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

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 326/JP/2024
निर्धारण वर्ष/Assessment Year : 2013-14

Shri Mahesh Kumar Sharma Aamun Wali Dhani Village: Raniyawas, Tehsil: Jamawramgarh, Distt. Jaipur	बनाम Vs.	The ITO Ward- 7 (4) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: DBCPS 1498 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri S.L.Poddar, Advocate
राजस्व की ओर से/Revenue by: Mrs. Monisha Choudhary, Addl. CIT-DR

सुनवाई की तारीख/Date of Hearing : 6/05/2024
उदघोषणा की तारीख/Date of Pronouncement: 10/07/2024

आदेश/ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the ld. CIT(A) dated 11-03-2024, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment year 2010-11 raising therein following grounds of appeal.

> ''1 In the facts and circumstances of the case the learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in passing the assessment order u/s 147/144 of the Income Tax Act, 1961 which was passed without disposing the objection raised by

the assessee before completion of assessment by passing a speaking order.

2 In the facts and circumstances of the case the learned CIT(A) has erred in confirming the addition of Rs. 14,84,856/- made by the Learned Assessing Officer u/s 45 of the Income Tax Act, 1961 on account of alleged undisclosed long term capital gain.

3 In the facts and circumstances of the case the learned CIT(A) has erred in not admitting the additional evidence submitted by the asessee under rule 46A of the Income Tax Rules, 1962 along with application for admitting the additional evidences.

2.1 Apropos Ground No. 1 to 3 of the assessee, the facts as emerges from the order of the ld. CIT(A) who has dismissed the appeal of the assessee by observing as under:-

''5. Finding and decision

I have carefully considered Form 35, statement of facts, order u/s 147 r.w.s 144, computation of total income and the Grounds of Appeal raised. The present appeal is filed against the order u/s 147 r.w.s 144 dated 19/12/2017. The grounds raised are adjudicated as under:

Ground No.1: Under the facts and Circumstances of the case the learned Assessing Officer has erred in passing the order u/s 147/144 of the Income Tax Act,1961 which is void ab-initio deserves to be quashed.

It is the submission of the appellant that the assessment order passed u/s 1-47 r.w.s 144 is void ab-initio. However, neither in the Form No.35 nor in the submissions uploaded, the appellant has established as to how the assessment order passed was void

ab-initio. Merely raising a ground that the order passed is void ab-initio does not make the order as void ab-initio, unless and otherwise it is proved with sufficient material evidence and the reasons thereof. From the submissions, it is seen that the appellant has miserably failed to substantiate the same with material evidence. Therefore, the ground raised is dismissed.

Ground No.2: Under the facts and Circumstances of the case the learned Assessing Officer has erred in making the addition of Rs. 14,84,856/- u/s 45 on account of alleged undisclosed long term capital gain.

It is understood from the assessment order that for the AY 2010-11 the appellant had not filed the return of income as provided u/s 139(1) of the Income Tax Act, 1961. The AO has received an information from the DDIT (Inv.)-III, Jaipur showing that as per Page-57 of Annexure-A-1 found and seized during the course of search and seizure operation conducted by the Income Tax Department in the case of Shri Rajendra Jain, Rajendra Bardiya and others group on 23/05/2013 that the appellant has sold his plot bearing No. 84 measuring 260 Sq. yards, Jamna Vihar scheme, village Teellawala, Jagatpura, Sanganer Tahsil, Jaipur to M/s. Hemeint Constructions Private Limited situated at D-24, Lal Bahadur Nagar, Jaipur for a consideration of Rs. 15,08,000/- in cash at Rs. 5800 per Sq. yard. Observing the sale effected by the appellant, the AO issued a notice u/s 148 dated 17/03/2017 requesting the appellant to file his return of income within 30 days, which was served on the appellant on 20/03/2017. However, the appellant has failed to file the return of income in response to the notice u/s 148.

Noticing the non-compliance, the AO has given 6 more opportunities vide notices u/s 142(1) dated 13/07/2017, 11/09/2017, 12/10/2017, 18/10/2017, 25/11/2017 and 11/12/2017. For all these notices, there was no response from the appellant. Therefore, based on the materials available on the record, the AO has computed the long term capital gain earned by the appellant at Rs. 14,84,856/-.

During the course of appellate proceedings, though the appellant has uploaded the registered sale deed, copy of the letter and the acknowledgement of the return of income filed after a gap of 8 months. The appellant has failed to establish as to why he has not responded by filing the return of income within 30 days from the service of notice and he has failed to establish, as to why the notices issued by the AO have gone unanswered. Further, the appellant has failed to upload his submission in support of the grounds raised.

It necessary to mention here the decision given by the Hon'ble Kerala High Court in the case of C. Unnikrishnan Vs CIT (1998) reported in 233 ITR 485 that Rule 46A provides certain conditions and situations under which an additional evidence can be filed before the CIT(A). Where the material on record makes it clear that no attempt was made before the AO or shows no regard to follow the requirement of Rule 46A, the additional evidence administered.

It may not be out of place to mention here that the Hon'ble ITAT Delhi in the case of Mrs. Jyotsna Suri Vs DCIT (1997) reported in 61 ITD 139 has held that an assessee cannot adduce additional evidence before Appellate Authority as a matter of right. The CIT (A) is justified in refusing to entertain additional evidence sought to be produced by an assessee which they failed to produce before the AO.

In the case of Velgi Deoraj and Co vs. CIT reported in [1968] 68 ITR 708 (Bombay) [13-09-1967] the Hon'ble Bombay High Court has held that the admission of additional evidence at the appellate stage was not referable to any right of the party to produce the evidence but was dependent solely on the requirement of the court and it was for the court to decide whether for pronouncing its judgment or for any other substantial cause it was necessary to have the additional evidence before it. The mere fact that the evidence sought to be produced was vital and important did not provide a substantial cause to allow its admission at the appellant stage especially

when the evidence was available to the party at the initial stage and had not been produced by him.

In the case of AK Babu Khan vs. CWT reported in [1976] 102 ITR 757(Andhra Pradesh) [05-09-1974) the Hon'ble High Court of Andhra Pradesh has held that it is well settled that a party guilty of remissness and gross negligence as in this case is not entitled to indulgence being shown to adduce additional evidence. The assessee had ample opportunities and year after year, he was given opportunities to produce material so that assessment could be made on a consideration of the material placed by him. Merely for the reason that the legal representative of the deceased-assessee has come on record at the stage of second appeal before the Tribunal, it will not entitle him to say that he should be afforded sufficient opportunity to dispute the assessments made by the Wealth-tax Officer. He cannot put himself in a better position than the assessee himself. The words "for any other substantial cause" have been clearly held to refer to the requirement of the court. That position is made clear by the Privy Council in Parsotim's case (supra).

It must be mentioned here that in the case of Satyanarayana Raju J. (as he then was) in Bobbili Gowresu v. Kottu Subhadramma, reported in AIR 1957 AP 961,964., while construing rule 27 of Order 41, Civil Procedure Code, observed:

‘’..... the court must be satisfied that it is… the disposal of the case that the document sought to be admitted must be received in evidence or in the alternative, there must be sufficient cause.""

The Hon'ble Supreme Court in Arjan Singh v. Kartar Singh reported in AIR 1951 SC 193, 195 observed:

"If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional

evidence so brought on the record will have to be ignored and the case decided as if it is non-existent."

In the case of Ram Prasad Sharma vs. CIT reported in [1979] reported in 233 Taxman 469 (Allahabad)/[1979] 119 ITR 867 (Allahabad)[23-07-1979] the Hon'ble Allahabad High Court has held that it would be seen that according to this rule the appellant-shall not be entitled to produce before the AAC any evidence, whether oral or documentary, which was not produced in the course of the proceedings before the ITO except in specified circumstances. Thus, the appellant has a right to produce additional evidence only in the circumstances specified in the rule and the appellant may be permitted to produce additional evidence in a fit case which falls outside the specified circumstances. The present case does not fall within the first category and the appellant has no right to produce additional evidence before the AAC. He may have been permitted to produce additional evidence but that was a matter of discretion with the AAC. In the present case repeated opportunities were given by the ITO to produce evidence to prove the genuineness of the disputed deposits but no evidence whatsoever was given, It cannot be said that in these circumstances the AAC exercised his discretion arbitrarily or capriciously while refusing to admit fresh evidence at the appellate stage.

In the light of the above observation and respectfully following the decisions, I am not satisfied with the additional evidence uploaded at the time of appellate proceedings, since the appellant has not satisfied the conditions provided under Rule 46A. Hence the additional evidence uploaded is not admitted.

Under the circumstances, the addition made by the AO based on the material found and seized at the time of search showing the actual value of the sale consideration is upheld and the ground raised is dismissed.

Ground No.3 Under the facts and Circumstances of the case the leamed Assessing Officer has erred in not disposing the

objection raised by the assessee before completion of assessment by passing a speaking order

The ground raised has been carefully examined and found from the assessment order that at no point of time the appellant or the authorized representative have filed any ccjection for issue of notice u/s 148 and requesting for the reasons for recpening of assessment, it must be made it clear that in sple of giving so many opportunities, the appellant did not respond and co-operate in completing the assessment. Therefore, the AD had to complete the assessment us 144. This fact is going to prove that there is no merit in the ground raised by the appellant. Thus, the ground raised deserves to be dismissed.''

2.2 During the course of hearing, the ld. AR of the assessee has filed detailed written submissions that the orders passed by the ld. CIT(A) deserves to deleted in view of his following submission.

''The assessee is an individual and did not enjoy taxable income during the year under consideration and as such did not file the return of income. In this case, notice u/s 148 was issued on 17.03.2017 on getting information from the Investigation Wing that in the case of search of Shri Rajendra Jain/Rajendra Bardia and Madan Mohan Gupta, certain documents were found and seized which revealed sale of plot by the assessee for Rs.15,08,000/- whereas apparent consideration in the sale deed was disclosed only Rs.5,43,450/-. Thus, there was receipt of money of Rs. 9,64,550/- over and above the sale consideration. Although on the basis of such information, proceedings were required with reference to Sec. 153 C, but the Learned Assessing Officer chose to issue notice u/s 148, which, therefore, is unlawful and illegal.

2. In response to notice u/s 148, the assessee furnished return of income on 09.12.2017 declaring income of Rs. 1,25,730/-. Copy of the return along with computation is available on **Paper Book Page No. 1-2.** In this return, the assessee had disclosed the capital gain on sale of the plot in question for S. 543450/-, which is the value taken by the Sub-Registrar as per sale deed dated 22/5/2009. A copy of the sale deed is available on **Paper Book Page No.3-13.** However, it appears that due to inadvertence the return filed by the assessee escaped the notice of the Learned Assessing Officer as he has completed the assessment u/s 144 on 19.12.2017 without taking into consideration the return filed by the assessee. This shows that the assessment order has been passed in a

hasty and careless manner. Assessment u/s 144 r.w.s 147 was completed on a total income of Rs. 14,84,856/- unlawfully and illegally without furnishing details called for by the assessee. In the assessment order itself, the Learned Assessing Officer has mentioned that due to paucity of time and heavy workload, he was not in a position to furnish relevant documents such as seized papers etc. to the assessee. The completion of assessment is against principles of equity and justice without furnishing the material to the assessee on the basis of which assessment has been completed.

3. Aggrieved by the order of the Learned Assessing Officer, the assessee preferred appeal before the Learned CIT(A). The Learned CIT(A), NFAC, Delhi, vide order dated 11/3/2024, who has confirmed the order passed by the Learned Assessing Officer. The action of the Learned CIT(A) in dismissing the appeal is illegal, unlawful and unjust. The Learned CIT(A) has observed that the assessee did not comply with the issuance of notice u/s 148 and did not file any return. On this ground alone, the Learned CIT(A) has further observed that he was not in a position to admit additional evidences filed before him. It is submitted that the assessee, in fact, did not file any additional evidence, except the copy of return, which the Learned Assessing Officer inadvertently failed to take into consideration and a copy of letter dated 11/12/2017, which also the Learned Assessing Officer did not take in record. In view of this, the Learned CIT(A) has erred in dismissing the appeal of the assessee on incorrect and wrong facts. Aggrieved with the order of the Learned CIT(A), the assessee is in appeal before the Hon'ble Tribunal and the grounds of appeal, including additional grounds, are discussed hereunder :-

Additional Ground No.1

In the facts and circumstances of the case, the Learned Assessing Officer has erred in issuing notice u/s 148 on the basis of information emanating out of search conducted in the case of Shri Rajendra Jain/Madan Mohan Gupta on 23/05/2013, whereas in the circumstances provisions of Sec. 153 C were applicable.

It is submitted that the Learned Assessing Officer has furnished the reasons recorded for initiating the proceedings u/s 147. These reasons were submitted to the Pr.CIT-3, Jaipur for approval u/s 151. A copy of the reasons recorded is scanned below :-

Reasons of belief for reopening U/s 147 of the 1.T. Act, 1961

An information was received from the DDIT(Inv.)-III, Jaipur vide his office letter No.1416 dated 07.01.2014. As per the information, during

the course of search & seizure operation in the case of Sh. Rajendra Jain, Rajendra Bardiya & others group conducted on 23.05.2013, certain incriminating documents were found and seized from the residential business premises of Sh. Madan Mohan Gupta and were inventorised as Exhibit -1 to 8 of annexure -A. On perusal of the copies of sale deed of the residential plot No.84, Jamna Vihar, Village-Teelawala, Jagatpura, Jaipur it is noticed that during the year under consideration Sh. Mahesh Sharma (the assessee) had sold these plots to Mis Hemang Construction Pvt. Ltd through its Director Sh. Rajendra Kumar Jain. Further on perusal of page No.57 of Exhibit 1 of annexure A of the seized document/material which was found & seized from the residential premises of Sh. Madan Mohan Gupta it is noticed that the plot nos, area of plot mentioned on page no.57 are the same as mentioned in the sale deeds of the plots mentioned above. Therefore, it is established that the details mentioned on this page are related to the purchase transaction of M/s Hemang Construction Pvt. Ltd made with the assessee. However, on perusal of the page No.57 of the seized material as well as the sale deeds, mentioned above, there is a vital difference in the sale price. The details of which are as under:-

S.N.	Plot No.	Area (Sq. Yds_	Rate (per. Sq. yds as mentioned on page no. 57 (Rs.)	Total amount as per details mentioned on page no. 57 (Rs.	Sale consideration shown in the sale deed (Rs.	Difference (Rs.)
1	84	260	5800	15,08,000/-	5,43,450/-	9,64,550/-
Total				15,08,000/-	5,43,450/-	9,64,550/-

From the above it is clear that from the sale of above plot, the assessee has received sale consideration of Rs. 15,08,000/- as against Rs.5,43,450/- shown in the sale deeds. Therefore, the assessce is liable to be charged capital gain as per the actual sale consideration of Rs.15,08,000/- As per the records of this office no return of income was filed by the assessee.

In view of the above facts, I have reason to belief that the assessee has escaped his capital gain income to the extent of Rs. 15,08,000/- within the meaning of section 147 of the LT.Act, 1961 for A.Y.2010-11.

Date: 23.02.2017

Sd/-
(Naresh Kumar Sharma)
Income-tax Officer

Ward-7(4), Jaipur

12. Whether the Pr. Commissioner of income tax-III, Jaipur is satisfied on the reasons recorded by the AO that it is a fit case for the issue of notice u/s 148. Sd/-
Pr. Commissioner of income-tax-III
Chhavi Anupam

In these reasons, the Learned Assessing Officer has mentioned that information was received from DDIT(Inv)-III, Jaipur under letter No. 1416 dated 07/01/2014 that during the course of search on 23/05/2013 in the case of Shri Rajendra Jain /Rajendra Bardia and Madan Mohan Gupta, certain documents were found and seized from the residence of Shri Madan Mohan Gupta, which were inventorised as Exhibit 1 to 8 of Annexure A. The perusal of these seized papers revealed sale of plot by the assessee for Rs.15,08,000/- to M/s Hemang Construction P. Ltd. whereas apparent consideration in the sale deed was disclosed only Rs.5,43,450/-. Thus, there was receipt of money of Rs. 9,64,550/- over and above the sale consideration of Rs. 5,43,450/-. Thus, the proceedings u/s 148 have emanated out of search action taken on 23/05/2013 in the case of Rajendra Kumar Jain/Rajendra Bardia and Madan Mohan Gupta. It is submitted that with the introduction of provisions of Sec. 153 C with effect from 01/06/2003, action was required under these provisions in cases where the Assessing Officer of the searched person was satisfied that the seized material or the information contained therein pertained to other person and the Assessing Officer of the other person was also satisfied that the seized material so received from the Assessing Officer of the searched person was having a bearing on the determination of income of such other person. For ready reference, provisions of Sec. 153 are quoted below :-

"Assessment of income of any other person.

153C.*(1)* [33] *[Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—*
(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total

income of such other person [34]*[for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of section 153A :*

***Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :*

***Provided further** that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made* [34]*[and for the relevant assessment year or years as referred to in sub-section (1) of section 153A] except in cases where any assessment or reassessment has abated.*

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year—

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or
(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or
(c) assessment or reassessment, if any, has been made,before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.

He further submitted that the perusal of the aforesaid provisions reveal that action 153C is required in cases where search has taken place after 1/6/2003 and before 1/4/2021. In this case, the search has taken place on 23/05/2013, therefore, the provisions of Sec. 153C are attracted in this case. Although on the basis of this information, proceedings were required to be considered with reference to Sec. 153 C, but the Learned Assessing Officer has wrongly issued

notice u/s 148, which, therefore, is unlawful and illegal. The entire proceedings initiated u/s 148 are abinitio void, the assessment so completed by the Learned Assessing Officer is invalid and the order of the Learned CIT(A) in confirming the order of the Learned Assessing Officer also requires to be quashed. The following case-laws are quoted in support :-

1.INCOME TAX OFFICER vs. ARUN KUMAR KAPOOR
IN THE ITAT AMRITSAR
ITA No. 147/Asr/2010; Asst. yr. 2006-07
(2011) 58 DTR 0201, (2011) 140 TTJ 0249
Section 147, 148, 153C

Reassessment—Validity—Reassessment on the basis of incriminating material found in search of third party—Provisions of s. 153C are applicable which exclude the application of ss. 147 and 148—Hence notice issued under s. 148 and proceedings under s. 147 are illegal and void ab initio—AO having not followed procedure under s. 153C, reassessment order was rightly quashed by the CIT(A)

Held

*The undisputed facts are that a search was conducted under s. 132 in the case of T on 28th March, 2006, during the course of which certain incriminating documents were allegedly seized. It is also a matter of record that the Dy. CIT intimated the AO of the assessee about seizure of certain documents pertaining to the assessee during search and enclosed copy of those documents requesting him to take appropriate action under s. 153C/148. The provisions of s. 153C were applicable, which supersedes the applicability of provisions of ss. 147 and 148. The documents were seized during the search under s. 132 and the same were sent to the assessee's AO at Amritsar by the officer at Delhi. The CIT(A) has correctly observed that only the provision in which any assessment could be made against the assessee in the IT Act was s. 153C r/w s. 153. It is also apparent from the record that the officer at Delhi has mentioned in his letter that the necessary action may be taken as per law under s. 153C/148. Hence, notice issued under s. 148 and proceedings under s. 147 by the AO are illegal and void ab initio. In view of the provisions of s. 153C, s. 147/148 stands ousted. In the instant case, the procedure laid down under s. 153C has not been followed by the AO and. therefore, assessment has become invalid. The CIT(A) was fully justified in quashing the reassessment order.—**Manish Maheshwari vs. Asstt. CIT** (2007) 208 CTR (SC) 97 : (2007) 289 ITR 341 (SC)* ***applied.***

2. Rajat Shubra Chatterji vs. ACIT ITA No. 2430/Delhi/2015 dated 20.05.2016(Delhi- Trib.)
3. Adarsh Agarwal v. ITO, ITA No. 777/Delhi/2019, dated 14.01.2020 (Delhi)
4. Saurashtra Color Tones Pvt. Ltd. v. ITO, ITA No. 6276/Delhi/2018, dated 22.01.2020 (Delhi)

5. Meer Hassan v. ITO and Ali Hassan v. ITO, ITA Nos. 1571 and 157./ Delhi/2015, dated 28.02.2019 (Delhi)
6. Smt. Sangeeta Chhabra v. ITO, ITA No. 1853/Delhi/2017, dated 21.04.2017 (Delhi)
7. Mohan Thakur v. ITO, ITA No. 7413/Mum./2017, dated 09.01.2020 (Mum.)
8. Girish Chand Sharma v. ITO, ITA No. 987/Delhi/2018, dated 30.11.2018 (Del.)
9. It has been held in the case of Sanjay Singhal (HUF) v. Dy. CIT 194 DTR (Chd. "A") 209 that the suspicion that some income having escaped assessment cannot by itself be sufficient to sustain the action under s. 147 & further, seizure of documents during search of third person could form the basis for action under s. 153C and not under s. 147.
10. It has been held in the case of **Asstt. CIT v. K.S. Chawla & Sons (HUF) 203 DTR 180 (Del 'B')** that assessment based upon documents found during the course of search of the premises of a third party can be made only under section 153C and not under section 147.
11. In the case of **Jasjit Singh v. ACIT[ITA No. 1436/Delhi/2012, dated 05.11.2014] (Delhi-Trib.)** Date of receiving seized documents is the "date of initiation of search" and six years period has to be reckoned from that date. An assessment order passes u/s 143(3) instead of u/s 153C is void.
12. **ACIT v/s Sunil Kumar Jain (2014) 100DTR 145 Chhattisgarh High Court** – Action u/s 148 cannot be taken in cases of block assessment where action is called for u/s 158BD.
13. It has been held in the case of **Karti P. Chidambaram v. Principal Director of IT (Inv.) [2021] 128 taxmann.com 116 (Mad.)** that use of the non-obstante clause coupled with the abatement mechanism contained in the provisions of sections 153A and 153C makes it clear that the legislative intent was for Assessing Officer to proceed only under section 153A or section 153C upon receipt of material seized or requisitioned.

In view of the aforesaid decisions, the ratio of which is applicable to the facts of the case of the assessee, the order passed by the Learned CIT(A) deserves to be quashed.

Additional Ground No.2

In the facts and circumstances of the case, the Learned CIT(A) has erred in sustaining the assessment order of the Learned Assessing Officer, which has been completed in flagrant violation of principles of nature justice.

In this case, the Learned Assessing Officer has wrongly completed the assessment u/s 144 of the IT Act, 1961. During the course of assessment proceedings, the assessee attended the office of the Learned Assessing Officer on 11/12/2017 and submitted a letter dated 11/12/2017 furnishing requisite details and also requiring certain details

from the Learned Assessing Officer. A copy of this letter dated 11/12/2017 is available on **Paper Book Page No.14-16.** It is further submitted that in para 3 of the assessment order, the Learned Assessing Officer has mentioned that the assessee attended proceedings and submitted a letter requiring certain documents on the basis of which assessment proceedings were initiated. The Learned Assessing Officer has further observed that he was not in a position to meet the requirements of the assessee and could not furnish the requisite details because of heavy workload and paucity of time as the assessment was getting barred by limitation on 31/12/2017. It is relevant to submit that vide letter dated 11/12/2017, the assessee has requested the Learned Assessing Officer to furnish the copy of seized documents on the basis of which proceedings u/s 148 were initiated. The Learned Assessing Officer was also requested to furnish the copy of statements of Shri Madan Mohan Gupta. The Learned Assessing Officer failed to comply and completed the assessment on 19/12/2017. It is submitted that the assessee had attended the proceedings on 11/12/2017 and the assessment has been completed almost after a weeks' time on 19/12/2017. Thus, the Learned Assessing Officer had time of seven days which he could have easily granted to the assessee and could have furnished the required documents. But this has not been done. The assessment has been completed on the basis of statements of Shri Madan Mohan Gupta recorded at the back of the assessee. The additions have been made on the basis of seized documents recovered during search in the case of Shri Madan Mohan Gupta, which have not been furnished to the assessee for his reply and defence. It is settled principle of law that material gathered at the back of the assessee and statements of third persons cannot be used against the assessee unless opportunity for cross-examination is allowed. In this case, theld Assessing Officer did not allow any opportunity to cross examine Shri Madan Mohan Gupta. Copy of his statement was not furnished. Copies of documents seized from his residence were also not furnished on the basis of which additons have been made. Thus, the principles of equity and justice have been violated, which have vitiated the assessment proceedings. Therefore, the assessment so completed by the Learned Assessing Officer and so confirmed by the Learned CIT(A) requires to be quashed. **The assessee seeks support from the following case laws :-**

I. The Apex Court has observed that not allowing cross examination is a serious flaw and makes the order nullity. ***Andman Timber Ind. Vs. Commission of Central Excise (2015) 281 CTR 211 (SC).*** *"not allowing the assessee to cross examine the witness by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order,* ***is a serious flaw which makes the order nullity i****n as much as it amounted to violation of principle of natural justice because of which the assessee was adversely affected.*

2. COMMISSIONER OF INCOME TAX vs. BIJU PATNAIK HIGH COURT OF ORISSA 190 ITR 0396

Although answers can be recorded either in favour of the Department or against it, ultimately each answer would again become inconclusive on account of the final findings of fact of the Tribunal that ITO has not given reasonable opportunity to the assessee to rebut the statements recorded ex parte under s. 131 of the Act and to furnish explanation to some of the materials. It is true that Tribunal has not given due weight to the relevant and admissible evidence while recording the findings of fact. However, the findings of the Tribunal on such fact are also vulnerable as they may require reconsideration. If answers in respect of each of the questions are indicated in the absence of reasonable opportunity being afforded to the assessee, they would be of academic interest inasmuch as the answers against the assessee would become vulnerable on account of the need to undo the absence or reasonable opportunity. A clear and conclusive finding binding on the parties can be given only after reasonable opportunity is given to the assessee as found by the Tribunal. No answer should be given in advisory jurisdiction which would not finally decide the issue since final finding can be arrived at only after giving reasonable opportunity to the assessee and explanation given by the assessee would have material bearing on the finding. It is necessary that the Assessing Officer gives opportunity to the assessee. Tribunal has not considered the evidence in its proper perspective while rendering the decision in appeal and accordingly, the findings of the Tribunal are vitiated in law. As the final fact-finding forum, the Tribunal has to consider the same again. ***Since Tribunal has recorded a finding that reasonable opportunity has not been given to the assessee to give rebuttal evidence and explanation,*** *this can effectively be done by the Assessing Officer. The reference applications are disposed of as above leaving it to the Tribunal to pass consequential orders.*

3. PRAKASH CHAND NAHTA vs. COMMISSIONER OF INCOME TAX (HIGH COURT OF MADHYA PRADESH) (2008) 301 ITR 0134 :

Assessment—Validity—Opportunity of being heard vis-a-vis statements of third party—Unaccounted silver ornaments and utensils were found and seized during the search at the assessee's premises—Assessee explained that the said silver items were purchased from one R & Co.—AO made addition to the income of the assessee after recording the statement of M, proprietor of R & Co., behind the back of the assessee—Not justified—AO has heavily relied upon the statement of M and has ignored the subsequent affidavit filed by M which is in variance of his original statement—Since the statement of M was used against the assessee and an affidavit was filed controverting the same, ***it was obligatory on the part of the AO to allow the prayer of assessee for cross-examination of M—AO having not summoned M under s. 131 in spite of the request of the assessee, evidence of M could not have been used against the assessee—Therefore, the assessment order is vitiated.***

4. ***HEIRS AND LRS OF LATE LAXMANBHAI S. PATEL vs. COMMISSIONER OF INCOME TAX (HIGH COURT OF GUJARAT) (2010) 327 ITR 0290***

Opportunity of being heard—During search of one R, key of bank locker along with two packets containing six promissory notes were recovered—Out of those six promissory notes, one was in the sum of Rs. 8,78,358 executed by one K in the capacity of partner of firm DCI—In his statement recorded during search, R stated that the key of locker and the two envelopes were handed over to him by the assessee—K also admitted in his statement recorded on the same day at 2.00 AM midnight that he had executed the pronote and signed it on behalf of DCI after obtaining a sum of Rs. 8,78,358—Later, K filed an affidavit that his statement was recorded at late hours in the night under coercion and pressure—Subsequently, K along with two other partners of DCI, made a voluntary disclosure of a sum of Rs. 11 lacs including the amount of Rs. 8,78,358 and same was assessed in the hands of the three partners—Relying on the statement of R and the retracted statement of K, AO made addition of Rs. 8,78,358 under s. 68 in the hands of assessee also and the same was confirmed by CIT(A) and Tribunal—Not justified—Apparently ***, there was a violation of principles of natural justice as the statement of one of the important witnesses, namely, R on which heavy reliance was placed by the AO is neither referred to in the assessment order nor copy thereof was given to the assessee nor the assessee was given an opportunity of cross-examining the said R—Authorities could not be absolved from doing so on the ground that the facts stated by R were admitted by the assessee—K*** *had not only retracted his earlier statement but also made a voluntary disclosure, along with two other partners of DCI, in the sum of Rs. 11 lacs which included the amount of pronote of Rs. 8,78,358—Legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, is that if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice—Orders of all the three authorities set aside and addition deleted.*

5. COMMISSIONER OF INCOME TAX vs. EASTERN COMMERCIAL ENTERPRISES (HIGH COURT OF CALCUTTA) 210 ITR 0103

Assessee showing a gross profit rate of 5.2%—Revenue being of the opinion that assessee inflated purchases, called in evidence one S from whom assessee made purchases and applied G.P. rate of 30%—S denied having made any sales to assessee in the face of earlier affidavits confirming such sales—Statement of S not furnished to assessee nor opportunity to cross-examine him given—Cross examination is sine qua non of the due process of taking evidence and no adverse inference can be drawn against a party unless that party is put on notice of the case made out against him—Matter remanded for cross-examination of S with opportunity to assessee to furnish evidence to rebut the evidence of S

6. KALRA GLUE FACTORY. vs. SALES TAX TRIBUNAL & ORS. (SUPREME COURT OF INDIA) 167 ITR 0498

Statement which was not tested by cross examination is not good evidence.

In view of the aforesaid fact the assessment order passed deserves to be quashed. ''

2.3 On the other hand, the ld. DR supported the orders of the ld. CIT(A) and strongly refuted the written submissions of the ld. AR of the assessee.

2.4 The Bench has heard both the parties and perused the materials available on record. Brief facts of the case are that the return of income for the assessment year 2010-11 was not filed by the assesse under the provisions of Section 139(1) of the Act. The assessment proceeding for the year under consideration was initiated after duly recording of reasons and obtaining the prior the approval of the Pr. CIT Tax-3, Jaipur. Further, in this case, it is noted that the assessment proceedings u/s 147 of the Act was initiated on the basis of information from the DCIT (Inv.)-III, Jaipur. It is noticed that notice u/s 148 of the Act was issued on 13-03-2007 which was got served upon the assessee through registered post dated 20-03-2017. Thereafter various opportunities i.e. 13-07-2017,11-09-2017,12-10-2017, 18-10-2017 25-11-2017 and 17-12-2017 were given to the assessee but neither the assesee nor his any authorized representative appeared and no documents were produced before the AO to substantiate his case. It is noted that the AO initiated

the proceedings being time barred case of limitation on 31-12- 2017. It is noted that during the year under consideration, the assessee sold a plot No. 84, Jamna Vijhar Scheme, Village-Teelkawala, Jagatpura, Tehsil- Sanganer, Jaipur to M/s. Hemang Construction Pvt. Ltd. whose registered office is situated at D-24, Lal Bahadur Nagar, Jawahar Lal Nehru Marg, Jaipur through its Director Shri Rajender Kumar Jain at sale consideration of Rs.5,43,450/- in cash on 25-05-2009 through sale deed which was executed by the Sub-Registrar-II, Sanganer, Jaipur charging the stamp duty on the estimated cost of immovable property of Rs.5,43, 450/-. . As per page no. 57 of Annexure- "A-1", found/seized during the search & seizure operation conducted by the Investigation Wing, Income Tax Department, Jaipur in the case of Shri Rajendra Jain, Rajendra Bardiya & others Group, Jaipur on 23.05.2013, which was forwarded by the Dy. Director of Income Tax(Inv.)-III, Jaipur vide his office letter no. DDIT(Inv.)-III/Jaipur/Search Jain Group/2013-14/1416 clated 07.01.2014, the assessee sold his plot no. 84 measuring 260 square yards, Jamna Vihar Scheme, Village-Teelawala, jagatpura, Tehsil-Sanganer, Jaipur to M/s. Hernang Construction Private Limited which registered office is situated at D-24, Lal Bahadur Nagar, Jawahar Lal Nehru Marg, Jaipur through its Director Shri Rajendra Kumar Jain at sale consideration of Rs. 15,08,000/- in cash @ 5800/- per square yards. The assessee purchased the above plot at ts. 15,600/- as per allotment certificate clated 30.11.2001 issued by the

Pathik Bhawan Nirman Sahakari Samiti Limited, Laxmi Dharm Kanta, 22 Godown, Jaipur-3020006. The sale consideration of immovable property is Rs. 15,08,000/- on which the long term capital gain is calculated as under:-

S.N.	Particulars		Long Term Capital Gain
1.	Sale Consideration	15,08,800/-	
2.	Purchase cost – Rs.15,600		14,84,856/-
3.	Indexed cost of acquisition	15600/426x632= 23,144	14,84,856/-

The AO noted that the assessee did not surrender the long term capital gain of Rs. 14,84,856/ arisen by selling of his plot no. 84, Jamna Vihar Scheme, Village-Teelawala, Jagatpura, Tehsil-Sanganer, Jaipur at Rs. 15,08,000/-as per incriminating documents found/seized during the search & seizure operation conducted in the case of Shri Rajendra Jain Group Director of M/s. Hemang Construction Private Limited. A show cause notice alongwith notice u/s. 142(1) of the Income Tax Act, 1961 was issued to the assessee but neither the assessee nor his Authorized Representative attended the case nor was any reply/information submitted by him. The assessee failed to surrender the long term capital gain of Rs. 14,84,856/- for taxation under the provisions of the Income Tax Act, 1961 for the assessment year under consideration Therefore, the above long term capital gain of Rs. 14,84,856/ is treated the undisclosed income of the assessee under the provisions of section 45 of the Income Tax Act, 1961 which is added to the total

income of the assessee for the assessment year under consideration. The assessee concealed/escaped the income of Rs. 14,84,856/-, hence, the penalty proceedings u/s. 271(1)(c) of the Income Tax Act, 1961 is initiated. The assessee did not file the return of income for the assessment year under consideration under the provisions of section 139(1) of the Income Tax Act, 1961. Therefore, the penalty proceedings u/s. 271F of the Income Tax Ac, 1961 is initiated. In first appeal, the ld. CIT(A) has dismissed the appeal as mentioned hereinabove. In this case, it is noted in this case that the ld. CIT(A) has wrongly confirmed the order passed by the AO without going through the assessment order itself. In the assessment order itself, the AO has mentioned that on 11/12/2017, the assessee attended the proceedings and furnished a letter requiring documents on the basis of which notice u/s 148 was issued. The requirements made by the assessee were basic and go to the root of the matter. The assessee, vide letter dated 11/12/107, had asked for copies of documents seized from the residence of Shri Madan Mohan Gupta and also copies of statements of Shri Madan Mohan Gupta, on the basis of which assessment proceedings u/s 147 had been initiated. It was incumbent upon the ld. CIT (A) to have quashed the order of the AO as the same was passed without furnishing details of the assessee, which go to the root of the matter. The AO was precluded in utilizing the information received on account of search without furnishing the same to the assessee. The assessee could not furnish his defence as

the documents found during search in the case of Shri Madan Mohan Gupta were not furnished to him. The AO has made addition exclusively on the basis of documents found during search in the case of Shri Madan Mohan Gupta. As these documents were not furnished to the assessee, no defence could be furnished to the assessee and, hence, the assessment was completed in violation of equity and justice. The ld. CIT(A) did not go to the letter dated 11/12/2017, which is available on Paper Book (supra). Therefore, the action of the ld. CIT(A) in sustaining the order of the AO is unlawful and requires to be quashed. It is also noted that the AO made addition of Rs. 14,84,856/- on the basis of sale consideration of plot found noted in some rough paper at Rs.15,08,000/-. These papers were not confronted with the assessee. Further, these papers were rough and their truthfulness was not tested. Copy of the undated and unsigned rough paper placed by the ld. AR of the assessee during the course of hearing before the Bench who submitted as under:-

> **1. It is undated** – It is submitted that the entire page does not indicate as to which period/to which date it relates. The entire paper nowhere indicates the period of its writing. It is settled position of law that an undated paper cannot be taken into consideration as the same is dump paper.
>
> **2. It is unsigned** – It is submitted that the entire page does not contain signature of any person leave aside the signature of the assessee. Hence it cannot be considered in the hands of the assessee.

3. No name on the paper– It is submitted that the entire page does not contain any name leave aside the name of the assessee. Hence it cannot be considered in the hands of the assessee. The paper does not contain the name of the purchaser Shri Rajendra Jain also. Therefore there is no ground to conclude that it contains details of plot sold by the assessee to Shri Rajendra Jain.

4. Writer is not known – It is further submitted the paper is not written by the assessee. The writer of the paper is not known. It is settled principle of law that if the writer of the paper is not known and is not examined no action on such rough paper can be taken.

5. It is rough paper – it is submitted that the paper has notings which are totally rough projections noted by Shri Madan Mohan Gupta of his personal business, these must relate to him and not to anybody else.

The ld. AR of the assessee submitted that no addition can be made on the basis of such rough and dump paper and thus the addition made deserves to be deleted. To this effect, the Bench takes into consideration the following laws in the support: -

(i) **DCIT Vs. Rajendra Kumar Sancheti (ITAT Jaipur) 42 Taxworld 152 dated 27.03.2009**

Addition cannot be made on the basis of seized paper which is not prepared by the assessee and which appears to be a deaf and dumb document.

(ii) **Mahaan Foods Ltd. Vs. DCIT (ITAT Delhi) (2009) 27 DTR 185**

In the absence of any other evidence found during the course of search or brought on record by the Assessing Officer to show that the expenditure found noted on seized documents was actually incurred by the assessee, the same cannot be added to the undisclosed income of the assessee.

No inference could be drawn against the assessee much less any inference of unexplained expenses on the basis of a dumb document

found at the residence of its director as there is no proof to show that the amount mentioned in the said document was paid by the company.

(iii) **Moolchand Kumawat & Sons Vs. DCIT (Ajmer) ITAT Jaipur Bench 42 Taxworld 241 in M.A. No. 93/JP/2008 arising out of ITSSA No. 24/JP/2005 order dated 20.02.2009**

Addition cannot be made on the basis of a dumb document or on the basis of entries found recorded on a paper seized during search without conducting any enquiry from the concerned party.

(iv) **Assistant Commissioner of Income Tax Vs. Satya Pal Wassan (2007) 295 ITR 9 AT 352 (Jabalpur)**

A documents found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant Assessment Year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigation and correlation with the other material found either during the course of the search or on investigation. Without this no addition can be made on the basis of a loose sheet.

(v) It was held in the following cases that addition could not be made on the basis of uncorroborated noting on loose sheets and papers –

(1) S.P. Goyal VS. DCIT (2002) 77 TTJ 1 (Mum)

(2) Chandra Mohan Mehta Vs. ACIT (1999) 65 TTJ 327 (Pune)

(3) Bansal Strips Pvt. Ltd. Vs ACIT (2006) 100 TTJ 665 (Del)

(4) Kishan Chand Sobhraj Mal (1991) 42 TTJ 423 (JP)

(5) CIT Vs. Naresh Khattar (HUF) (2003) 261 ITR 664 (Del)
(6) Lal Chand Agarwal vs ACIT 21 TW 213 (ITAT Jaipur)
(7) CIT Vs. S.M. Agarwal (2007) 293 ITR 43 (Del)
(8) CIT Vs. Girish Choudhary (2008) 296 ITR 619 (Del)
(9) Jayanti Lal Patel Vs. ACIT (1998) 233 ITR 588 (Raj)
(10) Rakesh Goyal Vs. ACIT (2004) 87 TTJ 151 (Del)

(11) ITO Vs. Manna Lal Jhalani 22 TW 551 (ITAT Jaipur)

(12) Hissaria Brothers Vs. ACIT 22 TW 684 (ITAT Jaipur)

(13) DCIT Vs. Countrywide Buildestate Pvt Ltd. (2012) 48 TW 50 (Jaipur ITAT) order dated 29.06.2012 ITA No. 961/JP/2011

It is noted that that the ratio of the aforesaid cases are fully applicable to the facts of the case. In the case of the assessee additions have been made on the basis of a mute paper without conducting any enquiry and without any corroborating material. The AO has not brought any material on record to establish and relate the paper with the affairs with the assessee. In view of this, the addition made deserves to be deleted. In fact, the entire exercise of the AO was mechanical. The AO initiated proceedings u/s 147 soon on receipt of information from the Investigation Wing. The action was taken as a thumb rule. No inquiry was conducted by the AO at his level for reaching to a belief that there was escapement of income. It is noted that proposal u/s 147 was submitted to the Pr. CIT-3, Jaipur simply on the basis of rough paper, although the writer of the same was not known. In view of this, it is felt that AO has completed u/s 148/144 without having any evidence in his possession. The addition made u/s 45 is not based on documents, but is based on rough papers. The same, therefore, deserves to be deleted. The Learned CIT(A) did not appreciate the facts of the case in correct perspective and dismissed

the appeal on wrong ground that return was not filed. The assessee has filed return in response to notice u/s 148, copy of which is available on record. Hence, in this view of the matter, the ld. CIT(A) is not justified in dismissing the appeal of the assessee and thus the Bench does not concur with the findings of the ld. CIT(A). Hence the appeal of the assessee is allowed. .

3.0 In the result, the appeal of the assessee stands allowed with no orders as to costs.

Order pronounced in the open court on 10/07/2024.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 10 /07/2024

*Mishra

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

1. The Appellant- Shri Mahesh Kumar Sharma, Jaipur
2. प्रत्यर्थी / The Respondent- The ITO, Ward- 7(4), Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 326/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar