# <u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक</u>

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER**
**AND**
**SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

आयकर अपील **सं/ITA No.282/CTK/2024**

(**निर्धारण वर्ष /** Assessment Year : 2015-2016)

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| ITO, Ward-1, Jharsuguda | Vs | Hirakhand Transport and Multi Purpose Cooperative Society Pvt. Ltd.,<br>At-Chingriguda, Bijapara,<br>R Kudopali, Brajrajnagar,<br>Jharsuguda-768216 |
| | | **PAN No. :AAAAH 5874 Q** |

**AND**

प्रत्याक्षेप **सं/Cross Objection No.04/CTK/2024**

(Arising out of ITA No.282/CTK/2024)

(**निर्धारण वर्ष /** Assessment Year : 2015-2016)

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|---|---|---|
| Hirakhand Transport and Multi Purpose Cooperative Society Pvt. Ltd.,<br>At-Chingriguda, Bijapara,<br>R Kudopali, Brajrajnagar,<br>Jharsuguda-768216 | Vs | ITO, Ward-1, Jharsuguda |
| **PAN No. :AAAAH 5874 Q** | | |

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| (**अपीलार्थी /Appellant**) | .. | (**प्रत्यर्थी / Respondent**) |

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| **निर्धारिती की ओर से** /Assessee by | : | Shri Anil Kumar Agrawala, CA |
| **राजस्व की ओर से** /Revenue by | : | Shri Sanjay Kumar, CIT-DR |
| सुनवाई की तारीख **/ Date of Hearing** | : | 04/09/2024 |
| घोषणा की तारीख**/Date of Pronouncement** | : | 04/09/2024 |

## <u>आदेश / O R D E R</u>

***<u>Per Bench</u>*** :

This is an appeal filed by the assessee against the order of the ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 15.05.2024, passed in DIN & Order No.ITBA/NFAC/S/250/2024-25/1064895008(1) for the assessment year 2015-2016, on the following grounds of appeal :-

1) *Whether on the facts and circumstances of the case and in law, the learned CIT(A) is justified in estimating the income @6% without appreciating the fact that during the appeal proceeding, the explanation and record provided relating to major sub-contractors who were related parties of the assessee was not up to the satisfaction of the ld. CIT(A). Further, the Ld. CIT(A) erred to substantiate as to whether the expenditure was excessive or unreasonable.*

2) *Whether on the facts and circumstances of the case and in law, the learned CIT(A) is justified in estimating the income @6% without appreciating the fact that the comparison of NP % to disallowance as compared by the Ld.CIT(A) is not substantiated by any provision of the Income-tax Act and which is based on conjectures and surmises.*

3) *Whether on the facts and circumstances of the case and in law, the learned CIT(A) is justified in estimating the income @6% without appreciating the fact that the assessee has not furnished any cogent documentary evidence before the Assessing Officer to prove that such expenditure is actually incurred and allowable u/s 40A(2)(b) of the Act.*

4) *Whether on the facts and circumstances of the case and in law, the learned CIT(A) is justified in estimating. the income @6% without appreciating the fact that the assessee has itself reported in the Return of Income that no part of the expenditure covered u/s 40A(2)(b) of the Act is allowable.*

5) *The appellant craves to leave to add, alter, amend one or more grounds of appeal before the appeal is heard.*

2. The assessee has filed cross objection and taken the following cross objections :-

***GENERAL GROUNDS***

1. *On the facts and in the circumstances of the case, the order passed by the learned Commissioner of Income-tax (Appeals) National Faceless Appeal Centre (Ld. CIT(A)-NFAC), is contrary and facts and law, beyond jurisdiction and accordingly, is liable to be set aside. The Appellant prays that the order of the Ld. NFAC be declared as bad-in-law and be quashed.*

2. *For that the Order u/s 250 issued by the Ld. CIT (Appeal) is arbitrary, illegal and bad in law.*

***JURISDICTIONAL GROUNDS***

3. *On the facts and circumstance of case and in law, the Ld. CIT(A)/ NFAC has erred in exceeding it's Jurisdiction as provided under section 251(1)(a) of the Income-tax Act, 1961 while enhancing the income of the Appellant to Rs. 46,64,000.00.*

4. *For that, for reopening beyond four years, prior approval as mandated under section 151(1) of the Income Tax Act (pre-amended), has not been obtained from PCIT / PCCIT. Rather it was obtained u/s 151(2) from JCIT, Getting approval from the correct authority is a condition precedent to assume jurisdiction u/s 147. Incorrect assumption by the A.O leads to proceeding being void ab initio.*

5. *For that the additional twin conditions enunciated in proviso to section 147 of the Income Tax Act under the pre-amended law namely i) by reason of failure of the part of the assessee and ii) disclose truly and fully all material facts necessary for the assessment, need to be fulfilled for assumption of jurisdiction by the department. The department has failed to demonstrate non-fulfillment of such additional conditions by the assessee and hence the entire proceeding is void ab initio.*

6. *For that notice u/s 148 dated 31.03.2021 was issued on 01.04.2021 at 5.29 AM through email. On 01.04.2021, new law as amended vide Finance Act 2021 had come into force, which ought to have been followed by the revenue starting from the point of issuance of jurisdictional notice. Incorrect assumption of jurisdiction owing to delay issuance of jurisdictional notice u/s 148 is bad in law and hence the entire proceeding is void ab initio.*

7. *For that the Ld Income Tax Officer has assumed jurisdiction violating Instruction No. 1/2011 (F No. 187/12/2010-IT(A-1) dated 31.01.2011 issued by CBDT, pecuniary limit for jurisdiction for non-corporate assessee having returned income of more than Rs.15 Lakhs, falls under the jurisdiction of ACIT /DCIT and hence the entire additions are bad in law.*

***LEGAL/TECHNICAL GROUNDS***

8. *For that vide Para 7 of the order u/s 148A(d) dated 29.07.20,2, the Ld A.O had dropped the case by mentioning being NOT A FIT CASEJO ISSUE NTICE U/S 148. The order u/s 147 dated 31.03.2022 becomes infructuous, the moment the Ld. AO decided to follow judgment of the Apex Court in the case of Ashish Agrawal and proceeded with issuance of notice u/s 148A(b) dated 02.06.2022 and subsequent passing of order u/s 148A(d) dated 29.07.2022.*

9. *For that non issuance of fresh order u/s 147, even after following the judgment of the Apex Court in the case of Ashish Agrawal and proceeded with issuance of notice u/s 148A(b) dated 02.06.2022 demonstrates acceptance of the case by the department being not a fit case to proceed further and hence no order u/s 147 was issued. Keeping the order u/s 147 alive which has become infructuous, is bad in law.*

10. *For that provisions of section 40A(2)(b) are not applicable to cooperative societies per se and hence disallowance invoking section 40A(2) (b) is bad in law.*

11. *For that there is clear-cut distinction between reporting requirement in Form 3CD by the Tax Auditor and disallowance to be made by the Assessing Officer. There could be no disallowance simply on the basis of reporting by Tax Auditor in Form 3CD.*

12. *For that the Assessing Officer ought to have made an exercise to find out the amount of excessive or unreasonableness before making disallowance u/s 40A(2)(b). In absence such exercise, disallowance made is bad in law.*

***RESIDUAL GROUNDS***

13. *For that the Appellant craves leave to add, alter, amend, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing so as to enable the Hon'ble Tribunal members to decide these according to the law.*

3. The cross objection filed by the assessee is delayed by 15 days and an application is filed for condonation of such delay, which is placed on record. The said application is also supported by an affidavit of the assessee, wherein the reasons stated in the application were stated on oath. After going through the petition, we find there is sufficient cause for delay in filing cross objection. Therefore, the delay is hereby condoned and the cross objections are admitted for adjudication on merits.

4. The assessee in his cross objection has challenged the assessment order on the jurisdictional issue. Therefore, before going into the grounds

of appeal taken by the revenue, we first decide the technical/legal objections taken about the validity of reassessment order by the assessee.

5. In one of the Cross Objection, the assessee has questioned the assessment order passed u/s.147 r.w.s.144B of the Act dated 31.03.2022 on the ground that the approval as mandated u/s.151(1) of the Act was obtained after the expiry of 4 years and such approval was not taken from the competent authorities as prescribed under the Act.

6. Brief facts of the case are that the assessee is a cooperative society and filed its return of income for the impugned year on 29.09.2015 declaring total income at Rs.29,01,910/-. The assessee society is engaged in the transportation business of coal for MCL and the assessment was completed u/s.143(3) of the Act vide order dated 07.12.2017 at a total income of Rs.29,92,380/-. Thereafter based on some report it was gathered that the assessee has made payments to the related party of Rs.5,44,88,752/- but no part of such expenditure was disallowed u/s.40A(2)(b) of the Act in the return of income filed. Based on these information, the AO has recorded the satisfaction and reopened the case by issue of notice u/s.148 on 31.03.2021.

7. Before us, the ld. AR submitted that in this case the assessment has already been completed u/s.143(3) of the Act and thereafter the proceedings u/s.148 of the Act were initiated by issue of notice u/s.148 of the Act dated 31.03.2021, which were issued after obtaining the necessary approval from JCIT, Range Rourkela. The ld. AR further

submitted that since the notice u/s.148 of the Act was issued after the expiry of the four years from the end of the relevant assessment years, therefore, in terms of Section 151(1) of the Act, necessary approval should have been obtained from the ld. PCCIT or CCIT or PCIT. However, in the present case, the approval was obtained from JCIT, Range Rourkela, which is evident from the notice itself issued u/s.148 of the Act, placed in the paper book at page 53 which is as under :-

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
ITO, WARD 1, JHARSUGUDA/

To,

HIRAKHAND TRANSPORT AND MULTI PURPOSE CO OPERATIVE SOCIETY LIMITED
CHINGRIGUDA BIJAPARA , R-KUDOPALI
BRAJRAJNAGAR
JHARSUGUDA 768216 , Orissa
India

| PAN: | AY: | Dated: | DIN & Notice No : |
|---|---|---|---|
| **AAAAH5874Q** | **2015-16** | **31/03/2021** | **ITBA/AST/S/148/2020-21/1032107162(1)** |

**Notice Under Section 148 Of The Income Tax Act, 1961**

Sir/ Madam/ M/s,

Whereas I have reasons to believe that your Income chargeable to Tax for the Assessment Year **2015-16** has escaped Assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/ re-assess the income/ loss for the said Assessment Year and I hereby require you to deliver to me within **30** days from the service of this notice, a return in the prescribed form for the said Assessment Year.

This notice is being issued after obtaining the necessary satisfaction of the Jt. CIT, RANGE ROURKELA

SUBHADEEP SAHU
ITO, WARD 1, JHARSUGUDA/

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

DILESWAR PADHAN
Chief Executive
Hirakhand Transport & Multi-Purpose Co-Operative Society Ltd

Note: If digitally signed, the date of digital signature may be taken as date of document.
,INCOME TAX OFFICE, IncomeTax Office, Sarbhal, JHARSUGUDA, Orissa, 768201
Email: JHARSUGUDA.ITO1@INCOMETAX.GOV.IN,

* DIN-Document identification No.

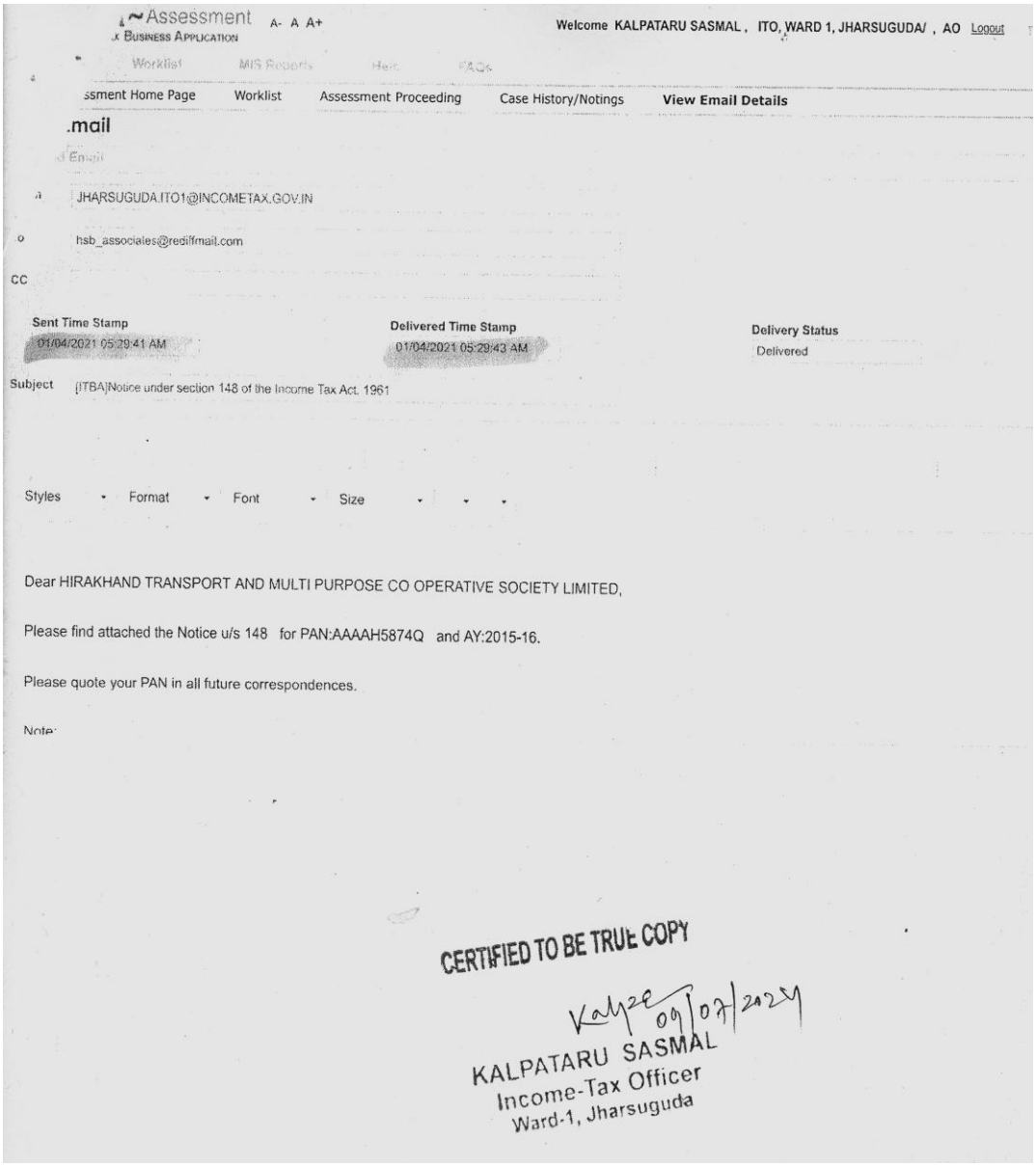
This document is digitally signed
Signer: SUBHADEEP SAHU
Date: Wednesday, March 31, 2021 8:50 PM
Location: BHUBANESWAR, India

8. Ld. AR accordingly prayed that the notice issued without proper sanction is bad in law, therefore, consequent reassessment order deserves to be quashed. In support of this, reliance were placed on the following case laws :-

i) ***Voltas Ltd. Vs. ACIT, reported in (2022) 141 taxmann.com 27 (Bom)****; wherein the Hon'ble Bombay High Court has held that as per provisions of Sec, 151(1) sanction of Commissioner or Principal Commissioner is a pre-requisite for issuance of a reopening notice under section 148 after expiry of four years from end of the relevant assessment year therefore the impugned notice issued with sanction of Addl. Commissioner and not Pr,CIT being legally invalid was liable to be set aside*

ii) ***Sidhmicro Equities (P) Ltd. Vs. DCIT, reported in (2023) 150 taxmann.com 460 (Bom****), wherein the Hon'ble Bombay High Court has held that that where AO issued reopening notice after obtaining necessary sanction from Addl. Commissioner since notice was issued beyond period of four year approval ought to have been obtained from Pr. Chief Commissioner/Chief Commissioner/Pr. Commissioner as per section 151 and thus, impugned notice was to be quashed.*

9. The assessee also taken another cross objection where he has challenged the notice u/s.148 of the Act being time barred as the same was issued and served upon the assessee on 01.04.2021 at 5.29 AM through email. In support of this ground, ld. AR submitted that the notice u/s.148 was though digitally singed by the AO on 31.03.2021 at 8.50 PM, however, the same was served on the assessee only on 01.04.2021. In support of this, a certified copy of the email obtained from the AO supplied to it on the request of the assessee is produced. The said certified copy as issued by the AO is as under :-



Assessment A- A A+
Business Application

Welcome KALPATARU SASMAL , ITO, WARD 1, JHARSUGUDA/ , AO Logout

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.mail

Email

JHARSUGUDA.ITO1@INCOMETAX.GOV.IN

hsb_associates@rediffmail.com

CC

| Sent Time Stamp | Delivered Time Stamp | Delivery Status |
|---|---|---|
| 01/04/2021 05:29:41 AM | 01/04/2021 05:29:43 AM | Delivered |

Subject [ITBA]Notice under section 148 of the Income Tax Act, 1961

Styles Format Font Size

Dear HIRAKHAND TRANSPORT AND MULTI PURPOSE CO OPERATIVE SOCIETY LIMITED,

Please find attached the Notice u/s 148 for PAN:AAAAH5874Q and AY:2015-16.

Please quote your PAN in all future correspondences.

Note:

CERTIFIED TO BE TRUE COPY

09/07/2024

KALPATARU SASMAL
Income-Tax Officer
Ward-1, Jharsuguda

10. Ld. AR submitted that since the notice has been issued after 31.03.2021, therefore, the provisions as amended by the Finance Act, 2021, wherein the provisions of Section 148A of the Act has been introduced, are replaced and if a notice is issued on or after 01.04.2021 the procedure for reopening as inserted by the Finance Act, 2021 should be followed. For this, ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of UOI Vs. Ashish Agarwal (2022) 444 ITR 1 (SC). He also submitted that the proceedings u/s.148A of the Act were

also initiated in the case of the assessee and the same were dropped by passing the order u/s.148A(d) of the Act dated 29.07.2022 by holding that it is not a fit case for issue of notice u/s.148 of the Act as the necessary order has already been passed u/s.147 of the Act against the notice issued u/s.148 of the Act dated 31.03.2021.

11. The assessee in another Cross Objection has challenged the reassessment order on the ground that the income declared by the assessee was more than Rs.15 lakhs and in view of the Instruction No.1 of 2011 dated 31.01.2011 issued by the CBDT, the jurisdiction over the assessee lies with the JCIT/DCIT, however, in the instant case the reassessment proceedings were initiated by issue of notice u/s.148 of the Act after recording satisfaction by the ITO Ward-1, Jharsuguda and the reassessment order was passed thereafter by the NFAC. He submitted that since the jurisdiction in terms of Instruction NO.1 of 2011 over the assessee lies with the ACIT/DCIT and not with the AO, therefore, the initiation of reassessment proceedings by the ITO, Ward-1, Jharsuguda is not in accordance with law. He, therefore, prayed that the notice u/s.148 of the Act and consequent proceedings deserves to be quashed.

12. The assessee has also taken a cross objection wherein it is stated that the assessee is a cooperative society and in the case of a society, provisions of Section 40A(2)(b) of the Act are not applicable. For this proposition, he placed reliance on the judgment of the Hon’ble Bombay High Court in the case of CIT Vs. Manjara Shetkari Sahakari Sakhar Karkhana Ltd., reported in 301 ITR 191 (2008) and prayed that the

satisfaction recorded that no disallowance was made u/s.40A(2) on the payments made to the related party is against the provision of law and, therefore, the action u/s.148 of the Act and consequent orders deserves to be held bad in law. In support of the above arguments, a written submissions was filed during the course of hearing, which reads as under:-

*Written submission filed In course of hearing of the above cited Cross Objection*

***CHRONOLOGY OF THE EVENTS***

| *Sl No* | *Date* | *Particulars* | *Remarks* |
|---|---|---|---|
| | | *ORIGINAL RETURN AND ASSESSMENT* | |
| *1* | *29.09.2015* | *Assessee filed Original ITR u/s 139(1)* | |
| *2* | *07.12.2017* | *Order u/s 143(3) passed by AO* | |
| | | *REASSESSMENT PROCEEDING* | |
| *3.* | *31.03.2021* | *Date of Notice u/s 148* | |
| *4.* | *01.04.2021* | *Notice u/s 148 received by assessee through email* | |
| *5.* | *29.11.2015* | *Respondent filed it submission to 148 notice* | |
| *6.* | *10.12.2021* | *JAO transferred case to FAO* | |
| *7.* | *15.01.2022* | *FAO issued notice u/s 142(1)* | |
| *8.* | *28.01.2022* | *FAO issued notice u/s 142(1) 12 16.06.2022 Respondent filed it submission to 148A(b)* | |
| *9.* | *27.03.2022* | *Draft Date of Order u/s 147* | |
| *10.* | *31.03.2022* | *Date of Order u/ s 147* | |
| *11.* | *02.06.2022* | *Notice u/s 148(b) issued by AO* | |
| *12.* | *16.06.2022* | *Respondent filed it submission to 148A(b) notice* | |
| *13* | *29.07.2022* | *Order u/s 148A(d) passed* | |
| | | | |
| | | ***FIRST APELLATE PROCEEDING*** | |
| *14.* | *28.04.2022* | *Respondent Field appeal with CIT-A u/s 246A* | |
| *15.* | *15.05.2024* | *Date Of CIT-A Order u/s 250* | |
| | | | |
| | | ***PRESENT APPEAL WITH ITAT*** | |
| *16.* | | *Revenue filed appeal with ITAT* | |
| | | | |

*Most respectfully, we submit as under:*

*A) ABOUT THE RESPONDENT*

*The respondent assessee is a registered Cooperative Society before the Deputy Registrar of Co-operative Societies, Sambalpur on 01.03.2011 as amended on 16.07.2014 and formed by project effected persons (of MCL for Coal Mining) to obtain work from MCL as per rehabilitation policy of the PSU company, during period under appeal were engaged in the business of transportation and other allied activities.*

*The respondent assessee for the AY 2015-16 filed return of income on 29.09.2015 declaring a net income of Rs. 29,01,910.00 (PB page 13-47). The return of income was selected for scrutiny and the income was determined at Rs.29,92,3801- in the order u/s 143(3) passed by the Assessing Officer on 07.12.2017 (PB page 48-51).*

***B) BACKGROUND OF THE CASE***

*The Finance Act' 2021 revamped the existing reassessment provisions u/s 147 to 151 with effect from 01/04/2021. However, numerous notice u/ s 148 under unamended Act were issued post 31/03/2021. Since then there has been a hue and cry over the validity of re-assessment notices issued u/s 148 under the unamended Act (herein after referred to as the old law) post 01/04/2021.*

*The legal stage was set with the decision of Hon'ble Chhattisgarh High Court (Single Member Bench) upholding the validity of such notices. However, the Hon'ble Allahabad High Court in the case of Ashok Agarwal took a contrary view and quashed all the notices issued post 01/04/2021 under the old law. And subsequently, various High Courts including the Delhi High Court, Rajasthan High Court, Bombay High Court, Madras High Court and Calcutta High Court followed the lead and quashed such notices issued under the old law.*

*The hon'ble Supreme Court, on 4.5.2022, in a batch of Civil Appeals, with the case ofUOI Yrs. Ashish Agarwal (2022) 444 ITR 1/213 DTR 217/326 CTR 476/ AIR 2022 SC 2781 (£Cl, as the lead case, has upheld the validity of all the respective re-assessment notices, hitherto, issued under old section 148, on or after 1.4.2021 and up to 30.06.2021, by holding them as deemed to have been issued under the new section 148A, of the Income Tax Act, as per the provisions of the Finance Act, 2021.*

*The Hon'ble Supreme Court has also held that all the defenses which may be available to the assessee under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the*

*Finance Act, 2021, are kept open and/or shall continue to be available.*

***C) REVENUE'S CASE***

*The tax auditor of the assessee had reported payment of Rs. 5,44,88,752.00 made to relatives u/s 40A(2)(b) in his report in Form 3CD in Para 23 under the clause Particulars of payments made to persons specified under section 40A(2}(b)Page 5 of PB}. While filing Income Tax Return (ITR), in para 9(a) (Other information' the Respondent Assessee has shown Nil under (Amounts paid to persons specified in section 40A(2)(b), (Page 26 of PB)*

*Subsequently, on examination of the audit report of the respondent submitted during the course of assessment proceedings, the department found that the payments aggregating to Rs.5,44,88,752.00 was made to persons specified u/s 40A(2)(b). Accordingly, the assessment was reopened u/s 147 and a notice u/s 148 dated 31.03.2021 was issued to the appellant assessee. The appellant did not file any return in response to the notice u/s. 148 rather filed a submission on 29.11.2021 objecting to the reassessment proceedings.*

*Subsequently, the assessment proceedings was completed in faceless matter under Faceless Assessment Scheme by adding the entire sum of Rs.5,44,88, 752.00 vide order dated 31.03.2022.*

*Being aggrieved with the order u/s 147 dated 31.03.2022, the respondent assessee filed an appeal before the CIT(A) on 28.04.2022. The Ld. CIT -A deleted the entire sum of Rs.5,44,88,752.00 by observing at Para 6.9 as under:*

*It is s affirmed that the Assessing Officer has failed to establish beyond doubt. that the payments made to such persons is excessive and unreasonable. Thus the condition laid down u/s 40A(2)(a) has not been fulfilled by the FAO" (Page 128A of PB).*

*However the Ld. CIT -A went one step ahead and determined the net income of the appellant assessee at Rs.46,64,000.00 on adhoc basis. While doing so, the Ld. CIT-(A) apparently invoked the powers vested by provisions of section 251(1)(a).*

*Following the judgment of honble Apex Court .in the case of UOI Vrs Ashish Agarwal, Ld AO issued a show cause notice u/s 148A(b) on 02.06.2022 against which the respondent assessee submitted its reply on 16.06.2022 and after that the Ld. A.O. passed an order u/s 148A(d) on 29.07.2022.*

*The present Cross Objection is directed against the illegal and arbitrary order passed u/s 250 by Ld. CIT (Appeal).*

***OUR SUBMISSION ON JURISDICTIONAL ISSUE***

***LD CIT(A) CANNOT TRAVEL BEYOND THE SUBJECT MATTER OF THE ASSESSMENT***

*1. That, in the case of the respondent, the only issue assailed by the respondent before the Ld. CIT (Appeal) was "disallowance u/ s 40A(2) (b) made by Ld. Assessing Officer amounting to Rs.5,44,88,752.00".*

*2. The Ld. CIT -A deleted the entire sum of Rs.5,44,88,752.00 by observing at Para 6.9 as under: "It is affirmed that the Assessing Officer has failed to establish beyond doubt that the payments made to such persons is excessive and unreasonable (Page 128A of PB}. Thus, the condition laid down u/s 40A(2)(a) has not been fulfilled by the FAO". However the Ld. CIT -A went one step ahead and determined*
*the net income of the appellant assessee at Rs.46,64,000.00 on adhoc basis. While doing so, the Ld. CIT -A) apparently invoked the powers vested by provisions of section 251(1)(a).*

*3. CIT(A) is the first Appellate Authority under the Income Tax Act, 1961 to whom an assessee can approach if he is aggrieved by the order of an Assessing Officer. Section 251 of the Income Tax Act deals with the power of CIT(A) to dispose-off the appeal, which reads as under:*

*251. (1) In disposing of an appeal, the [Commissioner (Appeals)] shall have the following powers-raj in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment; (aa)in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;] (b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty; (c) in any other case, he may pass such orders in the appeal as he thinks fit. (2) The [Commissioner (Appeals)] shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*

*Explanation.-In disposing of an appeal, the [Commissioner (Appeals)] may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals)] by the appellant.*

*4. The powers of the CIT(A) u/s 251(1)(a) of the Act, includes the power to "Enhance the Assessment". Whether such power is absolutely unlimited or the interest of the Assessee has been protected by the statue or court of laws.*

*5. Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog v [s CIT [2012] 18 taxmann.com 176 (Delhi), while considering the issue of power of CIT(A) to enhance, has held that - 14. We have considered the submissions of both the parties. There is no doubt about the fact that while framing the assessment even under Section 143 (3) of the Act, the Assessing Officer may omit to make certain additions of income or omit to disallow certain claims which are not admissible under the provisions of the Act thereby leading to escapement of income. The Income-Tax Act provides for remedial measures which can be taken under these circumstances. While framing assessment under Section 143 (3) of the Act, any of the following situation may occur:-*

*(a) The Assessing Officer may accept the return of income without making any addition disallowance; or*

*(b) The assessment is framed and the Assessing Officer makes certain addition or disallowance and in making such additions or disallowances, he deals with such item or items of income in the body of order of assessment but he under-assessed such sums; or*

*(c) He makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income*

*(d) Yet, there can be another situation where the Assessing Officer inadvertently omits to tax amount which ought to have been taxed and in respect of which he does not make a enquiry.*

*(e) Further another situation may arise, where an item or items of income or expenditure incurred and claimed is not at all considered and an assessment is framed, as a res thereof, a prejudice is caused to the revenue, or*

*(t) Where an item of income which ought to have been taxed remained untaxed, and there is escapement of income, as a result of the assessee's failure to disclose fully and truly material facts necessary for computation of income.*

*6. To ensure for each of such situations, an income which ought to have been taxed but remain untaxed, the legislature has provided different remedial measures as are contained in section 251(1)(a), 263,154 and 147 of the Act. In the category stated in (a), obviously if an income escapes an assessment, the provisions Section 147 of the Act can be invoked, subject to the condition stated in the*

*proviso of the s section. In the category of cases falling in category (b), section 251 (1 ) (a) provides the CIT(A) could enhance such an assessment qua the under- assessed sum i.e. where the AO had dealt the issue the assessment and was the subject matter of appeal.*

*7. The court has held that CIT(A) cannot travel beyond the subject matter of the assessment while enhancing the assessment within the meaning of Section 251(1)(a) of the Act. The main logic behind the above interpretation is inspired from the interpretation adopted by the Supreme Court in the case of CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443(SC), wherein it is held that:*

*"the principle that emerges as a result of authorities of this Court is that the appellate Asst. Commissioner has no jurisdiction under section 31 (3) of the Act (1922) to assess a source of income which has not been processed by the Income Tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order and therefore, the appellate Asst. Commissioner cannot travel beyond the subject matter of the assessment. In other words the power of enhancement under section 31 (3) of the Act is restricted to the subject matter of assessment or the source of income which have been considered expressly or by clear implications by the Income Tax Officer from the point of view of the taxability of the assessee".*

*8. In CIT v. Sardari Lal and Co., the same issue whether the appellate authority has the power under section 251 to discover a new source of income was referred to a Full Bench. After examining the authorities the full bench has held that:*

*"Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority ..... "*

*9. The principle culled out from the above judicial precedents clearly shows that words" enhance the assessment" are confined to the assessment reached through a particular process. It cannot be extended to the amount which ought to have been computed.*

*10. Hence, enhancement u/s 251 (1) (a) of the act is prohibited on the issues which have not at all been considered by the AO during assessment proceedings. Thus it is clear that the CIT (A) cannot enhance income of the assessee on altogether 'new Source'.*

*11. Therefore, the CIT(A) is not empowered to enhance the assessment taking an income which income was not considered expressly or by necessary implication by the Assessing Officer at all.*

***E) ILLEGAL ASSUMPTION OF JURISDICTION - AS THE LD. AO HAS OBTAINED MANDATORY PRIOR APPROVAL FROM JCIT INSTEAD OF PCIT I PCCIT***

*12, Notice u/s 148 dated 31.03,2021 for Asst Year 2015-16 was issued to the respondent assessee after the expiry of four years after obtaining prior approval from JCIT as mentioned in the said notice (Page 52),*

*13, Section 151 (pre-amended) of the Income Tax Act reads as under: 151. (1) No notice shall be issued under section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice,*

*14, Hon'ble Bombay High Court in the case of Voltas Ltd. Vs. ACIT (2022) 141 taxmann.com 127 held that as per provisions of Sec, 151(1) sanction of Commissioner or Principal Commissioner is a pre-requisite for issuance of a reopening notice under section 148 after expiry of four years from end of the relevant assessment year therefore the impugned notice issued with sanction of Addl. Commissioner and not Pr,CIT being legally invalid was liable to be set aside,*

*15, The Hon'ble Bombay High Court also in the case of Sidhmicro Equities (P) Ltd vs. DCIT (2023) 150 taxman.com 460 held that where AO issued reopening notice after obtaining necessary sanction from Addl. Commissioner since notice was issued beyond period of four year approval ought to have been obtained from Pr. Chief Commissioner /Chief Commissioner /Pr. Commissioner as per section 151 and thus, impugned notice was to be quashed.*

*16. Since in the case of the respondent assessee four years had already expired from the end of relevant assessment year as provided u/s 151 (1) of the Act (pre-amended), therefore, only the Pr. Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner could have accorded the sanction and not the Joint Commissioner of Income Tax. Therefore, the notice issued u/s 148 of the Act is bad in law. Consequently the impugned notice and subsequent assessment order passed on the basis of the said impugned notice needs to be quashed.*

*17. Valid sanction under section 15 I, an inbuilt check on the wanton exercise of power under section 147, cannot be reduced to mere formality. Sanction must be proper. [Ref:*

*United Electrical Co. Pvt. Ltd 258 ITR 317 (Del); Arjun Singh vs. ADIT 246 ITR 363 (MP); S.P.Agarwalla alias Sukhdeo Prasad Agarwalla vs. ITO 140 ITR 1010 (Cal)].*

*18. As the Ld. AO has not obtained mandatory prior approval from the appropriate sanctioning authority, as mandated under the law before issuing notice u/s 148, such notice must be treated as being issued without authority.*

***F) ILLEGAL ASSUMPTION OF JURISDICTION OWING TO NON FULLMENT OF JURISDICTIONAL CONDITIONS UNDER FIRST PROVISO TO SECTION 147 (PRE-AMENDED}***

*19. The first Proviso to section 147 (pre-amended) reads as under:*

*"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."*

*20. In absence of any failure on part of assessee to disclose fully and truly all material facts at time of assessment - Reassessment proceedings is held to be bad in law PCIT v. L&T Ltd. (2020) 113 taxmann.47/ 268 Taxman 391 (Bom.)(HC).*

*21. In a case Assessing officer wants to reopen an assessment beyond period of 4 years where the original assessment has been completed u/s. 143(3) of the Act the reasons recorded has to show that escapement of income is due to failure on part of assessee to disclose fully and truly all material facts necessary for his assessment} for that assessment year. There must be a live link between the reasons recorded and formation of the belief that income chargeable to tax has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment which must not be fanciful or based on suspicion. Both the conditions must co-exist in order to confer jurisdiction on the assessing officer. Of course} the assessee is required to make a true and full disclosure of the primary facts at the time of the original assessment.*

*22. Having concluded that all the material facts were fully and truly disclosed by the assessee at the time of original assessment} invoking the provisions of S. 147 after the expiry of four years from the end of the relevant asst. year was not valid. German Remedies Ltd v. DCIT (2006) 287 ITR 494 (Bom.)(HC) CIT v. Former France (2003) 264 ITR 566 (SC) Tata Business Support Services Ltd. v. Dy. CIT (2015) 232 Taxman 702 (Bom.)(HC).*

***G) ILLEGAL ASSUMPTION OF JURISDICTION OWING TO DELAY G) ILLEGAL ASSUMPTION OF JURISDICTION OWING TO DELAY IN ISSUANCE OF NOTICE U/S.148***

*23. Notice under Section 148 of the Act, 1961 for the Assessment Year 2015-16 was digitally signed by the Assessing Officer on 31.3.2021. It was sent to the respondent assesse through e- mail and e-mail was undisputedly received by the respondent assessee on his registered e-mail on 01.04.2021 at 5.29 AM {Page 531*

*24. There is no dispute that the notice must be issued by the Assessing Officer within the time limit as provided in Section 149 of the Act, 1961. Section 282 of the Act, 1961 provides for mode of service of notices. Section 282A provides for authentication of notices and other documents by signing it. Sub- Section 1 of Section 282 A uses the word "Signed" and "issued in paper form" "or "communicated in electronic form by that authority in accordance with such procedure as may be prescribed", Thus, signing of notice and issuance or communication thereof has been recognized as different acts.*

*25. Section 13 of the Information Technology Act, 2000 reads as under: Time and place of dispatch and receipt of electronic record.- (1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*

*26. Rule 127 A(l) of the Income Tax Rules 1962 provides that very notice or other document communicated in electronic form by an authority under the Act shall be deemed to be authenticated in case of electronic mail or electronic mail message (e-mail) if the name and office of such income tax authority is printed on the e-mail body, if the notice or other document is in the e-mail body itself or is printed on the attachment to the e-mail, if the notice or other document is in the attachment and the e-mail, is issued from the designated e- mail address of such income tax authority. Thus, the issuance of notice and other document would take place when the email is issued from the designated e-mail address of the concerned income tax authority.*

*27. After digitally signed the notice, the income tax authority has to issue it to the assessee either in paper form or through electronic mail. Sub-Section (1) of Section 13 of the Act 2000 provides that*

*dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. The aforesaid sub Section (1) of Section 13 indicates the point of time of issuance of notice. Therefore, after a notice is digitally signed and when it is entered by the income tax authority in computer resource outside his control i.e. the control of the originator then that point of time would be the time of issuance of notice.*

*28. Honorable Allahabad High Court vide Para 29, in the case of Daujee Abhushan Bhandar Vrs U'Ol Writ Tax No. 78 of 2022 dated 10.03.2022 has held as under: "Thus, considering the provisions of Section 282 and 282 A of the Act, 1961 and the provisions of Section 13 of the Act, 2000 and meaning of the word "issue" we find that firstly notice shall be signed by the assessing authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the Act, 2000 provides that unless otherwise agreed, the dispatch of an electronic record occurs when it enters into computer resources outside the control of the originator. Thus, the point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator i.e. the assessing authority that shall the date and time of issuance of notice under section 148 read with Section 149 of the Act, 1961".*

*29. In the case on hand the notice u/s 148 dated 31.03.2021 was digitally signed by the Ld AO on 31.03.2021, but entered the computer resources outside the control of the originator on 01.04.2021 at 5.29 AM. Hence the date 01.04.2021 should be considered as the point of issue of the said notice. Further. the Ld AO has himself admitted vide Para 3 (Page 64) of the order u/s 148A(.d) dated 29.07.2022 that notice u/s 148 dated 31.03.2021 was actually delivered after 31.03.2021 and termed the said notice as 'extended reassessment notice'. Reliance is further placed on the decision of the Delhi HighCourt in the case of Suman feet Agrawai Vrs ITO WPC 10/2022 dated 27.09.2022.*

*30. Since the notice-u/s 148 was Issued on 01.04.2021, the Income Tax Act as amended vide Finance Act 202 I, as prevailing on the date of issue shall come into play as per the settled jurisprudence of law on the subject matter. Moreover, in the cases where 'extended reassessment notices' were issued during the period 01.04.2021 to 30.06.202t mandate of the honorable Apex Court in the case of Ashish Agarwal, must be followed and complied with.*

*31. Since the department has followed the pre-amended (old provisions) of law on reopening of cases, as existed till 31.03.2021. while making reassessment. starting from issuance of 148 notices till the stage of making final order, the whole exercise is bad in law and void ab initio .*

***H) ILLEGAL ASSUMPTION OF JURISDICTION OWING TO NON ADHERANCE TO CBDT INSTRUCTION DATED 31.01.2011 ON PECUNIARY LIMIT***

*32. That, the CBDT vide Instruction No: 01 of 2011, dated 31/01/2011 w.e.f 01/04/2011, for assigning the cases for Assessment, has fixed the monetary limit based on Returned Income which are as under:*

*1. (i). ITO: (For Non Corporate Assessee - Metro Cities): Up to Rs.20.00 Lacs. Non Metro Cities - Up to Rs.15.00 Lacs. (ii). ITO: (For Corporate Assessee - Metro Cities): Up to Rs.30.00 Lacs. For Non Metro Cities: Up to Rs.20.00 Lacs.*

*2. Metro Cities: Ahmedabad, Bangalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune)*

*3. All other cities are Non Metro Cities.*

*4. Any Return filed which is in excess of the limits specified for ITOs, the assessment has to be completed by ACIT /DCIT. For non-corporate assessee - Non Metro Cities, having returned income of more than Rs.15 Lakhs, the jurisdiction lies with ACIT /DCIT.*

*33. The returned income for Asst Year 2015-16, in the case of the respondent assessee was Rs. 29,01,910.00.*

*34. In the case on hand, 'Income Tax Officer' instead of ACIT / DCIT (Page 52) has assumed jurisdiction to proceed with reassessment and thereby violated the instructions of CBDT Instruction dated 31.01.2011.*

*35. Where pecuniary Jurisdiction given to the particular Income Tax Authorities on the basis of CBDT Instruction NO: 01 OF 2011 dated 31/01/2011, is not being followed and the assessment order is passed by a non-competent authority, such assessment order is null and void.*

*36. The above proposition of law is supported by following decisions of the honorable Income Tax Tribunals: (a) ITO Vs. Arti Securities & Services Ltd (Lkw Trib.) (b) Bhagyalaxmi Conclave Pvt Ltd Vs. DCIT (Kol Trib.) (c) Soma Ray Vs. ACIT (Kol Trib.) (d) Krishendu Chowdhury Vs. ITa (Kol Trib.)*

***OUR SUBMISSION ON LEGAL/ TECHNICAL ISSUE:***

***I) ORDER U/S 147 ISSUED UNDER OLD LAW BECOMES INFROCTUOUS AFTER INTIATING THE PROCESS OF 148A***

***FOLOWING SC JUDGMENT***

*37. That after following the judgment of honourable Supreme Court in the case of Ashish Agrawal, the Ld AO proceeded with issuance of 148A(b) notice dated 02.06.2022 (Page 58) and subsequent issuance of order u/s 148A(d) dated 29.07.2022 (Page 62).*

*38. After following the procedure laid down by the Supreme Court in the case of Ashish Agrawal, the Ld AO vide Para 7 (Page 66) of the Order u/s 148A(d) dated 29.07.2022 decided to drop the case by coming to the conclusion that it is NOT A FIT CASE FOR ISSUANCE OF 148 NOTICE.*

*39. Thus, the order u/s 147 dated 31.03.2022 which was issued, basing upon the old provisions of law and subsequent following the procedure laid down by the Supreme Court in the case of Ashish Agrawal in issuance of order u/ s 148A( d) and non- issuance of fresh notice u/s 148, becomes infructuous.*

***J) NON ISSUANCE OF FRESH NOTICE U/S 148 AFTER FOLLOWING SC JUDGMENT IN ASHISH AGARWAL, LEADS TO CLOSURE OF THE CASE***

*40. After following the judgment of the Apex Court in the case of Ashish Agrawal and proceeded with issuance of notice u/ s 148A(b) dated 02.06.2022, the whole exercise itself demonstrates acceptance of the case by the department being not a fit case to proceed further and according and purposefully no order u/ s 147 was issued.*

*41. Keeping the order u/s 147 dated 31.03.2022 alive which has become infructuous, is bad in law.*

***K) PROVISIONS OF 40A(2)(b) ARE NOT APPLICABLE TO COOPERATIVE SOCIETIES***

*42. That the Hon'ble Bombay High Court in the case of CIT vs Manjara Shetkari Sahakari Sakhar Karkhana Ltd. 301 ITR 191 (2008) has held that tithe section 40A(2) does not apply to the co-operative society, hence no disallowance under that section can be made in the assessment of the Cooperative society".*

*43. In Para 10, 11 and 12, the Hon'ble High Court says as under:*

*"10. The question as to whether section 40A(2) of the Act applies to a co-operative society or not has been considered by this Court in the case of Shivamrut Doodh Utpadak Sahakari Sangh Maryadit, Akluj. While dismissing the Tax Appeal No. 62 of 1999 filed by the revenue (CIT v. Shivamrut Doodh Utpadak Sahakari Sangh Maryadit),7-12-1999 this Court confirmed the decision of the Tribunal and held that section 40A(2) of the Act does not apply to a co-operative society.*

*11. In the case of Shivamrut Doodh Utpadak Sahakari Sangh (supra) the question raised was whether the words "Association Of Persons" (A.O.P.) in section 40A(2) would include a co-operative society? It was held that the word A.O.P' in section 40A(2) would not include a co-operative society, because firstly, section 2 (19) of the Act defines a co- operative society to mean a co-operative society registered under the Co-operative Societies Act, 1912 or under any other law for the time being in force. Section 40A(2) applies to the persons specifically namely therein and since 'Cooperative Society' does not appear in section 40A(2) (b), the said Section would not apply to a Co-operative Society. Secondly, a co- operative society formed on the doctrine of mutuality is entitled to deduction under section 80P of the Act, whereas, no such deduction is not available to an A.O.P. This clearly shows that under the Income-tax Act, Co-operative Society is different from A.O.P. Thirdly, co-operative societies are distinctly referred to in various sections of the Act e.g., [sections 2(18)(ad), 2(24) (vii), 27(iii), 36(1)(ia), 40(ba), 45(3), 80L(1) (ii]. (vi), (via), (viii), (ix), 80P, Explanation 1 (b)(i) to section 139(1) prior to Finance Act, 2001] 193 (iib), 194A (3)(i), (v), 269T and 269 (V A). In these circumstances, it was held that under the Income-tax Act 'Co-operative Society' is distinct from 'association of persons' and since the word 'co-operative society' does not appear in section 40A(2) of the Act, disallowance under section 40(A)(2) cannot be made in the case of a co-operative society.*

*12. Accordingly, in the light of the decision of this Court in the case of Shivamrut Doodh Utpadak Sahakari Sangh Maryadit (supra), we answer the first question in favour of the assessee and against the revenue."*

***L) EXISTANCE OF CLEARCUT DISTINCTION BETWEEN REPORTING REQUIREMENT IN FORM 3CD BY AUDITOR AND DISALOWANCE BY THE ASSESSING OFFICER***

*Clause 23 of Tax Audit Report in Form 3CD requires reporting of 'Particulars of payments made to persons specified under section 40A(2) (b)' (Page-S).*

*45. Clause 23 of the Form No. 3CD requires only actual payments to persons specified in section 40A(2) (b) to be reported. [Film Shoppe (India) Pvt. Ltd. vs. ITO (ITA No. 2019/Mum/2003) (Mum-Trib.).*

*46. The tax auditor is expected to give the particulars of payments for goods or services or facilities to the persons specified in section 40A(2)(b) and not his opinion whether the payment made is excessive or unreasonable. Further, there is no requirement of reporting of fair market value.*

***M) ASSESSING OFFICER HAS TO DEMOSTRATE EXCESSIVENESS OR UNREASONABLENESS IN ORDER TO MAKE DISALLOWANCE U/S 40(2)(b)***

*47. Section 40A(2) of the Income Tax Act, 1961 relates to disallowance of expenditure paid to a related party which is excessive or unreasonable compared to the fair market value of the goods. services or facilities. Section 40A(2)(a) empowers the assessing officer to disallow such excessive or unreasonable part of the expenditure claimed by the assessee which is paid to the related party whereas section 40A(2) (b) lists out the persons who and when can be treated as 'related parties' for the purpose of income tax.*

*48. For an amount to be disallowed under this section, following conditions have to be fulfilled-*

*(i) the payment is in respect of any expenditure*

*(ii) the payment has been made or is to be made to a person specified in section 40A(2)(b) (hereinafter referred to as specified person or related person) In respect of such expenditure*

*[iii] the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to:*

*[a] the fair market value of the goods, services or facilities for which payment is made; or*

*[b] the legitimate business needs of the assessee's business or profession; or*

*(c) the benefit derived by or accruing to the assessee from the payment. If any of the above conditions is satisfied, then so much of the expenditure as is so considered by the Assessing Officer to be excessive or unreasonable, shall not be allowed as a deduction.*

*49. It has been held in the case of CIT vs Johnson & Johnson Ltd. (2017) 80 taxmann.com 337 (Born) that where no exercise was done by revenue nor even a remote attempt was made to establish that professional fees paid to advocate firm was excessive, no disallowance could be made on such payment.*

*50. The reasonableness of any expenditure is to be judged having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession or the benefit derived by, or accruing to, the taxpayer from the expenditure. Such portion of the expenditure which, in the opinion of the Income-tax Officer, is excessive or unreasonable according to these criteria is to be disallowed in computing the profits of the business or profession.*

*51. The onus is on the Revenue to prove that the assessee has made excessive and unreasonable payment to the sister concern for making the disallowance u/s 40A(2)(b) [DCIT v Computer Graphics Ltd. 285 ITR 84 (Mad)).*

*52. Even though assessee had made payments to related parties} if there was no material on record to demonstrate that payment made was excessive and unreasonable having regard to market rate} disallowance under section 40A(2) by AO cannot be made. [Motilal Laxmichand Sanghavi Vs ACIT (ITA Nos. 3110 to 3112 012018) [Mum-Trib.]*

*PRAYER*

*In view of the above particular facts & circumstances} the appeal order passed u/s 250 emanating from assessment order u/s 147 r.w.s 143 (3)} is neither sustainable in the eye of law nor based on proper facts. Hence the appellant prays your honour for justice by canceling the demand raised in toto. For this act of your kindness the appellant shall remain ever obliged.*

*For the Respondent*
*Sd/-*
*A K Agrawala, FCA*
*(Authorized Signatory)*

*Date: 04.09.2024*
*Place: Cuttack*

13. *Per Contra*, the ld. CIT-DR supported the orders of the AO, and submitted that the department is in appeal against the addition deleted by the ld. CIT(A), where the ld. CIT(A), NFAC has estimated the income of the assessee at Rs.46,64,000/- as against the disallowance of Rs.5,44,88,752/- made by the AO u/s.40A(2) of the Act. He, thus, requested for restoration of the reassessment order passed by the AO.

14. We have considered the rival submissions and perused the material available on record. At the outset, from bare perusal of the notice u/s.148 of the Act, it is evident that the satisfaction was recorded by the AO and necessary approval was obtained from the JCIT, Range Rourkela for the impugned year. In this regard, the provisions of Section 151 of the Act regarding sanction for issue of notice, are reproduced hereunder :-

***151. Sanction for issue of notice.***

*Specified authority for the purposes of Section 148 and Section 148A shall be,-*

*(i) Principal Commissioner or Principal Director or Commissioner Director, if three years or less than three years have elapsed from the end of the relevant assessment year,*

*(ii) Principal Chief Commissioner or Principal Director General or*** Chief Commissioner or Director General, if more than three years have elapsed from the end of the relevant assessment year:]*

*Provided that the period of three years for the purposes of clause (1) shall be computed after taking into account the period of limitation as excluded by the third or fourth or fifth provisos or extended by the sixth proviso to sub-section (1) of section 149.]*

15. As per Section 151(1) of the Act, any notice issued after four years from the end of the relevant assessment year should contain an approval from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner wherein satisfaction has to be reached on the sufficiency of reasons recorded by the AO being a fit case for issue of notice u/s.148 of the Act. In the instant case, as is clear from the notice u/s.148 of the Act itself that the approval was obtained/granted by the JCIT Rourkela, who is not competent for making such approval as in this case four years have elapsed from the end of the relevant year, therefore, notice issued u/s.148 is without proper sanction and is liable to be quashed. The Hon’ble Jurisdictional High Court in the case of M/s Ambika Iron and Steel Pvt Ltd. Vs. Pr.CIT & Ors. passed in W.P.(C) No.20919 of 2021, dated 24.01.2022 along with other connected cases, has held as under :-

> *6. Indeed in the notice issued under Section 148 of the IT Act on 31st March, 2021 which has been challenged in W.P.(C) No.41826 of 2021 it has been stated that the notices had been issued after obtaining "necessary satisfaction of the Jt. CIT Range-I, Cuttack" whereas the Officer authorized to record the necessary satisfaction had to be the Chief Commissioner of Income Tax / Commissioner of Income Tax.*
>
> *7. For all the aforesaid reasons, in each of the above cases, the impugned notice under Section 148 of the IT Act is hereby quashed. The writ petitions are allowed, but in the circumstances, with no order as to costs.*

16. Since this issue has been decided in favour of the assessee by the Hon'ble Jurisdictional High Court, thus, by respectfully following the order of the Hon'ble High Court in the above case cited supra, we hold that the notice u/s.148 of the Act is without proper satisfaction and sanction of competent authority. The assessee succeeded on this legal objection.

17. The other issue taken by the assessee is with regard to the issue of notice on 01.04.2021 where the law as amended vide Finance Act, 2021 has come into force. As per the certified copy supplied by the AO vide dated 09.07.2024 it is clear that the notice u/s.148 of the Act dated 31.03.2021 was sent and delivered to the assessee on 01.04.2021 at 5.29 AM through email and not on 31.03.2021, therefore, if the notice u/s.148 of the Act is issued on or after 01.04.2021, the amended provision of Section 148A of the Act by the Finance Act, 2021 are applicable. In the instant case, the assessment has been completed on the basis of the proceedings initiated by a notice issued u/s.148 of the Act dated 31.03.2021. Further the proceedings were also initiated under the amended Act u/s.148A of the Act which were dropped by the authorities by observing that it is a mere change of opinion since the reassessment

has already been done as a consequence of proceedings initiated u/s.148 of the Act vie notice dated 31.03.2021. This being so, we are of the considered view that when the notice u/s.148 of the Act dated 31.03.2021 was not issued nor served upon the assessee within the closing hours of 31.03.2021 and the proceedings under amended Act vide Finance Act, 2021 stood dropped by the department, the consequential order passed is liable to be quashed.

18. With regard to the Cross Objection of the assessee that the notice u/s.148 of the Act was violated the Instruction No.1/2011 issued by the CBDT, we find that similar issue came before us in the case of Shree Deosharwali Oil Industries, passed in ITA No.167/CTK/2024, order dated 29.07.2024, wherein by following the decision of the Hon'ble Kolkata High Court in the case of Shree Shoppers Ltd., passed in ITAT/39/2023 IA No.GA/1/2023, dated 15.03.2023, the proceedings initiated u/s.148 of the Act were quashed by observing as under:-

> *10. We have considered the rival submissions. CBDT vide its instruction No.1/2011 (supra) has issued specific instruction in regard to pecuniary jurisdiction. If the Sub-ordinate Officer was not competent to issue notice u/s.148 of the Act, it has to be issued by a higher authority, then there was no reason for CBDT to issue such instruction. It is possible that a Senior Officer assumed the jurisdiction of a Sub-ordinate Officer but the reverse is not possible and should that argument is accepted, nothing could stop the Income Tax officer for assuming the duty from a Senior Officer also. Now coming to the issue of Section 292BB, a perusal of the same would clearly show that, that was a case where a valid notice has been issued and the assessee has cooperated in such proceedings. That is a provision to protect the issuance of notice more so service on the AO, it does not protect invalid issuance of notice on account of jurisdiction. Section 292 B is for blocking Page7|8 Assessment Year : 2018-2019 the invalidation for reasons of any mistake, defect or omission to protect a notice which has been issued without jurisdiction. In the present case, admittedly, the*

> *Assessing Officer who has issued the notice u/s.148 of the Act, did not have the pecuniary jurisdiction in view of the instruction issued by CBDT (supra). This being so, respectfully following the principles laid down by Hon'ble Calcutta High Court in the case of Shree Shoppers (supra) as also the decision of the Co-ordinate Bench of Kolkata Tribunal in the case of Shivam Finance (supra), it is held that notice issued u/s.148 of the Act is bad in law and consequential assessments are also bad in law.*

19. Thus, by respectfully following the decision of the Hon'ble Kolkata High Court and the decision of the coordinate bench of the Tribunal, referred to supra, we are of the view that the notice issued u/s.148 of the Act by the ITO, Ward-1, Jharsuguda is without jurisdiction, therefore, consequential reassessment proceedings should be quashed. Assessee succeeded on this cross objection also.

20. Another technical objection taken by the assessee is with regard to the application of the provisions of Section 40A(2)(b) of the Act in respect to the cooperative societies. Admittedly, in this case the sole reason for reopening of the completed assessment was that the assessee has not made any disallowance u/s.40A(2)(b) of the Act for the payments made to the related parties which were identified by the auditor in the tax audit report filed in Form 3CD. The assessee being cooperative society and the payments are made to its members, the same is not covered under the provisions of Section 40A(2)(b) of the Act as a cooperative society forms on the principle of mutuality where the income distributed between the members is exempted in the hands of the members. Similar issue has been decided by the Hon’ble Bombay High Court in the case of CIT Vs. Manjara Shetkari Sahakari Sakhar Karkhana Ltd., reported in 301 ITR 191 (Bom), wherein the Hon’ble High Court has held that provision

u/s.40(2)(b) of the Act are not applicable to the cooperative societies. We, thus, respectfully following the order of the Hon'ble Bombay High Court in the case of Manjara Shetkari Sahakari Sakhar Karkhana Ltd. (supra), hold that the provision u/s.40A(2)(b) of the Act are not applicable in the case of the assessee being a cooperative society.

21. In view of the above discussions, we are of the considered view that the notice u/s.148 is without jurisdiction and, therefore, bad in law and thus, all the consequential proceedings are hereby quashed.

22. Since we have allowed the cross objections taken by the assessee without regard to the legality of notice issued u/s.148 of the Act, the other cross objection taken by the assessee on merits and also the grounds of appeal taken by the revenue in its appeal which relates to the issues on merit are become academic and, therefore, are not adjudicated upon.

23. In the result, cross objection of the assessee is allowed and appeal of the Revenue is dismissed.

Order dictated and pronounced in the open court on 04/09/2024.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(GEORGE MATHAN)** | **(MANISH AGARWAL)** |
| **न्यायिक सदस्य / JUDICIAL MEMBER** | लेखा सदस्य/ **ACCOUNTANT MEMBER** |

**कटक** Cuttack; दिनांक Dated 04/09/2024
*Prakash Kumar Mishra, Sr.P.S.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/** BY ORDER,

(**Assistant Registrar**)
**आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack**