

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 2418/Mum/2023 (A.Y.2016-17)

M/s. Staark Accessories Pvt. Ltd.,

A-20, Virwani Industrial Estate

Goregaon East,

Mumbai- 400063,

PAN: AATCS1816J

..... Appellant

Vs.

ACIT-13(2) (2),

Aayakar Bhavan, Maharishi

Karve Road,

Mumbai- 400020

..... Respondent

Appellant by : Shri Ashwin S. Chhag, Ld. AR

Respondent by : Shri Prasoon Kabra, Ld. DR

Date of hearing : 09/01/2024

Date of pronouncement : 06/02/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (NFAC), Delhi dated 02.05.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2016-17. The assessee has raised the following grounds of appeal:-

1. Staark Accessories P. Ltd PAN: AATCS1816J AY: 2016-17 Statement of Facts: The return of income was e-filed on 15/10/2016 declaring total Loss of Rs.(-) 3,64,13,448/-. **The case was selected for scrutiny through system under computer assisted scrutiny selection (CASS).** Accordingly, the statutory notice under section 143(2) of the I.T. Act, 1961 dated 03/07/2017 was issued by ITO- 13(2)(4), Mumbai and was duly served on the assessee on ITBA. It is admitted fact that the appellant assessee is involved in the business of reselling cosmetics and toiletries. It trades in perfumes under the brand name "Spykar". During the year under reference, the assessee has shown Loss from Business at Rs. 3, 64, 13,448/-. It is seen in the P & L a/c that the assessee has shown employee's cost at Rs. 2, 47, 63,183/- which is approximately 40% of the total sales of Rs. 6.26 Crores. The assessee, vide notice dated 08/12/2018 issued and served on ITBA, was asked to justify such huge employee cost.

2. The learned assessing office then completed the assessment u/s. 143(3) making disallowance salary paid to its employees to the tune of Rs.1,41,59,519/- in view of insufficient evidences which Ld. NFAC has confirmed. Aggrieved by which the appellant is before this Hon'ble Tribunal with the following grounds of appeal; 1. Both the lower authorities have failed to appreciate the facts and law, inter alia, and the reason for failure to provide the direct corroborative evidences to justify the expenses claimed, yet, there are indirect evidences which explains that the expenses claimed are genuine one and hence, appreciating the same it is urged to delete the addition made to the total income. 2. Appellant urges to add, alter amend or add the grounds of appeal raised here above.

Additional Grounds of Appeal: 1

The additional grounds of appeal, raised hereunder, is jurisdictional one and legal in nature, facts of which are available on the record and goes to the root of the proceedings and hence, may be admitted in view of the decision of the Hon'ble SC in the case of NTPC 229 ITR 383.

"That the order of assessment passed u/s. 143(3) vide dated 22.12.2018 by the Id. ACIT Circle 13(2)(2) Mumbai is without jurisdiction in a view of an admitted fact that this assessment u/s. 143(3) of the Act was followed by an issue of notice u/s.143(2) of the Act by the non-jurisdictional income tax Officer Ward 13(2)(4) Mumbai as a result the assessment completed is bad in law being void ab initio and hence, may be quashed for the want of the jurisdiction.

Additional Grounds of Appeal: 2

The additional grounds of appeal no. 2, in addition to one raised earlier on 16.10.2023, is hereunder, are jurisdictional and legal in nature, facts of which are

available on the record and goes to the root of the proceedings and hence, may be admitted in view of the decision of the Hon'ble SC in the case of NTPC 229 ITR 383.

It is urged to read each of the grounds of appeal raised is without prejudice to the other.

"the Id. AO is erred while taking the view that the assessee has inflated its employees cost to reduce income in view of which 186 employees were found fictitious so as to disallow the expenses of Rs. 1,41,59,519/- without appreciating the fact that the payment to these employees have recorded in the books from which part II and III of schedule VI to the Companies Act, 1956 were extracted, audited under Companies Act report of which have been accepted in the General Meeting of the Company and again the same books were audited u/s. 44AB of the Income Tax Act, 1961 to extract the report in form 3CA and 3CD which have not been doubted so as to invoke sec. 145 of the Income Tax Act, 1961. Hence, the disallowance and view therefore, of both the lower authorities, is without jurisdiction and therefore, may be quashed for the want of jurisdiction."

2. Brief facts of the case are that assessee company filed its return of income on 15.10.2016 declaring total loss of Rs. 3,64,13,448/-. Case of the assessee was selected for scrutiny **through system** under computer assisted scrutiny selection (CASS). Statutory notices u/s. 143(2) of the Act was issued by Income Tax Officer-13(2) (4), Mumbai vide dated 03.07.2017. Thereafter, the case was transferred to Circle-13(2) (2), Mumbai by virtue of Board instruction No. 1/2011 [F. No. 187/12/2010-IT (A-I)] dated 31.01.2011, which is reproduced as under:

**SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES -
INSTRUCTIONS TO SUBORDINATE AUTHORITIES**

INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT (A-I)], DATED 31-1-2011

References have been received by the Board from a large number of taxpayers, especially from Mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCs/ACs is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The

Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:

| | <i>Income Declared (Mofussil areas)</i> | | <i>Income Declared (Metro cities)</i> | |
|------------------------------|---|--------------------------|---------------------------------------|--------------------------|
| | <i>ITOs</i> | <i>ACs/DCs</i> | <i>ITOs</i> | <i>DCs/ACs</i> |
| <i>Corporate returns</i> | <i>Upto Rs. 20 lacs</i> | <i>Above Rs. 20 lacs</i> | <i>Upto Rs. 30 lacs</i> | <i>Above Rs. 30 lacs</i> |
| <i>Non-corporate returns</i> | <i>Upto Rs. 15 lacs</i> | <i>Above Rs. 15 lacs</i> | <i>Upto Rs. 20 lacs</i> | <i>Above Rs. 20 lacs</i> |

Metro charges for the purpose of above instructions shall be Ahmadabad, Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011.

3. In anticipation of this instruction mentioned (supra), ITO-Ward 13(2)(4), Mumbai transferred the case to Circle 13(2)(2) and subsequent notice u/s. 142(1) dated 23.08.2018 was issued by the concerned Circle. In response to the above notice, the assessee furnished the requisite information called for on the ITBA system. Relevant findings of the AO Circle 13(2)(2), Mumbai is reproduced to address the additional ground no. 1 as under:-

“3. The assessee is involved in the business of reselling cosmetics and toiletries. It trades in perfumes under the brand name "Spykar". During the year under reference, the assessee has shown Loss from Business at Rs. 3, 64, 13,448/-.

4. During the assessment proceedings, reminder dated 11/09/2018 was issued to the assessee on ITBA. However, when the assessee did not submit all the requisite details Notice u/s 144 of the Income Tax Act, 1961 dated 03/10/2018 was issued on ITBA asking

the assessee to show cause by 10/10/2018 as to why, in view of the non-submission by the assessee, assessment should not be completed on the basis of information available on records. The assessee submitted its reply on ITBA. Another notice alongwith questionnaire was issued on 11/10/2018 and duly served on the assessee on ITBA. This notice alongwith questionnaire was forwarded by e- mail also. The assessee again failed to submit the requisite details. In view of the non-compliance by the assessee a notice u/s 271(1)(b) was issued asking the assessee to show cause as to why Penalty u/s 271(1)(b) should not be initiated in its case. The notice was duly served on ITBA.

4.1 In reply, the assessee submitted the requisite documents which have been examined. It is seen in the P&L a/c that the assessee has shown employees cost at Rs. 2, 47, 63,183/- which is approximately 40% of the total sales of Rs. 6.26 crores. The assessee, vide notice dated 08/12/2018 issued and served on ITBA, was asked to justify such huge employee cost. In its employees list, it is further seen that, the assessee has shown Production Manager, Area Manager and Marketing & Sales Managers as its employees. On the contrary, it is seen, as per its own submission, the assessee's is a trader. It is not involved in any kind of manufacturing activity. The assessee, vide the above notice dated 08/12/2018, was asked to specify whether it is a trading concern or a manufacturing concern.

4.3 The assessee, with regard to the huge employee cost, has contended that it was its first year of operation and it wished to establish the product pan India and hence penetration in the market was necessary. It has further contended that the major expenses incurred were on sales promotion, conveyance, travelling, sample distribution, royalty & marketing. Regarding whether the assessee is a trading concern or a manufacturing concern, the assessee has contended that it is a trading concern. It gets the perfumes manufactured as per its specification and that is why it appoints Production Managers to supervise the quality of the goods. The relevant portion of the assessee's submission is appended as under:-

2. The assessee is in the business of trading in perfumes and deodorants under the brand name 'Spykar'. The assessee gets these products manufactured from its suppliers and buys finished products from then. The year under assessment was the first year of business of the assessee. The assessee wished to establish the product on a PAN India basis and so had hired employees at various posts on PAN India basis. Since this was the first year of business, penetration in the market was necessary and as such sample distribution and business promotion was the key during the year. Sales had just begun garnering and hence sales of around Rs. 6, 26, 35,678/- only can be achieved during the year. The major expenses incurred were

sales promotion, conveyance. Travelling, daily allowance for persons travelling and such related expenses of the employees of the company, sample distribution, royalty and marketing expenses. Expenses claimed of Rs.10, 22, 17,960/- includes cost of material consumed of Rs. 17,673,547/-, depreciation of Rs.335, 042/- and Finance cost of Rs.38, 30,019/-. Details of Expenses are attached. (Annexure A)

3. The company was engaged in trading of goods. The perfumes and deodorants were being bought from suppliers who manufactured them according to the company's specifications and formulae. As such, it was necessary to supervise the quality of the goods being manufactured by the supplier and so employees were hired for keeping such control and supervision. The said employees were given the designation of the Production Manager. Area Managers were hired to head defined areas segregated over many regions on a PAN India basis and Marketing and Sales Managers were hired to garner sales in these areas.”

4. In addition to the reproduced version of assessment order (supra), we have gone through the complete assessment order and submissions of the assessee and observed that during the assessment proceedings, nowhere this issue of jurisdiction was raised by the assessee throughout the assessment proceedings. We have carefully observed the order of Ld. CIT (A) also alongwith assessee's submission, but nowhere it is found that assessee has taken any objection on jurisdiction issue. Now to analyse the additional ground taken by assessee, we are reproducing herein below the relevant provisions of sections 124 and 127 of the Act as under:

[Jurisdiction of Assessing Officers

124. (1) where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction—

- (a) *in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the*

area, and

(b) *In respect of any other person residing within the area.*

(2) *Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the [Principal Director General or] Director General or the [Principal Chief Commissioner or] Chief Commissioner or the [Principal Commissioner or] Commissioner; or where the question is one relating to areas within the jurisdiction of different [Principal Directors General or] Directors General or [Principal Chief Commissioners or] Chief Commissioners or [Principal Commissioners or] Commissioners, by the [Principal Directors General or] Directors General or [Principal Chief Commissioners or] Chief Commissioners or [Principal Commissioners or] Commissioners concerned or, if they are not in agreement, by the Board or by such [Principal Director General or] Director General or [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner as the Board may, by notification in the Official Gazette, specify.*

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—

(a) ***where he has made a return [under sub-section (1) of section 115WD or under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or [sub-section (2) of section 115WE or] sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier;***

(b) *where he has made no such return, after the expiry of the time allowed by the notice under [sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144] to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier;*

[(c) *Where an action has been taken under section 132 or section 132A, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 153A or sub-section (2) of section 153C or after the completion of the assessment, whichever is earlier.*

(4) *Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.*

(5) *Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received*

within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120.

Power to transfer cases.

127. (1) *The [Principal Director General or] Director General or [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.*

(2) *Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same [Principal Director General or] Director General or [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner,—*

(a) *where the [Principal Directors General or] Directors General or [Principal Chief Commissioners or] Chief Commissioners or [Principal Commissioners or] Commissioners to whom such Assessing Officers are subordinate are in agreement, then the [Principal Director General or] Director General or [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;*

(b) *where the [Principal Directors General or] Directors General or [Principal Chief Commissioners or] Chief Commissioners or [Principal Commissioners or] Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such [Principal Director General or] Director General or [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf.*

(3) *Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the offices of all such officers are situated in the same city, locality or place.*

(4) *The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice*

already issued by the Assessing Officer or Assessing Officers from whom the case is transferred.

Explanation.—In section 120 and this section, the word "case, in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year.]

5. Through his submissions and arguments assessee relied upon the following decisions of Coordinate Benches and Hon'ble High Courts on the issue of jurisdiction:-

- i) CIT-I, Nagpur vs. Lalit Kumar Bardia (IT Appeal No. 127 of 2006)
- ii) Shri Ashish B. Sanghvi vs. ITO (ITA No. 329/Mum/2019)
- iii) Sri Krishnendu Chowdhury vs. ITO (ITA No. 1153/Kol/2015)
- iv) ITO vs. M/s. NVS Builders Pvt. Ltd. (ITA No. 3729/Del./2012)
- v) D. Craft Entertainment Pvt. Ltd. vs. ITO (ITA No. 1461/Kol/2017)
- vi) Deepak Kedia (ITA No. 881/Kol/2023)
- vii) Jigna Chetan Mehta (ITA No. 616/ Kol/2022)
- viii) Shivam Finance (ITA No. 422/Kol/2023)
- ix) Tata Sons (ITA No. 4497/Mum/2015)
- x) Abhishek Jain (2018) 94 taxmann.com (Delhi)

6. Revenue in its response to the assessee's argument furnished its reply vide letter dated 17.01.2024 same is also reproduced herein below where revenue relied upon various judicial pronouncements as under:-

"During the course of ITAT proceedings in case of M/s. Staark Accessories Pvt. Ltd. (PAN: AATCS1816J), A.Y. 2016-17, Assessee has taken additional ground, which is reproduced as under; (Annexure A)

"That the order of assessment passed u/s. 143(3) vide dated 22.12.2018 by the Ld. ACIT Circle 13(2)(2), Mumbai is without jurisdiction in a view of an admitted fact that this assessment u/s. 143(3) of the Act was followed by an issue of notice u/s. 143(2) of the Act by the non-jurisdictional income tax Officer Ward 13(2)(4) Mumbai as a result the assessment completed is bad in law being void ab initio and hence may be quashed for the want of the jurisdiction."

In this regard report has been called from jurisdictional assessing officer, who has raised objection regarding acceptance of this additional ground, vide para second of his report (copy of report is attached herewith). Assessee has put reliance on case of National Thermal Power Corporation Ltd. Vs Commissioner of Income Tax (Supreme Court of India, 1998), 97 Taxmann 358. But that reliance is completely misplaced as in this case Supreme Court has clearly stated that the additional ground raised must be bonafide and the same could not have been raised earlier for good reason. In this case the assessee has failed to produce any reason as why this issue has not been raised earlier in front of Assessment Officer and CIT (Appeals). It is pertinent to mention here that the question of issuance of notice u/s. 143(2) by ITO was never raised by the assessee during assessment proceedings before the Assessing Officer. In fact, the assessee had participated and co-operated in inquiries throughout the assessment proceedings. The issue was not raised in first appellate proceedings before the CIT (A) also. This issue also did not form part of the original grounds of appeal filed before the Hon'ble Tribunal. ITAT should exercise his discretion to permitting or not permitting the assessee to raise an additional ground in accordance with law and reason and on the merits of the case. Admission of additional ground is not an automatic route but has to be dealt with very judiciously.

Further in this regard reliance has been placed on decision of honourable Bombay High Court in case of Ultratech Cement Ltd. V. Additional Commissioner of Income Tax, Range 2(2) (2017) 81 taxmann.com 74 (Bombay). In this case honourable court has clearly held that "therefore before an additional ground is allowed to be raised, the appellate authority must be satisfied that the ground raised could not have been raised earlier for good reasons." (Annexure B)

Similarly, honourable High Court of Punjab & Haryana in case of Aravali Engineers (P.) Ltd. V. Commissioner of Income Tax [2011] 11 taxmann.com 291 (Punjab & Haryana) has

upheld the tribunal's decisions that assessee didn't raise the plea of additional ground earlier in spite of the opportunity being available. Honourable Punjab and Haryana High Court in this case has further held that "no doubt that an appellate authority can allow a question to be raised for the first time even if such a question was not raised at a lower forum but the discretion to do so has to be exercised in the interest of justice in the facts and circumstances and not mechanically." (Annexure C)

Furthermore, in case of Josh Builders & Developers (P.) Ltd. V. Principal Commissioner of Income Tax-I, Chandigarh [2017] 79 taxmann.com 435 (Punjab & Haryana) honourable Punjab & Haryana High Court has held that "Assessee, having not raised any objection with regard to issuance and service of a valid notice during assessment proceedings and rather, without any objection, having voluntarily taken part in such proceedings, could not seek annulment of assessment proceedings on ground of non-service of notice." (Annexure D)

Without prejudice to the above this additional ground should not be allowed at this stage as section 124(3) specifically bars a person from raising question about jurisdiction of AO after expiry of 1 month from the date of service of notice under section 143(2). As per section, 124(3)(a) no person shall be entitled to call in question the jurisdiction of an assessing officer, where he has made a return under sec 139 (1), after the expiry of 1 month from the date on which he was served a notice under section 143(2) or 142(1) or after completion of assessment whichever is earlier. In this case assessee has filed return for A.Y 2016-17 under sec 139(1) declaring loss of Rs. 36413448 and case was selected for scrutiny through system Computer Added Scrutiny Selection (CASS). Accordingly, statutory notice under sec 143(2) dated 03/07/2017 was issued automatically by without any manual interference by the office of ITO 13(2)(4).

This assessment was completed on 22/12/2018 and neither during assessment proceedings nor during appellate proceedings at CIT (Appeals) level, assessee has raised any issue or objection regarding jurisdiction of AO.

As per sec 124(3), he should have objected within 1 month but he has raised this issue for first time in ITAT only which is not allowed as per sec 124(3). This stand of department is further validated by Delhi High Court in case of Principal Commissioner of Income Tax V. Mega Corporation Ltd. (ITA 128/2016, order dated 23/02/2017), where high court clearly states that, (Annexure E)

"Since that was in continuation of the proceeding by the DCIT it could well have been urged by the Assessee within the stipulated time that he said officer, ACIT did not possess

jurisdiction. Its failure to do so within the stipulated time, i.e. one month after receipt of notice which was in fact a condition of Selection 143(2) proceeding and was treated as such by the assessee precluded it from urging lack of jurisdiction. The assessee, however, contended its omission by not urging this ground before the CIT(A) in the first ground but urging belatedly before the ITAT; precisely the situation which the provision seeks to eliminate."

This view regarding section 124(3) was also upheld by Allahabad High Court in case of Shivaaditya Jems and Jewellery (P) Ltd. [2022] 143 Taxmann.com 64(Allahabad) and by Delhi High Court in case of Abhishek Jain by ITO (2018) 94 Taxmann.com 355/405 ITR (1). Furthermore, in case of Shivaaditya Jems and Jewellery(P) Ltd. [2022] 143 Taxmann.com 64 (Allahabad), honourable Allahabad High Court opined that instruction no. 1/2011 dated 31/1 / 2011 was issued for the sole purpose of fixing pecuniary limit for the purpose of distribution of works between officers and it would not mean that there shall be inherent lack of jurisdiction of AO. (Annexure F)

Further in case of Subhash Chander V. Commissioner of Income Tax, Rohtak [2008] 166 Taxman 307 (Punjab & Haryana) honourable Punjab & Haryana High Court has held that jurisdiction of an Assessment Officer can't be called in question by an assessee after expiry of one month from date of which he was served with a notice under section 142(1) or after completion of assessment, whichever was earlier.(Annexure G)

Similarly, in case of Sohan Lal Sewa Ram Jaggi V. Commissioner of Income Tax [2009] 222 CTR 412 (ALL.) honourable Allahabad High Court has held that where assessee had raised no objection to jurisdiction of ITO within 30 days of service of notice under section 143(2), assessment made by such ITO could not be annulled on ground of jurisdiction. (Annexure H)

Without prejudice to the above grounds related to admissibility of additional ground and sec 124(3), it is clearly evident from the report of AO, that there is proper transfer memo in form ITA NS_110 duly kept on record for transfer of case as per instruction no.1 of 2011, hence all procedures are being followed. Instruction no 1/2011 only increases the monetary limit for distribution of work between officers which was already in place since 2001. It nowhere results in lack of inherent jurisdiction.

On the basis of above submission, it is humbly requested that additional ground raised by assessee should not be accepted keeping in view applicability of instruction no 01/2011 and sec 124(3)."

7. We have thoroughly considered the assessment order, order of Ld. CIT (A) and submissions of the assessee alongwith grounds (including additional grounds) raised before us and it is observed that the case of the assessee was selected for scrutiny under CASS. As we all are aware that this scheme of CASS is an automated random computer based selection system and it focuses on PAN no. of the assessee alongwith other criteria as guided by the Board. In this system of selection ward /circle does not affect the chances of getting selected. We agree if it would have been a case of manual scrutiny, it may affect the chance of getting selected. So, in the regime of CASS and that is too within the jurisdiction of same PCIT, ground raised by the assessee on its specific facts is of no relevance and not affecting the fate of the matter from any angle.

8. In addition to the above factual matrix of the case, we have gone through the judicial pronouncements relied upon by the assessee and revenue. But before proceeding further and discussing the judicial pronouncements relied upon by both the parties, we would like to discuss the legal position as pronounced by the Hon'ble Supreme Court and duly confronted to the assessee through clarification as under:-

[2023] 151 taxmann.com 434 (SC) DCIT (Exem.) v. Kalinga Institute of Industrial Technology

“ *The jurisdiction had been changed after the returns were filed. However, the records also reveals that the assessee had participated pursuant to the notice issued under section 142 (1) and had not questioned the jurisdiction of the Assessing Officer. Section 124(3)(a) precludes the assessee from questioning the jurisdiction of the Assessing Officer, if he does not do so within 30 days of receipt of notice under section 142 (1).[Para 1]*

In the present case, the facts did not warrant the order made by the High Court. At the same time, this Court notices that the High Court had granted liberty to the concerned authority to issue appropriate notice. It is clarified, therefore, that the Assessing Officer is free to complete the assessment (in case the assessment order has not been issued) within the next 60 days. In such event, the question of limitation shall not be raised by the assessee.[Para 2]"

9. The judicial pronouncement discussed (supra) was rendered by the Hon'ble Apex Court in response to the appeal filed by the revenue against the order of Hon'ble Orissa High Court. The ratio as laid down by the Hon'ble Orissa High Court is as under and precisely the issue before us and in the instant case before the Hon'ble High Court is identical:

[2023] 151 taxmann.com 433 (Ori.)Kalinga Institute of Industrial Technology v. DCIT

"1. By way of this writ petition, the petitioner has assails the order of assessment dated 30-12-2016 passed by opposite party No. 1 for the assessment year 2014-15 by raising an extra demand of Rs. 24,96,42,960, to be illegal, without jurisdiction and violative of natural justice.

2. As it appears, petitioner herein challenges the orders under Annexure-1, the order assessment, Annexure-2, the demand under section 156 of the Income-tax Act, 1961 and Annexure-13, the notice under section 143(2) of the Income-tax Act.

3. Affidavit has been filed by the Joint Commissioner of Income-tax (OSD) (Exemption), Bhubaneswar on 8-1-2018, wherein, at paragraph-9, it is stated as follows:-

".... Therefore, jurisdiction over the assessee is validly vested with the Circle. Accordingly, having proper jurisdiction over the assessee, the assessment u/s. 143(3) of the IT Act for the Asst. Yr.2014-15 was completed on 30-12-2016 as per provisions of Income-tax Act, 1961 basing on the materials available on record."

4. From the above, it is clearly established that the jurisdiction is with the Commissioner of Income-tax (OSD) (Exemption). Therefore, the notice under Annexure-13 issued by the Assistant Commissioner of Income Tax, Corporate Circle-1(2), Bhubaneswar, is without

jurisdiction. However, we are not expressing our opinion on Annexures-1 and 2, since those are appealable orders.

5. Accordingly, the notice under Annexure-13 is quashed/set aside. Further, it is open for the competent authority to issue appropriate notice to the petitioner in accordance with law.

6. The writ petition is allowed to the extent indicated above.”

10. We observed that even the judicial pronouncement by Hon’ble Orissa High Court, which is in favour of assessee as far as notice issued u/s. 143(2) of the Act is concerned, they haven’t allowed assessee’s appeal fully and rather allowed the department to issue a fresh notice by the concerned jurisdictional AO, although even this preposition has been reversed by the Hon’ble Apex Court relying on the provisions of section 124(3)(a) of the Act. Which is quite logical also because if an assessee will not raise this issue within the time frame allowed then how this deficiency in the procedure can be removed by the revenue? Relationship of assessee and department is based on the powers granted to the revenue by virtue of Income Tax Act to collect due revenues from assessee in a just and fair manner. In that case, neither revenue nor assessee can misuse the procedure for their own advantage which may hamper the rights of the assessee or the entitlement of exchequer to collect revenue. In the appeal before us, we observed assessee never raise this question of jurisdiction before AO and Ld. CIT (A), certainly raising this issue before us now will deprive the exchequer’s entitlement to collect its legitimate dues because of this hyper technical plea taken by assessee. Case laws relied upon by the assessee is enumerated below and for instance few of them, we are distinguishing in the light of facts under consideration and facts of the case laws relied upon by the assessee.

i) CIT-I, Nagpur vs. Lalit Kumar Bardia (IT Appeal No. 127 of 2006)

This case law pertains to section 127 of the Act, where interstate jurisdiction issue was involved. Facts of this case are not matching with the facts of assessee.

ii) Sri Krishnendu Chowdhury vs. ITO (ITA No. 1153/Kol/2015)

In this matter, selection of the case for scrutiny was done manually whereas in the appeal before us case was selected through CASS.

iii) ITO vs. M/s. NVS Builders Pvt. Ltd. (ITA No. 3729/Del./2012)

In this case, assessee's PAN no. was with ITO-13(1) at New Delhi whereas notice for scrutiny was issued by ITO Ward 1(1), Faridabad without having any valid transfer order u/s. 127 of the Act. Facts of this case are not matching with the facts of present appeal.

iv) D. Craft Entertainment Pvt. Ltd. vs. ITO (ITA No. 1461/Kol/2017)

v) Deepak Kedia (ITA No. 881/Kol/2023)

vi) Jigna Chetan Mehta (ITA No. 616/ Kol/2022)

vii) Shivam Finance (ITA No. 422/Kol/2023)

viii) Tata Sons (ITA No. 4497/Mum/2015)

ix) Abhishek Jain (2018) 94 taxmann.com (Delhi)

11. Above the all, when the matter has finally been settled once for all by the Hon'ble Apex Court in the case of Kalinga Institute of Industrial Technology (supra), we deem it fit not to expand the order further by discussing case laws

relied upon by the assessee/revenue and respectfully following the ruling of Hon'ble Supreme Court (supra).

12. Section 120(1) of the Act, 1961 confers powers upon the Income-tax Authorities to exercise all or any of the powers and perform all or any of the functions conferred on, or, as the case may be, assign to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities. Sub-section (3) provides the criteria to be considered by the Board in issuing directions for purposes of sub-section (1) and (2). Admittedly, the Board has issued a direction by Instruction No. 01 of 2011 dated 31-1-2011 and 6 of 2011 dated 8-4-2011 for equitable distribution of works amongst the Assessing Officers.

13. It is reiterated that sub-section (1) of section 124 of the Act, 1961 provides that where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction- (a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and (b) in respect of any other person residing within the area. Thus, under sub-section (1) of section 124 of the Act, 1961 the Assessing Officer who has been vested with jurisdiction over any area, shall have jurisdiction within the limits of such area. Sub-section (5) of Section 124 of the Act, 1961 starts with a *non-obstante* clause and provides that

every Assessing Officer shall have all the powers conferred by or under the Act, 1961 on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120. Thus, the Assessing Officer vested with jurisdiction by virtue of direction of sub-section (1) and (2) of section 120 shall have all powers conferred by or under the Act, 1961 on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction.

14. The facts and legal position as discussed above leave no manner of doubt that the ITO, Ward-13(2) (4), Mumbai is the Assessing Officer having territorial jurisdiction over the petitioner. Merely because some pecuniary limit has been fixed for purpose of distribution of work between officers, it would not mean that there shall be inherent lack of jurisdiction of ITO, Ward-13(2) (4), Mumbai. Therefore, it cannot be said that ITO, Ward-13(2) (4), Mumbai lacked inherent jurisdiction while issuing the impugned notice. Section 120 of the Act which relates to jurisdiction of the Income-tax Authorities stipulates that Income-tax Authorities shall exercise any of the powers and perform all or any of the functions conferred or assigned to such authority by or under this Act as per the directions of the Board *i.e.*, Central Board of Direct Taxes. As per *Explanation* to sub-section (1), the power can also be exercised, if directed by the Board, by authorities higher in rank. Under sub-section (2), the Board can issue orders in writing for exercise of power and performance of functions by the Income-tax Authorities and while doing so in terms of sub-section (3), the Board can take into

consideration and have regard to the four-fold criteria namely, territorial area; persons or classes of persons; incomes or classes of income; and cases or classes of cases. Thus, the Act does not authoritatively confer exclusive jurisdiction to specific Income-tax Authority. It is left to the Board to issue directions for exercise of power and functions taking into consideration territorial area, class/types of persons, income and case, and Board have been given wide power and latitude. The said Section by necessary implication postulates and acknowledges that multiple or more than one Assessing officer could exercise jurisdiction over particular assessee. Concurrent jurisdictions are therefore not an anathema but an accepted position under the Act. The term "jurisdiction" in section 120 of the Act has been used loosely and not in strict sense to confer jurisdiction exclusively to a specified and single assessing officer, to the exclusion of others with concurrent jurisdiction. It would refer to "place of assessment", a term used in the Income-tax Act, 1922. Sub-section (5) to section 120 of the Act again affirms and accepts that there can be concurrent jurisdiction of two or more assessing officers who would exercise jurisdiction over a particular assessee in terms of the four-fold criteria stated in sub-section (3) to section 120. Second part of sub-section (5) states that where powers and functions are exercised concurrently by Assessing Officers of different classes, then the higher authority can direct the lower authority in rank amongst them to exercise the powers and functions. **Thus, it is necessary that the Assessing Officers having concurrent jurisdiction ensure that only one of them proceeds and adjudicate. This is the purpose and objective behind sub-section (2) to section 124 of the Act. We find that**

additional ground no. 1 raised by the assessee is not sustainable, hence dismissed.

15. As Additional Ground no. 1 raised by the assessee is dismissed as the same is not sustainable in view of the decision of Hon'ble Supreme Court discussed (supra), now we are proceeding to adjudicate additional ground no. 2 raised by the assessee. We have gone through the Form No. 36 filed by the assessee alongwith additional ground no. 2 raised by the assessee. It is observed that assessee submitted the requisite documents which have been examined. It is seen in the P&L a/c that the assessee has shown employees cost at Rs. 2, 47, 63,183/- which is approximately 40% of the total sales of Rs. 6.26 Crores. The assessee, vide notice dated 8/12/2018 issued and served on ITBA, was asked to justify such huge employee cost. In its employees list, it is further seen that, the assessee has shown Production Manager, Area Manager and Marketing & Sales Managers as its employees. On the contrary, it is seen, as per its own submission, the assessee's is a trader. It is not involved in any kind of manufacturing activity. The assessee, vide notice dated 8/12/2018 was asked to specify whether it is a trading concern or a manufacturing concern.

16. The assessee, with regard to the huge employee cost, has contended that it was its first year of operation and it wished to establish the product pan India and hence penetration in the market was necessary. It has further contended that the major expenses incurred were on sales promotion, conveyance, travelling, sample distribution, royalty & marketing. Regarding whether the assessee is a trading concern or a manufacturing concern, the assessee has contended that it is a trading concern. It gets the perfumes manufactured as per its specification and

that is why it appoints Production Managers to supervise the quality of the goods.

The relevant portion of the assessee's submission is appended as under:-

2. The assessee is in the business of trading in perfumes and deodorants under the brand name 'Spykar'. The assessee gets these products manufactured from its suppliers and buys finished products from them. The year under assessment was the first year of business of the assessee. The assessee wished to establish the product on a PAN India basis and so had hired employees at various posts on PAN India basis. Since this was the first year of business, penetration in the market was necessary and as such sample distribution and business promotion was the key during the year. Sales had just begun garnering and hence sales of around Rs. 6, 26, 35,678/- only can be achieved during the year. The major expenses incurred were sales promotion, conveyance. Travelling, daily allowance for persons travelling and such related expenses of the employees of the company, sample distribution, royalty and marketing expenses. Expenses claimed of Rs.10, 22, 17,960/- includes cost of material consumed of Rs. 17,673,547/-, depreciation of Rs.335, 042/- and Finance cost of Rs.38, 30,019/-. Details of Expenses are attached. (Annexure A)

3. The company was engaged in trading of goods. The perfumes and deodorants were being bought from suppliers who manufactured them according to the company's specifications and formulae. As such, it was necessary to supervise the quality of the goods being manufactured by the supplier and so employees were hired for keeping such control and supervision. The said employees were given the designation of the Production Manager. Area Managers were hired to head defined areas segregated over many regions on a PAN India basis and Marketing and Sales Managers were hired to garner sales in these areas."

17. During the assessment proceeding, assessee was asked to produce its employees for verification and to submit the details of EPFO, ESIC & Gratuity fund paid to its employees. The assessee was also asked to show cause as to why the employees cost incurred on the fictitious employees should not be disallowed. In response to this, assessee submitted its response like few letters of offers, ID's, few cheques and categorically stated that registration process in respect of ESIC, PF and Gratuity for employees had been overlooked by it. AO was not satisfied

with the response of the assessee and disallowed the salary on which no TDS was deducted amounting to Rs. 1,41,59,519/-.

18. Assessee being aggrieved with this order of AO passed u/s. 143(3) of the Act preferred and appeal before the Ld. CIT (A), who in turn confirmed the order of AO. Assessee being further aggrieved preferred this present appeal before us. We have gone through the order of AO, order of Ld. CIT (A) and submissions alongwith case laws relied upon by the assessee. It is observed that appeal filed by the assessee before the Ld. CIT (A) was decided ex-parte as there was no response on behalf of assessee during the appeal proceedings. Relevant para no. 4 of the Ld. CIT (A)'s order is reproduced herein below for reference:

“4. The submission filed by the Appellant in support of the Grounds of Appeal has been perused carefully. Sufficient opportunity of being heard have been given to the Appellant vide the Notices dated 31.05.2019, 31.12.2020, 26.05.2022, 03.11.2022 & 21.03.2023. No Reply has been filed or uploaded by the appellant in response to the above stated notices. The statement of facts as submitted by the appellant along with Form 35 of the appeal has been perused and the same is reproduced as under:-“

19. As observed (supra) that assessee was failed to file requisite information before the AO and then there was total no compliance before the Ld. CIT (A), still we deem it fit to give another chance of being heard to the assessee before the Ld. CIT (A). In the light of this, we restore the matter back to the file of Ld. CIT (A) for re-adjudication of the matter after giving assessee a proper opportunity of being heard and assessee is directed to comply with all the notices without fail and submit the requisite information to substantiate its claim. In view of above,

additional ground no. 2 alongwith grounds raised in Form No. 36 are allowed for statistical purposes.

20. In the result appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 6th of February 2024.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 06/02/2024

Sr. PS (Dhananjay)

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai