

**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD 'SMC' BENCH, ALLAHABAD**

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER

**ITA No. 162/ALLD/2019
Assessment Year: 2012-13**

Sri Girdhar Gopal Rastogi, Dhundi Katra, Mirzapur, U.P. PAN-AANPR8525N	v.	Commissioner of Income Tax (Appeal), Allahabad
(Appellant)		(Respondent)
Appellant by:	Mr. R.N. Yadav, Adv & Mr. R.K. Kalyani, C.A.	
Respondent by:	Mr. A.K. Singh, Sr. DR	
Date of hearing:	26.04.2022	
Date of pronouncement:	13.05.2022	

ORDER

SHRI VIJAY PAL RAO, JUDICIAL MEMBER:

This appeal by the assessee is directed against the order dated 05.09.2019 of CIT(A), Allahabad for the assessment year 2012-13.

2. This appeal of the assessee was earlier disposed of by this Tribunal vide order dated 21.10.2021. Thereafter the assessee filed Misc Application for rectification of mistake in the order dated 21.10.2021. The Tribunal, vide order dated 21.12.2021 in M.A. No. 5/2021 has recalled the earlier order on the issue of jurisdiction of the Assessing Officer to take up the case of the assessee for compulsory scrutiny assessment in para 3 & 4 as under:-

"3. I have considered the rival submissions as well as the relevant material on record. In the Misc. Application, the assessee has mainly pointed out the mistake in the impugned order with respect to the additional ground raised by the assessee. The Tribunal has decided the additional ground against the assessee by observing in para 8 of the impugned order as under:-

"8. In view of the fact that the survey proceedings under section 133A were duly conducted on 6.1.2012 but due to interruption, the political leaders and local leaders of the Vyapar Mandal, the proceedings could not reach to the conclusion and were to stopped unconcluded. The

Assessing Officer, thereafter, conducted a post survey enquiry by issuing notice under section 131 to the assessee to appear alongwith the books of accounts and other records. In response to the submissions issued under section 131 of the Act, the assessee appeared alongwith the record and books of accounts and his statement was also recorded under section 131 of the Act. Therefore, apart from the statement recorded under section 133A of the Act on 6.1.2012, a statement of the assessee was also recorded under Section 131 of the Act by the Assessing Officer on 27.01.2012. It appears that there is no much gap between the survey and the post survey enquiry conducted by the Assessing Officer therefore the post survey enquiry are part and partial of the survey proceedings and would deem to be concluded on the conclusion of the post survey enquiry on 27.01.2012. Thus, when the fact of the conducting the survey as well as the post survey enquiry is not in dispute then the case of the assessee would certainly fall under the category of selection under compulsory scrutiny. Accordingly, in the facts and circumstances of the case, I do not find any substance or merit in the additional ground raised by the assessee. The same is dismissed. Ground no. 1 of the original grounds is general in nature and does not require any specific adjudication.”

4. Thus, it is clear that the Tribunal has considered the statement recorded by the Assessing Officer under section 131 on 27.01.2012 as part and partial of the survey proceedings and deemed the conclusion of the survey proceedings as on the date of the said statement instead of the date of survey itself. At the time of deciding this issue, the Tribunal presumed that the Assessing Officer has conducted the survey as well as recorded the statement of the assessee under section 131 in the post survey enquiry however, the fact now brought to the notice of the Tribunal is that the officer who was authorized to carry out the survey was different from that of the Assessing Officer. The Assessing Officer was not a party to the authorized team to carry out the survey under section 133A of the Income Tax. This fact is not in dispute as the assessee has filed the authorization letter. The department has also not disputed this fact that the Assessing Officer was not authorized for this particular survey carried out on 06.01.2012. Therefore, an order passed by the Tribunal by presuming incorrect facts certainly amounts a mistake apparent from record as a crucial fact was remained to be considered. Further the Tribunal while deciding this issue has also not considered the relevant instructions of the CBDT providing the criteria / guidance for selecting the cases under compulsory scrutiny without taking prior approval of the authority. In the case in hand, the Assessing Officer has initiated the compulsory scrutiny without any prior approval of the competent authority and therefore, the question arises whether the initiation of the compulsory scrutiny by the Assessing Officer is in accordance with the criteria prescribed by the CBDT or not? It is settled proposition of law that the scope and jurisdiction of this Tribunal under section 254(2) is very limited and circumscribed to rectify a mistake apparent from record. Therefore, the Tribunal cannot review its own order in the proceedings under section 254(2)

of the Act. The case law relied upon by the learned DR on this point are binding and there is no quarrel on this issue however, the failure to consider an important fact or contention raised during the hearing would certainly be a mistake apparent from record as the said relevant fact is likely to effect the decision on an issue. Non consideration of such a crucial and relevant fact and point out which is going to influence the decision is an apparent mistake from record requires to be rectified under section 254(2) of the Income Tax Act. The learned DR has also relied upon the various decisions on the point that the assessee has not raised any objection regarding jurisdiction of the Assessing Officer during the assessment proceedings and therefore cannot be permitted to raise this issue. It is pertinent to note that those decisions are only on the issue of jurisdiction of the Assessing Officer to assess the assessee and not on the validity of the initiation of compulsory scrutiny. Therefore, even if the Assessing Officer is having jurisdiction to assess the assessee, he may not have the authority to initiate the compulsory scrutiny if the prescribed criteria for such selection of compulsory scrutiny are not satisfied. Hence the decision relied upon by the learned DR on the jurisdiction of the Assessing Officer are not relevant for the issue under consideration. As there is an apparent mistake in the impugned order and particularly while deciding the additional issue which goes to the root of the matter then, in the facts and circumstances of the case and in the interest of justice, the impugned order dated 21st October, 2021 of this Tribunal is recalled for deciding the appeal of the assessee afresh. The Registry is directed to re-fix the appeal of the assessee for fresh hearing and adjudication on 24th January, 2022. Notice be issued to the parties.”

3. Thus, the earlier order was recalled for limited purpose of adjudication of the additional ground raised by the assessee that the Assessing Officer has initiated the compulsory scrutiny assessment without prior approval of the competent authority and therefore, it was not as per criteria / guidelines prescribed by the CBDT. Accordingly, the appeal was fixed for hearing and disposal of additional ground raised by the assessee which reads as under:-

“2. Because the Ld. Assessing Officer has erred in law and on facts by selecting the case for scrutiny under compulsory scrutiny criteria. There was no information nor satisfaction of the department for conducting survey and thus the entire survey proceedings is nothing but a biased action on the part of the department which is illegal and unjustified.

3. Because the Ld. Assessing Officer has erred in law and on facts by selecting the case for scrutiny under compulsory scrutiny criteria, as the survey proceedings was not concluded finally.”

4. The learned AR of the assessee has submitted that the instructions issued by the CBDT under section 119 of the Income Tax Act are binding on the tax authorities as well as providing jurisdiction to the Assessing Officer for issuing notice under section 143(2) in respect of the cases to be selected under compulsory scrutiny or for the cases to be selected manually with prior approval of Pr. CIT. So far as the instructions issued by the CBDT for taking up the cases for compulsory scrutiny is concerned, these instructions invariably issued for a particular financial year and therefore, for each financial year, fresh instructions are issued by the CBDT. The instructions issued by the CBDT are binding in nature on the Assessing Officer. The CBDT, vide instructions no. 10/2013 dated 5th August, 2013 issued the instructions in suppression of earlier instructions on the subject for selecting the case under compulsory scrutiny during the financial year 2013-14. These instructions were partially modified vide instruction no. 10/2013 dated 20th September, 2013 to include item no. (i) and (j). He has referred to the authorization letter for conducting the survey under section 133A of the Income Tax Act and the Assessing Officer was not authorized officer to carry out the survey. After conclusion of survey on 6.1.2012, the Assessing Officer issued summon under section 131 on 24.1.2012. In response to the said notice, the assessee produced the books of accounts which were impounded by the Assessing Officer on 27.1.2012. Thus, the learned AR has submitted that the books of accounts impounded by the Assessing Officer were not as part of the survey proceedings carried out under section 133A of the Act and thus the case does not fall in the criteria prescribed in the CBDT instruction no. 10/2013 for compulsory scrutiny without taking the approval from the Pr. CIT. The learned AR has then submitted that the Assessing Officer issued notice under section 143(2) on 11.6.2013 which is much before the guidelines issued by the CBDT for compulsory scrutiny criteria. Hence, the notice issued under section 143(2) for compulsory scrutiny by the Assessing Officer is without jurisdiction and the same is vitiated in law as there was no instruction as on that date for selecting the cases under

