

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**I.T.A .Nos. 3556 & 3557/Del/2015
(ASSESSMENT YEARS – 2010-11 & 2011-12)**

PANKAJ SHARMA, C/O M/S O.P. SAPRA & ASSOCIATES, C-763, NEW FRIENDS COLONY, NEW DELHI – 110 025 (PAN: AWYPS9585Q) (APPELLANT)	vs	DCIT, CENTRAL CIRCLE, INCOME TAX OFFICE, 3 RD FLOOR, CGO COMPLEX-1, HAPUR ROAD, GHAZIABAD UP (RESPONDENT)
Appellant by		Shri Kapil Goel, Adv.
Respondent by		Smt. Sulekha Verma, CIT(DR)

ORDER

PER H.S. SIDHU, JM

These appeals filed by the Assessee are directed against the respective Orders of the Ld. CIT(A), Ghaziabad relevant to assessment years 2010-11 & 2011-12. Since the issues involved in these appeals are common and identical, hence, they were heard together and are being consolidated by this common order for the sake of convenience, by dealing with the facts and circumstances of the case of ITA No. 3556/Del/2015 (AY 2010-11), which will apply *mutatis mutandis* in other appeal. In both the appeals, the assessee has raised as many as 08 grounds of appeal respectively, but he only argued no. 1 raised in both the appeals, which is legal in nature. The following is a common legal ground no. 1 raised in both the appeals:-

“1. That the impugned order as passed by the Ld. AO u/s. 153A/143(3) of the I.T. Act on 28.3.2013 ought to have been cancelled / annulled by the Ld. CIT(A) inter alia because:

(a) The impugned assessment order as passed is barred by limitation as the impugned order passed u/s. 143(3) has been antedated as if it was passed on 28.3.2013 as against the actual fact that it was not passed on 28.3.2013.

(b) Principles of natural justice had also been violated because no opportunity of being heard was given to the appellant before passing the impugned assessment order

2. The brief facts with regard to the issue in hand are that assessee is an individual and is regularly filing its return of income with Jurisdictional Assessing Officer at Ghaziabad. Assessee received a notice under section 153A of the Income Tax Act, 1961 (in short “Act”) dated 18.09.2012. On 17.01.2013 assessee filed the return in compliance of notice under section 153A of the Act. Assessee filed the detailed reply on 29.01.2013. No assessment order is received by assessee before 31.3.2013. On 17.4.2013 assessee filed an application stating that no assessment order is served on the assessee and requested to supply the certified copy of the assessment order. On 18.4.2013, DCIT, Central Circle/ AO supplied the certified copy of assessment order allegedly passed on 28.3.2013. AO while completing the assessment order has made various additions and completed the assessment at Rs. 5,76,47,430/- vide his order dated 28.03.2013 passed u/s. 143(3) of the Act. Against the assessment order, assessee appealed before the Ld. CIT(A), who vide his impugned order

dated 31.3.2015 has dismissed the appeal for statistical purposes. Against the impugned order, assessee is appeal before us.

3. Ld. counsel for the assessee has stated that the assessment order as passed is barred by limitation as the assessment order u/s. 143(3) has been antedated as if it was passed on 28.3.2013 as against the actual fact that it was not passed on 28.3.2013, hence, the assessment order passed u/s. 153A/143(3) of the Income Tax Act, 1961 on 28.3.2013 ought to have been cancelled/ annulled. In support of his contention he filed the two Paper Books one is containing pages 1 to 109 in which he has attached the copy of Notice issued u/s. 153A dated 18.9.2012 notice issued u/s. 142(1) dated 18.9.2012 and dated 14.12.2012; original ITR filed on 17.1.2013; postal tracking record of assessment order that it is time barred and other related evidence duly filed before lower authorities containing revenue dispatch record etc.; authentic order sheet entries from case records; notice u/s. 142(1) dated 18.9.2012 and 14.12.2012; Reply dated 29.1.2013; Order sheet entries; written submission before CIT(A) (16.10.2014); remand report dated 13.2.2015; rejoinder dated 25.2.2015; second rejoinder dated 10.3.2015; third rejoinder dated 12.3.2015; statements of assessee recorded at the time of search action u/s. 132; Hon'ble Allahabad High Court in the case of Smt. Kusum Aggarwal (Writ Tax No. 822 to 2016); Hon'ble Chattishgarh High Court recent decision in Ardent Steel Limited (Writ Petition 168/2016) on issue meaning; Allahbad High Court decision in case of Raj Kumar Jaiswal ITA No. 25/2010 (28.2.2017). In another paper Book which is having the copies of Ld. CIT(A)'s order in both the years; Remand Report of AO dated 13.2.2015 (Paper Book in ITA 3557/Del/2015) same in other year; Evidence for postal booking and dispatch register etc. (Paper Book in ITA No. 3557/Del/2015); Affidavit of assessee order booked for posting on 1.4.2013 at 19:20 hours in evening and also enclosed the copy of ITAT, Cuttack Bench decision dated 05.7.2018 in the case of Geetarani

