

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA Nos.353, 354 & 355/M/2021  
Assessment Years: 2007-08, 2008-09 & 2009-10**

Mr. Bhupendra Jivrajbhai Surani, B-2005, Chandanbala CHS, R.R. Thakkar Marg, Walkeshwar, Mumbai – 400 006 <b>PAN: BJAPS5761D</b>	Vs.	ACIT-CC 3(1), 19 <sup>th</sup> Floor, Air India Bldg., Nariman Point, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Bharat Kumar, A.R.  
Revenue by : Dr. Mahesh Akhade, D.R.

Date of Hearing : 17 . 04 . 2023

Date of Pronouncement : 27 . 04 . 2023

**ORDER**

**Per : Kuldip Singh, Judicial Member:**

Since common question of law and facts have been raised in the aforesaid inter-connected appeals, the same are being disposed of by way of composite order to avoid repetition of discussion.

2. The appellant, Mr. Bhupendra Jivrajbhai Surani (hereinafter referred to as 'the assessee') by filing the present appeals, sought to set aside the impugned orders all dated 29.01.2021 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter

referred to as the CIT(A)] qua the assessment year 2007-08, 2008-09 & 2009-10 on the identically worded grounds except the difference in figures (grounds from A.Y. 2007-08 are taken for the sake of brevity) inter-alia that :-

*“1. The learned CIT (A) has erred in law and in facts in not holding that assessment order u/ s. 153C r.w.s. 143(3) of the Act passed by the AO is bad law, illegal and null and void.*

*2. The learned CIT (A) has erred in law and in facts in not holding that t assessment order u/ s. 153C r.w.s. 143(3) of the Act is time barred and her bad in law, illegal and void ab initio.*

*3. The learned CIT (A) has erred in law and in facts in not holding that direction the special audit is not in accordance with the provisions of Section 142(2A) the Act and is bad in law and illegal.*

*4. The learned CIT (A) has erred in law and in facts in upholding the addition of a amount of Rs. 32.38 crore being the amount brought in by the appellant in NRE account from abroad. Further the learned CIT (A) has erred in law and in facts in upholding the above addition by applying the provision of Section 5(ii) w.s 9(1)(i) of the Act.*

*5. The learned CIT (A) has erred in law and in facts in upholding the addition of Rs. 20 crore as unexplained credit being the loan received from identifiable parties.*

*6. The learned CIT (A) has erred in law and in facts in not holding that the additions made by the AO in the assessment order passed u/ s. 153C r.w.s. 143(3) of the Act in absence of incriminating material found during the course of search are unsustainable.*

*7. The learned CIT(A) has erred in law and in facts in not holding that the AO erred in passing the assessment order in gross violation of principles of natural justice.*

*8. The appellant craves leave of Your Honours to add, amend, modify, alter and/ or delete any of the above grounds of appeal.”*

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of search operation carried out under section 132 of the Income Tax Act, 1961 (for short ‘the Act’) in case of JB Diamond Group of cases, notice was issued and served upon the assessee under section 153C

of the Act, to which assessee has not filed any return for A.Y. 2007-08. The assessee filed the return of income for A.Y. 2008-09 & 2009-10 declaring total income at Rs.66,480/- & Rs.2,400/- respectively. Notice under section 143(2) of the Act was duly served upon the assessee and in response thereto the assessee filed details. The assessee raised specific objections to the special audit report called by Assessing Officer (AO) under section 142(2A) on the ground that report of the nominated auditors is purely based on surmises and assumptions. Declining the contentions raised by the assessee the AO proceeded to frame the assessment making addition of Rs.52,39,02,630/-, Rs.39,88,77,085/- & Rs.1,09,19,230/- for A.Y. 2007-08, 2008-09 & 2009-10 respectively under section 153A read with section 143(3) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeals. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeals.

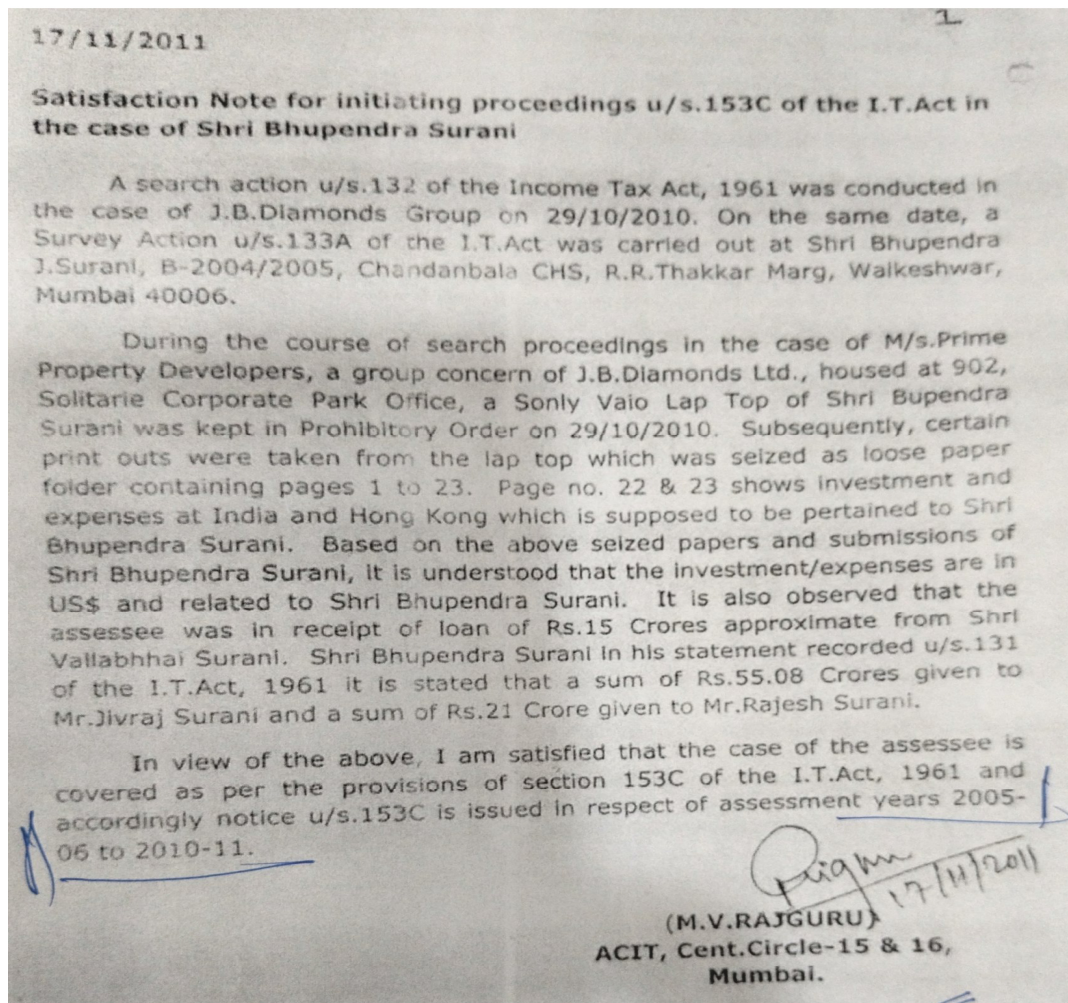
5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. At the very outset, the Ld. A.R. for the assessee challenging the impugned order passed by the Ld. CIT(A) contended that the Ld. CIT(A) has erred in sustaining the order passed by the AO under section 153C read with section 143(3) of the Act which is

bad in law, illegal, null and void and relied upon the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2010-11 in ITA No.2004/M/2017 order dated 23.12.2022.

7. However, on the other hand, the Ld. D.R. for the Revenue relied upon the order passed by the Ld. CIT(A).

8. Undisputedly notice under section 153C was issued to the assessee on the basis of search operation carried out in JB Diamond Group of cases by recording the satisfaction note by the AO brought on record by the assessee available at page 11 of the paper book, which is extracted for ready perusal as under:



9. Bare perusal of the satisfaction note for initiating the proceedings under section 153C of the Act in case of the assessee goes to prove that the same was recorded in respect of assessment years 2005-06 to 2010-11. It is also not in dispute that approval for special audit was given by the Ld. CIT(C)-II as per letter dated 11.03.2013 available at page 12 of the paper book, again for A.Y. 2005-06 to 2011-12. SGCO & Co., Chartered Accountants has also specifically mentioned in letter dated 16.09.2013 available at page 13 of the paper book that they are engaged to carry out the audit of assessee's accounts for A.Y. 2005-06 to 2011-12 under section 142(2A) of the Act.

10. Undisputedly under section 142(2A) of the Act special audit can be referred by the AO during assessment proceedings only when the accounts of the assessee are complex in nature or it is necessary for the interest of the Revenue. It is an admitted fact on record that the AO had no occasion to examine the books of accounts furnished by the assessee, which were actually furnished for A.Y. 2007-08 to 2011-12 on 04.10.2013 whereas order for special audit was passed on 22.03.2013 and pursuant thereto special auditor furnished report on 16.09.2013.

11. When we examine the contentions raised by the Ld. A.R. for the assessee in the light of the aforesaid undisputed facts it goes to prove that the order for special audit has been passed in these cases merely on the basis of surmises by the AO as well as the Ld. CIT even without having a look into the books of accounts furnished by the assessee. Rather on the other hand the assessee has been objecting to the special audit since beginning.

12. Identical issue has already been decided by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2010-11 (supra) which was part of the search carried out on 29.10.2010, operative part of which is extracted as under for ready perusal:

*“10. We have heard the submissions made by rival sides and have examined the orders of authorities below. The prime grievance of the assessee is against appointment of Special Auditor u/s. 142(2A) of the Act. It is an undisputed fact that the assessee had not furnished its books of accounts for the relevant period either before the Assessing Officer or the Special Auditor. A perusal of the assessment order reveals that the assessee has been noncooperative throughout and has been continuously objecting to Special Audit. The AO merely on the basis of bank statements and extracts of capital accounts formed an opinion regarding the nature and complexity of the accounts.*

*11. The sine-qua-non for appointing Special Auditor is the opinion of the Assessing Officer having regard to the nature and complexity of the accounts and the interests of Revenue. Unless the Assessing Officer forms an opinion about the complexity of the accounts and interests of Revenue, the Assessing Officer cannot initiate the proposal for appointing Special Auditor. To form such an opinion the Assessing Officer has to examine the accounts of the assessee. Without having examined the books of account an opinion cannot be formed with reference to “the nature and complexity of accounts”.*

*12. The Hon'ble Supreme Court of India in the case of Sahara India (supra) after examining the provisions of Section 142(2A) of the Act held as under: -*

*“6. 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. Vs. C.I.T., 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."*

*13. In the instant case, facts on records clearly indicate that the Assessing Officer without even examining the accounts of the assessee has formed an opinion regarding nature and complexity of the accounts of the assessee. This opinion has been formed by the Assessing Officer in a very casual manner. Without examining the books of account the Assessing Officer can have no understanding of the nature and complexity of the accounts of the assessee. We are unable to impress upon ourselves to subscribe to the view of Assessing Officer to hold nature of accounts of the assessee as complex, without even having a look at the books of assessee. The Hon'ble Apex Court in Sahara India (supra) has held that there has to be a genuine and honest attempt on the part of Assessing Officer to understand accounts of the assessee. The contention of the Revenue is that the assessee is non-co-operative and did not produce books. Under such circumstances, the Assessing Officer could have resorted to any other relevant provision available under the Act to complete the assessment but reference to Special Audit. The satisfaction of the Assessing Officer in the instant case is at the outset, shallow, flawed and unsustainable. The foundation of the*

*entire case of Revenue in making addition of Rs.553.95 crores u/s. 2(24)(iv) r.w.s. 56(1) of the Act is the observation made in the Special Audit report. Indubitably, the Special Auditor also furnished his report without examining the books of assessee. In our considered view, since the initiating point for invoking provisions of Section 142(2A) of the Act is defective, the subsequent proceedings arising therefrom are unsustainable.*

*14. Having held reference to Special Auditor as bad in law, the question arises; Whether the assessment u/s.143(3) r.w.s 153C of the Act is time barred?*

*The time limit for completing the assessment u/s.153C of the Act is one year from the end of the Financial Year in which seized documents were handed over to the Assessing Officer. In the instant case it is undisputed that seized documents were handed over to the Assessing Officer on 17/11/2011. Therefore, the assessment should have been completed on or before 31/03/2013, whereas, the assessment order was passed on 14/11/2013, hence, clearly beyond the period of limitation as specified u/s. 153B of the Act. The extended time for completing assessment would have been available to the Assessing Officer if reference to Special Auditor was held to be valid. As a sequitur to our findings on reference to Special Auditor, we hold the assessment order time barred, ergo, liable to be quashed. We hold and direct accordingly.”*

13. Following the order passed by the co-ordinate Bench of the Tribunal and in view of the admitted fact that order for special audit in this case was passed on 22.03.2013 and audit report was furnished on 16.09.2013, the AO had no occasion whatsoever to peruse the books of accounts furnished by the assessee for A.Y. 2007-08 to 2011-12 on 04.10.2013. The action of the AO referring the matter for special audit was purely a subjective decision based upon surmises which is patently against the spirit of section 142(2A) of the Act. The Hon’ble Supreme Court in case of Sahara India (supra) while deciding the identical issue held that “opinion required to be formed by the AO for exercising of power under section 142(2A) must be based on objective criteria and not on the basis of subjective decision”. But in the instant case re-course to the special audit by the AO is without any basis and

even without perusing the books of accounts of the assessee, which were actually not there before the AO at that time. In that eventualities the AO was having the only option to frame the assessment on the basis of best judgment assessment under section 144 of the Act.

14. So when the very initiation of proceedings for calling special audit report by the AO and approved by the Ld. CIT is bad in law, merely based upon surmises, the subsequent proceedings are also not sustainable in the eyes of law. As such the assessment order passed by the AO in all the aforesaid appeals is liable to be quashed on legal grounds the same are hereby quashed without going into the addition made by the AO on merits.

15. Consequently, the appeals filed by the assessee are allowed.

**Order pronounced in the open court on 27.04.2023.**

**Sd/-**  
**(GAGAN GOYAL)**  
**ACCOUNTANT MEMBER**  
Mumbai, Dated: 27.04.2023.

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.