

Debate as to whether CIT has power to assume jurisdiction u/s 263 of the Act in respect of assessments made u/s 153A after obtaining mandatory approval u/s 153D.

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(The author strongly feels that powers of CIT u/s 263 do not extend to assessments made u/s 153A after obtaining mandatory approval u/s 153D and invites comments from readers)

*The relevant provisions of Section 263 of the Income Tax Act, 1961 are reproduced hereunder:*

**“263.** (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[*Explanation.*—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;”

**Scope of section 263 and explanation thereto:** From a plain reading of the section 263 and explanation thereto, it is clear that in addition to assessment made by AO **as per explanation (a) (i)** only the assessment order made by the Assistant Commissioner or Deputy Commissioner or Income-tax Officer on the basis of directions issued by the Joint Commissioner u/s 144A and **as per the explanation (a) (ii)** only the order made by the Joint Commissioner in exercise of the power or in performance of the functions of Assessing Officer conferred on or assigned to him under the orders or directions issued by the Board or by the Chief Commissioner or the Commissioner authorized by the Board in this behalf u/s 120 are covered under this section.

A combined reading of these provisions read with explanation will indicate that this provision covers assessments made by AO u/s 143(3). In these cases, there is application of mind only by one person. Therefore in all these cases power of review been vested with the Commissioner. The assessments in search cases are made under special provisions as provided u/s 153A read with Section 153D. This means that as per the provisions of section 263 (1), only those cases are covered where the assessment has been made either by the Assessing Officer himself or on the basis of the directions issued by the Joint Commissioner u/s 144A or the Joint Commissioner in exercise of the power or in performance of the functions of Assessing Officer. If the intention of the legislature had been to cover the assessments made u/s 153A r.w.s. 153D, one more clause would have been added to explanation to section 263 providing for this.

The assessments u/s 153A can be made only after obtaining prior approval of the next higher authority i.e. Joint Commissioner / Addl. Commissioner u/s 153D of the I.T. Act, 1961. This sub-section was inserted by the Finance Act,

2007 w.e.f. 01/06/2007 and no corresponding amendment was made in explanation to section 263, to cover these assessments also.

**Meaning of the word Approval as mentioned in Section 153D:**

The word approval has not been defined in the Act. However, it has been defined in Black's Law Dictionary -VIth Edition as the act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. Hence approval implies knowledge and exercise of discretion after knowledge.

Hon'ble ITAT Pune, Bench "B" in case of Akil Gulamali Somji v. Income Tax Officer Ward 4[5], Pune, has observed that the provisions laid down u/s. 153D of the Act are different as here the prior approval of Joint Commissioner is not required merely for direction for payment of the due amount of tax but **overall approval of the assessment framed by the I.T.O.** Therefore, assessment made without obtaining prior approval as required under section 153 D was declared null and void in this case.

In case of assessments in cases other than cases of search and seizure, there is no provision for review in the Act other than as provided for under section 263 and explanation thereto. Therefore, all these are covered u/s 263. In case of assessments u/s 153A provision for prior approval under section 153D has been made. Approval can only be made after thorough review. Therefore, these are not covered u/s 263. Had the attention of the legislature been to cover the assessment u/s 153A read with section 153D under section 263, suitable amendment would have been made in explanation to section 263 (1) also. Clearly meaning thereby, that the assessment u/s 153A read with section 153D can not be revised u/s 263.

## **Procedure for assessment in Search and Seizure cases:**

Procedure for assessment in Search & Seizure cases is provided in the Manual of Office Procedure Vol.II (Tech.) published by **DIRECTORATE OF INCOME TAX** (ORGANISATION & MANAGEMENT SERVICES) CENTRAL BOARD OF DIRECT TAXES in February 2003. The relevant guidelines as provided In Chapter-3 related to Assessment Procedure (Search and Seizure) are reproduced hereunder:

**“4. Appraisal report, panchanama and annexures :** Along with the seized material the investigation wing forwards to the Assessing Officer an appraisal report, copies of *warrants*, and the panchanama and its annexures. These should be handed over to the A.O. within two and a half months from the date of initiation of the search. The appraisal report comprises the investigation wing’s findings on the search and may include a note on the modus operandi of tax evasion adopted by the searched parties and their associates, tentative computation of undisclosed income in the hands of various assessees, overview of seized materials and suggestions for further enquiries. This report is prepared essentially for the guidance of the AO; as such, its findings are not binding on him. Wherever there is a major deviation between the income estimated in the appraisal report and the income proposed to be assessed, however, the matter should be discussed between the assessment wing and the investigation wing and the minutes of this meeting should be recorded. The AO should leave a detailed note in the ordersheet of the MR in this regard. It must be noted that the appraisal report is open to scrutiny by audit along with the relevant assessment records in all search cases”.

A review of the provisions of Section 153A, Section 153D and procedure for assessment makes it clear that the assessment order u/s 153A is already subject approval by the Addl. Commissioner u/s 153D and discussed with the investigation wing in case of major deviation between the income estimated in the appraisal report and the income proposed to be assessed. If the orders

already subject to review by two authorities, as explained above have to be reviewed again u/s 263, there would not be finality in the assessment proceedings. This will be against the observation of Hon'ble Bombay High Court in CIT vs Gabriel India Ltd (1993) 203 ITR (BOM), wherein the Hon'ble High Court held that such an action is against the well accepted policy of law that there must be point of finality in all legal proceedings and that stale issues should not be reactivated beyond a particular stage.

The power exercised by JCIT u/s 144A is not same as u/s 153D of the Act

That the provisions of section 144A and 153D are reproduced hereunder:

**[Power of [Joint Commissioner] to issue directions in certain cases.**

**144A.** A [Joint Commissioner] may, on his own motion or on a reference being made to him by the [Assessing] Officer or on the application of an assessee, call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the [Assessing] Officer to enable him to complete the assessment and such directions shall be binding on the [Assessing] Officer :

**Provided** that no directions which are prejudicial to the assessee shall be issued before an opportunity is given to the assessee to be heard.

*Explanation.*—For the purposes of this [section] no direction as to the lines on which an investigation connected with the assessment should be made, shall be deemed to be a direction prejudicial to the assessee.

**[Prior approval necessary for assessment in cases of search or requisition.**

**153D.** 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 [sub-section (1) 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.]

A review of the aforesaid provisions indicates that the powers of JCIT/Addl.CIT u/s 153D are much wider compared to the compared to powers u/s 144A of the Act. Under the provisions of Section 144A, the JCIT may, on his own motion or on a reference being made to him by the [Assessing] Officer or on the application of an assessee, call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the [Assessing] Officer to enable him to complete the assessment and such directions shall be binding on the [Assessing] Officer. Whereas heading of Section 153D indicates that it is applicable only in cases of search or requisition and provides that 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 [sub-section (1) 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.]

Thus the provisions of Section 144A are applicable in all cases other than search and requisition whereas provisions of Section 153D are applicable only in case of search and requisition. The provisions of Section 144A empower to JCIT to issue binding directions to AO for his guidance to enable him to complete the assessment only in certain circumstances, whereas the provisions of Section 153D require the AO to seek prior approval of JCIT before passing any order of assessment or reassessment.

No assessment can be made u/s 153A or u/s 153B by AO until and unless, the entire record of assessment and the issues arising during assessment are reviewed by JCIT/Addl. CIT and proposed assessment order is approved by

him. Hence approval u/s 153D from JCIT/ Addl. CIT, tantamount to review by the next higher authority. Orders already reviewed can not be reviewed again.

There is no such provision for assessment under section 143(3) of the Income Tax Act, 1961, which is taken care of u/s 263 of the Income Tax Act, 1961.

Further even in cases where the AO obtained prior approval of JCIT u/s 144A in support of any view taken by him during the course of assessment proceedings, the Hon'ble Allahabad High Court in the following cases has held that CIT would not be justified in interfering in the approval accorded by the Addl.CIT for framing assessment order.

CIT vs. Dr. Ashok Kumar in Appeal No. 192 of 2000

CIT vs. Dr. Ashok Kumar in Appeal No. 163 of 2008

CIT vs. Dr. Ashok Kumar in Appeal No. 413 of 2012

CIT vs. Dr. Ashok Kumar in Appeal No. 414 of 2012

In all the aforesaid cases the Hon'ble Court at para 5.2 of the order observed as under:

**“ In the last it is also relevant fact that the AO was fully alive about the facts of the case and that is why he got necessary approval of Addl. Commissioner before completing the assessment orders for all the assessment years and once that is not disputed by the Revenue than the CIT would not be justified in interfering in the approval accorded by the Addl.CIT for framing assessment order and thus there was no case for setting aside the assessment orders for the assessment years in question. On the basis of facts and circumstances of the case I am of the opinion that the impugned order is liable to be quashed accordingly.”**

**Conclusion:** In view of the foregoing, it is clear that powers of the CIT do not extend to assessments made u/d 153A after obtaining approval u/s 153 D. However, since there is no conclusive case law on the subject, readers are requested to kindly share their views with relevant case law, if possible.