ITAT on the proposition of law encapsulated in the foregoing paras. Let's first dwell on a seminal decision rendered by Madras High Court quite some time back in [Commissioner of Income Tax, Madras vs. Sundaram & Co. Pvt. Ltd.](#) (1964) 52 ITR 763 (Madras), which is also relied upon by the Appellant. The law expounded in this judgment forms the bedrock for several other decisions on the subject. Indeed, majority of the recent judgments also refer to this decision, as the law therein has been elucidated in lucid and unequivocal terms and is still on the mark. In the said case, the High Court dealt with Rule 27 of the ITAT Rules, 1946 a provision pari materia with the instant Rule 27 of the ITAT Rules, and authoritatively held that although the assessee may not have preferred an independent appeal before the ITAT against the order of the Appellate Assistant Commission (AAC), it could still invoke the said provision to support the order on any of the grounds decided against him. The court interpreted the Rule and held that its invocation is not restricted to grounds decided favorably but would also include the grounds held against him by the authority whose decision is the subject matter of challenge. The relevant portion of the said judgment read as under:

"11. The appellant has no right to urge any ground not set forth in the memorandum of appeal. But it would be open to the Tribunal to grant him leave to raise additional

grounds. So far as the Tribunal is concerned, it would not be fettered in its decision by confining to the grounds set forth in the memorandum of appeal or even to those taken by the appellant with the leave of the Tribunal. So long as the principles of natural justice are not violated and the affected person is afforded an opportunity to be heard the Tribunal can dispose of the appeal in its own light. But of course the Tribunal should not act arbitrarily or capriciously but should adopt judicial standards. For example, questions of fact which had not been mooted or discussed or investigated by the Income-tax Officer or by the Appellate Assistant Commissioner should not be gone into at the stage of the appeal before the Tribunal, It would of course be open to the Tribunal to remand the proceedings for fresh ascertainment of facts. The substance of rule 12 is this. The appellant can only urge grounds either set forth in the memorandum of appeal or subsequently taken with the leave of the Tribunal, but the Tribunal's powers to decide the appeal are not subject to any such restrictions. Turning to rule 27 which permits the respondent before the Tribunal to support the order of the Appellate Assistant Commissioner on any of the grounds decided against him, it seems to be clear that this is a right conferred upon him. The Tribunal has no discretion to deprive the respondent of the benefit of this rule. It is an enabling provision which the respondent can avail himself of in order to retain the benefit which has accrued to him from the order appealed against.

12. The rule that a respondent before the court or Tribunal can justify and support the decision in his favor not merely on grounds favourably decided but also on other grounds held against him by an authority whose decision is challenged on appeal is nothing peculiar to the procedure before the Income-tax Appellate Tribunal. A similar provision is found in the Civil Procedure Code. Order XLI, rule 22, Civil Procedure Code, states:

"(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below, but take any cross-objection to the decree which he could have taken by way of appeal....."

13. The reason for such a rule is obvious. If the final outcome of a decision is favourable to a person it would not matter to him how and by what reasoning the decision is arrived at so long as it is not challenged by his adversary. But, if it is attacked he must be in a position to support it on every ground he urged before the deciding authority whether or not it found favour. If he were not given that amount of freedom he would be a victim of wrong reasons. This would be unjust in the extreme. If rule 27 had not been enacted there would still have been scope for invoking the principle underlying that rule in the name of natural justice. The true rule is that an appeal is a continuation of the original proceeding and that rights of parties cannot be defeated by the form of the order but by the actual decision.

(emphasis supplied)

14. It emerges that Rule 27 ought not to be applied narrowly and therefore we cannot agree with Mr. Hossain, that by permitting the Appellant- Assessee (respondent before the Tribunal) to invoke Rule 27 before the Tribunal, to challenge the ground decided against him, scope of the subject matter of appeal would get expanded. We must also bear in mind that jurisdictional issue sought to be urged by the appellant under Rule 27 is interlinked with the other grounds of appeal, and its adjudication would have a direct impact on the outcome of the appeal. The validity of the proceedings goes into the root of the matter and for this reason, the assessee should not be precluded from raising a challenge to that part of the order which was decided against him by the CIT(A). In this regard, it would be profitable to refer the following extract from the judgment of Sundaram & Co.(supra),where the court had also examined as to what constituted 'subject-matter of an appeal' and held as follows:

"14. Learned counsel for the department contends that it would not be open to a respondent to travel outside the scope of the subject-matter of the appeal under the guise of invoking rule 27. This contention is unexceptionable and we do not think that the learned counsel for the assessee disputed it. But then, what is the subject-matter of an appeal? The answer is simple. The subject-matter is that which the Tribunal or the appellate court is called upon to decide and to adjudicate. The subject-matter cannot be identified with the grounds raised either by the appellant

or by the respondent. In the present case the subject-matter of the appeal before the Tribunal was the reduction of tax rebate in respect of Rs. 3,54,716. It is impossible to contend that the subject-matter of the appeal lay within a narrower limit and that it was the question whether the Appellate Assistant Commissioner was right in not allowing reduction of rebate on the ground mentioned by him. The assessee had obtained relief before the Appellate Assistant Commissioner to a particular extent. And this was objected to by the department in the appeal before the Tribunal. The applicability of section 34 of the Act was a general question raised by the assessee even before the Appellate Assistant Commissioner. It cannot be said that it became debarred from raising the question over again before the Tribunal because of the fact that it did not choose to file an appeal against other portions of the order of the Assistant Commissioner which was unfavourable to it. The scope of section 34 was a ground which was decided against the assessee before the Appellate Assistant Commissioner and we do not see how the assessee is precluded from relying upon rule 27 and urging that ground before the Tribunal with a view to support only that portion of the Appellate Assistant Commissioner's order which was favourable to it.

15. The decision of this court in [V. Ramaswamy Iyengar v. Commissioner of Income-tax](#) [[1960] 40 I.T.R. 377,395.] is relied upon by the learned counsel for the department in support of the contention that the subject-matter of the appeal is confined only to the grounds of appeal raised on behalf of the appellant. We have no doubt that this decision is not authority for the position contended. The decision in that case was that where an appeal was only against part of an order the appellate authority would have no jurisdiction to interfere with the other part which does not form the subject of the appeal. Rama-chandra Iyer J., as he then was, after referring to the provisions of the Act and the Rules framed thereunder, observed thus:

"The aforesaid rules, including the power to remand, would be governed by the provisions of section 33(4), and, therefore, the jurisdiction of the Tribunal would be circumscribed by the subject-matter of the appeal--the subject-matter of the appeal being that contained in the

original grounds of appeal, together with such other grounds as may be raised by the assessee by leave of the Tribunal. As the right of the respondent is only to support the order of the Appellate Assistant Commissioner on other grounds, it would follow that the Tribunal would have no jurisdiction to pass an order, so as to permit a ground to be raised by the respondent which, if allowed, would make the position of the appellant worse than what it was before."

16. The principle underlying this decision is that the Tribunal has no power to enlarge the scope of the appeal before it by permitting either the appellant or the respondent to urge grounds which would have the effect of destroying the finality of that portion of the order of the original authority which had not been appealed against by either of the parties. But this does not mean that the respondent should be denied the opportunity of supporting a decision in his favour which has come up on appeal on a ground decided against him by the authority whose decision is challenged.

17. We would like to refer to two decisions of the Bombay High Court on this question of the scope of appellate power of the Tribunal and the right of the respondent to support the decision on grounds decided against him. In J.B. Greaves v. Commissioner of Income-tax [[1963] 49 I.T.R. 107.] the Bombay High Court held, following two decisions of that court, New India Life Assurance Co. Ltd. v. Commissioner of Income-tax [[1957] 31 I.T.R. 844.] and Commissioner of Income-tax v. Hazarimal Nagji & Co. [[1962] 46 I.T.R. 1168.] , that the subject-matter of an appeal is confined to grounds specifically raised in the memorandum of appeal, the new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of the decree passed in his favour, even though the decision of the court, against which the appeal is filed, is against him. The learned judges of the Bombay High Court observed that this is a general rule and that the position of the Appellate Tribunal is the same as a court of appeal under the Civil Procedure Code and that its powers are identical with the powers enjoyed by the appellate court under the Code. At page 124 it is observed as follows:

"Now, a respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. A respondent, unless he has filed an appeal himself or filed cross-objections in the appeal filed by his opponent, will not be entitled to challenge that part of the lower court's decree which is against him, and the appellate court will have no power or jurisdiction to permit him to do so....."

It thus follows that the subject-matter of appeal would get confined to the limits of the grounds specifically raised in the memorandum of appeal, the new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of the decree passed in his favour, even though the decision of the court, against which the appeal is filed, is against him."

18. *In Pokhraj Hirachand v. Commissioner of Income-tax* [[1963] 49 I.T.R. 293.] the same principle is reiterated."

19. We would like to disentangle the subject-matter of the appeal from the grounds upon which the appeal is raised or upon which the respondent would like to rely. As stated already the subject of an appeal is an item of dispute or controversy between the department and the assessee in regard to a particular question. Properly speaking, the subject of a tax appeal is the relief sought by the assessee and objected to by the department. The grounds are only missiles employed by the combatants to achieve their respective desired ends. It would not be possible to circumscribe the subject of the appeal by taking into account the rival contentions or the reasons or the grounds which are put forward either by the department or by the assessee. We have no doubt that in the light of the principles laid down by this court in *V. Ramaswamy Iyengar v. Commissioner of Income-tax* [[1960] 40 I.T.R. 377.] and also of the principle of the Bombay decision referred to above and on the principles which we have ourselves set forth, the Tribunal acted rightly in permitting

the assessee to raise the question of the applicability of section 34 before it. Questions Nos. 1 and 2 raised in this reference will, therefore, be answered against the department and in favour of the assessee."

(emphasis supplied)

15. Now, we shall deliberate on the judgement of this Court in Commissioner of Income Tax Central - II v Divine Infracon Pvt. Ltd, 2015 64 taxman.com 472 (Delhi) which has been strongly relied upon Mr. Hossain to suggest that the court has taken a different view on Rule 27 that is in consonance with his contentions. Let's first briefly refer to the facts of the said case. Here, the assessee filed an appeal before the CIT (A) against the order of the AO challenging additions made under section 68 of the Act, on merits, as well as on the ground that the same were beyond the scope of section 153A as the share application money was duly disclosed in its return and the addition was unrelated to any incriminating material found in the search. The CIT(A) decided that the addition was beyond the scope of 153A, however at the same time, he upheld the conclusion of the AO regarding the share application money and sustained the additions made by the AO. Assessee then filed an appeal before the ITAT. In this appeal, Revenue sought to assail the finding of the CIT (A) which held that the additions were outside the scope of [section 153A](#). Although the Tribunal permitted the revenue to raise the contentions, it however, finally upheld the conclusion of the CIT (A). Thereafter, appeals were preferred before this Court by both, Assessee as well as Revenue. During the proceedings, Assessee contented that since Revenue has not appealed against the order of the CIT (A), it could not raise the issue before the Tribunal and the scope of the subject matter of the appeal was limited to the finding of the CIT(A) with respect to the merits of the addition and the Tribunal could not have gone beyond the subject matter. In this context, this court held as under:-

"5. He submitted that the scope of the subject matter of the Appeal was limited to the finding of the CIT (A) with regard to the merits of the addition made; the issue whether the same was beyond the scope of Section 153A of the Act was not the subject matter before the Tribunal and, thus,

the Tribunal could not have entertained any plea in that regard.

6. The learned counsel for the Assessee also referred to the decision of the Supreme Court in Hindustan Coca Cola Beverage (P.) [Ltd. v. Jt. CIT](#) [2007] 293 ITR 226/163 Taxman 355. In that case, the Tribunal had decided to reopen an appeal decided earlier and permitted the Assessee to urge a ground, which had not been considered by the Tribunal while deciding the appeal. The decision of the Tribunal to reopen the matter was not appealed against by the Revenue but, the Revenue successfully assailed the final order passed by the Tribunal before the High Court, inter alia, on the ground that the matter could not be reopened by the Tribunal. In this context, the Supreme Court held that, "We have already noticed that the order passed by the Tribunal to reopen the matter for further hearing as regards ground No. 7 has attained its finality. In the circumstances, the High Court could not have interfered with the final order passed by the Income-tax Appellate Tribunal."

7. We find considerable merit in the contention advanced on behalf of the Assessee. Concededly, the issue whether the additions made by the AO were beyond the scope of Section 153A had been decided by the CIT (A) in favour of the Assessee and the decision on the said issue had attained finality as the revenue had not preferred any appeal with regard to the CIT (A)'s order.

8. It is also relevant to note that by virtue of Section 253(2) of the Act, the Principal Commissioner or Commissioner may, if he objects to an order passed by the CIT (A) under Section 250 of the Act, direct the AO to prefer an appeal to the Tribunal. It is not disputed that no such directions to file an appeal against the CIT (A)'s order dated 21st January, 2014 were issued by the concerned Income Tax Authority.

9. In the circumstances, there could be no dispute that the CIT (A)'s order in so far as it relates to the issue regarding the assessment being beyond the scope of Section 153A of the Act had attained finality, and thus, could not have been disturbed by the Tribunal.

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12. Indisputably, the Revenue could also not take recourse to Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963. By virtue of the said Rule, a respondent before the Tribunal can support the decision appealed against not only on the grounds decided in favour of the respondent but also on grounds decided against it. However, Rule 27 of the said Rules would not extend to permitting the respondent to expand the scope of an appeal and assail the decision on issues, which are not subject matter of the appeal. In CIT v. Edward Keventer (Successors) Pvt. Ltd. (supra), this court had reiterated that "it would not be open to a respondent to travel outside the scope of the subject matter of the appeal under the guise of invoking r 27.

13. The learned counsel for the Revenue has referred to the decision of the Supreme Court in National Thermal Power Corpn Ltd. v. CIT [1998] 229 ITR 383 (SC) in support of the contention that it is open for the Tribunal to consider all questions of law where no investigation into facts are necessary. We find that the aforesaid decision is wholly inapplicable to the facts of the present case. It is trite law that the Tribunal may, under Section 254(1) of the Act, pass such orders as it thinks fit; nonetheless, the decision must be in respect of the subject matter of the dispute. Indisputably, the Tribunal can examine all questions which relate to the subject matter of an appeal but, once an issue has attained finality and is not a subject matter of the dispute before the Tribunal, it would not be open for the Tribunal to reopen the issue on the pretext of examining a question of law."

(emphasis supplied)

16. On the strength of the above reasoning, Mr. Hossain argues that in the present case as well, since the Appellant has not preferred any cross appeal or objections, it cannot now be permitted to urge jurisdictional grounds. We do not agree. The factual situation in Divine Infracon (supra) is entirely distinguishable from what we have in hand. We had, in fact, summoned the judicial record of the said case in order to understand the context in which the aforementioned observations were rendered by the court. In the said case, the assessment was framed under section 153A of the Act making

an addition in respect of share application money amounting to Rs. 20,25,000/-. The CIT (A) took into consideration detailed submissions as to validity of the proceedings under section 153A, as is evident from grounds raised therein, as well as on substantive issues. On the former, the CIT (A) held that there was 'considerable merit' in the contentions, but at the same time, the additions under section 68 of the Act were confirmed, partly allowing the appeal. The Assessee then impugned the action of the CIT(A) specifically on the point of contradictory findings i.e having found merit on the legal issue viz. section 153A, the additions could not have been sustained. This is evident from ground urged before the Tribunal to the effect "That the Learned CIT (Appeals) has grossly erred in law and on facts in sustaining the addition made by Assessing Officer under sec.68 of the Act amounting to Rs.20,25,00,000 particularly having regard to the fact that very assumption of jurisdiction to bring to tax the aforesaid sum was beyond the scope of Learned CIT(Appeals) in the impugned order." Revenue then filed an application under Rule 27 before the Tribunal which was admitted and duly adjudicated in favour of the assessee. In these circumstances, in further appeal, since the Revenue had not filed any cross appeal or objections, this Court in these peculiar facts rightly held that Revenue could not have raised the plea under Rule 27 before the Tribunal, since the issue as sought to be urged by the Revenue was subject matter of Assessee's appeal before the Tribunal [Ref: first ground of the memorandum of appeal, reproduced above]. Thus, the aforesaid observations made by the court cannot be construed to restrict the Appellant herein from invoking Rule 27 in the context of the present case. We cannot also read the aforesaid judgment as a view contrary to the law expounded in Sundaram & Co.(supra), as contended by Revenue.

17. Further, Mr. Hossain has placed reliance on the judgment of this court in CIT, New Delhi (Central) v Edward Keventer (Successors) Pvt. Ltd, (1980) 123 ITR 200, a decision also noticed in Divine Infracon (supra).First, the factual controversy in this case is required to be explained. In this case, the assessee had filed a return showing loss which it had incurred via purchase and subsequent sale of shares and the payment of interest which had accrued due to the loan taken for the purpose of making the investments in the aforesaid shares. The Income Tax Officer (in short 'ITO') found

that losses out of the share transactions undertaken by the assessee were fictitious and that the claim of deductions for interest on loans relatable to alleged purchase of shares as unjustified and accordingly disallowed the same. On appeal by the assessee, the AAC found that the loss claimed by the assessee in the transactions of shares was done with a collusive intent, when in fact profits were earned by the assessee and that the interest liability was anything but artificial. Finally, the AAC held the transactions to ine but enhanced the income of the assessee, while partially allowing the deduction on claim of interest with regard to loans. Aggrieved by the findings of the AAC, the assessee went in appeal before the Tribunal, seeking deletion of entire gross addition, while the department as respondent, relying on Rule 27 of the 1946 Rules, contended that in case the appeal was allowed the whole of the addition should not be deleted but only part of it to the extent disallowed by the AAC. The Tribunal while rejecting the department's contention under rule 27, set aside the whole enhancement as it found that the AAC made the enhancement based on no material evidence. Thus, a reference was made from the said decision to the High court under [section 66\(2\)](#) of the old act. The High Court firstly examined as to what constituted the subject matter of appeal. Furthermore, the High Court held that the appellant would not be left in a worse off position than where it was before filing of the appeal, if the said ground raised by the respondent under Rule 27 was examined and allowed by the tribunal, as the AAC had decided in favour of the respondent-assessee on merits. The relevant portion of the aforementioned judgment is extracted hereunder:

"16. How then is the subject-matter of the appeal to be determined? This is easy, for an appeal comes up before the Tribunal because one of the parties before the AAC--the assessee or the ITO is aggrieved by the order of the AAC. He comes to the Tribunal to have his grievance redressed and the subject-matter of his grievance is set out in the grounds of appeal filed by him. To start with, therefore, the subject-matter of the appeal is constituted by the grounds of appeal filed by him which will clearly identify the question in dispute in the appeal. Rule 12 of the Tribunal Rules, as they stood at the relevant time, laid down the general rule that an appellant shall not urge or be heard in support of any ground of objection, not set forth in the grounds of appeal. But this rule has also an exception for the very rule impliedly confers a power on the Tribunal to grant leave to the appellant to urge

additional grounds not set forth in the memorandum of appeal. Normally speaking such additional grounds can be urged only in relation to the subject-matter already appealed against and in regard to such grounds the Tribunal has discretion to grant or refuse permission and the grant of permission may also be express or implied. But, where an appellant seeks to bring in new items which had nothing to do with the subject-matter of the appeal as originally filed, it will be as if the appeal in this regard has been filed belatedly and the Tribunal can entertain them only after considering whether there are grounds to excuse the delay in filing the appeal ([See Panchura Estate Ltd. v. Government of Madras](#), [1973] 87 ITR 698 (Mad)). Where, however, permission is granted by the Tribunal, the scope of the original appeal will stand expanded or enlarged so as to cover the matters raised in the original grounds as well as those raised in the additional grounds. Thus, the subject-matter of the appeal is constituted by the original grounds of appeal and such additional grounds as may be raised by leave of the Tribunal. So much regarding the appellant.

17. Now, adverting to the rights of the respondent in an appeal, we start with the basic idea that, if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has a grievance, he has a right to file a cross-appeal (and under the Civil Procedure Code and the [I.T. Act](#) of 1961, a memorandum of objections). But, if no such thing is done, he is deemed to be satisfied with the decision. He is, therefore, entitled to support the judgment of the first officer on any ground but he is not entitled to raise a ground which will work adversely to the appellant. In fact such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the regarding of any evidence, even though the nature of the objection may be such that it is not only a defence to the appeal itself but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be subject to the restriction that even if it is accepted, it should be given effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of, to disturb or to set

aside, the order in favour of the appellant ([See Bamasi v. CIT](#), [1972] 83 ITR 223 (Bom)). This liberty to the respondent is reserved by r. 27 of the Tribunal Rules.

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23. Of course, as pointed out by the Bombay High Court in [Bamasi v. CIT](#), [1972] 83 ITR 223, earlier referred to, the assessee could use this argument only to sustain the order of the AAC but not to get further relief and have the reassessment itself annulled and thus adversely affect the appellant and place it in a worse position than if it had not appealed at all. This decision illustrates the principle that the subject-matter of the appeal should be Understood not in a narrow and unrealistic manner but should be so comprehended as to encompass the entire controversy between the parties which is sought to be got adjudicated upon by the Tribunal.

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26. Suppose the assessee prefers an appeal to the Appellate Tribunal, against the AAC's order, contending that the determination of the sale consideration is excessive and the Tribunal is inclined to accept the figure of Rs. 2 lakhs shown by the assessee. We think it would be fair to say that the subject-matter of the appeal is not merely the question of what should be the sale consideration but as to what should be the capital gain. If the department was satisfied with the determination of the capital gain at Rs. 1 lakh it could not be expected to file an appeal and it would not be correct to deprive the department of the opportunity to maintain the AAC's order by construing the subject-matter of the appeal in a narrow manner as restricted to the question of the sale consideration; We think, therefore, that the department would be entitled to support the order of the AAC, under r. 27, on the basis that the market value as on January 1, 1954, was Rs. 1 lakh as determined by the AAC and not Rs. 1½ lakhs as decided by the AAC, rejecting the ITO's contention. Therefore on the same analogy that in a case where certain grounds concerning the same matter are interlinked, they should be considered together and the scope of the subject-matter before the Tribunal should be construed accordingly. The position might be different

where different grounds of appeal are dealt with by the AAC, which have no real inter-connection with each other though naturally they all bear upon particular assessment and though they may all broadly relate to the computation of income from the same head of source. But in a case where there are inter-connected grounds of appeal and they have impact on the same subject-matter, the scope of the appeal should be broadly considered in the correct perspective, While the appellant should not be made to suffer and be deprived of the benefit given to him by the lower authority where the other side has not appealed, equally the procedural rules should not be interpreted or applied so as to confer on an appellant a relief to which he cannot be entitled if the points decided in his favour on the same matter by the lower court are also considered as requested by the respondent. It seems to us that the position in the present case is somewhat similar. The ITO had treated certain transactions as sham and collusive, disallowed the losses claimed and consequently disallowed the interest admitted by the assessee to relate to these transactions. On appeal, the AAC treated the transactions as genuine but considered the prices to be inflated. He, therefore, computed a profit and as a logical corollary, allowed the interest substantially (except to the extent of inflation found by him). When, on appeal, the Tribunal decides to restore the ITO's finding that the transactions were bogus then the logical consequence will be a reversal of the AAC's allowance of interest also. For the reasons discussed above, we are unable to construe the subject-matter of the appeal as restricted to the ground raised, viz., deletion of Rs. 9,28,000. We think the subject-matter of the appeal was the genuineness or otherwise of the share transactions and the profit assessable in respect thereof. On this, the AAC had given two findings, one against the assessee and the other against the department. In view of the former being substantially beneficial to it, the department could not be aggrieved by the consequential finding on the latter. Unlike in Sundaram's case, [1964] 52 ITR 763 (Mad), where at least it could be said that the assessee could have filed an appeal in regard to the applicability of [s. 34](#) as that was a separate and independent ground decided against it, here, however, as mentioned earlier, the department could not

have filed an appeal on this point as it was consequential, according to it, on the finding of the AAC on the first point which was to its benefit. It could not have assailed the latter in appeal without attacking the finding on the first also. To say, in such circumstances, that the department cannot seek to uphold the AAC's order on this subject-matter would virtually amount to denial of natural justice to it which, as pointed out in Sundaram's case, [1964] 52 ITR 763 (Mad), is not the object of the relevant statutory provisions. Moreover, even if the department's ground ultimately succeeds on merits, the assessee will not be adversely affected and will not be in a worse position than if it had preferred no appeal at all."

(emphasis supplied)

18. Mr. Hossain, relying on Edward Keventer(supra) argued, if the additional grounds raised by the assessee under Rule 27 were examined and allowed by the ITAT, the revenue would be left in a worse off position than it was before filing of the appeal. He submits that since the assessee had not assailed the order of CIT(A), it has attained finality qua him. Now, the assessee cannot be permitted to take away the benefit that accrued in favour of Revenue, except by way of an appeal or cross objections. He submits that an order adverse to the interest of revenue, by recourse to Rule 27 is impermissible as held in the aforesaid judgment.

19. We are of the view that Mr. Hossain's reading of the aforementioned Judgment is flawed. He is misconstruing the language employed in [Section 254](#) (1) of the Act (corresponding to [section 33\(4\)](#) of the Indian Income-tax Act 1922). The word 'thereon' used in [section 254](#) (1) of the Act, gives power to the Appellate Tribunal to pass such orders thereon as it thinks fit, implies that the tribunal would confine itself to the subject matter of appeal only. Under Rule 11 of the ITAT Rules, an appellant can, by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, and the Tribunal, in deciding the appeal, would not be confined to the grounds set forth in the memorandum of appeal. This, however, does not mean that the Respondent is prevented from supporting the judgment on the grounds decided in his favor, or by assailing the aspect decided against him. Accepting Mr. Hossain's submission

would mean that subject matter of the appeal is circumscribed and is confined only to the grounds urged by the Appellant. Firstly, the subject matter of an appeal is not be construed narrowly, as already observed above. Subject matter is "comprehended as to encompass the entire controversy between the parties which is sought to be got adjudicated upon by the Tribunal". Secondly, if jurisdictional objection under Rule 27 is gone into by the Tribunal, albeit raised by resort to Rule 27, it cannot be said that the subject matter is expanded under the guise of the said provision. It cannot be said that Respondent is taking away benefit that could be said to have accrued in favour of the Appellant before the Tribunal. The jurisdictional question is not an independent issue that can be reversed only by way of an appeal or cross objection. We do not find any merit in the submission of Mr. Hossain.

20. Having analyzed the judgments relied upon by the Revenue and not finding same to be of any assistance to the Revenue, we now proceed to examine the legal position that emerges from a plain reading of the provision in question. In fact, we feel the controversy sought to be raked up by the Revenue to deprive the Appellant [Respondent before ITAT] an option to raise jurisdictional grounds of objection is completely misplaced. If we refer to Rule 27 of ITAT Rules, 1963, a bare reading thereof manifest that a Respondent has a right to support the impugned order, without having filed any cross appeal or cross objection. This understanding emerges from the language of the said provision which begins with the words "The Respondent, though he may not have appealed,". This means that the provision is to enable a Respondent to effectively defend the order appealed before the Appellate forum. The expression "though he may not have appealed" also indicates that the provision is to be resorted to in a situation where a Respondent may otherwise have a right to file an appeal or cross objections, but has chosen not to avail of this remedy. Thus, a party who has not availed of the option of filing an appeal, in a given situation, if arrayed as a Respondent before the Appellate Tribunal, can rely upon Rule 27, to support the order under appeal. The aforesaid expression also suggests that recourse to Rule 27 would only be available in case the remedy of appeal is otherwise available with the Respondent, and he has elected not to avail

the same. In other words, in case a Respondent would not have such a right [of filing a cross appeal or cross objection], then he would not have the option to invoke the said provision. This brings us to the more fundamental question regarding the scope of aforesaid rule at the instance of the Respondent who is invoking the same. The scope and ambit of the aforesaid provision can be gathered from the remaining part of the said rule to the effect "may support the order appealed against on any of the grounds decided against him". A plain reading of the aforesaid expression indicates that a Respondent can support an impugned order on any of the grounds which were decided against him. Now, if we apply the aforesaid provision to the situation before us, we can easily discern that the Appellant-assessee- on the basis of Rule 27, was urging before the ITAT that the initiation of reassessment may be declared as invalid. Therefore, by invoking Rule 27, the assessee sought to support the final order of the CIT(A) in his favour, by assailing that part of the said order, wherein the CIT(A) upheld the initiation of reassessment under [Section 153C](#) of the Act. We are, therefore, of the view that invocation of Rule 27 for challenging the decision of the CIT (A) on the legal ground was well within the scope of Rule 27. The Appellant - assessee, as a respondent before the Tribunal was within its right to support the order under appeal before the Tribunal by attacking the grounds decided against him. It should nevertheless be borne in mind that Rule 27 cannot be invoked by a Respondent on an issue which is independently decided against him in the order appealed by the Appellant. In other words, if there is an issue, which is separately decided against a Respondent [in appeal], and the decision on the said issue has no bearing on the final decision of the CIT (A), then invocation of Rule 27 to challenge the correctness of the same cannot be sustained. Rule 27 and the provisions dealing with cross objections operate in separate fields, although there is certain overlap between them. Evidently, if cross objection is not filed, the Respondent would run the risk of being faced with a situation that it cannot succeed in getting anything over and above the order in appeal being confirmed. If the Respondent wants to assail an independent issue that has been decided against him in the order appealed by the Appellant, which has no bearing on the result of order impugned in appeal before the Tribunal, the appropriate remedy would lie in of filing a cross appeal or cross objection.

In that event, as explained above, Rule 27 cannot be pressed into service to have the same upset or overturned.

21. Therefore, arguably Rule 27 has a limited sphere of operation, but this cannot be whittled or narrowed down to the extent, the Revenue would like us to hold. We cannot read Rule 27 in a restrictive manner to hold that the said provision can only be invoked to support the order in appeal and while doing so, the subject matter of the appeal before the ITAT should be confined only to the extent of the grounds urged by the Appellant. To read Rule 27 in this manner would render the said rule redundant as the respondent before the Tribunal would, even otherwise be entitled to oppose the appeal and raise submissions in answer to the grounds raised in the appeal that are pressed at the hearing of the appeal. With this clarity, we do not find any merit in the submissions of the Revenue that the assessee had accepted order of CIT (A), or that the issue of maintainability had attained finality. We also do not find that by such an interpretation, the scope of Rule 27 is expanded or that it would be contrary to [Section 253](#) (4), or that it would render the provision relating to cross objections redundant and otiose. In *Sundaram & Co.* (supra), the High Court observed that the reason for such a rule [Rule 27] was that when a decision is favorable to a person and comes to be challenged by his adversary, the person must be in a position to support the decision on every ground urged before the deciding authority whether or not it found favor, else such a person would be a victim of wrong reasons if no such freedom was given. In fact, the court has further held that even if Rule 27 as under the 1946 Rules had not been enacted, scope for invocation of the principle underlying the rule would still be possible based on principles of natural justice. This is the essence of the proceedings in appeal before the ITAT which unfortunately has been completely ignored and, instead, the Tribunal has engaged itself in a totally irrelevant issue of the form and structure of the application.

22. Therefore, the position of law that materialises on a reading of the aforesaid decisions is that the appellant herein, (Respondent before ITAT) could have invoked Rule 27 to assail those grounds that were decided against him if those grounds/issues had a bearing on the final decision of the

CIT(A). Revenue was certainly not taken by surprise as the appeal is considered to be continuation of the original proceedings. The ITAT had no discretion to deprive the appellant the benefit of the enabling Rule provision to defend the order of the CIT(A). The question of jurisdiction -which is sought to be urged by the Respondent while supporting the order in appeal, had a bearing on the final order passed by the CIT(A), because if the said issues were to be decided in favour of the appellant herein the assessee, that would have been an additional reason to delete the additions made by the A.O.

23. We shall now also note some other decisions, where similar issue has been considered. The decision in [Kanpur Industrial Works v. Commissioner of Income-Tax](#), 1965 SCC OnLine All 480: (1966) 59 ITR 407 is worth mentioning. In this case, certain land of the assessee was acquired by the State Government for Rs. 10,000/- and immediately he was given a part of the land on lease for 999 years on a nominal rent. He was permitted to sell the land to anybody as a freehold property. Accordingly, he sold a major part of it during the accounting year for Rs. 1,26,870/-. During his assessment, two questions arose, one, whether the net receipts from the sale of the land amounted to profits of business, example, an adventure in the nature of trade or commerce liable to tax, and the other being the quantum of the net receipts. The Income Tax Officer (ITO) held that the receipts were profits and fixed the amount at Rs. 1,16,870/-, by deducting Rs. 10,000/- paid as premium, from the sale proceeds of Rs. 1,26,870/-. The assessee appealed before the Appellate Assistant Commissioner (AAC), who confirmed the Income Tax Officer's finding that the receipts from the sale were profits but disagreed with the finding that the amount of Rs. 1,16,870/- was the quantum of profits. The AAC was of the opinion that market price of the land should be cost to the assessee. Accordingly, on the basis of a report from the ITO, he determined the market price of the land was Rs. 1,12,056/- and on that basis determined the net receipts at Rs. 14,814/- and decided the appeal accordingly. The department preferred an appeal before the Tribunal. In the appeal, the assessee invoked Rule 27 of the Income Tax Appellate Tribunal Rules, 1946 to support the order on the ground that the transaction was not an adventure in the nature of trade, a ground having been decided against the

Respondent. The Tribunal took the prayer to be of fundamental nature, destroying and not supporting the order of the AAC and disallowed it. The Tribunal held that the price paid by the assessee for purchasing the land in dispute should be taken to be the cost price and remanded the case for determining it and then arriving at the amount of net receipts. The assessee applied to the Tribunal for referring the case to the High Court under [Section 66](#) (1) of the Act. The question on reference to the High Court was "Whether on a proper construction of rule 27 of the Appellate Tribunal Rules, 1946, the assessee-respondent having not appealed against the order of the Appellate Assistant Commissioner was entitled to contend, in the department's appeal before the Tribunal, that the entire profit arising out of the sale of land was not liable to assessment?" The question was answered in the negative, and it was held that the assessee could contend that the receipts were not profits of a business at all, but for the purpose of showing that the department was not entitled to succeed in the appeal i.e. to an increase in the assessed income and not for the purpose of claiming the relief of quashing of the assessment order. It was held that so long as it did not ask for the quashing of the assessment order, its plea that the receipts were not profits ought to have been entertained. It was thus held that the answer to the question referred depends upon what the assessee prayed for before the Appellant Assistant Commissioner. If it prayed that the assessment order be quashed, it was not entitled to be heard, whereas if it simply prayed that the Department's appeal be dismissed, it was entitled to be heard. This judgment thus brings out this fine distinction with respect to the interplay of Rule 27, which is the *pari materia* provision under the rules in operation. The observations of the Court, bring out the scope of Rule 27, reads as under:

"7. The provision in rule 27, with which we are concerned, is to be distinguished from that in Order 41, rule 22(1). While rule 22(1) gives two rights to the respondent, one in respect of part of the claim decreed in his favour, and the other in respect of the part disallowed, rule 27 deals with the order of the lower court, viz., the Appellate Assistant Commissioner in its entirety. It does not contemplate the splitting of the Appellate Assistant Commissioner's order into two parts for the simple reason that an assessment

order is incapable of being treated as an order partly allowing something and partly disallowing the other thing. While in respect of a claim of a plaintiff it can be said that part of it is allowed and part disallowed the same cannot be said in respect of an assessment order and it cannot be said to involve two orders partly assessing something and partly disallowing assessment of another thing. When a person is assessed he is assessed on all the income found assessable. There are no two parties before an Income-tax Officer or an Appellate Assistant Commissioner and there is no claim by one party to be met by the other; so the analogy of a suit, part of which may be decreed and part rejected, does not apply to an assessment proceeding. A dispute may arise in an assessment proceeding about certain receipts being income or not income or the assessee being entitled to a certain deduction or being not entitled to it and the assessment order is passed after deciding this dispute. The dispute may be decided partly in favour of the assessee and partly against him. But since the assessability is indivisible the order assessing the income is treated as one indivisible order and the facts on account of which the various receipts are held to be assessable income are treated as various grounds of attack and the various facts on account of which deductions or exemptions are allowed or receipts are not treated as assessable income are treated as grounds of defence. So an assessment order is based upon allowing and disallowing grounds of attack and of defence. An appeal to the Tribunal whether by the department or by an assessee is like an appeal by a defendant or a plaintiff from a decree accepting or rejecting the entire claim of the plaintiff. There is no scope for any cross-objection and consequently no scope for the respondent's, e.g., the assessee's or the department's urging for reduction in the assessed income or increase in the assessed income, as the case may be. If the appellant before the Tribunal is the department claiming increase in the assessed income all that the assessee can urge is that there should be no increase; that is the only subject-matter of the appeal. If the assessee desires reduction in the assessed amount he himself must file an appeal; he has not been given the right to file a cross-objection. The only right given to him is of urging that there should be no increase, not only for the

ground of defence accepted by the Appellate Assistant Commissioner but also for the other ground of defence rejected by him. This is the only right given to him by rule 27. There is only one order of the Appellate Assistant Commissioner that assessing the income at a certain figure, and the right given to him is of urging another ground, though rejected by the Appellate Assistant Commissioner, in support of it; he must support the order, i.e. must not ask for any variation (in his favour) in the order. In other words, he must not ask for any reduction in the assessed income. Asking for any reduction in the assessed income is not supporting the order assessing it.

8. As I said earlier the order is one assessing the income after accepting and rejecting various grounds of attack and defence. Grounds of attack and defence may be grounds of law or of fact. A ground of law may affect the assessability of the assessee or inclusion of the whole of a receipt or a part of a receipt in his assessable income. If an assessee is not liable to be assessed at all no part of his income can be assessed; if the whole of a receipt is not income no part of it can be included in his assessable income and if a part of a receipt is not income that part cannot be included in his assessable income. If an assessee is not assessable at all but is still assessed he and the department both can be aggrieved by the assessment order; he, on the ground that he was not liable to be assessed at all and other grounds, if any, and the department, on the ground that something more should have been included in his assessed income. So either of them can file an appeal. If he files an appeal, the department can urge in support of the assessed income any ground of attack that might have been rejected by the Appellate Assistant Commissioner but it cannot ask for an increase in the assessed income; it can ask for an increase only by appealing. If the department files an appeal, which must be for an increase in the assessed income, the subject-matter of the appeal is the increase claimed by the department and the assessee can urge any ground of defence, even though it might have been rejected by the Appellate Assistant Commissioner, for showing that there should be no increase. That he is not liable to be assessed is a ground for showing that there should be no

further assessment. Whole includes part and if no receipt is assessable the particular receipt claimed by the department to be assessable also is not assessable and the department's appeal can be resisted on this ground. The Appellate Assistant Commissioner rejected this ground of defence and holding him assessable assessed his income. But since the non-liability to assessment on any income includes the non-liability to assessment on a particular receipt he can object to the inclusion of the receipt in his assessable income on the ground that he is not liable to be assessed on any receipt. This is supporting, and not demolishing, the assessment order passed against him, provided he does not ask for cancellation of the assessment order. He could have filed an appeal against his being assessed but was not bound to do so even though he believed that he was not liable to be assessed at all. If he did not mind paying the tax on the assessed amount nothing compelled him to file an appeal. But this fact that he did not file an appeal does not estop him from contending in the department's appeal for an increase in the assessed amount that there should be no increase. He is not barred either by the rule of estoppel or by the rule of res judicata on account of the fact that on that ground he should not have been assessed at all and that he has submitted to his being assessed. His submission to the assessment order does not amount to his submission to assessability. If the assessment order becomes final it may be said that he is barred by estoppel or res judicata from contending in a subsequent proceeding that he was not liable to be assessed at all. In an appeal against the assessment order itself there is no question of his being barred by estoppel or res judicata. The appeal being from the assessment order there is no question of its being final or operating as res judicata. There is no other doctrine which can be relied upon for barring his contention that he was not assessable at all. It is irrelevant to consider that on the ground on which he urges that there should be no increase he should not have been assessed at all; there is no law that in the absence of estoppel or res judicata a ground applicable to a whole cannot be urged in respect of a part if it is not urged, or is urged but rejected, in respect of the other part. No incongruity results from applying it to a part even

though it is not applied to the other part nor any shock to the conscience. There is no incongruity in maintaining the assessment order passed on the assessee and refusing to increase it on the ground that he was not liable to be assessed at all. What is irksome is incongruity in two orders and not incongruity in respect of reasons for the two orders. Two orders should not be incompatible with each other, so that one can be enforced and the other cannot be, but if two orders can both be enforced it is immaterial that they are based upon contradictory reasons. Two orders not mutually exclusive have been maintained even though they are based on mutually exclusive reasons:

vide Dunn v. United States [76 L.Ed. 356 : 284 U.S.

390.], Bartkus v. Illinois [3 L.Ed. 2d. 684 : 359 U.S.

121.], Hoag v. New Jersey [2 L.Ed. 2d. 913 : 356 U.S. 464.] and In re William Barron [10 Criminal Appeal Reports 81.] . It is also irrelevant to consider what relief could have been allowed to the assessee if this ground of defence is allowed to be urged by him in the department's appeal if the appellant does not ask for it. No relief can be given to an assessee unless he asks for it and is entitled in law to get it; the Tribunal has no jurisdiction to give him any relief though he may be entitled to it, if he does not ask for it in the appeal. The power conferred upon it by [section 33\(4\)](#) is certainly very wide but is so wide only within the subject-matter of the appeal. However wide it may be, it is limited by the scope of the appeal. It cannot travel outside its scope and pass any order even though it thinks it a fit order. It has to pass an order on the appeal, i.e., in respect of the subject-matter of the appeal. The order that it thinks fit must be in respect of the subject-matter of the appeal and so long as it is in respect of it it can be passed regardless of its nature or contents. I respectfully agree with the observation of Sir Leonard Stone C.J. and Kania J. in [Motor Union Insurance Co. Ltd. v. Commissioner of Income-tax](#) [[1945] 13 I.T.R. 272.] at page 283, of Chagla C.J. and Tendolkar J. in [Puranmal Radhakishan v. Commissioner of Income-tax](#) [[1957] 31 I.T.R.294.] at page 304 and in [New India Life Assurance Co. Ltd. v. Commissioner of Income-tax](#) [[1957] 31 I.T.R.

844.] and of Jagadisan and Srinivasan JJ. in Commissioner of Income- tax v. Sundaram & Company Private Ltd. [[1964] 52 I.T.R. 763.] at pages 759 and 770, that "the word 'thereon' used in [section 33\(4\)](#) only means 'on the appeal', which must mean on the grounds raised in the appeal." In the last case the learned judges observed that "the subject-matter of an appeal.... is that which the Tribunal or the appellate court is called upon to decide and to adjudicate" and that "the subject-matter cannot be identified with the grounds raised either by the appellant or by the respondent." By its order an appellate court can dispose of the appeal and not something not included within its scope. In the department's appeal for an increase in the assessable income the only question for its consideration is whether the increase or part of it should be allowed or not. Whether the amount already assessed was wrongly assessed or not or whether the assessee is liable to be assessed at all or not is a question quite outside the scope of the appeal and any decision on it cannot be said to be an order on the appeal. Consequently it cannot be said that the Tribunal would have power to annul the assessment even without any prayer by the assessee to that effect, if it accepts his ground of defence that he was not liable to be assessed at all. On that ground being accepted it can only refuse to increase the assessed income; only that would be an order on the appeal by the department. Any other order such as annulling the assessment would be outside the scope of the appeal. Therefore, it would be erroneous to say that the effect of accepting the ground of defence of the assessee would be the annulment of the assessment order and that this would be quite the reverse of supporting it by the ground of defence.

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13. In the result I hold that the assessee could contend that the receipts were not profits of a business at all, but for the purpose of showing that the department was not entitled to succeed in the appeal, i.e., to an increase in the assessed income and not for the purpose of claiming the relief of the quashing of the assessment order. In other words, so long as it did not ask for the quashing of the

assessment order its plea that the receipts were not profits ought to have been entertained."

(emphasis supplied)

24. Similar is the view taken in the case of [Principal Commission of Income Tax, Vadodara - II v. Sun Pharmaceuticals Industries Ltd.](#), 2017 86 taxmann.com 148 (Gujarat). The brief facts of the said case are that the Respondent - assessee, a company registered under the [Companies Act](#) was engaged in various businesses including manufacturing pharmaceuticals. For relevant assessment years, the assessee had filed the returns of income computing the same in terms of Section 115 JB. The AO issued notices for reopening of the assessments and ultimately framed reassessment by making various additions. In appeal, the assessee contested the reopening of the assessments and also the addition made by AO. The Commissioner (Appeals) allowed the appeals on the additions made by the AO, however on the question of validity of reopening of the assessments, he held against the assessee. Revenue preferred an appeal before the Tribunal, where the assessee - Respondent without filing an appeal, relied upon Rule 27 of the ITAT Rules and raised the legal issue of the validity of assessments before the Tribunal. Despite objections from the Revenue, the Tribunal permitted the assessee to raise such contentions and ultimately held that the notice for reopening of assessment was bad in law. When the matter travelled to the High Court, the question arose as to whether the Tribunal was right in law by allowing Respondent - assessee to raise question of validity of notices for reopening of assessments taking the recourse of Rule 27 of the ITAT Rules without assessee having filed cross appeal or cross objection before the Tribunal against order of Commissioner (Appeals). Examining this question, the High Court, relying upon the decision of Gujarat High Court in [Dahod Sahakari Kharid Vechan Sangh Ltd. v. Commissioner of Income Tax](#), 2005 149 Taxman 456 (Gujarat), held as under:

9. This Rule thus provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. This rule embodies the fundamental principle that the person, who may not have been aggrieved by an order of the lower

authority or the Court and has therefore not filed any appeal against such order, is free to defend the order before the Appellate Forum on all grounds including the ground, which may have been held against him by the lower authority or the Court, whose order is otherwise in his favour.

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11. To put the controversy beyond doubt, Rule 27 of the Rules makes it clear that the respondent in appeal before the Tribunal even without filing an appeal can support the order appealed against on any of the grounds decided against him. It can be easily appreciated that all prayers in the appeal may be allowed by the Commissioner (Appeals), however, some of the contentions of the appellant may not have appealed to the Commissioner. When such an order of the Commissioner is at large before the Tribunal, the respondent before the Tribunal would be entitled to defend the order of the Commissioner on all grounds including on grounds held against him by the Commissioner without filing an independent appeal or cross-objection.

12. Rule 27 of the Rules is akin to Rule 22 Order XLI of the Civil Procedure Code. Sub-rule (1) provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been decided in his favour; and may also take any cross-objection to the decree which he could have taken by way of an appeal. In case of [Virdhachalam Pillai v. Chaldean Syrian Bank Ltd.](#) AIR 1964 SC 1425 in context of the said Rule the Supreme Court observed as under:

"32. Learned Counsel for the appellant raised a short preliminary objection that the learned Judges of the High Court having categorically found that there was an antecedent debt which was discharged by the suit-mortgage loan only to the extent of Rs. 59,000/- and odd and there being no appeal by the Bank against the finding that the balance of the Rs. 80,000/- had not gone in discharge of an antecedent debt, the respondent was precluded from putting forward a contention that the entire

sum of Rs. 80,000/- covered by Exs. A and B went for the discharge of antecedent debts. We do not see any substance in this objection, because the respondent is entitled to canvass the correctness of findings against it in order to support the decree that has been passed against the appellant.

13. Likewise, in case of [S. Nazeer Ahmed v. State Bank of Mysore](#) AIR 2007 SCW 766 it was held and observed as under:

"7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of Order II Rule 2 rendered by the trial court."

14. Similar issue came-up before Division Bench of this Court in case of [Dahod Sahakari Kharid Vechan Sangh Ltd. v. CIT](#) [2006] 282 ITR 321/[2005] 149 Taxman 456 (Guj.) in which the Court observed as under:

"17. Taking up the second issue first, the Tribunal has committed an error in law in holding that the assessee having not filed cross-objection against findings adverse to the assessee in the order of Commissioner (Appeals), the said findings had become final and remained

unchallenged. The Tribunal apparently lost sight of the fact that the assessee had succeeded before the Commissioner (Appeals). The appeal had been allowed and the penalty levied by the assessing officer deleted in entirety. In fact, there was no occasion for the assessee to feel aggrieved and hence, it was not necessary for the assessee to prefer an appeal. The position in law is well settled that a cross objection, for all intents and purposes, would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal.

18. [Section 253](#) of the Act provides for appeal to the Tribunal. Under sub-section (1), an assessee is granted right to file an appeal; under sub-section (2), the Commissioner is granted a right to file appeal by issuing necessary direction to the assessing officer; sub-section (3) prescribes the period of limitation within which an appeal could be preferred. [Section 253\(4\)](#) of the Act lays down that either the assessing officer or the assessee, on receipt of notice that an appeal against the order of Commissioner (Appeals) has been preferred under sub-section (1) or subsection (2) by the other party, may, notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross objections verified in the prescribed manner and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within the period of limitation prescribed under sub-section (3). Therefore, on a plain reading of the provision, it transpires that a party has been granted an option or a discretion to file cross objection.

19. In case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

20. *If the inference drawn by the Tribunal is accepted as a correct proposition, it would render Rule 27 of the Tribunal Rules redundant and nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be avoided. Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to provisions of [Section 253\(4\)](#) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the Commissioner (Appeals) remained unchallenged since the assessee had not filed cross objections."*

15. *The first question is, therefore, answered against the Revenue and in favour of the assessee."*

(emphasis supplied)

25. Similar views have been expressed in, **Commissioner of Income Tax v. M/s India Cements Ltd., Chennai in Tax Appeal Case No.117/2009 (Madras High Court), [Sir Syed Educational and Social Welfare Society, Bhopal v. Assistant Commissioner of Income Tax-I, Bhopal in ITA Nos. 102-108/2019 \(MP High Court \) and Principal Commissioner of Income Tax-6 v. M/s Dhara Vegetable Oil and Foods Company Ltd. in ITA 454/2019 \(Delhi High Court\).](#)**

26. The upshot of the above discussion is that Rule 27 embodies a fundamental principal that a Respondent who may not have been aggrieved by the final order of the Lower Authority or the Court, and therefore, has not filed an appeal against the same, is entitled to defend such an order before the Appellate forum on all grounds, including the ground which has been held against him by the Lower Authority, though the final order is in its favour. In the instant case, the Assessee was not an aggrieved party, as he had succeeded before the CIT (A) in the ultimate analysis. Not having filed a cross objection, even when the appeal was preferred by the Revenue, it does not mean that an inference can be drawn that the Respondent- assessee had accepted the findings in part of the final order, that was decided against him. Therefore, when the Revenue filed an appeal before the ITAT,

the Appellant herein (Respondent before the Tribunal) was entitled under law to defend the same and support the order in appeal on any of the grounds decided against it. The Respondent - assessee had taken the ground of maintainability before Commissioner (Appeals) and, therefore, in the appeal filed by the Revenue, it could rely upon Rule 27 and advance his arguments, even though it had not filed cross objections against the findings which were against him. The ITAT, therefore, committed a mistake by not permitting the assessee to support the final order of CIT (A), by assailing the findings of the CIT(A) on the issues that had been decided against him. The Appellant - assessee, as a Respondent before the ITAT was entitled to agitate the jurisdictional issue relating to the validity of the reassessment proceedings. We are, therefore, of the considered opinion that the impugned order passed by the ITAT suffers from perversity in so far as it refused to allow the Appellant - assessee (Respondent before the Tribunal) to urge the grounds by way of an oral application under Rule 27. The question of law as framed is answered in favour of the Appellant - assessee and resultantly the impugned order is set aside. The matter is remanded back before the ITAT with a direction to hear the matter afresh by allowing the Appellant- assessee to raise the additional grounds, under Rule 27 of the ITAT Rules, pertaining to issues relating to the assumption of jurisdiction and the validity of the reassessment proceedings under [Section 153C](#) of the Act.

27. The appeal is allowed in the above terms.”

19. In view of the detailed reasoning given by the Hon’ble Delhi High Court in the case cited (supra), we respectfully following the same, admit the ground raised by the assessee challenging the validity of approval of the draft assessment order u/s 153D by the Addl. CIT.

20. Now coming to the ground raised by the assessee in the application under Rule 27, we find the only issue to be decided is regarding the validity of the approval given by the Addl. CIT to the draft assessment order u/s 153D of the Act for the above two

Assessment Years. We have already decided this issue while adjudicating ITA No.2399/Del/2016 and Cross Objection No.222/Del/2016 in assessee's own case for Assessment Year 2009-10, vide order of even date and have held that all the assessment orders are vitiated for want of valid approvals u/s 153D of the Act and as such no additions could be made against the assessee. The relevant observations are as under:-

“31. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the learned CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case, completed the assessment u/s 143(3)/153A of the Act on 28.03.2013 determining the total income of the assessee at Rs.19,19,39,700/- as against the returned income of Rs.2,69,85,790/-. We find the Ld. CIT(A) sustained the addition of Rs.51,750/- on account of disallowance of expenses for personal use of motor car and sustained the addition of Rs.56,57,861/- out of the total addition of Rs.1,16,57,861/- made by the Assessing Officer u/s 2(22)(e) of the Act and deleted the rest of the additions, the reasons of which have already been reproduced in the preceding paragraph.

32. Before proceeding to decide the grounds raised by the Revenue, we would first like to decide the additional ground raised by the assessee in the cross objection challenging the validity of approval given by the Ld. Addl. CIT in a mechanical manner and without application of mind, for which the assessment order according to the ld. Counsel for the assessee is void-ab-initio. We find some force in the above argument of the ld. Counsel for the assessee. A perusal of the details received by the assessee from the Department under

RTI vide application u/s 6(3) of the R.T.I Act, 2005 shows that the Assessing Officer sought approval of the Addl. CIT on 28.03.2013 in respect of the following cases, the details of which are placed at page no. 6 of the paper book and which are as under:-

Office of the
Dy. Commissioner of Income Tax,
Central Circle-09, Room No. 357, ARA Centre,
E-2, Jhandewalan, New Delhi-110055.

F.No. DCIT/CC-09/11-12/ 1737

Dated:-28.03.2013

To

The Addl. Commissioner of Income Tax,
Central Range-4,
New Delhi.

Sir,

Sub:- Approval u/s 153D of the I.T. Act, 1961 for framing assessment u/s 153A/143(3)-regarding-(Jagat Group & Others).

Kindly refer to above.

Kindly find enclosed herewith the draft assessment orders in the following cases as per details given below for your kind consideration:-

Sl. No.	Name of assessee	PAN	Assessment Year	Dropped assessment year
1	Subhash Dabas Prop. Tirupati Construction Co.	AFDPD9368Q	A.Y. 2005-06 to 2011-12	-
2	Rosy Dabas	ACEPD8776E	A.Y. 2005-06 to 2011-12	-
3	Tirupati Constwell Pvt. Ltd.	AACCT2478E	A.Y. 2006-07 to 2011-12	A.Y. 2005-06
4	Tirupati Buildings & Offices (P) Ltd.	AACCT7060J	A.Y. 2007-08 to 2011-12	A.Y. 2005-06 & 2006-07
5	Ayush Dabas.	ALCPD9217B	A.Y. 2008-09 to 2011-12	A.Y. 2005-06 & 2007-08

You are requested to kindly grant necessary approval u/s 153D of Income-tax Act, 1961, for the cases completed u/s 153A/143(3).

V. V. bnp.

Yours faithfully,

Encl: As above.

(Sumesh Swani)
Dy. Commissioner of Income Tax,
Central Circle-09, New Delhi.

Certified True Copy

Asstt. Commissioner of Income Tax,
Central Circle-18, Room No. 1033
New Delhi

आपके आधिकार क्षेत्र में
बोम्बेई रेजि-4, ए.आर.ए. ऑफिस
जुहपूर-वालीम संस्थान. नई दिल्ली

तारीख सं०.....

33. We find the Addl. CIT vide his approval dated 28.03.2013 has given approval, the copy of which is placed in the paper book at page, 5 which is as under:-

P+2

Office of the
Addl. Commissioner of Income Tax,
Central Range-4, 3rd Floor,
A.R.A. Centre, E-2, Jhandewalan Extn. New Delhi-110055

F.No. 153D/CC-09/Jagat Group/2012-13/988

Dated:-28.03.2013

To,

The Deputy Commissioner of Income Tax
Central Circle-09,
New Delhi.

Sub: Approval u/s 153D of the Income Tax Act in the Jagat Group cases - reg -

This is in reference to your letter No. DCIT/CC-09/12-13/1737 dated 28.03.2013 whereby you have submitted draft assessment orders to be passed seeking approval u/s 153D of the IT Act 1961 in the following cases:-

Sr. No.	Name of the assessee company	PAN	AY
1	Subhash Dabas Prop. Tirupati Construction Co.	AFDPD9368Q	2005-06 to 2011-12
2	Rosy Dabas	ACEPD8776E	2005-06 to 2011-12
3	Tirupati Constwell Pvt. Ltd.	AACCT2478E	2006-07 TO 2011-12
4	Tirupati Buildings & Offices (P) Ltd.	AACCT7060J	2007-08 TO 2011-12
5	Ayush Dabas	ALCPD9217B	2008-09 TO 2011-12

The above draft orders as proposed are hereby accorded approval with the direction to ensure that the orders are passed well before the limitation. Further, the copies of the final orders so passed be sent to this office for records.

Certified True Copy

Asstt. Commissioner of Income Tax
Central Circle-18, Room No. 269B
New Delhi

(Shashi Bhushan Shukla)
Addl. Commissioner of Income Tax,
Central Range-4, New Delhi.

उप आयकर आयुक्त
केन्द्रीय वृत्त-9, नई दिल्ली
20 MAR 2013
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डायरी सं०.....

34. We find the Ld. CIT(A) has reproduced the remand report of the Assessing Officer where the Assessing Officer while giving his comments about the addition on account of unsecured loan has given the following report:-

“2. Unsecured loans

During the year the assessee has received Rs.15,06,50,000/- as unsecured loan from following parties

Sl. No.	Name of Loaner	Loan Amount
1	M/s Golden Buildmart Pvt. Ltd.	Rs.7,00,000/-
2	Sh. Santosh Singh	Rs.20,00,000/-
3	Sh. Surinder Yadav	Rs.4,50,000/-
4	M/s Tirupati Real Tech Pvt. Ltd.	Rs.14,75,00,000/-
	Total	Rs.15,06,50,000/-

Since the identity, creditworthiness and genuineness of transaction was not proved same was added back as unexplained credit u/s 68.

The additional evidences in respect of unverifiable unsecured loan were examined and report on the same is as under:-

Regarding unsecured loan the assessee has submitted that he had already submitted confirmation of accounts of various loaner parties during the course of assessment. It is pertinent to mention here that during the course of assessment confirmation of accounts was submitted as appearing in the books of the assessee and the same were not verifiable during the course of assessment and even in remand proceedings assessee has failed to furnish any additional evidence except a chart showing names, addresses, PAN and AO's jurisdictions of the loaner parties. The assessee has failed to produce the bank statement of the above mentioned parties. In view of the above decision may be taken on merits of the case. However, from the perusal of assessment record and i confirmation of account it is found that the assessee has taken loan amounting to Rs. 6,75,00,000/- during the year under consideration instead of Rs. 14,75,00,000/- and Rs.8,00,00,000/- was opening balance. The mistake is apparent from record and needs to be rectified.

Additional evidences may be considered on merits subject to recommendation made regarding the admissibility of additional evidences in of para 2.”

35. Similarly, while giving his report for disallowance u/s 40(a)(ia), the Assessing Officer has given his observation as under:-

3. Disallowance u/s 40(a)(ia)-Non deduction of TPS on payment of interest

During the assessment proceedings it is found that the assessee has claimed payment of interest of Rs.15,24,125/-. The assessee has been paid interest of Rs.5,94,317/- to M/s Swan Software Ltd., however, the assessee has not deducted tax at source as provided u/s 194A of the Income Tax Act, 1961. Therefore, payment of interest on which TDS was not deduction amounting to Rs. 5,94,317/- was added back to the income of the assessee. On this issue the assessee submission is as under:

“total interest payable to M/s Swam Software Ltd. was Rs. 7,48,510/- on which a TDS of Rs. 1,54,193/- has been deducted and duly deposited in Central Govt, account. This is only a matter of accounting presentation, instead of crediting the gross interest first and debiting the TDS amount: the net interest has been directly credited to the party a/ c and the TDS as deducted above, has been shown in the narration. The TDS was deducted and deposited as evident from the bank statement.

Additional evidences may be considered on merits subject to recommendation made regarding the admissibility of additional evidences in of para 2.

36. A perusal of the approval sought by the Assessing Officer shows that he has requested to grant necessary approval u/s 153D for the cases completed u/s 153A/143(3) of the Act. A combined perusal of the approval sought by the Assessing Officer, the approval given by the Addl. CIT and the copy of remand report of the Assessing Officer show that there is only some namesake approval given by the Addl. CIT on the very same day on which the Assessing Officer sought approval. The Addl. CIT without verifying the records has given approval in a mechanical manner. This is more so evident from the fact that the opening balance of unsecured loans of Rs.8 Crores was added by the Assessing Officer, which is not a small amount and the number of unsecured loan creditors are only four and not very large. We find merit in the argument of the ld. Counsel for the assessee that the Ld. Addl. CIT received draft assessment order in 35 cases and approved all cases in one go on the same day and the Assessing Officer not only passed the orders on the

very same day but also prepared demand notices after completion of tax calculation and penalty notices etc. which is not possible within a span of few hours.

37. It has been held in various decisions that the function to be performed by the Addl. CIT or CIT in granting previous approval requires an enquiry and judicial approach on the entire facts, material and evidence. It has been held that where any act or function requires application of mind and judicial discretion or approach by any authority it partakes and assumes the character and status of judicial or at least quasi judicial act, particularly because their Act or function is likely to affect the rights of affected persons. The approving authority is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. However, in the present case, we have no hesitation in stating that there is complete non-application of mind by the Ld. Addl. CIT before granting the approval. Had there been application of mind, he would not have approved the addition of Rs.8 Crores in respect of M/s Tirupati Real Tech Pvt. Ltd. and Rs.7 lakhs in respect of M/s Golden Buildmart Pvt. Ltd. which are opening balances and the very same amounts were added in the preceding Assessment Year. Even the Assessing Officer in his remand report has also admitted the mistake that the addition of an amount of Rs.8 Crores, was the opening balance and the mistake is apparent from record and needs to be rectified.

38. We find, the co-ordinate Bench of the Tribunal in the case of Sanjay Duggal vs ACIT vide ITA No.1813/Del/2019, order dated 19.01.2021 and batch of 52 appeals, while adjudicating an identical issue has observed as under:-

“11. We have considered the rival submissions and perused the written submissions filed by the parties and considered the material on record. It is an admitted fact that search and seizure action were carried-out in the cases of the assesseees on 29.12.2015. Section 153A have been inserted into the Income Tax Act w.e.f. 01.06.2003. Prior to that there were provisions contained under section 158BC being the special procedure for assessment of search cases. Thus, the provisions of Section 153A to 153D are applicable in the case of assesseees. According to Section 153A of the I.T. Act, there should be a search initiated under section 132 of the I.T. Act and panchanama drawn, the A.O. shall have to issue notice to the assessee requiring him to furnish the return of income within

the specified time in respect of each assessment year falling within six assessment years. The A.O. shall assess or re-assess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Provided that the A.O. shall assess or re-assess the total income in respect of each assessment year falling within such six assessment years. It is further provided that assessment or re-assessment, if any, relevant to any assessment year falling within the period of six assessment years referred to in this Section pending on the date of initiation of the search under section 132 or making of requisition under section 132A as the case may be, shall abated. Thus, when provisions of Section 153A are applicable in a case of assessee, A.O. shall have to give separate notice of each assessment year and assessee shall have to be directed to file return of income for each year and separate orders shall have to be passed for each assessment year. In Section 153A of the I.T. Act, the A.O. shall have to see whether there are abated or non-abated assessments which was not provided in earlier provisions for block assessments. The Hon'ble Delhi High Court in the case of CIT vs., Kabul Chawla [2016] 380 ITR 573 (Del.) considered the issue of abated and non-abated assessments and with regard to completed assessments held that the same can be interfered with by the A.O. while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in the course of original assessment. It is also held in the same Judgment that in so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall have to be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on record by the A.O. Therefore, these were the mandatory provisions contained in Section 153A which shall have to be satisfied by the A.O. before proceeding to frame assessment in the cases of persons searched under section 132 of the I.T. Act, 1961. Further safeguard have been provided for framing the assessments under section 153A that prior approval shall be necessary for assessments in the cases of the search or requisitioned, under section 153D of the I.T. Act. Section 153D of the I.T. Act is reproduced as under :

"153D – No Order of assessment or re-assessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in Clause (b) of Sub-Section (1) of Section 153A or the assessment year referred to in Clause (b) of sub-section (ii) of Section 153B except with the prior approval of the Joint Commissioner.

"Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA."

11.1. It is an admitted fact that in all the above appeals assessments under section 153A have been framed by ACIT, Central Circle, New Delhi, therefore, prior approval of the JCIT in respect of each assessment year referred to under section 153A or 153B shall have to be obtained. Thus, no order of assessment or re-assessment shall be passed by the A.O. in the present cases in respect of each assessment years under section 153A/153B of the I.T. Act, 1961, except with the prior approval of the Joint Commissioner. Learned Counsel for the Assessee has argued that the approval under section 153D have been granted by the JCIT without going through the seized material, appraisal report and other material on record. Thus, the approval is granted in a most mechanical manner and without application of mind. Therefore, same is invalid, bad in Law and *void abinitio* and as such all assessments under section 153A got vitiated and as such A.O. was not having jurisdiction to pass the assessment orders under section 153A of the I.T. Act, 1961.

11.2. The meaning of the word "Approval" as defined in Black Law Dictionary is –

"The Act of confirming, rectifying, sanctioning or consenting to some act or thing done by another. To approve means to be satisfied with, to confirm, rectify, sanction or consent to some act or thing done by another, to consent officially, to rectify, to confirm, to pronounce good, thing or Judgment of, admitting propriety or excels or to pleas with."

11.3. The Hon'ble Supreme Court of South Carolina in State vs., Duckett 133 SC 85 [SC 1925], 130 SE 340 decided on 05.11.1925 held that *"Approval implies knowledge and, the exercise or discretion after knowledge."*

11.4. The Hon'ble Supreme Court in the case of Vijayadevi Naval Kishore Bharatia vs., Land Acquisition Officer [2003] 5 SCC 83 wherein it has been held that :

"Whenever there is an administrative approval given by higher authority, higher authority applies its mind to see whether the proposed Award is acceptable to the Government or not ? Such Authority may satisfy itself as to the material relied upon by the Adjudicator, but, the Approving Authority cannot reverse the finding, as he is an Appellate Authority for the purpose of remanding the matter to the Adjudicating Authority as can be

done by the Appellate Authority. Further, the Approving Authority also cannot exercise its power of prior approval to give directions to the Adjudicating Authority in what beneficial to accept/appreciate the material on record in regard to the compensation payable. Otherwise, it would tantamount to blurring the distinction between Approving Authority and Appellate Authority”.

11.5. The Hon’ble Gauhati High Court in the case of Dharampal Satyapal Ltd., vs., Union of India [2019] 366 ELT 253 (Gau.) Manu/GH/07070/2018 in para-28 has held as under :

“When an Authority is required to give his approval, it is also to be understood that such Authority makes an application of mind as to whether the matter that is required to be approved satisfies all the requirements of Law or procedure to which it may be subjected. In otherwords, grant of approval and application of mind as to whether such approval is to be granted must co-exist and, therefore, where an Authority grants an approval it is also to be construed that there was due application of mind that the subject matter approved and satisfies all the legal and procedural requirements.”

11.6. Therefore, in the cases of search, assessment orders whether framed under section 153A or 153C, the Joint Commissioner [Approving Authority] is required to see that whether the additions have been made in the hands of assessee are based properly on incriminating material found during the course of search, observations/comments in the appraisal report, the seized documents and further enquiries made by the A.O. during the course of assessment proceedings. Therefore, necessarily at the time of grant of approval of the assessment made by the A.O, the Joint Commissioner is required to verify the above issues, apply his mind that whether they have been properly appreciated by the A.O. while framing the assessment orders or not. The JCIT is also required to verify whether the required procedure have been followed by the A.O. or not at the time of framing of the assessments. Thus, the approval cannot be a mere discretion or formality, but, is mandatory being Quasi Judicial function and it should be based on reasoning. In our view, when the legislature has enacted some provision to be exercised by the higher Revenue Authority enabling the A.O. to pass assessment order or re-assessment order in search cases, then, it is the duty of the JCIT to exercise such powers by applying his judicious mind. We are of the view that the obligation of the approval of the Approving Authority is of two folds ; on one hand, he has to apply his mind to secure in build for the Department against any omission or negligence by the A.O. in taxing right income in the hands of right person and in right assessment year and on the other hand, JCIT is also

responsible and duty bound to do justice with the tax payer [Assessee] by granting protection against arbitrary or unjust or unsustainable exercise and decision by the A.O. creating baseless tax liability on the assessee and thus, the JCIT has to discharge his duty as per Law. Thus, granting approval under section 153D of the I.T. Act is not a mere formality, but, it is a supervisory act which requires proper application of administrative and judicial skill by the JCIT on the application of mind and this exercise should be discernable from the Orders of the approval under section 153D of the I.T. Act.

11.7. In the following Orders of various Benches of the Tribunal, it is held that while granting approval under section 153D, the JCIT shall have to peruse all the incriminating material and other seized material on record and proper procedure if have been adopted by the A.O. and appraisal report as well. The JCIT shall apply his mind to such material on record before granting his approval, otherwise, it will be invalid and bad in Law. We may refer to such Orders as under.

11.8. Order of ITAT, Delhi Bench, Delhi in the case of M3M India Holdings vs., DCIT [2019] 71 ITR (Trib.) 451 (Del.) in which in paras 11 to 14 it was held as under :

“11. On Ground No.1.3, Learned Counsel for the Assessee submitted that no proper sanction as required under section 153D have been received, therefore, assessment order is illegal and bad in Law. Learned Counsel for the Assessee referred to page 46 of the assessment order and submitted that Addl. CIT, Central Range, Chandigarh communicated the sanction under section 153D to the A.O. on 31st January 2014 and the assessing officer on the same day i.e., 31st January 2014 passed the assessment order. He has referred to page-48 of the paper book, which is copy of Fax message dated 5th February 2014 in connection with the communication of sanction/approval of Addl. CIT. PB-31 is the reply filed before A.O. by assessee on 29th January 2014. PB-469 is the reply to the RTI application filed by assessee dated 6th June 2018, in which no specific reply have been given by the Department as to by which mode the assessment record was forwarded by A.O. to Addl. CIT as no such record available and how the sanction/approval was communicated to the assessing officer. PB-46 is letter of the assessing officer to the Addl. CIT, Central Range, Chandigarh dated 30th January 2014 sending the draft assessment order for approval in terms of section 153D of the Income Tax Act. PB-47 is approval of the Addl. CIT, Chandigarh dated 31st January 2014 without mentioning if he has seen the assessment record. Learned Counsel for the Assessee submitted that letter dated 23rd January 2019 was given to the assessing officer, in which it was brought to his notice that after inspection of the assessment record conducted on 25th

October 2018, it was noted that while inspecting the assessment file, assessee has not found any original copy of statutory approval under section 153D of the Income Tax Act, 1961, except the copy of the approval only. The assessee, therefore, requested that original approval under section 153D may kindly be made available to him. He has submitted that till date no reply have been conveyed to the assessee. He has, therefore, submitted that in this case no approval have been conveyed to the assessing officer before passing the assessment order. He has submitted that in section 153D the word used is 'Shall' which indicates that this provision is mandatory which is to be complied before passing the assessment order. In the present case, no such approval have been found on record. On inspection of the record, it was found the approval was received by the assessing officer for the first time by Fax on 5th February 2014 [PB 48]. There is no other documentary evidence available on record. It is, therefore, clear that approval/sanction of the Addl. CIT was received after passing of the assessment order. Therefore, assessment order is illegal and bad in Law. The assessing officer was not in possession of the valid sanction/approval of Competent Authority before passing the assessment order. Learned Counsel for the Assessee submitted that the Tribunal can in fact call for production of the assessment record for itself to determine whether the satisfaction was received, before passing the assessment order by the Assessing Officer ? Reliance was placed upon the Judgment of the Allahabad High Court in the case of S K Gupta and Co. vs ITO 246 ITR 560 (All.). He has submitted that to the same effect there is another Judgment of the Allahabad High Court in the case of M.D. Overseas Ltd., vs., DGIT 333 ITR 407 (All.) He has, therefore, submitted that the approval in this case though not conveyed to the Assessing officer on time, but, is also given in a mechanical manner. Learned Counsel for the Assessee relied upon Judgment of the Honorable Bombay High Court in the case of Pr. CIT vs Smt. Shreelekha Damani in Income Tax Appeal No. 668 of 2016 dated 27th November 2018. He has submitted that the draft assessment order was sent from Faridabad to Chandigarh on 30th January 2014 and it is not clarified as to how it was sent, whether through messenger or courier or any other valid mode. Therefore, no time was left to consider the assessment record. Since last reply is filed on 29th January 2014, therefore, there was no application of mind by the assessing officer or the Addl. CIT to pass the assessment order within the time. Learned Counsel for the Assessee also relied upon order of ITAT, Jodhpur Bench in the case of Smt. Indira Bansal vs., ACIT (2018) 192 TTJ 968 (Jodh.). Learned Counsel for the Assessee, in the circumstances, submitted that since last reply was filed on 29th January 2014, which contains more than 500 pages, therefore, it is highly improbable that assessing officer who is stationed at Faridabad, would have sum-up the entire

assessment file, containing voluminous submissions and drafted assessment order containing not less than 46 pages and sent it to the Addl. CIT at Chandigarh on 30th January 2014. The Department has filed vague reply to the RTI application. It is difficult to believe that within a span of a single day, assessment record would have reached to the Addl. CIT, at Chandigarh. It is highly unbelievable that Addl. CIT would have perused the voluminous assessment record and material on record on the same day and granted approval on the same day on 31st January 2014 and transmitted back the record from Chandigarh to Faridabad on the same day on 31st January 2014 for passing of the final assessment order. It was, therefore, submitted that sanction granted by Addl. CIT to draft assessment order was devoid of any application of mind without considering material on record and without adopting prescribed procedure. It was, therefore, submitted that the said statutory function of granting sanction was exercised casually and not in a proper manner by due application of mind. Therefore, assessment order is null and void and liable to be quashed.

12. On the other hand, Learned Departmental Representative relied upon the orders of the authorities below and referred to PB-47 approval granted by Addl. CIT on 31st January 2014. She has submitted that the Addl. CIT, Chandigarh after going through the assessment record, correctly granted approval to the draft assessment order. She has submitted that Addl. CIT does not say that he has not gone through the material on record and also did not apply his mind before grant of approval in the matter. Ld. D.R, therefore, submitted that this ground of appeal of assessee may be dismissed.

13. We have considered the rival submissions. It is not in dispute that search and seizure action was taken in the case of the assessee on 30th January 2011. Therefore, assessing officer rightly proceeded against the assessee firm under section 153A of the Income Tax Act, 1961. The assessing officer also rightly passed the assessment order under section 153B(1)(b) of the Income Tax Act, 1961. Further, Section 153D of the Income Tax Act provides that “no order of assessment or reassessment shall be passed by the assessing officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of Section 153A or assessment year referred to in clause (b) of sub-section (1) of Section 153B except with the prior approval of Joint Commissioner.” Therefore, for passing the impugned assessment order, the assessing officer who is in the rank of DCIT shall have to obtain prior approval of JCIT. The Learned Counsel for the Assessee referred to PB-31, which is last reply filed before assessing officer on 29th January 2014. The assessing officer written a letter to the Addl. CIT, Chandigarh on 30th January 2014 sending a draft assessment

order for his consideration and approval in terms of Section 153D of the Income Tax Act, copy of which is filed at page 46 of the PB. The assessing officer is stationed at Faridabad. However, the Addl. CIT is stationed at Chandigarh. The Addl. CIT, Chandigarh granted approval under section 153D of the Income Tax Act on 31st January 2014, copy of which is, filed at page 47 of the paper book and the same reads as under :

“No.Addl.CIT/Central/Chd./2013-14/616.

Office of the
Addl. Commissioner of Income Tax,
Range Central, Chandigarh.

Dated the 31st January, 2014.

To
Shri Tatung Padi
Dy. Commissioner of Income Tax,
Central Circle-II,
Faridabad.

Sub: Approval u/s.153D of the I.T. Act, 1961, in the case of M/s. M3M India Holdings, Formerly M/s.Krishna Flexi Solution, C-13, Sushant Lok-I, Gurgaon for the A.Y. 2012-2013 – regarding.

Please refer to the Draft Assessment Order U/s. 153B(1)(b) of the I.T. Act, 1961, referred for approval u/s.153D of the I.T. Act, 1961, dated 30.01.2014.

The approval u/s. 153D of the I.T. Act, 1961, is accorded for the Assessment Year 2012-13.

Sd/-RAJEEV KUMAR,
Addl. Commissioner of Income Tax,
Range (Central), Chandigarh.

Encl: As Above.”

13.1. The Addl. CIT, Chandigarh did not mention in the approval, if he has gone through the assessment record or whether assessment record have been produced before him before granting approval in the matter. The assessee filed RTI application to the Revenue Department, copy of reply is filed at page 469 of the PB, in which it was explained that letter of the Assessing Officer, Faridabad dated 30th January 2014 was forwarded to the Addl. CIT, Chandigarh on 30th January 2014. No reply was given to assessee as to when the letter of the assessing officer was received

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY
ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 668 OF 2016

*Mr. A.R. Malhotra a/w Mr. N.A. Kazi for the appellant
Mr. Jehangir Mistri, Senior Counsel a/w Mr. Atul Jasani
for the respondent*

P.C.

2. Following question was argued before us for our consideration

3. *Brief facts are that the Tribunal by the impugned judgment set aside the order of the Assessing Officer passed under Section*

153A of the Income Tax Act, 1961 ("the Act" for short) for Assessment Year 2007-08. This was on the ground that the mandatory statutory requirement of obtaining an approval of the concerned authority as flowing from Section 153D of the Act, before passing the order of assessment, was not complied with.

4. This was not a case where no approval was granted at all. However, the Tribunal was of the opinion that the approval granted by the Additional Commissioner of Income Tax was without application of mind and, therefore, not a valid approval in the eye of law. The Tribunal reproduced the observations made by the Additional CIT while granting approval and came to the conclusion that the same suffered from lack of application of mind. The Tribunal referred to various judgments of the Supreme Court and the High Courts in support of its conclusion that the approval whenever required under the law, must be preceded by application of mind and consideration of relevant factors before the same can be granted. The approval should not be an empty ritual and must be based on consideration of relevant material on record.

5. The learned Counsel for the Revenue submitted that the question of legality of the approval was raised by the assessee for the first time before the Tribunal. He further submitted that the Additional CIT had granted the approval. The Tribunal committed an error in holding that the same is invalid.

6. Having heard the learned Counsel for the both sides and having perused the documents on record, we have no hesitation in upholding the decision of the Tribunal. The Additional CIT while granting an approval for passing the order of assessment, had made following remarks.

"To,
The DCIT(OSD)-I Mumbai

Subject : Approval u/s 153D of draft order u/s 143(3) r.w.s. 153A in the case of Smt. Shreelekha Nandan Damani for A.Y. 2007-08 reg.

Ref: No. DCIT (OSD)-I/CR-7/Appr/2010-11 dt. 31.12.2010

As per this office letter dated 20.12.2010, the Assessing Officers were asked to submit the draft orders for approval u/s 153D on or before 24.12.2010. However, this draft order has been submitted on 31.12.2010. Hence there is no much time left to analyze the issue of draft order on merit. Therefore, the draft order is being approved as it is submitted.

Approval to the above said draft order is granted u/s 153D of the I.T. Act, 1961."

7. In plain terms, the Additional CIT recorded that the draft order for approval under Section 153D of the Act was submitted

only on 31st December, 2010. Hence, there was not enough time left to analyze the issues of draft order on merit. Therefore, the order was approved as it was submitted. Clearly, therefore, the Additional CIT for want of time could not examine the issues arising out of the draft order. His action of granting the approval was thus, a mere mechanical exercise accepting the draft order as it is without any independent application of mind on his part. The Tribunal is, therefore, perfectly justified in coming to the conclusion that the approval was invalid in eye of law. We are conscious that the statute does not provide for any format in which the approval must be granted or the approval granted must be recorded. Nevertheless, when the Additional CIT while granting the approval recorded that he did not have enough time to analyze the issues arising out of the draft order, clearly this was a case in which the higher Authority had granted the approval without consideration of relevant issues. Question of validity of the approval goes to the root of the matter and could have been raised at any time. In the result, no question of law arises.

8. Accordingly, the Tax Appeal is dismissed.”

13.2. The ITAT, Jodhpur Branch in the case of Smt. Indira Bansal vs., ACIT (supra), held as under:

“Conclusion : Jt. CIT having granted the approval under s. 153D on the very same day on which the forwarding letter seeking approval was received in his office, and circumstances indicate that this exercise was carried out by the Jt. CIT in a mechanical manner without proper application of mind and even without going through the records as the same were in Jodhpur while the Jt. CIT was at Udaipur, therefore, the approval granted by him cannot be sustained. Impugned assessments are annulled.”

14. Considering the facts of the case in the light of above discussion, it is clear that assessee filed last reply before assessing officer at Faridabad on 29th January 2014 and according to Learned Counsel for the Assessee, it contained more than 500 pages. Therefore, it is difficult for the Assessing Officer at Faridabad to go through these voluminous papers and prepare a draft order on 30th January 2014, so that the draft order could be transmitted to the Addl. CIT at Chandigarh on same day. In reply to RTI application, the assessing officer has reported that no record of mode of dispatch of assessment record to the Addl. CIT is available with the Assessing Officer. Similarly, no record is available as to how the draft order and assessment record have been received by Addl. CIT at Chandigarh. The Addl. CIT, Chandigarh did not mention in his approval dated 31st January 2014 (supra), if he has gone through the assessment record or that assessment record was produced before him. Since no details are available on record about the mode, through which, assessment

record was transmitted by the assessing officer at Faridabad to Addl. CIT in Chandigarh and vice-versa by Addl. CIT, Chandigarh to Assessing Officer at Faridabad on the very next day would lead to suspicion, in explanation of A.O. if any, valid draft order was transmitted to the Addl. CIT within the time or if the Addl. CIT has communicated the approval under section 153D to the Assessing Officer at Faridabad on 31st January 2014. These facts would clearly show that the action of the Addl. CIT, Chandigarh granting approval in this case was, thus, a mere mechanical exercise, accepting the draft order as it is, without any independent application of mind on his part. Nothing has been clarified during the course of hearing to the effect that if Addl. CIT has gone through the assessment record, before accepting the draft assessment order. Thus, there was no application of mind on the part of the Addl. CIT before granting approval. The Addl. CIT, Chandigarh has merely gone through the draft assessment order as per PB-47. Therefore, the contention of Learned Counsel for the Assessee is justified that the approval was granted in a most mechanical manner without application of mind and such approval was intimated to assessing officer only on 5th February 2014, after passing of the assessment order on 31st January 2014. The above decisions are clearly applicable to the facts and circumstances of the case. In view of the above discussion, we are of the view that no valid approval/sanction have been granted by the Addl. CIT, Chandigarh before passing the assessment order in the matter. The requirement of Section 153D of I.T. Act, 1961, are not satisfied in this case. We accordingly hold that entire assessment order is vitiated and is null and void. We, accordingly, set aside the orders of the authorities below and quash the assessment order in the matter. Resultantly all additions stand deleted. In the result, Ground No.1.3 of the appeal of Assessee is allowed.”

11.9. Order of ITAT, Cuttack Bench, Cuttack in the case of Dilip Construction P. Ltd., Bhubaneswar vs., ACIT, Circle-1, Bhubaneswar (supra) in which in paras 20 to 41 held as under :

20. We have heard the rival submissions and perused the relevant materials placed on the record of the Tribunal, inter alia, various case laws cited both the sides. The CBDT Circular No. 3 of 2008, dated 12.3.2008, as referred by the ld AO clarifies that the legislature in its highest wisdom made it compulsory that the assessments of search cases should be made with the prior approval of superior authority, so that the superior authority apply their mind on the materials and other attending circumstances on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authority have to approve the draft Assessment order.

21. In the above background of law and in the light of Order dated 23.11.2017 passed under section 153A r.w.s 143(3) of the Act and order of approval u/s.153D of the Act dt.23.11.2017, which provides validity to the impugned Assessment order, the main question which arises for our consideration is whether the said Approval granted by the ld. Joint CIT u/s.153D of the Act vide his order dated 23.11.2017 can be held to be granted after due application of mind and can be held to be valid in the eye of law as per intention of the legislature and mandate of the provision of [section 153D](#) of the Act ?

22. Since we are adjudicating the controversy regarding validity of procedure and approval granted by the JCIT vide letter dated 23.11.2017, therefore, we find it necessary and appropriate to reproduce the relevant provisions of [section 153D](#) of the Act, which reads as under:

"153D. Prior approval necessary for assessment in cases of search or requisition.--No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of [section 153A](#) or the assessment year referred to in clause (b) of sub-section (1) of [section 153B](#), except with the prior approval of the Joint Commissioner.

Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case maybe, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of [section 144BA](#)."

23. First of all, we observe that we are in agreement with the contention of ld CIT DR based on the judgment of Karnataka High Court in the case of Gopal S Pandit (supra), wherein, it was held that the provisions of [section 153D](#) of the Act do not require that any opportunity of hearing to be given to the assessee by the authority who has to approve the draft assessment order passed by the Assessing Authority. Therefore, there is no requirement of allowing opportunity of hearing to the assessee before granting approval under [section 153D](#) of the Act. It is also not a contention of the assessee/appellant that they were not provided due opportunities of hearing before granting approval.

24. On careful consideration rival submissions, we note that the legal contention of the assessee regarding procedure for granting approval order dated 23.11.2017 u/s.153D of the Act can be summarized mainly on two points viz; (i) the approving authority i.e. ld JCIT has granted approval in a mechanical and hasty manner without even perusing the relevant assessment records and draft assessment orders placed before him and (ii) the approving authority has not applied his mind to the assessment records and draft

assessment orders proposed to be passed by the Assessing officer as per mandate of [section 153D](#) of the Act, which is clearly discernible from the approval order dated 23.11.2017. As per mandate of [section 153D](#) of the Act, no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of [section 153A](#) of the Act without prior approval of the ld JCIT.

25. As per the decision of Hon'ble Bombay High Court in the case of Smt. Shreelekha Damani (supra), while granting approval, if the approving authority did not have enough time to analyse the issues arising out of the draft assessment orders, then clearly this was a case in which the higher authority had granted the approval without consideration of relevant issues. Their Lordships held that the question of validity of the approval goes to the root of the matter and could have been raised at any time and the Tribunal was justified in holding that there was no application of mind on the part of the authority granting approval and, therefore, approval was invalid. The relevant paras 4 & 5 of this judgment read as follows:

" 4. This was not a case where no approval was granted at all. However, the Tribunal was of the opinion that the approval granted by the Additional Commissioner of Income Tax was without application of mind and, therefore, not a valid approval in the eye of law. The Tribunal reproduced the observations made by the Additional CIT while granting approval and came to the conclusion that the same suffered from lack of application of mind. The Tribunal referred to various judgments of the Supreme Court and the High Courts in support of its conclusion that the approval whenever required under the law, must be preceded by application of mind and consideration of relevant factors before the same can be granted. The approval should not be an empty ritual and must be based on consideration of relevant material on record.

5. The learned Counsel for the Revenue submitted that the question of legality of the approval was raised by the assessee for the first time before the Tribunal. He further submitted that the Additional CIT had granted the approval. The Tribunal committed an error in holding that the same is invalid."

26. In almost similar facts and circumstances, the Delhi Bench in M3M India Holdings (supra), the Tribunal in para 14 held thus:

" 14. Considering the facts of the case in the light of above discussion, it is clear that assessee filed last reply before assessing officer at Faridabad on 29th January 2014 and according to Learned Counsel for the Assessee, it

contained more than 500 pages. Therefore, it is difficult for the Assessing Officer at Faridabad to go through these voluminous papers and prepare a draft order on 30th January 2014, so that the draft order could be transmitted to the Addl. CIT at Chandigarh on same day. In reply to RTI application, the assessing officer has reported that no record of mode of dispatch of assessment record to the Addl. CIT is available with the Assessing Officer. Similarly, no record is available as to how the draft order and assessment record have been received by Addl. CIT at Chandigarh. The Addl. CIT, Chandigarh did not mention in his approval dated 31st January 2014 (*supra*), if he has gone through the assessment record or that assessment record was produced before him. Since no details are available on record about the mode, through which, assessment record was transmitted by the assessing officer at Faridabad to Addl. CIT in Chandigarh and vice-versa by Addl. CIT, Chandigarh to Assessing Officer at Faridabad on the very next day would lead to suspicion, in explanation of A.O. if any, valid draft order was transmitted to the Addl. CIT within the time or if the Addl. CIT has communicated the approval under [section 153D](#) to the Assessing Officer at Faridabad on 31st January 2014. These facts would clearly show that the action of the Addl. CIT, Chandigarh granting approval in this case was, thus, a mere mechanical exercise, accepting the draft order as it is, without any independent application of mind on his part. Nothing has been clarified during the course of hearing to the effect that if Addl. CIT has gone through the assessment record, before accepting the draft assessment order. Thus, there was no application of mind on the part of the Addl. CIT before granting approval. The Addl. CIT, Chandigarh has merely gone through the draft assessment order as per PB-47. Therefore, the contention of Learned Counsel for the Assessee is justified that the approval was granted in a most mechanical manner without application of mind and such approval was intimated to assessing officer only on 5th February 2014, after passing of the assessment order on 31st January 2014. The above decisions are clearly applicable to the facts and circumstances of the case. In view of the above discussion, we are of the view that no valid approval/sanction have been granted by the Addl. CIT, Chandigarh before passing the assessment order in the matter. The requirement of [Section 153D](#) of I.T. Act, 1961, are not satisfied in this case. We accordingly hold that entire assessment order is vitiated and is null and void. We, accordingly, set aside the orders of the authorities below and quash the assessment order in the matter. Resultantly all additions stand deleted. In the result, Ground No.1.3 of the appeal of Assessee is allowed. "

27. Furthermore, ITAT Cuttack Bench in the case of Geetarai Panda (supra) in paras 24 to 26 held that when the approving authority could not apply his mind and has accorded the approval mechanically to meet the requirements of law, the requirement was merely a formality. The Co-ordinate Bench also held that the said Supervisory authority had a duty towards both the assessee as well as the revenue which was failed to be performed. The relevant paras 25 & 26 read as follows:

" 25. In the instant case, we find that the supervisory authority has himself admitted that because of reasons stated by him, could not apply his mind and has accorded the approval mechanically to meet the requirements of law as the requirement was merely a formality. The said supervisory authority had a duty towards both the assessee as well as the Revenue which was failed to be performed in the instant case.

26. Further, we find that the approving authority has required the assessing authority to conduct further enquiry in respect of opening cash in hand. The assessing authority thereafter has never communicated his findings of the further enquiry to the supervisory authority and not taken the approval of justification of his findings. Thus, in our considered opinion, alleged approval letter dated 27.3.2015 of the Addl. CIT, Range-1, Bhubaneswar does not constitute the approval which is envisaged by the provisions of [section 153](#) of the Act. Thus, following the decision of the Hon'ble Bombay High Court in the case of Akil Gulamali Somji (supra), we hold that the impugned order of assessment is void and bad in law. Therefore, the impugned order of assessment is hereby cancelled...."

28. In view of above requirements of provisions of [section 153D](#) of the Act, as vehemently relied upon by ld counsel for the assessee, as noted above, when we logically analyse the procedure adopted by JCIT while granting approval u/s.153D of the Act in the case of both the assessees, then, first of all, we find it necessary and appropriate to reproduce verbatim the approval granted by JCIT for both the assessees. The approval in the case of Dilip Construction Pvt Ltd., available at page 3 of paper book is as under:

" OFFICE OF THE JOINT COMMISSIONER OF INCOME TAX
(CENTRAL),

AAYAKAR BHAWAN ANNEXE. 4TH FLOOR. RAJASWA VMAR.

BHUBANESWAR-751007

F.No .JCIT(Central) / BBSR/ 153D CC-1 BBSR/2017-18/3138

Date: 23.11.2017

To
The Assistant Commissioner of Income Tax,
Central Circle-1, Bhubaneswar

Sub: Approval of the Assessment orders u/s 153D of the LT. Act, 1961 in respect to the cases of M/s Dillip Construction P Ltd- Reg

Ref: Your letter no. ACIT/CC-1/BBSR/Report/2017-18/7 dated 17.11.2017 seeking approval of draft assessment orders u/s 153D

Approval is hereby accorded as per the provisions of [section 153D](#) of the I.T. Act for passing the assessment orders in respect to the following cases.

Sl.No.	Name of the assessee	PAN	A.Y.	Total Assessed Income (Rs.)	Section under which order passed
1.	M/s. Dilip Construction P Ltd.,	AABCD1417E	2010-11	18,25,68,000/-	u/s.153A/143(3)
2.			2011-12	14,96,41,388/-	u/s.153A/143(3)
3.			2012-13	8,21,92,330/-	u/s.153A/143(3)
4.			2013-14	10,07,78,950/-	u/s.153A/143(3)
5.			2014-15	9,53,00,070/-	u/s.153A/143(3)
6.			2015-16	16,51,32,390/-	u/s.153A/143(3)
.			2016-17	14,72,53,800/-	u/s.143(3)

Sd/-
Joint Commissioner of Income Tax (Central),
Bhubaneswar

End: Record for the AY 2010-11 to 2016-17

(In Seven Folders)

The approval granted in the case of Shilpa Seema Constructions Pvt Ltd., available at page 1 of paper book is as under:

" OFFICE OF THE JOINT COMMISSIONER OF INCOME TAX (CENTRAL),
AAYAKAR BHAWAN ANNEXE. 4TH FLOOR. RAJASWA VMAR.
BHUBANESWAR-751007

F.No .JCIT(Central) /BBSR/ 153D CC-1 BBSR/2017-18/ 3137 Date:
23.11.2017

To
The Assistant Commissioner of Income Tax,

Central Circle-1, Bhubaneswar.

Sub: Approval of the Assessment orders u/s 153D of the LT. Act, 1961 in respect to the cases of M/s Shilpa Seema Construction P Ltd- Reg

Ref: Your letter no. ACIT/CC-1/BBSR/Report/2017-18/8 dated 17.11.2017 seeking approval of draft assessment orders u/s 153D Approval is hereby accorded as per the provisions of [section 153D](#) of the I.T. Act for passing the assessment orders in respect to the following cases.

Sl.No.	Name of the Assessee	PAN	A.Y.	Total Assessed Income (Rs.)	Section under which order passed
1.	M/s. Shilpa	AAKCS 2712E	2010-11	41,43,750/-	u/s.153A/143(3)
2.	Seema		2011-12	5,71,290/-	u/s.153A/143(3)
3.	Construction		2012-13	83,61,660/-	u/s.153A/143(3)
4.	P. Ltd.,		2013-14	5,37,450/-	u/s.153A/143(3)
5.			2014-15	NIL	u/s.153A/143(3)
6.			2015-16	4,59,65,350/-	u/s.153A/143(3)
7.			2016-17	7,64,70,720/-	u/s.143(3)

Sd/-

*Joint Commissioner of Income Tax (Central),
Bhubaneswar*

End: Record for the AY 2010-11 to 2016-17 (In Seven Folders)

29. From the above, first of all, we note that the Assessing Officer has requested the ld JCIT to grant approval u/s.153D vide letter dated 17.11.2017 in both the cases. The JCIT has granted approval in both the cases by only stating that "Approval is hereby accorded as per the provisions of [section 153D](#) of the I.T.Act for passing the assessments in respect of the following cases".

30. In this approval, we are unable to see any mention by the approving authority that he has perused the relevant assessment records and draft assessment orders proposed to be passed by the Assessing Officer. The Assessing Officer issued letter seeking approval on 17.11.2017 and approval has been granted on 23.11.2017 that after a passage of five days time from the approval order as reproduced hereinabove. From the above, it is very much clear that the approving authority i.e. the ld JCIT has not even bothered to mention that he has perused the relevant assessment records and draft assessment orders

for which he has granted approval u/s.153D of the Act as per the mandatory requirements of the said provisions of the Act.

31. *Before we proceed, we find it appropriate to consider the contention of ld CIT DR wherein, he submitted that as per letter dated 19.12.2018, the JCIT, the approving authority had given approval for passing order u/s.153A r.w.s 143(3) in both the cases after satisfying himself with the draft assessment orders. This letter has been written to the JCIT (Central) by approving authority i.e. JCIT (BPU) pertaining to the office communication regarding additional ground of appeal, which are being adjudicated but in view of approval order dated 23.11.2017, thus we are inclined to accept the contention of ld A.R. that this submission of approving authority is mere an attempt to fill the gaps and procedural lacunas occurred in the procedure adopted by JCIT while granting approval under [section 153D](#) of the Act and, therefore, the contention of ld A.R. in this regard hold the field.*

32. *Similarly letter dated 4.1.2019 issued by JCIT (Central), Bhubaneswar to the CIT (Audit & ITAT), Bhubaneswar is merely a covering letter supplying copy of the approval dated 23.11.2017, which cannot be treated as an explanation to the approval dated 23.11.2019 curbing the mistake in the procedure adopted by the JCIT while granting approval u/s.153D of the Act. On these subsequent letters/ correspondences, we are of the considered view that for adjudicating legal ground of assessee's challenging the validity of approval u/s.153D of the Act dated 23.11.2017, we have to evaluate said approval apparently by considering the totality of facts and circumstances and the manner in which such approval has been granted. This cannot be improvised by way of subsequent exercise or correspondence between the approving authority and the AO or other officers.*

33. *In view of foregoing discussion, we are inclined to hold that the ld JCIT has granted approval under [section 153D](#) of the Act in a mechanical manner without application of mind to the relevant assessment records and draft assessment orders submitted before him by the AO for grant of approval u/s.153D of the Act before passing the relevant assessment orders u/s.153A r.w.s 143(3) of the Act.*

34. *Considering the facts and circumstances of the case in the light of above discussion, it is amply clear that the AO vide letter dated 17.11.2017 requested the Approving Authority i.e. JCIT to grant approval u/s 153D of the Act and furnished relevant assessment records and draft assessment order before him for consideration prior to grant of approval. As we have already noted above that there is no requirement of mandate of [section 153D](#) of the Act that an opportunity of hearing should*

be allowed to the assessee before grant of approval u/s.153D of the Act but at the same time, it is also a requirement of mandate of [section 153D](#) of the Act that the approving authority must apply his mind to the relevant assessment records and draft assessment order before granting approval u/s.153D of the Act. As the requirement of grant of approval by the Superior authority is not merely a formality but it is a mandate and requirement of provisions of the Act.

35. In our considered and humble opinion, no procedure for grant of approval has been provided u/s.153D of the Act and the Income tax Rules, 1962. However, when legislature has enacted some provision to be exercised by a higher revenue authority enabling the AO to pass assessment or reassessment orders in the search cases, then, it is the duty of the approving authority to exercise such power by applying his judicious, vigilant and cautious efforts. We are of the view that the obligation on the approval granting authority is of two folds, one the one hand, he has to apply his mind to secure in-build for the department against any omission or negligence by the AO in taxing right income in the hands of right person in the right assessment year and on the other hand he is also responsible and duty bound to do justice with the taxpayer/assessee by granting protection against arbitrary or unjust or unsustainable exercise and decision by the AO crating baseless tax liability on the assessee and thus he has to discharge his duties as superior authority. Thus, granting approval u/s.153D of the Act is not merely an official formality but it is a supervisory act which requires proper application of administrative and judicial skill by the authority on the application of mind and this exercise should be discernible from the order of approval u/s.153D of the Act.

36. In our humble understanding the provisions of [section 153D](#) of the Act has been introduced by the legislature in its cautious wisdom to make it mandatory on the supervisory authority/approving authority to discharge the duty towards both the assessee as well as revenue to follow the proper procedure and to apply his mind on the material, relevant evidences and other documents including materials found during search & post search investigations and explanation & supporting documents of the assessee to the issue show caused to him by the AO, on the basis of which the AO wants to pass or frame assessment or reassessment orders and after such exercise by perusing and going through the relevant assessment folders/files along with proposed draft orders and also by applying his mind has granted approval u/s.153D of the Act. This is the minimum required exercise by the approving authority before granting approval u/s.153D of the Act. The approving authority has undertaken any such exercise should be

discernible from the order of the approval and the subsequent internal correspondence between the lower authorities have no relevance and the defects or omissions or non-application of mind cannot be cured or rectified by any other exercise or working undertaken by the approving authority after grant of approval and after passing the assessment orders u/s.153A of the Act by the Assessing officer.

37. The provisions of [section 153D](#) of the Act was inserted by the [Finance Act, 2007](#) w.e.f. 1.6.2007. In our humble understanding of said provision, the legislative intent for insertion of said provision is clear inasmuch as prior to insertion of provision u/s.153D, there was no provision for taking approval in cases of assessment or reassessment where search and seizure operation was conducted u/s.133A of the Act. Therefore, in our considered view, the legislature wanted the assessment/reassessment of search and seizure cases should be made and orders should be passed with the prior approval of superior authority, which also means that the superior authority should apply his mind on the materials on the basis of which the AO is making or passing assessment orders and after due application of mind to material in the hands of department while initiating search proceedings, material found & seized during the course of search and also material or information unearthed or gathered during post search investigation and enquiry along with explanation, documentary evidence and other relevant material or information submitted by the assessee during search and assessment proceedings, the superior authority has to grant the approval u/s.153D of the Act for passing assessment/reassessment orders in the search cases.

38. Further, in our considered view, the approval u/s.153D of the Act cannot be treated as an official formality but the provision has been inserted by the legislature with some specific and useful purpose. It is apparent that the purpose behind enactment of the said provision in the Statute by the legislature are of two folds viz (i) before approval, the Sr. Authority will ensure that the assessee should be protected against undue or irrelevant addition & disallowances in the assessment and (ii) the approving granting authority will also ensure that proper enquiry or investigations are carried out by the Assessing Officer on all the relevant materials including material in hands of the department at the time of initiating search proceedings, material or documents found and seized during search operation and materials found and unearthed during post search investigations and enquiries. Therefore, said provision provides and requires application of mind by the approving authority of the department which, in turn, provides safeguard to the both the parties i.e. revenue and the assessee.

Therefore, the provisions of [section 153D](#) of the Act cannot be treated as a mere formality and mandate therein required to be followed by the approving authority in a judicious manner by due application of mind in a manner of cautious judicious or quasi judicial authority. This view has also been expressed by Pune Bench of the ITAT in the case of Akil Gulamali somji, in ITA Nos.455 to 458(Pune) of 2010 vide order dated 30.3.2012, wherein, it was held that when the approval was granted without proper application of mind, the order of assessment will be bad in law. We also take respectful cognizance of the fact that the Hon'ble Bombay High Court in the case of Akil Gulamali Somji (supra) has concurred with the said findings and view taken by the Pune Tribunal that not following the provisions of [section 153D](#) of the Act will render the related order of assessment void.

39. In view of foregoing discussion, we reach to a logical conclusion that it is the duty of the approving authority to act in accordance with the mandate and provisions of law while granting approval and discharging statutory function lay on his shoulders by following proper procedure and also by applying his judicious and cautious mind to the relevant assessment folders/files and draft assessment orders while granting approval u/s.153D of the Act. This is not a formality but a statutory duty of the approving authority with a corresponding obligation on him to examine relevant record and assessment orders and thereafter grant the approval. We are cautious about that the reasons for granting approval may not be a subject matter of challenge or are not required to be mentioned in the order of approval but the manner and the material on the basis of which approval has been granted can be challenged by the assessee and following proper procedure and application of mind by the approving authority should be discernible from the order of approval. No other evidence or documents is required to be considered or appreciated as the approval should be self-speaking that it has been granted by the Id JCIT by following due procedure and due application of mind to the relevant records and orders. The scope and issue agitated by the assessee by way of legal ground in the present case is not that of grant of hearing or representation to the assessee at the time of granting approval but the main grievance and legal objection of the assessee is that the approving authority has granted approval without application of mind and without looking into the seized materials and investigation report and draft assessment/ reassessment orders and this fact should be clearly discernible from the approval order and no other extraneous material/ document can be seen in this regard.

40. In view of above, we are inclined to hold that if an approval has been granted by the approving authority in a mechanical manner without application of mind then the very purpose of obtaining of approval u/s.153D and mandate of enactment by the legislature will be defeated. In the present case, the approving authority, the Id JCIT got five days time but from the order of approval, we are unable to see any exercise by the approving authority and even in the approval orders (supra), he has not mentioned that the relevant appeal folders/files along with assessments/reassessment orders have been perused or any discussion or consultation has been made with the AO prior to granting of approval u/s.153D of the Act. Accordingly, we are compelled to hold that the approval granted by the Id JCIT in the appeals under consideration has been granted in a mechanical manner without application of mind and that the assessments/reassessment orders passed by the AO on such approval are declared to be void and bad in law. We hold so.

41. In view of aforesaid discussion, we clearly find that approving authority has not applied his mind to the relevant assessment records and draft assessment orders prior to granting approval to the Assessing officer for passing assessment orders u/s.153A/143(3) of the Act. Therefore, the contention of Ld A.R. of the assessee is justified and sustainable that the approval was granted in most mechanical manner without application of mind and respectfully following the proposition rendered by Hon'ble Bombay High Court in the case of Smt. Shreelakha Damani (supra), the order of ITAT Delhi Bench in the case of M3M India Holdings (supra) and decision of ITAT Cuttack Bench in the case of Geetarani Panda (supra), we hold that no valid approval has been sanctioned or accorded by the Id JCIT before allowing the AO to pass the relevant assessment orders. From the relevant approval orders dated 23.11.2017, it is vivid that Id JCIT has not mentioned in the approval orders that he has gone through the relevant assessment records/files/folders and draft assessment orders for granting approval. These facts clearly show that the approval had been granted in a mechanical manner without application of mind and, thus, no valid approval has been granted by the Id JCIT before authorising the AO to pass assessment orders u/s.153A of the Act. Accordingly, all assessment orders are vitiated and thus same are void being bad in law. The requirement of mandate of [section 153D](#) of the Act has not been satisfied in both the cases and accordingly we hold that the all assessment orders are vitiated and thus same are void being bad in law. We, accordingly set aside the impugned orders of lower authorities and quash the assessment orders by allowing additional ground of the assessee in all appeals filed by both

the assessees having identical and similar facts and circumstances.”

11.10. Order of ITAT Agra Bench, Agra in the case of Rajesh Ladhani, Faizabad vs., DCIT, Central Circle, Agra (supra) in which in paras 11 to 25 it was held as under :

11. Having held as above, the issue which now requires to be adjudicated is whether the Approval so granted in this case can be treated as valid in view of the mandate of the provisions of Sec. 153-D of the Act vis-a-vis the legislative intent of inserting the said section in the statute. Section 153-D read as under :

"No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner. Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case maybe, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of Section 144BA."

12. The legislative intent can be gathered from the CBDT Circular No. 3 of 2008, dated 12.3.2008 which read as under:

"50. Assessment of search cases Orders of assessment and reassessment to be approved by the Joint Commissioner.

50.1 The existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A does not provide for any approval for such assessment.

50.2 A new section 153D has been inserted to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision has been made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. The provision has also been made applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A.

50.3 Applicability-These amendments will take effect from the 1st day of June, 2007."

13. It is evident from the CBDT Circular that the legislature in its highest wisdom made it compulsory that the assessments of search cases should be made with the prior approval of superior authority, so that the superior authority apply their mind on the materials and other attending circumstances on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authority have to approve the Assessment order. Object of entrusting the duty of Approval of assessment in search cases is that the Additional CIT, with his experience and maturity of understanding should scrutinize the seized documents and any other material forming the foundation of Assessment. It is an elementary law that whenever any statutory obligation is casted upon any statutory authority such authority is required to discharge its obligation not mechanically, not even formally but after due application of mind. Thus, the obligation of granting Approval acts as an inbuilt protection to the taxpayer against arbitrary or unjust exercise of discretion by the AO. The approval granted under section 153D of the Act should necessary reflect due application of mind and if the same is subjected to judicial scrutiny, it should stand for itself and should be self-defending.

14. In the above background of law and in the light of Order dated 27.03.2015 passed under section 153D of the Act, which gives legality to the impugned Assessment order, question which arises for our consideration is whether the said Approval granted by the Additional CIT, Central, Kanpur vide his order dated

27.03.2015 can be held to be granted after due application of mind and can be held to be valid in the eye of law?

15. To decide the above issue, order dated 27.03.2015 passed by the Additional CIT was again carefully perused. The contents of the Approval, as reproduced in Para 4, speak for itself loud and clear. The following inferences are inevitable from the bare reading of the said order. Draft Assessment orders were placed before the Additional CIT, Central, Kanpur on 27.03.2015 at 3.50 PM for the first time and soon on the same day it was granted. As clearly mentioned in the Approval under challenge, that prior to this date the case was never discussed with the authority granting the approval. The Additional CIT has further noted that even the questionnaire as was required to be issued with the approval of Additional CIT, in view of CBDT instruction was not issued with his approval. He further observed that since, there was no time left to analyze the issue of draft order

on merit, therefore, the said order is approved, as specifically mentioned in the said order, solely relying upon the undertaking obtained from the AO that he has taken due care while framing the assessment that all the observations made in the appraisal report relating to examination/investigation as also the issues identified in the course of examination of seized material have been carefully considered by the authority seeking approval. Thus, the sanctioning authority delegated his statutory duty to grant Approval, after due application of his mind, to the same subordinate AO, whose action the Additional CIT, was supposed to supervise and adopting a short cut in the matter obtained an undertaking from the subordinate AO, accepting it on face value that all the issues have been taken care off while framing the assessment by the AO, and that all the observations made in the appraisal report relating to examination/investigation as also the issues identified in the course of examination of seized material have been carefully considered by the AO, the Additional CIT, granted Approval. Admittedly, the Additional CIT, without any consideration on merit in respect of issues on which addition was made granted the Approval on the undertaking of the AO and in view of stated paucity of time with him for granting Approval. This approach of the Additional CIT, Central has rendered the Approval to be an eyewash and idle formality and such a mechanically granted Approval is no approval in the eyes of law.

16. The Lucknow Bench of the ITAT in the case of "AAP Paper Marketing Limited Vs ACIT", (2017) (4) TMI 1371-ITAT Lucknow, (APB-122-129) coincidentally where the ITAT had the occasion to consider the validity of approval granted by the same Additional CIT, Central Circle, Kanpur while quashing the assessments vide Para-14 held as under :

"In the present case ACIT has granted impugned approval half-heartedly without application of mind and without considering and perusing the material on record. Thus, we are inclined to hold that there has been no application of mind by the ACIT before granting the approval. Consequently, we hold that the assessment orders made u/s 143(3) of the Act r.w.s 153A of the Act in the case of M/s Siddhbhumi Alloys Ltd. for Assessment Year 2006-07 is bad in law and deserve to be annulled, thus, we ordered accordingly. Finally additional ground of appeal raised by the assessee by way of Rule 27 of the IT AT Rules in ITA No. 321/Lkw/2016 for the Assessment Year 2006-07 is allowed."

17. From the approval order dated 27.03.2015 of the Addl. CIT, we find that the Ld. AR has rightly pointed out that in the facts of case of AAP Paper Marketing Limited (supra) there may be some justification for the qualified approval in

view of the fact that the limitation in that case was getting expired on the day when the draft assessment orders were put up before the Additional CIT, Central Circle, Kanpur for his approval. However, to the disadvantage of the revenue in the case on hands there can be no little justification for qualified approval as the proposal for approval was put up before the Additional CIT on 27.03.2015 at 3.50 PM and at the same time it was granted, without any application of mind on the pretext that limitation is going to get expired on 31.03.2015. Thus, in the case at hand despite availability of time, the Additional CIT has been taking excuse of limitation and has chosen to grant approval without application of his own mind but on the undertaking of the AO that “while completing the assessment as per the draft assessment order, all the observations made in the appraisal report relating to examination/ investigation as also the issues identified in the course of examination of seized material have carefully considered.” In our view such a practice is required to be deprecated and we deprecate the same.

18. *ITAT Mumbai Bench in the case of “Smt. Shreelekha Damani” (supra) (APB-130-137) annulled the assessment holding as under :*

“Coming to the facts of the case in hand in the light of the analytical discussion hereinabove and as mentioned elsewhere, the Addl. Commissioner has showed his inability to analyze the issues of draft order on merit clearly stating that no much time is left, inasmuch as the draft order was placed before him on 31.12.2010 and the approval was granted on the very same day. Considering the factual matrix of the approval letter, we have no hesitation to hold that the approval granted by the Addl. Commissioner is devoid of any application of mind, is mechanical and without considering the materials on record. In our considered opinion, the power vested in the Joint Commissioner/Addl Commissioner to grant or not to grant approval is coupled with a duty. The Addl Commissioner/Joint Commissioner is required to apply his mind to the proposals put up to him for approval in the light of the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. Commissioner before granting the approval. Therefore, we have no hesitation to hold that the assessment order made u/s. 143(3) of the Act r.w. sec. 153A of the Act is bad in law and deserves to be annulled. The additional ground of appeal is allowed. ”

19. *The above order so passed by the ITAT, Mumbai Bench was subjected to judicial scrutiny in appeal before the Hon'ble Bombay High Court and the Hon'ble High Court approved the order passed by the Mumbai Bench of the ITAT which is found reported as*

“PCIT Vs Smt. Shreelekha Damani”, (2019) 307 CTR (Bom.) 218 (APB-138-139) wherein in Para-7 the Hon’ble High Court held as under :

7. In plain terms, the Addl. CIT recorded that the draft order for approval under s. 153D of the Act was submitted only on 31st Dec. 2010. Hence, there was not enough time left to analyze the issue of draft order on merit. Therefore, the order was approved as it was submitted. Clearly, therefore, the Addl. CIT for want of time could not examine the issues arising out of the draft order. His action of granting the approval was thus, a mere mechanical exercise accepting the draft order as it is without any independent application of mind on his part. The Tribunal is , therefore, perfectly justified in coming to the conclusion that the approval was invalid in eye of law. We are conscious that the statue does not provide for any format in which the approval must be granted or the approval granted must be recorded. Nevertheless, when the Addl. CIT while granting the approval recorded that he did not have enough time to analyze the issues arising out of the draft order, clearly this was a case in which the higher authority had granted the approval without consideration of relevant issues. Question of validity of the approval goes to the root of the matter and could have been raised at any time. In result, no question of law arises. ”

20. Similar view has been adopted by the Cuttack Bench in the case of Geetarani Panda (supra) (APB140-154) wherein following order passed under section 153D of the Act by the Additional CIT was subjected to challenge before the ITAT on the ground of non-application of mind. ITAT held as under :

23. In the instant case, the alleged approval letter dt. 27th March, 2015 of the Addl. CIT, Range-1, Bhubaneswar reads as under :

“Despite a reminder given on 19th March, 2015 to submit the time barring draft assessment orders for approval under s153D on or before 23rd March, 2015, the draft orders in M/s. Neelachal CarboMetalicks (P) Ltd. Group of cases has been received in this office only on 26th March, 2015 in the afternoon. The draft orders having being submitted only 5 days before final orders are getting barred by limitation, I have no other option but to accord the approval to the same as the approval is statutorily required under s. 153D, even though there is no time left for undersigned to ensure that all the points raised in the appraisal report, the appellate proceedings, audit inspection etc. are duly taken into account, and the enquiries and investigations that are required to be made are actually made before finalization of the assessment orders.

It would have been much better and in the interest of Revenue if you

had submitted the draft orders at least one month earlier so as to allow the undersigned sometime to go through and analyse the same vis-a-vis the appraisal report and seized records. It also goes without saying that you never cared even to discuss these cases with the undersigned for guidance and line of investigation to be taken.

However, despite all this, I have gone through the material available on records and some of the observations, in respect of the following cases are given in subsequent paras."

24. *In our considered view, the provisions contained in s. 153D as enacted by the Parliament cannot be treated as an empty formality. The provision has certain purpose. It is apparent that the purpose behind the enactment of the above provision in the statute by the Parliament is two-folds. Firstly, the approval of the senior authority will ensure that the assessee is not prejudiced by the undue or irrelevant addition or assessment. Secondly, the approval by senior authority will also ensure that proper enquiry or investigations are carried out by the assessing authority. Thus, the above provision provides for mental application of a senior officer of the Department, which in turn, provides safeguard to both i.e., Revenue as well as the assessee. Therefore, this important provision laid down by the legislature cannot be treated as a mere empty formality. The same view was expressed by the Pune Benches of the Tribunal in the case of Akil Gulamali Somji vs. ITO in ITA Nos. 455 to 458 (Pune) of 2010, order dt. 30th March, 2012, wherein it was held that when the approval was granted without proper application of mind, the order of assessment will be bad in law. The Hon 'ble Bombay High Court in the case of CIT vs. Akil Gulamali Somji in IT Appeal (L) No. 1416 of 2012, order dt. 15th Jan., 2013 concurred with the view of the Tribunal that not following of the provisions of s. 153D of the Act will render the related order of assessment void.*

25. *In the instant case, we find that the supervisory authority has himself admitted that because of reasons stated by him, could not apply his mind and has accorded the approval mechanically to meet the requirements of law as the requirement was merely a formality. The said supervisory authority had a duty towards both the assessee as well as the Revenue which was failed to be performed in the instant case.*

21. *It is the bounden duty of the Additional Commissioner of Income Tax to in accordance with the law, while discharging statutory functions an obligation is casted upon him by the Act to apply his mind while according the approval. There is a statutory duty on the Additional Commissioner of Income Tax with a corresponding obligation on him to examine the record and thereafter accord the statutorily required Approval. The reason for granting the Approval may not be subject matter of the challenge but the manner and the material on the basis of which the approval was granted can always*

be examined by the Tribunal to come to the conclusion whether the Approval was granted in a mechanical manner or after applying mind looking into the record. No evidences required to be appreciated as the approval is self-evident, i.e., that it was granted by the Additional Commissioner of Income Tax without application of mind and without looking into the record.

22. *We may record that the decisions relied upon by the ld. DR are factually distinguishable as none of the order has examined this aspect of the matter which is subject matter of present litigation i.e non-application of mind by the superior authorities at the time of granting the Approval. The sum and substance of the decisions relied upon by the Ld. DR's was that the assessee was not entitled to any hearing or representation at the time of grant of approval. As mentioned hereinabove the scope and ambit in the present litigation is not that of grant of hearing or representation at the time of Approval but whether the Approval can be granted by the superior authority without application of mind without looking into seized material, investigation report, the draft assessment order etc can be held sustainable in the eyes of law. We had already answered that such an approval is bad in law and cannot be sustained.*

23. *The last submission made by the Ld. DR's was that the matter may be sent back to the AO to pass a fresh assessment order after seeking the approval from the competent authority. In this regard we are of the opinion that the Revenue is not entitled to second inning, for correction of its own mistake. Assessee cannot be made to run again for many more years for contesting the litigation. Hon'ble Supreme Court also in the case of Parashuram Pottery Works Co. Ltd. v. ITO 106 ITR 1 observed that "It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity, (emphasis supplied) In view of these peculiarity of the facts we are of the opinion that second inning cannot be granted to the revenue.*

24. *In view of the above, we hold that if the approval is granted by the superior authorities in mechanical manner without application of mind then the very purpose of obtaining approval is defeated. Moreover, where 4 clear days' time was available with the administrative authority, it was a half-hearted approval and as' such*

held as no approval in the eyes of law. Accordingly, we have no - hesitation in declaring that the Approval granted by the Additional CIT, Central, Kanpur on 27.03.2015 is no approval in the eyes of law and therefore, the assessment made by the AO based on such an approval is also declared to be null and void.

25. *We, therefore, quash the Assessment orders under section 153A of the Act dated 31.03.2015 for Assessment Year 2009-10 & 2011-12 in ITA No.106/Agra/2019, ITA No. 107/Agra/2019 and all collateral proceedings taken up in pursuance of the said Assessment orders also do not survive. As the Assessment orders itself are quashed all other issues challenging the merits of the addition, in respective appeals arising out of impugned assessment proceedings, are rendered to be academic and not adjudicated upon."*

11.11. Order of ITAT, Agra Bench in the case of Shri Saurabh Agarwal vs., DCIT, Central Circle Agra (supra) in which in paras 4 to 5 it was held as under :

"4. *We have heard the rival contentions of the parties and perused the record. Karnataka High court in the matter of Gopas S. Pandit v. CIT, 95 taxman. Com 246 in paragraph 8 had held as under :*

"8. *Having heard the learned Counsel for the parties, we are satisfied that the internal guidelines issued by the Central Board of Direct Taxes, as urged by the learned Counsel for the Assessee, bereft of the statutory provisions in Section 153D of the Act cannot bind the approving Authority, namely, the Joint Commissioner to comply with the principles of natural justice by the said Authority. The Assessing Authority undoubtedly has of course given adequate and reasonable opportunity of hearing to the Assessee and all objections on merits were considered by him. Merely because, Section 153D of the Act requires a prior approval of the Draft Assessment Order by the higher Authority, namely, the Joint Commissioner in the present case, because the Assessment Order was passed by the Authority below the rank of the Joint Commissioner, the provisions of the Act do not mandate that a fresh round of opportunity of hearing should Date of Judgment 28-06-2018, I.T.A. No.37/2017 Gopal S. Pandit Vs. The Commissioner of Income Tax & Another be given to the Assessee by such Authority, namely, Joint Commissioner also even for approving Draft Assessment Order."*

4.1. *Similarly, Gujrat High Court in the matter of Pr. CIT v. Sunrise Finlease P. Ltd. [2018] 89 taxmann.com 1 (Gujarat) Vin paragraph No. 9 -11 had held as under :*

9. As regards proposed questions [B] and [C] viz., whether lack of approval under section 153D would invalidate the assessment order and was not a curable defect, it may be noted that section 153D of the Act mandates that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of subsection (1) of section 153A or the assessment year referred to in clause (b) of subsection (1) of section 153B, except with the prior approval of the Joint Commissioner. In the present case, the assessment order has been passed by an Income Tax Officer, who admittedly is an officer below the rank of Joint Commissioner; therefore, the provisions of section 153D of the Act would be applicable. Section 153D starts with the words "No order of assessment or reassessment shall be passed. ..". In other words, the language employed in the provision is couched in the negative and therefore, there is a prohibition against passing of an assessment or reassessment order, except with the prior approval of the Joint Commissioner.

10. In *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* [2005] 7 SCC 234, the Supreme Court has observed that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases, absolute, and that neglect to attend to them will invalidate the whole proceeding. In *Vijay Narayan Thatte v. State of Maharashtra* [2009] 9 SCC 92, the Supreme Court has held that it is well settled that when a statute is couched in negative language it is ordinarily regarded as peremptory and mandatory in nature. The Supreme Court, in some decisions has held that merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. However, the present case deals with the interpretation of a taxing statute. It is well settled that a taxing statute has to be strictly construed, therefore, from the language employed in section 153D of the Act, the requirement of obtaining the prior approval of the Joint Commissioner has to be regarded as mandatory in nature.

11. In the facts of the present case, as the assessment order has been passed by an Income Tax Officer, the requirement of obtaining the prior approval of the Joint Commissioner under section 153D of the Act was absolute. The Tribunal, however, has recorded a finding of fact that there is nothing on record to indicate that the prior approval of the Joint Commissioner was obtained. As a natural corollary therefore, in the absence of the requirement of prior approval of the Joint Commissioner being satisfied, the whole proceeding would stand invalidated. The Tribunal was, therefore, wholly justified in holding that the impugned order of assessment would stand

initiated in view of non-compliance of the provisions of section 153D of the Act. On this count also, therefore, the appeal, does not merit acceptance.

4.2. Similarly in the matter of Akil Gulamali Somji 20 taxmann.com 380 (Pune) Tribunal had held as under:

"11. We have considered the above submissions and have gone through the decisions relied upon by the parties in view of orders of the authorities below and material available on record. The relevant facts are that during the course of search and seizure action on 29.7.2003 at the business and residential premises of Mr. Shriram Soni, certain documents belonging to the assessee were found and seized. Notice u/s. 153C was issued to the assessee and assessment u/s. 153C r.w.s. 144 have been framed for all the 4 A.Ys. under consideration. Before the Ld CIT(A), the assessment orders were questioned both on legal issue and on merits. On legal issue, the validity of assessment orders in absence of approval obtained u/s. 153 D of the Act of Joint Commissioner of Income Tax has been questioned. On merits additions made by the A.O were impugned. Since the assessee could not succeed in its appeal, the present appeals have been preferred in questioning the first appellate orders.

12. On perusal of the provisions laid down u/s. 153C of the Act, it is apparent that after issuance of notice u/s. 153C, the A.O having jurisdiction over such other person (against which incriminating material has been found during the course of search conducted on a person) arose or re-assess income of such other person in accordance with the provisions of Sec. 153A. Sec. 153B talks about time limit for completion of assessment u/s. u/s. 153A, whereas S. 153D, talks about necessity of prior approval for framing assessment in case of search or requisition. We thus fully concur with the submission of the Ld. A.R. that provisions laid down u/s. 153D are very much applicable in case of assessment of income of any other person (i.e. the person other than the person searched). Now the issue for our adjudication is as to whether absence of obtaining prior approval u/s. 153D of Joint Commissioner of Income Tax, assessment made u/s. 153 C will make the assessment void or voidable/curable. For a ready reference, provisions laid down u/s. 153D of the Act are being reproduced hereunder :

"153D. No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of [subsection (1) of section 153A or the assessment year referred to in clause (b) of subsection (1) of section 153B, except with the prior approval of the Joint

Commissioner]."