Panda vs. ACIT in IT(SS) No. 01/CTK/2017 (AY 2007-08) and in the case of Manjusmita Dash vs. ACIT in IT(SS) A No. 02/CTK/2017 (AY 2007-08) by which the issue in dispute is squarely covered. In view of above, he requested to quash the assessment order on the legal ground itself and cancel the orders of the authorities below.

4. On the contrary, Ld. CIT(DR) relied upon the orders of the authorities below and reiterated the contention made in her written submissions:-

- a. In ground no. 1 (a) of the Appeal of A.Y. 2010-11 & 2011-12 the appellant has claimed that the assessment order is barred by limitation and required to be set aside on this ground. The appellant has mentioned that the order of assessment though dated 28.03.2013, but has been made only on 31.03.2013.
- b. This issue has also been agitated before CIT(A) in appeal no. 296/2013-14/GZB for A.Y. 2010-11 and in appeal no. 297/2013-14/GZB for A.Y. 2011-12 and Ld. CIT(A) had adjudicated this issue in para 5.3 of the order and rejected the plea of the appellant.
- c. As per the provision of Section 153(1) of the Act the order u/s 143 or u/s 144 shall not be made after the expiry of two years from the end of the A.Y. in which the income was first assessable, meaning thereby that no order of assessment shall be made after 31.03.2016. This fact is also mentioned by the appellant in the written submission and there is no disagreement on this account. However, even after quoting the provision of Section 153(1) where the word the assessment 'shall be made' has been given and there is no mention of issue of the

order in this section, the appellant has claimed that it 'should be issued'. The appellant has also relied upon the decisions of Hon'ble Courts where the issue of notice u/s 148 was in question and not the passing of order u/s 143(3). Apparently, in these cases the notice which was signed on 31.03.2010 was sent for booking on subsequent date and the Hon'ble Court has held that the date on which the said notices were actually handed over to the post office for the purpose of booking for affecting service can be said as the date of issue of notice.

However, the fact of the case of the appellant is that assessment under section 143(3) of the Act was made on 28.03.2013 and the AO has dispatched these orders to the post office on 31.03.2013. The system in the Income tax department is that the persons from the business post office centre comes and collect the envelopes of speed post from the different offices and then hand it over to the head office of the post office for sorting and further send it for delivery. Apparently, India post centre gives the date when the items are booked in the head office for delivery and it is not the date on which the items are collected from the offices by the persons of the post office. Hence, apparently the speed post no. which is signed by the AO on 28.03.2013 shows that the dispatch was made on 31.03.2013. In this light, also even on facts, there is no delay.

d. The time limit for completion of assessment and reassessment has been given u/s 153(1) and this time

limit cannot be compared with the limitation which is given u/s 149 of the Act, which is for the issue of notice u/s 148 of the Act. For better appreciation, both these section 153(1) and Section 148 are reproduced as under:
Section 153(1) "Time limit for completion of assessments and reassessments.

153.(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—

(a) two years from the end of the assessment year in which the income was first assessable; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later.

Provided that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2004 but before the 1st day of April, 2010, the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty-one months" had been substituted.

Provided further that in case the assessment year in which the income was first assessable is the assessment year commencing &[on or after the 1st day of April, 2005 but before the 1st day of April, 2009 and during the course of the

proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA—

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted.

Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "three years" had been substituted. ”

Section 148

“Issue of notice where income has escaped assessment.

148. (1) Before making the assessment, reassessment or recomputation under section the

Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139. ”

Hence, from the above, it is apparent that Section 149 speaks that no notice u/s 148 shall be issued whereas Section 153 does not give the word issued. It says that no order of assessment shall be made that means it clearly gives the time limitation for ‘completion’ of assessment and reassessment and not for the ‘issue’ of assessment order. The different words used by the legislature in different sections clearly proves that by 31.03.2016 only the assessment/reassessment has to be made and not ‘issued or send’. Hence, the comparison by the appellant of Section 149 and Section 153 is wrongly made.

e. From the above, it is apparent that the intention of legislature is to complete the assessment and if the assessment order reaches

the appellant within the reasonable time, it cannot be said that it is barred by limitation. Apparently, the assessment order was passed on 28.03.2013, collected from Assessing Officer on 31.03.2013 by the speed post centre people. In this light, there is no merit and substance in ground no. 1 of the appeal and the claim made by the appellant deserves to be rejected.

5. We have heard both the parties and perused the records especially the impugned order passed by the Ld. CIT(A), Paper Books and the case laws referred by both the parties. We find that it is the main contention of the assessee that assessment order is served on assessee on 18.4.2013 and is barred by limitation and therefore, assessment order deserves to be declared null and void. Though the assessment order is dated 28.3.2013, but it is served on assessee on 18.4.2013 i.e. after the expiry of the period on which assessment order was liable to be time barred as per section 153 of the Income Tax Act, 1961 and it is barred by limitation. However, the Ld. CIT(DR) has the contention that the intention of the legislature is to complete the assessment and if the assessment order reaches the assessee within the reasonable time, it cannot be said that is barred by limitation. Apparently, the assessment order was passed on 28.3.2013, collected from Assessing Officer on 31.3.2013 by the speed post centre people. In this light, there is no merit and substance in ground no. 1 of the appeal and the claim by the assessee deserves to be rejected. We further note that Ld. CIT(A) has given the following finding:-

5.3 *Ground of appeal no. 3:*

5.3.1 In this ground the assessee has contended that the assessment is barred by limitation. The assessee appellant has submitted that:

That assessment order is served on assessee on 18.4.2013 is barred by limitation and therefore, assessment order deserves to be declared null and void. Though the assessment order is dated 28.03.2013, but it is served on assessee on 18.04.2013 i.e. after the expiry of the period on which assessment order was liable to be time barred as per section 153 of the Income-tax act, 1961 and it is barred by limitation.

5.3.2 In this regard, the assessing officer in his remand report has submitted that:-

As per record, the assessment was completed on 28.03.2013 and was dispatched on 31.03.2013 on the address given below:-

Sh. Pankaj Sharma, S/o Sh. Dharam Pal Sharma, C-198, 1st Floor, New Panchwati Colony, Ghaziabad.

Thus, the assessment was completed on 28.03.2013 which is within limitation and the order was dispatched on

31.03.2013. As the assessment was made within limitation as per provisions of section 153(1) of I.T. Act, the assessee's contention may kindly be rejected.

5.3.3 In rejoinder report the appellant has reiterated the facts as mentioned his earlier submission.

5.3.4 I have considered the rival contentions and the facts of the case. I find that the requirement of the law is that assessment order should be made under section 143(3) within given period. The law does not require service of such order within the given period. In the present case the said period ended on 31.03.2013. The order is dated 28.03.2013 and as per the appellant it was dispatched through speed post on 01.04.2013 and assessee received it on 02.04.2013. The appellant on these facts submits that the order is time barred. In support of the same, the appellant has submitted a copy of speed post track report which was sent to the Assessing Officer for his comments. The assertion that speed post was booked on 02.04.2013 is not commented upon by Assessing Officer in his report and it can be presumed that he does not rebut this claim of assessee appellant. The assessing officer has however submitted that order was passed on 31.03.2013 with approval of Addl. CIT, Central Range, Meerut dated 28.03.2013 and was dispatched on 31.03.2013 and given for speed post on 31.3.2013. The scanned copy of the documents

produced in report by the Assessing Officer is reproduced below:-.....

.....As regards the issue whether assessment was time barred not, as stated above the only requirement of law is to make assessment by given date. The assessee has placed reliance on case of Shanti Lai Godhawat. The case law cited by the assessee i.e. the case of Shantial Godawat decided by Hon'ble ITAT Jodhpur has been considered by the hon'ble ITAT Mumbai in case of Jai Jinendra Cold Storage Pvt Ltd vs ACIT in ITA No. 2584 and 2585 and after discussing facts of that case, which are similar to that of present case, it has held that Merely because according to the assessee that was dispatched on 11.2010 does not mean that the assessment order was passed after the statutory time limit provided under the Act.

It has further held that the question as to when an order can be stated to have been made was the subject of consideration in Government Wood Workshop v. State of Kerala [1988] 69 STC 62; [1987] 1 KLT 804 in which the court stated, after relying on various decisions of the Supreme Court culminating in B.J. Shelat v. State of Gujarat. AIR 1978 SC 1109, as follows (at page 69) :

"The order of any authority cannot be said to be passed unless it is in some way pronounced or published or the party affected has the means of knowing it. It is not enough if the order is made, signed, and kept in the file, because such order may be liable to change at the hands

of the authority who may modify it, or even destroy it, before it is made known, based on subsequent information, thinking or change of opinion. To make the order complete and effective, it should be issued, so as to be beyond the control of the authority concerned, for any possible change or modification therein. This should be done within the prescribed period, though the actual service of the order may be beyond that period." (emphasis supplied)

Having discussed the facts and above judgement, the hon'ble ITAT has held that Respectfully following the same and in the absence of any material to show that the order passed by the AO was not made on 30.12.2009, we hold that the order passed by the AO was within the limitation and not barred by limitation. The plea taken by the learned counsel for the assessee is without any merit and, hence, the same is rejected.

In present case, the evidence proves that the once the assessment order has been given for speed post to a third person (which the appellant claims to be a notice server) be it a postman or notice server of the department, it is out of hands of the assessing officer. The fact that the order has been approved by Addl CIT, has been shown to have been dispatched in the Dispatch and handed over to third person for speed post prior to time barring date prove that the order was made, op or before 31.03.2013. In facts and circumstances of the case, I hold that the impugned assessment order has

been made within stipulated time. Therefore, this ground of Appeal is rejected.”

5.1 After perusing the aforesaid finding of the Ld. CIT(A), we find that AO in his remand report has submitted that as per record, the assessment was completed on 28.3.2013 which is within limitation and the order was dispatched on 31.3.2013. Hence, the assessment was within limitation as per provisions of section 153(1) of I.T. Act and same view was adopted by the Ld. CIT(A) and later reiterated by the Ld. CIT(DR) before us. But, after perusing the evidence for postal booking and dispatch register which are placed on record at page no. 11-16 of Paper Book in ITA No. 3557/Del/2015 (AY 2011-12), we find considerable cogency in the contention of the Ld. counsel for the assessee that the assessment order as passed by limitation as the same has been antedated as it was passed on 28.3.2013 as against the actual fact it was not passed on 28.03.2013. Though the assessment order is dated 28.3.2013, but it served on the assessee after the expiry of the period on which assessment order was liable to be time barred as per section 153 of the Income Tax Act, 1961 and it is barred by limitation. We further note that assessee has submitted a Affidavit dated 26.11.2018 which is placed in Paper Book which states that assessment order was not dispatched on 28.03.2013 or 31.03.2013 and it was dispatched in the late evening (Time 19:20) of 01.04.2013 i.e. after the expiry of limitation period. For the sake of convenience, we are reproducing the India Post Track Result Receipt as under:-

INDIA POST

MINISTRY OF COMMERCE & INFORMATION TECHNOLOGY

Track Result for EU283993276IN [Tract. More](#)

Booked at	Booked On	Delivered at	Delivered on	Details
Model Town S.O (Ghaziabad)	01/04/2013	Not Available	Not Available	

Detailed Track Events For EU283993276IN

Date	Time	Status at	Status
01/04/2013	19:20:00	Model Town S.O (Ghaziabad)	Item Booked
01/04/2013	19:52:30	GHAZIABAD SH	Bag Received
01/04/2013	19:52:46	Model Town S.O (Ghaziabad)	Item bagged for GHAZIABAD SH

01/04/2013	19:53:03	Model Town S.O (Ghaziabad)	Bag Despatched to GHAZIABAD CSO
01/04/2013	20:51:43	GHAZIABAD SH	Bag Opened
01/04/2013	20:51:53	GHAZIABAD SH	tem Received
02/04/2013	01:27:09	GHAZIABAD SH	tem bagged for Kavi Nagar S.O
02/04/2013	05:02:16	GHAZIABAD SH	Bag Despatched to Kavi Nagar S.O
02/04/2013	09:42:17	Kavi Nagar S.O	Bag Received
02/14/2013	10:02:45	Kavi Nagar S.O	Bag Opened
02/04/2013	10:02:45	Kavi Nagar S.O	tem Received

5.2 After perusing the aforesaid Tract Report, it is crystal clear that Income Tax Department has booked the DAK containing assessee's assessment order dated 28.03.2013 in dispute only on 01/04/2013 at 19:20:00 from Model Town S.O. (Ghaziabad) which was received on 02/04/2013 10:02:45 Kavi Nagar, S.O., and did establish that when the assessee has received the assessment order, hence, the assessment is barred by limitation and deserves to be set aside on this account. In this regard, we draw support from the decision dated 27.09.2018 of the ITAT, Cuttack Bench passed in IT(S)A No. 44 to 46/CTK/2016 (AYrs. 2004-05 to 2006-07) & Ors. in the case of Sri Trinadh Chowdary vs. ACIT, Corporate Circle 1(2), Bhubaneswar & Ors., wherein it has held as under, on similar and identical issue:-

"1. We have heard rival submissions and perused the materials available on record. Id. AR's contention that the order passed by the AO u/s.153A(b)/254 of the Act is barred by limitation and it was served on the assessee/Id. AR on 06.04.2015. The Id. AR supported his arguments with the paper book and also referred to the earlier directions of the Tribunal in IT(SS)A No.13 to 17/CTK/2017, order dated 10.10.2013, wherein the Tribunal has restored the matter to the file of AO and observed at para 6 to 8, which read as under :-

"6. we have gone through Ground Nos.1 to 3 taken by the assessee, wherein, in Ground No.1, assessee has taken the contention that Id OT(A) has not accepted the fact that the assessment order has been served on the assessee after 46 days from the period of limitation. Therefore, the assessment order is nullity in eyes of law. The second ground is that AO has violated the principles of natural justice by calling return of income u/s.153A of

the I.T.Act, 1961 and third ground is that AO has not given reasonable opportunity to the assessee to produce any evidence in support of return and has violated the principles of natural justice insofar as the issuance of notice u/s.143(2) is concerned. We also find that Id CIT(A) has dismissed these grounds. We also find from the orders of the AO as well as Id CIT(A) that AO has not given reasonable opportunity of hearing before passing the orders to the assessee. Therefore, in our opinion, AO and Id CIT(A) has passed the orders without following principles of natural justice. In respect of notice under section 143(2), we find that notice was issued on the same date at 11 AM and it was not possible for the assessee to file submission and could not produce details as called for and in view of this, assessee was not able to cooperate with the assessment proceedings.

7. The Hon'ble Orissa High Court in the case of Radhika Charan Banerjee v Sambalpur Municipality, AIR 1979 Orissa 69, has held that right of appeal wherever conferred includes a right of being afforded opportunity of being heard irrespective of language conferring such right that is a part and parcel of principles of natural justice. Where an authority is required to act in a quasi-judicial capacity, it is imperative to give appellant an adequate opportunity of being heard before deciding the appeal. The aim of the rule of natural justice is to prevent miscarriage of justice and denial of principles of audi alteram partem results into such miscarriage of justice. Therefore, the Learned CIT(A) should have afforded reasonable opportunity of being heard to the assessee. Therefore, in order to impart substantial justice to the assessee, we reverse the orders of Id. CIT(A) and restore the appeals to the file of the AO to decide Ground Nos.1 to 3 afresh after giving reasonable opportunity to the assessee.

8. As we have restored Ground Nos.1 to 3, rest of the issues taken in Ground Nos.4 to 8 also restored to the file of the AO for deciding the same afresh. AO is directed to frame denovo assessment as per law."

Accordingly, as per the directions of the Tribunal the AO has passed the reassessment order on 30.03.2015 against which the assessee has filed an appeal with the first appellate authority and was dismissed by the CIT(A). The contention of Id. AR is that the reassessment order

passed on 30.03.2015 is barred by limitation as the same was served on 06.04.2015. Further Id. AR demonstrated the service of order with paper book along with copy of the notice of demand u/s.156 of the Act dated 30.03.2015 with endorsement of receipt of the order on 06.04.2015 for the said assessment year, which the Revenue has not disputed. Id. AR vehemently emphasized that the reassessment order was passed beyond limitation period and is barred by limitation and supported his submissions with the decisions of coordinate bench of the Tribunal.

12. We have perused the decisions of the Tribunal and the supporting material placed on record. We found that there is no dispute raised by the Revenue in respect of serving of order on 06.04.2015 but the fact remains that the Revenue could not demonstrate with evidence that the order was prepared and has left office of AO on date of passing of the order, whereas the Id. DR submitted that the above order was prepared and was sent to the Additional/Joint Commissioner of Income Tax for approval before serving on the assessee and the order was passed on 30.03.2015.

We found that this issue of service of the order was dealt by this coordinate bench of the Tribunal in the case of Geetarani Panda & Ors. Vs. ACIT, IT(SS)A Nos.01&02/CTK/2017, dated 05.07.2018, wherein the Tribunal observed as under :-

"19. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the assessee has raised two legal issues. Firstly, the order of assessment being issued after the statutorily permitted time is barred by limitation. Secondly, no requisite approval as envisaged under the provisions of Section 153D of the Act was obtained and, therefore, the impugned order of assessment is barred in law.

20. We find force in both the above legal issues raised by the assessee for the reason discussed hereunder.

21. In the instant case, it is not in dispute that though the impugned order of assessment is dated 31.3.2015 was issued and served manually only on 8.4.2015 on the Authorised Representative of the assessee. This Bench of the Tribunal in the case of M/s. Nidan vs ACIT, (2018) 53 CCH 0046 (Cuttack Tribunal) has held as under: "

4. In all the above seven appeals, the assessee raised a legal ground which is that the orders of assessment passed by the Assessing Officer are barred by limitation.

5. The facts relating to this issue are that a search and seizure operation was conducted in the case of the assessee on 28.5.2014. In pursuance to the said search, order u/s.153A r.w.s 144 of the Act was passed for the assessment years 2009-2010 to 2014-15 and assessment for the assessment year 2015-16 was made u/s.144 of the Act. The said orders of assessment were served upon the assessee on 9.1.2017 though all the orders were dated 30.12.2016.

6. Before the CIT(A), the assessee contended that the aforesaid orders being dispatched on 7.1.2017 are barred by limitation. The CIT(A) observed that as the orders were dated 30.12.2016 and in absence of any material to show that the Assessing Officer revisited these orders after 30.12.2016 upheld the orders and drawn support from the decision of Hon'ble Calcutta High Court in the case of CIT vs. Binani Industries Ltd., (2015) 59 taxmann.com 389 (Cal)

7. Before us the assessee produced copy of envelope by which the orders of assessment were sent to the assessee by the Assessing Officer and copy of track record of Speed Post to show that the impugned orders of assessment were, in fact, dispatched by the Assessing Officer on 7.1.2017, though the orders were dated 30.12.2016. The assessee contended that as the orders were dispatched after 30.12.2016, therefore, the orders of assessment were barred by limitation. He placed reliance on the decision of Hon'ble Karnataka High Court in the case of CIT vs. B J N Hotels Ltd., (2017) 79 taxmann.com 336(Kar).

8. On the other hand, Id D.R. placed reliance on the orders of the CIT(A).

9. Id D.R. could not explain when the orders were prepared on 30.12.2016 why it could not be dispatched on or before 31.12.2016.

10. We find that Section 153B(1)(a) reads as under:

"153B (1) Notwithstanding anything contain in section 153, the AO shall make an order of assessment or reassessment -

(a) In respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b) of sub-section (1) of section 153A, within a period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed."

11. A perusal of the above provisions show that the language used by the legislature in the above provision is in negative and the words used are "order of assessment" and not only "assessment". The word order denotes a command which is to be followed by somebody else. Unless the command is communicated to the person by whom it has to be followed, it does not become an "order".

12. In our considered view, simply determining the total income of an assessee and determining its tax liability on a piece of paper and signing the same may constitute an assessment but only on its communication to the assessee it becomes "order of assessment". Thus, in our considered opinion, to become a legal valid order of assessment, its communication must be within a period of limitation prescribed by the law though the communication may end after the prescribed period of limitation. Our above view derives support from the decision of Hon'ble Karnakata High Court in the case of B J N Hotels Ltd (supra), wherein, it has been held as under:

"That the revenue is neither able to point out from the records that the assessment orders were dispatched on 27.4.2007 nor produced the dispatch register to establish that the orders were complete and effective i.e. it was issued, so as to be beyond the control of the authority concerned within the period of limitation i.e. 29.4.2007. Admittedly, the assessment orders were served on the assessee on 30.4.2007. hence, the assessment orders passed were barred by limitation."

In the above decision, Hon'ble High Court follows its one earlier decision and has stated as under:

"An identical issue was before this Court in ITA No.832/2008 (D.D. 14.10.2014 in the case of Maharaja Shopping Complex vs DCIT. This court following the judgment of Kerala High Court in the case of Government Wood works vs State of Kerala (1988) 69 STC 62 has held that in the absence of dispatch date made available to the Court from the records, to prove that the order is issued within the prescribed period, order passed by AO is barred by limitation. The said judgment squarely applies to the facts of the present case."

13. To the same effect are the decisions of Hon'ble Kerala High Court, which are in the case of (i) K. Joseph Jacob vs Agricultural Income Tax Officer & another (1991) 190 ITR 464 (Ker) and (ii) Commissioner of Agricultural Income Tax Officer vs. Kappumalai Estate, 234 ITR 187 (Ker).

14. The Jodhpur Bench of this Tribunal also held similarly in the case of Shanti Lal Godawat and Others vs. ACIT, reported in 126 TTJ (Jd) 135.

15. In view of above plethora of judicial precedents, in our considered opinion, the decision of Hon'ble Calcutta High Court relied upon by the CIT(A) in the case of Binani Industries Ltd., (supra) will not deter us as it is a settled position of law that when two divergent views are expressed by two different Hon'ble High Courts, none of which are Hon'ble Jurisdictional High Court, then the view favourable to the assessee should be followed. For this, we derive support from the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd., 88 ITR 192 (SC).

16. Coming to the facts of the instant case, it is not in dispute that the last authorisation u/s.132 of the Act was executed on 28.5.2014. Twenty- one months from the end of the financial year 2014-2015 expires on 31.12.2016. Therefore, the orders of assessment in pursuance to the said search for the assessment years 2009-2010 to 2015-2016 were to be made on or before 31.12.2016.

17. It is not in dispute that the orders of assessment under consideration were dispatched only on 7.1.2017. Hence, in our considered opinion, the said orders of assessment were time barred and consequently, we set aside the same and allow this ground of appeal of the assessee for all the seven years under appeal."

22. In view of above, as in the instant case, the communication process of the assessment was not initiated admittedly within the prescribed period of limitation, hence it did not become an "order of assessment" within the period of limitation. We, therefore, have no hesitation in holding that the impugned order of assessment is barred by limitation.

23. In the instant case, the alleged approval letter dated 27.3.2015 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 u/s. 153D on or before 23.03.2015, the draft orders in M/s. Neelachal Carbo Metalicks Pvt. 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 u/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 atleast 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."

