Legality of Prior approval of Joint Commissioner for assessment in search cases under Section 153D of the Income Tax Act'1961.

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Section 153D of the act in the present Search Assessment regime mandates that a prior approval is necessary for a valid assessment under Section 153A and 153C of the act.

For the sake of brevity, the relevant extract provisions of Section 153D of the act are reproduced herein below:-

"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 maybe, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA."

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 requisition is made under section 132A.

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

From the perusal of the Section 153D of the act read with the CBDT Circular No. 3 of 2008, dated 12.3.2008, the legislative intent can be gathered so far as that the legislature in its highest wisdom made it compulsory that the assessments of search cases should be made with the prior approval of superior authority, so that the superior authority apply their mind on the materials and other attending circumstances 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 authority have to approve the Assessment order. Object of entrusting the duty of Approval of assessment in search cases is that the Joint CIT, with his experience and maturity of understanding should scrutinize the seized documents and any other material forming the foundation of Assessment. It is an elementary law that whenever any statutory obligation is casted upon any statutory authority such authority is required to discharge its obligation not mechanically, not even formally but after due application of mind. Thus, the obligation of granting Approval acts as an inbuilt protection to the taxpayer against arbitrary or unjust exercise of discretion by the AO. The approval granted under section 153D of the Act should necessary reflect due application of mind and if the same is subjected to judicial scrutiny, it should stand for itself and should be self-defending.

Now the question arises as to whether a mechanical approval granted u/s 153D of the act can be treated as valid in view of the mandate of Sec. 153D of the Act vis-à-vis the legislative intent of inserting the said section in the statute.

It is seen in practice that the appraisal report along with the seized material, statements etc. from the investigation wing is received by the assessing officer at almost at the fagend of the assessment proceedings with numerous findings and further suggestions and recommendations for further investigation to be done by the Assessing Officer at his end. During this phase, the Assessing Officer is also additionally required to facilitate the centralization of further cases for coordinated investigation which takes considerable time. Examination of seized material, going through the appraisal report, preparation of questionnaires for the assessment proceedings requires significant time of the Assessing Officer. Even at the end of the assessee subjected to such assessment, considerable time is also required to furnish replies and make compliances to numerous questionnaires issued by the Assessing Officer. This exercise takes the assessment proceedings to the very fag end and thus leaving no reasonable time for the approving authority i.e. Addl. CIT/ JCIT to go through the same and grant his approval after the careful consideration of the facts of the case, findings of the Investigation Wing, action taken by the assessing officer and the submission of the assessee subjected to such search assessments. It is also seen in certain cases wherein the assessment orders are to be passed on or before 31ST December, the assessment records with the draft assessment orders are furnished at the very fag end leaving not more than 3-4 days of time. In such a scenario, assuming that the approving authority applied his due mind with caution and care shall be nothing less than a fallacy. In such circumstances, the approving authority are compelled to accord sanction for the sake of it to comply with the sanction of law mechanically failing which the assessment u/s 153A of the act can't be legally completed.

Having said so, let us come to the moot question as to whether mechanical approval granted shall suffice the purposes of Section 153D of the act.

It is most worthwhile to mention here is that in order to enable the approving authority to grant his previous approval, the Assessing Officer has to forward to the Approving authority the entire record containing all the facts, seized materials and other evidence collected by him during the course of his enquiry embarked for the purpose of making assessments along with his report on the findings arrived at by him on such enquiry or the proposed draft of the order of assessment to be passed by him in terms of Section 153A of the Act. It is, therefore, lawfully expected that the Approving authority after receipt of such report or draft order of assessment with the record, seized materials and other evidence from the Assessing Officer has to apply his mind by carefully studying the entire record of the proceedings in relation to the framing of the order of assessment and then to make a final order by the Assessing Officer which may be either beneficial or prejudicial to any person/assessee. Thus, this act or function to be performed by the Approving authority in granting previous approval requires an enquiry and a judicial approach on the entire facts, materials and evidence. In law where any act or function requires application of mind and judicial discretion or approach by any authority it partakes of and assumes the character and status of a judicial or at least quasi-judicial act particularly where such act or function is likely to affect any person or his rights prejudicially, and where, more so, such right is civil right, namely, the amount of money, property and assets which the assessee will be required to part with after the passing of the final order of assessment.

Therefore in my considered opinion, the provisions contained in Section 153D of the act as enacted by the Parliament cannot be treated as an empty formality. If it was merely a formality and the superior authority is not required to apply its mind then there was no reason to incorporate even for approval of the superior

authority and it would not have been worded in the mandatory manner. Because the language used in the provision of Section 153D of the act is in the form of mandatory direction therefore it cannot be argued that even if the approval is granted without application of mind then also it is valid in the eyes of law. The provision has certain purpose. It is apparent that the purpose behind the enactment of the above provision in the statute by the Parliament is two-folds. Firstly, the approval of the senior authority will ensure that the assessee is not prejudiced by the undue or irrelevant addition or assessment. Secondly, the approval by senior authority will also ensure that proper enquiry or investigations are carried out by the assessing authority. Thus, the above provision provides for mental application of a senior officer of the Department, which in turn, provides safeguard to both i.e., Revenue as well as the assessee. Therefore, this important provision laid down by the legislature cannot be treated as a mere empty formality. If the approval is granted by the superior authorities in mechanical manner without application of mind then the very purpose of obtaining approval is defeated.The power to grant approval is not to be exercised casually and in routine manner and further the concerned authority, while granting approval, is expected to examine the entire material before approving the assessment order. It has also been laid down that whenever any statutory obligation is cast upon any authority, such authority is legally required to discharge the obligation by application of mind. At this juncture, it is pertinent to mention that the **Hon'ble Apex Court in the case of *Sahara India (Firm) v. CIT & Anr. (2008) 216 CTR (SC) 303 : (2008) 7 DTR (SC) 27 : (2008) 300 ITR 403 (SC)***, while discussing the requirement of prior approval of Chief Commissioner or Commissioner in terms of provision of section 142(2A) of the Act, opined that the requirement of previous approval of the Chief Commissioner or Commissioner in terms of said provision being an inbuilt protection against arbitrary or unjust exercise of power by the assessing officer, casts a very heavy duty on the said high-ranking authority to see it that the approval envisaged in the section is not turned

into an empty ritual. The Hon'ble Apex Court held that the approval must be granted only on the basis of material available on record and the approval must reflect the application of mind to the facts of the case.

It is also in practice seen that when matter is assailed in higher forums in appeal, what is examined by the courts is that as to whether the Joint Commissioner had adequate time with him so as to grant approval after duly examining the material prior to approving the assessment order and as to whether due mind has been applied before according such sanction as against according sanction in utmost haste and in a mechanical manner. In my considered opinion, mechanical approval is no approval in the eyes of law, if having been granted without application of mind, such a mechanically granted approval may vitiate the very assessment order passed on the strength of such an approval in the appellate proceedings.

To legislature conscious of such situation, by virtue of Finance Act ,2018 with retrospective effect from 01-06-2003 inserted sub-section (2) in Section 153A of the act which reads as under:-

"(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 [Principal Commissioner or] Commissioner:

***Provided** that such revival shall cease to have effect, if such order of annulment is set aside."*

However, such enactment shall only take care of the abated years however the concluded assessments cannot be cured by virtue of Section 153A(2) of the act. Even otherwise it will lead to 2nd

innings of assessment with considerable loss of administrative time and resources and thus not warranted.

The aforementioned view that assessment framed on the strength of a mechanical approval is bad in law, also gathers strength from numerous judicial decisions which are mentioned herein under:-

- ITAT, Mumbai Bench in the case of ***Shreelekha Damani Vs DCIT (2015) 173 TTJ (Mumbai) 332*** wherein Hon'ble tribunal annulled the assessment holding as under:

"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."

The above order so passed by the ITAT, Mumbai Bench was subjected to judicial scrutiny in appeal before the Hon'ble Bombay High Court and the Hon'ble High Court approved the order passed by the Mumbai Bench of the ITAT which is found reported as ***PCIT Vs Smt. Shreelekha Damani , (2019) 307 CTR (Bom.)***

218(APB- 138-139) wherein in Para-7 the Hon'ble High Court held as under:

7. In plain terms, the Addl. CIT recorded that the draft order for approval under s. 153D of the Act was submitted only on 31st Dec. 2010. Hence, there was not enough time left to analyze the issue of draft order on merit. Therefore, the order was approved as it was submitted. Clearly, therefore, the Addl. CIT for want of time could not examine the issues arising out of the draft order. His action of granting the approval was thus, a mere mechanical exercise accepting the draft order as it is without any independent application of mind on his part. The Tribunal is , therefore, perfectly justified in coming to the conclusion that the approval was invalid in eye of law. We are conscious that the statue does not provide for any format in which the approval must be granted or the approval granted must be recorded. Nevertheless, when the Addl. CIT while granting the approval recorded that he did not have enough time to analyze the issues arising out of the draft order, clearly this was a case in which the higher authority had granted the approval without consideration of relevant issues. Question of validity of the approval goes to the root of the matter and could have been raised at any time. In result, no question of law arises."

- The Allahabad Bench of Tribunal in *Verma Roadways v. Asstt. CIT (2001) 70 TTJ (All) 728 ; (2000) 75 ITD 183 (All)* held that while granting approval, Commissioner is required to examine the material before approving the assessment order. In this case, Tribunal, Allahabad Bench was examining the issue of approval under section 158BG of the Act and it opined that the object for entrusting the job of approval to a superior and a very reasonable (sic-responsible) officer of the rank of Commissioner is that he with his ability, experience and maturity of understanding can scrutinize the documents, can appreciate its factual and legal aspects and can properly supervise the entire progress of assessment. Tribunal, Allahabad Bench held that the concerned authority while granting the approval is expected to examine the

entire material before approving the assessment order and further that whenever any statutory obligation is cast on any authority, such authority is legally required to discharge the obligation not mechanically, nor formally but by application of mind.

- *In Indra Bansal & Ors. Vs ACIT* (ITA Nos. 321 to 324, 279 to 281, 325 to 331 & 400 to 404/Jd/2016 vide Judgement dated 23-02-2018) , the Hon'ble bench of Jodhpur ITAT held as under:

It is apparent from the documents on record that the approval was given by the Joint Commissioner in hasty manner without even going through the records as the records were in Jodhpur while the Joint Commissioner was camping at Udaipur. The entire exercise of seeking and granting of approval in all the 22 cases was completed in one single day itself i.e., 31-3-2013.

Thus, it is apparent that the Joint Commissioner did not have adequate time to apply his mind to the material on the basis of which the assessing officer had made the draft assessment orders. Tribunal, Mumbai Bench and Tribunal, Allahabad Bench in their orders, as discussed in the preceding paragraphs, have laid down that the power to grant approval is not to be exercised casually and in routine manner and further the concerned authority, while granting approval, is expected to examine the entire material before approving the assessment order.

It has also been laid down that whenever any statutory obligation is cast upon any authority, such authority is legally required to discharge the obligation by application of mind. In all the cases before us, the Department could not demonstrate, by cogent evidence, that the Joint Commissioner had adequate time with him so as to grant approval after duly examining the material prior to approving the assessment order.

The circumstances indicate that this exercise was carried out by the Joint Commissioner in a mechanical manner without proper application of mind. Accordingly, respectfully following the ratio of the Co-ordinate Benches of Mumbai and Allahabad as afore-mentioned and also applying the ratio of the judgment of the

Hon'ble Apex Court in the case of Sahara India (Firm) v. CIT *(supra), we hold that the* Joint *Commissioner has failed to grant approval in terms of section 153D of the Act i.e., after application of mind but has rather carried out exercise in utmost haste and in a mechanical manner and, therefore, the approval so granted by him is not an approval which can be sustained.*

- Similar view has been adopted by the Cuttack Bench in the case of ***Geetarani Panda (2018) 194 TTJ (Ctk) 915 (Cuttack)*** wherein following order passed under section 153D of the Act by the Additional CIT was subjected to challenge before the ITAT on the ground of non-application of mind. ITAT held as under:

23. In the instant case, the alleged approval letter dt. 27th March, 2015 of the Addl. CIT, Range-1, Bhubaneswar reads as under:

"Despite a reminder given on 19th March, 2015 to submit the time barring draft assessment orders for approval under s. 153D on or before 23rd March, 2015, the draft orders in M/s NeelachalCarboMetalicks (P) Ltd. Group of cases has been received in this office only on 26th March, 2015 in the afternoon. The draft orders having being submitted only 5 days before final orders are getting barred by limitation, I have no other option but to accord the approval to the same as the approval is statutorily required under s. 153D, even though there is no time left for undersigned to ensure that all the points raised in the appraisal report, the appellate proceedings, audit inspection etc. are duly taken into account, and the enquiries and investigations that are required to be made are actually made before finalization of the assessment orders.

It would have been much better and in the interest of Revenue if you had submitted the draft orders at least one month earlier so as to allow the undersigned sometime to go through and analyse the same vis-a-vis the appraisal report and seized records. It also goes without saying that you never cared even to discuss these cases

with the undersigned for guidance and line of investigation to be taken.

However, despite all this, I have gone through the material available on records and some of the observations, in respect of the following cases are given in subsequent paras."

- In ***Rajesh Ladhani Vs DCIT (ITAT Agra)*** *in ITA No.***. *106,107 and 108/Agra/2019***

ITAT held that If the approval is granted by the superior authorities in mechanical manner without application of mind then the very purpose of obtaining approval is defeated. Moreover, where 4 clear days' time was available with the administrative authority, it was a half-hearted approval and as such held as no approval in the eyes of law. Accordingly, it was held that the Approval granted by the Additional CIT, Central, Kanpur on 27.03.2015 is no approval in the eyes of law and therefore, the assessment made by the AO based on such an approval is also declared to be null and void.

- The Lucknow Bench of the ITAT in the case of "AAP *Paper Marketing Limited Vs ACIT", (2017) (4) TMI 1371*, co-incidentally where the ITAT had the occasion to consider the validity of approval granted by the same Additional CIT, Central Circle, Kanpur while quashing the assessments vide Para-14 held as under:

"In the present case JCIT has granted impugned approval halfheartedly without application of mind and without considering and perusing the material on record. Thus, we are inclined to hold that there has been no application of mind by the JCIT before granting the approval. Consequently, we hold that the assessment orders made u/s 143(3) of the Act r.w.s 153A of the Act in the case of M/s Siddhbhumi Alloys Ltd. for Assessment Year 2006-07 is bad in law and deserve to be annulled, thus, we ordered accordingly. Finally additional ground of appeal raised

by the assessee by way of Rule 27 of the ITAT Rules in ITA No. 321/Lkw/2016 for the Assessment Year 2006-07 is allowed."

- The Ranchi Bench of the ITAT in the case of *Rajat Minerals (P.) Ltd. V DCIT [2020] 114 taxmann.com 536 (Ranchi-Trib.)*, *held as under:-*

> *"14.3 Needless to say, provision of section 153D of the Act casts onerous responsibility on the superior authority to look into the draft assessment framed by the subordinate officer with some degree of objectivity. Apparently, the whole exercise of the AO in claiming to have prepared assessment orders in as many as 28 cases within a short time available (after 11:30 a.m.) and approval thereon by the JCIT and closure of the assessment on the same day is not judicially palatable. As also observed earlier, the AO has prepared the draft assessment order without even waiting for completion of that date of hearing is gross sub-version of the quasi-judicial process and such ipse-dixit conduct deserves to be deprecated. The superior authority performing the solemn duty to supervise the action of the AO claimed to have approved such large staked search matter in a spur of moment does not inspire any confidence in such hawkish supervisory process. When sequence of events are integrated and collated, the plea of the assessee that the whole exercise of the aforesaid revenue authorities are antedated cannot be refuted to be without any substance. The stand of the assessee that the assessment order in all probability is antedated to avoid consideration of reply of the assessee filed on 29.11.2016 also clinches for two more reasons; (i) the assessment order itself assertively refers to the reply of the assessee in response to the questionnaire dated 21.11.2016 as per para 5.4 of the assessment order. The order sheet, as a matter of record, clearly shows that no reply was filed till the date of passing of the order to such questionnaire i.e. till 28.11.2016. The reply to questionnaire was filed on 29.11.2016. If the reply has been considered as asserted by the AO then a natural presumption would arise that assessment was kept open till at least 29.11.2016 and therefore the assessment order dated 28.11.2016 is clearly antedated; & (ii) the assessment order has been sent by speed*

post on 14.12.2016 which clearly shows that the assessment orders which were passed with lightning speed but was languishing thereafter and dispatched after about two weeks from the date of passing the order.

14.4 The allegation of assessee is thus based on number of facts established by evidence and circumstances. Hence, whether the allegation made is sound or not must be determined by attaching weight to all facts cumulatively and by applying the test of preponderance of probabilities. The assessee is not expected to prove its case of antedating the order with mathematical precision where it is otherwise evident to a demonstrable degree. All that is required in such cases is the establishment of such a degree of probability that a reasonable person may, on its basis, believe in the existence of facts in issue. The conduct of Assessing Officer cannot be countenanced, howsoever soft stance we may incline to take. The conduct, when seen in totality, is unprecedented and casts infallible impression that the assessment orders giving rise to the captioned appeals are antedated indeed and thus a nullity in the eyes of law. All the assessment orders are required to be cancelled at the threshold in such sordid circumstances.

14.5 It would however be also pertinent to delineate whether the so-called approval of JCIT under s.153D of the Act meets legal requirement or not. As repeatedly observed above, the JCIT purportedly carried out the exercise of granting approval in a baffling haste. The order sheets recorded by the AO shows that what was sent to the JCIT were only draft assessment orders seeking approval thereon. No reference to the assessment records also being sent together with the draft assessment orders is found in the order sheet. Communication/approval letter from JCIT is not placed before us by either side to examine this aspect. Considering these facts, the JCIT has presumably given approval while remaining oblivious of the assessment records. Notwithstanding aforesaid, the JCIT was expected to enquire into reply of the assessee in response to the questionnaire dated 21.11.2016 which was crucial and of utmost significance in the context of the allegations made by AO. JCIT however has summarily endorsed the action of the AO presuming no substance in replies allegedly filed without looking at it nor he could have seen such non-

existent reply on 28.11.2016. Apparently, the approval granted by the JCIT, if any, suffers from inherent lack of application of mind on the draft assessment order and consideration of relevant assessment records. The purported approval so granted by the JCIT has been clearly reduced to an empty ritual rendering such approval to be invalid in the eyes of law. We also cannot loose sight of the fact that no minimal enquiry into the issues of substantial nature arising from the draft assessment orders have been made by the JCIT defeating the salutary purpose of section 153D of the Act.

14.6 On appraisal of the facts and circumstances of the case and peculiarities of the instant case and having regard to the long line of judicial precedents in similar circumstances including Pr.CIT v. Shreelekha Damani [IT Appeal No. 668 of 2018, dated 27-11-2018] Geetarani Panda (supra), Rishabh Buildwell (P.) Ltd. (supra), AAA Paper Marketing Ltd. (supra) and Indra Bansal (supra), we find no hesitation to hold that the action of the JCIT under s.153D of the Act is to be regarded as perfunctory and mechanical in subversion of the spirit of section 153D of the Act. Such symbolic approval is unfounded in law. As a corollary, in the absence of any valid approval under s.153D of the Act, the respective assessment orders giving cause of action in the form of captioned appeals requires to be quashed on this score also."

To conclude, it is always recommended that the authorities starting from the Investigating Wing and the Assessing Officer should act well in time and also the assessee should comply in reasonable time without delaying the assessment proceedings intentionally so that necessary due time is available with the approving authority to accord his approval in spirit of law after due application of mind and going through the case records in depth. It is pertinent to mention that by virtue of Section 153B of the act, in respect of searches conducted on or after 1st April 2019 now the time limit available for framing assessments has been significantly reduced to only 12 months as against earlier 21 months. Therefore, significant planning of time shall be required now so that due time is available

with the approving authority to accord due approval in the spirit of legislation.