The above provisions u/s. 153D have been laid down under the heading "prior approval necessary for assessment in cases of search or requisition". This heading itself suggests that obtaining prior approval the assessment in cases of search or requisition is necessary. We further note that the provisions u/s. 153D start with a negative wording "no order of assessment or re-assessment" supported by the further wording "shall" makes the intention of the Legislature clear that compliance of Sec. 153D requirement is mandatory. No universal rule can be laid down as to whether mandatory enactment shall be considered directory or obligatory with an implied nullification for disobedience. As per the decision of Hon'ble Supreme Court in the cases of *Banwari Lal Agarwalla v. State of Bihar* AIR 1961 SC 849 ; *Raza Buland Sugar Co. Ltd., v. Municipal Board* AIR 1965 SC 895 if object of the enactment will be benefited by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory, serious general inconvenience will be created to nascent persons without very much further object of enactment, the same will be construed as directory. But all these does not mean that language used is to be ignored, only that the prima facie inference of the intention of the legislature arising from the words used may be displaced by considering the nature of the enactment, its designed consequences flowing from alternative constructions. The wordings and language used in Sec. 153D of the Act and the heading "prior approval necessary for assessment in cases of search or requisition" under which, Sec. 153D has been provided do not leave an iota of doubt about the very intention of the legislature to make the compliance u/s. 153D a mandatory. There is no dispute that if a provision is mandatory, an act done in breach thereof will be invalid, but, if it is directory, the act will be valid although non-compliance may give rise to some other penalty if provided by the Statute. The general rule that non-compliance of mandatory requirements results in nullification of the Act is subject at least to one exception. If contain requirements or conditions are provided by a statute in the interest of a particular person, the requirements, or conditions although mandatory may be waived him if no public interest are involved and in such case, the act done still be valid even if the requirement or condition has not been performed. Here, before us, is not a case where consent of assessee will waive the condition of obtaining prior approval u/s. 153D of the Joint Commissioner of Income Tax by the A.O for framing assessment u/s. 153C/ 153A of the Act. Condition of prior approval of JCIT u/s. 153D has been put in public interest and not in the interest of a particular person. Thus it cannot be waived by particular person. The use of word "shall" raises a presumption that a particular provision is imperative but this prima facie inference may be reverted by other consideration such as object and scope of the enactment and consequence flowing from such construction. The revenue has not

been able to rebut the above inference by pointing out other consideration like object and scope of the enactment and the consequence flowing from such construction before us. Clause 9 of Manual of Office Procedure, Volume II (Technical) February 2003 issued by Directorate of Income Tax on behalf of Central Board of Direct Taxes, Department of Revenue, Government of India, reads as under :

"9. Approval for assessment : An assessment order under Chapter XIV-B can be passed only with the previous approval of the range JCIT/ADDL.CIT. (For the period from 30-6-1995 to 31-12-1996 the approving authority was the CIT.) The Assessing Officer should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order-sheet and a copy of the draft order and covering letter filed in the relevant miscellaneous records folder. Due opportunity of being heard should be given to the assessee by the supervisory officer giving approval to the proposed block assessment, at least one month before the time barring date. Finally once such approval is granted, it must be in writing and filed in the relevant folder indicated above after making a due entry in the order-sheet. The assessment order can be passed only after the receipt of such approval. The fact that such approval has been obtained should also be mentioned in the body of the assessment order itself.

" Chapter XIVB also deals with assessment of search cases. Sections 153A, 153B & 153 C have been introduced to Chapter XIV "procedure for assessment" w.e.f. 1.6.2003 by the Finance Act 2003 whereas Sec. 153 D has been inserted to the Chapter w.e.f 1.6.2007 by the Finance Act 2007. These provisions thus also deal with the assessment in case of search or requisition and when the assessment orders in the present case were passed the provisions laid down u/s. 153D were very much in operation. In the present case, assessments in question have been framed on 27.12.2007.

13. In the case of Mrs. Rataabai N.K. Dubhash (Supra), the difference between cancellation and amendment of assessment in view of the provisions of Sections 143, 144B, 153 and 251 of the I.T. Act 1961 has been dealt with. The Hon'ble High Court has been pleased to hold as under :

"In view of the above discussion, we are of the clear opinion that incases falling under section 144B of the Act, the quasi-judicial function of the Income-tax Officer as an assessing authority comes to an end the moment the assessee files objections to the draft order. The power to determine the income of the assessee thereafter gets vested in the Inspecting Assistant Commissioner to whom the Income-tax Officer is required to forward the draft order together with objections. The only thing that remained to be done by the Income-tax

Officer is to pass a final order in accordance with the directions given by the Inspecting Assistant Commissioner. The function of the income-tax Officer to make the final assessment under section 144B(5) of the Act is more in the nature of a ministerial function because he can pass the order only in accordance with the directions of the Inspecting Assistant Commissioner. He cannot vary or depart from the directions given by the Inspecting Assistant Commissioner. Moreover, the requirements of section 144B of the Act re mandatory. The Income-tax Officer has no option but to follow the same. He cannot make the final order on the basis of the draft order without forwarding the same to the Inspecting Assistant Commissioner along with the objections and without obtaining the directions of the Inspecting Assistant Commissioner. An assessment made by the Income-tax Officer in violation of the provisions of section 144B of the Act would be an assessment without jurisdiction. In the instant case, the admitted position is that on receipt of the draft order of assessment, the assessee did file objections and the Income-tax Officer completed the assessment himself on the basis of the draft order without forwarding the draft order and the objections to the Inspecting Assistant Commissioner and obtaining directions from him. Such an order, on the face of it, is beyond the powers of the Income-tax Officer under section 143 read with section 144B of the Act and, hence, without jurisdiction. The Tribunal, in our opinion, was, therefore, justified in its conclusion that the assessment was liable to be annulled. It was right in holding that the assessment order passed by the Income-tax Officer the instant case without reference to the Inspecting Assistant Commissioner had rightly been annulled by the Commissioner of Income-tax (Appeals). In view of the above, we answer the question referred to us accordingly in favour of the assessee and against the Revenue. This reference is disposed of accordingly with no order as to costs."

14. *In the case of SPL's Siddharth Ltd. (Supra), before the Hon'ble Delhi High Court, the facts were that notice issued by the A.O u/s. 147 r.w.s 148 of the Act for re-opening the assessment for the A.Y. 2002-03 was set aside by the Tribunal on the ground that the requisite approval of Addl. Commissioner of Income Tax, which is mandatorily required, was not taken. Since 4 years had elapsed from the end of the relevant A.Y, the A.O u/s. 151(1) of the Act was required to take approval of the competent authority. The Hon'ble Delhi High Court after discussing the issue in detail and the case laws cited before it has been pleased to approve the decision of Tribunal. In view of these decisions and the position of law provided u/s . 153D of the Act, we hold that the assessment orders impugned framed in absence of obtaining prior approval of the Joint Commissioner for the A.Ys. under consideration are invalid as null and void and are quashed accordingly.*

15. *The decisions relied upon by the Ld. D.R are having*

different facts and issue, hence are not helpful to the revenue. In the case of Guduthur Bros. (Supra) the levy of penalty without affording a hearing to the assessee was questioned before the appellate authority, who set aside that order. The matter ultimately travelled to the Hon'ble Supreme Court and it was held that the ITO was well within his jurisdiction to continue the proceedings from the stage at which the illegality has occurred and to assess the appellants to a penalty, if any. Before the Hon'ble M.P. High Court in the case of Sardarilal Bhasin (Supra), the issue was regarding applicability of prescribed limitation u/s. 275 in a penalty order passed after the case is remanded by an appellate authority. The Hon'ble Court was pleased to hold that the limitation prescribed u/s. 275 of the Act is not applicable to the penalty order passed after the case is remanded by an appellate Authority. In the case of Gayathri Textiles (Supra) non-obtaining of prior approval of I.A.C u/s. 271(1)(c) (iii) for direction for payment of penalty was held as procedurally defective. The provisions laid down u/s. 153D of the Act under consideration in the present case before us, are different as here the prior approval of Joint Commissioner is not required merely for direction for payment of the due amount of tax but overall approval of the assessment framed by the I.T.O. Thus, the cited decision is not applicable in the present case. In the case of Sara Enterprises (Supra), the issue was as to whether the bar of limitation contained u/s. 275 of the Act would attenuate or curtail the powers of CIT, vested in him u/s. 263 of the said Act. The Hon'ble Madras High Court was pleased to hold that it is not hit by provisions of Sec. 275 of the Act. In Prabhudayal Amichand (Supra), the Hon'ble High Court of Madhya Pradesh with reference to Sec. 271(1)(c) of the Act was pleased to hold that a procedural irregularity not involving the question of jurisdiction can be cured. It is not helpful to the revenue in the present case because in the present case, the A.O was having no jurisdiction to frame assessment order without prior approval of JCIT as necessary requirement to comply with u/s. 153D of the Act. In the case of Damoderdas Murarilal (Supra), the Hon'ble High Court did not approve the view of the Tribunal in holding that in view of Clause (b) of Sec. 251(1) of the Act, the first appellate authority had no power of remand and therefore, the procedural illegality would not be corrected by recourse to remanding the case to the ITO. Here in the present case, as we have already discussed, and also cited the recent decision of Hon'ble jurisdictional Bombay High Court in the case of Mrs. Ratanbai N.K. Dubhah (Supra) and of Hon'ble Delhi High Court in the case of SPL's Siddhartha Ltd. (Supra) that requirement u/s. 153 D for obtaining approval of JCIT is not procedural only but a mandatory requirement, hence the cited decision by the Ld. D.R is not applicable in the case of present assessee. Under above circumstances, the issue raised regarding the validity of assessment orders in question without obtaining prior approval u/s. 153D of the Act is decided in favour of the assessee. The assessment orders in question are thus quashed as null and void.

Personal hearing to the Assessee before according the approval under section 153D

4.3 From perusal of the above decisions, it is categorically clear

The assessee is not entitled to have personal hearing from JCIT before granting approval u/s. 153D, as the assessee had already been heard during the assessment/reassessment proceedings by the Assessing Officer and

Therefore, we are in agreement with the submissions of the ld. DR that the assessee is not required to be given any hearing for the purpose of granting any approval. There is inbuilt purpose for seeking approval from an Officer below the rank of JCIT.

Whether approval granted by the officer under 153D is administrative order

4.4. Now, we will be examining whether the order passed by the JCIT/Addl. CIT in the case u/s. 153D was an administrative order or an order having civil, criminal or penal consequences. The similar provision was examined by the various high courts pertaining to section 158 BG, and after examining the scheme of Act had come to the conclusion that the prior approval provided under section 158 BG is administrative in nature. The Hon'ble Jurisdictional high Court in the matter of Dr. K.P. Singh [2014] 41 taxmann.com 406 (Allahabad) it was held as under ;

"9. It may be mentioned that no opportunity is required while giving the approval by the CIT as per the ratio laid down in the case of Rishabchand Bhansali (supra), where it was held that being an administrative action, assessee is not entitled to opportunity of being heard. Further, in the case of Lakshmi Jewellery (supra), it was held that :

"...the Commissioner of Income-tax before making an order approving the order of assessment made by the Assessing Officer in exercise of his powers under Section 158BG(a) need not give a hearing to the assessee".

Similarly, in the case of Shree Rama Medical and Surgical Agencies (supra), it was observed that :

"... The provisions of Section 158BG do not contemplate that the Commissioner should come face to face with the assessee while according approval for the proposed assessment under Chapter XIB-B of the Act. Apart from the language of the provision, the nature of

the functions confided to the Commissioner is inconsistent with the application of the principles of natural justice."

4.5. *Similar decision was rendered by the Hon'ble Karnataka High Court in the matter of Rishabhchand Bhansail, 136 Taxman 579, where the Karnataka High Court had held that the approval granted by the Commissioner u/s. 158BG is an administrative approval and there is no necessity of giving hearing to the assessee. For the purpose of that, we reproduce paragraph No. 4 to 4.4 which is to the following effect :*

4. *Section 158BG provides that no order of assessment for the Block period shall be passed by the Assessing Officer without the previous approval of the Joint Commissioner in respect of a search initiated under section 132. The assessee contends that before granting previous approval under section 158BG for an order of assessment made under section 158BC, the Joint Commissioner should have given a hearing to the assessee. It is submitted that the power to grant previous approval under section 158BG is an amalgam of appellate and revisional power and therefore, the right to a hearing should be read into section 158BG. It is also contended that the Tribunal failed to consider this ground though specifically urged before it.*

4.1 *Chapter XIV-B contains a special procedure for assessment of search cases. Section 158BC prescribes the procedure for block assessment. Clause (c) of section 158BC enables the Assessing Officer, on determination of the undisclosed income of the block period, to pass an order of assessment and determine the tax payable by him on the basis of such assessment. Clause (b) requires he Assessing Officer to proceed in the manner laid down in section 158BB and the provisions of section 142 sub-sections (2) and (3) of section 143 and section 144, while determining the undisclosed income of the block period. It is thus evident that the procedure clearly contemplates the Assessing Officer giving a hearing to the assessee before making an assessment order in regard to the block period.*

4.2 *Clause (k) of section 246A provides for an appeal against the order of assessment for the block period made by the Assessing Officer under clause (c) of section 158BC. Sub-section (2) of section 250 provides for a hearing of the appeal. Thus, the assessee is heard by the Assessing Officer before making the assessment order under section 158BC. If the assessee is aggrieved by the assessment order he had a remedy by way of an appeal under section 246A where also he is heard. There is no need therefore for the Joint Commissioner, to give a hearing before giving previous approval under section 158BG. Firstly, the statute does not provide for such a hearing; secondly, principles of natural justice also do not require such a hearing having regard to the fact that the assessee gets a*

hearing before the assessment and also a hearing if he files an appeal against the order of assessment; and thirdly the order passed by the Joint Commissioner granting previous approval under the proviso to section 158BG is in exercise of administrative power on being satisfied that the order of assessment has been made in accordance with the provisions of Chapter XIV-B. The previous approval is purely an internal matter and it does not decide upon any rights of the assessee. The Joint Commissioner, while examining the matter under the proviso to section 158BG does not examine or adjudicate upon the rights or obligations of the assessee, but only considers whether the Assessing Officer has fulfilled the requirements of Chapter XIV-B.

4.3. In *V.C. Shukla v. State* AIR 1980 SC 962, the Supreme Court gave the following example :

"In cases where law requires sanction to be given by the appointing authority before a prosecution can be launched against a Government servant, it has never been suggested that the accused must be heard before sanction is accorded. ."

4.4. Where a statute requires the Executive to take an administrative action after being satisfied or after forming an opinion as to the existence of a state of circumstances, the action is based on the subjective satisfaction. It is well-settled that any administrative actions based either on policy or on subjective assessment, if does not prejudicially affect any vested right or interest, need not be preceded by a hearing, unless the statute specifically provides for the same. Therefore, in the absence of any provision for opportunity of hearing in section 158BG, there is no need for the Joint Commissioner to give a hearing to the assessee before granting "previous approval" under section 158BG. The first question is, therefore, answered against the assessee.

4.6. The language used in section 153D and section 158BG, are similar in nature and both prohibits passing of the assessment order or reassessment/block assessment without the prior approval of the officers mentioned in the said sections. The language used in these sections are in the mandatory form which prohibits passing of the order by the assessing officer without prior approval. Meaning thereby if an order is passed without any approval from the authorities mentioned in the respective sections then the order shall be bad in law and would be liable to be declared void being passed in contradiction to these provisions. Moreover these 2 provisions were provided by the legislature for the same purposes i.e., to supervise the functioning of the lower authorities by the higher authorities. The comparative chart of these 2 provisions it is as under :

<i>[Prior approval necessary for section 153 assessment in cases of search or requisition. 153D. No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of 51[sub-section (1) of] section 153A or the assessment year referred to in clause (b) of subsection (1) of section 153B, except with the prior approval of the Joint Commissioner:] 52[Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the 53[Principal Commissioner or] Commissioner under sub-section (12) of section 144BA.]</i>	<i>[Authority competent to make the block assessment. 158BG. The order of assessment for the block period shall be passed by an Assessing Officer not below the rank of an Assistant Commissioner 7 [or Deputy Commissioner] or an Assistant Director 7 [or Deputy Director], as the case may be : Provided that no such order shall be passed without the previous approval of— (a) the 8 [Principal Commissioner or] Commissioner or 8 [Principal Director or] Director, as the case may be, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995 but before the 1st day of January, 1997; (b) the 9 [Joint] Commissioner or the 9 [Joint] Director, as the case may be, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or after the 1st day of January, 1997.]</i>
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- 4.7. *In view of the above and also on account of the fact that the issue had already been examined by the jurisdictional High Court in respect of section 158 BG holding that the approval granted by the higher authorities were administrative in nature we do not find any reasons to take a contrary view and accordingly we are also of the opinion that the approval granted by the Joint Commissioner in the present case was in the nature of administrative approval.*

Whether an administrative order which entail civil consequences/penal consequences/civil liabilities can be challenged before the tribunal if assessment order is premised on such administrative prior approval

- 4.8. *In the above noted paragraph it is categorically mentioned that if the approval is lacking under section 153D granted by the superior authorities, then the assessment order is liable to be quashed being passed in violation of section 153D. However, if the approval is granted by the superior authority without looking into the material, without application of mind and merely relying upon the understanding of the assessing officer, then in that eventuality the said approval ceases to be*

approval in the eyes of law. In our view the approval as envisaged under section 153D of the Act is not empty formality and there is a rational and reason for mandating the approval before passing the assessment order under the Act. If it was merely a formality and the superior authority is not required to apply its mind then there was no reason to incorporate even for approval of the superior authority and it would not have been worded in the mandatory manner. Because the language used in the provision is in the form of mandatory direction therefore it cannot be argued that even if the approval is granted without application of mind then also it is valid in the eyes of law. In our opinion, civil and penal consequences would flow from completion of assessment and therefore if the approval is denied then crystallize right will accrue in favour of the assessee and the assessee will have a right to assert that the assessment made is bad in law. Similarly if the approval is granted without application of mind which is discernible from the record then the said approval loses its character to be approval in the eyes of law.

4.9. *We had already mentioned that the assessee is not entitled to any personal hearing before passing of the approval order by the authority under section 153D of the Act. But, while holding this in favour of the revenue, we cannot close our eyes and close the right of the assessee to challenge the approval granted by the superior authority in violation of the basic fundamental principle enshrined in the income tax Act as well as in general law whereby, it has been held that the authority while granting the approval should not grant the approval mechanically without even looking into the document and without applying its mind.*

4.10. *The right to challenge the approval, is also based on various principal including the non-application of mind by the superior authority or granting approval by an authority which is not vested with the power to grant the approval or the approval granted was after the passing of the assessment order in all these cases and any other cases the direction of the tribunal and also the other courts are not barred and the tribunal and the other courts can very well examine the approval granted by the superior authority in the context of our aforesaid observation and also the other preparation of law laid down by the high courts and the tribunal.*

4.11. *The jurisdictional High Court in the case of Verma Roadways vs. ACIT, 75 ITD 183 to the following effect :*

“Coming to the aspect of the application of mind, while granting approval, we are of the view that requirement of approval pre-supposes a proper and thorough scrutiny and application of mind. In the case of Kirtilal Kalidas & Co. (supra), the I.T.A.T Madras Bench ‘A’ has observed that the function to be performed by the Commissioner in granting previous approval requires an enquiry and judicial approach

on the entire facts, materials and evidence. It has been further observed that in law where any act or function requires application of mind and judicial discretion or approach by any authority, it partakes and assumes the character and status of a judicial or at least quasi-judicial act, particularly because their Act, function, is likely to affect the rights of affected persons."

4.12. Similarly, in the matter of *Sahara India (Firm) vs. CIT*, 169 taxman 329 and in paragraph 6 and 21-24 it was held as under :

*"A bare perusal of the provisions of sub-section (2A) of the Act would show that the opinion of the Assessing Officer that it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and "the interests of the revenue" are the prerequisites for exercise of power under section 142(2A) of the Act. Undoubtedly, the object behind enacting the said provision is to assist the Assessing Officer in framing a correct and proper assessment based on the accounts maintained by the assessee and when he finds the accounts of the assessee to be complex, in order to protect the interests of the revenue, recourse to the said provision can be had. The word "complexity" used in section 142(2A) is not defined or explained in the Act. As observed in *Swadeshi Cotton Mills Co. Ltd. v. CIT* [1988] 171 ITR 634 1 (All.), it is a nebulous word. Its dictionary meaning is: "The state or quality of being intricate or complex or that is difficult to understand. However, all that is difficult to understand should not be regarded as complex. What is complex to one may be simple to another. It depends upon one's level of understanding or comprehension. Sometimes, what appears to be complex on the face of it, may not be really so if one tries to understand it carefully." Thus, before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the Assessing Officer to understand accounts maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee. But opinion required to be formed by the Assessing Officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction. There is no gainsaying that recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of*

power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the section is not turned into an empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case.

21. *In the light of the aforementioned legal position, we are in respectful agreement with the decision of this Court in Rajesh Kumar's case (supra) that an order under section 142(2A) does entail civil consequences. At this juncture, it would be relevant to take note of the insertion of proviso to section 142(2D) with effect from 1-6-2007. The proviso provides that the expenses of the auditor appointed in terms of the said provision shall, henceforth, be paid by the Central Government. In view of the said amendment, it can be argued that the main plank of the judgment in Rajesh Kumar's case (supra) to the effect that direction under section 142(2A) entails civil consequences because the assessee has to pay substantial fee to the special auditor is knocked off. True it is that the payment of auditor's fee is a major civil consequence, but it cannot be said to be the sole civil or evil consequence flowing from directions under section 142(2A). We are convinced that special audit has an altogether different connotation and implications from the audit under section 44AB. Unlike the compulsory audit under section 44AB, it is not limited to mere production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and clarification which may be required by the special auditor on various issues with relevant data, document etc., which, in the normal course, an assessee is required to explain before the Assessing Officer. Therefore, special audit is more or less in the nature of an investigation and in some cases may even turn out to be stigmatic. We are, therefore of the view that even after the obligation to pay auditor's fees and incidental expenses has been taken over by the Central Government, civil consequences would still ensue on the passing of an order for special audit.*

22. *We shall now deal with the submission of learned counsel appearing for the revenue that the order of special audit is only a step towards assessment and being in the nature of an inquiry before assessment, is purely an administrative act giving rise to no civil consequence and, therefore, at that stage a pre-decisional hearing is not required. In Rajesh Kumar's case (supra) it has been held that in view of section 136 of the Act, proceedings before an Assessing Officer*

are deemed to be judicial proceedings. Section 136 of the Act stipulates that any proceeding before an Income-tax Authority shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of Indian Penal Code, 1860 and also for the purpose of section 196 of I.P.C. and every Income-tax Authority is a court for the purpose of section 195 of Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in *Rajesh Kumar's case* (supra), but having held that when civil consequences ensue, no distinction between quasi-judicial and administrative order survives, we deem it unnecessary to dilate on the scope of section 136 of the Act. It is the civil consequence which obliterates the distinction between quasi-judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see: *Mrs. Maneka Gandhi v. Union of India* [1978] (1) SCC 248 and *S.L. Kapoor v. Jagmohan* AIR 1981 SC 136. As already noted above, the expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. Anything which affects a citizen in his civil life comes under its "wide umbrella. Accordingly, we reject the argument and hold that since an order under section 142(2A) does entail civil consequences, the rule *audi alteram partem* is required to be observed.

23. We are also unable to persuade ourselves to agree with the proposition canvassed by learned counsel for the revenue that since a post-decisional hearing in terms of sub-section (3) of section 142 is contemplated, the requirement of natural justice is fully met. Apart from the fact that ordinarily a post-decisional hearing is no substitute for pre-decisional hearing, even from the language of the said provision it is plain that the opportunity of being heard is only in respect of the material gathered on the basis of the audit report submitted under sub-section (2A) and not on the validity of the original order directing the special audit. It is well-settled that the principle *audi alteram partem* can be "excluded only when a statute contemplates a post decisional hearing amounting to a full review of the original order on merit, which, as explained above, is not the case here.

24. The upshot of the entire discussion is that the exercise of power under section 142(2A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional

hearing to an assessee and in the absence of any express provision in section 142(2A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision. Accordingly, we reiterate the view expressed in Rajesh Kumar's case (supra)."

4.13. Further, the coordinate bench in the matter of *Shreelekha Damani* 88 *Taxmann.com* 383 had held as under :

"11.9. This decision of the Tribunal was considered by Allahabad Bench of the Tribunal in the case of Verma Roadways v. Asstt. CIT [2000] 75 ITD 183 wherein also the assessee-appellant has challenged the validity of approval to the assessment order accorded by the CIT Kanpur. The Tribunal at Para-47 has held as under :

"Coming to the aspect of the application of mind, while granting approval, we are of the view that requirement of approval presupposes a proper and thorough scrutiny and application of mind. In the case of Kirtilal Kalidas & Co. (supra), the I.T.A.T Madras Bench 'A' has observed that the function to be performed by the Commissioner in granting previous approval requires an enquiry and judicial approach on the entire facts, materials and evidence. It has been further observed that in law where any act or function requires application of mind and judicial discretion or approach by any authority, it partakes and assumes the character and status of a judicial or at least quasi-judicial act, particularly because their Act, function, is likely to affect the rights of affected persons."

