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[2021] 129 taxmann.com 126 (Madras)/[2021] 282 Taxman 321 (Madras)/[2021] 437 ITR 178 (Madras)[03-08-2021]

INCOME TAX : Where assessment orders passed in case of assessee under section 153A were passed in gross violation of principles of natural justice as copies of all materials seized which were used for framing assessment had not been supplied to assessee,no opportunity for cross-examination had been provided and even section 65B of Evidence Act had not been complied with before admitting electronic evidence, matter was to remanded back to Assessing Officer for adjudication afresh

■■■

[2021] 129 taxmann.com 126 (Madras)

HIGH COURT OF MADRAS

Vetrivel Minerals

v.

Assistant Commissioner of Income-tax, Central Circle-2, Madurai*

MRS. J. NISHA BANU, J.
W.P (MD) NOS. 11261, 11271, 11272, 11273 AND 11765 OF 2021
AUGUST 3, 2021

Section 153A, read with section 132, of the Income-tax Act, 1961 and section 65B of Indian Evidence Act, 1872 - Search and seizure - Assessment in case of (Scope of) - Pursuant to search conducted in group companies, assessment orders were passed in case of assessee under section 153A - However, copies of all materials seized which were used for framing assessment had not been supplied to assessee - Revenue had also not given all panchanamas to assessees - Further, no opportunity for cross-examination had been provided and section 65B of Evidence Act had also not been complied with before admitting electronic evidence - Whether where assessment is framed under section 153A, it has to be based on incriminating materials found at time of search - Held, yes - Whether non-furnishing of panchanama to assessee is a violation of principles of natural justice as it disables assessee from having knowledge of seized materials and alleged incriminating materials relied upon by revenue - Held, yes - Whether further, denial of opportunity to assessee to cross-examine persons, whose statements were recorded under section 132(4) would also amount to violation of principles of natural justice - Held, yes - Whether therefore, in view of violation of principles of natural justice and also due to non-compliance of section 65B of Indian Evidence Act, assessment orders were to be set aside and matter was to remanded back to Assessing Officer for adjudication afresh - Held, yes [Paras 21, 22, 25 and 26] [Matter remanded]

FACTS

- Pursuant to a search conducted on 25-10-2018 in VV group of companies, Assessment Orders were passed in case of petitioners under section 153A.
- The petitioners assailed the impugned orders contending that they were in violation of principles of natural justice, arbitrary, mechanical and without any independent application of mind and also stating that the Income-tax Department had not discharged the burden of proof, proving that the income determined and sought to be taxed were not from the materials seized during the time of search.

HELD

- It is found that the petitioners have sought for copies of *panchanamas* in the 63 places searched, but however, the department had admittedly not given all the *panchanamas* to the petitioners even though they accepted that the petitioners are entitled to the same in the counter filed in the Writ Petition.[Para 18]
- In the impugned order, the respondent stated that it is practically impossible to give all the seized copies given the volume of materials seized from each premises. The department cannot take such stand. Whatever be the volume of the materials seized, the assessee also having demanded the same, the department is bound to have given all the copies. Again in the impugned order, the department contends that it is illogical for the assessee to insist for the copies of the materials seized from the office, factories and residences of the Directors of 'D'. However, as pointed out by the petitioners, the documents seized from 'D', were discussed in the assessment order. That being so, when the department using the said materials for framing the assessment, copies of the same should have been given to the assessee. Moreover, in the typed set of papers filed by the respondent department, wherein a communication is found addressed by the petitioner dated 28-7-2020 wherein the petitioner has set out the persons who are Directors/Partners in each of the concern and it could be seen in 'D', the members belonging to the petitioners' group are also there. In the counter affidavit filed by the department, the respondent department contends that copies of the one group cannot be given to other and in the counter, the Assessing Officer states that if specific materials were asked, he would have taken permission from the other group and supplied. As rightly pointed out by the petitioners, this stand was not taken by the department before the passing of the assessment orders, but on the contrary as found in the communication dated 17-11-2020, the department demanded original *panchanamas* for giving copies of the seized document. Even assuming the stand taken by the department in their counters are justifiable, in the facts and circumstances of the case, the respondent department should have informed the same before passing the assessment order or at least should have discussed the same in the assessment order.[Para 19]
- Therefore, the stand taken by the department now by way of counter of non-furnishing of *panchanamas* cannot be accepted. It is also not explained as to which are the concern, the respondent department concluded as belonging to the other group and what was the basis for such conclusion when the petitioners in its communication dated 28-7-2021 has explained their interest in every concern.[Para 20]
- Therefore, non-furnishing of the *panchanama* to the assessee is a violation of the principles of natural justice as it disables the petitioners from having knowledge of the seized materials and the alleged incriminating materials relied upon by the respondent department.[Para 21]
- On the next issue of refusal of cross-examination of the persons whose statements were recorded during the time of search under section 132(4), it is trite law that the person against whom a statement is used, should be given opportunity to counter and contest the same. The contention of the petitioners that since the statements recorded were of persons who were employees of the assessee and therefore the assessee cannot seek for cross-examination of them is unacceptable. The basic principles of

jurisprudence governing the law of evidence can in no way be interfered and could not be by the Income-tax Act provisions and neither the authorities functioning under the Income Tax Act has any discretion in such matters.[Para 22]

- As contended by the writ petitioners, when the entire assessment has been framed only on the basis of the so-called electronic record which are said to be copies of Excel Sheet, Excel work note book etc., non-compliance of section 65(B) of the Indian Evidence Act renders the document inadmissible in the eye of law.[Para 24]

- In view of the violation of the principles of natural justice and also due to the non-compliance of section 65(B) of the Indian Evidence Act, it is a fit case for setting aside the assessment orders. The alternative remedy under the statute in the case of violation of principles of natural justice should be an effective one capable of remedying the violations by providing afresh, but however, it remains the fact that after amendment to section 251(1)(*a*) on 1-6-2001, the Commissioner (Appeals) does not have the power of remand. Therefore, in the facts and circumstances of the case, since the petitioners have made out a clear case of violation of principles of natural justice and the statute, it is a fit case for interfering with the impugned orders. In such circumstances, plea of alternative remedy which is also an effective one to undo the violations committed by the respondent, cannot be sustained. This Court is well within its power to *set aside* the impugned orders and remand back the same for fresh consideration. [Para 25]

- Therefore, the assessment orders impugned in the present writ petitions are *set aside* and the matter is remanded back to the respondent Assessing Officer for *de novo* assessment and while doing so, the respondent officer shall:-

  (*a*) afford an opportunity of cross-examination of the persons whose statements are relied upon by the respondent for making additions or disallowance ;

  (*b*) give the details of all the seized materials including the place of seizure and give copies of seized material demanded by the petitioners. In case, the department thinks that the seized materials sought for by the petitioners does not belong to the petitioners or the petitioners' group, communicate the same to the petitioners and in such event, in the assessment orders that framed either on the concerns that do not belong to the petitioners/petitioners' group or the assessment orders that are framed on the basis of the seized materials refused to be given to the petitioners/members of the petitioners' group, there would be no tax liability on the petitioners or members of the petitioners' group;

  (*c*) the respondent should strictly comply with section 65-B of the Indian Evidence Act if the respondent wants to use the electronic document by way of secondary evidence;

  (*d*) none of the statements of the other group should be taken into consideration while framing the assessment on the petitioners or members of the petitioners' group and if the department thinks it is necessary to use the statement of the other group members, the petitioners/members of the petitioners' group should be given opportunity for cross-examination, if demanded of the persons whose statements are relied on, by the petitioners or members of the petitioners' group.

  (*e*) In case, if the department wants to fix the tax liability on the petitioners or on the members of the petitioners group, based on the search conducted and materials seized during the search conducted in the premises of the other group or in case, if the department wants to rely on the statement recorded under section 132(4) during search conducted in the premises of the members of the other group, the said assessment proceedings can only be under section 153-C. The limitation if any would stand extended and would start afresh for completion of the fresh assessment proceedings. [Para 26]

■ The writ petitions are allowed with the above observations and directions. [Para 27]

CASES REFERRED TO

All Cargo Global Logistics Ltd. v. *DCIT* [IT Appeal Nos. 5018 to 5022 & 5059 (M) of 10, dated 23-5-2021] (para 3), *CIT* v. *Continental Warehousing Corpn. Ltd.*[2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.) (para 3), *CIT* v. *Kabul Chawla*[2015] 61 taxmann.com 412/234 Taxman 300/[2016] 380 ITR 573 (Delhi) (para 3), *CIT* v. *St. Francis Clay Decor Tiles* [2016] 70 taxmann.com 234/240 Taxman 168/385 ITR 624 (Ker.) (para 3), *CIT* v. *Smt. Dayawanti Gupta* [2016] 75 taxmann.com 308/[2017] 245 Taxman 293/[2016] 390 ITR 496 (Delhi) (para 3), *CIT* v. *Meeta Gutgutia* [2017] 82 taxmann.com 287/248 Taxman 384/395 ITR 526 (Delhi) (para 3), *Pr. CIT* v. *Best Infrastructure (India) (P.) Ltd.* [2017] 84 taxmann.com 287/397 ITR 82 (Delhi) (para 3), *MDLR Resorts (P.) Ltd.* v. *CIT* [2013] 40 taxmann.com 365/[2014] 221 Taxman 83 (Mag.)/361 ITR 407 (Delhi) (para 4), *Anwar PV* v. *B.K. Basheer* [2014] 10 SCC 473 (para 5), *Arjun Pandit Rao Khotkar* v. *Kailash Kushanrao Gorantyal* [2020] 7 SCC 1 (para 5), *Pr. CIT* v. *Anand Kumar Jain* [2021] 432 ITR 384 (Delhi) (para 7), *Dy. CIT* v. *Roger Enterprises (P.) Ltd.* 2012 SCC Online ITAT 11 821 (para 7), *Brij Bhushan Singhal* v. *ACIT* 2018 SCC Online ITAT 2891 (para 7), *D.S. Suresh* v. *Asstt. CIT* [IT Appeal Nos. 462 and 463 (Bang.) of 2020, dated 22-2-2021] (para 7), *Siemens Ltd.* v. *State of Maharashtra* [2006] 12 SCC 33 (para 11), *Oryx Fisheries (P.) Ltd.* v. *Union of India* [2010] 13 SCC 427 (para 11), *CIT* v. *Chhabil Dass Agarwal* [2013] 36 taxmann.com 36/217 Taxman 143/357 ITR 357 (SC) (para 14), *M. Vivek* v. *Dy. CIT*[2020] 121 taxmann.com 366/278 Taxman 52/432 ITR 53 (Mad.) (para 14), *Jeans Knit (P.) Ltd.* v. *CIT* [2018] 12 SCC 36 (para 16), *Maharashtra Chess Assn.* v. *Union of India* [2020] 13 SCC 285 (para 16), *V. Gopalan* v. *Chief CIT* 2021 SCC Online Ker 269 (para 16), *Radha Krishnan Industries* v. *State of H.P.* [2021] 127 taxmann.com 26 (SC) (para 16), *ESS Advertising (Mauritius) S.N.C. Et. Compagnie* v. *Asstt. CIT* [2021] 128 taxmann.com 120 (Delhi) (para 16), *Mohinder Singh Gill* v. *Chief Election Commissioner* [1978] 1 SCC 405 (para 17), *Chandra Ammal Educational and Charitable Trust* v. *BSNL* 2015 SCC Online Mad. 4419 (para 17), *N. Subburaj* v. *District Collector* 2016 SCC Online Mad. 4715 (para 17), *Dr. Mary Nirmala Jayaraj* v. *Joint Director of Medical and Rural* 2019 SCC Online Mad. 18738 (para 17) and *ICDS Ltd.* v. *CIT* 2020 10 SCC 529 (para 23).

R. Gopinath *for the Petitioner.* **T.R. Senthil Kumar**, Sr. Standing Counsel and **Ms. K.G. Usha Rani**, Standing Counsel *for the Respondent.*

ORDER

1. W.P(MD)No.11261 of 2021 is filed by the petitioner challenging the common impugned order passed by the respondent for the Assessment Years 2013-2014 to 2019- 2020.

W.P(MD)No.11271 to 11273 of 2021 are filed by the petitioners challenging the individual assessment orders for the Assessment Years 2017-2018 to 2019-2020.

2. The Assessment Orders in the above writ petitions are passed under section 153A of the Income Tax Act pursuant to a search conducted on 25-10-2018 in VV group of companies. The facts in all the cases are almost identical and the orders came to be passed pursuant to the group search conducted by the Income Tax Department. The ground of challenge are also identical and all the writ petitions are disposed of by this common order.

3. The petitioners assailed the impugned orders contending that it is in violation of the principles of natural justice, arbitrary, mechanical and without any independent application of mind and also stating that the Income Tax Department has not discharged the burden of proof, proving that the income determined and sought to be taxed were not from the materials seized during the time of search. The learned counsel for the petitioners relied on the following judgments namely,

a. *All Cargo Global Logistics Ltd.* v. *DCIT* [IT Appeal Nos. 5018 to 5022 & 5059/M/10 dated 23-5-2012]

b. *CIT* v. *Continental Warehousing Corpn. Ltd.* [2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.)

c. *CIT* v. *Kabul Chawla* [2015] 61 taxmann.com 412/234 Taxman 300/[2016] 380 ITR 573 (Delhi)

d. *CIT* v. *St. Francis Clay Décor Tiles* [2016] 70 taxmann.com 234/240 Taxman 168/385 ITR 624 (Ker.)

e. *CIT* v. *Smt. Dayawanti Dupta* [2016] 75 taxmann.com 308/[2017] 245 Taxman 293/[2016] 390 ITR 496 (Delhi).

f. *CIT* v. *Meeta Gutgutia* [2017] 82 taxmann.com 287/248 Taxman 384/395 ITR 526 (Delhi).

g. *Pr. CIT* v. *Best Infrastructure (India) (P.) Ltd.* [2017] 84 taxmann.com 287/397 ITR 82 (Delhi).

and contended that in case of assessment under section 153(A), the addition or disallowance can be made only from the materials found during the time of search. The petitioners along with the written arguments have annexed the orders of dismissal of the Special Leave Petition preferred by the Income Tax Department in Special Leave Petition (Civil) Diary No. 18121/2018 as against the judgment in the case of *Meeta Gutgutia* (*supra*) wherein, the counsel for the writ petitioners contended that no incriminating materials were seized during the time of search and therefore no addition or disallowance can be made in an assessment under section 153(A) of the Act and therefore contended that the impugned assessment orders were bad in law.

4. It was also contended that the department only relied upon the materials found in the brothers group of companies and residences and also the assessment in the case of the petitioners was framed only by taking into consideration the estranged brother's statement who belonged to the other group. He would further submit that even assuming some incriminating materials were found during the time of search pertaining to any person other than the person searched, then the recourse for the department is to proceed under section 153C and not under section 153A by placing reliance on paragraph 10 of the Division Bench judgment of the Delhi High Court in the case of *MDLR Resorts(P.) Ltd.* v. *CIT* [2013] 40 taxmann.com 365/[2014] 221 Taxman 83 (Mag.)/361 ITR 407 High Court held that

> "10. For clarity we would like to elaborate what has been briefly referred to above. Search warrant (*i.e.*Form No. 45) were printed documents in which requisite blanks *i.e.,* names and details have been filled by hand. Due to paucity of space in the column, the authority issuing the search warrant had put an, (*) mark and thereafter mentioned other names in respect of whom the search warrant had been issued."

5. Further, the counsel for the petitioners also contended that the entire assessment on the petitioners was framed on the basis of the alleged secondary evidence of electronic records such as, Excel Sheet, Excel work sheet, Excel note book, Excel files, e-mail communication and Whatsapp conversation and the so-called statement of the persons recorded under section 132(4) of the Income Tax Act. The counsel for the writ petitioners contends by placing reliance on the judgment of the Supreme Court in the case of *Anwar PV* v. *B.K. Basheer* [2014] 10 SCC 473 and also in the case of *Arjun Pandit Rao Khotkar* v. *Kailash Kushanrao Gorantyal* [2020] 7 SCC 1 that since the mandatory requirement of section 65B of the Indian Evidence Act has not been complied with in respect of any of the electronic records relied upon by the respondent, they being not admissible in evidence, the assessment orders being passed on the same, cannot be sustained in the eye of law.

6. It was further contended by the petitioners' counsel that depriving the assessee the opportunity to cross-examine the persons whose statements were recorded under section 132(4) of the Income Tax Act, were

used for making additions/disallowance under section 153(A) would amount to violation of the principles of natural justice.

7. The petitioners' counsel further pointed out that in spite of specific request by the petitioners, they were not allowed to cross-examine the said persons, but the request was not even considered. The petitioners in support of his arguments placed reliance on the decision of the Delhi High Court in the case of *Pr. CIT* v. *Anand Kumar Jain* [2021] 432 ITR 384 and the decisions of ITAT Delhi Bench in the case of *Dy. CIT* v. *Roger Enterprises (P.) Ltd.* 2012 SCC Online ITAT 11821 and *Brij Bhushan Singhal* v. *ACIT* 2018 SCC Online ITAT 2891 and the decision in the case of *D.S. Suresh* v. *Asstt. CIT* by the ITAT Bangalore Bench in ITA Nos. 462 and 463 Bang/2020, dated 22-2-2021.

8. The petitioners' counsel further contended that the petitioners were handicapped from effectively defending the proposals of additions and disallowance of the department in the absence of copies of the *panchanama* being given to them. The petitioner pointing out various communications of petitioners seeking for the copies of all the *panchanamas*, submitted that in the absence of the said *panchanamas*, the petitioners are not in a position to account as to what are all the seized materials and from which group, the said materials were seized and whether the seized materials has anything incriminating and whether the department was deliberately not considered most of the seized materials which otherwise would prove the genuineness of the transaction.

9. The petitioners' counsel further contended that in view of the assessment being framed under section 153(A) of the Income Tax Act, the same has to be based on the incriminating materials found at the time of search. By denying the copies of the *panchanamas*, the petitioners were prevented from pointing out the materials relied by the department which were not found at the time of search in the premises of the petitioners.

10. The petitioners' counsel further submitted that at the time of consolidating the search proceedings, the department contended that the same has necessitated due to interlocking and interconnecting of funds of various groups. That being so, without any clarity as to which funds the alleged seized materials belong to, framing of the assessment orders is improper. The counsel for the petitioner also pointed out the earlier counter filed by the department in W.P(MD)No.16869 of 2019 and contended that the department has conceded that after centralisation, the petitioners are entitled for all the copies of seized materials but denying the same subsequently is illegal.

11. The petitioners further contended that in the case of W.P(MD)Nos.11271 to 11273 of 2021, the specific objections made in the communication dated 8-3-2021 were not even considered by the Assessing Officer. It was further pointed out that by the communications dated 8-9-2020 and 13-3-2020 the department has predetermined the liability therefore, on the wise of predetermining the issue, the assessment orders have to be set aside. The counsel for the petitioners pointed out various paragraphs in the show cause notice that show cause notices that preceded the assessment orders are identical and similar to the assessment orders and therefore, the counsel for the petitioners pleaded for quashing of the assessment orders as it is violative of the law laid down by the Supreme Court in the case of *Siemens Ltd.,* v. *State of Maharashtra* [2006] 12 SCC 33 and *Oryx Fisheries (P.) Ltd.* v. *Union of India* [2010] 13 SCC 427.

12. The petitioners also pointed out that the assessment orders are mechanical orders passed without any independent application of mind and it was a cut and paste one from the predetermined show cause notice and communication dated 8-9-2020 and 13-3-2020.

13. The counsel for the petitioners also contended that as far as the writ petitions in W.P(MD)Nos.11271 to 11273 of 2021, are concerned, not only the specific objections raised by communication dated 8-3-2021 were not considered but also the statements made in paragraphs 3 and 4 of the assessment orders are completely false and the same demonstrates the mechanical manner in which the impugned orders came to be passed.

14. *Per contra*, the learned Senior Standing Counsel for the Income Tax Department contended that *panchanamas* were given to the concerned authorised persons and the petitioners' request for cross-examination was not conducted, as the statements relied upon were recorded under section 132(4) during the time of search from the employees of the petitioners and therefore it will not be given. The learned Senior Standing Counsel also pointing out the judgment of the Supreme Court in the case of *CIT* v. *Chhabil Dass Agarwal* [2013] 36 taxmann.com 36/217 Taxman 143/357 ITR 357 and the judgment of this Court in *M. Vivek* v. *Dy. CIT* [2020] 121 taxmann.com 366/278 Taxman 52/432 ITR 53, contended that in view of the alternative remedy available under the statute, the writ petitions are not maintainable. The learned Senior Standing Counsel also placing reliance on the Delhi High Court judgment *MDLR Resorts (P.) Ltd.* (*supra*), contended that *panchanama* is a document which can either be (a) preceding documenting search with or without any seizure (b) it can be a document for return of seized article or the removal of seals and (c) it can also be a document evidencing the conclusion of the search and therefore, the petitioners cannot be aggrieved on account of the denial of copies of *panchanama*.

15. The learned Senior Standing Counsel relied on the judgment of the Single Bench of this Court cited *supra* and contended that proposed additions were not made only on the oral evidence made by the third parties, but it was based on the materials seized during the time of search. The learned Senior Standing Counsel placing reliance on the counter filed by the department made extensive submissions by reiterating the contentions found therein.

16. In response to the arguments submitted by the learned Senior Standing Counsel for the respondent, counsel for the petitioners submitted that in the case of violation of principles of natural justice, the alternative remedy cannot be a bar and also placed the following decisions for consideration of this Court.

(*i*) *Jeans Knit (P) Ltd.* v. *CIT* [2018] 12 SCC 36

(*ii*) *Maharashtra Chess Assn.* v. *Union of India* [2020] 13 SCC 285

(*iii*) *V. Gopalan* v. *Chief CIT* 2021 SCC Online Ker 269

(*iv*) *Radha Krishnan Industries* v. *State of H.P.* [2021] 127 taxmann.com 26 (SC)

(*v*) *ESS Advertising (Mauritius) S.N.C. Et. Compagnic* v. *Asstt. CIT* [2021] 128 taxmann.com 120 (Delhi)

17. Further, the counsel for the petitioners contended that the excuse given for not furnishing the *panchanama* is an after thought and the excuse is invented subsequently which can neither be sustained nor accepted as the law in this regard is no more *res integra*. For the said purpose, he argued placing reliance on the judgment of the Supreme Court in *Mohinder Singh Gill* v. *Chief Election Commissioner* [1978] 1 SCC 405 which was followed in the cases of *Chandra Ammal Educational and Charitable Trust* v. *BSNL* 2015 SCC Online Mad 4419, *N. Subburaj* v. *District Collector* 2016 SCC Online Mad 4715 and *Dr. Mary Nirmala Jayaraj* v. *Joint Director of Medical and Rural* 2019 SCC Online Mad 18738.

18. On considering the arguments, documents and judgments cited by both sides, I find that the petitioners have sought for copies of *panchanamas* in the 63 places searched, but however, the department had admittedly not given all the *panchanamas* to the petitioners even though they accepted that the petitioners are entitled to the same in the counter filed in W.P(MD)No.16869/2019.

19. In the impugned order in W.P(MD)No.11261 of 2021, in paragraph 26.7, the respondent stated that it is practically impossible to give all the seized copies given the volume of materials seized from each premises. The department cannot take such stand. Whatever be the volume of the materials seized, the assessee also having demanded the same, the department is bound to have given all the copies. Again in paragraph 26.8 of the impugned order in W.P(MD)No.11261 of 2021, the department contends that it is illogical for the assessee to insist for the copies of the materials seized from the office, factories and

residences of the Directors of M/s.Dhanalakshmi Srinivasan Sugars Pvt Ltd. However, as pointed out by the counsel for the petitioners, the documents seized from M/s.Dhanalakshmi Srinivasan Sugars Pvt Ltd., were discussed in the assessment order in paragraphs 22.4, 22.7 and 24.7. That being so, when the department using the said materials for framing of the assessment, copies of the same should have been given to the assessee. Moreover, in the typed set of papers filed by the respondent department in page 1, wherein a communication is found addressed by the petitioner dated 28-7-2020 wherein the petitioner has set out the persons who are Directors/Partners in each of the concern and it could be seen in M/s.Dhanalakshmi Srinivasan Sugars Ltd., the members belonging to the petitioners' group are also there. In the counter affidavit filed by the department in W.P(MD)No.11261 of 2021 in paragraph 19, the respondent department contends that copies of the one group cannot be given to other and in paragraph 18.6 of the counter filed in W.P(MD)Nos.11271 to 11273 of 2021, the Assessing Officer states that if specific materials were asked, he would have taken permission from the other group and supplied. As rightly pointed out by the learned counsel for the petitioners, this stand was not taken by the department before the passing of the assessment orders, but on the contrary as found in the communication dated 17-11-2020 at pages 299, 302, 304, 306, 308 and 310, the department demanded original *panchanamas* for giving copies of the seized document. Even assuming the stand taken by the department in their counters are justifiable, in the facts and circumstances of the case, the respondent department should have informed the same before passing the assessment order or at least should have discussed the same in the assessment order.

20. Therefore, the stand taken by the department now by way of counter of non-furnishing of *panchanamas* cannot be accepted. It is also not explained as to which are the concern, the respondent department concluded as belonging to the other group and what was the basis for such conclusion when the petitioners in its communication dated 28-7-2021 has explained their interest in every concern.

21. Therefore, non-furnishing of the *panchanama* to the assessee is a violation of the principles of natural justice as it disables the petitioners from having knowledge of the seized materials and the alleged incriminating materials relied upon by the respondent department.

22. On the next issue of refusal of cross-examination of the persons whose statements were recorded during the time of search under section 132(4) of the Income Tax Act, it is trite law that the person against whom a statement is used, should be given opportunity to counter and contest the same. I am unable to accept the contention of the learned Senior Counsel that since the statements recorded were of persons who were employees of the assessee and therefore the assessee cannot seek for cross-examination of them. The basic principles of jurisprudence governing the law of evidence can in no way interfered and could not be by the Income Tax Act provisions and neither the authorities functioning under the Income Tax Act has any discretion in such matters. The Supreme Court in the judgment *Kishan Chand Chellaram* 125 ITR 713 at page 720 which is also followed in the judgments cited by the petitioner in the case of *Roger Enterprises (P) Ltd.* (*supra*) and in the case of *Brij Bhushan Singhal* (*supra*), held as follows:-

> "It is true that the proceedings under the Income Tax Act law are not governed by the strict rules of evidence and therefore, it may be said that even without calling the Manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income Tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for the opportunity to cross-examine the Manager of the bank with reference to the statement made by him. ...."

23. The counsel for the petitioners also placed the recent judgment of the Supreme Court in the case of *ICDS Ltd.* v. *CIT* 2020 10 SCC 529, wherein, the Apex Court has remanded back the matter on account of the assessee being deprived of cross-examination. Therefore, the respondent either should not have relied on the statements recorded under section 132(4) or in case, if they want to rely on the same, they should not have denied the opportunity to the petitioners when they demanded of cross-examining the persons who gave the statement. When the department has taken a stand that there are two groups which were

searched by a single warrant and that the companies of one group should not be given to another, as rightly pointed out by the learned counsel for the petitioners, the Assessing Officer should not have discussed the statement of the other group for framing the assessment of the petitioners. This completely vitiates the entire assessment proceedings.

24. As contended by the writ petitioners, when the entire assessment has been framed only on the basis of the so-called electronic record which are said to be copies of Excel Sheet, Excel work note book etc., non-compliance of section 65(B) of the Indian Evidence Act renders the document inadmissible in the eye of law as held by the Supreme Court in the judgment *Anvar P.V.* case (*supra*).

> "14.Any documentary evidence by way of an electronic record under the Evidence Act, in view of sections 59 and 65A, can be proved only in accordance with the procedure prescribed under section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a *non obstante* clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, *i.e.,* electronic record which is called as computer output, depends on the satisfaction of the four conditions under section 65B(2). Following are the specified conditions under section 65B(2) of the Evidence Act:
>
> (*i*) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (*ii*) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
>
> (*iii*) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
>
> (*iv*) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.
>
> 15. Under section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (*a*) There must be a certificate which identifies the electronic record containing the statement;
>
> (*b*) The certificate must describe the manner in which the electronic record was produced;
>
> (*c*) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (*d*) The certificate must deal with the applicable conditions mentioned under section 65B(2) of the Evidence Act; and
>
> (*e*) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to section 45A opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under section 65B of the Evidence Act are not complied with, as the law now stands in India."

25. In view of the violation of the principles of natural justice and also due to the non-compliance of section 65(B) of the Indian Evidence Act, this Court feels that it is a fit case for setting aside the assessment orders. The alternative remedy under the statute is in the case of violation of principles of natural justice should be an effective one capable of remedying the violations by providing afresh, but however, it remains the fact that after amendment to section 251(1)(*a*) of the Income-tax Act on 1-6-2001, the CIT(Appeals) does not have the power of remand. Therefore, in the facts and circumstances of the case, since the petitioners have made out a clear case of violation of principles of natural justice and the statute, this Court feels that it is a fit case for interfering with the impugned orders. In such circumstances, plea of alternative remedy which is also an effective one to undo the violations committed by the respondent, cannot be sustained. This Court is well within its power to *set aside* the impugned orders and remand back the same for fresh consideration. The Supreme Court in the recent judgment *Maharashtra Chess Association* (*supra*) negatived the contention of restriction on the exercise of the powers of the High Court under Article 226 of the Constitution of India and in this regard has held as follows:—

"19. This argument of the second respondent is misconceived. The existence of an alternative remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

22. The mere existence of alternative forums where the aggrieved party may seek relief does not create a legal bar on a High Court to exercise its writ jurisdiction."

26. As far as W.P(MD)No.11765 of 2021, is concerned, it is said to be filed only to overcome the technical objection raised by the respondent and not challenging the assessment orders separately.

Therefore, the assessment orders impugned in the present writ petitions are *set aside* and the matter is remanded back to the respondent Assessing Officer for *de novo* assessment and while doing so, the respondent officer shall,

(*a*) afford an opportunity of cross-examination of the persons whose statements are relied upon by the respondent for making additions or disallowance ;

(*b*) give the details of all the seized materials including the place of seizure and give copies of seized material demanded by the petitioners. In case, the department thinks that the seized

materials sought for by the petitioners does not belong to the petitioners or the petitioners' group, communicate the same to the petitioners and in such event, in the assessment orders that framed either on the concerns that do not belong to the petitioners/petitioners' group or the assessment orders that are framed on the basis of the seized materials refused to be given to the petitioners/members of the petitioners' group, there would be no tax liability on the petitioners or members of the petitioners' group;

(*c*) the respondent should strictly comply with section 65-B of the Indian Evidence Act if the respondent wants to use the electronic document by way of secondary evidence;

(*d*) none of the statements of the other group should be taken into consideration while framing the assessment on the petitioners or members of the petitioners' group and if the department thinks it is necessary to use the statement of the other group members, the petitioners/members of the petitioners' group should be given opportunity for cross-examination, if demanded of the persons whose statements are relied on, by the petitioners or members of the petitioners' group.

(*e*) In case, if the department wants to fix the tax liability on the petitioners or on the members of the petitioners group, based on the search conducted and materials seized during the search conducted in the premises of the other group or in case, if the department wants to rely on the statement recorded under section 132(4) during search conducted in the premises of the members of the other group, the said assessment proceedings can only be under section 153-C of the Act. The limitation if any would stand extended and would start afresh for completion of the fresh assessment proceedings.

27. The writ petitions are allowed with the above observations and directions. No costs. Consequently, connected miscellaneous petitions are closed.

JYOTI

*Matter remanded.