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IN THE HIGH COURT OF ORISSA AT CUTTACK

I.T.A. Nos. 39, 40, 41, 42, 43, 44 & 45 of 2022

ACIT, Circle-1(2), Bhubaneswar* *Appellant

-versus-

M/s. Serajuddin & Co. Kolkata* ... *Respondent

Advocates, appeared in these cases:

***For Appellant (s)* :** Mr. Tushar Kanti Satapathy,
Senior Standing Counsel
Mr. A. Kedia,
Junior Standing Counsel

***For Respondent (s)* :** Mr. S. Ganesh, Senior Advocate
Mr. Gaurav Khanna, Advocate
(In ITA No.39 of 2022)

Mr. Ramesh Singh, Senior Advocate
Mr. V. Mohapatra, Advocate
(In ITA No.45 of 2022)

Mr. A.K. Parija, Senior Advocate
Mr. S. K. Sahu, Advocate
(in ITA Nos.40, 41, 42 and 43 of 2022)

Mr. Sidhartha Ray, Senior Advocate
(In ITA No.44 of 2022)

**CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN**

**JUDGMENT
15.03.2023**

Dr. S. Muralidhar, CJ.

1. These appeals by the Revenue are directed against a common order dated 21st January 2022 passed by the Income Tax Appellate Tribunal (ITAT), Cuttack Bench, Cuttack in the appeals filed by the

Respondent-Assessee and the Revenue against separate orders of the Commissioner of Income Tax (Appeals) [CIT(A)], Bhubaneswar dated 28th February 2013 for the assessment years (AY) 2003-04 to 2006-07; dated 19th February 2013 for the AY 2007-08; dated 28th January 2013 for the AY 2008-09 and dated 5th February 2013 for the AY 2009-10, respectively, in the matter of assessment under Sections 143(3)/144/153A of the Income Tax Act, 1961 (Act).

2. While admitting the present appeals on 4th August 2022, the following question was framed for consideration:

“Whether on the facts and circumstances of the case, the ITAT was correct in holding that the Approving Authority has not applied his mind for giving approval under Section 153D?”

3. The background facts are that a search and seizure operation under Section 132 of the Act was conducted in the case of the Assessee and various persons and concerns of the Assessee on 28th May, 2008. Notice dated 11th March 2010 under Section 153A of the Act was served on the Assessee. Notices under Section 142 (1) of the Act dated 19th May 2010 and reminders dated 1st July and 21st July 2010 were also issued. On 30th December 2010, the Assistant Commissioner of Income Tax (ACIT) Circle-1(2), Bhubaneswar (hereafter, the Assessing Officer-AO) passed assessment orders under Section 143(3)/144/153A of the Act making various additions/disallowances.

4. The Assessee then filed appeals before the CIT (A). One of the grounds for challenge was the non-compliance with Section 153D

of the Act which requires prior approval of the Additional Commissioner of Income Tax (Additional CIT). The stand of the Revenue was that such approval had been sought by the AO and granted by the Additional CIT prior to the passing of the assessment order.

5. By an order dated 28th February 2013, the CIT (A) partly allowed the appeals. The CIT (A), however, held that it is not necessary that the fact of approval of the Additional CIT was required to be mentioned in the body of the assessment order. The CIT (A) observed that there was a consolidated approval order dated 30th December 2010 given by the Additional CIT for AYs 2003-04 and 2009-10 and therefore, this ground had no merit.

6. The Assessee filed further appeals before the ITAT contending that the guidelines contained in Circular No.3 of 2008 dated 12th March 2008 issued by the Central Board of Direct Taxes (CBDT) had not been followed. It was further contended by the Assessee that the so-called approval of the Additional CIT under Section 153D of the Act had been granted in a mechanical manner without application of mind. Reference was made to the letter dated 29th December 2010 of the AO addressed to the Additional CIT Range-1 seeking approval under Section 153D of the Act and the letter dated 30th December 2010 of the Additional CIT addressed to the AO communicating the approval. Reference was also made to the decision dated 29th November 2019 of the ITAT in IT (SS) A Nos. 66 to 71/CTK/2018 (***Dillip Construction Pvt. Ltd. v. ACIT***) which held the guidelines contained in the aforementioned Circular to be mandatory and binding on the Department.

7. The ITAT has, in the impugned order, referred to the decision of the Bombay High Court in ***Akil Gulamali Somji*** and other decisions of the ITAT to come to the conclusion that the approving authority did not apply his mind to the relevant assessment records or to the draft assessment orders prior to granting approval to the AO under Sections 143(3)/144/153A. The assessment orders were accordingly set aside. As a result, the cross appeals of the Revenue were held to be infructuous and disposed of as such.

8. Mr. T.K. Satapathy, learned Senior Standing Counsel for the Revenue made the following submissions:

(i) In the present case, prior approval had in fact been taken by the AO from the Additional CIT and there was no illegality in that regard.

(ii) The approval of the superior officer was distinct from the assessment order. It was a mere administrative order and not open to challenge before a court of law. In other words, it was submitted that the approval granted by the Additional CIT was not justiciable and could not form the basis for challenging the assessment order.

(iii) What could only be challenged is want of sanction. Reliance was placed on the decision of the ITAT, Mumbai in ITA No.3874/Mumbai/2015 (***Pratibha Pipes & Structural Limited v. DCIT***).

(iv) There was no requirement for any hearing to be given to the Assessee by the supervisory officer prior to giving approval although Clause-9 of the Manual of Office Procedure stipulates it. This, therefore, cannot be said to be mandatory. Reliance was

placed on the decisions of the Karnataka High Court in ***Gopal S. Pandit v. CIT 96 taxmann.com 233*** and ***Rishab Chand Bhansali v. DCIT 267 ITR 577*** and of the Madras High Court in ***Sakthivel Bankers v. ACIT 255 ITR 144*** which were all in the context of Section 158 BG of the Act.

(v) The mere irregularity in granting approval in the context of Section 158BG of the Act was held not to be fatal to the assessment order. Reliance was placed on the orders of the Kolkata ITAT in ***Shaw Wallace & Co. Ltd. v. ACIT, 68 ITD 148*** and of the Delhi ITAT in ***Kailash Moudgil v. DCIT, 72 ITD 97***. Reliance was also placed on the decision of the Karnataka High Court in ***Gayathri Textiles v. CIT, 111 taxman 123*** where it was held that for the purpose of Section 271 (1) (c) of the Act, the failure to obtain prior permission from the IAC for imposing penalty was only a procedural error and not fatal to the order of penalty.

(vi) Since the entire documents were already available to the Additional CIT in the file sent for approval, there was no need for exchange of the said documents prior to the grant of formal approval under Section 153D of the Act.

(vii) Lastly, it was submitted that even if there had been a violation of the principles of natural justice, unless prejudice were shown by the Assessee, no interference with the assessment orders was warranted. Reliance was placed on the decisions in ***Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise Gauhati (2015) 8 SCC 519***; ***Managing Director, ECIL v. B. Karunakar (1993) 4 SCC 727***; ***Haryana Financial Corporation v. Kailash Chandra Ahuja (2008) 9 SCC 31***; ***State Bank of Patiala v.***

S.K. Sharma (1996) 3 SCC 364; P.D. Agrawal v. State of Bank of India (2006) 8 SCC 776 and State of U.P. v. Sudhir Kumar Singh. It was then submitted that where initiation was valid but completion was not correct, the order may not be invalid but only irregular because the intervening irregularity is a curable one. Reliance was placed on the decision of the Kerala High Court in ***Panicker (CGG) v. CIT, (1999) 237 ITR 443*** and ***CIT v. M. Krishnan (N) (1999) 235 ITR 386***. It was submitted that mere technicality should not defeat justice.

9. On behalf of the Assessee submissions were made by Mr. Ramesh Singh, Senior Advocate; Mr. Sidhartha Ray, Senior Advocate; Mr. Ashok Kumar Parija, Senior Advocate as well as Mr. S. Ganesh, Senior Advocate. They drew attention of the Court to the relevant clauses of the CBDT Circular dated 12th March 2008 and the decisions in ***Sahara India (Firm,) Lucknow v. Commissioner of Income Tax (2008) 14 SCC 151; Rajesh Kumar v. Deputy CIT, (2007) 2 SCC 181*** and the decisions of the Delhi High Court in ***ESS Advertising (Mauritius) v. Assistant Commissioner of Income Tax, (2021) SCC OnLine Del 3613; Principal Commissioner of Income Tax-6 v. M/s. N.C. Cables Ltd., 2017 SCC OnLine Del 6533; Yum ! Restaurants Asia Pte. Ltd. v. Deputy Director of Income Tax, (2017) 397 ITR 665; Syfonia Tradelinks Private Limited v. Income Tax Officer; 2021 SCC OnLine Del 2692*** and ***German Remedies Limited v. DCIT 2006 (1) Maharashtra Law Journal 517***.

10. At the outset, it requires to be noticed that many of the decisions referred to both on the side of the Revenue as well as the Assessee do not directly refer to Section 153D of the Act which was inserted

with effect from 1st June, 2007. There is no doubt about the applicability of the said provision since the proceedings under Section 153A of the Act was initiated in the present case after that date.

11. Among the changes brought about by the Finance Act 2007 was the insertion of Section 153D of the Act. The CBDT circular dated 12th March 2008 refers to the various changes and *inter alia* also to the change brought about by the insertion of a new Section 153D of the Act. Paragraph 50 of the said circular is relevant and reads as under:

“50. Assessment of search cases—Orders of assessment and reassessment to be approved by the Joint Commissioner.

50.1 The existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A, does not provide for any approval for such assessment.

50.2 A new section 153D has been inserted to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision has been made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. The provision has also been made applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under

section 132 or requisitioned is made under section 132A.

50.3 Applicability- These amendments will take effect from the 1st day of June, 2007.”

12. It must be noted at this stage that even prior to the introduction of Section 153D in the Act, there was a requirement under Section 158BG of the Act, which was substituted by a Finance Act 14 of 1997 with retrospective effect from 1st January 1997, of the AO having to obtain a previous approval of the JCIT/Additional CIT by submitting a draft assessment order following a search and seizure operation.

13. The CBDT issued the Manual of Office Procedure in February 2003 in exercise of the powers under Section 109 of the Act. Para 9 of Chapter 3 of Volume-II (Technical) of the Manual reads as under:

“9. Approval for assessment: An assessment order under Chapter XIV-B can be passed only with the previous approval of the range JCIT/ADDL.CIT (For the period from 30-6-1995 to 31-12-1996 the approving authority was the CIT.). The Assessing Officer should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order-sheet and a copy of the draft order and covering letter filed in the relevant miscellaneous records folder. Due opportunity of being heard should be given to the assessee by the supervisory officer giving approval to the proposed block assessment, at least one month before the time barring date. Finally once such approval is granted, it must be in writing and filed in the relevant folder indicated above after making a due entry in the order-sheet. The assessment order can be passed only after the receipt of such approval.

The fact that such approval has been obtained should also be mentioned in the body of the assessment order itself.”

14. The requirement of prior approval under Section 153D of the Act is comparable with a similar requirement under Section 158BG of the Act. The only difference being that the latter provision occurs in Chapter-XIV-B relating to “special procedure for assessment of search cases” whereas Section 153D is part of Chapter-XIV.

15. A plain reading of Section 153D itself makes it abundantly clear that the legislative intent was to be obtaining of “prior approval” by the AO when he is below the rank of a Joint Commissioner, before he passes an assessment order or reassessment order under Section 153A(1)(b) or 153B(2)(b) of the Act.

16. That such an approval of a superior officer cannot be a mechanical exercise has been emphasized in several decisions. Illustratively, in the context of Section 142 (2-A) which empowers an AO to direct a special audit. The obtaining of the prior approval was held to be mandatory. The Supreme Court in **Rajesh Kumar v. Dy. CIT (2007) 2 SCC 181** observed as under:

“58. An order of approval is also not to be mechanically granted. The same should be done having regard to the materials on record. The explanation given by the assessee, if any, would be a relevant factor. The approving authority was required to go through it. He could have arrived at a different opinion. He in a situation of this nature could have corrected the assessing officer if he was found to have adopted a wrong approach or posed a wrong question unto himself. He could have been asked to complete the process of the assessment within the specified time so as to save the Revenue

from suffering any loss. The same purpose might have been achieved upon production of some materials for understanding the books of accounts and/ or the entries made therein. While exercising its power, the assessing officer has to form an opinion. It is final so far he is concerned albeit subject to approval of the Chief Commissioner or the Commissioner, as the case may be. It is only at that stage he is required to consider the matter and not at a subsequent stage, viz., after the approval is given.”

17. It is therefore not correct on the part of the Revenue to contend that the approval itself is not justiciable. Where the approval is granted mechanically, it would vitiate the assessment order itself. In ***Sahara India (Firm) Lucknow v. Commissioner of Income Tax*** (*supra*), the Supreme Court explained as under:

“8. There is no gainsaying that recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the Section is not turned into an empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case.”

18. The contention of the Revenue in those cases that the non-compliance of the said requirement does not entail civil

consequences was negated. Reiterating the view expressed in *Rajesh Kumar (supra)*, the Supreme Court in *Sahara India (Firm) Lucknow v. Commissioner of Income Tax (supra)* held as under:

“29. In *Rajesh Kumar (2007) 2 SCC 181* it has been held that in view of Section 136 of the Act, proceedings before an Assessing Officer are deemed to be judicial proceedings. Section 136 of the Act, stipulates that any proceeding before an Income Tax Authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of Indian Penal Code, 1860 and also for the purpose of Section 196 of I.P.C. and every Income Tax Authority is a court for the purpose of Section 195 of Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in *Rajesh Kumar's case (supra)*, but having held that when civil consequences ensue, no distinction between quasi judicial and administrative order survives, we deem it unnecessary to dilate on the scope of Section 136 of the Act. It is the civil consequence which obliterates the distinction between quasi judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see: *Maneka Gandhi v. Union of India (1978) 1 SCC 248* and *S.L. Kapoor v. Jagmohan (1980) 4 SCC 379*).

30. As already noted above, the expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. Anything which affects a citizen in his civil life comes under its wide umbrella. Accordingly, we reject the argument and hold that since an order under Section 142 (2A) does entail civil

consequences, the rule audi alteram partem is required to be observed.”

19. To the same effect, are the decisions of the Delhi High Court in ***Yum! Restaurants Asia Pte. Ltd. v. Deputy Director of Income Tax (supra)*** which dealt with the requirement under Section 151 (2) of the Act for initiating proceedings under Section 147 read with 148 of the Act. It was observed as under:

“11. The purpose of Section 151 of the Act is to introduce a supervisory check over the work of the AO, particularly, in the context of reopening of assessment. The law expects the AO to exercise the power under Section 147 of the Act to reopen an assessment only after due application of mind. If for some reason, there is an error that creeps into this exercise by the AO, then the law expects the superior officer to be able to correct that error. This explains why Section 151 (1) requires an officer of the rank of the Joint Commissioner to oversee the decision of the AO where the return originally filed was assessed under Section 143 (3) of the Act. Further, where the reopening of an assessment is sought to be made after the expiry of four years from the end of the relevant AY, a further check by the further superior officer is contemplated.”

20. The non-compliance of the requirement was held to have vitiated the notice for reopening of the assessment. Likewise, in ***Syfonía Tradelinks Private Limited v. Income Tax Officer (supra)*** the Delhi High Court disapproved of the rubber stamping by the superior officer of the reasons furnished by the AO for issuance of the sanction.

21. It is seen that in the present case, the AO wrote the following letter seeking approval of the Additional CIT:

GOVERNMENT OF INDIA
OFFICE OF THE ASST. COMMISSIONER OF INCOME TAX,
CIRCLE-1(2), BHUBANESWAR

No. ACIT/C-1(2)//Approval/2010-11/5293
Dated, Bhubaneswar, the 27/29th December, 2010

To

The Addl. Commissioner of Income-tax, Range-1, Bhubaneswar.

Sub: Approval of draft orders u/s 153D of the I.T. Act 1961 in the case of M/s. Serajuddin & Co. 19A, British India Street, Kolkata (in Serajuddin Group of Cases)- matter regarding.

Sir,

Enclosed herewith kindly find the draft orders u/s 153A of the I.T. Act, 1961 along with assessment records in the case of M/s Serajuddin & Co., 19A, British India Street, Kolkata for kind perusal and necessary approval u/s.153D.

No.	Name of the Assessee	Section under which order passed	Asst. year
1.	M/s. Serajuddin & Co., 19A, u/s 153A/143(3)/144/145(3) British India Street, Kolkata.		2003-04
2.	-do-	-do-	2004-05
3.	-do-	-do-	2005-06
4.	-DO-	-DO-	2006-07
5.	-DO-	-DO-	2007-08
6.	-DO-	-DO-	2008-09
7.	-DO-	U/s.143(3)/144/153B(B)/145(3)	2009-10

The above cases will be barred by limitation on 31.12.2010.

Encl: As above

Yours faithfully,
Sd/-
Asst. Commissioner of Income-tax,
Circle-1(2), Bhubaneswar

of the Tribunal itself Government of India
OFFICE OF THE ADDL. COMMISSIONER OF INCOME TAX,
3 Floor, Range-1, Bhubaneswar

No. Addl. CIT/R-1/BBSR/SD/2010-11/5350
Dated, Bhubaneswar, the 30th December, 2010

To

The Assistant Commissioner of Income Tax,
Circle-1(2), Bhubaneswar.

Sub: Approval u/s 153D-in the case of M/s Serajuddin & Co., 19A, British India Street, Kolkata-Matter regarding.

Ref: Draft Orders u/s 153A/143(3)/144 for the A.Y. 2003-04 to 2008-09 u/s.143(3)/153B (b)/144 of the A.Y.2009-10 in the case of above mentioned assessee.

Please refer to the above

The draft orders u/s 153A/143(3)/144 for the A.Y. 2003-04 to 2008-09 and u/s. 143(3)/153B(b)/144 for the A.Y. 2009-10 submitted by you in the above case for the following assessment years are hereby approved:

Assessment Year	Income Determined (Rs)
2003-04	11,66,22,771
2004-05	36,46,80,016
2005-06	65,70,12,805
2006-07	60,02,65,791
2007-08	130,03,13,307
2008-09	274,68.87,069
2009-10	301,17,05,952

You are requested to serve these orders expeditiously on the assessee, submit a copy of final order to this office for record.

Sd/-

Addl. Commissioner of Income Tax,
Range-1, Bhubaneswar

22. As rightly pointed out by learned counsel for the Assessee there is not even a token mention of the draft orders having been perused by the Additional CIT. The letter simply grants an approval. In other words, even the bare minimum requirement of the approving authority having to indicate what the thought process involved was is missing in the aforementioned approval order. While elaborate reasons need not be given, there has to be some indication that the approving authority has examined the draft orders and finds that it meets the requirement of the law. As explained in the above cases, the mere repeating of the words of the statute, or mere “rubber stamping” of the letter seeking sanction by using similar words like ‘see’ or ‘approved’ will not satisfy the requirement of the law. This

is where the Technical Manual of Office Procedure becomes important. Although, it was in the context of Section 158BG of the Act, it would equally apply to Section 153D of the Act. There are three or four requirements that are mandated therein, (i) the AO should submit the draft assessment order “well in time”. Here it was submitted just two days prior to the deadline thereby putting the approving authority under great pressure and not giving him sufficient time to apply his mind; (ii) the final approval must be in writing; (iii) The fact that approval has been obtained, should be mentioned in the body of the assessment order.

23. In the present case, it is an admitted position that the assessment orders are totally silent about the AO having written to the Additional CIT seeking his approval or of the Additional CIT having granted such approval. Interestingly, the assessment orders were passed on 30th December 2010 without mentioning the above fact. These two orders were therefore not in compliance with the requirement spelt out in para 9 of the Manual of Official Procedure.

24. The above manual is meant as a guideline to the AOs. Since it was issued by the CBDT, the powers for issuing such guidelines can be traced to Section 119 of the Act. It has been held in a series of judgments that the instructions under Section 119 of the Act are certainly binding on the Department. In ***Commissioner of Customs v. Indian Oil Corporation Ltd. 2004 (165) E.L.T. 257 (S.C.)*** the Supreme Court observed as under:

“Despite the categorical language of the clarification by the Constitution Bench, the issue was again sought to be raised before a Bench of three Judges in *Central Board of Central Excise, Vadodara v. Dhiren Chemicals*

Industries: 2002 (143) ELT 19 where the view of the Constitution Bench regarding the binding nature of circulars issued under Section 37B of the Central Excise Act, 1944 was reiterated after it was drawn to the attention of the Court by the Revenue that there were in fact circulars issued by the Central Board of Excise and Customs which gave a different interpretation to the phrase as interpreted by the Constitution Bench. The same view has also been taken in *Simplex Castings Ltd. v. Commissioner of Customs, Vishakhapatnam* 2003 (5) SCC 528. The principles laid down by all these decisions are: (1) Although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad (4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.”

25. For all of the aforementioned reasons, the Court finds that the ITAT has correctly set out the legal position while holding that the requirement of prior approval of the superior officer before an order of assessment or reassessment is passed pursuant to a search operation is a mandatory requirement of Section 153D of the Act and that such approval is not meant to be given mechanically. The Court also concurs with the finding of the ITAT that in the present cases such approval was granted mechanically without application of mind by the Additional CIT resulting in vitiating the assessment orders themselves.

26. The question of law framed is therefore answered in the affirmative i.e., in favour of the Assessee and against the Department.

27. The appeals are accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K. Guin/PA