*11.10. Similarly, u/s. 151 of the Act it is provided that no notice shall be issued u/s. 148 unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied that it is a fit case for the issue of such notice. The sanction under this section was considered by the Tribunal, Mumbai Bench in the case of *Shri Amarlal Bajaj v. Asstt. CIT*[2013] 37 *taxmann.com* 7/60 SOT 83 (URO) wherein at para-8, the Tribunal has considered the decision of the Honble High Court of Delhi Bench in the case of *United Electrical Co. (P.) Ltd. v. CIT*[2002] 125 *Taxman* 775/258 ITR 317 (Delhi) which read as under:*

*'Hon'ble Delhi High Court in the case of United Electrical Co. Pvt. Ltd. v. CIT*258 ITR 317 has held that "the proviso to sub-section (1) of

section 151 of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some inbuilt safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment". The Hon'ble High Court further observed that "what disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of the said parties, perhaps he would not have granted his approval, which was mandatory in terms of the proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval'.

12. Coming to the facts of the case in hand in the light of the analytical discussion hereinabove and as mentioned elsewhere, the Addl. Commissioner has showed his inability to analyze the issues of draft order on merit clearly stating that no much time is left, inasmuch as the draft order was placed before him on 31.12.2010 and the approval was granted on the very same day.

Considering the factual matrix of the approved letter, we have no hesitation to hold that the approval granted by the Addl. Commissioner is devoid of any application of mind, is mechanical and without considering the materials on record. In our considered opinion, the power vested in the Joint Commissioner /Addl Commissioner to grant or not to grant approval is coupled with a duty. The Addl. Commissioner/Joint Commissioner is required to apply his mind to the proposals put up to him for

approval in the light of the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. Commissioner before granting the approval. Therefore, we have no hesitation to hold that the assessment order made u/s. 143(3) of the Act r.w. sec. 153A of the Act is bad in law and deserves to be annulled. The additional ground of appeal is allowed.

13. *The Ld. Departmental Representative has strongly relied upon the decision of the Tribunal Mumbai Bench in the case of Rafique Abdul Hamid Kokani v. Dy. CIT [2000] 113 Taxman 37 (Mag.), Hon'ble High Court of Karnataka in the case of Rishabchand Bhansali v. Dy. CIT[2004] 136 Taxman 579/267 ITR 577 and Hon'ble High Court of Madras in the case of Sakthivel Bankers v. Asstt. CIT [2002] 124 Taxman 227/255 ITR 144.*

13.1. *We have carefully perused the decisions placed on record by the ld. DR. We find that all the decisions relied upon by the ld. DR are misplaced inasmuch as all these decisions relate to the issue whether the Joint CIT/CIT has to give an opportunity of being heard to the assessee before granting the approval. This is not the issue before us as the ld. Counsel has never argued that the assessee was not given any opportunity of being heard. These decisions therefore would not do any good to the Revenue."*

4.14. *In view of the above we are of the considered opinion if the approval is granted by the superior authorities for extraneous reasons, without application of mind or without looking into the record, then the approval loses its character of an approval in the eyes of law. Accordingly we have no hesitation in declaring that the approval granted by the higher authorities on 27 March 2014 is no approval in the eyes of law and accordingly the assessment made by the assessing officer based on such an approval is also declared to be null and void. In fact, the issue of judicial review of the administrative decision were examined by Hon'ble Supreme Court in Tata Celular vs. Union of India (1994) 6SCC 651 (Paragraph 77) and also in the matter of West Bengal Central School Service Commission vs. Abdul Halim, (2019) SCC online (SC) 902. We are bound by the law laid down by the Hon'ble Supreme Court in the aforesaid judgment.*

4.15. *We may mention that in the approval granted by additional Commissioner of income tax on 27 March 2014 it is clearly mentioned that he has not applied its mind and he has not even look into the draft assessment order and he solely relied upon the undertaking of the assessing officer who had completed the assessment proceedings. He has also not gone into the record of*

investigation and seized material and has granted the approval without any meaningful discussion and going through the record. In our view such a practice is required to be deprecated and we deprecate the same. It is the duty of the additional Commissioner of income tax to apply his mind while according the approval and should not grant approval in a callous and clandestine manner. There is a statutory duty on the additional Commissioner of income tax with a corresponding obligation on him to examine the record and thereafter accord the approval. The reason for granting the approval may not be subject matter of the proceedings but the manner and the material on the basis of which the approval was granted can always be examined by the tribunal and also by the other courts to come to the conclusion whether the approval was granted in a mechanical manner or after applying mind looking into the record. No evidences required to be appreciated as the approval is self-evident, i.e., that it was granted by the additional Commissioner of income tax without application of mind and without looking into the record. In view of the above the assessment order passed by the assessing officer is void and accordingly all the appeals of the assessee are allowed.

4.16. *We may record that the decisions relied upon by the Id. DR are factually distinguishable as none of the decisions have examined this aspect of application of mind by the superior authorities at the time of granting the approval. The sum and substance of the decisions relied upon by the learned departmental representative was that the assessee was not entitled to any hearing or representation at the time of grant of approval. As mentioned hereinabove the scope and ambit in the present litigation is not that of grant of hearing or representation at the time of approval but whether the approval can be granted by the superior authority without application of mind without looking into seized material, investigation report, the draft assessment order etc can be sustainable in the eyes of law. We had already answered that such an approval is bad in law and cannot be sustained.*

4.17 *The last submission made by the learned departmental representative was that the matter may be sent back to the assessing officer to pass a fresh assessment order after seeking the approval from the competent authority. In this regard we are of the opinion that the revenue is not entitled to 2nd inning, in the matter as the non grant of approval/grant of approval in a mechanical manner takes out the direction of the assessing officer to pass the assessment order and the same cannot be rectified or improved by the revenue in the 2nd round of litigation. Undoubtedly the assessee is contesting the matter from the date of search before various forums including before the Hon'ble High court and the assessee cannot be made to run again for many more years for contesting the litigation. In view of these peculiarity of the facts we are of the opinion that 2nd inning for rectifying or removing the defects cannot be granted to the revenue.*

4.18. As we had held that the assessment made by the Assessing Officer was bad in law and the same has been annulled, therefore, the appeals of the Revenue challenging the orders of the ld. CIT(A) are also liable to be dismissed.

5. In the result, the appeals of the assessee are allowed and those of Revenue are dismissed.”

11.12. The Order of ITAT, Delhi Bench in the case of Uttarakhand Uthan Samiti, Dehradun vs., ITO, Ward 45(5), New Delhi (supra) in which in paras 13 to 19.1 it was held as under :

13. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited by the parties. The only issue to be decided in the impugned appeals are regarding the validity of the assessment order in absence of proper approval necessary for assessment as per the provisions of section 153D. The provisions of section 153D read as under :-

“153D. No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner.

Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA.”

13.1. A perusal of the order sheet entries copy of which is placed at page 37 of the paper book, Volume-I shows that on 30th March, 2015, the AO has mentioned as under:-

“Draft order submitted for approval u/s 153D. Approval received vide letter No.1158. Order passed u/s 153A. Issue notice of demand.”

14. Similarly, the letter addressed by the DCIT, Central Circle, Dehradun to the Addl.CIT, Central Range, shows that such draft assessment orders were submitted for approval on 30th March, 2015. The relevant scanned copy of the same reads as under:-

“ F.No.: DCIT/CC/DDN/DFA/2014-15/

*Office of the Dy. Commissioner of Income Tax,
Central Circle, Dehradun
Dated : 30.03.2015*

To
The Addl. Commissioner of Income Tax,
Central Range,
Meerut

Sir,

*Subject: Submission of Draft Assessment Orders in DBIT Group of cases,
Dehradun - Approval thereof - regarding
Kindly refer to the subject cited above.*

2. *In this context, it is submitted that in compliance to your directions the Draft Assessment Orders in the following cases u/s 153A of the I T Act 1961 are being submitted for your kind perusal and necessary approval.*

<i>Sl.No.</i>	<i>Name of the assessee</i>	<i>PAN</i>	<i>Asstt. Years</i>
1.	<i>Sh. Sanjay Bansal</i>	<i>ACZPB9725A</i>	<i>2007-08 To 2013-2014</i>
2.	<i>Uttarakhand Uthan samiti</i>	<i>AAAAU1376N</i>	<i>2007-08 To 2013-2014</i>
3.	<i>Wali Gram Udhyog sansthan</i>	<i>AAAAW1501B</i>	<i>2007-08 To 2013-2014 ;</i>
4.	<i>Shri Krishna Educational Trust</i>	<i>AAATS 3624 C</i>	<i>2007-08 To 2013-2014</i>

It is requested that approval may kindly be accorded to the draft assessment orders.

Yours faithfully,

Encl: Case records:

*Sd/-
(Poonam Sharma)
Dy. Commissioner of income Tax,
Central Circle, Dehradun."*

15. We find, Addl.CIT, Central Range, Meerut, granted approval vide letter dated 30th March, 2015, the relevant scanned copy of which reads as under:-

“OFFICE OF THE ADDL. COMMISSIONER OF INCOME TAX,
CENTRAL RANGE, MEERUT

F. No. Addl. CIT/CR/MRT/153D/2014-15/1158

Dated: 30.03.2015

To'

The Dy. Commissioner of Income Tax

Central Circle, Dehradun

Sub.: Draft Assessment Orders u/s 153A/153C in DBIT Group of cases, Dehradun - Approval u/s 153D of Income Tax Act, 1961 - regarding -

Please refer to your letters F.No. DCIT/CC/DDN/2014-15/2338 dated 27.3.2015 and F.No. DCIT/CC/DDN/2014-15/2339 dated 30.03.2015 on the above the above mentioned subject.

2. In the following case of DBIT Group' of ca.ses, prior approval u/s 153D of the Income Tax Act, 1961 is accorded for passing assessment orders u/s 153A/143(3) or 144 and 153C/143(3) of the I.T. Act, 1961 in respect of the assesses for the assessment years as mentioned below:-

U/s. 153 A

Sl.No.	Name of the assessee	PAN	Asstt. Years
01	Smt. Seema Bansal	AHBPB3579P	2007-08 To 2013-2014
02	Smt Bimal Bansal	ADCPB1768R	2007-08 To 2013-2014
03	Drishti Builders	AAIFA4643E	2012-13 to 2013-14
04	Sh. Sushil Kumar	AQLPK2365D	2007-08 To 2013-2014
05	Sh Sunil Dandriyal	ALTPD8489N	2007-08 To 2013-2014
06	Strategic Marketing	AADFS8010M	2007-08 To 2013-2014
07	Sh. Ashok Mehta	ABNPM2590F	2007-08 To 2013-2014
08	CKSR Animation pvt ltd	AAECC0802F	2011-12 to 2013-14

- 09 Bharti Water Pvt Ltd AACCB5459M 2007-08 To 2013-2014
- 10 Chand sons education city pvt ltd AA ECC0801G 2011-12 to 2013-14
- 11 Water wealth infra tech india pvt ltd./AABCW0319C 2011-12 to 2013-14
- 12 Sumer chand and sons AACFS6622C 2007-08 To 2013-2014,
- 13 Sh. Sanjay Bansal ACZPB9725A 2007-08 To 2013-2014
- 14 Uttarakhand Uthan samiti AAAAU1376N 2007-08 To 2013-2014
- 15 Wali Gram Udhyog sansthan AAAAW1501B 2007-08 To 2013-2014
- 16 Shri Krishna Educational Trust AAATS3624 C 2007-08 To 2013-2014

u/s 153C

<i>Sl.No.</i>	<i>Name of the assessee</i>	<i>PAN</i>	<i>Asstt. Years</i>
01	Rama Gautam	ADQPA8706L	2007-08 To 2013-2014
02	Mamta Dandriyal	AYDPD5055F	2007-08 To 2013-2014
03	Gulzar Ahmed	AFGPA7405Q	2007-08 To 2013-2014
04	Sohan lal kala	AKMPK8071H	2007-08 To 2013-2014
05	Rishi Raj	ANOPS3775M	2007-08 To 2013-2014

3. You are directed to pass necessary orders, as discussed/as amended in the drafts, in the above cases for all the relevant years. This office letter approving the draft orders shall invariably be quoted in the final order. A copy of final order passed in these cases shall be sent to this office for record. Further, proceedings are to be filed in the case of assessee when it was incorporated/was not in existence.

4. Record submitted in the cases of the above assesses are being returned.

Sd/-

(Anupam Kant Garg)

Ends: as above.

*Addl. Commissioner of Income Tax
Central Range, Meerut."*

16. From the above, it is seen that the AO passed the draft assessment order on 30.03.2015 and submitted the same for approval

before the Addl.CIT who is stationed at a place 250 Kms away from Dehradun on 30.03.2015, the Addl. CIT gave the approval subject to certain modifications/amendments on 30.03.2015 and the AO passed the order on the same date i.e., 30th March, 2015. On a pointed query raised by the Bench as to whether any movement register is available to verify as to whether the files were sent to the Addl.CIT at Meerut, the Ld.CIT-DR submitted that there is no separate movement register for the purpose of sending for approval of the draft assessment orders by the AO to the JCIT/Addl.CIT, Central Range, Meerut. She submitted that it is customary practice that staff go with file and after discussion/approval get it back. The relevant portion of the reply given by the ld. CIT-DR at para 10 of her written synopsis reads as under:-

“10. It has been submitted by the Assessing Officer that there is no separate movement register for the purpose of seeking approval of draft order by the Assessing Officer from the JCIT/Addl. CIT, Central Range Meerut. It is customary practice that staff go with file and after discussion/approval get it back.”

17. A perusal of the above clearly shows that the approval was given in a mechanical manner by the Addl.CIT to the draft assessment orders passed by the AO. As mentioned earlier, the AO has submitted the draft assessment orders on 30th March, 2015 as per the order sheet entry which indicated that the AO was very much available in her office at Dehradun on 30th March, 2015. The Office of the Addl.CIT is situated at Meerut which is about 250 Kms from Dehradun. There is no other record to suggest that the files containing the draft orders were, in fact, moved from the office of the AO at Dehradun to the office of the Addl.CIT at Meerut who went through the same and has given approval with certain amendments. It is not possible on the part of the Addl.CIT to go through the orders in about more than 100 cases on the very same day and give approval. Even if such approval has been given, it can be said that the same is nothing but a technical formality without application of mind. Further, as mentioned earlier, there is nothing on record to suggest that the files have in fact moved from Dehradun to Meerut for obtaining approval. Therefore, in our opinion, the mandatory provisions as required u/s 153D has not been complied with.

17.1 We find identical issue had come up before the Delhi Bench of the Tribunal in the case of Rishabh Buildwell Pvt Ltd. (supra). The Tribunal, after considering the various decisions, quashed the assessment orders by observing as under :-

“ 11. We have heard the arguments of both the parties and gone through the record and documents filed before us. For ready reference the entire part of the letter of approval dated 30.12.2016 is reproduced as under:

“Subject: Prior approval u/s 153 D in the cases of Cloud-9 & Sethi Group- regarding.

Please refer to your office letter F. No. DCIT/ CC/ GZB/ S&S/153D 2016- 17/2904, 2908 & 2911 dated 28-12-2016 & 30-12-2016 on the above mentioned subject.

2. In the following cases of Cloud-9 & Sethi Group, prior approval u/s 153D of the IT Act, 1961 accorded for passing assessment orders in respect of the assesses for the assessment years as mentioned below:

<i>S.</i>	<i>Name of the assessee</i>	<i>PAN</i>	<i>A.Yrs.</i>
<i>No.</i>			
<i>1</i>	<i>M/s Risabh Buildcon Pvt. Ltd.</i>	<i>AACCR7502F</i>	<i>2009-10 to 2015-16</i>
<i>2</i>	<i>M/s R.G.V. Fininvest Pvt. Ltd.</i>	<i>AAACR4383G</i>	<i>2009-10 to 2015-16</i>
<i>3</i>	<i>M/s Aggarwal Capfin Fin. Services P.Ltd.</i>	<i>AABCA0925E</i>	<i>2009-10 to 2015-16</i>
<i>4</i>	<i>M/s Arihant Info Solutions P. Ltd.</i>	<i>AADCA5015H</i>	<i>2009-10 to 2015-16</i>
<i>5</i>	<i>M/s Sethi Estate P. Ltd.</i>	<i>AABCS7643B</i>	<i>2009-10 to 2015-16</i>
<i>6</i>	<i>Sh. Chander Mohan Sethi</i>	<i>AASPS1246A</i>	<i>2009-10 to 2015-16</i>
<i>7</i>	<i>Sh. Gulshan Sethi</i>	<i>AASPS1248Q</i>	<i>2009-10 to 2015-16</i>
<i>8</i>	<i>M/s East View Developers P. Ltd.</i>	<i>AABCE5324R</i>	<i>2009-10 to 2015-16</i>
<i>9</i>	<i>Sh. Desh Bhushan Jain</i>	<i>AAFPJ6467R</i>	<i>2009 10 to 2015-16</i>
<i>10</i>	<i>M/s Max City Developers Pvt. Ltd.</i>	<i>AAECM5401A</i>	<i>2009-10 to 2015-16</i>
<i>11</i>	<i>Sh. Sanjeev Jain</i>	<i>ACFPJ3817P</i>	<i>2009-10 to 2015-16</i>
<i>12</i>	<i>M/s Sethi Buildwell Pvt. Ltd.</i>	<i>AAICS9/42C</i>	<i>2009-10 to 2015-16</i>
<i>13</i>	<i>Sh. Satpal Nagar</i>	<i>AAFPN6467M</i>	<i>2009 10 to 2015-16</i>
<i>14</i>	<i>M/s Risabh Buildwell Pvt. Ltd.</i>	<i>AACCR9776R</i>	<i>2009-10 to 2015-16</i>
<i>15</i>	<i>Srnt. Magan Jain</i>	<i>AIMPJ8085G</i>	<i>2009-10 to 2015-16</i>
<i>16</i>	<i>M/s Angel Buildcon Pvt. Ltd.</i>	<i>AAFCAI968H</i>	<i>2009-10 to 2015-16</i>

2. A technical approval is accorded to pass assessment orders in the above cases on the basis of the drafts assessment orders submitted for the assessment years in reference years. You are directed to ensure taking into account the seized documents/papers and comments in the appraisal report pertaining to AYs. The fact of

initiation of penalty proceedings, wherever, applicable, must also be incorporated in last para of the order. The initiation of correct penalty provisions of I.T. Act u/s 271 (1)(c)/ 271AAB, as per facts of the case, must be ensured.

3. *This office reference no of approving the draft orders shall invariably be quoted in the assessment orders to be passed. A copy of final assessment orders passed in these cases should be sent to this office for record immediately on passing the assessment orders.*

4. *It must also be ensured that if any document in this case, pertains to any third party assessed with a different AO, the necessary information for taking necessary action must be sent to concerned AO immediately.*

12. *The salient points of the approval letter is as under:*

1. *It is a technical approval*
2. *The AO was directed to ensure that the comments in the appraisal report are duly ensured.*
3. *The penalty proceedings should be mentioned wherever applicable for the initiation of correct penalty provisions must be ensured.*
4. *After taking into consideration, the above points, a copy of the final orders passed be sent to the JCIT.*

13. *The Income Tax Act envisages prior approval of the JCIT before passing the assessment order. The provisions read as under:*

“no order of assessment or reassessment shall be passed by the assessing officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of Section 153A or assessment year referred to in clause (b) of sub-section (1) of Section 153B except with the prior approval of Joint Commissioner.”

14. *When the approval given by the JCIT, Meerut is juxtaposed against the directions and provisions of the Income Tax Act pertaining to completion to assessment u/s 153B(1) of the Act, it can be said that the approval given by the JCIT is invalid. The Act envisages that the JCIT's approval before passing of the final order. There is no provision to alter, change, modify, adjust, amend or rework the order once the approval has been accorded. The approval to be given is statutory in nature and legally binding. In the instant case, the approving authority has clearly mentioned that the approval given is a technical approval. Moreover, he has*

directed the DCIT to ensure the seized materials and the findings of the appraisal report to be incorporated in the final assessment order. This clearly goes to prove that the approval given by the JCIT is not a final approval as required u/s 153D of the Act but a conditional approval subjected to modifications by the DCIT after receiving of the approval which makes it an invalid, qualified, uncertain approval. This is not the mandate of the Act. It has also been laid down that whenever any statutory obligation is cast upon any authority, such authority is legally required to discharge the obligation by application of mind. The approval has to be statutory nature after due application of mind, it should be neither technical nor proforma approval which is envisaged u/s 153D of the Act. Reliance is placed on the judgment of Coordinate Bench in the case of M3M India Holdings (ITA 2691/2018). And the judgment of Hon'ble High Court of Bombay in the case of Pr CIT vs. Smt. Shreelekha Damani [ITA no 668 of 2016 Dated: 27th November, 2018] is as under:

"1. This appeal is filed by the Revenue challenging the judgment of Income Tax Appellate Tribunal ("the Tribunal" for short) dated 19th August, 2015.

2. Following question was argued before us for our consideration:- "Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that there was no 'application of mind' on the part of the Authority granting approval?"

3. Brief facts are that the Tribunal by the impugned judgment set aside the order of the Assessing Officer passed under Section 153A of the Income Tax Act, 1961 ("the Act" for short) for Assessment Year 1 of 4 Uday S. Jagtap 668-16-ITXA15=.doc 2007-08. This was on the ground that the mandatory statutory requirement of obtaining an approval of the concerned authority as flowing from Section 153D of the Act, before passing the order of assessment, was not complied with.

4. This was not a case where no approval was granted at all. However, the Tribunal was of the opinion that the approval granted by the Additional Commissioner of Income Tax was without application of mind and, therefore, not a valid approval in the eye of law. The Tribunal reproduced the observations made by the Additional CIT while granting approval and came to the conclusion that the same suffered from lack of application of mind. The Tribunal referred to various judgments of the Supreme Court and the High Courts in support of its conclusion that the approval whenever required under the

law, must be preceded by application of mind and consideration of relevant factors before the same can be granted. The approval should not be an empty ritual and must be based on consideration of relevant material on record.

5. The learned Counsel for the Revenue submitted that the question of legality of the approval was raised by the assessee for the first time before the Tribunal. He further submitted that the Additional CIT had granted the approval. The Tribunal committed an error in holding that the same is invalid.

6. Having heard the learned Counsel for the both sides and having perused the documents on record, we have no hesitation in upholding the decision of the Tribunal. The Additional CIT while granting an approval for passing the order of assessment, had made following remarks :-

*"To,
The DCIT(OSD)-1
Mumbai*

Subject : Approval u/s 153D of draft order u/s 143(3) r.w.s. 153A in the case of Smt. Shreelekha Nandan Damani for A.Y. 2007-08 reg.

Ref : No. DCIT (OSD)-1/CR-7/Appr/2010-11 dt. 31.12.2010

As per this office letter dated 20.12.2010, the Assessing Officers were asked to submit the draft orders for approval u/s 153D on or before 24.12.2010. However, this draft order has been submitted on 31.12.2010. Hence there is no much time left to analyse the issue of draft order on merit. Therefore, the draft order is being approved as it is submitted. Approval to the above said draft order is granted u/s 153D of the I.T. Act, 1961."

7. In plain terms, the Additional CIT recorded that the draft order for approval under Section 153D of the Act was submitted only on 31st December, 2010. Hence, there was not enough time left to analyze the issues of draft order on merit. Therefore, the order was approved as it was submitted. Clearly, therefore, the Additional CIT for want of time could not examine the issues arising out of the draft order. His action of granting the approval was

thus, a mere mechanical exercise accepting the draft order as it is without any independent application of mind on his part. The Tribunal is, therefore, perfectly justified in coming to the conclusion that the approval was invalid in eye of law. We are conscious that the statute does not provide for any format in which the approval must be granted or the approval granted must be recorded. Nevertheless, when the Additional CIT while granting the approval recorded that he did not have enough time to analyze the issues arising out of the draft order, clearly this was a case in which the higher Authority had granted the approval without consideration of relevant issues. Question of validity of the approval goes to the root of the matter and could have been raised at any time. In the result, no question of law arises.

8. Accordingly, the Tax Appeal is dismissed.”

15. Hence, keeping in view the facts and circumstances of the case and peculiarities of the instant case, owing to the judgment of the Hon'ble High Court, we hereby hold that the assessments completed by the DCIT do not stand in the eyes of law. Since the orders have been treated as null and void, any adjudication on other issues would be academic in nature only, hence refrained to do so.

16. In the result, the appeals of the assesseees are allowed. (Order Pronounced in the Open Court on 04/07/2019).”

18. We find, the Jodhpur Bench of the Tribunal in the case of Indra Bansal & Ors (supra) has observed as under :-

“6.4. Coming to the facts of the case, it is apparent from the documents on record that the approval was given by the Joint Commissioner in hasty manner without even going through the records as the records were in Jodhpur while the Joint Commissioner was camping at Udaipur. The entire exercise of seeking and granting of approval in all the 22 cases was completed in one single day itself i.e., 31-3-2013. Thus, it is apparent that the Joint Commissioner did not have adequate time to apply his mind to the material on the basis of which the assessing officer had made the draft assessment orders. Tribunal, Mumbai Bench and Tribunal, Allahabad Bench in their orders, as discussed in the preceding paragraphs, have laid down that the power to grant approval is not to be exercised casually and in routine manner and further the concerned authority, while granting approval, is expected to examine the entire material before approving the assessment order. It has also been laid down that whenever any statutory obligation is cast upon any authority, such authority is legally required to discharge the obligation by

application of mind. In all the cases before us, the Department could not demonstrate, by cogent evidence, that the Joint Commissioner had adequate time with him so as to grant approval after duly examining the material prior to approving the assessment order. The circumstances indicate that this exercise was carried out by the Joint Commissioner in a mechanical manner without proper application of mind. Accordingly, respectfully following the ratio of the Co-ordinate Benches of Mumbai and Allahabad as afore-mentioned and also applying the ratio of the Judgment of the Hon'ble Apex Court in the case of Sahara India (Firm) v. CIT (supra), we hold that the Joint Commissioner has failed to grant approval in terms of section 153D of the Act i.e., after application of mind but has rather carried out exercise in utmost haste and in a mechanical manner and, therefore, the approval so granted by him is not an approval which can be sustained. Accordingly, assessments in three COs and nineteen appeals of the assessee(s), on identical facts, are liable to be annulled as suffering from the incurable defect of the approval not being proper. Accordingly, we annul the assessment orders in CO Nos, 8 to 10/Jodh/2016 and ITA Nos.325 to 331/Jodh/2016. Thus, all the three Cos and the nineteen appeals of the assessee, as aforesaid are allowed.” (emphasis supplied by us)

19. Since the facts of the instant case are identical to the facts of the case cited (supra), therefore, respectfully following the decisions cited above, we hold that there is no proper approval given u/s 153D in the instant case for which the assessment orders passed by the AO are not in accordance with law. We, therefore, have no hesitation in holding that the assessments completed by the DCIT do not stand in the eyes of law and, therefore, these orders are treated as null and void. Accordingly, the orders passed by the AO are annulled and the ground raised by the assessee on this preliminary issue as per grounds of appeal No.4 and 5 are allowed. Since the assessee succeeds on this preliminary ground of validity of assessment order in absence of proper approval u/s 153D, the other grounds raised by the assessee do not require any adjudication being academic in nature. The appeal filed by the assessee is accordingly allowed.

19.1 Since facts of the other appeals are identical to the facts of the appeal for A.Y. 2008-09, therefore, following similar reasonings the assessment orders for other years are also held to be null and void being not in accordance with law. Accordingly, these appeals filed by the assessee are also allowed.”

11.13. The Order of ITAT, Delhi G-Bench, Delhi in the case of Rishabh Buildwell P. Ltd., New Delhi vs., DCIT, Central Circle, Ghaziabad (supra) in paras 8 to 16 has held as under :

"8. We have heard the arguments and find that the issue is a purely legal issue pertaining to approval of assessment u/s 153D of the Act and hence being admitted. We rely on the judgment of the Hon'ble Supreme Court in the case of [NTPC v. CIT](#) (1998) 229 ITR 383 SC wherein it has explained that the power of the Tribunal in dealing with the appeals under [Section 254](#) of the Act is "expressed in the widest possible terms". It was further observed as under:

"5. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

9. The ld. AR argued that the approval given by the Joint Commissioner of Income Tax, Central Range, Meerut is invalid and the short and narrow legal issue of assessment being framed on basis of invalid approval u/s 153D no longer res integra. The ld. AR relied on the decision of Delhi ITAT in case of M3M India Holdings order dated 15.03.2019 in ITA 2691/Del./2018, ITAT, Jodhpur Bench in the case of [Smt. Indira Bansal vs., ACIT](#) (2018) 192 TTJ 968 (Jodh.) and Cuttack bench ITAT Sri Trinadh Chowdary, IT(S)A No.44 to 46/CTK/2016 27/09/2018.

On basis of the ration of the above judgements, it was argued that the additional grounds be admitted on legal and jurisdictional grounds, allow the appeal, and quash the orders passed by Ld AO and Ld CIT(A).

10. The ld. DR argued that as per the [Section 153D](#) of the Act, the JCIT has duly approved the assessment orders after going through the draft assessment order given by the Deputy Commissioner of Income Tax, Central Range, Ghaziabad. It was also argued that there was no fix it format for according the

approval and from the letter dated 30.12.2016, it can be gauged that approval has been duly given by the JCIT in accordance with the provisions of the Act.

11. We have heard the arguments of both the parties and gone through the record and documents filed before us. For ready reference the entire part of the letter of approval dated 30.12.2016 is reproduced as under:

Subject: Prior approval u/s 153D in the cases of Cloud-9 & Sethi Group- regarding.

Please refer to your office letter F. No. DCIT/ CC/ GZB/ S&S/153D 2016- 17/2904, 2908 & 2911 dated 28-12-2016 & 30-12-2016 on the above mentioned subject.

2. In the following cases of Cloud-9 & Sethi Group, prior approval u/s 153D of the IT Act, 1961 accorded for passing assessment orders in respect of the assesses for the assessment years as mentioned below:

S.No.	Name of the assessee	PAN	A.Yrs.
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3	M/s Aggarwal Capfin Financial Services P.Ltd.	AABCA0925E	2009-10 to 2015-16
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11	Sh. Sanjeev Jain	ACFPJ3817P	2009-10 to 2015-16
12	M/s Sethi Buildwell Pvt. Ltd.	AAICS9/42C	2009-10 to 2015-16
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15	Srnt. Magan Jain	AAIMPJ8085G	2009-10 to 2015-16
16	M/s Angel Buildcon Pvt. Ltd.	AAFCAI968H	2009-10 to 2015-16

2. A technical approval is accorded to pass assessment orders in the above cases on the basis of the drafts assessment orders submitted for the assessment years in reference years. You are directed to ensure taking into account the seized documents / papers and comments in the appraisal report pertaining to AYs. The fact of initiation of penalty proceedings, wherever, applicable,

must also be incorporated in last para of the order. The initiation of correct penalty provisions of [I.T. Act](#) u/s 271 (1)(c)/ 271AAB, as per facts of the case, must be ensured.

3. *This office reference no of approving the draft orders shall invariably be quoted in the assessment orders to be passed. A copy of final assessment orders passed in these cases should be sent to this office for record immediately on passing the assessment orders.*

4. *It must also be ensured that if any document in this case, pertains to any third party assessed with a different AO, the necessary information for taking necessary action must be sent to concerned AO immediately.*

12. *The salient points of the approval letter is as under:*

1. *It is a technical approval*

2. *The AO was directed to ensure that the comments in the appraisal report are duly ensured.*

3. *The penalty proceedings should be mentioned wherever applicable for the initiation of correct penalty provisions must be ensured.*

4. *After taking into consideration, the above points, a copy of the final orders passed be sent to the JCIT.*

13. *[The Income Tax Act](#) envisages prior approval of the JCIT before passing the assessment order. The provisions read as under:*

"No order of assessment or reassessment shall be passed by the assessing officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of sub-section (1) of [Section 153A](#) or assessment year referred to in clause (b) of sub-section (1) of [Section 153B](#) except with the prior approval of Joint Commissioner."

14. *When the approval given by the JCIT, Meerut is juxtaposed against the directions and provisions of the [Income Tax Act](#) pertaining to completion to assessment u/s 153B(1) of the Act, it can be said that the approval given by the JCIT is invalid. [The Act](#) envisages that the JCIT's approval before passing of the final order. There is no provision to alter, change, modify, adjust, amend or rework the order once the approval has been accorded. The approval to be given is statutory in nature*

and legally binding. In the instant case, the approving authority has clearly mentioned that the approval given is a technical approval. Moreover, he has directed the DCIT to ensure the seized materials and the findings of the appraisal report to be incorporated in the final assessment order. This clearly goes to prove that the approval given by the JCIT is not a final approval as required u/s 153D of the Act but a conditional approval subjected to modifications by the DCIT after receiving of the approval which makes it an invalid, qualified, uncertain approval. This is not the mandate of the Act. It has also been laid down that whenever any statutory obligation is cast upon any authority, such authority is legally required to discharge the obligation by application of mind. The approval has to be statutory nature after due application of mind, it should be neither technical nor proforma approval which is envisaged u/s 153D of the Act. Reliance is placed the judgment of Coordinate Bench in the case of M3M India Holdings (ITA 2691/2018). And the judgment of Hon'ble High Court of Bombay in the case of [Pr CIT vs. Smt. Shreelekha Damani \[ITA no 668 of 2016 Dated: 27th November, 2018 \]](#) is as under:

1. This appeal is filed by the Revenue challenging the judgment of Income Tax Appellate Tribunal ("the Tribunal" for short) dated 19th August, 2015.

2. Following question was argued before us for our consideration:-

"Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that there was no 'application of mind' on the part of the Authority granting approval ?

3. Brief facts are that the Tribunal by the impugned judgment set aside the order of the Assessing Officer passed under [Section 153A](#) of the Income Tax Act, 1961 ("the Act" for short) for Assessment Year 2007-08. This was on the ground that the mandatory statutory requirement of obtaining an approval of the concerned authority as flowing from [Section 153D](#) of the Act, before passing the order of assessment, was not complied with.

4. This was not a case where no approval was granted at all. However, the Tribunal was of the opinion that the approval granted by the Additional Commissioner of Income Tax was without application of mind and, therefore, not a valid approval in the eye of law. The Tribunal reproduced the observations made by the

Additional CIT while granting approval and came to the conclusion that the same suffered from lack of application of mind. The Tribunal referred to various judgments of the Supreme Court and the High Courts in support of its conclusion that the approval whenever required under the law, must be preceded by application of mind and consideration of relevant factors before the same can be granted. The approval should not be an empty ritual and must be based on consideration of relevant material on record.

5. *The learned Counsel for the Revenue submitted that the question of legality of the approval was raised by the assessee for the first time before the Tribunal. He further submitted that the Additional CIT had granted the approval. The Tribunal committed an error in holding that the same is invalid.*

6. *Having heard the learned Counsel for the both sides and having perused the documents on record, we have no hesitation in upholding the decision of the Tribunal. The Additional CIT while granting an approval for passing the order of assessment, had made following remarks :-*

"To, The DCIT(OSD)-1 Mumbai Subject : Approval u/s 153D of draft order u/s 143(3) r.w.s. 153A in the case of Smt. Shreelekha Nandan Damani for A.Y. 2007-08 reg.

Ref : No. DCIT (OSD)-1/CR-7/Appr/2010-11 dt. 31.12.2010 As per this office letter dated 20.12.2010, the Assessing Officers were asked to submit the draft orders for approval u/s 153D on or before 24.12.2010. However, this draft order has been submitted on 31.12.2010. Hence there is no much time left to analyze the issue of draft order on merit. Therefore, the draft order is being approved as it is submitted.

Approval to the above said draft order is granted u/s 153D of the I.T. Act, 1961."

7. *In plain terms, the Additional CIT recorded that the draft order for approval under [Section 153D](#) of the Act was submitted only on 31st December, 2010. Hence, there was not enough time left to analyze the issues of draft order on merit. Therefore, the order was approved as it*

was submitted. Clearly, therefore, the Additional CIT for want of time could not examine the issues arising out of the draft order. His action of granting the approval was thus, a mere mechanical exercise accepting the draft order as it is without any independent application of mind on his part. The Tribunal is, therefore, perfectly justified in coming to the conclusion that the approval was invalid in eye of law. We are conscious that the statute does not provide for any format in which the approval must be granted or the approval granted must be recorded. Nevertheless, when the Additional CIT while granting the approval recorded that he did not have enough time to analyze the issues arising out of the draft order, clearly this was a case in which the higher Authority had granted the approval without consideration of relevant issues. Question of validity of the approval goes to the root of the matter and could have been raised at any time. In the result, no question of law arises.

8. *Accordingly, the Tax Appeal is dismissed."*

15. *Hence, keeping in view the facts and circumstances of the case and peculiarities of the instant case, owing to the judgment of the Hon'ble High Court, we hereby hold that the assessments completed by the DCIT do not stand in the eyes of law. Since the orders have been treated as null and void, any adjudication on other issues would be academic in nature only, hence refrained to do so.*

16. *In the result, the appeals of the assesseees are allowed."*

12. It may be noted that provisions of Section 153D provides for approval in case of ["Each"] the assessment year. Therefore, each of the assessment year is required to be verified and approved by the JCIT being Approving Authority that it complies with Law as well as the procedure laid down. The assessee has filed details on record regarding returns filed under section 139 (1) for A.Ys. 2010-2011 to 2015-2016. It is also explained that there are un-abated assessments except A.Y. 2015-2016 in which the assessments have been abated. Therefore, for each un-abated and abated assessments, the authorities below and the Approving Authority [JCIT] shall have to verify the incriminating material found during the course of search or the seized material if

pertain to the same assessment year and its basis. The assessee has explained above that these cases are coming up because of the assessments framed in the case of M/s. JIL and others prior to the search in the case of assessee. Therefore, all material was within the knowledge of the Income Tax Authorities prior to the search in the cases of the assessee. Therefore, for granting approval under section 153D of the I.T. Act, the Approving Authority shall have to verify and consider each assessment year and shall have to apply independent mind to the material on record to see whether in each assessment year there are un-abated or abated assessments and their effect, if any. But, in the present case, the Approving Authority i.e., JCIT has granted common approval for all the assessment years in respect of the single assessee. Thus, there is no application of mind on the part of JCIT while granting approval for all the common years instead of granting approval under section 153D for each assessment years separately.

13. In the present cases various approvals were granted by the JCIT, Central Range-1, New Delhi, and forwarding letter of the A.O. are placed on record in all the cases. In all the cases as per the forwarding letter of the A.O. only assessment records were forwarded to the JCIT, Range-1, New Delhi at the time of granting approval. Therefore, it is evident that the JCIT being the Approving Authority was neither having seized material nor the appraisal report or other material at the time of granting approval. In the approval under section 153D there is a reference to the A.O. letter only. There is no reference to the seized material or record or notice under section 142 and reply of the assessee and if procedure for its inspection or perusal is there. There is no material considered by the JCIT. Learned Counsel for the Assessee has pointed out that assessee has suffered serious prejudice because of non-application of mind on the part of the JCIT while granting approval under section 153D of the I.T. Act because the A.O. has made several double or triple additions on account of share capital, investments, FDRs purchased, loans, capital gains because these were created out of bank deposits made in the bank accounts of the assessee after the money transferred from the account of M/s. Alfa India. No telescopic benefit have been given as it was out of the source deposited in the bank accounts of the assessee. Netting of the money left have also not been considered and even the Ld. CIT(A) without considering the same has

enhanced the assessments in some of the cases of the assessee. No steps have been taken by the A.O. for rectifying their mistakes when assessee filed petition for rectification under section 154 of the I.T. Act. Thus, there was inconsistencies and double additions made by the A.O. in various assessment years. It may also be noted that in the present case the facts stated in the impugned orders are that the sales of liquor are made by M/s. JIL to M/s. MAPSCO and Singla Group of cases and that part of the sale proceeds have been transferred to the account of M/s. Alfa India instead of paying the entire sale consideration to M/s. JIL. Thus, the nature of total receipt/addition is the sale proceeds originally to be received by M/s. JIL. If the part of the sale proceeds which were to be received by M/s. JIL and when transferred to the account of M/s. Alfa India Ltd., the entire part sale receipts cannot be the income either in the hands of M/s. JIL or M/s. Alfa India or the Assesseees who may be the conduit as argued before us. The A.O. has failed to consider the concept of real income for the purpose of determining the correct tax liability and correct determination of income of the assesseees. We rely upon the Judgment of the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd., 225 ITR 746 (SC). This fact is also not verified and considered by the JCIT while granting approval under section 153D of the I.T. Act. It may be noted here that entire sale proceeds when cannot be added in the hands of M/s JIL as income which is also not done in the case of M/s. JIL, rightly so, how the same sale proceeds could be added as income in the hands of assesseees under section 68 of the I.T. Act is not understandable. Thus, the Approving Authority without application of mind and in a most mechanical and technical manner granted approval under section 153D even without reference to any reason in the Order under section 153D of the I.T. Act. We, even, otherwise failed to understand that in search cases how an approval can be granted to an assessment year which is required to be based only on incriminating material without verification of those material and its reference in the appraisal report. The JCIT even in approval did not mention if assessment record is seen by him.

14. Another interesting aspect that has come to the notice on the basis of various documents submitted for approval as well as request for approval by the A.O. to the JCIT. We make a specific reference to letter dated 29.12.2017 written by ACIT, Central Circle-4, New Delhi, which is placed at page-144 of the PB. This letter Dated

29.12.2017 is a request for obtaining approval under section 153D of the I.T. Act in the case of Shri Rajnish Talwar and family wherein the approval in the case of Shri Rajnish Talwar for A.Ys. 2010-2011 to 2016-2017 is sought for. The A.O. send the draft assessment order along with assessment records of the above named assessee. In paragraph-4 of the letter, A.O. stated as under :

“It is certified that all issues raised in the appraisal reports have been duly examined with reference to the seized impounded material.”

15. Thus, the JCIT acted on certificate given by the A.O. without satisfying himself to the record/seized material etc., The A.O. sent only assessment records to the JCIT for his approval. The identical is fact in the case of all the request for approval made by the A.O. but factual position noted above established that even assessment records have not been seen by the JCIT. The A.O. sent draft assessment orders for 07 assessment years on 29.12.2017 which were got approved on 30.12.2017 merely on the basis of draft assessment order. The JCIT in the approval Order Dated 30.12.2017 also mentioned that A.O. to ensure all the assessment proceedings are conducted as per procedure and Law. It would show that even JCIT was not satisfied with the assessment proceedings conducted by the A.O. as per Law and records.

16. In some of the cases the approval was granted on the date the request was made for approval by the A.O. In all those cases merely draft assessment order and the assessment folders were available with the A.O. For example in the case of Shri Sanjay Duggal family, in the case of Ms. Kritika Talwar on the same date the approval was granted and that too merely on the basis of the assessment records and draft assessment order and in most of the cases approval has been granted either on the same day or on the next day. Further, there is no reference that seized material as well as appraisal report have been verified by the JCIT. It is not clarified whether assessment record is also seen by the JCIT. It may also be noted that even in some of the Talwar group of cases approval is granted prior to 30.12.2017 but in main cases of Shri Sanjay Duggal and Rajnish Talwar the approval is granted on 30.12.2017. Therefore, without granting approval in the main cases how the JCIT satisfied himself with the assessment orders in group cases which is also

not explained. Therefore, the approval granted by the JCIT in all the cases are merely technical approval just to complete the formality and without application of mind as neither there was an examination of the seized documents and the relevance of various observations made by the Investigation Wing in appraisal report. Thus, we hold the approval under section 153D have been granted without application of mind and is invalid, bad in Law and is liable to be quashed. Since we have held that approval under section 153D is invalid and bad in law, therefore, A.O. cannot pass the assessment orders under section 153A of the I.T Act against all the assessees. Therefore, all assessment orders are vitiated for want of valid approval under section 153D of the I.T. Act and as such no addition could be made against all the assessees. In view of the above, we set aside the Orders of the authorities below and quash the assessment orders passed under section 153A of the I.T. Act as well as the impugned appellate Order. Resultantly, all additions are deleted. The additional grounds are allowed. In view of the above findings, the other issues on merits are left with academic discussion only. Accordingly, all the appeals of the Assesseees are allowed.

17. In the result, all the appeals of the Assesseees are allowed.

NOTICE U/S. 150 TO M/s. JAGATJIT INDUSTRIES LTD.,

18. Vide Order Dated 21.02.2020 when all the appeals were being heard, notice was issued to M/s. JIL connected with these appeals as to why the direction be not issued while deciding these appeals for reopening entire case under section 147/148 of the I.T. Act for 07 years. Notice was served upon M/s. JIL. Shri R.S. Singhvi, C.A. appearing for M/s. JIL and he has objected to the issue of notice and direction against them. He has also filed written submissions. Shri R.S. Singhvi has submitted that search and seizure operation under section 132 of the I.T. Act was conducted on Jaiswal Group was included assessee company M/s. JIL on 06.05.2014. Further a search action was also undertaken on Shri Sanjay Duggal and Rajnish Talwar Group on 29.12.2015. Pursuant to search, a survey operation under section 133A was also carried out on these assessee. The case of this assessee was centralized vide Order passed under section 127 Dated 20.11.2015. As a result of search and survey assessment proceedings for A.Ys. 2009-2010 to 2013-2014 were completed under

section 153A. Undisputedly no incriminating material/adverse material was found during the course of search. Further on the basis of some statements made by Shri Sanjay Duggal and Rajnish Talwars, the issue of rebate and discount allowed to the distributors was examined and the A.O. in the case of M/s. JIL made protective disallowances of claim of rebate for A.Ys. 2009-2010 to 2013-2014 in a sum of Rs.56,57,67,894/-. The A.O. passed the assessment orders under section 15A3 of the I.T. Act and the assessee filed appeal before the Ld. CIT(A) for all these years against this addition which have been deleted by the Ld. CIT(A) in A.Ys. 2009-2010 and 2010-2011 vide Order Dated 02.06.2017. He has submitted that the appeals of the Revenue are pending before the Tribunal for all these years. Learned Counsel for the Assessee, therefore, submitted that since assessee M/s. JIL is already in Departmental Appeal before the Tribunal, therefore, no direction be issued against the assessee as it may be prejudicial to the interests of the assessee. He has submitted that when the issue of rebate is already pending before the Tribunal and no seized material was found during the course of search, therefore, even such addition could not be made against the assessee. Thus, in these circumstances when assessee M/s. JIL is already in Departmental Appeal before the Tribunal, therefore, no direction under section 150 of the I.T. Act be issued against the assessee because the A.O. shall have to satisfy the requirements of Section 147 of the I.T. Act on assumption of jurisdiction in their case. He has relied upon several decisions in support of the contention that even if direction is issued under section 150 of the I.T. Act, the A.O. shall have to satisfy the requirement of Section 147 of the I.T. Act which cannot be done in the present case because the case of M/s. JIL is also connected with the search and as such no direction could be issued for reopening of the assessment in the matter.

19. Considering the objections raised by Shri R.S. Singhvi, Learned Counsel for the Assessee M/s. JIL, we are of the view that since the Ld. CIT(A) has already allowed the appeals of Assessee and Departmental Appeals are pending before the Tribunal for consideration, therefore, we do not find it appropriate to issue any direction on merit as the same would prejudice the case of the assessee pending before the Tribunal. Further, Learned Counsel for the Assessee has explained that even if directions are issued for reopening of the case, the A.O. shall have to satisfy the requirements of

Section 147 of the I.T. Act. Since the Ld. CIT(A) in the case of M/s. JIL already deleted the addition and the matter is subjudice before the Tribunal and we have quashed the substantive assessment orders and appellate Orders in the group cases of Shri Sanjay Duggal and Shri Rajnish Talwar Group of cases on account of invalid approval granted under section 153D of the I.T. Act and findings in this Order, therefore, no purpose would serve in issuing any direction under section 150 of the I.T. Act, 1961 against M/s. JIL. In view of the above, we discharge the notice issued against M/s. JIL. There is no need of further direction in the matter.

20. In the result, all the appeals of the Assesseees are allowed.”

39. In the present case, the situation is much worse than the facts decided by the Tribunal in the case of Sanjay Duggal (supra). In that case, at least the assessment folders were sent whereas in the instant case, as appears from the letter of the Assessing Officer seeking approval, he has sent only the draft assessment orders without any assessment records what to say about the search material. Therefore, the approval given in the instant case by the Ld. Addl. CIT is not valid in the eyes of law. We, therefore, hold that the approval u/s 153D has been granted without application of mind and is invalid, bad in law and is liable to be quashed. Since, we have held that the approval u/s 153D is invalid and bad in law, therefore, the Assessing Officer cannot pass the assessment order u/s 153A of the Act against the assessee. Therefore, all assessment orders are vitiated for want of valid approvals u/s 153D of the Act and as such no addition could be made against the assessee.

40. In view of the above, we quash the assessment order passed u/s 153A of the Act. The additional ground raised by the assessee in the cross objection is allowed.

41. Since, the assessee succeeds on this legal ground, the grounds raised by the Revenue challenging the deletion of additions on merit become academic in nature and do not require any adjudication.

42. In the result, the Cross Objection filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.”

21. Since, the Assessing Officer has sought approval u/s 153D of the Act in the case of assessee from Assessment Years 2005-06 to 2011-12, therefore, in view of our order in ITA No.2399/Del/2016 and Cross Objection No.222/Del/2016 in assessee's own case for Assessment Year 2009-10 reproduced above, we hold that the assessment orders are vitiated for want of valid approval u/s 153D of the Act and as such no addition could be made against the assessee. We, therefore, quash the assessment orders passed u/s 153A of the Act for both the years, resultantly, all additions are deleted. The ground raised by the assessee under Rule 27 of the ITAT Rules is accordingly allowed.

22. Since, the assessee succeeds on his legal ground, the grounds raised by the Revenue challenging the additions on merit are not being adjudicated being academic in nature.

23. In the result, both the appeals filed by the Revenue are dismissed.

Order was pronounced in the open court on 25/11/2021.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Delhi; Dated: 25/11/2021.

Sd/-

[R.K.PANDA]
ACCOUNTANT MEMBER

Shikhar,

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi