

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA Nos. 64 to 70/Srt/2022 (Assessment Years: 2012-13 to 2018-19)
(Physical hearing)

Sureshbhai Babubhai Asodariya, 20, Sadhana Society, Mtawadi, L.H. Road, Surat-395006. PAN No. AEEPA 5402 Q	Vs.	Pr.C.I.T., (Central) Circle, Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Rasesh Shah, CA
Department represented by	Shri Ashok B Koli, CIT-DR
Date of hearing	20/01/2023
Date of pronouncement	25/01/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This set of seven appeals by the single assessee are directed against the separate orders of the learned Principal Commissioner of Income Tax (Central), Surat [in short, the Id. Pr.CIT] passed under Section 263 of the Income Tax Act, 1961 (in short, the Act) all dated 08/02/2022 for the Assessment years (AY) 2012-13 to 2018-19 respectively.
2. In all these appeals, certain facts are common, the assessee has raised common grounds of appeal, therefore, with the consent of parties, all the appeals were clubbed, heard together and are decided by this consolidate order to avoid the conflicting decision. For appreciation of fact, the appeal in ITA No. 64/Srt/2022 for A.Y. 2012-13 is treated as

'lead' case, wherein, the assessee has raised following grounds of appeal:

- “1. On the facts and in the circumstances of the case as well as law on the subject, the learned Pr.CIT has erred in passing the order u/s 263, although the assessment order passed u/s 143(3) r.w.s. 153A of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of the revenue.*
- 2. It is therefore, prayed that above order passed by Pr.CIT u/s 263 may please be quashed or modified as your honours deem it proper.*
- 3. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”*

3. Brief facts of the case are that initially, the assessee filed his return of income for A.Y. 2012-13 on 28/03/2013 declaring income of Rs. 1,73,070/-. A search and seizure action was carried out under Section 132 of the Act on 23/01/2018 in case of M/s Happy Home Corporation of Surat. During the said search action, several incriminating documents/material was found and seized. The case of assessee was also covered in the said search. During the search action, at the residence of assessee, various incriminating documents were found and seized. Consequent upon search action, case of assessee was centralized. Notice under Section 153A dated 12/09/2019 was served upon the assessee to file return of income for various assessment years including assessment year under consideration. In response, notice under Section 153A, the assessee filed his return of income on 05/10/2019 declaring income of Rs. 1,73,070/-. The Assessing Officer

after serving statutory notice under Section 143(2) and 142(1) of the Act, completed the assessment on 26/12/2019 under Section 143(3) r.w.s. 153A of the Act. In the assessment order, the Assessing Officer accepted the returned income of assessee. The Assessing Officer recorded that the assessment order was passed after obtaining prior approval of Joint Commissioner of Income Tax, Central Range, Surat (in short, the JCIT).

4. The assessment order was revised by the Id. Pr.CIT (Central), Surat vide his order dated 08/02/2022. Before revising the assessment order, the Id. Pr.CIT issued show cause notice under Section 263 dated 25/01/2021 for fixing the date of hearing on 11/02/2021. In the show cause notice, the Id. Pr.CIT noted that on verification of record, it was noted that the Assessing Officer carried out necessary verification of incriminating documents found and seized. The assessee was asked to furnish explanation about the seized material relating to cash transaction of Rs. 20,88,500/-. The assessee failed to furnish proper explanation, accordingly, the Assessing Officer proposed to add the same in total income. The Assessing Officer prepared draft assessment order and sought statutory approval of Joint Commissioner of Income tax (JCIT) for making addition of Rs. 20,88,500/-. Statutory approval under Section 153D of the Act from JCIT/competent authority was given. However, the assessment order is passed in accepting the

returned income without considering the additions proposed in the draft order which was submitted for obtaining approval of competent authority. Thus, the assessment order in the aforesaid facts is erroneous and in so far as prejudicial to the interests of revenue within the meaning of Section 263 r.w. Explanation-2 (c) of the Act. The Id. Pr.CIT recorded that no compliance was made by assessee in respect of show cause notice dated 25/01/2021. Further another notice dated 14/10/2023 was issued and served upon the assessee. The assessee obtained adjournment and hearing was fixed on 11/10/2021. The assessee vide their letter dated 01/11/2021, requested to provide basis/working of amount mentioned in the show cause notice for different assessment years. The Id. Pr.CIT in para 6 of his order recorded that on considering such request of assessee, the basis on which figures were taken in the show cause notice were provided to the assessee and hearing was re-fixed on 27/11/2021. The Id. Pr.CIT also issued a letter dated 09/11/2021 referring various seized material and the basis of figure of Rs. 20,88,500/- mentioned in the loose papers which remained unexplained. The assessee on receipt of such letter, again sought adjournment and hearing was fixed on 24/11/2021 vide notice dated 18/11/2021 sent through ITBA portal.

5. The assessee filed its reply dated 24/11/2021. The contents of reply is recorded in para 8 of order of Id. Pr.CIT. In the reply, beside denying

various allegations, the assessee submitted that there was no failure on his part to provide explanation in respect of seized paper particularly page Nos. 41 and 43. The assessee stated that the Assessing officer carried out necessary verification of incriminating documents found and seized during the course of search proceedings and it has been confronted to the assessee. The contents of show cause notice itself shows that the Assessing Officer carried out necessary enquiry. The assessee furnished page wise reply before the Assessing Officer and explained the noting of transport business carried out by his brother Viren Asodariya who has offered income under Section 44AE of the Act. The assessee replied that there was no proposal or issuance of show cause notice for making addition of Rs. 20,88,500/- i.e. Rs. 15,63,500/- in respect of loose paper No. 41 and Rs. 5,25,000/- in respect of loose paper page No. 43. The assessee submitted that there was no such proposal for making addition in respect of such papers in the assessment. The Assessing Officer was satisfied with the explanation furnished by the assessee with documentary evidence. The assessee further stated that there seems to be a mistake of Assessing Officer in sending the proposal of the draft assessment to the competent authority for obtaining approval. Before making any proposal for addition in the draft assessment order, the Assessing Officer should have at least called for an explanation from assessee or should have

issued a show cause notice. Since there was no enquiry by Assessing Officer, the assessee has furnished proper explanation about the loose papers.

6. The assessee further in his without prejudice submission, submitted that there was no question of making any addition of Rs. 20,88,500/- in respect of loose papers as proposed in the impugned notice. The assessee submitted that on going through page No. 41, it can be appreciated that it contains name of one person Vallabhbhai along with some amounts and dates pertaining to A.Y. 2012-13 of aggregating Rs. 15,63,500/-. The said paper does not contain the name of assessee or his handwriting nor signature but contains the name of Vallabhbhai who was working with his brother Viren Asodariya in his transport business. The documentary evidence of business of his brother was furnished along with return of income which could no doubt that the said paper belonging to assessee for page No. 43, the assessee submitted that on appreciation of such page which contains only some figure with dates without any narration whatsoever at the same being neither in his handwriting nor containing the name of signature, the same is a dump document. On the basis of such submission, the assessee prayed to drop the revision order.

7. The Id. Pr.CIT after considering the explanation of assessee, noted that initially, his predecessor issued show cause notice under Section 263 of the Act wherein there was certain inadvertent error occurred in para 3 of said notice, wherein in the show cause notice, the provisions of Explanation-2 (c) of Section 263 of the Act was invoked, however, the said notice was corrected wherein the reference of Explanation-2 (c) was deleted and the assessee was asked to furnish his reply, if so desired. The Id. Pr.CIT recoded that no further reply was filed by assessee. The Id. Pr.CIT after considering the record of assessment, reply of assessee held that during the assessment, the Assessing Officer based on material available on record, arrived at a conclusion that a certain amount is to be added to the total income of the assessee and prepared the assessment order under Section 143(3) r.w.s. 153A of the Act and sent it to JCIT for statutory approval under Section 153D of the Act. Under such circumstances, it is not open for the Assessing Officer to pass assessment order which is not in accordance with draft assessment order approved under Section 153D of the Act. Passing of assessment order other than draft assessment order is inconsistent. The Assessing Officer passed the assessment order other than the assessment order approved by the JCIT, such assessment order suffers with infirmity. The Assessing Officer passed the assessment order which was neither approved by the JCIT nor it is factually consistent with the

draft assessment order which was approved under Section 153D of the Act. Thus, the order is erroneous in so far as it is prejudicial to the interests of revenue. The assessment order dated 26.12.2019 was cancelled with the direction to the Assessing Officer to pass a fresh assessment *de novo* after considering all seized/impounded material, statement recorded in the course of search and seizure proceedings as well as post survey proceedings and other details available on record. The Assessing Officer also directed to grant reasonable opportunity of hearing to the assessee before passing assessment order afresh. Aggrieved by the order of Id. Pr.CIT, the assessee has filed the present appeal before this Tribunal.

8. We have heard the submissions of the learned authorised representative (Id. AR) of the assessee and the learned Commissioner of Income Tax- Departmental Representative (Id. CIT-DR) of the Revenue and have gone through the orders of the lower authorities carefully. The Id. AR of the assessee submits that during the assessment proceedings, initiated, pursuant to notice under Section 153A, the Assessing Officer issued a very detailed show cause notice under Section 142(1) dated 15/10/2019. In the said show cause notice, the Assessing Officer vide question No. 20, asked the assessee to furnish explanation with regard to supporting evidence in the format relating to seized document, found during the course of search proceedings from

residential premises relating to Happy Homes Group of Surat. The Assessing Officer specifically asked the assessee to explain the alleged incriminating evidence. The assessee filed its detailed reply explaining the nature of entries and explained that these paper contains the rough noting of transport business of his brother, which has been offered in his return of income. Copy of which is filed at page No. 86 to 91 of the paper book. Before initiation of assessment, the assessee in post search assessment also explained about the alleged seized paper. The Id. AR submits that the statement of assessee was recorded under Section 132(4) of the Act on 23/01/2018 and in response to question No. 14 about the seized document, the assessee clearly stated that page No. 41 relates to firm of his brother who is in transport business and he is not aware about the writing of page No. 41A and 41B. About page No. 42, the assessee explained that he does not know anything, about page No. 43, the assessee explained that it relates to his brother. Thus, the assessee not only in post search proceeding, but during the assessment proceedings also explained the complete fact. The Id. AR further submits that in reply to show cause notice issued by the Id. Pr.CIT under Section 263 of the Act, the assessee filed his detailed reply dated 24/11/2021. In the reply, the assessee clearly submitted that the Assessing Officer carried out necessary verification of the incriminating documents. The assessee furnished page-wise explanation with the

department on 23/05/2018. Copy of submission dated 23/05/2018 was also filed. The Assessing Officer after carrying out proper enquiry and considering the explanation with documentary evidence, passed the assessment order which cannot be said to be erroneous in so far as prejudicial to the interests of revenue. The assessee also explained that there was no proposal or issuance of show cause notice for making addition of Rs. 20,88,500/- in respect of loose paper No. 41 and 43. There may be some mistake in the draft assessment order sent by the Assessing Officer and the assessee demanded the copy of draft assessment order. The assessee on the basis of his reply prayed for dropping the proceedings under Section 263 of the Act. The Id. AR of the assessee submits that though as per their knowledge and information, no such proposal for making the so called addition was submitted to the JCIT, therefore, order cannot be branded as erroneous which has been passed after due verification.

9. In the alternative and without prejudice submission, the Id. AR of the assessee submits that even if it is considered for the sake of argument that the assessment order which is picked up for revision, is passed without approval of JCIT may be a nullity or *non-est* in the eyes of law, it is settled law that the order which is not valid, cannot be revised. To support such submission, the Id. AR of the assessee relied upon the following decisions:

- (i) CIT Vs Kamal Galani (2018) 95 taxmann.com 261 (Guj)
- (ii) DCIT Vs Dina Mahabir Re-rollers (P) Ltd. (2022) 135 taxmann.com 338 (Patna)
- (iii) Hari Mohan Das Tandon (HUF) (2018) 91 taxmann.com 199 (Allahabad-Trib).

10. On the various other legal and factual contention that when the Assessing Officer has taken reasonable and plausible view after considering the material available on record, the assessment order cannot be branded as erroneous or where two views are possible and the Assessing officer has adopted one of the possible view, the assessment order cannot be revised. To support such submission, the Id. AR of the assessee relied upon the following decisions:

- (1) CIT Vs Kwality Steel Suppliers Complex (2017) 84 taxmann.com 234(SC)
- (2) CIT Vs Max India Ltd. 295 ITR 0282 (SC)
- (3) CIT Vs G.M. Mittal Stainless Steel Pvt. Ltd. 263 ITR 255 (SC)
- (4) Malabar Industries Co. Ltd. Vs CIT 243 ITR 83 (SC)
- (5) CIT Vs Amit Corporation Tax Appeal No. 2583 of 2010 (Guj)
- (6) CIT Vs Nirma Chemical Works Pvt. Ltd. 309 ITR 67 (Guj)
- (7) CIT Vs R.K. Construction Co. 313 ITR 65 (Guj)
- (8) CIT Vs Arvind Jewellers (2003) 259 ITR 502 (Guj)
- (9) CIT Vs Minalben S. Parikh 215 ITR 0081 (Guj)
- (10) Moil Ltd. Vs CIT 396 ITR 244 (Bom)
- (11) CIT Vs Nirav Modi 390 ITR 292 (Bom)
- (12) CIT Vs Gabriel India Ltd 203 ITR 108 (Bom)
- (13) ITO Vs DG Housing Projects Ltd. 343 ITR 329 (Del)

- (14) Gee Vee Enterprises Vs ACIT (1975) 99 ITR 375 (Delhi)
- (15) CIT Vs Vikas Polymers 341 ITR 537 (Delhi)
- (16) CIT Vs Anilkumar Sharma 335 ITR 83 (Delhi)
- (17) CIT Vs Sunbeam Auto Ltd. (2010) 189 Taxman 436 (Delhi)
- (18) CIT Vs Kelvinator of India Ltd. (2002) 123 Taxman 433 (Delhi)
- (19) PCIT Vs Delhi Airport Metro Express Pvt. Ltd. (2017) 398 ITR 0008 (Delhi)
- (20) CIT Vs Jain Construction Co. 257 CTR 336 (Raj)
- (21) CIT Vs Ganpat Ram Bishnoi 296 ITR 292 (Raj)
- (22) CIT Vs JL Morrisons India Ltd. 366 ITR 593 (Cal.)
- (23) R. Srinivasan Vs ACIT (2014) 360 ITR 471 (Madras)
- (24) Abha Bansal Vs PCIT (2021) 132 taxmann.com 231 (Delhi –Trib)
- (25) Shanti Krupa Estate Pvt. Ltd. Vs ACIT ITA 1252/Ahd/2015 (Ahd Trib)
- (26) JRD Tata Trust Vs DCIT 122 taxmann.com 275 (Mum Trib)
- (27) Narayan Tatu Rane Vs ITO 70 taxmann.com 227 (Mum-Trib)
- (28) Torrent Pharmaceuticals Ltd. Vs DCIT (2018) 173 ITD 130 (Ahd Trib).

11. On the other hand, the Id. CIT-DR for the revenue supported the order of Id. Pr.CIT. The Id. CIT-DR submits that in response to notice under Section 153A of the Act, the assessee filed his return of income on 05/10/2019. The Assessing Officer initiated assessment proceedings. During the assessment proceedings, the Assessing Officer issued various questionnaire and after considering the submission of assessee, the Assessing Officer prepaid draft assessment order proposing addition of Rs. 20,88,500/- in respect of cash transaction as per the seized material and sent such draft assessment order to JCIT, Central Range

for his statutory approval under Section 153D of the Act on 24/12/2019. The JCIT granted his approval under Section 153D in respect of draft assessment wherein addition of Rs. 20,88,500/- was proposed by the Assessing Officer. Such approval was received in the office of Assessing Officer on 26/12/2019. However, the Assessing Officer passed assessment order under Section 153A r.w.s. 143(3) of the Act on 26/12/2019 accepting the income offered in the return of income, filed in response to notice under Section 153A of the Act. Such order passed without making any addition, which was proposed in the draft assessment and was duly approved by the JCIT, is erroneous and certainly prejudicial to the interests of revenue. Once the draft assessment, wherein proposal of addition of Rs. 20,88,500/-, it was to be added in the final assessment order. The Id. Pr.CIT on appreciation of such fact issued show cause notice to the assessee, initially while issuing show cause notice under Section 263, the Id. Pr.CIT invoked Explanation -2 (c) to Section 263 of the Act. However, invocation of such explanation was not warranted, therefore, the notice was corrected by the Id. Pr.CIT vide his notice dated 13/12/2021. The Id. Pr.CIT after giving due opportunity of hearing and considering the submission of assessee, passed the order under Section 263 directed the Assessing Officer to pass fresh assessment order after considering all seized/impounded material. The assessee in its reply, has raised a

baseless contention that there was no proposal for making addition of Rs. 20,88,500/-. It is incumbent upon the Assessing Officer in the proceedings initiated under Section 153A of the Act to seek the approval and to follow the direction of Range head. The Assessing Officer failed to follow the approval granted by the JCIT while passing the assessment order. The Id. CIT-DR for the revenue submits that the copy of proposal dated 24.12.2018 sent by the Assessing Officer for approval of JCIT/range head and copy of approval granted by the JCIT on 24.12.2018, received by assessing officer on 26.12.2018 is filed before the Tribunal. The Id. CIT-DR for the revenue submit that as per direction of Bench, he has called the record of Assessing Officer wherein the draft assessment order which was duly approved by the JCIT is available. The Id. CIT-DR submits that it was a fit case for setting aside the assessment order for passing the assessment order de novo as the order passed by the Assessing Officer is erroneous and prejudicial to the interests of revenue.

12. We have considered the submissions of both the parties and have gone through the contents of order of Id. Pr.CIT as well as assessment order dated 26/12/2019 passed under Section 143(3) r.w.s. 153A of the Act. We have also deliberated on various case laws relied by the Id AR for the assessee. The main contention of Id. AR of the assessee is that the Assessing Officer after considering the reply of assessee accepted the

explanation about the seized material and no addition was made. On the contrary, the Id. CIT-DR for the revenue contended that in the scrutiny assessment, initiated under Section 153A it is incumbent on the Assessing Officer to seek approval of range head before finalising the assessment order. The Id. CIT-DR for the revenue at the time of making his submission, has filed copy of proposal sent by the Assessing Officer for approval of JCIT under Section 153D of the Act. On perusal of assessment record, we find that the Assessing Officer sent the proposal for approval of draft assessment order on 24/12/2019. The draft assessment order was approved and such intimation was sent to the Assessing Officer vide order No. SRT/Jt.CIT/CR/Approval/CC-3/153D/2019-20 dated 24/12/2019 which was received by the Assessing Officer on 26/12/2019. On perusal of final order passed by the Assessing Officer on 26/12/2019, we find that no such addition as proposed in the assessment order sent for approval of JCIT was included.

13. Before us, the Id. AR of the assessee while making his submission, submitted that the alleged approval as recorded in the assessment order is dated 26/12/2019, copy of which was not provided to him. On careful perusal of approval under Section 153D granted by the JCIT, we find that such approval was granted by JCIT, vide his order dated 24/12/2019, which was received by the Assessing Officer on

26/12/2019. The last paragraph of the assessment order contains the same reference number of approval number which is mentioned in the approved order itself. However, while passing the final assessment order, no such addition was made in the assessment order. Thus, the objection raised by the Id. AR of the assessee that no addition was proposed by assessing officer against the assessee or his contention is not sustainable.

14. The Id. AR of the assessee while making his submission also relied on number of case laws which we have referred above. The Id. AR specifically relied upon the decision of Patna Tribunal in DCIT Vs Dina Mahabir Re-Rollers (P) Ltd. (supra) and Allahabad Tribunal in Hari Mohan Das Tandon (HUF) Vs PCIT (supra) wherein the Coordinate Benches of Tribunals held that void order of Assessing Officer cannot be revised by the Commissioner as it is nonest in the eyes of law. There is no dispute about the legal position that the assessment order which is void or nonest in the eyes of law, cannot be given new lease of life, however, the facts in the present case is absolutely on different footing. As recorded earlier, the Assessing Officer made addition in the draft assessment order which was subject to the approval of JCIT and in fact such order was approved by the JCIT vide his approval dated 24.12.2018. However, while passing the final assessment order, the Assessing Officer has not included those proposed addition in the final

assessment order due to omission to include such addition in the final assessment order. Certainly such omission resulted the order as erroneous being not inconsonance with the provisions in cases of search or requisition wherein prior approval is a condition precedent for passing assessment order by the Assessing Officer who is below the rank of JCIT in respect of each assessment year referred in clause (b) of sub-Section (1) of Section 153A of the Act. Admittedly, the Assessing Officer in the present case was Assistant Commissioner of Income Tax, which is below the rank of JCIT. Thus, the assessment order passed by the assessing officer is erroneous. The order is not only erroneous but prejudicial to the interest of revenue as such the revenue lost the recovery of due tax on addition made in the assessment order approved by JCIT. In view of aforesaid discussion, we are of the considered view that twin condition as required for invoking jurisdiction under Section 263 of the Act are fulfilled in the present case. Hence, we do not find any merit in the grounds of appeal raised by the assessee. In the result, this appeal of assessee is dismissed.

15. Now we take appeal in ITA Nos. 65, 66, 67, 68, 69, & 70/Srt/2022 for the A.Ys. 2013-14 to 2018-19 wherein the assessee has raised similar grounds of appeal as raised in appeal in ITA No. 64/Srt/2022 for A.Y. 2012-13. Considering the fact that we have dismissed the appeal of assessee in ITA No. 64/Srt/2022 for A.Y. 2012-13, therefore,

considering the principle of consistency, the appeal of ITA Nos. 65, 66, 67, 68, 69, & 70/Srt/2022 for the A.Ys. 2013-14 to 2018-19 are also dismissed with similar findings.

16. In the result, all these appeals of the assessee are dismissed.

Order pronounced in the open court on 25th January, 2023.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 25/01/2023

**Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

Sr. Private Secretary, ITAT, Surat