

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAIPUR BENCH: RAIPUR**

श्री रवीश सूद, न्यायिक सदस्य, एवं  
श्री अरुण खोडपिया, लेखा सदस्य के समक्ष  
**BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER AND  
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.70/RPR/2021

**And**

Cross Objection No.20/RPR/2022  
(Arising out of ITA No.70/RPR/2021)

निर्धारण वर्ष /Assessment Year: 2010-11

ACIT (Central)  
Bilaspur

v. M/s. Barbarik Project Ltd.,  
Ward No.13, Nehru Park,  
Surajpur (C.G.)

[PAN: AADCB 4662 P]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by  
प्रत्यर्थी की ओर से /Respondent by

: Shri S. R. Rao, Adv.  
: Shri Satya Prakash Sharma,  
Sr. D.R.

सुनवाई की तारीख/Date of Hearing : 23.08.2023  
घोषणा की तारीख /Date of Pronouncement : 18.09.2023

**आदेश / ORDER**

**PER ARUN KHODPIA, ACCOUNTANT MEMBER:**

This captioned appeal along with Cross Objection filed by the Revenue is directed against the order of the Commissioner of Income-tax (Appeals)-3, Bhopal for Assessment Year 2010-11 dated 12.07.2021, arose out of the order of Learned Assistant Commissioner of Income-tax (Central), Bilaspur under Section

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143(3) read with Section 147 of the Income-tax Act, 1961 dated 29.12.2017.

2. The assessee has raised the following grounds of appeal:

- "1. Whether on the facts and circumstances of the case and on the points of law Ld. CIT(A) was justified deleting the addition Rs.1,51,46,200/- made by the AO based on the documents/evidence seized during the course of search proceedings.*
- 2. The order of Ld. CIT(A) is erroneous both in law and on facts.*
- 3. Any other ground that may be added at the time of hearing of appeal."*

3. The brief facts of the case are that the assessee is a company, engaged in the business of construction and transporting contracts. The assessee has electronically filed its return of income for A.Y. 2010-11 on 14.10.2010 declaring total income of Rs.4,72,73,995/- . Subsequently, the case of assessee was selected for scrutiny and assessment was completed under Section 143(3) of the Income-tax Act, 1961 dated 26.03.2013 assessing the total income of the assessee at Rs.4,96,70,700/-. Subsequently, the case of the assessee was picked up for reopening the assessment under Section 147 of the Act according to the reasons to believe that the assessee has incurred expenditure on salary and wages in cash during the year from undisclosed sources, assessee incurred bogus sub-

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contract expenses and SD/EMD deposits were made in cash through sources in the name of sub-contractors. Therefore, Learned AO believe that income chargeable to tax for A.Y. 2010-11 has escaped assessment and by reason of the failure on the part of the assessee to make a return under Section 139 to disclose fully and truly all material facts necessary for his assessment, for that assessment year. The said reopening assessment proceedings were initiated on account of search and seizure operations conducted by the Investigation Wing on 19.05.2016 in the Barbrik Group, Surajpur, Chhattisgarh. During the search and seizure proceedings, statement of Shri Dhruv Kumar Agrawal one of the Directors of the company M/s. Barbrik Project Limited were recorded under Section 132(4) of the Act, 1961 and while giving the statement, the said Director had admitted the aforesaid payments from undisclosed sources. Therefore, the same becomes reason for reopening assessment under Section 147 of the Act. Under such facts and circumstances with necessary approval from Pr. CIT(Central), Bhopal, Learned AO issued notice under Section 148 of the Act dated 17.03.2017 advising to assessee to file the return in the prescribed form for the aforesaid assessment year. In response to this notice, the assessee requested for extension of time to file the

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return. Later on, a notice under Section 142(1) of the Act dated 19.04.2017 was issued to the assessee but no response was received from the assessee. The case of the assessee was later on transferred from ACIT, Circle – 2, Raipur to ACIT (Central), Bilaspur, Chhattisgarh. Again, a notice under Section 142(1) dated 09.10.2017 was issued fixed the case for hearing on 13.10.2017. In response, the assessee requested to extend the date of hearing. Subsequently, a letter dated 24.10.2017 was issued on the assessee to produce the required documents regarding post search and seizure fixing the case for hearing on or before 01.11.2017. In response to this notice, assessee replied vide letter dated nil that the return filed originally under Section 139 vide Ack. No.171138351141010 dated 14.10.2010 may be treated as return filed in response to the notice under Section 148 of the Act. It is also stated that the amount of Rs.8,98,300/- on account of SD/EMD was erroneously mentioned in F.Y. 2009-10 in place of F.Y. 2010-11 but was not supported with any substantial documentary evidences. Learned AO observed that the assessee was required to submit explanation on other points regarding Salary and Wages and bogus payment to sub-contractors in case. A final show-cause notice before passing an order was issued on the assessee and was

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required to submit reply on or before 16.12.2017. In response, the assessee himself submitted the reply stating that all the necessary documents along with proper details and evidence were already submitted on 21.12.2017 thus it was observed by Learned AO that the assessee has nothing to say in response to the final show-cause notice issued and relied upon on the submission made earlier on 21.12.2017. Therefore, it was concluded that the assessee failed to discharge the onus lies on him. With such observations, Learned AO made all the three disallowances making the total assessed income to the tune of Rs.6,48,16,900/-.

4. Aggrieved with the order of Assessing Officer under Section 143(3) r.w.s 147 of the Act, assessee preferred an appeal before Learned CIT(A), wherein relief was granted by Learned CIT(A) on merits to the assessee. However, legal additional grounds of the appeal raised by assessee i.e. Ground Nos.4 & 5 were dismissed by the Learned CIT(A). Since the additions made by the Assessing Officer were vacated by the Learned CIT(A). Aggrieved by the order of Learned CIT(A), Revenue is now in appeal before us challenging the decision of Learned CIT(A). At the same time, the assessee has also filed Cross Objection challenging the dismissal of additional

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grounds of appeal before Learned CIT(A) wherein it was the allegation of the assessee that the assessment order passed under Section 143(3) r.w.s 147 of the Act was without issuing of statutory notice under Section 142(1) of the Act. Thus, the same was bad in law and not maintainable. Since the assessee has raised a legal ground in its Cross Objection pertaining to non-issuance of statutory notice under Section 143(2) of the Income Tax Act which is the basis and foundation without which no assessment can survive. We are first taking this ground of Cross Objection for adjudication.

5. Learned AR at the outset, submitted that the reassessment order passed under Section 147 r.w.s 143(3) of the Act dated 29.12.2017 was bad in law since the required notice under Section 143(2) of the Act not issued by the Assessing Officer which is prerequisite and mandatory under the provisions of Income Tax Act, however the assessment have been completed without issuing of the impugned notice. In support of its contention, Learned AR of the assessee placed reliance on the case of Hon'ble Apex Court reported in the case of Commissioner of Income tax vs. Laxman Das Khandelwal dated 13.08.2019 reported in 2019 (8) TMI 660 –

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Supreme Court, wherein a question about legality of the assessment was raised by the assessee that;

*"(1) Whether on the facts and in circumstances of the case the issuance of notice under Section 143(3) of the Income Tax Act, 1961 within the prescribed time-limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory?"*

6. While discussing this issue and answering the question raised by the assessee, Hon'ble Apex Court interrupted the provision of Section 292BB of the Act, regarding valid service of notice was discussed and has observed as under:

*"6. The question, however, remains whether Section 292BB which came into effect on and from 01.04.2008 has effected any change. Said Section 292BB is to the following effect:-*

*"292BB. Notice deemed to be valid in certain circumstances. – Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was –*

- (a) Not served upon him; or*
- (b) Not served upon him in time; or*
- (c) Served upon him in an improper manner:*

*Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."*

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7. *A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer."*

7. After discussing Section 292BB of the Act, Hon'ble Apex Court noted the submissions of the Learned Advocate on behalf of the assessee/respondent that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid. On the submission of the Learned Counsel, Hon'ble Apex Court observed that *"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. 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*

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*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. 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."*

8. In order to substantiate that no order under Section 143(2) of the Act was issued. Assessee drew our attention to the assessment order wherein no mention pertaining to issue of notice under Section 143(3) of the Act was found. Assessee reiterated and drew our attention to additional Ground No.2 raised before the Learned CIT(A) and the submissions made by the assessee against the said ground is extracted as under:

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**Additional Ground No.2 :**

*"In the facts and circumstances of the case and in law, the assessment order passed under section 143(3) r.w.s 147 without issuing statutory notice under section 143(2) of the Income Tax Act, 1961 is bad in law and invalid."*

**Response made by assessee:**

*"3.1 In response to notice issued u/s. 148 of the Act, the appellant filed letter requesting to treat the return filed u/s. 139 of the Act as return filed in response to u/s. 148. (Annexure-3). The Ld. Assessing Officer recorded this fact in the assessment order (Page No.2 Para No.2 (11th line from the bottom)] and proceeded to make the assessment. However, he did not issue notice u/s 143(2), which is mandatory.*

*3.2 The appellant obtained copy of order sheet of the assessment proceedings and the same is submitted herewith as ANNEXURE-4 The fact of non-issuing of notice u/s.143(2) is verifiable from the order sheet for there is no entry in this regard. It is also verifiable from the assessment order as the Ld. Assessing Officer did not mention anything regarding issue of notice of 143(2) of the Act endorsing the fact that notice u/s.143(2) was never issued. Therefore, the appellant filed specific application along with copying fee to supply copy of notice issued u/s.143(2). Copy of the application is enclosed herewith as ANNEXURE-5. The Ld. Assessing Officer replied to said request and stated that he is busy with time barring assessments and said document is not readily traceable. Copy of Ld. Assessing Officer's letter dated 25/06/2021 is enclosed herewith as ANNEXURE-6. Needless to submit that assessment records for any assessment year might not be more than in two or three volumes and it is grossly improbable that it is available but not traceable. This oblique reply further substantiates that notice under section 143(2) was not issued and Ld. Assessing Officer is avoiding to admit this fact in writing. Accordingly, the assessment order passed u/s. 143(3) r.w.s. 147 of the Act, without issuing jurisdictional notice u/s.143(2) of the Act, is illegal and invalid. In this connection appellant relies on the latest decision of Hon'ble*

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*Supreme Court in the case of CIT vs. Laxman Das Khandelwal reported in 2019 (8) TMI 660. Copy of the citation is incorporated in the compilation of case laws for ready reference.*

*3.3 Under these circumstances, it is humbly prayed that impugned order may kindly be quashed in the interest of justice.”*

9. With such submissions Learned AR of the assessee argued that under such circumstances when notice u/s 143(2) was not issued to the assessee, the order issued under Section 147 r.w.s 143(3) of the Act is invalid in accordance with principle of law of Hon'ble Apex Court in the case of CIT vs. Laxman Das Khandelwal (supra). Therefore, it was the request that the order under Section 147 of the Act should be quashed on its illegality itself and therefore, no addition made under such order can sustain against the assessee.

10. Against the submissions of the Learned AR of the assessee, Ld Department Representative vehemently supported the order of AO and has assailed that the order of Learned CIT(A) was not justified in deleting the additions of Rs. 1,51,46,200/-, was on error in deciding the issues on merits. However, observations with regard to legal additional grounds of the assessee, the observations of Learned CIT(A) were justified and therefore, on merits the additions

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made by Ld AO should be sustained and on legality order of Learned CIT(A) is sustainable.

11. We have heard the submissions, perused the material available on record and considered the case laws placed before us by the Learned AR. In the present appeal since the Learned AR has raised a legal ground which was dismissed by the Learned CIT(A) pertaining to non-issuance of statutory notice under Section 143(2) of the Income Tax Act, 1961, on this aspect to verify the facts that whether the notice under Section 143(2) was issued or not during the hearing on 26.04.2023. The Learned DR was directed to produce the assessment record so as to verify the status. Again, on 03.07.2023, Learned DR was directed to produce the assessment record, however, despite specific directions, the assessment records have not been produced. Considering importance of the facts once again, the Department is directed to produce the assessment record on next hearing of appeal and the appeal is adjourned to 20.07.2023. On next hearing dated 20.07.2023, wherein the assessee-respondent/cross objector has *inter alia* assailed the validity of jurisdiction assumed by the AO for framing the assessment order under Section 147 r.w.s 143(3) dated 29.12.2017

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for the reason that no notice under Section 143(2) of the Act was issued by him. Therefore, the Learned DR is directed to obtain a report from the AO i.e. ACIT (Central), Bilaspur and case was adjourned. In compliance with the said directions of the Bench, Learned ACIT(Central), Bilaspur has submitted copy of a letter having F. No. ACIT(Central)/BSP/BPL/ITAT/2023-24 dated 22.08.2023, wherein Learned AO in para II, has categorically mentioned that the assessee had not filed its return of income either physically or through online mode and notice under Section 143(2) of the Act was not issued to the assessee. Copy of the letter is extracted as under:

*"To,*

*The Jt Commissioner of Income Tax, ITAT,  
B&C Wing, 5th Floor, Central Secretariat Building,  
Sector-24, Atal Nagar, Naya Raipur (C.G.)*

*Sir.*

*Subject-Clarification in respect of notice u/s 143(2) of the IT Act in the case of M/s Barbarik Project Ltd. PAN AADCB4662P, for the A.Y. 2010-11-Reg.*

*Please refer to your good office letter F. No JCIT-ITAT/RPR/REQ/2023-24 dated 20.07.2023 the above subject.*

2. **Reason of non-issuance of notice u/s 143(2) of the Act in the above mentioned case:-**

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With the reference to the above subject, **Reason of non-issuance of notice u/s 143(2) of the Act in the above mentioned case:-**

- I. A notice u/s 148 of the Income Tax Act, 1961 (hereinafter mentioned as the Act) was issued to the assessee on 17.03.2017 after obtaining approval of the Jt. CIT. In response to the notice, the assessee has not filed its return of income. Then, notice u/s 142(1) of the Act on 19/04/2017 to the assessee for filing of return of income u/s 148 of the Act. In response to the notice, the assessee had requested for short adjournment. Therefore, the assessee was show-cause notice on 28/07/2017 and given further opportunity to file the return on or before 08.08.2017.
- II.** Thereafter, the case was centralized in this Circle vide order dated 26/09/2017 of the Pr. CIT(Central), Bhopal u/s 127 of the Act and the case was transferred in this office on 04.10.2017. Subsequently, notice u/s 142(1) of the Act was issued the assessee on 09.10.2017 and given further opportunity to file return of income on or before 13/10/2017. In response to the notice, the assessee had filed adjournment letter on 11.10.2017 Thereafter, the assessee was issued letter on 24.10.2017 and requested to produce document regarding post search & seizure. In response to the letter, the assessee had furnished letter stating that the rerun originally filed u/s 139(1) on 14/10/2010 may kindly be treated as the return filed in response to the notice u/s 148 of the Act. But, **the assessee had not filed its return of income either physical or through online mode and notice u/s 143(2) of the Act was not issued to the assessee.**
- III. Further, on perusal of the record, it is found that the assessee had not any objection during assessment proceeding regarding issuance of notice u/s 143(2) of the Act and attended the re-assessment proceedings and submitted the written reply with supporting documents. The AO has following the proper procedure before completing the assessment.

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*3. The case record in one volume alongwith letter is being submitted for kind perusal and necessary action."*

12. Again, on 23.08.2023 Learned Sr. D.R. submitted a letter pertaining to submission of report received from Ld AO in the case of assessee/respondent enclosed therewith of letter to JCIT, ITAT dated 22.08.2023 written by ACIT(Central Circle), Bilaspur having clarification in respect of notice under Section 143(2) of the Act in the case of assessee. On perusal of the said letter in para 5, Learned AO again accepted that no notice under Section 143(2) of the Act could have been issued on the assessee during the assessment proceedings. Since, the Learned AO has specifically accepted that while conducting the assessment under Section 143(3) r.w.s 147 of the Act, no notice under Section 143(2) of the Act was issued and served on the assessee. Therefore, in terms of additional grounds raised by assessee, respectfully following the principle of law laid down by Hon'ble Apex Court in the case of CIT vs. Laxman Das Khandelwal (supra), we are confined to hold that the requirement of notice under Section 132 of the Act, which is mandatory and pre-requisite, in absence of which the entire assessment proceedings are liable to be hold as invalid.

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13. Our view is further fortified on the issue of non-issuing of notice u/s 143(2) on which the Hon'ble Supreme Court in the case of CIT Vs Laxman Das Khandelwal (supra), the case of ACIT & Anr. Vs. Hotel Blue Moon (2010) 229 CTR (SC) 219 was referred to, the issue was discussed in detail and has held that :

*"An analysis of this sub-section indicates that, after the return is filed, this clause enables the AO to complete the assessment by following the procedure like issue of notice under s. 143(2)/142 and complete the assessment under s. 143(3). This section does not provide for accepting the return as provided under s. 143(1)(a). The AO has to complete the assessment under s. 143(3) only. In case of default in not filing the return or not complying with the notice under s. 143(2)/142, the AO is authorized to complete the assessment ex parte under s. 144. Clause (b) of s. 158BC by referring to ss. 143(2) and 143(3) would appear to imply that the provisions of s. 143(1) are excluded. But s. 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under s. 143(2). However, if an assessment is to be completed under s. 143(3) r/w s. 158BC, notice under s. 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under s. 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under s. 143(2) cannot be dispensed with."*

14. On the same issue observations of the ITAT Jaipur in ITA 461/JP/2018 for AY 2010-11 dated 21/12/2020 in the case of Smt. Gayatri Sharma Vs ITO 14, are also relevant and supportive to our observations, the same are extracted as under:-

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8. We observe that when the assessee has filed the return u/s 148 on dt. 06.01.2016 the AO has not issued the notice u/s 143(2) and without issue the notice the AO has passed the assessment order, it is very settled legal position that when the assessee filed the return in response to the notice u/s 148 of the Act. It is mandatory on the part of the AO to issue the notice u/s 143(2) when the AO has taken cognizance of such return. He has not treated the return as non-est or invalid. We also found that as no notice u/s 143(2) was sent to the assessee for reassessment u/s 148 before completion assessment or the deadline i.e. 30/09/2016, so the return submitted by the assessee has to be deemed as accepted as such.

9. We also observe that the CBDT circular No.549 dated 31/10/1989 (1990) 823 CTR (SC) (1) makes it abundantly clear that once an assessee does not received a notice u/s 143(2) within the period stipulated then such an assessee "can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return". The position emerges from this CBDT circular was referred to and clarified by Hon'ble Punjab and Haryana High Court in the case *Vipan Khanna Vs. CIT (2002) 175 CTR (P&H) 335*. The Hon'ble High Court referred the circular in this case and observed that in case where the AO chose to verify the return and frame an assessment he has to issue a notice u/s 143(3) of the Act requiring the assessee to produce his books of accounts and other material in support of his return. The Hon'ble High Court has further observed as:

"Thereafter he can make an assessment order under sub-section(3) of the section 143 of the Act. Another important change incorporated in subsection (2) of section 143 of the Act is that the notice under this subsection cannot be served on an assessee after the expiry of 12 months from the end of the month in which the return is furnished. Therefore, in a case where a return is filed and is proceed u/s 143(1)(a)of the Act and not notice under sub-section (2) of Section143) of the Act thereafter is served on the assessee within the stipulated period of

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*12 months, the assessment proceedings u/s 143 come to an end and the matter becomes final. Thus, although technically no assessment is framed in such a case yet the proceedings for assessment stand terminated.”*

15. Under such circumstances, since the assessee's legal ground which was dismissed by the Learned CIT(A) is again assailed by the assessee under the Cross Objection, we are of the considered opinion that in absence of notice under Section 143(2) of the Act, the assessment framed under Section 143(2) r.w.s 147 of the Act is liable to be held as invalid and thus no addition on the foundation of such invalid assessment can be sustained. In the result, Ground No.2 of the Cross Objection of the assessee is allowed.

16. Since, we have held the assessment order framed under Section 147 r.w.s 143(3) of the Act is invalid in the present case in terms of our observations supported with the ratio of law laid down by the Hon'ble Apex Court in judgments referred to supra, the additions made are consequently deleted. The grounds of appeal raised by the Revenue in its appeal and other grounds of appeal raised by the assessee in Cross Objection are become academic and thus are not adjudicated upon and left open.

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17. In the combined result, appeal of the revenue is dismissed, and Cross Objection of the assessee is partly allowed.

Order pronounced on the 18<sup>th</sup> day of September 2023, in Raipur.

Sd/-  
(रवीश सूद)  
**(RAVISH SOOD)**  
न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-  
(अरुण खोडपिया)  
**(ARUN KHODPIA)**  
लेखा सदस्य/**ACCOUNTANT MEMBER**

रायपुर/Raipur,

दिनांक/Dated: 18<sup>th</sup> September, 2023.

**Priti Yadav, Sr.PS (on Tour)**

आदेश की प्रतिलिपि अग्रेषित / **Copy to:**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त (अपील) / The CIT(A)-1, Raipur (C.G)
4. The Pr.CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर /  
The DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फाईल/Guard File

आदेशानुसार / By Order

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur