IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	21.12.2023
Pronounced on	23.02.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

W.P.Nos.9753, 9757, 9761 & 11176 of 2023
and
W.M.P.Nos.11043, 9838, 9842 & 11041 of 2023

M/s.Saravana Selvarathnam Retails Private Limited,
Rep by its Director,
Mr.Saravana Arul,
No.14, Ranganathan Street,
T.Nagar, Chennai 600 017.

... Petitioner in W.P.No.9753 of 2023

M/s.Shri Rathna Akshaya Estates Private Limited,
Represented by its Director,
Mr.Saravana Arul,
No.241, Avadi Poonamallee Road,
Kaduvetti, Veeraraghavapuram,
Chennai 600 017.

... Petitioner in W.P.No.9757 of 2023

M/s.Saravana Selvarathnam Trading and Manufacturing Private Limited,
Represented by its Director,
Mr.Saravana Arul,
No.14, Ranganathan Street,
T.Nagar, Chennai 600 017.

... Petitioner in W.P.No.9761 of 2023

Vs.

1.The Commissioner of Income Tax Appeals,
New No.46, M.G.Road,
Chennai 600 034.

2.The Assistant Commissioner of Income Tax,
Central Circle 1(2),
Office of the Assistant Commissioner of Income Tax,
Central Circle 1(2),
New No.46, M.G.Road,
Chennai 600 034.

3.The Deputy Director of Income Tax (Investigation Unit 4(4)),
Nungambakkam,
Chennai 600 034.

[*** The name of R2 was deleted vide order dated 29.03.2023 made in W.P.No.9753, 9757 & 9761 of 2023.
*** The R3 was suo motu impleaded vide order dated 05.04.2023 made in W.P.No.9753, 9757 & 9761 of 2023]

... Respondents in WP.Nos.9753, 9757 & 9761 of 2023

W.P.No.11176 of 2023:

M/s.Saravana Selvarathnam Trading and Manufacturing Private Limited,
Represented by its Director,
Mr.Saravana Arul,
No.14, Ranganathan Street,
T.Nagar, Chennai 600 017.

... Petitioner

Vs.

1.The Assistant Commissioner of Income Tax,
Central Circle 1(2),
Office of the Assistant Commissioner of Income Tax,
Central Circle 1(2),
New No.46, M.G.Road,
Chennai 600 034.

2.The Deputy Director of Income Tax (Investigation Unit 4(4)),
Nungambakkam,
Chennai 600 034.

[*** The R3 was suo motu impleaded vide order dated 12.09.2023 made in W.P.No.11176 of 2023]

... Respondents

Prayer in W.P.No.9753, 9757 and 9761 of 2023:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Declaration, to declare that the seizure of the .txt files by the 2nd respondent from an undisclosed location is not in accordance with law and therefore is inadmissible in evidence.

Prayer in W.P.No.11176 of 2023:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the 2nd respondent culminated in the impugned order – ITBA/AST/S/147/2022-

23/1051677092(1) dated 30.03.2023 for the Assessment Year 2018-19 under Section 147 of the Income Tax Act, 1961 and consequential Demand Notice- ITBA/AST/S/156/2022-23/1051677452(1) dated 30.03.2023 issued under Section 156 of the Income Tax Act, 1961 and quash the same as illegal, arbitrary and devoid of merits.

For Petitioner in all petitions : Mr.P.H.Arvind Pandiyan, Senior counsel
Mr.J.Sivanandaraj, Senior counsel
Assisted by Mr.S.Kaushik Ramaswamy for Mr.Akhil R.Bhansali

For Respondents in all writ petitions : Mr.AR.L.Sundaresan, Additional Solicitor General of India
Assisted by Mr.A.P.Srinivas, Senior Standing counsel,
and Mr.A.N.R.Jayaprathap, Junior Standing counsel.

COMMON ORDER

The writ petitions in W.P.Nos.9753, 9757 and 9761 of 2023 have been filed to declare that the seizure of the .txt files by the 2nd respondent from an undisclosed location is not in accordance with law and therefore is inadmissible in evidence.

2. The writ petition in W.P.No.11176 of 2023 has been filed challenging the impugned order dated 30.03.2023 and consequential demand notice dated 30.03.2023.

3. In the present case, the 2nd respondent had passed three assessment orders dated 31.12.2022, against which the writ petitions in W.P.No.9753, 9757 and 9761 of 2023 have been filed challenging the admissibility of evidence. Subsequent to the filing of the above writ petitions, the respondents had passed another assessment order dated 30.03.2023 without providing any opportunity of personal hearing to the petitioner and in violation of principles of natural justice and hence, challenging the same, the writ petition in W.P.No.11176 of 2023 has been filed by the petitioner.

4. The case of the petitioner is that the respondents-Department had conducted a sudden search under Section 132 of the Income Tax Act, 1961 (hereinafter called as "the Act") on different dates between 01.12.2021 and 27.01.2022. In the said searches, the 2nd respondent had

seized the electronic data and pursuant to the same, the Show Cause Notices dated 21.12.2022 and 22.12.2022 were issued to the petitioner and the reply was filed by the petitioner on 24.12.2022 and 28.12.2022. Subsequently, the assessment orders were passed on 31.12.2022. As far as the subject matter relating to W.P.No.11176 of 2023 is concerned, the Show Cause Notice was issued on 01.03.2023 and the reply was filed on 14.03.2023 and 15.03.2023. Subsequently, the assessment order was passed on 30.03.2023.

5. The main grievance of the petitioner was that the digital data evidences were collected by the respondents from unknown locations without any valid search warrant and without following the guidelines issued by the CBDT vide Digital Evidence Investigation Manual. Further, without providing any opportunity of personal hearing to the petitioner and without any corroborative evidence to corroborate the digital data evidences as mandated in the Digital Evidence Investigation Manual, four non-speaking assessment orders were passed by the respondents. In total, the respondents are intended to initiate 21

proceedings, out of which, now they have only initiated four proceedings and passed the assessment orders on 31.12.2022 in three cases and on 30.03.2023 in one case.

6. The respondents had filed the counter and raised the issue of maintainability of the present writ petitions on the ground that the certain assessments have been completed and the petitioner had also filed the statutory appeals before the 1st respondent and thus, the writ petitions are not maintainable. Further, he would contend that the evidentiary value has to be appreciated by the Appellant Authority and hence, the writ petitions are not maintainable. He would also contend that the writ petitioner cannot ride two horses at the same time and the petitioner having chosen to file the appeal ought to have pursue the same and hence, the writ petitions are not maintainable.

7. He would further contend that the writ of declaration regarding the evidentiary value is not maintainable and as the assessment is completed and appeal is pending before the Appellate Authority, the

petitioner has to agitate all the issues before the Appellate Authority. The admissibility, nature of evidence and the manner of proof cannot be questioned in the writ petitions.

8. In this regard, he referred to the judgement of the Hon'ble Apex Court rendered in "***Dhakeswari Cotton Mills Limited vs. Commissioner of Income Tax"*** reported in ***(1954) 26 ITR 775 (SC)***. By referring to the said judgement, he would submit that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a Court of law. Therefore, he would submit that the writ petitions are liable to be dismissed.

9. On the other hand, the learned Senior counsel appearing for the petitioner would submit that in the present case, the search was conducted and the assessment orders were passed in a hasty manner. At the time of search and in the event of collection of electronic data, the respondents are supposed to have followed the procedures laid down in

the Digital Evidence Investigation Manual. However, the said Manual, which was issued in terms of Section 119 of the Act by CBDT, was not followed by the respondents in letter and spirit. Further, he would contend that it is the duty of the respondents to follow the said Manual while conducting the search and taking steps to seize the materials. Hence, the question of taking exemption, by claiming that it is only optional to follow the said Manual and the same is not mandatory, is not correct and the same cannot be apply for the Department since the said Manual was issued only by the Department. Therefore, having issued the said Manual, the Department cannot take a plea that they cannot comply the same, since the Department has framed the said guidelines based on the past experiences and the law laid down in the various cases by the High Courts and the Hon'ble Apex Court in order to avoid the invalidation of evidences collected by the Department once again before the Court of law. On the other hand, the Assessee can challenge the said guidelines if it is not in accordance with law. Therefore, the guidelines issued by CBDT is mandatory, however, the same has not been followed by the Department.

10. Further, he would contend that the petitioner had made several representations to the respondents for the purpose of getting copies of the materials collected from their premises. However, for a very long period of time, they were refused to provide those documents. Thereafter, even when they provided the documents to some extent, the same was not sufficient and hence, still the petitioner made request with regard to the same, for which the respondents had replied that some of the documents were misplaced and the other documents were not provided till date.

11. Under these circumstances, the Show Cause Notices were issued in three proceedings on 21.12.2022 and 22.12.2022, for which the reply was filed by the petitioner on 24.12.2022, however still the same was not sufficient to provide the reply for the materials relied upon by the respondents in the Show Cause Notices and hence, the petitioner had provided the additional reply on 28.12.2022 wherein they had categorically requested the respondents to provide the additional

documents collected by them, however the same has not been provided till date. At this juncture, the respondents had passed the impugned orders in three cases on 31.12.2022. In another proceedings, the Show Cause Notice was issued on 01.03.2023 and the reply was filed on 15.03.2023 and subsequently, the assessment order was passed on 30.03.2023. However, in all these cases, neither the additional documents nor the opportunity of personal hearing was provided before the passing of assessment orders.

12. Further, he would submit that if the issue of suspiciousness was raised with regard to the manner in which the respondents had collected and preserved the data by not following the procedures laid down by the Act, Rules and other Manuals, certainly it is the duty of the respondents to corroborate the evidences and they are supposed to have produced the corroborative evidences. If it is oral evidence of any person, the respondents should have allowed the petitioner to cross-examine the said person, however, they had not provided any corroborative materials to corroborate the data relied by them as required

under the Digital Evidence Investigation Manual and no opportunities for cross-examination have been provided to the petitioner. Therefore, he would submit that in total violation of principles of natural justice, the entire search and the subsequent procedures have been conducted by the respondents. Hence, the present writ petitions have been filed.

13. He would also submit that this Court always have power to entertain these writ petitions, since the aforesaid circumstance is an exception to the alternative remedy available to the petitioner. In this regard, he referred to the judgement of the Hon'ble Supreme Court in "***Dhakeswari Cotton Mills Limited vs. Commissioner of Income Tax"*** reported in ***(1954) 26 ITR 775 (SC).***

14. I have given due consideration to the submissions made by Mr.P.H.Arvind Pandiyan, and Mr.J.Sivanandaraj, learned Senior counsel appearing for the petitioner and Mr.AR.L.Sundaresan, Additional Solicitor General of India, appearing for the respondents on the aspect of maintainability of the present writ petitions.

15. The challenge involved in the present writ petitions was that while conducting search and seizure of the digital data from the premises of the petitioner, the procedure, which was laid down by CBDT by virtue of Digital Evidence Investigation Manual issued under Section 119 of the Act for the purpose of conducting the search and seizure have not been followed. In this regard, the learned counsel for the respondents had submitted that it is only optional for the Department to follow the Digital Evidence Investigation Manual i.e., if the Department finds it convenient to follow the said Manual, they would follow, otherwise it will only be optional.

16. The Department have faced so many issues in collecting and preserving of digital evidences and hence, based on the findings given in various cases by the Hon'ble Apex Court and High Courts with regard to the collection and preservation of digital evidences, so as to avoid the invalidation of the same, the CBDT came with Digital Evidence Investigation Manual, which will have force since it was issued by virtue

of the powers available in terms of the provisions of Section 119 of the Act. If any evidence is collected contrary to the said Manual, Act, Rules and Statute, certainly those actions of the Department can be challenged before any Court of law and the same would be exception to the alternate remedy available to the Assessee and such exercise can also be carried out in addition to the alternate remedy available to the available to the Assessee.