compulsory scrutiny. Even otherwise the impounding of the books of accounts by the Assessing Officer under section 131(3) cannot be co-related to section 133A(3) of the Act because the jurisdiction of the Assessing Officer was not authorized to carry out the survey under section 133A(1) of the Income Tax Act. Therefore, the entire exercise undertaken by the Assessing Officer was without jurisdiction. Even the Assessing Officer was not authorized to impound the books of accounts when assessee produced the same for his inspection and verification. A notice issued by the Assessing Officer under section 143(2) for compulsory scrutiny assessment is invalid being without jurisdiction.

5. In support of his contention, he has relied upon the decision of Hon'ble Delhi High Court in the case of ***SKY View Consultants (P.) Ltd., vs. Income Tax Officer 397 ITR 673*** and submitted that the Hon'ble High Court has analyzed the powers of the Assessing Officer under section 133A(1) and held that the Income Tax Officer has no jurisdiction to exercise the power under section 133A(1) of the Act without a proper authorization. The learned AR has then relied upon the judgment of Hon'ble Rajasthan High Court in the case of ***Commissioner of Income Tax vs. Moolchand Salecha 256 ITR 730*** and submitted that the Hon'ble High Court has held that the powers under section 132 as also under section 131(3) cannot be read into the powers to carry out the survey under section 133A. Further the summons under section 131(1) cannot be issued after the survey operation is over. Thus, the learned AR has submitted that when no impounding of books of accounts or other record was done during the survey by the authorized officer and income returned for the year under consideration is greater than the income returned in the immediately preceding year and in the absence of any disclose during the survey then the case of the assessee does not fall in any of the criteria for compulsory scrutiny. Thus, the assessee's case is covered under these exceptions and selection of the case by the Assessing Officer for compulsory scrutiny was not as per the binding instructions / directions of the CBDT and consequently the same is invalid and liable to be quashed.

The learned AR has submitted that when the statutes provides for a particular procedure, the tax authority has to follow the same and cannot be permitted to act in contravention of the same. In support of his contention, he has relied upon the judgment of Hon'ble jurisdiction High Court in the case of CIT vs. Rajiv Sharma 336 ITR 678. Accordingly, the Assessing Officer was not justified in assuming the jurisdiction for issuing notice under section 143(2) dated 11.6.2013 which is in contravention of the instructions of the CBDT and further the same is much before the guidelines issued by the CBDT dated 5th August, 2013 which were subsequently modified on 20th September, 2013.

6. On the other hand, the learned DR has submitted that as per the criteria prescribed in the instructions issued by the CBDT, the only requirement is impounding of books of accounts not necessarily under section 133A of the Act. The Assessing Officer has not only impounded the books of accounts but also recorded the statement of the assessee. He has referred to the instruction no. 10/2013 dated 5th August, 2013 as amended on 20th September, 2013 and submitted that as per para 3(d) of the CBDT instructions, all the assessments pertaining to the survey under section 133A of the Act are covered in the category of compulsory scrutiny including cases selected under manual criteria. The exception provided in the said clause is only where no impounded books of accounts and documents and returned income excluding any disclosure made during the survey is not less than the returned income of preceding year. Therefore, this exception does not specify that the impounding of the books of accounts should be in the survey proceedings under section 133A of the Act. He has also referred to the statement recorded by the Assessing Officer under section 131 of the Income Tax Act on 24th January, 2012 wherein the assessee has produced the books of accounts and record which were impounded by the Assessing Officer. The statement was made by the assessee voluntarily and the same is an important piece of evidence for the assessment. The learned DR has further submitted that the discretion vested with the Revenue

