

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH “B”, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.271/M/2023  
Assessment Year: 2013-14**

Dy. Commissioner of Income Tax, Central Circle-2(1), Old CGO Building, 804, 8 <sup>th</sup> Floor, M.K. Road, Mumbai – 400 020	Vs.	Shri Bishan Jugraj Jain, 301/302, Vaastu Park, A-Wing, Off-Link Road, Malad (W), Mumbai – 400 064 <b>PAN: AFGPJ7399A</b>
(Appellant)		(Respondent)

**Present for:**

Assessee by : None

Revenue by : Shri Ashok Kumar Ambastha, Sr. D.R.

Date of Hearing : 20 . 07 . 2023

Date of Pronouncement : 26 . 07 . 2023

**O R D E R**

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

The appellant, Dy. Commissioner of Income Tax, Central Circle-2(1), Mumbai (hereinafter referred to as ‘the Revenue’) by filing the present appeal, sought to set aside the impugned order dated 21.11.2022 passed by the Commissioner of Income Tax (Appeals), [hereinafter referred to as CIT(A)] qua the assessment year 2013-14 on the grounds inter-alia that:-

*“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the appeal of the assessee without going into the merits of the additions as it was evident that assessee had taken accommodation entry in the form of penny stock.*

*2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred by allowing the appeal of the assessee on a technical ground without appreciating that said technical ground was never raised by the assessee during the course of assessment proceedings and assessee never challenged notice u/s.148 during assessment proceedings.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: during the year under consideration the assessee filed return of income declaring total income of Rs.25,73,040/-. By initiating the proceedings under section 147 and 148 of the Income Tax Act, 1961 (for short ‘the Act’) the Assessing Officer (AO) opened the assessment and in response to the notice the assessee reiterated the same income as mentioned in the earlier assessment. Declining the contentions raised by the assessee the AO framed the assessment at the total income of Rs.50,96,540/- by making addition of Rs.24,50,000/- on account of unexplained cash credit under section 68 of the Act from the sale of penny scrips and Rs.73,500/- on account of unexplained expenditure under section 69C of the Act on account of commission for arranging accommodation entry and their assessment under section 1433 read with section 147 of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by partly allowing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. This appeal was instituted on 27.02.2023 thereafter numerous notices were issued and served upon the assessee and on 17/5/2023

one Ms. Riddhi Shah Jain appeared and thereafter on 06.06.2023 one Shri Karan Jain appeared and on 05.07.2023 Ms. Riddhi Shah Jain appeared, thereafter none appeared on behalf of the assessee. It appears that the assessee is not interested in prosecuting the present appeal and hence the Bench has proceeded to decide the present appeal on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

5. We have heard the Ld. D.R. for the Revenue, 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 case law relied upon.

6. Bare perusal of the impugned order passed by the Ld. CIT(A) goes to prove that the Ld. CIT(A) has declared the assessment order passed under section 147 of the Act void ab- initio on the ground that there was no "incriminating material" found/seized in the search matter. Moreover assessment concerning search matters can be reopened only under section 153 of the Act. Ld. CIT(A) decided the present appeal by returning following findings:

*"7.1 During the appellate, through additional ground, the appellant has submitted that the assessment order passed u/s 147 of the Act is bad-in-law and without jurisdiction as the assessment relating to search matter can be re-opened only u/s 153A of the Act. On perusal of the impugned assessment order, I find that the AO has invoked proceeding u/s 147 of the Act for AY 2013-14 based on search conducted in the case of the Appellant. Therefore, it is relevant to discuss section 153A of the Act, which deals with assessment proceeding relating to search matter. Section 153A of the Act starts with a non-obstante clause and overrides section 147 of the Act. As per the said section read with Explanation 1, the notice under section 153A can be issued for the six assessment years immediately preceding the relevant previous year and also for the 'relevant assessment years'. 'Relevant assessment years' means beyond six assessment year and not more than ten assessment year. Therefore, I agree with the Ld. AR that as per section 153A of the Act, the AO has power to open re-assessment*

*proceeding for 10 years' subject to conditions specified in the said section. In the instant case, the AO has re-opened proceeding for AY 2013-14 which is seventh year immediately preceding the year of search. Therefore, AY 2013-14 falls within the ambit of Section 153A of the Act. Hence, the assessment proceeding for AY 2013- 14 can be initiated u/s 153A of the Act only and the same cannot be initiated u/s 147 of the Act.*

7.2 *In this regard, reliance of the appellant in the judgment delivered by Hon'ble Jurisdictional Tribunal in the case of M/s. Rayoman Carriers Pvt. Ltd. vs ACIT (ITA No. 3275/Mum/2015 & 3276/Mum/2015) is in order. In the judgment, the Tribunal has held that in consequences to search the proceeding should be initiated of 153C of the Act and not u/s Section 147 of the Act. Thus, assessment order framed u/s.143(3) r.w.s. 147 is without any jurisdiction. The head notes and catch notes of the decision is as under:*

*"15. In terms of above judicial pronouncements, Section 153C provides that persons relating to whom some material is found in search of some other person should be assessed under sec. 153C of the Act. The provisions of section 153C are non-obstantive provisions and specially exclude the operation of sec. 147 of the Act, therefore, the Assessing Officer in the present case has erred in invoking the provisions of sec. 147 of the Act. If action under sec. 147 is permitted on the basis of material found in the course of search, then the provisions of sec. 153 would be redundant. The provisions of sec.153C were applicable which excludes the application of sections 147 and 148 of the Act and hence the notice issued under sec. 148 and proceedings under sec. 147 are void ab initio.*

*16. Applying the proposition of law laid down in the above judicial pronouncements to the facts of the instant case, wherein consequences to search at the premises of director, proceedings u/s.153C has been initiated in the hands of assessee company, the AO was not justified in not complying with the provisions of 153C and proceeding with the provisions of Section 147. Thus, assessment order framed u/s.143(3) r.w.s. 147 is without any jurisdiction. Respectfully following the above Judicial pronouncements, I set aside the order passed by the AO."*

7.3 *Similar view has been taken by Hon'ble Visakhapatnam Tribunal in the case of G. Koteshwara Rao vs. DCIT [2015] 64 taxmann.com 159 (Visakhapatnam Trib.). The extract of the decision is as under:*

*"A careful study of sections 153A to 153C and also the circular issued by the CBDT explaining the procedure of assessment in search cases shows that these are separate provisions independent of other provisions relating to reassessment,*

*because of the non obstante clause begins with the said sections. The language used in these sections, i.e. 'notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153 made it clear that provisions of these sections are not made applicable to the assessments covered by the provisions of section 153A. Prior to the introduction of these three sections, there was a separate chapter XIV-B of the Act, by sections 158BC to 158BE which governs the search assessments which is popularly known as block assessment."*

*7.4 Considering the totality of the facts and circumstances of the issue involved, in my considered view, in the instant case, the AO has acted without jurisdiction by re-opening the case under section 147 of the Act instead of u/s 153A. Hence, the assessment order passed u/s. 147 of the Act for AY 2013-14 deserved to be held as void ab initio. Hence, the additions made ie., (1) On account of accommodation entry from sale of penny scrips amounting to Rs. 24,50,000/- and (ii) On account of Commission expenses of Rs. 73,500/- as unexplained expenditure u/s. 69C of the Act cannot survive as held in the above judicial decisions. The AO is accordingly directed to delete the impugned additions made in the assessment order. Thus, the additional ground of appeal is allowed."*

7. We are of the considered view that the findings returned by the Ld. CIT(A) after duly thrashing the facts in the light of the second preposition of law that if the re-opening is made on the basis of search and seizure operation AO has the jurisdiction to frame the assessment under section 153A of the Act and not to proceed under section 147 of the Act. The present assessment being beyond a period of 6 assessment years as per section 153A the AO was empowered to reopen the assessment proceedings for 10 years subject to the conditions specified in the said section. But in the instant case neither any "incriminating material" is there on record nor the reopening proceedings have been initiated under section 153A of the Act. So in these circumstances Ld. CIT(A) has rightly thrashed the assessment order by allowing the appeal. Finding no illegality or perversity in the impugned order passed by

the Ld. CIT(A), present appeal filed by the Revenue is hereby dismissed.

**Order pronounced in the open court on 26.07.2023.**

**Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

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

Mumbai, Dated: 26.07.2023.

\* 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.