

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM**

आयकर अपील सं/ I.T.A. No.3806/Mum/2013

(निर्धारण वर्ष / Assessment Years: 2009-10)

Mahesh K. Faria 71/73, 4 <sup>th</sup> Floor, Bazaar gate street, Fort, Mumbai- 400001.	<b>बनाम/</b> Vs.	DCIT(OSD)-II, Central Range-7 Mumbai.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPF0587F</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Ms. Hiral Sejjal	
Revenue by:	Shri Achal Sharma (DR) & Ms. Vranda U Matkarni	

सुनवाई की तारीख / Date of Hearing: 04/07/2022

घोषणा की तारीख /Date of Pronouncement: 22/07/2022

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)-40, Mumbai dated 25.02.2013 for AY. 2009-10.

2. At the outset, the Ld. AR of the assessee, pointed out that the assessee has raised a legal issue which if adjudicated in favour of the assessee will go to the root of the matter/jurisdiction of the AO to have passed the impugned assessment order. The legal issue raised by the assessee is that the AO has framed the assessment order for this year (AY. 2009-10) u/s 153A of the Income Tax Act, 1961 (hereinafter "the Act"). According to her, the AO could not have validly framed the assessment order neither u/s 153A nor 144 of the Act because this (AY. 2009-10) was the searched assessment year, so the AO ought to have framed the assessment u/s 143(3)/ 144 of the Act and the AO in this case has not issued notice u/s 143(2) of the Act before framing the scrutiny assessment. Brief facts pertaining to legal issue is that the



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search took place in assessee's premises u/s 132 of the Act on 30.05.2008 (i.e. AY. 2009-10). And since the relevant assessment year before us is the searched assessment year (AY. 2009-10), the assessment ought to have been framed by AO u/s 143(3) of the Act and not under the specified provision given u/s 153A of the Act. According to Ld. AR, the assessment in this case has been framed by the AO u/s 153A/144 of the Act. According to her, in either case (assessment u/s 153A of the Act or u/s 144A of the Act), the AO lacks jurisdiction to frame the assessment for AY 2009-10. According to Ld. AR, as per the law as it stood for assessment for AY 2009-10, the assessment should have been framed u/s 143(3) of the Act. However, since no notice u/s 143(2) of the Act has been issued by the AO before framing of the impugned assessment order, the action of the AO to have framed the assessment even under section 144 of the Act is bad in law. It was pointed out by the Ld. AR that Section 153A of the Act is a special provision which gets triggered on an assessee in the event of a search u/s 132 of the Act; and by virtue of the special provision (section 153A of the Act), six (6) assessment years preceding the searched assessment year falls in the ken of assessment/re-assessment under section 153A of the Act and then assessment/re-assessment pertaining to these six(6) assessment years have to be framed u/s 153A of the Act (as per the law in force during AY. 2009-10). According to Ld. AR since the searched assessment year has to be assessed u/s 143(3) of the Act and not u/s 153A of the Act, the action of AO to have invoked section 153A of the Act by issuing notice u/s 153A of the Act was erroneous in this case. The Ld. AR also brought to our



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notice that later an amendment was inserted by Parliament by Finance Act, 2017 w.e.f. 01.04.2017 in Section 153A of the Act [only in AY. 2017-18 onwards] wherein the searched assessment year also would fall in the sweep/ken of Section 153A of the Act. Therefore, according to Ld AR, law is thus clear that the AO was bound to frame the assessment order in this case (AY. 2009-10) u/s 143(3) of the Act and since the AO have not issued notice u/s 143(2) of the Act, he could not have passed the impugned assessment order and therefore, the impugned assessment order for AY. 2009-10 since has been framed by AO is without jurisdiction.

**3.** Per contra, the Ld. CIT-DR for department opposing the submission of Ld. AR pointed out that the assessee has not raised this legal issue before the AO/CIT(A) and so the assessee should not be allowed to raise the same before this Tribunal for the first time. According to Ld. DR, section 124(3) of the Act comes to the rescue of the department because the assessee has never challenged jurisdiction of the AO before framing of the impugned assessment order passed u/s 153A/144 of the Act. According to him, the assessee did not cooperate before the AO and therefore, the AO had no other alternative but to frame the best judgment assessment u/s 144 of the Act. Therefore, according to the Ld. CIT-DR, the legal issue does not survive and has to be dismissed. The Ld. CIT-DR also brought to our notice that the AO had issued notice u/s 153A of the Act to the assessee. Pursuant to which the assessee did not bother to file the return of income. According to the Ld. CIT-DR the assessee did not respond to the notice u/s 153A of the Act and even to the notice u/s



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142(1) of the Act. Since the assessee did not respond at all, the AO had no other alternative but to frame assessment u/s 144 of the Act. And therefore the legal issue should be dismissed.

4. In her rejoinder, the Ld. AR brought to our notice that the assessee had filed belated return of income u/s 139(4) of the Act on 19.07.2010. According to her, the assessee received only notice u/s 153A of the Act on 30.11.2009 for AY. 2005-06 and 153C notice on 12.07.2010 reminding the assessee about non-filing of return pursuant to the notice u/s 153C of the Act dated 09.12.2009; and according to her there was no valid notice issued for AY 2009-10 u/s 143(2) of the Act. According to her, the issuance of notice u/s 153A/153C of the Act for AY 2009-10 is non-est in the eyes of law because for AY. 2009-10 being the searched assessment year, the AO was not empowered by law to issue notice u/s 153A/153C of the Act to the assessee, therefore, according to her, since the assessment in this case has been framed by the AO (for searched assessment year AY. 2009-10) u/s 153A is bad in law. And even if it is taken that AO had passed the assessment u/s 144 of the Act, still AO ought to have issued notice u/s 143(2) of the Act before proceeding to frame assessment u/s 143(3)/144 of the Act. Having not done so, in any case, the impugned assessment order passed by the AO for AY. 2009-10 u/s 153A/144 of the Act is null in the eyes of law because the AO did not have the jurisdiction to frame the assessment and so the legal issue raised by her even though for first time before Tribunal be upheld and cited the decision of the Hon'ble Supreme Court in the case of NTPC Vs. CIT (229 ITR 383) (SC). And to counter the submission of Ld. DR that AO had issued notice u/s



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142(1) of the Act and since assessee did not respond, the AO had no other alternative but to frame assessment u/s 144 of the Act, it was clarified by the Ld. AR that even though the AO had issued notice u/s 142(1) of the Act on 18.10.2010 and 27.10.2010, but there was no direction from AO for filing of return of income. Therefore, according to her, the AO could not have proceeded to frame assessment u/s 143(3)/144 of the Act without issuing notice u/s 143(2) of the Act.

**5.** We have heard both the parties and perused the record. The main plea of the assessee is that since the search took place on 31.05.2008, it happened in assessment year (AY.) 2009-10. And therefore, as per Section 153A of the Act for AY. 2009-10 (searched assessment year) the relevant assessment year would not fall in the ken of special provision for assessment/re-assessment u/s 153A of the Act. It was also pointed out by the Ld. AR that the Parliament only by Finance Act, 2017 inserted the searched assessment year also in the ken of assessment u/s 153A of the Act. Therefore, according to her, this assessment year i.e. for AY 2009-10 should have been assessed/scrutinized u/s 143(3) of the Act, and not u/s 153A of the Act as done by the AO. According to her, even if, the AO had issued u/s 153A of the Act for this assessment year (AY. 2009-10) then also it is non-est in the eyes of law because law does not empower him to do so. And therefore, the action of the AO to have framed the assessment u/s 153A of the Act is invalid. According to her, since as per law only an assessment u/s 143(3) of the Act could have been framed against the assessee for this searched assessment year i.e. AY. 2009-10, the AO ought to have framed the assessment only after the issuance of notice



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u/s 143(2) of the Act which undisputedly the AO had not issued. And therefore, the assessment framed u/s 143(3)/144 of the Act without issuance of notice u/s 143(2) of the Act is without jurisdiction. And therefore impugned assessment is null in the eyes of law. However, the Ld. DR brought to our notice that the notice u/s 153A of the Act was issued by the AO calling for return of income from the assessee and since no return of income was filed pursuant to notice u/s 153A of the Act, the AO thereafter on 18.10.2010 issued notice u/s 142(1) of the Act reminding the assessee that no return of income for AY. 2009-10 was filed by the assessee. And since the time given for assessee to file ROI has elapsed and the assessee filed copy of ROI only on 19.11.2010 the AO treated the same as non-est and therefore in the aforesaid facts and circumstances the AO had no other alternative but to pass the best judgment assessment under 144 of the Act and therefore, there was no necessity for issuance of notice u/s 143(2) of the Act.

**6.** In this context the Ld. AR of the assessee pointed out that assessee had filed return of income twice and took us to the sequence of events to show that the assessee had infact filed twice the return of income. Therefore, according to her, the AO was bound to issue notice u/s 143(2) of the Act before framing scrutiny assessment u/s 143(3) of the Act or u/s 144 of the Act.

**7.** Having taking note of the aforesaid facts pertaining to the legal issue raised by the assessee, however we find that certain factual verification about the notices, its compliance especially that of filing of ROI on 19.07.2010 before ITO Ward 12(2)(3)/Central Circle and



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notice u/s 142(1) of the Act dated 18.10.2010 calling for return of income and the AO's action of holding the purported ROI filed on 19.11.2010 as non-est etc need to be examined in the light of the judicial precedence on the issue and thereafter only the AO's action of assessing the income of assessee u/s 144 of the Act in the peculiar facts and circumstances of the case be determined. So for the interest of justice for both sides, this legal issue which has been raised for the first time, before us is remitted back to Ld. CIT(A) for deciding the same. Therefore, we set aside the impugned order of the Ld. CIT(A) and restore the appeal back to the file of Ld CIT(A) with a direction to adjudicate the additional grounds [Legal issues] raised before us. Needless to say that assessee be given proper opportunity of hearing; and the assessee is directed to be diligent and if advised, file written submission and case laws before the Ld. CIT(A) in support of the legal ground and the Ld. CIT(A) to pass a speaking order in accordance to the law un-influenced by any observation made by us (supra).

**8.** In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 22/07/2022.

Sd/-

(AMARJIT SINGH)  
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/07/2022.  
Vijay Pal Singh, (Sr. PS)



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**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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