Authorities under section 133A(3) and section 132(4) of the Act are not radically different. Under section 133A the statement is recorded by the authority whereas under section 132(4), the authority may examine such person on oath therefore, the statement recorded under section 133A has an evidentiary value. The decision relied upon by the learned AR are not relevant to the controversy in the present case as the selection of the case under scrutiny was well within the powers of the Assessing Officer as per the relevant CBDT instructions. The learned DR has submitted that though the CBDT instructions were issued in the month of August, 2013 after the notice issued under section 143(2) however, the identical instructions of the CBDT for previously issued will apply for the case. He has referred the CBDT instructions for the financial year 2011-12 and submitted that a similar criteria has been provided for compulsory scrutiny. The learned DR has referred to the statement of the assessee recorded under section 133A and submitted that in reply to question no. 4, the assessee has stated that cash ledger is not prepared and books of accounts was not available whereas in response to notice under section 131, the assessee produced the books of accounts as well as other records which is contradictory to the earlier statement. The learned DR has referred to section 131(3) and submitted that Assessing Officer is authorized to impound the books of accounts which was approved by the CIT as per the reasons recorded by the Assessing Officer for impounding the documents. Thus all the conditions are satisfied as provided under section 131(3) of the Act. There is no infirmity in the case taken up for compulsory scrutiny by the Assessing Officer.

7. I have considered the rival submissions as well as relevant material on record. The undisputed facts of the case which are already recorded by the Tribunal in order dated 21st October, 2021 that there was a survey under section 133A of the Act at the business premises of the assessee carried out on 6th January, 2012. There were interruption by the local leaders of Vyapar Mandal during the survey and consequently a police complaint / FIR was lodged by the survey party. Thereafter,

the Assessing Officer issued summons under section 131 whereby called the assessee to appear alongwith the books of accounts and other documents on 04.01.2012. In response to the summons issued under Section 131 of the Act, the assessee appeared before the Assessing Officer alongwith the books of accounts and other record. The Assessing Officer recorded the statement of the assessee under section 131 of the Act and also impounded the books of accounts of the assessee. Thereafter, the Assessing Officer issued notice under section 143(2) for taking up the case for compulsory scrutiny. The assessee has challenged the jurisdiction of the Assessing Officer for taking up the case for compulsory scrutiny on the ground that when there was no impounding of books of accounts during the survey under section 133A of the Act and the assessee declared the income in the return of income for the year under consideration which is not less than the income returned for the immediate preceding year then the conditions for compulsory scrutiny are not satisfied as per the instruction no. 13/2013 issued by the CBDT on 5th August, 2013 modified on 20th September, 2013. The Revenue has countered the contention of the assessee on the point that there is no requirement of impounding of books of accounts only in the survey proceedings and since there was a survey under section 133A of the Income Tax Act and subsequently there is impounding of books of accounts by the Assessing Officer the case falls in the criteria prescribed by the CBDT for compulsory scrutiny. The CBDT's instruction no. 10/2013 dated 5th August, 2013 and modified on 20th September, 2013 are as under:-

“Procedure and criteria for selection of scrutiny cases under compulsory manual during the financial-year 2013-2014.

In supersession of earlier instructions on the above subject, the Board hereby lays down the following procedure and criteria for manual selection of returns/cases for scrutiny during the financial-year 2013-2014:

2. The targets for completion of scrutiny assessments and strategy of framing quality assessments as contained in Central Action plan document for Financial Year 2013-2014 has to be complied with. It is being reiterated that all scrutiny assessments including the cases selected under manual criteria will be completed through AST system software only.

3. The following categories of cases / returns shall be compulsorily scrutinized:-

- a) Cases where value of international transaction as defined u/s 92B of IT Act exceeds Rs. 15 crores.
- b) Cases involving addition in an earlier assessment year on the issue of transfer pricing in excess of Rs. 10 Crores or more which is confirmed in appeal or is pending before an appellate authority.
- c) Cases involving addition in an earlier assessment year in excess of Rs. 10 lacs on a substantial and recurring question of law or fact which is confirmed in appeal or is pending before an appellate authority.
- d) All assessments pertaining to Survey under section 133A of the IT Act excluding the cases where there are no impounded books of accounts/documents and returned income excluding any disclosure made during the Survey is not less than returned income of preceding assessment year. However, where assessee retracts the disclosure made during the Survey will not be covered by this exclusion.
- e) Assessment in search and seizure cases to be made under sections 158B, 158BC, 158BD, 153A & 153C read with 143(3) of the IT Act.
- f) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- g) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- h) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- i) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- 4. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- 5. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

8. Para 3 of the instruction no. 13/2013 contemplates the categories of cases for compulsory scrutiny Clause (d) of para 3 of the instructions is relevant for the case under consideration. As per Clause (d), all the cases pertaining to the survey under section 133A of the Act excluding certain exceptions falls in the category of compulsory scrutiny. There is no dispute that in the case in hand, the books of accounts and documents were impounded by the Assessing Officer by issuing summon under section 131 of the Income Tax Act and therefore, the impounding of books of accounts and documents did not take place during the survey proceedings under section 133A of the Act. The Revenue has also not disputed the fact that the Assessing Officer was not authorized person for carrying out the survey under section 133A at the business premises of the Assessing Officer on 6th January, 2012. The Revenue has tried to defend the action of the Assessing Officer by contending that once the books of accounts are impounded, it is not necessary that the same shall be in the survey proceedings to bring the case in the category of compulsory scrutiny. A plain reading of Clause (d)of para 3 of the instruction no. 10/2013 will lead to the

only inference that all assessment pertaining to survey under section 133A are falling in the category of compulsory scrutiny subject to the exceptions provided therein. Thus, the impounding of books of accounts and documents as mentioned in Clause (d) as a direct nexus with the survey under section 133A and therefore, I do not find any substance in the contention of the learned DR that what is required is impounding of books of accounts not necessarily in the survey. The Clause (d) of para 3 of the instructions is without any ambiguity that where no impounding of books of accounts or documents during survey under section 133A then the case would not fall in the category of compulsory scrutiny. The Revenue has not disputed the fact that the returned of income for the year under consideration is not less than the returned income of the preceding year. Therefore, there is no doubt about the criteria prescribed in the instructions that where the books of accounts are not impounded during the survey and returned of income for the year is not less than the returned of income of the preceding year the case would not fall in the category of compulsory scrutiny. In the case in hand, the impounding of books of accounts by the Assessing Officer under section 133(1) cannot be linked to the proceedings under section 133A of the Act as the authority under section 133A as well as section 131 of the Income Tax Act are separate and distinct. The Hon'ble Delhi High Court in the case of SKY View Consultant Pvt. Ltd. vs. Income Tax Officer (supra) has observed as under:-

“15. As already pointed out hereinabove, the Revenue has no answer to the submission that the entire exercise undertaken by the ITO (Inv.) was without jurisdiction. Which is why in the counter affidavit filed in the present writ petition, the stand taken by the Revenue is that it is not the only reason for re-opening the assessment. The fact remains that it could not form tangible material for re-opening the assessment. The fact remains that the power under Section 131 (1A) can be exercised only by officers named therein and they are all officers in the Department superior to the ITO. If the ITO had to exercise the powers under that provision, he had to be duly authorized to do so. He clearly was not and, therefore, the reports submitted by him could not have formed the valid basis for re-opening the assessment.”

9. This decision of Hon'ble Delhi High Court was challenged by the Revenue in SLP which was dismissed by the Hon'ble Supreme Court reported in 257 taxman 250. Similarly, the Hon'ble Rajasthan High Court in the case of CIT vs. Mool Chand Salecha (supra) has also analyzed the powers of the tax authorities under section 133A viz a viz section 132 and 131 of the Income Tax Act in 13 to 15 as under:-

“13. Thus, it is evident that the provision gives power to the tax authorities to check or verify the case, stock or other valuables in the premises where business or profession is carried on and also to require the proprietor, employ etc. to furnish information which may be useful or relevant to the proceedings under the Act. The provision also empowers the tax authorities to enter any other place in which the person carrying on business or profession states that any book of his accounts or other documents or any part of his cash or stock or other valuable articles or things relating to his business or profession are kept. The authorities have also been empowered to collect information and record the statements of the persons concerned at any time after any function, ceremony or event even before the stage of assessment proceedings for the following year for which the information may be relevant, if they are of the opinion that having regard to the nature, scale or extent of the expenditure incurred, it is necessary to do so. Thus, it is evident that the power of survey is to collect the information but the power to conduct survey does not extend to removal of books of account or other documents from the premises of survey. Sub-s. (1) of S. 133A empowers the income tax authorities to enter into the premises mentioned under clauses (1), (b), and (c). After entering into the premises, the tax authorities can require any proprietor, employee or any other person to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place or to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein or to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under the Act. Sub -s. (2) empowers the authority to enter into such premises during the hours at which such place is open for the conduct of business or profession and in case of any other place, only after sunrise and before sunset. Sub-s (3) empowers the Income Tax authorities, if they deem necessary, to place marks of identification on the books of account or other documents inspected by them and make or cause to be made extracts r copies therefrom. It is also permissible to make an inventory of such cash, stock or other articles. The provision also empowers to record the statement of any person, which may be useful for or relevant to any proceedings under the Act. Sub-s. (4) puts a complete ban on removal or causing to be removed from a place where such a tax authority has entered any book of accounts of documents or any cash or stock or other valuable article or thing, by the tax authority. Sub-s (5) provides that where having regard to the nature of scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, in the opinion of such authority, it is necessary or expedient to do so, he may at any time, after such function, ceremony or event is over, require the assessee by whom such which may be useful or

relevant to any proceeding under the Act. The provision also empowers the tax authorities to record the statement of the assessee or any other person. Sub-s. (6) lays down that where a person, who is required to afford facility to income Tax authorities for inspection of books, etc. refuses or evades to do so, the tax authority shall have power under s. 131 for enforcing compliance with the requirement made. Thus, the contents of S. 131(1) are incorporated into S. 133A(6) by reference. It is significant to notice that reference has not been given to S. 131(3), which empowers the authority before whom books of account are produced to impound the same. There is an express prohibition under S. 133A(4) for removing or causing to be removed the books of account or other documents or any cash, stock or other valuable article or thing from the place of survey. This leaves no scope for entering into or contending that the power conferred under S. 131(1) extends to proceed further and invoke S. 131(3). The prohibition contained in s. 133A(4) is absolute and unqualified. The powers under S. 133A. It is not permissible in law to do s. the apex court in *Jagir Singh Vs. Ranbi Singh*, AIR 1979 SC 381, has observed as under:

“What may not be done directly cannot be allowed to be done indirectly: that would be an evasion of the statute. It is a well-known principle of law that the provisions of any Act of Parliament shall not be evaded by shift or contrivance (per Abbott C.J. in *Fox vs. Bishop of Chester* (1824) 2 B & C 635). To carry out effectually the object of a statute. It must be construed as to defeat all attempts to do or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined (Maxwell, 11th edition, p. 109).”

14. Thus, it is clear that income-tax authority cannot impound the books of account or other documents in the proceedings conducting the survey under section 133A. We are buttressed in our view by the decisions of the various High Courts viz., *Dr. Vijay Pahwa v. Samir Mukhopadhyay, Dy. CIT* (1995) 129 CTR (Cal) 64, (2) *N.K. Mohnot Dy. CIT & Ors.* (1995) 215 ITR 275 (Mad) (3) *Gherulal Balchand v. ITO* (1982) 137 ITR 190 (P&H), (4) *United Chemical Agency v. R.K Singh, ITO & Ors.* (1974) 97 ITR 14 (All), (5) *Sri Venkateshwara Tourist Home (P) Ltd. v. Asstt. Director of IT (Inv.)* (1999) 8 DTC 36 (Karn-HC) : (1998) 233 ITR 736 (Karn), (6) *Ramswaroop Pawankumar v. ITO* (1980) 125 ITR 603 (P&H) and *Maruti Mills v. Union of India* (2000) 14 DTC 667 (Raj-HC) : (2001) 250 ITR 348 (Raj). It is not necessary to traverse the law, nor to go into the facts of each case. There appears to be unanimity among all the High Courts that during the survey under section 133A(3), the tax authority, what to talk of impounding the books of account and documents, he cannot even remove them. Of course, during the survey under section 133A(6), the tax authority, if he so deems necessary, may place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom. He may record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. In case, the assessee refuses or evades to cooperate in producing the books or documents asked for inspection, such authority may invoke the provisions of section 131(1) in view of section 133A(6) but such an authority cannot further proceed under section 131(3). Thus, even in a case where the assessee has refused or evades to cooperate in producing the books of account or documents during the survey, there can be neither seizure nor

impounding. The summons can be issued under section 131(1) at the time of survey operation compelling the production of books of account and other documents. Even, summons cannot be issued after the survey operation is over because section 133A lays down that where a person, who is required to afford facility to tax authorities for inspection of books, etc., refuses or refrains to do so at the time of survey, further summons can be served under section 131(1) only in case of obstruction by the person concerned or when some sort of hindrance is put by him. Thus, in our view, the Tribunal was perfectly justified in holding that the tax authorities were wrong in impounding the documents of the assessee Mool Chand during the survey operation.

15. The second question which arises for consideration is whether the assessing authority is justified in not complying with the orders of the Tribunal to release the books of account to the respondent-assessee Mool Chand on the ground that application for settlement has been admitted by the statutory Settlement Commission?

It is not in dispute that the survey was conducted on 25-11-1994, and on the same day, books of account of the respondent-assessee Mool Chand were impounded. The assessee filed an application before the Settlement Commission on 16-2-1995, but the same was admitted as late as on 30-9-1996. During this period, the Income Tax Officer passed the order of assessment on 24-2-1995. The Commissioner (Appeals) confirmed the order of assessing authority on 27-3-1995, and the Tribunal remitted the matter to the assessing authority for fresh assessment and directed to release the books of account to the assessee. Thus, the question as to the effect of admission of application for settlement by the statutory Settlement Commission on the order of the Tribunal dated 12-3-1996, has arisen for consideration."

10. Therefore, the powers under section 131 cannot be linked with the powers to carry out the survey under section 133A of the Act and hence, the books of accounts impounded by the Assessing Officer under section 131(3) cannot be regarded as impounding of the books of accounts in the proceedings under section 133A of the Act. Once there is no impounding of the books of accounts during the survey under section 133(A) of the Ac and the returned income of the assessee for the year under consideration is not less than the returned income of the immediate preceding year then the case would not fall in the category of compulsory scrutiny. The Assessing Officer has not taken any prior approval for issuing the notice under section 143(2) it is also pertinent to note that the notice under Section 143(2) was issued by the Assessing Officer on 11.6.2013 which is prior to the instruction no. 10/2013 dated 5.8.2013. The timing of issuing the instructions by the CBDT for the

scrutiny of the cases is very relevant as the earliest limitation for issuing the notice under section 143(2) expires on 30th September, as per the proviso to section 143(2) being other within six month from the end of the financial year in which the return was filed. The instructions were issued by the CBDT well in time and the Assessing Officer was having the sufficient time even after the instructions dated 5.8.2013 to issue notice under section 143(2) however, the Assessing Officer issued notice under section 143(2) on 11.6.2013 which is much prior to the CBDT instructions issued for taking up the compulsory scrutiny during the financial year 2013-14. Even the criteria for selection of the returns/cases for scrutiny during the financial year 2012-13, there is no much difference so far as the conditions prescribed in Clause (d) of the said instruction. Accordingly, the notice issued by the Assessing Officer under section 143(2) on 11.6.2013 is not in conformity with the criteria provided by the CBDT in the instruction no. 10/2013 as well as in the earlier instructions for the financial year 2012-13 because the mandatory conditions are not satisfied. The other contentions of the learned DR are more on the merits of the case which has already been decided by the earlier order of the Tribunal dated 21st October, 2021. The case was fixed for the hearing and disposal on the additional ground challenging the jurisdiction and powers of the Assessing Officer to initiate the compulsory scrutiny proceedings by issuing notice under section 143(2) of the Act. Since the conditions as prescribed in Clause D of para 3 of the instruction no. 13/2013 are not satisfied therefore, the Assessing Officer was not having the jurisdiction and authority to take up the case for compulsory scrutiny. Accordingly, the initiation of the compulsory scrutiny proceedings by issuing the notice under section 143(2) dated 11.6.2013 is invalid and consequently the assessment framed by the Assessing Officer is vitiated as invalid in law. Hence, the impugned assessment framed by the Assessing Officer is liable to be quashed being passed without jurisdiction. The additional ground of the appeal is allowed.

12. In the result, the additional ground of the appeal of the assessee is allowed.

Order pronounced in the open Court on 13.05.2022 at Allahabad.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED: 13/05/2022
Sh

Copy forwarded to:

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

By order
Sr. P.S