आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

सर्वश्री विजय पाल राव,,न्यायिक सदस्य **एवं** नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND

SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

आयकर अपील सं/ I.T.A. No.4061/Mum/2012

(**निर्धारण वर्ष** / Assessment Year :2007-08

Smt. Shreelekha Damani, 11, Damani House, Cuffe Parade, Mumbai-400 005	**बनाम**/ Vs.	The DCIT (OSD-1)CR-7, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AECPD 7468K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	Shri J.D. Mistry
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Manjunath R. Swamy

सुनवाई की तारीख / **Date of Hearing :12.08.2015**

घोषणा की तारीख /**Date of Pronouncement :19.08.2015**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the Ld. CIT(A)-40, Mumbai dt. 29.3.2012 pertaining to Assessment year 2007-08.

2. The grievance of the assessee as per Form No. 36 read as under:

1. ***Rent paid to Tobaccowala - Rs. 60,23,270/- (Para 8 of the Assessment Order):***

On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income tax (Appeals)-40 erred in

upholding the disallowance of rent paid to Tobaccowala of Rs.60,23,2701- on the ground that it was personal in nature.

2. ***Brokerage paid to HDFC Realty - Rs. 2,20,500/- (Para 9 of the Assessment Order):***

On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income tax (Appeals)-40 erred in upholding the disallowance of brokerage paid for arranging new premises of Rs.2,20,500/- on the ground that the expenditure was for non business purpose.

3. ***Fair Market Value of the leasehold land as on 01.04.1981 - Rs. 1,85,13,960/- (Para 11.3 of the assessment order):***

On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income tax (Appeals)-40 erred in adopting the fair market value as on 01.04.1981 at Rs.700/-per square feet instead of Rs. 1000/- per square feet considered by your appellant in respect of property at 11, Damani House, Cuffe Parade, Mumbai - 400005.

4. *On the facts and in the circumstances of the case and in law, the Hon,ble CIT (Appeals)-40 erred in not adjudicating the ground that the order passed U/s 143(3) read with Section 153 A with the prior approval of the Addl. CIT as required U/s 153D is bad in law, as it was against the principles of natural justice in so far as the opportunity of being heard personally in the matter was not given by the Addl. CIT despite requests by your appellant."*

3. By an application dated 4.7.2013, the assessee sought permission to raise additional ground of appeal. It is the say of the assessee that the said additional ground of appeal is on the question of law and no new facts are required to be brought on record. The additional ground read as under:

> *"1. On the facts and in the circumstance of the case and in law the CIT(A) ought to have held that the AO had not complied with the provisions of Sec. 153D of the Act and hence the assessment under section 153A of the Act is bad in law.*
>
> *2. On the facts and in the circumstance of the case and in law the CIT(A) ought to have held the assessment order*

u/s. 153A is non est and not in accordance with law and ought to have set aside the assessment."

4. A perusal of the additional ground of appeal show that it does not require any verification of fact hence the additional ground of appeal are admitted as they go to the root of the issue. We decide to proceed with the additional ground first.

5. Briefly stated the facts of the case are that a search and seizure action u/s. 132 of the Act was carried out on 16.10.2008 and on subsequent dates on Simplex Group of Companies and its Associates. The Office/residential premises of the company and its Directors/connected persons were also covered. Simplex Group is engaged in the business of Reality, paper, Textile and Finance. On the basis of the incriminating documents/books of account found during the course of search and seizure operation, assessment was made u/s. 143(3) of the Act r.w. Sec. 153A and as per the endorsement on page-11 of the assessment order this order is passed with the prior approval of the Addl. Commissioner of Income Tax, Central Range-7, Mumbai.

6. The additional ground raised before us is against this endorsement in the assessment order as the claim is that the Assessing Officer has not complied with the provisions of Sec. 153D and hence the assessment made u/s. 153A of the Act is bad in law.

7. At the very outset, the Ld. Departmental Representative furnished the copy of the approval given by Addl. Commissioner of Income tax, Central Range-7, Mumbai which is also filed by the assessee in the paper book and the same is exhibited at page-1 of the paper book.

8. The Ld. Senior Advocate, Shri Jahangir Mistry vehemently submitted that the so called approval brought on record cannot be

considered as an approval within the frame work of the provisions of Sec. 153D of the Act. The Ld. Sr. Counsel continued to argue that the approval granted by the Addl CIT is devoid of application of mind and by any stretch of imagination the order made u/s. 143(3) r.w. Sec. 153A of the Act cannot be said to be made after receiving the approval as per the provisions of Sec. 153D of the Act. The entire arguments/submissions of Ld. Shri Mistry revolved around this approval letter dated 31.12.2010.

9. Per contra, defending the assessment order, the Ld. Departmental Representative stated that the AO has made the assessment order after getting the approval from the Range Addl. CIT and therefore the mandate of Sec. 153D of the Act has been fulfilled and there is no error in law and the assessment is to be upheld. It is the say of the Ld. DR that the issues raised vide additional ground require interpretation and therefore the Tribunal should not take any interpretation which would defeat the provisions of the law.

10. We have given a thoughtful consideration to the rival contentions. We have also gone through the approval of the Addl CIT, Central Range-7, Mumbai carefully. The said approval read as under:

"No. Addl CIT/Cent. Rg-7/Approval 153D/2010-11/366 Dt. 31.12.2010

To:

The DCIT (OSD)-1,
Mumbai

Sub: Approval u/s. 153D of draft order u/s. 143(3) r.w.s. 153A in the case of Smt. Shreelekha Nandan Damani for A.Y. 2007-08 reg.

Ref: No. DCIT (OSD)-1/CR-7/Appr/2010-11 dt. 31.212.2010

……

As per this office letter dated 20.12.2010, the Assessing Officers were asked to submit the draft orders for approval u/s.

153D on or before 24.12.2010. However, this draft order has been submitted on 31.12.2010. Hence there is no much time left to analise the issues of draft order on merit. Therefore, the draft order is being approved as it is submitted.

Approval to the above said draft order is granted u/s. 153D of the I.T. Act, 1961."

11. The contents of this approval are *"res ipsa Loquiter"* in as much as the language is speaking for itself. The Addl CIT says that the draft order was placed before him on 31.12.2010. He further says that there was no much time left to analyze the issue of draft order on merit, therefore, the said order is approved as it is. The approval is also dated 31.12.2010.

11.1. The issue which we have to decide is can this approval be treated as fulfilling the mandate of the provisions of Sec. 153D of the Act vis-à-vis the legislative intent of inserting the said section in the statute. Sec. 153D read as under:

"No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner.

Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA."

11.2. The Legislative intent can be gathered from the CBDT Circular No. 3 of 2008 dated 12.3.2008 which read 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."

11.3. The Legislative intent is clear inasmuch as prior to the insertion of Sec.153D, there was no provision for taking approval in cases of assessment and reassessment in cases where search has been conducted. Thus, the legislature wanted the assessments/reassessments of search and seizure cases should be made with the prior approval of superior authorities which also means that the superior authorities should apply their minds on the materials on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authorities have to approve the assessment order.

11.4. The question before us is " has this been done in the present case". The language of the approval letter says "no". Let us now consider some analogous provision in the Act. Sec. 142(2A):

"142(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts

about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require."

In this section also the AO may direct the assessee to get the accounts audited by an Accountant with the previous approval of the Principal Chief Commissioner or Chief Commissioner. This provision has been elaborately considered by the Hon'ble Supreme Court in the case of Sahara India Vs CIT 169 Taxman 328 wherein at para-6, the Hon'ble Supreme Court observed as under:

"A bare perusal of the provisions of sub-section (2A) of the Act would show that the opinion of the Assessing Officer that it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and "the interests of the revenue" are the prerequisites for exercise of power under section 142(2A) of the Act. Undoubtedly, the object behind enacting the said provision is to assist the Assessing Officer in framing a correct and proper assessment based on the accounts maintained by the assessee and when he finds the accounts of the assessee to be complex, in order to protect the interests of the revenue, recourse to the said provision can be had. The word "complexity" used in section 142(2A) is not defined or explained in the Act. As observed in Swadeshi Cotton Mills Co. Ltd. v. CIT [1988] 171 ITR 634 1 (All.), it is a nebulous word. Its dictionary meaning is: "The state or quality of being intricate or complex or that is difficult to understand. However, all that is difficult to understand should not be regarded as complex. What is complex to one may be simple to another. It depends

upon one's level of understanding or comprehension. Sometimes, what appears to be complex on the face of it, may not be really so if one tries to understand it carefully." Thus, before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the Assessing Officer to understand accounts maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee. But opinion required to be formed by the Assessing Officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction. 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."

11.5. Thus, even the Hon'ble Supreme Court has clearly laid down that the approval must reflect the application of mind to the facts of the case.

11.6. Similarly, the Hon'ble High Court of Calcutta in the case of Peerless General Finance & Investment Co. Ltd. Vs DCIT 236 ITR 671 has made the following observations which are pertinent to the facts of the case in hand before us.

"The factual matrix of the matter clearly shows that a proposal was made on March 10, 1998, and no prior approval therefore was granted by the Chief Commissioner of Income-tax but merely one G. P. Agarwal was nominated.

An argument has been advanced to the effect that by making such a nomination, approval will be deemed to have

been granted. The answer to the said contention must be rendered in the negative. The Chief Commissioner of Income-tax before granting such approval must have before him the materials on the basis whereof an opinion had been formed. A prior approval can be granted only when the materials for appointment of the extraordinary procedure is required to be taken by the Assessing Officer. The Assessing Officer, therefore, was required to place all materials before the Commissioner of Income-tax or the Chief Commissioner of Income- tax, as the case may be, to show that he intends to take recourse to the said provision having regard to the nature and complexity of the accounts of the assessee and the interests of the Revenue. No such materials had been placed before the Chief Commissioner of Income-tax.

It further appears that even no previous approval was sought for but merely a proposal was placed for perusal of the Chief Commissioner of Income-tax and for appointment of a special auditor. The Chief Commissioner of Income-tax, therefore, did not apply his mind at all as regards the pre-requisite for grant of previous approval and mechanically appointed Sri G. P. Agarwal, as a special auditor. The said order depicts a total non-application of mind on the part of the Assessing Officer as also the Chief Commissioner of Income-tax."

11.7. Another section relevant to the facts in issue is Sec. 158BG which read as under:

"The order of assessment for the block period shall be passed by an Assessing Officer not below the rank of an Assistant Commissioner or Deputy Commissioner or an Assistant Director or Deputy Director, as the case may be:

Provided that no such order shall be passed without the previous approval of--

(a) the Commissioner or the Director, as the case may be, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997;

(b) the Joint Commissioner or the Joint Director, as the case may be, in respect of search initiated under section 132 or books of account, other documents or any assets

requisitioned under section 132A, on or after the 1st day of January, 1997."

11.8. In this section also it is provided that the order cannot be passed without the previous approval. This section was thoroughly scrutinized by the Tribunal Madras Bench in the case of Kirtilal Kalidas & Co. Vs DCIT 67 ITD 573, at para-41 of its order the observations of the Tribunal are as under:

> *"In these cases, the Commissioner has passed an order granting approval under section 158BG of the Act through a single order passed on 31-3-1997 without giving any reason whatsoever. As we have recorded elsewhere above, the draft assessment orders of the block period in all these cases were made on 31-3-1997 and on the very same day, i.e., on 31-3-1997 the Commissioner grants approval and that too without giving or recording any reasons whatsoever. The approval order does not disclose the points which were considered by the Commissioner and the reasons for accepting them. In our view, this is totally an unsatisfactory method of granting approval in exercise of judicial power vested in the Commissioner.*

11.9. This decision of the Tribunal was considered by Allahabad Bench of the Tribunal in the case of Verma Roadways Vs ACIT 75 ITD 183 wherein also the assessee- appellant has challenged the validity of approval to the assessment order accorded by the CIT Kanpur. The Tribunal at Para-47 has held as under:

> *"Coming to the aspect of the application of mind, while granting approval, we are of the view that requirement of approval pre-supposes a proper and thorough scrutiny and application of mind. In the case of Kirtilal Kalidas & Co. (supra), the I.T.A.T Madras Bench 'A' has observed that the function to be performed by the Commissioner in granting previous approval requires an enquiry and judicial approach on the entire facts, materials and evidence. It has been further observed that in law where any act or function requires application of mind and judicial dikscretion or approach by any authority, it partakes and assumes the character and status of a judicial or at least quasi-judicial act, particularly*

because their Act, function, is likely to affect the rights of affected persons."

11.10. Similarly, u/s. 151 of the Act it is provided that no notice shall be issued u/s. 148 unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied that it is a fit case for the issue of such notice. The sanction under this section was considered by the Tribunal, Mumbai Bench in the case of Shri Amarlal Bajaj in ITA No. 611/M/2004 wherein at para-8, the Tribunal has considered the decision of the Hon'ble High Court of Delhi Bench in the case of United Electrical Co. 258 ITR 317 which read as under:

> *"Hon'ble Delhi High Court in the case of United Electrical Co. Pvt. Ltd. Vs CIT 258 ITR 317 has held that "the proviso to sub-section (1) of section151of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-builts safeguards to prevent arbitrary exercise of power by an 7 ITA Nos.534 & 611/M/04 Assessing Officer to fiddle with the completed assessment". The Hon'ble High Court further observed that "what disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of the said parties, perhaps he would not have granted his approval, which was mandatory in terms of the proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval".*

12. Coming to the facts of the case in hand in the light of the analytical discussion hereinabove and as mentioned elsewhere, the Addl. Commissioner has showed his inability to analyze the issues of draft order on merit clearly stating that no much time is left, inasmuch as the draft order was placed before him on 31.12.2010 and the approval was granted on the very same day. Considering the factual matrix of the approval letter, we have no hesitation to hold that the approval granted by the Addl. Commissioner is devoid of any application of mind, is mechanical and without considering the materials on record. In our considered opinion, the power vested in the Joint Commissioner/Addl Commissioner to grant or not to grant approval is coupled with a duty. The Addl Commissioner/Joint Commissioner is required to apply his mind to the proposals put up to him for approval in the light of the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. Commissioner before granting the approval. Therefore, we have no hesitation to hold that the assessment order made u/s. 143(3) of the Act r.w. Sec. 153A of the Act is bad in law and deserves to be annulled. The additional ground of appeal is allowed.

13. The ld. Departmental Representative has strongly relied upon the decision of the Tribunal Mumbai Bench in the case of Rafique Abdul Hamid Kokani Vs DCIT 113 Taxman 37, Hon'ble High Court of Karnataka in the case of Rishabchand Bhansali Vs DCIT 136 Taxman 579 and Hon'ble High Court of Madras in the case of Sakthivel Bankers Vs Asstt. Commissioner 124 Taxman 227.

13.1. We have carefully perused the decisions placed on record by the Ld. Dr. We find that all the decisions relied upon by the Ld. DR are

misplaced inasmuch as all these decisions relate to the issue whether the Joint CIT/CIT has to give an opportunity of being heard to the assessee before granting the approval. This is not the issue before us as the Ld. Counsel has never argued that the assessee was not given any opportunity of being heard. These decisions therefore would not do any good to the Revenue.

14. Since we have annulled the assessment order, we do not find it necessary to decide the issues raised on merits of the case.

15. Before parting with the issues, there was a apprehension in our mind as to what will happen in search cases if the order is annulled as done in the present case. Our apprehension is answered by the provisions of Sec. 153A(2)

> *"If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner"*:

Thus the AO is at liberty to take any course of action as per the provisions of the law.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 19th August, 2015

Sd/-	Sd/-
(VIJAY PAL RAO)	(N.K. BILLAIYA)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :19th August , 2015

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**