

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 127/JP/2023
निर्धारण वर्ष/Assessment Year : 2020-21.

V.C. Granites, Naya Ghar, Gulab Bari, Ajmer.	बनाम Vs.	The DCIT Central Circle, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAIFV 3552 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 171/JP/2023
निर्धारण वर्ष/Assessment Year : 2020-21.

The DCIT Central Circle, Ajmer.	बनाम Vs.	V.C. Granites, Naya Ghar, Gulab Bari, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAIFV 3552 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri C.M. Agarwal (CA)

राजस्व की ओर से / Revenue by : Shri James Kurian (CIT)

सुनवाई की तारीख / Date of Hearing : 11/04/2023

उदघोषणा की तारीख / Date of Pronouncement: 5/07/2023

आदेश / ORDER

PER BENCH :

These are two cross appeals filed by the assessee and revenue directed against the order dated 25.01.2023 of Id. CIT (A), Udaipur-2 passed under section 250 of the IT Act, 1961 for the assessment year 2020-21. The assessee has raised the following grounds :-

ITA NO. 127/JP/2023 (Assessee) :

“ 1. That the orders passed by the Ld CIT(A) and the Assessing Officer in so far as they are against the appellant are opposed to law, equity, weight of evidences, probabilities , facts and circumstances of the case.

2. That the Ld CIT(A) has erred in law as well as on the facts and circumstances of the case in not quashing the absolutely illegal, arbitrary and void ab initio Assessment order of the Ld Assessing Officer.

3. That the Ld CIT(A) has erred in law as well as on facts and circumstances of the case in declaring the assessment order to be in order which has been passed pursuant to the absolutely illegal notice u/s 153C of the Income Tax Act.

3.1 That the Ld CIT(A) erred in law as well as on facts and circumstances of the case in incorrectly interpreting the statutory provisions relating to issuance of Notices u/s 153C of the Income Tax Act as the statutory provisions, subject to the satisfaction of conditions precedent mentioned therein, mandates only issuing notices calling for the returns of income for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted.

3.2 That the Ld CIT(A) erred in law as well as on facts and circumstances of the case and in contravention of the unambiguous provisions of Section 153C , in not quashing the Notice u/s 153C issued for the assessment year relevant to the assessment year in which search was conducted, as well as the assessment order passed pursuant thereto.

3.3 That without prejudice to the above grounds of appeal, alternatively, the Ld CIT(A) erred in law as well as on facts and circumstances of the case in not quashing the assessment order passed u/s 143(3) read with Section 153C of the Income Tax Act when no notice u/s 143(2) of the Income Tax Act was issued prior to the completion of assessment u/s 143(3) of the Income Tax Act.

3.4 That without prejudice and in the alternative, the Ld CIT(A) erred in law as well as on facts and circumstances of the case in not quashing the assessment order as no return of income even under

protest was filed in response to the Notice u/s 153C of the Income Tax Act and therefore, valid assessment order can only be passed u/s 144 of the Income Tax Act.

4. That the Ld CIT (A) erred in law as well as on facts and circumstances of the case in holding the approval u/s 153D of the Income Tax Act to be valid when evidently the approval was granted in absolutely mechanical manner and without any application of mind and in contravention of the statutory provisions thereby rendering the assessment order as non est and bad in law.

The appellant craves leave of the Hon'ble Tribunal to amend or raise any other ground, cross objection, including any additional ground of appeal not set out in the appeal memo.

ITA NO. 171/JP/2023 (Revenue) :

The revenue has raised the grounds as under :-

1. The learned CIT Appeal has erred in law and on facts in granting relief to the assessee.
2. The learned CIT Appeal has erred in law and on facts in deleting the addition of Rs. 1,76,40,480/- made under section 69A of the IT Act 1961 on account of established undisclosed sales, and thereafter retaining the profit element only at Rs. 75,04,260/-.
3. The learned CIT Appeal has erred in law and on facts in the circumstances of the case, by not considering the action of the AO for invoking provisions of section 69A whereby the assessing officer had applied tax rates under section 115BBE of the Income Tax Act, and in that process not appreciating the fact that the taxpayer had made undisclosed sales during the year under consideration without explaining any expenses/purchases etc.
4. The learned CIT Appeal has erred in law and on facts in holding that provisions of section 115BBE are not applicable and thereby holding that penalty initiated by the AO under section 271AAC cannot be levied while failing to initiate penalty under section 270A even with regard to addition sustained to the extent of admitted profit element.
5. The learned CIT Appeal has erred in granting relief to the tax payer holding that there are no purchases in case of mining

business, and in this process failing to consider that there are other expenses besides purchases, in any business.

6. The learned CIT Appeal has erred on facts and has given an incorrect finding that the taxpayer has offered the profit element in unaccounted sales, even though the assessee had not offered even the profit element inspite of admission of the same.
7. The appellant craves leave to add, amend or withdraw any of the grounds of appeal during the course of appeal proceedings.

All the grounds taken by the assessee and revenue in the respective appeal are inter-related and inter-connected, the main grievance of the assessee is that the assessment order passed by the AO on the basis of illegal notice under section 153C deserves to be quashed, whereas the main grievance of the revenue is deletion of addition made on account of undisclosed sales under section 69A read with section 115BBE of the IT Act, 1961 and retaining the profit element only at Rs. 75,04,260/-.

2. The brief facts of the case are that the assessee is engaged in manufacturing of all kinds of granite products. A search and seizure action under section 132 of the Income-tax Act, 1961 was carried out on 13.02.2020 at the residential and business premises of the assessee group and family members i.e. "Saini-Gupta-Jain-Malpani-Somani Group" of Ajmer. Various assets had been found at the time of search and some of them were also seized at various places of the group at the time of action under section 132 of the IT ACT. Certain incriminating documents/loose papers/books of accounts etc. were also found, inventorized and some of them also seized or impounded at the time of search/survey under section 132/133A of the IT Act, 1961. The appellant firm filed its original return of income for the assessment year 2020-21 on 31.03.2021 declaring the total income of Rs. 5,31,560/-. Pursuant

to search action, proceedings under section 153C of the IT Act were initiated against the assessee. A notice under section 153C of the IT Act, 1961 was issued on 14.10.2021. In compliance, no return of income has been filed by the appellant. The assessee objected to issue of notice under section 153C of the Act, stating that no notice under section 153C of the Act can be issued for the year in which search was conducted i.e. Assessment Year 2020-21. The objection of the assessee was disposed off vide letter dated 01.02.2022 and a Notice under section 142(1) was also issued on this date seeking details/information/explanation. In response to the said notice, appellant furnished reply dated 24.02.2022 objecting that in terms of section 153B of the IT Act, the assessment is time barred. In response to another notice under section 142(1) of the IT Act, 1961 dated 25.03.2022, the assessee further furnished various details/explanation. The AO considered the explanation of the assessee but could not find it tenable. The AO, in view of the documents seized during search and details filed by the assessee and admission made during assessment proceedings, assessed the total income of the assessee at Rs. 1,81,72,040/- by making an addition of Rs. 1,76,40,480/- on account of undisclosed sales. Aggrieved by the order of the AO, the assessee preferred appeal before the Id. CIT (A), who considering the detailed submissions of the assessee partly allowed the appeal of the assessee.

3. Now the assessee as well as the revenue filed cross appeals before us.
4. Before us, the Id. A/R of the assessee reiterated the submissions made before Id. CIT (A). Further, the Id. A/R submitted his written submissions as under :-

“Legal Submission on the issue of Notice u/s 153C issued for the year of Search and completion of assessment without issuing Notice u/s 143(2) of the Income Tax Act:

Apart from placing reliance upon the plain and unambiguous language of the provisions of Section 143(2), Section 153A, Section 153C and Section 153B of the Income tax, the humble appellant submits that it is the settled position of law that for completing assessments u/s 153A or Section 153C of the Income Tax Act, there is no requirement of issuing any Notice u/s 143(2) of the Income Tax Act. Several High Courts have reiterated this legal position in numerous decisions. Decision of the Hon’ble High Court of Delhi in Ashok Chaddha’s case (337ITR 399), Punjab & Haryana High Court in the case of Tarsem Singla (385 ITR 138) and Kerala High Court in the case of Promy Kuiakose (386 ITR 597) & decision of the Hon’ble Jurisdictional High Court in J R Tantia Charitable Trust (15 taxmann.com 311) being some of the prominent decisions on the issue.

However, for completing the assessment of the total income of the previous year in which search was conducted, issuance of Notice u/s 143(2) of the Income Tax Act has been held to be mandatory failing which assessment order has been quashed. In this regard, it is submitted that the issue has been settled by the Agra Bench of the Hon’ble Tribunal in the case of Laxman Das Khandelwal which decision has been upheld by the Hon’ble High Court of Madhya Pradesh and subsequently by the Hon’ble Supreme Court in the judgement dated August 13, 2019 in Civil Appeal No 6261-6262 of 2019 titled “ Commissioner of Income Tax Vs Laxman Das Khandelwal”. Therefore it is evident from the decision of the Hon’ble Supreme Court that the procedure for completing the assessment of search year is different from the procedure of completion of assessments u/s 153A/153C of the Act. Thus, there is no requirement of issuing Notice u/s 153C of the Income Tax Act and assessment of the search year cannot be completed without issuing Notice u/s 143(2) of the Income Tax Act.

In this regard it is submitted that the Agra Bench of the Hon’ble Tribunal while allowing the cross objections of the assessee held as under:

*"17. In conclusion, we find that there was no notice issued u/s 143 (2) prior to the completion of assessment under section 143 (3) of the Act by the AO; **that the year under consideration was beyond the scope of the provisions of Section 153 A of the Act, it being the search year and not covered in the six year to the year of search as as per the assessment scheme/procedure defined u/s 153A;** that*

the AO has passed regular assessment u/s 143 (3) of the Act; although the Id CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143 (2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non-issuance thereof is not a curable defect. Even in case of block assessment u/s 158 BC, it has been so held by the Apex court in the case of 'ACIT Vs. Hotel Blue Moon', (2010) 321 ITR 362 (SC) (Supra).

18. Considering the facts, as discussed above, we note that the assessment order is passes without issue of notice u/s 143 (3) of the Act and this defect cannot be cured by taking recourse to the provisions of section 292 BB of the Act.

19. In view of the above, we hold that the AO had no valid jurisdiction to pass the assessment order and the very foundation of the assessment proceedings is bad in law. Hence, these proceedings culminating in the assessment order, as well as the impugned order stand quashed. Nothing else remains to be adjudicated. In consequence, the revenue's appeal in ITA No.57/AGR/2014 is dismissed."

On an appeal filed by the revenue, the Hon'ble High Court of Madhya Pradesh dismisses the appeal observing that no substantial question of law arises. On further appeal by the Revenue, the Hon'ble Supreme Court dismissed the appeal observing as under :

“ Para 3-The relevant facts leading to the filing of aforementioned Income Tax Appeal No.97 of 2018 before the High Court, as culled out from the judgment and order dated 27.04.2018 presently under appeal are as under:-

“The assessee is an individual carrying a business of brokerage. Search and seizure operation was conducted under Section 132 of the Act of 1961 on 11.03.2010 at his residential premises. The assessee submitted return of income on 24.08.2011, declaring total income of Rs.9,35,130/-. The assessment was completed under Section 143(3) read with Section 153(D) of 1961 Act. Rupees 9,09,110/- was added on account of unexplained cash under Section 69 of 1961Act. Rs.15,09,672/- was added on account of unexplained jewellery. Rupees 45,00,000/- was added on account of unexplained hundies and Rs.29,53,631/was added on account of unexplained cash receipts.

Aggrieved, the assessee filed an appeal before the Commissioner Income Tax (Appeal). The Commissioner of Income Tax (Appeal) deleted an amount of Rs.7,48,463/- holding that jewellery found in locker weighing 686.4 gms stood explained in view of circular No.1916 and further deleted the addition of Rs.29,23,98,117/- out of Rs.29,53,52,631/- holding that the correct approach would be to apply the peak formula to determine in such transaction which comes to Rs.29,54,514/- as on 05.03.2010.

Aggrieved, Revenue filed an appeal. The Assessee filed cross objection on the ground of jurisdiction of Assessment Officer regarding non issue of notice under

*Section 143(2) of the Act of 1961. **The Tribunal vide impugned order upheld the cross objection and quashed the entire reassessment proceedings on the finding that the same stood vitiated as the assessment Officer lacked jurisdiction in absence of notice under Section 143(2) of the act of 1961.***

.....

Para 8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Blue Moon's case. The issue that however needs to be considered is the impact of Section 292BB of the Act.

Para 9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

Para 10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.

Thus, from a conjoint reading of the decision of the Hon'ble Tribunal, decision of the Hon'ble High Court and the Hon'ble Supreme Court, the following facts emerge:

- 1. Assessment of Search year is not covered u/s 153A. Since, assessment u/s 153C is also to be made in accordance with the procedure laid down u/s 153A, assessment of total income relevant to the year of search cannot be made u/s 153C*
- 2. For making an assessment of the total income of the search year, issuance of Notice u/s 143(2) of the Income Tax Act is a must and in the absence of Notice u/s 143(2) the assessment is without jurisdiction and null and void. Further, the defect of jurisdiction is not curable under any provisions of the Income Tax Act.*

In view of the above, it is humbly submitted that the assessment made by the AO u/s 143(3) of the Income Tax Act, pursuant to the Notice u/s 153C of the Income Tax Act is void ab initio as Notice issued u/s 153C for the year of search is illegal, as well as the assessment completed pursuant thereto without issuing the mandatory Notice u/s 143(2) of the Income Tax Act is absolutely without jurisdiction and should be quashed. It is prayed accordingly.

