IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)

ITA No. 1496/MUM/2023
Assessment Year: 2017-18

DCIT Central Circle- 2(4) Room No. 802, 8th Floor, Prathishtha Bhavan, M.K. Road Churchgate, Mumbai- 400020	**Vs.**	M/s Ronak Gems Pvt Ltd 311, Mehta Bhavan, Shop No. 5, Opp. Charni Road, Mumbai- 400 004
		PAN No. AABCR 7550 G
Appellant		**Respondent**

Assessee by	:	Mr. Nishit Gandhi, Ms. Madhuri Tambe & Aishwarya Wanikar
Revenue by	:	Smt. Sanyogita Nagpal, CIT-DR
Date of Hearing	:	09/11/2023
Date of pronouncement	:	15/11/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 09.02.2023 passed by the Ld. Commissioner of Income Tax (Appeals)-48, Mumbai (in short Ld. CIT(A)) for assessment year 2017-18, raising following ground:-

> *1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing*

Corporation, ignoring the fact that appeal is pending before the Hon'ble Supreme Court of India on this issue of 'power conferred by section 153A of the Act' which has not been adjudicated upon.

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in narrowing the scope of assessment u/s 153A in respect of completed assessments by holding that only undisclosed income and undisclosed assets detected during the search could be brought to tax.

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in holding that the scope of section 153A is limited to assessing only search related income, thereby denying Revenue, the opportunity of taxing other escaped income that comes to the notice of the Assessing Officer.

4. Whether on the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to delete the addition without adjudicating on the merits of the case.

2. The Ld. DR also raised additional grounds, which are reproduced as under

Additional Ground

i. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the impugned addition made in the assessment order without taking into consideration the fact that notice u/s 143(2) dated 13-08-2018 had been issued and served upon the assessee and thus on the date of search i.e. 11.10.2019 the assessment proceedings had accordingly stood abated.

ii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not adjudicating on the merits of the case and simply allowed the assessee's appeal

2.1 The additional grounds raised being only of the legal nature and not requiring any investigation of the fresh facts, therefore after considering submission of the parties, the additional ground raised by the Revenue is admitted for adjudication.

3. Briefly stated facts of the case are that in the case of assessee company, a search action u/s 132 of the Income Tax Act, 1961 (in short 'the Act') was carried out on 11.10.2019. Consequently, a notice u/s 153A of the Act dated 29.09.2021 was issued and assessment was completed u/s 153A r.w.s. 144 of the Act on 29.09.2021 wherein total income was assessed at Rs. 3,22,40,000/- under the regular provisions of the Act. On further appeal, the assessee challenged validity of the assessment passed as well as merit of the addition. The Ld. CIT(A) while adjudicating grounds challenging validity of the assessment on the ground that in absence of any incriminating material found during the course of search, the assessment order was illegal and without jurisdiction, , following the various decisions cited in the impugned order, held that no addition could be made without aid of incriminating evidences. Accordingly, he did not deliberate upon merit of addition.

4. In the grounds and additional ground raised before us, the Revenue has challenged the action of the Ld. CIT(A) in deleting the addition on the ground that no incriminating material was found during course of search at the premises of the assessee. We find the Hon'ble Bombay High Court in the case of **CIT vs Continental Warehousing Corporation 374 ITR 609 (Bom)** has held that in the case of unabated assessments, no addition could have been made without the aid of any incriminating material found during the course of search. The finding of the Hon'ble Bombay High Court has been further upheld by the Hon'ble Supreme Court in the case of **PCIT Vs Abhisar Buildwell P Ltd in Civil appeal no. 6580 of 2021.** For invoking the ratio in the case of Continental Warehousing Corporation (supra), two conditions are required to be fulfilled. ***Firstly***, the assessment should be unabated, which means no proceedings were pending in respect of those assessment years as on the date of the search. ***Secondly***, no incriminating material has been found from the premises of the assessee in the course of

the search qua the addition in dispute. So if the assessment is abated or the assessment proceedings were pending as on the date of the search, the Assessing Officer has the authority of making the addition u/s 153A proceedings , not only on the basis of the incriminating material found but also on the basis of enquires made during the course of the assessment proceedings based on financial statement of the assessee or any other material or information available with him. In the case of the assessee, the Ld. DR has submitted that the Ld. CIT(A) in para 6.4 has wrongly mentioned that proceeding for the assessment year 2017-18 had not abated. She drawn our attention to copies of the notices u/s 143(2) of the Act dated 13.08.2018 and 21.08.2018 issued by the Assessing Officer in relation to the return of income filed u/s 139 of the Act. Therefore, according to her as on the date of the search i.e. 11.10.2019 the assessment proceedings for the assessment year 2017-18 was pending and therefore the assessment for assessment year 2017-18 got abated on account of the search dated 11.10.2019. In our opinion, the Ld. CIT(A) has deleted the addition only on the basis of finding that no incriminating material was found during course of search , overlooking the fact that assessment was abated and the Assessing Officer was authorized to make the additions otherwise than the incriminating material found during the course of search. Thus, only one condition of the decision of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (supra) of 'incriminating material found in search ' has been fulfilled and another condition of 'non-abated assessment' has not been fulfilled in the case of the assessee. Accordingly, the finding of Ld. CIT(A) on validity of the assessment is set aside. Since the Ld. CIT(A) has not decided the addition on merit and therefore, we feel appropriate to restore the issue of adjudication of the addition on merit back to the file of the Ld. CIT(A) for deciding afresh. The grounds of appeal including

additional ground challenging validity of assessment are accordingly allowed, whereas grounds including additional ground challenging merit are allowed for statistical purposes.

5.1 Before us the Ld. Counsel for the assessee referred to the finding of the Assessing Officer in para 3 of the assessment order that no return of income was filed by the assessee for assessment year 2017-18 i.e. the year under consideration in response to notice u/s 153A of the Act and therefore notice u/s 143(2) was not issued in proceedings u/s 153A of the Act. The Ld. Counsel submitted that the assessee had filed the return of income on 30.09.2021 in response to the notice u/s 153A of the Act issued on 03.11.2020,. Therefore, action of assessing Officer completing the assessment u/s 153A without issue of notice u/s 143(2) of the Act is bad in law and the assessment completed u/s 153A read with section 144 of the Act is liable to be quashed. The ld DR on the other hand submitted in notice u/s 153A dated 3/11/2020 , the assessee was provided period of 15 days for filling of return of income, but the return of income in response was filed on 30/09/2021 is beyond the period provided in notice issued u/s 153A of the Act, therefore, the said return was non-est and thus the AO has correctly held that no valid return of income was filed by the assessee in response to notice u/s 153A issued. But the ld Counsel rejoined and submitted that the period of issue of notice was during Covid pandemic and thus, the period for filing the return of income automatically got extended in view of the decision of Hon'ble Supreme Court allowing extended period during Covid pandemic. The DR contradicted above argument and submitted that no any request was made by the assessee before the AO for regularization of the return of income filed beyond the period prescribed in the Notice u/s 153A of the Act and never intimated to the AO that the assessee filed any return of income just before expiry of statutory limitation period for completing the assessment.

5.2 The Ld Counsel further relied on the decision dated 4th September, 2023 of Hon'ble Bombay High Court in the case of Ashok Commercial Enterprises Vs ACIT in writ petition No. 2595 of 2021 and others and submitted that assessment completed u/s 153A of the Act without issue of notice u/s 143(2) of the Act is void *ab-intio* and bad in law. The ld DR on the other hand submitted that Hon'ble High court in the case has relied on the decision of Hon'ble Supreme Court in the case of Hotel Bluemoon 188 Taxmann 113(SC), where in the assessment was competed under the provision of section 158BC of the Act. The said provision specifically provided for issue of notice u/s 143(2) of the Act but in assessment u/s 153A no such issue of notice is provided for completion of the assessment and completion of assessment following principle of natural justice is sufficient. He also relied on the decision of Hon'ble Delhi High Court in the case of Ashok Chaddha Vs ITO ((2011) 337 ITR399(Delhi) and submitted that in said decision Hon'ble high court has pointed out distinction between the proceeding u/s 158BC & 153A of the Act and held that there is no requirement for issue of notice u/s 143(2) while completing assessment u/s 153A of the Act.

5.3 However we find that before us the appeal was fixed for hearing 07.11.2023 and on that day the assessee sought adjournment on the ground that assessee wished to file cross objection against the appeal of the Revenue. However no such cross objection has been filed by the assessee challenging the assessment proceedings u/s 153A of the order. We find in the case of Peter Vaz v/s CIT (2016) 436 ITR 616(Bombay) before the Hon'ble Bombay High Court question was raised whether ITAT was correct in rejecting the cross objection filed by the assessee solely on the ground of delay, when admittedly, the ITAT concluded that issue raised in the Cross objection are legal in nature. The Hon'ble High Court held that held that there was sufficient cause was made by

the appellant to seek condonation of delay of 248 days in filing cross objection. The Hon'ble High Court referred to the decision of Hon'ble Supreme Court in the case of N Balakrishnan Vs M Krishnamurthy (1998) 7 SCC 123 , where in it is held that Rules of limitation are not meant to destroy the right of parties but they were meant to see parties do not resort to dilatory tactics. The Hon'ble High Court on the raising of issue otherwise than cross-objection held that same could have been raised under rule 27 of ITAT Rules. The Relevant finding of the Hon'ble High Court is reproduced as under:

> *26. To begin with therefore we propose to consider the issue as to whether there was any necessity for the Appellants/assessees to file cross-objections before the ITAT to raise the jurisdictional issue of compliance with jurisdictional parameters before any proceedings could be initiated under Section 153C of the IT Act.*
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> *27. In this case, admittedly, the CIT (Appeals) had decided the matters in favor of the assessees and even set aside the orders made by the Assessing Officers. Therefore, the assessees did not have to institute any further appeals to the ITAT. The Revenue in this case had appealed to the ITAT against the orders made by the CIT (Appeals). Therefore, the issue is, whether the assessees could have raised the issue of noncompliance with jurisdictional parameters set out under Section 153C of the IT Act, before the ITAT, even without filing any cross-objections before the ITAT.*
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> *28. At least, prima facie, non-compliance with jurisdictional parameters set out under Section 153C of the IT Act, if established, will go to the root of the matter and even nullify the very action initiated under Section 153C of the IT Act. Based on the material furnished to the assessees, it was the case of the assessees that what was found in the course of search proceedings under Section 132 of the IT Act in the premises of the said firm and the said company, were the books of accounts belonging to the said firm and the said company. It is the case of the assessees that no books of accounts belonging to the assessees i.e. Peter Vaz and Edgar Afonso were found in the search proceedings under Section 132 in the premises of the said firm and the said company. Therefore, it was the case of the assessees that no proceedings under Section 153C of the IT Act could ever have been initiated against these assessees.*
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> *29. Mr. Pardiwala stressed that the provisions of Section 153C as amended up to the year 2013 required the Assessing Officer to be satisfied that the books of the accounts belonging to the assessees who were proposed to be proceeded with under Section 153C ought to*

have been found, as a precondition for any action under Section 153C of the IT Act. For this purpose, he compared the provisions of Section 153C as amended up to 2020, in which, there is a significant departure. Amended provisions, which did not apply to the present case, provided that the action under Section 153C was competent even if the books of accounts "pertaining to" and not belonging to the assessee were found during the search under Section 132 upon a person not referred to in Section 153A of IT Act. He submitted that this was an issue of law and therefore, the ITAT should have permitted the assessees to raise this issue even without the necessity of filing any cross-objections. He referred to Rule 27 of the Appellate Tribunal Rules, 1963 to contend that this Rule gives a right to the Respondent in an appeal before the ITAT to support the order appealed against on any of the grounds decided against him, even though he may not have appealed against the order.

30. Rule 27 of the Appellate Tribunal Rules, 1963 reads as follows:-

> *"Respondent may support order on grounds decided against him.*
>
> *27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."*

31. In this case, the assessees merely wanted to support the order made by the CIT (Appeals), which was entirely in their favor. The assessees wished to raise an issue, that was at least prima facie going to the root of jurisdiction to initiate proceedings under Section 153C of the IT Act. Having regard to the provisions of Rule 27 referred to above, the ITAT in our opinion should have permitted the assessees who were Respondents before it, to support the orders of CIT (Appeals) on this ground, even without the necessity of filing any cross-objections.

32. In Dahod Sahakari Kharid Vechan Sangh Ltd. (supra), the Division Bench of Gujarat High Court was deciding whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee needed to file cross-objections despite fully succeeding in appeal and therefore, being unable to challenge the finding of the CIT (Appeals) that the assessee was guilty of concealment of income and/or furnishing inaccurate particulars.

33. In the above case, the CIT (Appeals) recorded a finding that the assessee had concealed particulars of his income or furnished inaccurate particulars of his income but for detailed reasons set out, the CIT (Appeals) quashed the penalty imposed upon the assessee under Section 271 of the IT Act. In the appeal filed by the Revenue before the ITAT, the assessee sought to assail the finding of concealment but the ITAT did not permit the assessee to do so, on the ground that the assessee had failed to file any cross-objections.

34. The Division Bench of Gujarat High Court however held that the ITAT committed an error in law in not permitting the assessee to assail the finding of the concealment without filing cross-objections. The Court held that the ITAT apparently lost sight of the fact that the assessee had succeeded before the CIT (Appeals) that had allowed the assessee's appeal and even set aside the penalty in its entirety. Therefore, the assessee did not have to appeal. The position in law is well settled that the cross-objections, for all intents and purposes, would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal. Since the assessee did not have to appeal, the ITAT could not have insisted upon the filing of cross-objections as a precondition for permitting the assessee to assail the finding of concealment.

35. The Division Bench referred to the provisions of Section 253 of the IT Act and after analyzing the scheme held that on a plain reading of the provision, it transpires that the party had been granted an option or a discretion to file cross-objections. In case a party having succeeded before the CIT (Appeals) opts not to file cross-objection even when an appeal is preferred by the other party, from that, it is not possible to infer that the said party had accepted the order or the part thereof which was against the respondent. Since the ITAT drew such an inference that was not supported by the plain language of Section 253, the High Court held that the ITAT was clearly in error.

36. The High Court then referred to Rule 27 quoted above and held that if the inference drawn by the ITAT is accepted as a correct proposition, then, it would render Rule 27 of the Appellate Tribunal Rules, 1963 redundant and nugatory. The High Court held that it is not possible to interpret the provision in such a manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and interpretation which makes other connected provisions otiose has to be avoided. Rule 27 of the Appellate Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to the provisions of Section 253(4) of the IT Act. The ITAT was, therefore, in error in holding that the finding recorded by the CIT (Appeals) remained unchallenged since the assessee had not filed cross-objections.

37. The reference in this regard can also be made to the provisions of Section 260A(7) of the IT Act which provides that save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may apply in the case of appeals under this Section. Now in the context of the provisions of Order XLI Rule 22 of the CPC dealing with the cross-objections, the Hon'ble Supreme Court in the case of S. Nazeer Ahmed (supra) has held that the High Court was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial Court that the suit was not barred by Order l Rule 2 of the Code. The respondent in an appeal is entitled to support the

decree of the trial Court even by challenging any of the findings that might have been rendered by the trial Court against himself. For supporting the decree passed by the trial Court, it is not necessary for the respondent in the appeal, to file a memorandum of cross-objections citenging a particular finding that is rendered by the trial Court against him when the ultimate dean itself is in his favor. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial Court and in addition to what he has already been given by the decree under challenge. The Hon'ble Supreme Court, therefore, held that the respondent in the appeal had every right to canvas the correctness of the finding on the bar of Order Il Rule 2 rendered by the trial Court.

38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 as also the provisions of Section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in S. Nazeer Ahmed (supra) we think that the ITAT should not have precluded the assessees from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross18 objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assessees and against the Revenue."

5.4 Before us the Ld Counsel supported the order of ld CIT(A) for raising the issue of validity of proceedings u/s 153A , though no specific application under Rule 29 of the ITAT Rule, 1963 was filed in writing. The revenue objected to the arguments made without either cross objection or mention of Rule 29 of ITAT Rules, which being a surprise and in violation of principle of natural justice to the Revenue.

5.5 We have heard rival submission of the parties but in view of the binding precedent of Hon'ble Bombay High Court in the case of Peter Vaze (supra), we admit the objection raised by the assessee against the validity of proceedings u/s 153A of the Act. But, we find that in case the AO has observed that no return of income was filed by the assessee, however before us the assessee has shown that return u/s 153A of the Act was filed just before completion of assessment therefore, it need to be ascertained whether the AO was having access to such return of income filed electronically by the

assessee. This issue needs verification from the Directorate of computer system. The issue of condonation of delay in filing return of income u/s 153A of the Act by the AO also needs to be examined. Since, we have already sent the issue of deciding the merit to the file of ld CIT(A), therefore, we feel it appropriate to restore this issue also to the file of ld CIT(A) for adjudication after proper verification of facts and providing adequate opportunity of being heard to the assessee.

6. In the result, appeal of the Revenue is allowed for statistical purpose.

Order pronounced in the open Court on 15/11/2023.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 15/11/2023
Shubham P. Lohar

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai