

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No. 4451/MUM/2024  
Assessment Year: 2014-15**

Assistant Commissioner of Income Tax-3, Thane	Vs	Premier Marine Products Pvt. Ltd., 3rd Floor, D Wing Amerchand Mansion, 16 Madam Cama Road, Colaba, Mumbai 400039 (PAN : AAHCP1350N)
<b>(Appellant)</b>		<b>(Respondent)</b>

**Present for:**

Assessee : Shri Nitesh Joshi Advocate, and  
Shri Pratik Mehta, CA

Revenue : Shri R. A. Dhyani, CIT DR

Date of Hearing : 26.11.2024

Date of Pronouncement : 21.02.2025

**ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the Revenue is against the order of Ld. CIT(A), Pune-11, vide order no. ITBA/APL/S/250/2024-25/1065665358(1), dated 14.06.2024, passed against the assessment order by Assistant Commissioner of Income Tax, Circle – 3, Thane, u/s. 143(3) r.w.s. 153A of the Income-tax Act (hereinafter referred to as the "Act"), dated 24.12.2019 for Assessment Year 2014-15.

2. Grounds taken by the Revenue are reproduced as under:

1. *"On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in holding that Assessing officer has not disputed that the payments for wages were made directly to individual labour without appreciating the fact that the Assessing Officer held that as per exclusive clause in the agreement between the assessee and the*

*Contractor, the assessee had deducted TDS u/s 194C of the Act and the contractors had claimed expenses in their P&L A/c establishing that the said payment was not made to the labourers directly by the assessee.*

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the fact that in the subsequent year, on the same terms and conditions of the agreement, the assessee had made payment to the contractor by cheque directly and not to the labourers.”*

3. Facts of the case are that assessee is in the business of processing of sea food, i.e., procuring raw material, processing, packing and export of shrimps and fish. In the present case, impugned assessment order arises out of search and seizure operations u/s. 132 carried out on the business as well as residential premises of Liberty Group including assessee on 05.10.2017. Case of the assessee was centralised with Central Circle-3, Thane, vide order dated 24.08.2018. Notice u/s.153A was issued on 13.09.2019 for Assessment Years 2012-13 to 2017-18. Pursuant to this notice, assessee filed its return of income for Assessment Year 2014-15 on 12.10.2019, reporting total income at Rs.2,17,59,240/-, which is same as originally reported in return filed u/s.139(1) on 19.09.2014.

3.1. Prior to the impugned assessment proceedings u/s.153A r.w.s. 143(3), case of the assessee for the year under consideration i.e. Assessment Year 2014-15 was subjected to scrutiny assessment u/s.143(3) for which assessment order was passed on 08.12.2016. In this assessment order, in para 3, ld. Assessing Officer noted that “On perusal of submissions made by assessee, it is noticed that the assessee made payment of Rs.1,42,71,871/- as processing charges to Shri M. Marthandan and Rs.2,47,07,215/- as contract payment to Ms. Thenmozhi by way of cash. All the above said payments are more than Rs.20 thousand which violates section 40A(3) of IT Act” [emphasis supplied by us by underline]. Accordingly, after issuing show cause

notice, ld. Assessing Officer disallowed these payments u/s.40A(3) and completed the said assessment by recording the following reasons-

- i. *On perusal of the ledgers, the payments were made directly to Mr. Marthandam and Mrs. Thenmozhi as contract payments and processing charges and not towards labours in lieu of wages as claimed by it.*
- ii. *The assessee was not able to furnish any direct evidence to show that the payments were directly made to labourers towards wages as agent. The assessee had also not claimed these payments as either wages or salary but only as contract payments falling u/s 194C and the assessee had also deducted TDS on the said payments.*
- iii. *The assessee's contention that there are no banking facility in the area was also not accepted as there was a ATM of Lakshmi Vilas Bank and another Pandian Gramin Bank. Hence, the claim for exemption u/s 40A(3) r.w.r. 6DD(g) was not accepted.*
- iv. *There was no evidence produced to substantiate the claim of the assessee that the wages was disbursed in cash to ensure continuous production without disruption of production process.*
- v. *The assessee's claim that this method of payment of labour on account of the contractor is the prevalence in the trade and that these were just payments and not expenditure. However, the assessee itself had deducted TDS u/s 194C and claimed the expenses in their P & L a/c.*
- vi. *Vi The assessee's submission that their case is covered by Rule 6DD(k) as the contractor acted only as an agent was also not accepted by the AO as the assessee failed to substantiate the said claim. Since the payments having been made under section 194C as contract payments by way of cash, the same cannot be allowed in view of the provisions of section 40A(3) of the Act.*

3.2. On appeal before the ld. CIT(A), disallowance made by ld. Assessing Officer were sustained. Assessee went in further appeal before the Coordinate Bench of ITAT, Chennai, who restored the file to the ld. Assessing Officer for re-adjudication on the issues relating to disallowance u/s 40A(3) raised in the appeal. The observations and findings of Coordinate Bench vide its order dated 07.02.2018 in ITA No.1733/CHNY/2017, in this respect is reproduced as under:

*6. A perusal of the facts in the present case clearly shows that the issue of disallowance by invoking the provisions of Sec. 40A(3) has been initiated by the AO only on 30.11.2016. A perusal of the letter of the assessee dated 02.12.2016 also clearly shows that the letter is in response to the discussion, the assessee's representative had with the AO. A perusal of the consignment tracking shows that the show cause notice issued by the AO on 30.11.2016 has*

*been served on the assessee only on 05.12.2016. To this, the assessee has filed a letter dated 07.12.2016 seeking a short adjournment till 14.12.2016. It is noticed that the assessee has also complied with the show cause notice by filing the details on 14.12.2016. However, it is noticed that the Assessment Order has been passed on 08.12.2016. Thus, it is noticed that the AO did not have the benefit of the details submitted by the assessee in his letter filed on 14.12.2016 when he made the assessment on 08.12.2016. There are substantial issues which are raised in the reply of the assessee filed on 14.12.2016. The said evidences produced also given credence to the claim of the assessee that it was making payments directly to the contract workers supplied by the two labour contractors appointed by the assessee. However, these evidences need to be examined by the AO. In these circumstances, we are of the view that the issues in the assessee's appeal must be restored to the file of the AO for re-adjudication and we do so. In these circumstances, the issues in this appeal are restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard.*

[emphasis supplied by us]

4. On the above facts, it is important to take note of chronology of events as submitted by the assessee before us to delve into the issues:

Sr. No.	Date	Particulars
A	08/12/2016	The Assessee's case for AY 2014-15 was selected for scrutiny. Assessment order u/s 143(3) dated 08/12/2016 was passed by the Assessing Officer, Chennai. The Ld. Assessing Officer made total addition of Rs. 3,89,79.0867- u/s 40A(3) disallowing payments of Rs, 1,42.71.8717- (processing charges) and Rs. 2,47,07,2157- (contract payment).
B	31/05/2017	Being aggrieved, the Assessee preferred appeal before the CIT(A). Chennai. The CIT(A) upheld the disallowance of Ld. Assessing Officer vide order dated 31/05/2017
C		Being aggrieved, the Assessee preferred appeal before the Hon'ble ITAT Chennai.
D	05/10/2017	Search and seizure operations u/s 132 of the Income Tax Act were carried out on the Assessee on 05/10/2017.
E	07/02/2018	The Hon'ble ITAT, Chennai vide order dated 07/02/2018 restored the Assessee's appeal to the file of the Assessing Officer for re-adjudication.
F	24/12/2019	The Ld. Assessing Officer framed order u/s 143(3) r.w.s. 153A of the Income Tax Act dated

		24/12/2019 disallowing payments of Rs. 1,42,71,8717- (processing charges) and Rs. 2.47.07.2157- (contract payment) aggregating to Rs. 3,89,79,086/- u/s 40A(3). No incriminating evidence was found against the Assessee in the course of search operations, which fact is evident from the assessment order framed u/s 143(3) r.w.s. 153A.
G	14/06/2024	Being aggrieved, the Assessee preferred appeal before the ld. CIT(A). The Ld. CIT(A)-11 vide order dated 14/06/2024 allowed the Assessee's appeal in toto.
H		Being aggrieved, the Department is in appeal before the Tribunal in this appeal.

4.1. From the above chronology, most clinching fact in the context of present appeal is that search and seizure operation u/s.132 were carried out on the assessee on 05.10.2017 and the order of Coordinate Bench of ITAT, Chennai restoring the appeal of the assessee to the file of ld. Assessing Officer for re-adjudication was pronounced on 07.02.2018, i.e., subsequent to the date of conduct of search. Taking into consideration this crucial fact, it is important to understand whether the impugned year under consideration, i.e., Assessment Year 2014-15 is an abated year or otherwise, as referred to in section 153A. We make this observation because both, ld. Assessing Officer and ld. CIT(A) in their respective orders have noted that the assessment gets abated in reference to the directions of ITAT. Ld. Assessing Officer has noted this aspect of assessment getting abated in para-7 and ld. CIT(A) in para-3 of his order.

4.2. Now to deal with this aspect of the case, we find that Revenue is in appeal contesting on the merits of the case, since ld. CIT(A) has deleted the disallowances made by ld. Assessing Officer. Assessee has not filed its cross objection or cross appeal to challenge the above

stated aspect of the case. However, assessee has moved an application before the Bench, dated 22.11.2024 whereby it is contested that as on the date of search, there was no assessment or re-assessment pending in accordance with second proviso to section 153A. Further, there is no incriminating material found during the course of search of the assessee for the purpose of making impugned disallowance u/s.40A(3) in accordance with fourth proviso to section 153A as well as decision of Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell Pvt. Ltd. [2023] 454 ITR 212 (SC). Thus, assessee through this application contends that it is entitled to raise a ground of appeal on law as a defense despite not raising this issue before the authorities below. Assessee thus, raised the contention in its application that "*the assessment order, dated 24.12.2019, passed by the DCIT, CC-3, Thane, u/s.153A r.w.s. 143(3) of the Income-tax Act is without jurisdiction in the absence of any incriminating material being found in the course of search*". Through this application, assessee requests to admit this contention/ground of appeal which is signed by the Director of the assessee.

5. On this submission by the assessee, we refer to Rule 27 of Income Tax (Appellate Tribunal) Rules, 1963 (hereinafter referred to as ITAT Rules) which is reproduced as under:

*"Respondent may support order on grounds decided against him*

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

5.1. Assessee (respondent before the Tribunal) admittedly, did not file a cross appeal or cross objection u/s.253(4) of the Act and has sought to invoke Rule 27 of the ITAT Rules to question the validity of proceeding u/s.153A by contesting that additions made are not based on incriminating material found and seized during the course of search of the assessee. On confrontation of the contentions raised by

the assessee to Id. Sr. DR, it was strongly objected upon, since assessee did not file cross objection or cross appeal and has raised this issue for the first time before the Tribunal by resorting to an application and invoking Rule 27 of ITAT Rules in the course of hearing. Id. Sr.DR has made a written submission which is perused and considered. In the said submission, while narrating basic details of the case, it is stated that the said set aside proceedings vide order of the Coordinate Bench of ITAT Chennai got abated and the said issue was dealt by the Assessing Officer in the assessment proceedings u/s. 153A of the Act. He justified the disallowance made by Id. Assessing Officer by dealing with the merits of the case.

6. From the submissions made by both the parties, we find that it is the jurisdictional objection which has been raised by the assessee in its application contending that disallowance u/s.40A(3) has been made without jurisdiction in absence of any incriminating material found and seized during the course of search of assessee. We note that jurisdictional question raised before us is not an independent issue. Rule 27 cannot be read in a restrictive manner, such that subject matter of appeal before the Tribunal should be confined only to the extent of grounds urged by the appellant. Subject matter in appeal is to be comprehended so as to encompass the entire controversy between the appellant and respondent which is to be adjudicated upon by the Tribunal. The jurisdictional issue raised by the assessee is interlinked with the grounds of appeal raised by the Revenue in its appeal and therefore its adjudication has direct impact on the outcome of the appeal filed by the Revenue. Validity of impugned assessment proceedings goes to the root of the matter and therefore assessee cannot be precluded from raising the jurisdictional issue which forms the very basis for making disallowance by the Id.

Assessing Officer in the impugned assessment. Rule 27 embodies a fundamental principle that a respondent who may not have been aggrieved by the final order of the authority below or the court and therefore has not filed an appeal against the same, he is entitled to defend such an order before the appellate forum on all grounds, including the ground which has been held against him by the authority below, though the final order is in its favour.

6.1. In the present case before us, assessee succeeded before the ld. CIT(A) on the merits of the case and therefore is not an aggrieved party to that extent. Revenue has come up before the Tribunal challenging the merits of the case for the relief granted by ld. CIT(A). Assessee as a respondent has raised the ground of maintainability of the impugned disallowance by invoking Rule 27 of ITAT Rules vide its application dated 22.11.2024. We are therefore, inclined to take up the jurisdictional issue raised by the assessee vide its application, keeping in juxtaposition, the entire discussion made hereinabove.

6.2. For the above, we draw force from the decision of Hon'ble High Court of Delhi in the case of Sanjay Sawhney v. PCIT [2020] 116 taxmann.com 701 (Del) which elaborately dealt with the invocation of Rule 27 of the ITAT rules.

6.3. Thus, we need to look into the fulfilment of jurisdictional parameters u/s.153A for the disallowance made by ld. Assessing Officer who held that the proceedings for the year under consideration is abated pursuant to order of Coordinate Bench, whereby the issues were restored to the file of ld. Assessing Officer for re-adjudication.

7. *Prima facie*, non-compliance with jurisdictional parameters prescribed u/s.153A are to be read with decision of Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd. (supra) and if the same are established, will go to the root of the matter. We make a useful reference to the conclusions drawn by Hon'ble Supreme Court in the case of Abhisar Buildwell (supra) which has dealt with additions/disallowances to be made for the years abated and otherwise, while applying provisions of section 153A. Para – 14 of this decision is extracted below:

*“14. In view of the above and for the reasons stated above, it is concluded as under:*

- i. that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A,*
- ii. all pending assessments/reassessments shall stand abated,*
- iii. in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns, and*
- iv. in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby. in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.*

*The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs.”*

7.1. Hon'ble Court refers to un-abated/completed assessments in para 14(iii) and (iv) to determine assumption of jurisdiction by the Assessing Officer to assess or re-assess total income by taking into

consideration incriminating material unearthed during the search. It very specifically pointed out that in respect of un-abated/completed assessments, no addition can be made by the Assessing Officer in absence of any incriminating material found during the search. Though it made an observation that such assessments can be reopened by the Assessing Officer in exercise of powers u/s.147/148 subject to fulfilment of conditions as mentioned under these sections and those powers are saved.

8. In this backdrop, the moot point before us is to first decide as to whether the impugned assessment year 2014-15 is an abated year or otherwise. For this, we have taken note of the clinching fact from the chronology of event already tabulated above. From this, it very clearly emerges that on the date of search, i.e., 05.10.2017, what was pending was appeal by the assessee before the Tribunal against assessment completed u/s.143(3) contesting disallowances made u/s.40A(3). The Coordinate Bench pronounced its order on 07.02.2018, i.e., subsequent to the conduct of search, whereby it restored the issues to the file of Assessing Officer for re-adjudication. Thus, as contemplated in second proviso to section 153A, on the date of search, neither assessment nor re-assessment was pending so as to get abated. The pendency was in respect of appeal before the Tribunal.

8.1. In this respect we make a useful reference to circular No.7/2003, dated 05.09.2003, containing explanatory notes on provisions relating to direct taxes in respect to Finance Act, 2003 which inserted three new sections, namely, 153A, 153B and 153C, while introducing special procedure for assessment of search cases. In para 65.5 of the said circular, it is clarified that appeal, revision or rectification proceedings, pending on the date of initiation of search

u/s 132 or requisition shall not abate. Thus, in the present case, in view of the aforesaid explanatory note, the appeal by the assessee, pending before the Tribunal on the date of initiation of search, did not abate. Accordingly, the view adopted by both, ld. Assessing Officer and ld. CIT(A) that the assessment gets abated with respect to the direction of ITAT does not hold good. Relevant para 65.5 from the circular is extracted below for ready reference.

*“65.5 The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 1538 and section 1530, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.”*

[emphasis supplied by us by underline]

8.2. Considering the undisputed facts on the chronology of events as tabulated above, second proviso to the section 153A, clarifications contained in para 65.5 of the above circular and jurisprudence by Hon'ble Supreme Court in the case of Abhisar Buildwell (supra), we unhesitatingly hold that impugned Assessment Year is an unabated Assessment Year.

8.3. Having so held, we now look at what was the basis for making disallowance by the ld. Assessing Officer vis-à-vis contention raised by the assessee. From the perusal of the original assessment order passed u/s.143(3), dated 08.12.2016 and the impugned assessment order passed u/s. 143(3) r.w.s. 153A, dated 24.12.2019, the disallowance made are identical, which are in respect of payment made by assessee towards processing charges and contract payment

by way of cash violating the provisions of section 40A(3), there being no difference in the parties involved and the amounts disallowed. Thus, what has been disallowed in the assessment made u/s.143(3) has been repeated verbatim in the post search assessment made u/s.143(3) r.w.s. 153A. We have already extracted para-3 of the original assessment order passed u/s.143(3) whereby, ld. Assessing Officer has noticed the facts for making disallowance based on the perusal of the submissions made by the assessee.

8.4. Furthermore, in the impugned assessment made pursuant to notice u/s. 153A, ld. Assessing Officer noted in para-7 that assessee was given an opportunity to file its submission in the matter, pursuant to direction of ITAT for re-adjudicating the issues in appeal. He has dealt with the submissions filed by the assessee as mentioned in para -9 to conclude that the said payments were not justified and accordingly show cause notice was issued. Assessee filed several submissions reiterating its claim which in the conclusion were not acceptable by the ld. Assessing Officer. Thus, from the submissions filed by the assessee, ld. Assessing Officer ultimately concluded to disallow the claim of assessee u/s. 40A(3) of the Act. It is thus evident from the material on record and observations and findings of ld. Assessing Officer that there is no reference to any incriminating material, found and seized during the course of search of the assessee in respect of payment of Rs.1,42,71,871/- as processing charges to Shri M. Marthandan and Rs.2,47,07,251/- as contract payment to Ms. Thenmozhi.

9. Hon'ble High Court of Bombay in the case Peter Vaz v. CIT [2021] 128 taxmann.com 180 (Bom) dealt with similar issue to arrive at a conclusion that where Tribunal in impugned order had come to

conclusion that issues raised in cross objection were legal issues, Tribunal should not have stopped assesseees from raising issue in appeals instituted by revenue, without necessity of filing any cross objections. We take note of additional substantial question of law which was answered by the Hon'ble Court as stated in para 5 of its order:

*“Whether in the facts and circumstances of the present case, it was open to the appellant/assessee to have supported the orders of the Commission (Appeals), based on the ground that the jurisdictional parameters prescribed under section 153C of the I.T. Act were not fulfilled, even without the necessity of filing any cross objections?”*

9.1. Before answering the aforesaid substantial question of law, Hon'ble Court referred to non-compliance of jurisdictional parameters of section 153C as contained in para 28, extracted below:

*“28. At least, prima facie, non-compliance with jurisdictional parameters set out under section 153C of the IT Act, if established, will go to the root of the matter and even nullify the very action initiated under section 153C of the IT Act. Based on the material furnished to the assesseees, it was the case of the assesseees that what was found in the course of search proceedings under section 132 of the IT Act in the premises of the said firm and the said company, were the books of accounts belonging to the said firm and the said company. It is the case of the assesseees that no books of accounts belonging to the assesseees i.e. Peter Vaz and Edgar Afonso were found in the search proceedings under Section 132 in the premises of the said firm and the said company. Therefore, it was the case of the assesseees that no proceedings under section 153C of the IT Act could ever have been initiated against these assesseees.”*

9.2. After extensive deliberations on Rule 27 of the ITAT Rules and sections 253 and 153C of the Act as well as section 260A(7) read with Order XLI Rule 22 of CPC, it concluded in answering the additional substantial question of law in favour of assessee, as contained in para 38, extracted below:

*“38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 as also the provisions of section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in S. Nazeer Ahmed (supra) we think that the ITAT should not have precluded the assesseees from raising the issue*

*in the appeals instituted by the Revenue, even without the necessity of filing any cross-objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assesseees and against the Revenue.”*

10. Accordingly, taking into account the entire discussion and observations deliberated above, both on facts and law, contention raised by the assessee vide its application dated 22.11.2024 by invoking Rule 27 of the ITAT Rules that the assessment order passed u/s. 143(3) r.w.s. 153A is without jurisdiction in absence of any incriminating material found and seized in the course of search of assessee, is allowed. Accordingly, the assessment so framed is liable to be quashed. In the result, appeal by the Revenue become infructuous and is dismissed accordingly.

11. In the result, appeal of the Revenue is dismissed.

Order is pronounced in the open court on 21 February, 2025

Sd/-  
(Amit Shukla)  
Judicial Member

Sd/-  
(Girish Agrawal)  
Accountant Member

***Dated: 21 February, 2025***

*MP, Sr.P.S.*

**Copy to :**

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

BY ORDER,

(Dy./Asstt.Registrar)  
ITAT, Mumbai