It is further submitted that the similar decision has been rendered by the Hon'ble High Court of Allahabad in Judgement dated 28th July 2017 in Income Tax Appeal No 168 and 169 of 2009 in the case of Commissioner Of Income Tax .vs Sri Moins Iqbal Cantt Road Lucknow wherein identical issue arose in respect of both in case of person covered u/s153A as well as in case of person covered u/s 153C of the Income Tax Act. The relevant observations of the Hon'ble High Court are extracted below:

“ In both these appeals three substantial questions of law have been formulated by this Court while admitting same and since they are common hence substantial questions of law formulated in ITA No. 168 of 2009 are hereby quoted as under:

"I. Whether on the facts and circumstances of the case, Income Tax Appellate Tribunal was justified in dismissing appeal of Revenue by ignoring the fact that merely quoting a wrong section will not render assessment order ab initio void and that such mention of a wrong section is a defect curable u/s 292B of I.T. Act, 1961.

II. Whether on the facts and circumstances of the case, Income Tax Appellate Tribunal was justified in dismissing appeal of Revenue by holding that assessment order was passed u/s 153A of Act, ignoring the fact that assessment was completed u/s 143(3)/153A after issuing notice u/s 142(1) of I.T. Act, 1961 in compliance of which assessee furnished return of income for A.Y. 2006-07 without objecting to jurisdiction of Assessing Officer.

III. Whether on the facts and circumstances of the case, Income Tax Appellate Tribunal was justified in dismissing appeal of Revenue by ignoring relevant provision of Section 153B(1)(b) where time limit for completion of search assessment for current year i.e. the assessment year relevant for the previous year in which search is conducted, is laid down which clearly shows that the authority to assess or re-assess the total income of current assessment year, is also derived from provisions of Section 153A of the I.T. Act, 1961.

Para 3. The facts in brief giving rise to ITA No. 168 of 2009 are as under.

Para 4. Search and seizure operation under Section 132 of Act, 1961 was conducted on 10.11.2005 at the premises of Sri Siraj Iqbal and Suhail Ahmad, to search residential premises at House No. 118/86 Kha, Cantt. Road, Lucknow in which Assessee, Monis Iqbal is also residing. Simultaneously, survey under Section 133A was also carried on 10.11.2005 in the premises of M/s F.I. Builders, M/s Azad Educational Society and M/s F.I. Hospital.

*Para 5. Assessee, Monis Iqbal being Director of M/s F.I. Builders (P) Ltd. was enjoying salary income from Company. He was also engaged in trading of readymade garments under Section 44AF of Act, 1961. **Notice under Section 153C of Act, 1961***

was served on Assessee on 05.01.2007. Return of income for Assessment Year 2006-07 was filed by Assessee showing income of Rs. 62,250/-. Questionnaire in the form of notice under Section 142(1) of Act, 1961 was issued to Assessee on 06.11.2007 and served on 22.11.2007. For compliance, date was fixed on 04.12.2007. Thereafter on 28 July, 2017 show cause notice was served on Assessee on 13.12.2007. Assessment was completed on 28.12.2007 computing total income at Rs. 8,93,210/-. In assessment order, in the column for "Section under which order is passed" Assessing Officer wrote Sections 143(3)/153A.

Para 6. Aggrieved by assessment order, Assessee preferred appeal before CIT(A). Appeal was allowed vide order dated 04.02.2009 on the ground that assessment order was wrongly passed under Section 153A though it should have been under Section 143(3). There against Revenue preferred appeal before Tribunal but same has been dismissed vide impugned judgment dated 29.05.2009.

Para 15. As we have already noticed, this fact is not disputed that no notice under Section 143(2) was ever issued. Tribunal has found that notice under Section 143(2) does not give any jurisdiction to AO to make assessment under Section 143(3) but it is gathered by AO just after furnishing the return of income by Assessee under Section 139 or on issuance and service of notice under Section 142(1) requiring Assessee to furnish return of income or on notice issued under Section 148 of Act, 1961. However, notice under Section 143(2) is a provision obligatory to comply before making assessment under Section 143(3) or Section 144, as the case may be.

Para 19. Learned counsel for Revenue did not dispute seriously that mention of Section 153A was an error and that will not vitiate the assessment order but since assessment was claimed to have been completed under Section 143(3) and if that be so, notice under Section 143(2) was mandatory and non-compliance thereof vitiates assessment, therefore, we answer Question-I in favour of Assessee and against Revenue holding that Tribunal was justified in dismissing appeal of Revenue not for quoting wrong provision but, in substance, for non-compliance of a mandatory provision which was not treated to be a mere procedural irregularity in various authorities as discussed above

Requirement of Issuing Notice u/s 153A/153C was for 6 Years only is also evident from the reply given by the Hon'ble Finance Minister in Lok Sabha:

It is also submitted that very recently on 06th Feb 2023, the Hon'ble Finance Minister in respect of Stared Question No 56 regarding alleged harassment by Income Tax Authorities gave the following information in Lok Sabha

“ The scheme for re-assessment of income escaping assessment, as laid down in Section 148 of the Income Tax Act, 1961 (‘Act’) was reformed by the Finance Act, 2021 & Finance Act, 2022. The new scheme was introduced with an intent to reduce litigation and provide ease of doing business to taxpayers by reducing the time limit and specifying a higher threshold by which a notice for assessment or reassessment or re-computation can be issued. Simultaneously, assessments/ reassessments/ re-computation in search & seizure cases initiated after 31st March 2021 have been brought under the ambit of Section 148 in place of the erstwhile sections 153A/153C of the Act.

2. The salient features of the new scheme under Section 148 for search & seizure cases, inter-alia, include:

In search cases, the time limit to issue notice for re-assessment was reduced to 3 years from the end of the relevant assessment year as against erstwhile 6 years period.”

Ld CIT(A) without considering the settled legal position held that as per the provisions assessment u/s 153C can be made for six assessment years immediately preceding the A.Y. relevant to the previous year in which search was conducted or requisition is made and for the relevant A.Y. or year referred to in sub section (1) of Section 153A and therefore the assessment made by the assessing office is found to be in order and no adverse inference is drawn.

The Ld CIT(A) completely ignored the statutory provisions which prescribes issuance of Notice u/s 153A or 153C for the Six assessment years only and for the assessment of assessment year relevant to the year in which search is conducted , issuance of Notice u/s 153A/153C is not prescribed. In case no return has been filed for the relevant year, assessing Officer can resort to Notice u/s 142(1) of the Income Tax Act only and not to the Notice u/s 153A or 153C. Further, as per the decision of the Hon’ble Supreme Court in Laxman Das Khandelwal, and also the decision of the Hon’ble High Court of Allahabad in Moin Iqbal assessment for the year of search is to be completed u/s 143(3) and after issuing Notice u/s 143(2) of the Income Tax Act.

Submissions on Limitation- In this case search was conducted on 13.02.2020. The Assessing Officer having jurisdiction over the case of the searched person as well over the

case of the assessee is the same. The relevant provisions of Section 153B are extracted as below:

“153B. Time limit for completion of assessment under section 153A.—(1) Notwithstanding anything contained in section 153, the Assessing Officer shall make an order of assessment or reassessment,—

- (a) in respect of each assessment year falling within six assessment years referred to in clause (b) of sub-section (1) of section 153A, within a period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed;*
- (b) 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, within a period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed:*

Provided that in case of other person referred to in section 153C, the period of limitation for making the assessment or reassessment shall be the period as referred to in clause (a) or clause (b) of this sub-section or nine months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person, whichever is later”

In the case of the assessee no seized documents were to be handed over to another Assessing officer. Therefore, time limit to pass assessment order u/s 153A in the case of the searched person as well as u/s 153C in the case of the assessee remains same. Since search was conducted on 13.02.2020, in accordance with the provisions of Section 153B time limit to complete the assessment was 30.09.2021 only, whereas the assessment has been made on 29.03.2022, much after the date of limitation to pass assessment order. Moreover, even the notice u/s 153C was issued 14.10.2021 after the expiry of period of limitation prescribed for passing the assessment order.

Ld CIT(A) observed that the assessment order passed by the Assessing officer on 29.03.2022 is well within the time limit prescribed u/s 153B of the Income Tax Act. The Ld CIT(A) concurred with the observations of the Assessing Officer that seized documents were received from the Investigation wing in the Financial year 2020-21 and therefore, assessment has been completed within the prescribed time. However, the Ld CIT(A) completely ignored the fact that the Assessing Officer in respect of searched person as well as the assessee is same and therefore, there is no question of any handing over of the seized material and thus the limitation period shall be the same for searched person as well as the person in whose

case proceeding u/s 153C have been initiated. Therefore, limitation to pass the assessment order was 30.09.2021 only. Therefore, the Notice u/s 153C as well as the assessment order are barred by limitation.

In view of the above submission the humble appellant submits that;

- i. The Assessment order u/s 143(3) of the Income Tax Act dated 29.03.2022 passed by the Assessing Officer is beyond the period of limitation which has already expired on 30.09.2021
- ii. The Notice u/s 153C issued for the impugned year was without jurisdiction as there is no requirement of issuing Notice u/s 153C for the search year, moreover when assessee had already filed its return of income.
- iii. Completion of assessment u/s 143(3) read with section 153C of the Act is also void ab initio as no Notice u/s 143(2) was issued by the Assessing Officer.
- iv. When no return of income was filed by the assessee in pursuance to the Notice u/s 153C of the Act, the assessment order, if at all permissible under law, can only be passed u/s 144 of the Income Tax Act and not u/s 143(3) of the Act.

Submission on mechanical approval by the Additional Commissioner of Income Tax U/s 153D of the Income Tax Act.

The humble appellant submit that the approval given by the Addl. CIT u/s 153D of the Act is without application of mind, purely in a mechanical manner, without appreciating the facts and not following the provisions/mandate of the section, makes the assessment order dated 29.03.2021 non est, void ab initio, and bad in law, and therefore the same deserves to be quashed.

It is astonishing that the Id. DCIT, Central Circle, Ajmer prepared the draft assessment order on the same day, sent it for approval of the Addl. CIT, Central Range, Udaipur, u/s 153D of the Act which is a mandatory requirement. Approval of the Addl. CIT, Central Range, Udaipur was also received on the same day and the final assessment order was also passed on the same day. This shows that the A.O. raised this issues in a reckless manner and made the assessment completely ignoring the principle of natural justice, making huge addition on the basis of his presumption only for the sake of making addition, which is complete misuse of power causing under hardship and harassment to the assessee. The Id. Addl. CIT, Central Range, Udaipur who is a supervisory authority and has been entrusted with a mandatory duty u/s 153D to supervise the assessment proceedings and accord approval after examining the

assessment records, replies of the assessee and also the seized material etc. did not fulfil the mandate of section 153D and accorded approval in a most ritualistic and mechanical manner within no time of receipt of the draft assessment order.

It is also important to mention that Udaipur where the Addl. CIT according approval u/s 153D is stationed, is more than 300 k.m. away from Ajmer, where the Id. AO is stationed. If the approval accorded by the Addl. CIT, Central Range, Udaipur in other cases of DCIT, Central, Ajmer and other AOs i. e. DCIT, Central, Kota and DCIT, Central, Udaipur who are under the administrative control of Addl. CIT, Central Range, Udaipur is considered the figure of cases approved on a single day will be much more.

It is respectfully submitted that Addl CIT i.e. is the approving authority who, before granting approval, is required to see all search material including incriminating material, seized documents, appraisal report, enquiries made by the investigation wing and various enquiries made by the Assessing Officer during the assessment proceedings and the replies submitted by the assessee and after due application of mind and after ascertaining that the Assessing Officer has appreciated the search material and other evidences in proper perspective has to give approval to the draft assessment order and only after that Assessing Officer can pass the assessment order. It is also submitted that whenever a superior authority grants 'approval' to an 'order' of subordinate authority then the superior authority must apply his mind to all material on record, basis of order made by subordinate authority and superior authority must ensure that the subordinate authority has followed due process of law and has not taken arbitrary decisions. The obligation of the approval of the approving authority is of two fold i.e. on one hand, he has to apply his mind to ensure the interest of the Revenue against any omission or negligence by the Assessing Officer in taxing right income in the hands of right person and in right assessment year and on the other hand, superior authority is also responsible and duty bound to do justice with the tax payer by granting protection against arbitrary or creating baseless tax liability on the assessee.

The CBDT Circular No. 3 of 2008, dated 12.3.2008, 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.

The Hon'ble Supreme Court in the case of ' Sahara India vs. CIT & Others' [2008] 216 CTR 303 (S.C.) : [2008] 7 DTR (SC) 27: [2008] 300 ITR 403 (SC) while discussing the requirement of prior approval of Chief Commissioner or Commissioner in terms of provision of section 142(2A) of the Act, opined that the requirement of previous approval of the Chief Commissioner or Commissioner in terms of said provision being an inbuilt protection against arbitrary or unjust exercise of power by the assessing officer, casts a very heavy duty on the said high-ranking authority to see it that the approval envisaged in the section is not turned into an empty ritual. The Hon'ble Apex Court held that the approval must be granted only on the basis of material available on record and the approval must reflect the application of mind to the facts of the case.

The case of the appellant assessee is squarely covered by the decision of Hon'ble jurisdictional TAT, Jodhpur Bench in the case of Indra Bansal & Ors. vs. ACIT reported in (2018) 192 TTJ(Jd.) 968 in which the Tribunal held as under:

"The main contention of learned Authorised Representative is that reasonable time was not available with the Joint Commissioner for the grant of necessary approval as envisaged under section 153D of the Act. We have perused the forwarding letter dt.30-3-2013 seeking approval of the draft assessment order. The date of receipt of this letter in the office of Joint Commissioner is indisputably on 31-3-2013 which is apparent from the date stamped on it by the office of the Joint Commissioner. Thus, this leaves no doubt that the letter requesting grant of approval and the granting of approval, both, are within one day of each other. This lends credence to the contention of the learned Authorized Representative that the draft assessment order was approved without much deliberation by the Joint Commissioner....."

...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 2 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 Allahabadas 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.//..”(Emphasis supplied).

Reliance is also placed on the following judicial pronouncements:

- (i). Naveen Jain v. DCIT, IT(SS)A No. 639 to 641/Lkw/2019, 03.08.2021, ITAT, Lucknow.
- (ii). Uttarakhand Uthan Samiti v. ITO, ITA No. 48 to 52/DDN/2019, 130/DDN/2013, 30.04.2020, ITAT, Delhi.
- (iii). M/s. Inder International v. ACIY, ITA No. 1573/Chd/2018, 07.06.2021, ITAT, Chandigarh.
- (iv). M/s. Arch Pharmalabs Ltd. v. ACIT, ITA No. 6656/M/2017, 7795/M/2011, 7597/M/2011, 3752/M/2012, dated- 07.04.2021, ITAT, Mumbai.
- (v). M/s. Rajat Minerals P. Ltd. v. DCIT, IT(SS)A No. 41 to 47/Ran/2019, 20.01.2020, ITAT, Ranchi.
- (vi). Smt. Sapna Gupta v. DCIT, IT(SS)A No. 424/Lkw/2019, 07.10.2021, ITAT, Lucknow.
- (vii). Sh. TarachandKhatri v. ACIT, ITA No. 21/JAB/2019, 17.01.2020, ITAT, Jabalpur.
- (viii). M/s. Goyal Energy & Steel P. Ltd. v. ACIT, ITA No. 240 to 243/RPR/2019, 17.09.2021, ITAT, Raipur.
- (ix). Sh. Sanjay Duggal v. ACIT, ITA No. 1813/Del/2019, 19.01.2021, ITAT, Delhi.
- (x). M/s. Dilip Constructions P. Ltd. v. ACIT, IT(SS)A No. 66 to 71/CTK/2018, 29.11.2019, ITAT, Cuttack.

(xi). Sh. Swapan Kumar Paul v. ACIT, ITA No. 136-142/Gau/2018, 31.07.2019, ITAT, Gauhati.

(xiii). Rajesh Ladhani v. DCIT, ITA No. 106 to 108/Agra/2019, 06.11.2019, ITAT, Agra.

(xiv). PCIT v. Smt. Shreelekha Damani, (2019) 307 CTR (BOM.) 2018, Bombay High Court.

Very recently, **Hon'ble High Court of Orissa in the Judgment dated 15.03.2023 in ITA Nos 39 to 45 of 2022 in the case of ACIT, Circle-1(2), Bhubaneswar Versus M/s. Serajuddin & Co. Kolkata** upheld the decision of the Hon'ble Tribunal of quashing the assessment based on mechanical approval of the Addl CIT. Some of the observations of the Hon'ble High Court are extracted below:

“Para 12. It must be noted at this stage that even prior to the introduction of Section 153D in the Act, there was a requirement under Section 158BG of the Act, which was substituted by a Finance Act 14 of 1997 with retrospective effect from 1st January 1997, of the AO having to obtain a previous approval of the JCIT/Additional CIT by submitting a draft assessment order following a search and seizure operation.

Para 13. The CBDT issued the Manual of Office Procedure in February 2003 in exercise of the powers under Section 109 of the Act. Para 9 of Chapter 3 of Volume-II (Technical) of the Manual 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.”

Para 16; That such an approval of a superior officer cannot be a mechanical exercise has been emphasized in several decisions. Illustratively, in the context of Section 142 (2-A) which empowers an AO to direct a special audit. The obtaining of the prior approval was held to be mandatory. The Supreme Court in Rajesh Kumar v. Dy. CIT (2007) 2 SCC 181 observed as under:

“58. An order of approval is also not to be mechanically granted. The same should be done having regard to the materials on record. The explanation given by the assessee, if any, would be a relevant factor. The approving authority was required to go through it. He could have arrived at a different opinion. He in a situation of this nature could have corrected the assessing officer if he was found to have adopted a wrong approach or posed a wrong question unto himself. He could have been asked to complete the process of the assessment within the specified time so as to save the Revenue from suffering any loss. The same purpose might have been achieved upon production of some materials for understanding the books of accounts and/ or the entries made therein. While exercising its power, the assessing officer has to form an opinion. It is final so far he is concerned albeit subject to approval of the Chief Commissioner or the Commissioner, as the case may be. It is only at that stage he is required to consider the matter and not at a subsequent stage, viz., after the approval is given.”

Reliance may also be placed in the decision of Honourable Allahabad High Court in -

The Pr. Commissioner Of Income Tax and Another v/s Siddarth Gupta ITA Nos. 85, 87, 90 of 2022 dated 12.12.2022.

Considering the facts mentioned above it is abundantly clear that the Ld. Addl. CIT, Central Range, Udaipur accorded approval u/s 153D in a most mechanical manner, without any application of mind at all and he utterly failed in his supervisory duty entrusted to him as per mandate of section 153D of the Act. Therefore, the assessment completed on the basis of such approval deserves to be quashed in view of the judicial pronouncements cited above.”

5. On the other hand, the Id. D/R supported the order of the AO stating that the Id. CIT (A) was not justified in allowing relief to the assessee by not considering the action of the AO for invoking provisions of section 69A of the Act.

6. We have heard rival contentions, perused the material on record and gone through the orders of the revenue authorities. The issue involved for our consideration is whether the Id. CIT (A) was justified in sustaining the order passed by the AO without complying with the statutory provisions relating to issuance of Notices under section 153C of the Income Tax Act, 1961 as the statutory provisions, subject to the satisfaction of conditions precedent mentioned therein, mandates only

issuing notices calling for the returns of income for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted. The AO passed the assessment order under section 143(3) read with section 153C of the IT Act without issuing notice under section 143(2) of the IT Act, 1961, which is mandatory requirement for the purpose of making the assessment under section 143(3) of the IT Act. The matter in the case of the assessee is squarely covered by the decision of Coordinate Bench of the Agra Bench of the Tribunal in case of Laxman Das Khandelwal, in favour of the assessee, which decision has been upheld by the Hon'ble Madhya Pradesh High Court and subsequently by the Hon'ble Supreme Court in the judgment dated 13th August, 2019 in Civil Appeal No. 6261-6262 of 2019 titled as Commissioner of Income Tax vs. Laxman Das Khandelwal. While dealing with the matter, the Coordinate Bench of the Tribunal, Agra allowed the cross objections of the assessee by holding as under :-

"17. In conclusion, we find that there was no notice issued u/s 143(2) prior to the completion of assessment under section 143(3) of the Act by the AO; that the year under consideration was beyond the scope of the provisions of Section 153A of the Act, it being the search year and not covered in the six year to the year of search as as per the assessment scheme/procedure defined u/s 153A; that the AO has passed regular assessment u/s 143(3) of the Act; although the Id. CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143(2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non-issuance thereof is not a curable defect. Even in case of block assessment u/s 158BC, it has been so held by the Apex Court in the case of ACIT vs. Hotel Blue Moon (2010)321 ITR 362 (SC)(supra).

18. Considering the facts, as discussed above, we note that the assessment order is passed without issue of notice u/s 143(3) of the Act and this defect cannot be cured by taking recourse to the provisions of section 292BB of the Act.

19. In view of the above, we hold that the AO had no valid jurisdiction to pass the assessment order and the very foundation of the assessment proceedings is bad in law. Hence, these proceedings culminating in the assessment order, as well as the impugned order stands quashed. Nothing else remains to be adjudicated. In consequence, the revenue's appeal in ITA No. 57/AGR/2014 is dismissed."

We also find that the Hon'ble Allahabad High Court in Income Tax Appeal No. 168 and 169 of 2009 dated 28th July, 2017 in the case of CIT vs. Sri Moins Iqbal on exactly identical facts, adjudicated the matter in favour of assessee by observing that *Tribunal was justified in dismissing appeal of Revenue not for quoting wrong provision but, in substance, for non-compliance of a mandatory provision which was not treated to be a mere procedural irregularity in various authorities as discussed above.*

Respectfully following the judgment of the Hon'ble Supreme Court, Hon'ble High Courts and also of the Coordinate Bench of the Tribunal as discussed herein above, we are of the view that the assessee deserves to succeed and accordingly we quash the impugned order of the Id. CIT (A) to the extent of assessment order passed under section 143(3) read with section 153C found to be in order.

7. In the result, appeal of the assessee is allowed.

ITA No. 171/JP/2023 (Revenue)

8. Now we take up the appeal of the revenue in ITA No. 171/JP/2023.

Since we have allowed the claim of the assessee and quashed the impugned order of Id. CIT (A) to the extent of assessment order passed under section 143(3) read with section 153C, the grounds raised by the revenue have become infructuous and needs no adjudication. Thus, the appeal of the revenue is dismissed.

9. In the result, this appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced in the open court on 5/07/2023.

Sd/-

(राठौड़ कमलेश जयंतभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-

(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 5/07/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. V.C. Granites, Ajmer.
2. प्रत्यर्थी / The Respondent- The DCIT, Ajmer.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 127 & 171/JP/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