24. In our considered view, the provisions contained in Section 153D as enacted by the Parliament cannot be treated as an empty formality. The provision has certain purpose. It is apparent that the purpose behind the enactment of the above provision in the Statute by the

Parliament are 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 investigation 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. The same view was expressed by the Pune Benches of the Tribunal in the case of Akil Gulamali Somji vs ITO, in IT Appeal Nos.455 to 458 (Pune) of 2010 order dated 30.3.2012, wherein, it was held that when the approval was granted without proper application of mind, the order of assessment will be bad in law. The Hon'ble Bombay High Court in the case of CIT-II Vs Shri Akil Gulamali Somji, in Income Tax Appeal (L) No.1416 of 2012 order dated 15.1.2013 concurred with the view of the Tribunal that not following of the provisions of section 153D of the Act will render the related order of assessment void.

25. In the instant case, we find that the Supervisory Authority has himself admitted that because of reasons stated by him, could not apply his mind and has accorded the approval mechanically to meet the requirements of law as the requirement was merely a formality. The said Supervisory Authority had a duty towards both the assessee as well as the Revenue which was failed to be performed in the instant case.

26. Further, we find that the approving authority has required the assessing authority to conduct further enquiry in respect of opening cash in hand. The Assessing Authority thereafter has never communicated his findings of the further enquiry to the Supervisory Authority and not taken the approval of justification of his findings. Thus, in our considered opinion, alleged approval letter dated 27.3.2015 of the Addl. CIT, Range1, Bhubaneswar does not constitute the approval which is envisaged by the provisions of section 153D of the Act. Thus, following the decision of the Hon'ble Bombay High Court in the case of Akil Gulamali Somji (supra), we hold that the impugned order of assessment is void and bad in law. Therefore, the impugned order of assessment is hereby cancelled and

Ground No.2 and Ground No.4 of appeal in case of both the assesseees are allowed."

13. We considering the facts and circumstances of the case and the orders of lower authorities and the judicial precedence and applying the ratio of judgment of above decision in the present case, found that the reassessment order is dated 30.03.2015 and the same was served on 06.04.2015, which is not disputed by the Revenue and which is similar facts of the decision of coordinate bench of the Tribunal in case of Geetarani Panda (supra), where service of order is barred by limitation.

Accordingly, we set aside the orders of lower authorities and allow the additional grounds of appeal of the assessee-Trinadh Chowdary for the assessment year 2004-2005 in IT(SS)A No.44/CTK/2016."

5.3 We have heard both the parties and perused the relevant records especially the documentary evidences filed by the assessee in the Paper Book as mentioned above and the Written Submissions filed by both the parties, especially the Written Submissions of the Ld. CIT(DR) and we are of the considered view that in this case the Assessing Officer has passed the assessment order on 28.03.2013 and according to the evidence of the postal authority which we have reproduced under para no. 5.1 at page no. 14 & 15 of this order. We are also of the view that the assessment order dated 28.03.2013 has been dispatched on 01.04.2013. Therefore, keeping in view of the order dated 27.09.2018 passed by the ITAT, Cuttack Bench in IT(S)A No. 44 to 46/CTK/2016 (AYrs. 2004-05 to 2006-07) & Ors. in the case of Sri Trinadh Chowdary vs. ACIT, Corporate Circle 1(2), Bhubaneswar & Ors. reproduced above, we are of the considered view that assessment in dispute is time barred, hence, respectfully following the ITAT, Cuttack Bench decision in the case of Sri Trinadh Chowdary vs. ACIT (Supra), we set aside the assessment order and allow the ground no. 1 raised by the assessee. Since we have decided the legal issue raised vide ground no. 1 in favour of the assessee, there is no need to adjudicate other

grounds raised by the assessee. In the result, the appeal of the assessee is partly allowed.

6. Since in other ITA No. 3557/Del/2015 (AY 2011-12), similar facts are permeating therefore, my finding given above will apply *mutatis mutandis* in this appeal also, because the facts and circumstances of the case are exactly the same, hence, this appeal is also partly allowed.

7. In the result, both the appeals filed by the Assessee stand partly allowed.

Order pronounced on 08-02-2019.

Sd/-

(L.P. SAHU)
ACCOUNTANT MEMBER

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 08-02-2019

SR BHATNAGAR

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR, ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI