**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER**
**AND ARUN KHODPIA, ACCOUNTANT MEMBER**

**ITA Nos.415 to 421/CTK/2019**
Assessment Years : 2009-10 to 2015-16

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| Sujata Panda, The X Ray Clinic, State Bank of India, Berhampur-760001 | Vs. | ACIT, Central Circle-1, Bhubaneswar |
| PAN/GIR No.AGPPP 7126H | | |
| **(Appellant)** | .. | ( **Respondent**) |

Assessee by : Shri D.Parida, CA/C.Parida, Adv
Revenue by : Shri M.K.Gautam, CIT DR

**Date of Hearing : 18/11/2022**
**Date of Pronouncement : 18/11/2022**

**O R D E R**

**Per Bench**

These are appeals filed by the assessee against the separate orders of the ld CIT(A)-2, Bhubaneswar dated 21.8.2019 in Appeal No.0760/2016-17, dated 17.9.2019, Nos. 0765/2016-17, 0769/2016-17,0775/2016-17, 0782/2016-17, dated 18.9.2019 No. 0780/2016-17 & 0788/2016-17 for the assessment years 2009-10 to 2015-16, respectively.

2. S/Shri D.Parida/C.Parida, ld ARs appeared for the assessee and Shri M.K.Gautam, ld CIT DR appeared for the revenue.

3. It was submitted by ld AR that there was a search on the premises of the assessee on 28.5.2014. It was the submission that the assessee is an individual, who earns her income through salary and is a partner in the partnership firm M/s. Nidan, which is a radiology and pathology diagnostics centre. It was the submission that the assessment order is purported to have been passed on 30.12.2016. It was the submission that the said assessment order was dispatched only on 7.1.2019. For this proposition, he drew our attention to pages 8 to 10 of PB, which was the consignment tracking record of the speed post in respect of the assessment order. It was the submission that the order sheet entries in respect of the assessment also do not contain any entry in respect of the sending of the assessment order for the approval of the JCIT or the receipt thereof or passing of the assessment order. Ld AR has placed copies of the order sheet entries for each of the assessment year. It was the further submission that the demand of collection registers no. has not been entered on the assessment order or demand notice u/s.156 of the Act provided to the assessee. It was the submission that the issue was squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the case of M/s. Nidan in IT(ss) A Nos.32 to

37/CTK/2018 dated 16.5.2018, wherein, in para 17, the Co-ordinate Bench has held as follows:

> "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."

4. It was the further submission that the order in the case of M/s. Nidan (supra) was the subject matter of appeal by the Revenue before the Hon'ble Jurisdictional High Court and the Hon'ble Jurisdictional High Court vide its order dated 13.7.2022 in ITA No.157 of 2018 has dismissed the revenue's appeal and upheld the order of the Co-ordinate Bench of this Tribunal in the case of M/s. Nidan (supra) by holding in paras 7 to 11 as follows:

> "7. As rightly noted by the ITAT the requirement under Section 153B (1) is for the AO to make the assessment order within a period of twenty-one months from the end of the financial year in which the last of the authorization for the search under Section 132 of the Act was executed. In the present case, there is no doubt that the last date by which the assessment had to be made was 31st December, 2016. As further rightly noticed Section 153B (1) uses the expression "order of assessment" and not merely 'assessment'. Therefore, the assessment order becomes an order only when in fact it is communicated and therefore the communication of the order had to be prior to the end of the limitation period. In BJN Hotels Ltd. (supra) the Karnataka High Court, held as under:
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> > "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 dispatched 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."

8. In the same judgment in BJN Hotels Ltd. (supra), the Karnataka High Court noted:

> "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 courts 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."

9. On the other hand, the facts in the decision of the Calcutta High Court in M/s. Binani Industries Ltd. (supra) did not involve despatch of the assessment order by post at all. The judgment reveals that the assessment order was passed on 31st March, 2005, the last date by which had to be made and the Authorised Representative (AR) of the Assessee visited the office of the Department and collected it on 13th April, 2005. When confronted the CIT produced records which 'did not contain the dispatch register'. The Calcutta High Court then concluded that from the oral evidence of the CIT that the Department had "not made any attempt to dispatch the order for service on the assessee." It further observed "there is no indication that the Assessing Officer revisited the order after 31.3.2005. The probability of the order being made and ready to be collected by the representative of the assessee as on 1.4.2005 cannot also be ruled out."

10. The above facts in M/s. Binani Industries Ltd. (supra) are therefore clearly distinguishable from the case at hand were the postal records clearly show that the despatch of the assessment was made by speed post only on 7th January, 2017 and was delivered to the Assessee only on 9th January, 2017. Therefore, notwithstanding that the Supreme Court may have the dismissed the SLP filed by the Assessee against the decision of the Calcutta High Court in M/s. Binani Industries Ltd. (supra) in limine, the said decision is not of assistance to the Revenue as far as the present case is concerned.

> 11. Consequently, the Court is satisfied that no error has been committed by the ITAT in allowing the Assessee's appeal. This Court is, therefore, not persuaded to frame the questions of law as urged by the Revenue."

5. It was the submission that the assessment orders were liable to be annulled being passed beyond the period of limitation.

6. In reply, ld CIT DR vehemently supported the order of the Assessing officer and ld CIT(A). He has filed written submission, as follows:

> "The official records do not show that the assessment order was passed by the A.O. beyond the limitation period i.e. 31.12.2016. In fact, it has been passed on 30.12.2016.
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> Section 153(1) states that " No order of assessment shall be **made** u/s.143 or section 144 at any time after the expiry of two years from the end of assessment year in which the income was first assessable".
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> The legislative intent specified in sections 143(2)/148 and other sections is clear wherein which it is stated that the A. O. should "serve on the assessee" as compared to the language used in section 153(1) of the Act. The legislature in its wisdom has not used the term "shall be served on the assessee" U/s. 153(1) for any assessment order or Demand Notice.
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> Thus "made" shall imply that the A.O. should make the assessment order by that date however there is no mention about service of assessment order along with notice of demand.
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> It is cardinal rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver as held by the Hon'ble Supreme Court in the case of Union of India v. Tata Chemicals Ltd. (363 ITR 658) (para-22).
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> i.) In the present case, the assessment order is dated 30.12.2016 as per entries in the Demand & Collection Register. There is no evidence that it was antedated. There is no evidence to the effect that such order was not passed on 30.12.2016. There is no evidence that it has been tempered with by the A.O.
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> ii.) It has been dispatched on 07.01.2017 and received by the assessee on

09.01.2017. Kindly refer to para-5.1 on page-6 of the appellate order dated 21.08.2019. There is a categorical finding by the CIT(A) that he has seen the assessment records and the AO had sought the approval of JCIT u/s. 15 3D vide letter dated 29.12.2016 which was approved by the Supervisory Officer vide letter dated 30.12.2016. **These assessment order have been entered on page-73 of Demand & Collection Register (Part-XII/134/2016-17) on 30.12.2016.** When the A.O. sends the draft order to the JC1T for approval u/s.l53D, the order is beyond his control since after approval, the same order has to be issued to the assessee. Hence the allegation of being ante-dated shall not apply to such assessment orders. **The Demand & Collection Register and approval folder of JOT, Central Range, Bhubaneswar are produced in original for kind perusal of Hon'ble Members of IT AT.**

**iii.) The undersigned has also produced in original the assessment records in the cases of M/s. Mehars Handloom Pvt. Ltd., M/s. Ikat Exports Pvt. Ltd. and Sri Ramachandra Handloom Pvt. Ltd. passed by the same A.O. (Shri V. Sivaji) on 30.12.2016 which have been entered in the Demand & Collection Register prior to entries of Smt. Sujata Panda on 30.12.2016.**

**iv.) The undersigned has also produced in original the assessment records in the cases of M/s. Nidan Radiology, Shri Sankar Kumar Mehar and Shri Chaturbhuj Mehar passed by the same A.O. (Shri V. Sivaji) on 30.12.2016 which have been entered in the Demand & Collection Register prior to entries of Smt. Sujata Panda on 30.12.2016.**

**v.) The decision of the Hon'ble Andhra Pradesh High Court in the case of Kodicasu Appalaswamy** & **Suryanarayana vs. CIT (46 ITR** 735) is pertinent in which their lordships held that where an order of assessment had been passed within the period of limitation then the date on which order of assessment and demand notice were served, was not relevant.

vi.) **The Hon'ble Gauhati High Court in the case of Ramanand Agarwalla vs. CIT (151 ITR 216)** held that as per sub-section 1 of section 153 of the Income Tax Act, 1961, the A.O. is required to pass an order of assessment within the limitation period, it does not require that the demand notice and assessment order should also be issued within that limitation period. The Hon'ble High Court clearly distinguished the legislative intent regarding making of assessment order and service of demand notice. In other words, the statute requires the Income Tax Authority to serve any notice of demand U/s 156 of the Income Tax Act on the assessee not necessarily within the period of limitation U/s 153(1) of the Income Tax Act. **In the cited case, the assessment order dated 16.03.1968 (due date 31.03.1968) was served on the** assessee **on** 13.04.1968 **and the Hon'ble Gauhati High held that the assessment**

**order was not barred by limitation of time. Similarly in the case of Esthuri Aswathiah vs. CIT (50 ITR 764), the assessment order dated 29.02.1960 (due date 31.03.1960) was served on the assessee on 04.04.1961 and the Hon'ble Mysore High held that the assessment order was not barred by limitation of time.**

**vii.) In the case of K.U. Srinivasa Rao Vs. Commissioner of Wealth-tax (152 ITR 128),** the Hon'ble Andhra Pradesh High Court held that an order of assessment was not an administrative order but a quasi-judicial order. Section 17A(l)(a) of the Income Tax Act, 1957, requires that an order of assessment should be made within the prescribed period. It does not further require that it should be communicated within the prescribed period. An order must be deemed to have been made on the date on which it is purported to have been made. Therefore, an assessment order purporting to have been made on 31st March, 1979, but served on the assessee on 20th April, 1979, is deemed to have been passed in the eye of law **on** 31st March, 1979 and not barred by limitation under section 17A(l)(a).

viii.) **Similarly in the case of India Ferro Alloy Industry Pvt. Limited Vs. Commissioner of Income Tax (202 ITR 671),** the Hon'ble Calcutta High Court held that in its opinion, what was required for completion of the assessment was the determination of the tax liability and issue of demand notice but certainly not the service of the same on the assessee. In view of above cited decisions and facts of the present case, it is clear that the AO had passed the assessment order within limitation period i.e. 31.03.2015.

**ix.) The Hon'ble Cuttack ITAT in the case of Sophia Study Circle Vs. ITO, Ward-2(1), Cuttack in ITA No.286/CTK/2012 dated 10.06.2013 for AY 2008-09 has decided this issue in the favour of the Department (para-6 page-4 of the order).**

> "6. We have considered the rival submissions. At the outset, a perusal of the provisions of section 153 of the Act shows that the word used in the said section 'make'. Similarly, a perusal of the proviso to section 147 of the Act shows that the word used as 'no action shall be taken'. Similarly, in the provisions of section 148 of the Act, the words used are 'shall serve on the assessee'. Similarly, in the provisions of section 149 of the Act, the words used are 'issue to the assessee. Thus, each word used in each section has a different purpose and different meaning. 'Made' cannot be treated on the same footing as served. The fact that the word used is 'made' in section 153 shows that the assessment order should be made on or before the said date. It does not mean that it should be served. On this ground itself as we find that the decision of the Coordinate Bench has erroneously laid down the law on this issue if the word 'made' is given the meaning served then the section itself would become unworkable and it would make all assessment orders

made on the last ,d^aY illegal. In the circumstances, respectfully following the principles and the ratio laid down by the Hon'ble Madras High Court in the case of CIT Vs. Hi-Tech Arai Ltd. (2010) 321 ITR 477, **we differ from the decision taken by the Coordinate Bench in the case of Durga Condev Pvt. Ltd. (supra) as also the decision of Shanti Lai Godawat & Ors. Vs. ACIT (2009) 126 TTJ (Jodh) 135.** Here, we may specifically mention that in the case of Durga Condev Pvt. Ltd. (supra), though one of us is co-signatory in that order still we differ from the said order as there is no bravery in perpetuating an error in law. The fact that the assessment order is dated 31.12.2010 and there is no evidence available to show that this order was not passed on 31.12.2010 makes this order sustainable in law as **under the provisions of the General Clauses Act a government document cannot be questioned unless and until substantial evidence has been produced to dislodge the veracity of the same.** Under these circumstances, as it is noticed that the assessment order is dated 31.12.2010 and as no evidence has been produced to show or to prove the allegation that the order was back dated, the technical ground raised by the assessee stands rejected".

**In the case of Sophia Study Circle, the Hon'ble Cuttack ITAT differed from the earlier decision in the case of Durga Condev Pvt. Ltd. in ITA NO.162/CTK/2012 dated 18.05.2012. Hence there is a judicial precedent which needs to be followed.**

x.) It may please be appreciated that in case of an assessee, facts and circumstances being same, the Tribunal is required to follow order passed by it. **The Hon'ble Cochin Tribunal in the case of ACIT vs. Chandragiri Construction Co. (21 taxmann.com 167) (TM) observed in para-8 of the decision of Hon'ble Vice President (Third Member) as under:**

"The Tribunal is to follow the decision of another Bench where facts are the same. This is a treaty law. **The only other alternative is to refer the matter to the larger bench if the Members of this Bench are not willing to follow the earlier order.** In this case, there is no dispute that the facts and circumstances are the same as appearing in the assessment year 2002-03 except change in figures and it is also true that the very same Members decided the issues for assessment year 2002-03 in favour of the assessee. **In such circumstances, the only course left to the Bench was to follow the earlier decision in order to gain confidence of public in the judicial system.** In case the learned Accountant Member wanted **to** deviate from the earlier order, the only course left was to refer the matter to the larger bench with the concurrence of the learned Judicial Member which, in this case had

> not happened. Hence, I am of the view that the learned Accountant Member should have **restrained from dissenting** or he should have persuaded the learned Judicial Member for referring the matter to the larger Bench. **For** the sake of uniformity, at least, the very same Bench should have followed its own order. The Bench should not come to a conclusion contrary to the conclusion reached in the earlier order of the Tribunal. In this case, the Bench being the same, definitely contrary view should not have been taken".

Therefore the decision of Hon'ble Cuttack ITAT in the case of Sophia Study Circle (supra) being a binding precedent needs to be applied with full force or it should be referred to a larger Bench.

xi.) It may please be appreciated that section 263(2) is also similarly worded. Section 263(2) states that " No order shall be **made** under sub-section (1) after the expiry of two years from the end of the financial year in which order sought to be revised was passed". Thus "made" shall imply that the Pr. CIT should make the revision order by that date however there is no mention about service of revision order u/s.263 of the Act.

**The Hon'ble Supreme Court in the case of CIT vs. Mohammed Meeran Shahul Hameed (131taxmann.com 94) has held in para-4.3 as under:**

> **"4.3** On a fair reading of sub-section (2) of section 263 it can be seen that as mandated by sub-section (2) of section 263, no order under section 263 of the Act shall be "made" after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. Therefore the word used is "made" and not the order "received" by the assessee. Even the word "dispatch" is not mentioned in section 263(2). Therefore, once it is established **that** the order under section 263 was made/passed within the period of two years from the end of the financial year in which the order sought to be revised was passed, such an order cannot be said to be beyond the period of limitation prescribed under section 263 (2) of the Act. Receipt of the order passed under section 263 by the assessee has no relevance for the purpose of counting the period of limitation provided under section 263 of the Income Tax Act. In the present case, the order was made/passed by the learned Commissioner on 26-3-2012 and according to the department it was dispatched on 28-3-2012. The relevant last date for the purpose of passing the order under section 263 considering the fact that the assessment was for the financial year 2008-09 would be 31-3-2012 and the order might have been received as per the case of the assessee-respondent herein on 29-11-2012. **However as observed hereinabove, the date on which the order under section 263 has been received by the assessee is not relevant for the purpose of calculating/considering the**

> **period of limitation provided under section 263 (2) of the Act. Therefore the High Court as such has misconstrued and has misinterpreted the provision of sub-section (2) of section 263 of the Act. If the interpretation made by the High Court and the learned ITAT is accepted in that case it will be violating the provision of section 263 (2) of the Act and to add something which is not there in the section. As observed hereinabove, the word used is "made" and not the "receipt of the order".** As per the cardinal principle of law the provision of the statue/act is to be read as it is and nothing is to be added or taken away from the provision of the statue. Therefore, the High Court has erred in holding that the order under section 263 of the Act passed by the learned Commissioner was barred by period of limitation, as provided under sub-section (2) of section 263 of the Act. xii.) **In the case of CIT vs. Subrata Roy (45 taxmann.com 513), the Hon'ble Kolkata ITAT observed that** "But in the present case before us, it is a fact that despite repeated opportunities to the Revenue, they could not prove any documentary evidence that the assessment was framed on 31.12.2008 i.e. the date of assessment order. It is a fact that the assessment order and demand notice was handed over to Postal Authorities on 12.02.2009 and the same was received by assessee on 16.02.2009".

Hence it was held by the Hon'ble ITAT that the assessment order was barred by limitation since the order of assessment and the demand notice were served 47 days after the limitation period. **On appeal, however the Hon'ble Kolkata High Court held that even if demand notice and copy of assessment order was served to the assessee after 47 days from date of assessment order which was last date for making such assessment (31.12.2008), such order could be said to have been passed on date it bore, as a period of 47 days time was not long enough to create any doubt regarding correctness of date of order and hence, such assessment could not be held to be barred by limitation of time.** Thus this issue was decided in the favour of the Revenue. The observations of the Hon'ble High court in para-10 & 11 are reproduced as under:

> "10. We have considered the rival submissions advanced by the learned advocates for the parties and are of the opinion that the submission of Mr. Dudharia must be accepted. The submission that the assessment records were taken into account by the CIT(A) without disclosing the same to the assessee is altogether without any merit. The appellate authority cannot be expected to dispose of an appeal without looking into the assessment records. Had the appellate authority relied upon any independent enquiry or the result of any such enquiry, then it would have been incumbent upon the appellate authority to inform the assessee about the result of

such enquiry so as to afford an opportunity to the assessee to make his submission with regard thereto. But the appellate authority had no such obligation to disclose the assessment records to the assessee before taking them into account at the time of hearing of the appeal. An appellate court cannot be prevented from perusing the lower court recprds. It is a strange submission to make that the lower court records could not have been perused without giving an opportunity to the assessee. The submission that the learned Tribunal was justified in drawing an adverse inference is altogether without any merit. **The learned Tribunal was hearing an appeal. The learned Tribunal was not taking evidence of the matter as a Court at the first instance would do.** The question for consideration was whether the order dated 31st December, 2008 could be said to have been passed on 31st December, 2008 when the demand notice together with a copy of the order was served after 47 days. A **period of 47 days time is not time long enough which can even make anyone suspicious as regards the correctness of the date of the order. In any case the presumption arising out of clause (e) of Section 114 proves the fact that the order was passed on 31st December, 2008.** The same presumption once again would apply to the order dated 13th November, 2009 passed by the CIT (Appeal). There is, as such, no reason to even entertain any doubt as regards the existence of the file including the order dated 31st December, 2008. There is equally no reason to doubt that the assessment order was passed on 31st December, 2008.

11. We are, as such, of the opinion that the order passed by the learned Tribunal cannot be sustained, which is accordingly set aside and the order of the CIT(A) is restored", xiii.) In the case of Nidan, **the Hon'ble Cuttack ITAT has followed the decision of Hon'ble Karnataka High Court in the case of B. J. N. Hotels Ltd. (382 ITR 110)** which was rendered on different facts. In the case of B. J. N. Hotels, the premises of the assessee company engaged in hotel business were subjected to search and proceedings. In response to notice u/s.l53A, the assessee filed its return of income declaring loss. Proceedings by order dated 31st July, 2006, initiated under section 142(2A) of the Act, appointing a special auditor came to be dropped as no opportunity was provided to the assessee. A notice was issued under section 142(2A) of the **Act** on 30th November, 2006 proposing to send the books of account of the assessee for special audit. The assessee objected but the Assessing Officer obtained prior permission from the Commissioner on 18th December, 2006 and directed the assessee to get the accounts audited fixing the due date for submission of the special audit report on 28th February, 2007. The assessment was completed u/s.l53A r.w.s. 143(3) of the Act by an order dated 27th April, 2007 and the orders were served on the assessee on 30th April, 2007. The Commissioner (Appeals) allowed the appeal filed by the assessee in part.

The following questions of law came to be referred to the Hon'ble High Court;

"1. Whether the Tribunal was correct in law in holding that the time for furnishing the special audit report could not have been extended beyond 27th January, 2007 being 180 days from 31st July, 2006 being the date of the first direction and the order of assessment ought to have been made by 26th March, 2007 and consequently the assessment order passed on 27th April, 2007 is barred by limitation on the facts and circumstance of the case ?

2. Whether the Tribunal is correct in law in holding that the Assessing Officer does not have the power to unilaterally withdraw the direction for audit under section 142(2A) of the Income Tax Act as the original direction was made with the approval of the commissioner of Income Tax on the facts and circumstance of the case ?
3. Whether the Tribunal was correct in law in holding that the assessment order passed on 27th April, 2007 is barred by limitation as successive direction under section 142(2A) is not permissible and the second direction given to obtain the audit report before 28th February, 2007 is to elongate the assessment proceedings and also contrary to section 142(2C) of the Act on the facts and circumstance of the case ?
4. Whether the assessment order is barred by limitation as it was made beyond the period of limitation on the fact and circumstances of the case ?"

On appeal, the Hon'ble Karnataka High Court held that the period prescribed under law being sixty days, the assessment orders were required to be issued on or before **26th March, 2007** considering sixty days from 27th January, 2007, the due date for the special auditor's report as specified under section 142(2C) of the Act. The assessment orders were dated 27th April, 2007. The due date for submission of the special audit report upon second reference of the Commissioner dated 18th December, 2006 being 28th February, 2007, the assessment orders were to be issued on or before 29th April, 2007. On **the direction of Hon'ble High Court to produce the original records, the same were placed before the court. But it was noticed that there were certain over writings in the order sheet as regards date of passing of the order by the Assessing Officer and moreover, a particular page of the order sheet was maintained on a rough sheet (in an unusual manner) different from other pages of the order sheet.** Besides this flaw in the records, the counsel for the Revenue was neither able to point out from the records that the assessment orders were dispatched on 27th April, 2007 nor produced the dispatch register to establish that the orders were complete and effective i.e. if these were issued then these were beyond the control of the authority concerned within the period of limitation. **Hence in these peculiar facts, it was held that the assessment orders were barred by limitation.** These facts & circumstances do not exist in the present case. Here the assessment orders have been passed before the

prescribed period as laid down in section 153 of the Act. There is no allegation against the A.O. to the effect that there are certain over-writings in the order sheet as regards the date of passing order by the A.O. The A.O. has not used any rough paper (other than order sheet) for writing the entries, xiv.) **The Hon'ble Mumbai IT AT in the case of Jai Jinendra Cold Storage Pvt. Ltd. vs. ITO in ITA No.2584 & 2585/Mum/2011 dated 08.02.2012 has decided this issue in the favour of the Revenue. In** this case, it was argued by the assessee that since the assessment order dated 30.12.2009 was dispatched by the department on 01.01.2010 which was received by the assessee on 02.01.2010 as per postal receipt, therefore, the assessment order dated 30.12.2009 was barred by limitation as according to the Act the assessment order was required to be served by 31.12.2009. Reliance was also placed on the decision of Hon'ble Jodhpur Tribunal in the case of Shantilal Godawat & Others vs. ACIT (2009) 30 DTR 413, wherein it was held that "the assessment order passed on 28.12.2007 but served on 02.01.2008, beyond the period of limitation of 31.12.2007 was barred by limitation and thus non-est in law".

On appeal, **the Hon'ble Mumbai IT AT held in paras-7 to 8 as under:**

> "7. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that there is no dispute that the impugned assessment order was passed on 30.12.2009. It is also not in dispute that the same was received by the assessee within three days i.e. on 2.1.2010. Under the provisions of section 153 of the Act, it has been mentioned that the order of assessment has to be made within twenty one months from the end of the relevant assessment year i.e. in the case of the assessee on or before 31.12.2009. **It is not necessary that the order of the assessment should be communicated to the assessee or that notice of demand in pursuance thereof should be served on him within the above period.** The assessee placed no material on record to show that the order of assessment was not passed on 30.12.2009. Merely because according to the assessee that it was dispatched on 01.01.2010 does not mean that the assessment order was passed after the statutory time limit provided under the Act.

8. In B.J. Shelat vs. State of Gujarat, AIR 1978 SC 1109, it has been held (at page 471):

> " The question as to when an order can be stated to have been made was the subject of consideration by this court in Government Wood Workshop vs. State of Kerala [1988] 69 STC 62 ; [1987] 1 KLT 804 **in** which this 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).** 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".

xv.) **Sirnilar to section 153 of the Act, there is no mention in section 263(2) of the Act to the effect that the revision order passed by Pr. CIT should be served within prescribed due date of passing such order.** In the case of Jaidurga Minerals vs. Pr. CIT in ITA No.276/CTK/2015 dated 10.08.2020, the Hon'ble Cuttack IT AT has observed in para-10 as under:

"10. In ground No.l Id. AR raised an issue regarding service of order which has been served by the assessee on 04.04.2015, which is placed in paper book at page No.21 wherein in the right side top, it has been mentioned that the order dated 30.03.2015 passed u/s.263 of the Act was received through speed post by the office staff on 04.04.2015. According to the arguments of the assessee the order should be served up to the end of the financial year i.e. 31.03.2015 but the order has been received by the assessee on 04.04.2015, which is illegal. In this regard, we refer to the provisions of Section 263(2) of the Act, which reads as under "263(2) No order shall be made under sub-section (1) after the expiry of **two** years from the end of the financial year in which the order sought to be revised was passed." From the record, it is clear that the assessment order u/s.l43(3) of the Act was passed on 22.03.2013 and the Pr. CIT has passed his order on 30.03.2015, therefore, the order is within **two** years from the relevant date. **From the reading of the provisions of Section 263(2) of the Act, it is clear that there is no mention about the "service" of the order, however, it is only mentioned that the order shall be "made". With regard to "service" it has clearly been defined in the section 143(2) of the Income Tax Act but in section 263 of the Act nowhere about service of order has been mentioned.** Therefore, this argument of the assessee with regard to ground No.l, is dismissed".

xvi.) **In the case of CIT vs. HiTech Arai Limited (321 ITR 477), the Hon'ble Madras High Court held** that there is no merit in argument that

> the Tribunal should blindly follow its own earlier decision even if such earlier decision did not reflect the correct position of the law. Thus where the Tribunal by the impugned order had applied section 32(l)(iia ) to the facts involved in the case of the assessee and had found that the assessee was entitled for the additional depreciation claimed under the said provision, it could not be held that simply because a co-ordinate Bench of the Tribunal had earlier taken a different view, the Tribunal on this occasion also ought to have followed the same, especially when it was found that the Tribunal had applied the law correctly in the impugned order. **In view of binding precedent in case of Sophia Study Circle,** it is humbly requested that this legal issue raised by the assessee needs to rejected and dismissed."

7. Ld CIT DR has placed before us the original of the demand and collection register. It was the submission that the demand and collection register clearly register the date of the assessment order as 30.12.2016. It was the submission that the assessment order had been passed within the prescribed time limit and approval of JCIT has also been taken on 30.12.2016. It was the submission that the assessment orders are liable to be upheld as it has been passed within the period of limitation. It was the submission that the delay in dispatch of the assessment order should not be a ground for treating the assessment orders as being barred by limitation.

7. We have considered the rival submissions. Admittedly, a perusal of the assessment orders in the present case clearly shows that DNCR, which is to be clearly hand written on the assessment orders is absent in the present case. It is also an admitted fact that DNCR original which has been produced by ld

CIT DR does contain the entry in respect of the date of assessment order. DNCR also does mention the date of the assessment order as 30.12.2016. However, DNCR does not contain the date of the entry made in respect of the assessment order. It only mentions the date of the assessment order as 30.12.2016. Therefore, we are of the view that DNCR register does not help the case of the revenue.

8. Ld CIT DR has placed before us the file of the JCIT, wherein, he has granted the approval u/s.153D in respect of the assessment order on 30.12.2016. Again, this does not help the revenue insofar as it is only in respect of the approval u/s.153D from the JCIT. It does not prove that the order has been passed on 30.12.2016. A perusal of the order of the Co-ordinate Bench of this Tribunal in the case of M/s. Nidan (supra) clearly shows that this issue has been considered by the Tribunal, wherein, it is held that the assessment order therein is barred by limitation. The order of the Co-ordinate Bench of this Tribunal in the case of M/s. Nidan (supra) has also been upheld by the Hon'ble Jurisdictional High Court vide order dated 13.7.2022. The assessee, herein, is a partner in M/s. Nidan (supra). Thus, the facts in the case of M/s. Nidan (supra) most specifically in respect of period of limitation would apply

*paripasu* in respect of the assessee also. In these circumstances, respectfully following the principles laid down by the Hon'ble Jurisdictional High Court in the case of M/s. Nidan referred to supra, we are of the view that the assessment orders passed in assessee's case purported to have been passed on 30.12.2016 is barred by limitation and, therefore, quashed.

9. In the result, appeals of the assessee are allowed.

Order dictated and pronounced in the open court on 18/11/2022.

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|---|---|
| Sd/- | sd/- |
| **(Arun Khodpia)** | **(George Mathan)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Cuttack; Dated 18/11/2022
B.K.Parida, SPS (OS)

**Copy of the Order forwarded to :**

1. The Appellant : Sujata Panda, The X Ray Clinic, State Bank of India, Berhampur-760001
2. The Respondent: ACIT, Central Circle-1, Bhubaneswar
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

**By order**

Sr.Pvt.secretary
**ITAT, Cuttack**