17. Further, on perusal of the affidavit filed by the petitioner, it appears that in the present case, in all the four proceedings, the petitioner had made several representations before the respondents for the purpose of providing the copy of the documents and other data collected from the premise of the petitioner, however, the respondents had not provided any of the documents or materials. On the other hand, they had provided only few documents and as far as the remaining documents are concerned, they had replied that the same have been misplaced, which is really quite surprising to note, since it is the bound duty of the respondents to preserve the evidences as per the procedure laid down in the Digital

Evidence Investigation Manual. The above acts of the respondents would show their lethargic attitude in collection and preserving of evidences. However, with the available documents, the petitioner had filed their reply dated 24.12.2022 for the Show Cause Notices dated 21.12.2022 and 22.12.2022. Even thereafter, the petitioner made representations through the reply dated 25.12.2022 stating that the documents available in digital data .txt files are not sufficient to provide the reply for the Show Cause Notices. Subsequently, within a period of 3 days, the assessment order came to be passed in three cases.

18. In another case, in a similar fashion, the Show Cause Notice was issued on 01.03.2023, for which the reply was filed on 15.03.2023 and thereafter, the assessment order was passed by the respondents on 30.03.2023.

19. In view of the above, it is crystal clear as to how the Show Cause Notices were issued and time limit was provided to the petitioner by the respondents. Further, while passing the assessment orders, no

opportunity of personal hearing was provided to the petitioner and hence, there is no doubt that the impugned orders were passed in violation of principles of natural justice.

20. In the present case, if the respondents are relying upon any digital data, they are bound to provide the details of the corroborative evidence. Further, even if the statement of any person is relied, the petitioner is certainly entitled for cross-examination about the trueness of the statement of the said person. All those aspects have not been considered by the respondents while passing the assessment orders and therefore, the impugned assessment orders are purely and totally in violation of principles of natural justice and the same is liable to be set aside on this ground alone.

21. Therefore, the petitioner had filed these writ petitions under the Article 226 of the Constitution of India as an exemption to the alternative remedy and the said aspect was clearly explained in the case of ***Commissioner of Income Tax vs. Chhabil Dass Agarwal*** reported in

(2013) 36 Taxmann.com 36 (SC), wherein the Hon'ble Apex Court held as follows:

> *"19. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titagarh Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*

22. A reading of the above makes it very clear that there are exemption to the alternate remedy. Further, the circumstances discussed in the present writ petitions are clearly falls within the purview of the exemptions provided by the Hon'ble Apex Court in the ***Chhabil Dass*** case (referred supra). Hence, as far as the maintainability is concerned, this Court is of the considered view that these writ petitions are maintainable and the submission made by the Department with regard to the maintainability of these writ petition stands rejected.

23. The learned Senior counsel appearing for the petitioner would submit that in the present case, the search was made without proper warrant authorising search of the premises of Saravana Selvarathnam Furnitures, whose name was not included in the search warrant. Therefore the search, which was conducted in the premises of third party, is not in accordance with law.

24. Further, he would contend that when the search was conducted on 27.01.2022, there were two witnesses, in which, one of the witnesses,

Mr.Praveenkumar Yadhav, was not an independent witness in terms of Rule 112 of the Income Tax Rules (hereinafter called as "the IT Rules"). In terms of the said Rules, at the time of search, there must be two independent witnesses, who would be from the same locality. However in the present case, the said Praveenkumar Yadhav from the GST Department, who came for the inspection in the same premises, was added as one of the witnesses, in violation of Rule 112(7) of the IT Rules.

25. Further, he would contend that the respondents are bound by the Digital Evidence Investigation Manual and the Rules and Regulations prescribed thereunder. Since the Department had come across various difficulties, including invalidity of evidences, under the various circumstances, the CBDT had issued the said Manual with regard to the collection and preservation of the digital data and hence, the same will have statutory force in terms of the provisions of Section 119 of the Act. However, the Digital Evidences Investigation Manual has not been followed by the respondents. In this regard, he has narrated

the various aspects as stated at paragraph No.4 of the written submission under the head "Binding nature of the Digital Investigation Manual issued by CBDT and its non-compliance" and submitted that the said Manual was issued by the Committee, which was appointed by CBDT for the proper administration of Act under Section 119 of the Act and the same is statutory, binding and mandatory.

26. The learned Senior counsel further contended that the fundamentals of the proceedings to deal with the digital evidence were not followed by the respondents in the present case and the same was elaborately stated at paragraph No.5 of the written submission and this Court is relying upon the same.

27. Yet another submission made by the learned Senior counsel is that the respondents have mechanically relied upon the corrupted and incomplete data for the purpose of passing the assessment orders. Further, he would submit that out of 61948 .txt files, only 8993 were completed and readable and all other files were corrupted since the

respondents had not followed the procedure laid down by CBDT with regard to the collection of digital data and the department had not taken due care for preserving those data. In fact, when the petitioner asked the physical copies of the data, which were seized by the respondents, they replied that the same were misplaced, which shows the amount of care taken by the respondents in collection and preservation of the evidences.

28. Further, while passing the assessment order, the respondents took the sale value of 25.12.2020, which is a Christmas day, and applied the same for all the day throughout the year in a mechanical manner. Further, though the Covid pandemic was on its peak and during most of the days total lock down was in force, when the shops are closed, the respondents had applied the sale value as if the shop was open and sales were made throughout the year 2020 to the extent at par with the Christmas day, which is totally arbitrary, capricious and in non-application of mind and the same was done without any corroborative evidences. Thus, the reliance of such data and evidences to pass the assessment order is unjustifiable and it will raise the serious doubts with

regard to the accuracy of the claims made against the petitioner. Hence, he would contend that the assessment orders have been passed based on the digital data, which has been collected in an illegal manner.

29. Further, he would submit that whatever the documents, data etc., seized at the time of search, the same should have been mentioned in panchanama, however, in the present case, the respondents had not do so and hence, the seizure of electronic data is inadmissible since the hash value was not mentioned in the panchanama, which is mandatory requirement in terms of the Digital Evidence Investigation Manual. Further, the said evidences have to be sealed and signed by the Assessee, however, the same was also not followed by the respondents. Therefore, he would contend that the entire evidences have been collected against the procedure laid down in the Digital Evidence Investigation Manual and in violation of principles of natural justice and contrary to the law laid down by this Court in various cases. In this regard, he relied upon the following judgements:

i) ***State of Kerala and others vs. M/s.Kurian Abraham Private Limited and another*** reported in ***(2004) 12 KTR 235;***

ii) ***Commissioner of Customs vs. Indian Oil Corporation Limited*** reported in ***(2004) 3 SCC 488;***

30. On the other hand, the learned Senior counsel appearing for the respondents would contend that the entire premises belongs to the petitioner, wherein in one of the floors, the Saravana Selvarathnam Furniture has been functioning according to the petitioner. However, it is not that the search warrant was issued with regard to any particular floor but the search warrant was issued for "Door No.33, Natesan Street, T.Nagar, Chennai". Therefore, he would contend that whatever premises available at the aforesaid address is subject to be searched by the Department and accordingly, the respondents had conducted the search and hence, there is no invalidity of the same.

31. As far as the independent witnesses for the search conducted on 27.01.2022 are concerned, he would submit that the Income Tax

Rules prescribes that two respectable inhabitants of the locality to perform the duties of witness to the search action. It has been the practice to request the other Government Department, PSUs, etc., to provide personnel to witness the conduct of search action. This ensures the continuous presence of the witnesses from the commencement of the search to the final conclusion and thereby provides fairness and transparency in the department's action.

32. Further, as far as the Digital Evidence Investigation Manual is concerned, he would submit that it is only optional and respondents can either follow the same or not, depends upon their convenience, since it is not mandatory. Even he would refer to the Chapter 1.5 of the Manual, wherein it has been stated as follows:

> "*Though the requisite hardware/ software and technical support is not available in several stations, the departmental officers are advised to take initiative and create necessary infrastructure and awareness and follow the recommended procedures as far as possible.*

Some of the examples given on various softwares/hardwares are only used for illustration and in no way recommendatory or mandatory to be used"

33. By referring the last sentence of the above paragraph, he would submit that it is only illustrative and it is neither recommended nor mandatory. However, though it is not mandatory, the department have followed the same to the extent possible. Further, he would submit that since in the entire manual nothing has been mentioned about Section 119 of the Act, it is not mandatory and it is only optional to follow the said Manual. Therefore, merely not following the procedure laid down in the Manual, while collection of digital data evidences, will not invalidate such evidences to make the Department not to rely upon those evidences.

34. Further, he would contend that the fundamentals of the procedure to deal with the digital evidence has been duly followed and the hash value was calculated using forensic tools and the calculated hash value along with the algorithm was clearly mentioned in the Digital Evidence Forms pertaining to each of the seized electronic devices. The

Digital Evidence Collection Form was duly signed by the General Manager of the petitioner's company, two independent witnesses and also the digital forensic examiner. In the certificate issued under Section 65B of the Indian Evidence Act, 1872, the General Manager of the petitioner's company stated that the devices imaged for seizure were used by him & the company staffs. This certificate was duly signed by the General Manager of the petitioner's company and two independent witnesses. The Chain of Custody form was also recorded mentioning the devices along with the receiving and releasing parties. The master copies were sealed in a separate box and the signatures was obtained on the sealed box from the assessee (the GM of petitioner's Company), the witnesses and the officer in charge. Therefore, he would submit that the seizure procedure has been followed by the respondents.

35. He would also submit that though the database consisting of 61948 .txt files and only 8993 were complete and readable and others were corrupted, based on the 8993 files only, the Department had passed the assessment order. Hence, it is not that the respondents have passed

the assessment order without any documentary evidence. Further, he would submit that to corroborate the digital data collected by the respondents, they had relied upon the following statements:

i) The sworn statement of S.Sivakumar, which was recorded on 01.12.2021

ii) The sworn statement of S.R.Saravana Arul, which was recorded on 05.12.2021

iii) The sworn statement of Vivek Arul Raj, which recorded on 04.12.2021.

36. Hence, he would submit that the electronic data was collected and relied upon by the Department only based on the corroborative evidences of the sworn statement of the aforesaid persons and there is no procedural lapse in passing of the assessment order, thus, the same has to be challenged in the manner known to the law. Therefore, he prayed for the dismissal of these writ petitions. In support of his submissions, he relied upon the following judgements:

i) ***Pooran Mal vs. Director of Inspection*** reported in ***(1974) 93 ITR 505 (SC);***

ii) ***Dhakeswari Cotton Mills Limited, vs. Commissioner of Income Tax*** reported in ***(1954) 26 ITR 775 (SC);***

iii) ***Commissioner of Income Tax vs. Chhabil Dass Agarwal*** reported in ***(2013) 36 Taxmann.com 36 (SC);***

37. I have given due consideration to the submissions made by Mr.P.H.Arvind Pandiyan, and Mr.J.Sivanandaraj, learned Senior counsel appearing for the petitioner and Mr.AR.L.Sundaresan, Additional Solicitor General of India, appearing for the respondents and also perused the materials available on record.

38. As far as the authorisation in issuance of search warrant is concerned, a perusal of the record would show that the search warrant was issued for Door No.33, Natesan Street, T.Nagar, Chennai and in the said search warrant, nothing has been mentioned with regard to floors. In the present case, the search warrant was issued to cover the entire premises, where the entity of the petitioner viz., Saravana Selvarathnam Furnitures, is also situated, where the respondents have conducted the

search and seized some of the files and relied upon the same. Since no specific floor number was mentioned in the search warrant but only the plot number, the Department had conducted the search in all the floors, including the Saravana Selvarathnam Furnitures, which is not an entity mentioned in the search warrant.

39. If any search warrant was issued with regard to the particular entity without mentioning the floor number where many number of entities were situated, the Authorities concerned are generally expected to make search in the entities against whom the search warrant was issued. In the present case, the Authorities had presumed that the entity, where the search was conducted, belongs to the entities of the petitioner mentioned in the search warrant. On the other hand, the said entity, Saravana Selvarathnam Furnitures, was not mentioned in the search warrant.

40. Further, in terms of the provisions of Rule 112(7) of the IT Rules, at the time of search, two independent witnesses are supposed to

be present throughout the period of search. In this regard, it would be apposite to extract Rule 112(6) and (7) of the IT Rules, which reads as follows:

> *"**112. Search and Seizure:***
>
> *(1) to (5).....*
>
> *(6) Before making a search, the authorised officer shall,?*
>
> *(a) where a building or place is to be searched, call upon two or more respectable inhabitants of the locality in which the building or place to be searched is situate, and*
>
> *(b) where a vessel, vehicle or aircraft is to be searched, call upon any two or more respectable persons, to attend and witness the search and may issue an order in writing to them or any of them so to do.]*
>
> *(7) The search shall be made in the presence, of the witnesses aforesaid and a list of all things seized in the course of such search and of the places in which they were respectively found shall be prepared by [the authorised officer] and signed by such witnesses; but no person witnessing a search shall be required to attend as a witness of the search in any proceedings under [the Indian Income-tax Act, 1922 (11 of 1922), or] the Act unless specially summoned."*

41. The above Section provides that the witnesses must be inhabitants of the same locality, which means those who are all residing in and around the premises, where the search was conducted and beyond that no other meaning can be provided for the word “inhabitant of the same locality”.

42. In the present case, the search was conducted on 27.01.2022 and one Praveenkumar Yadhav, who was added as an independent witness, is not an inhabitant of the same locality but an officer of the GST Department, who has conducted the inspection with regard to the GST violation subsequent to the data search made by the respondents. For the said violation, the respondents had submitted that it is a practice of the Department to make one of the officials of other Department as witnesses, since the same would be convenient for the Department to call the witness at the time of trial.

43. However, with regard to the above aspect, the intention of the legislation was different i.e., the witness must be independent and from

the same locality. Hence, at the moment, when the respondents made the officials of other departments as witnesses since it is convenient for them to call them at the time of trial, the said witness would loss the character of independent witness and that is not the witness, which was referred under Rule 112(6) of the IT Rules. Therefore, this Court has no other aspect but to conclude that the search was conducted on 27.01.2022 without one of the independent witnesses, out of two. Further, with regard to the aspect of mandatory requirement of the independent witnesses, the Digital Evidence Investigation Manual also deal with the same at chapter 6.2 at par with the Rule 112(6) and (7) of the IT Rules.

44. Thereafter, the petitioner had heavily relied upon the binding nature of Digital Evidence Investigation Manual issued by CBDT and its not compliance. In this regard, to find out the reliance and the nature of Manual issued by CBDT, it would apposite to extract the provisions of Section 119 of the Act hereunder:

> *"**119. Instructions to subordinate authorities.—***
>
> *(1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax*

authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued—

(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the [Commissioner (Appeals)] in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,—

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections 3 [115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK,] 4 [139,] 143, 144, 147, 148, 154, 155 5 [, 158BFA], 6 [sub-section (1A) of section 201, sections 210, 211, 234A, 234B, 234C 7 [, 234E]], 8 [270A,] 271 9 [, 271C, 271CA] and 273 or otherwise), general or special orders in respect of 10[any class of

incomes or fringe benefits] or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other incometax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

*(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise 11[any income-tax authority, not being a 12*** Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;*

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement

contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:—

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed:

Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament."

45. A reading of the above provision would show that the CBDT may issue such orders, instructions, directions from time to time to other income tax authorities for proper administration of this Act and such authority and other persons shall observe and follow such orders, instructions and directions of the Board. Therefore, if the CBDT issued any orders, instructions, directions etc., for the Authorities, the same must be observed or followed by the Authorities concerned.

46. In the present case, the manual issued by the CBDT would be in the nature of orders, instructions and directions as prescribed under Section 119(1) of the Act and in such case, it is mandatory for the Department to follow it. As far as the reference made to Chapter 1.5 of the Manual by the learned Senior counsel appearing for the respondents is concerned, in the said portion of the Manual, some of the examples were given on various software and hardware that the same has to be used for illustration and in no way recommendatory or mandatory to the users. It only talks about the examples given in the software and hardware and it is not about the Rules prescribed in the Manual.

47. It was also mentioned with regard to the non-availability of the hardware, software and technical support in several stations, for which, the Department is advised to take initiative and create awareness. The Manual was issued in the year 2015 and we are living in digital India, where the entire Department have been computerised and even the ledgers have been maintained in the electronic form. It would applicable for throughout India since even a layman in the corner of the country is

required to follow the terms of the Income Tax Act with regard to the e-filing, etc. The Department have also been making the assessment in faceless manner. When such being the case, the search was conducted in a Metropolitan city, where the respondents-Department had all the facility, they cannot claim any excuse of non-availability of hardware or software. Thus, the respondents have to follow the instructions as stated in the Manual, particularly, for today's scenario, the Manual has to be followed in letter and spirit since the same was issued under Section 119 of the Act. In a similar aspect, the Hon'ble Supreme Court rendered judgement in ***State of Kerala and others vs. M/s.Kurian Abraham Private Ltd.,*** (referred supra), which reads as follows:

> *"20. In the case of Union of India and anr. V. Azadi Bachao Andolan and anr. Reported in (2004) 10 SCC 1 a circular was issued by CBDT under Section 119 of the Income-tax Act, 1961. It was challenged inter alia on the ground that it was ultra vires the provisions of Section 19(1). The argument was rejected by this Court in the following words:*
>
> > *"47. It was contended successfully before the High Court that the circular is ultra vires the provisions of Section 119.*

Sub-section (1) of Section 119 is deliberately worded in a general manner so that CBDT is enabled to issue appropriate orders, instructions or directions to the subordinate authorities "as it may deem fit for the proper administration of this Act". As long as the circular emanates from CBDT and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to the source of power under Section 119 irrespective of its nomenclature. Apart from sub-section (1), sub-section (2) of Section 119 also enables CBDT 'for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue appropriate orders, general or special, in respect of any class of income or class of cases, setting forth directions or instructions (not being prejudicial to the assessees) as to the guidelines, principles or procedures to be followed by other Income Tax Authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties'.

48. A reading of the above makes it clear that the orders, instructions and directions issued by CBDT is pertaining to the proper administration of the Act and it is relatable to the source of power under Section 119 of the Act irrespective of its nomenclature. Further, it was

held that sub-section (1), sub-section (2) of Section 119 also enables CBDT 'for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue appropriate orders, general or special, in respect of any class of income or class of cases. In such view, it is clear that the Manual issued by CBDT was in terms of the powers available under Section 119 of the Act and it will have Statutory force. When such being the case, now the Department cannot take a stand that the said Manual is only optional and there is no need to follow the same.

49. Further, as stated above, the CBDT have brought this Digital Evidence Investigation Manual based on the past experience which the Department have faced before the various Courts of law, and upon the conclusion arrived at various orders from the High Courts as well as the Hon'ble Supreme Court, to avoid the invalidity of the evidences due to the certain reasons, which have been culled out by the Department in the form of Manual. In such view of the matter, the Department should follow the same. Hence, when the Department issued such Manual for its

Authorities, they cannot come and say before this Court that it is only optional for them to follow the same. Thus, if these guidelines were not followed, the same would amount to nullifying of evidences and thereby, the Department has to incur the huge revenue losses.

50. With regard to the above aspect, after examining the case of ***Commissioner of Customs vs. Indian Oil Corporation Limited*** (referred supra), the Hon'ble Supreme Court had culled out the following principles:

> (1) Although a circular is not binding on a Court or an assessee, It is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.
>
> (2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.
>
> (3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad.

(4) It is not open to the revenue to advance an argument or filed an appeal contrary to the circulars.

51. By applying above ratio in the present case, this Court can conveniently come to the conclusion that if the Manual is not followed, the entire search proceedings would be against the law. However in the case of ***Dhakeswari Cotton Mills Limited*** (referred supra), the Constitutional Bench of the Hon'ble Supreme Court had accepted the contention of the learner Solicitor General of India, who appeared for the Department and held as follows:

> "*The Income Tax Officer is not fettered by technical rules of evidences and pleadings, and that he is entitled to act on the materials, which may not be accepted as evidence before the Court of law, but there the agreement ends.*"

52. By applying the above, one could say that the non-compliance of the Rules by the Department may not ultimately nullify the material evidence culled out by them, which may not be accepted in the Court of law. However in the present case, merely, there is no doubt that the

entire materials collected cannot be nullified, but in the same judgment when the above said statement was accepted by the Constitution Bench, wherein the next sentence is as follows:

> "*because it is equally clear that in making the assessment under sub-section (3) of section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3).*"

53. A reading of the above paragraph makes it clear that the evidences cannot be nullified based on the technical clutches because the Income Tax Officers is not entitled make assessment without reference to any evidence or materials at all. There must be something more than the suspicion to support the assessment under the Act.

54. In the present case, the respondents have not followed the procedure laid down in the Digital Evidence Investigation Manual and collected 61948 documents totally and out of the same, only 8993

documents were complete and readable, whereas the others were corrupted. Out of the said 8993 readable files, the respondents had chosen sale of one particular day i.e.,25.12.2020 as sale value and considered the same as if the entire sale of that day would be the sale of each and every days of the year, including the days on which the shop was closed mandatorily due to Covid pandemic, which means, as held by the Constitution Bench of the Hon'ble Apex Court, the assessment is not supposed to be made by virtue of pure guess and it should be made with evidences, which is beyond suspicions, but, in the present case, the collection of materials and preservation of the same at the place of the respondents is entirely suspicious and assessments were made by virtue of guess work and without any valid evidence in the eye of law.

55. Further, the data, which were relied upon by the respondents while passing the assessment order, have not been corroborated by any other evidences, which is mandatory to prove the case of the respondents when they are not bound by any technical clutches. When the respondents are not bound by any technical clutches, they are supposed

to produce the material evidence corroborated by the other evidences to substantiate the assessment since assessment should be beyond suspicions.

56. In view of the above, it appears that the assessment has been made without corroboration of material evidence and hence, the same is not done in the manner held by the Constitution Bench of the Hon'ble Apex Court. Hence, the same is challenged before this Court. Further, in the present case, how the Department had not followed the Digital Evidence Investigation Manual and other non-compliance at the time of seizure of evidences, has been tabulated hereunder:

As per Chapter 6 of the Digital Evidence Investigation Manual at page 52, one person from technical, one from the assesse side and two independent witnesses should be present.	*In the present case in one of the searches ie on 27.01.2022 one witness was not an independent witness.*
At the time of seizure a unique device number has to be allotted and the same should be duly reflected in the panchnamas chain of custody and digital evidence collection forms.	*In the present case, this procedure was not followed.*

Potential digital device that needs to be seized should be photographed along with the respective reference like cubicle number or name room surroundings etc.	*In the present case the procedure was not followed.*
If the hard disk is removed, a photograph should have been taken.	*This procedure was not followed*
A declaration to be taken from the panchas that they have been explained the various digital devices that have been identified and about the various procedures used in forensic collection.	*This procedure was not followed*
Document, the chain of custody and digital evidence forms. In the present case chain of custody document was not made and the digital evidence collection form was defective and did not contain the requirements. *Signature of the assessee and the witness had to be obtained on the hard disk*	*This was not followed*
Chapter 6.8 of the Digital Evidence Investigation Manual Forensic Imaging/Cloning at page 61 & 62 *The procedure mentioned under this chapter was not followed. Further, it is specifically stated under this chapter that the hash value should be recorded in the panchnama and the assesse can be given an option for seeking a copy of the image/clone of the hard disk.* *In the present case, the hash value was not recorded in the panchnama and the copy of*	*In the present case, the same was not done.*

the image/cloned hard disk was not supplied to the Petitioners. *Report generated by the imaging tool which contains the details of the imaging attributes, details of hard disk drive imaged, date and time and the hash value of the hard disk drive should be incorporated in the report and the report should be annexed with the panchnama.*	
Chapter 8 of the Digital Evidence Investigation Manual Guideline for documentation and seizure of digital evidences at page 86 The original storage media seized 2 cloned copies to be taken and one clone copy to be handed over to the assesse.	*This procedure was not followed in the present case.*
Before seizing any of the digital evidences their hash value must be calculated using the forensic tools such as cyber check or duplicator or anything else. There will be a report generated by these tools which can be attached with the panchanama.	*This procedure was not followed.*
Chapter 11 of the Digital Evidence Investigation Manual-Cyber Forensic Labs & Forensic Data Extraction Centres at page 96. *11.4.2-hash value of each disk should be mentioned in the panchnama*	*In the present case the same was not followed.*
The following information has to be incorporated in the panchnama :- Inventory of all computer hard disks/media found	*In the present case all the above were not followed*

The time displayed in the CPU clock of the PC/Server and the actual local time at that time *Inventory of all disks which were cloned/imaged with number of clones created/seized giving hash value of each disk.* *Inventory of all disks found and seized without cloning*	
SEIZURE MEMO *Proper Seizure memo and Seizure Proceedings must be drawn and the following things should be reflected in the Seizure Memo:* *Before seizing any of the digital evidence, their hash value must be calculated using forensic tools such as cyber check or duplicator or anything else. There will be a report generated by these tools which can be attached along with the panchnama. [Refer Section 3 of IT Act, 2000). In the present case the same was not done* *Make sure that one person from the technical side, one from the assessee side and two independent witnesses are part of the search and seizure proceedings. In the present case the same was not done.* *Allot a unique device number and the same should be duly reflected in the Panchnama,*	*In the present case the same was not done.*

Chain of Custody and Digital Evidence Collection Forms. In the present case the same was not done *Make sure all potential digital devices that needs to be seized are photographed along with the respective reference like cubicle number or name room surroundings etc. This is important since assessee may claim that the same was implanted without his knowledge, In the present case the same was not done.* *If the hard disk is removed, a photograph of the hard disk drive should be taken. In the present case the same was not done.* *If Possible paste a serial number on the digital device so that it can be related to the exact case, date and the section under which it is searched. In the present case the same was not done.* *Document the chain of custody and Digital Evidence Collection forms.*	
DIGITAL EVIDENCE COLLECTION FORM *Digital Evidence Collection Form ensures proper documentation of all the information about the evidence that is visible to the naked eye.*	*NOT FOLLOWED*
CHAIN OF CUSTODY FORM *Chain of custody refers to the documentation that shows the people who have been entrusted with the evidence. It should*	*NOT FOLLOWED*

document the details of the people who seized the equipment, the details of people who transferred it from the premise to forensic labs, people who are analyzing the evidence, the details on when all it was opened and so on.	
FORENSIC DUPLICATION *Forensic Duplication is a process of bit-stream imaging of the digital evidence by which entire data is transferred to a storage medium. Files can be copied DUP from suspected storage media using two different techniques* *<u>Logical backup</u>* *During backups, the integrity of the original media should be maintained. Investigator should use a write blocker while backing up. A write blocker PA is a hardware or a software-based tool that prevents a computer from writing to computer storage media connected to it. After Backup or imaging is performed, it is advisable to verify whether copied data is exact duplicate of the original data* *<u>Bit Stream Imaging/Forensic Imaging/Cloning</u>* *If on previewing, important data is found either in deleted or in active form, the storage medium is required to be cloned for evidence purpose. Otherwise a normal data*	*THE PROCEDURE FOR DUPLICATION OF THE DATA FINDS NO MENTION IN THE PANCHAMA*

backup can be taken. *The following steps should be taken at the time of cloning* *• As part of preparatory work, it is necessary to start with preparation of blank disks for use in cloning. This will ensure that no changes take place in the data being acquired at the time of viewing, analysing or cloning.* *Report: Take printout of report generated by the imaging tool which contains the details of imaging attributes, details of Hard Disk Drives imaged, date and time and the most important thing the hash value of the Hard Disk Drive. Attach the report along with panchnama as an annexure to it.*	
STEPS FOR SEIZURE *Collect all the digital evidence: either the original or the cloned copies.* *Separate out the main copy and working copies.* *Pack all the working copies in a separate box, which would later be used in the office for analysis.* *For the main copies, wrap a white tape on the connecting ports of each Hard Disk Drive along with department's seal. The seal and the tape will ensure that no one has*	*NOT COMPLETELY FOLLOWED AS PER THE GUIDELINES*

accessed the Hard Disk Drives. *Seal the main copies by putting them in a bubble bag and then in a storage box. And then again wrap the white tape around the storage box so that no-one can open the box without removing the tape, and then place a seal of the department.* *Take signature of assessee and officer in charge, on the seal.* *If we are seizing a system or a server or any other digital evidence, then it should be wrapped with tape and sealed in such a manner that no-one can start or open the digital evidence without breaking the seal.*	
Procedure for imaging seized hard disks *In cases where hard disks cannot be cloned at site and are therefore seized, two sets of images/clones should be created in the lab in presence of the assessee or his representative and the authorised of fiber following the same procedure as described above. A panchnama shoticer fe prepared for this activity recording the hash value of each of the hard disks imaged and the other particulars mentioned above. The assessee may be given an option to obtain copy of image at his cost.* *The chain of custody form (enclosed in Annexure-8) should be filed up. This is a key document that should be mandatorily filed up to ensure that integrity of the data cannot be*	*NOT FOLLOWED*

questioned by any court of law.	

57. With the above discrepancies, the respondents had conducted the search and collected the digital data. Further, when they make assessment based on the collected data, the same has to be supported by corroborative evidences and the respondents are supposed to provide opportunities for the petitioner to respond. However, the same was not done in the present case.

58. Further, in terms of the provision of last paragraph of the Chapter 2.6 of the Digital Evidence Investigation Manual, it has been stated as follows:

> "*Accordingly, merely gathering electronic evidence is not sufficient. Efforts have to be made to corroborate the contents therein vis-a-vis other evidence such as material and oral. Preliminary and detailed statements of the persons in control of computers/electronic devices are always very important.*"

59. In general, if any statement is made against the Assessee, he is entitled to file a counter and even he is entitled to cross-examine the person, whose statement was relied upon by the Department. In this regard, the law has been settled by this Court and the Hon'ble Apex Court in number of cases, including ***Chhabil Dass*** case (referred supra). In support of the same, the Department has also brought the Digital Evidence Investigation Manual with regard to all the digital data, wherein it has been stated that the gathering of electronic evidences alone is not sufficient to prove and make the assessment, but, efforts have to be made to corroborate the contents therein with other evidences, such as material or oral evidences.

60. Further, the law has been well settled by this Court as well as Apex Court in umpteen number of cases that the right of cross-examination is part of one of the most essential rights and whenever a request is made for cross-examination of the witnesses to test the veracity of their statements, the authority have to necessarily grant the

said request. In the case of ***"Thilagarathinam Match Works & others vs CCE" (2013) 2 CTC 369 = 2013 SCCOL Mad 333,*** this Court has held in para 9 as under:

> *"9. Petitioners have not stated any reason for crossexamination of those persons No reason need be stated by any person for requiring cross-examination in an enquiry a person gets two kinds of rights. The first set of right revolves around the right to peruse the documents relied upon by the department and the right to cross-examine the witnesses on whose statements, the enquiry or prosecution is based. The second set of right revolves around the right to produce the witnesses and documents in defence. If a person facing an enquiry seeks to summon some persons to be examined in his defence or seeks to summon some documents to be produced in support of his defence, it is open to the Enquiry Officer to ask the delinquent to justify such a request by adducing reason. But, insofar as cross-examination is concerned, no justification need be provided in the form of reasons by a delinquent. The very fact that some statements of some officers are relied upon is good enough reason for permitting cross-examination. The very fact that the right of cross-*

examination is part of the most essential rights is sufficient to grant the request. But, the enquiry officer cannot test the request for cross-examination on the strength of the reasons. Therefore, the second ground on which the request of the Petitioners is rejected, cannot also be sustained."

61. A perusal of the above, it is clear that no justification need to be provided in the form of reasons by the petitioner while seeking for cross-examination of the witnesses. Further, it was made clear that right would arise for an Assessee to peruse the documents relied upon by the Department and thereafter, to ask for the cross-examination. However, in the present case, neither the documents nor the sworn statements are produced to ask for the opportunity of cross-examination by the Assessee.

62. In the case of ***"Andaman Timer Industries versus Commissioner of Central Excise" (2015) 94 CCH 0187 ISCC***, the Hon'ble Supreme Court of India, has held as under in para 6:

"6. According to us, not allowing the assessee to crossexamine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for

the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."

63. A perusal of the above judgement would make it clear that when the impugned order was passed based on the data and with the strength of the sworn statements made by the three persons, the respondents should have provided all the documents and thereafter, the opportunities would arise for the petitioner to demand for the cross-examination. However, in the present case, the necessary documents have not been produced and the assessment orders were passed hurriedly within a short span of 10 days and 30 days from the date of issuance of show cause notices in three matters and one matter respectively. Thus, the impugned order passed by the 2nd respondent is in a serious flaw, which make the orders nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected.

64. This Court, in ***"Vetrivel Minerals vs ACIT" (2021) 129***, has dealt with the issue of provision opportunity to the petitioner, for cross-examination of persons, those who had provided the sworn statements against the petitioner, pursuant to search where it has been held as under in paragraphs 22 and 23:

> *"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 Chadn Chellaram reported in 125 ITR 713 at page 720 which is also followed in the judgments cited by the*

petitioner in the case of Deputy Commissioner of Income Tax vs. M/s.Roger Enterprises (P) Ltd., reported in 2012 SCC Online ITAT 11821 and in the case of Brij Bhushan Singal vs. Assistant Commissioner of Income Tax reported in 2018 SCC Online ITAT 2891, 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., reported in 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."

65. Further, it was mandated that the preliminary and detailed statements of the persons in control of computers/electronic devices are always very important. However, in the present case, it is very clear that it is not known whether the statement of the persons, who are maintaining the computer data have been recorded and in which case, before passing the assessment, certainly the respondents are entitled to cross-examine those persons with regard to the veracity of the statements made against the Assessee, however, the said procedure was not followed by the respondents and the same would be fatal to the entire assessment proceedings.

66. In the present case, the petitioner's contention was that there are four petitions challenging four proceedings of the respondents, whereas in total the respondents are intend to initiate 21 proceedings and 17 is yet to be completed. Hence, if all the discrepancies are not set right in the present proceedings, the petitioner have to approach this Court for again and again for each proceedings. Therefore, to set right all the irregularities and nullify the evidences, the prayer was sought by the petitioners to pass a comprehensive order to avoid the multiplicity of the proceedings.

67. The search was conducted and the Show Cause Notices dated 21.12.2022 and 22.12.2022 were issued in a hasty manner and the reply was filed on 24.12.2022 and 28.12.2022, for which the assessment order was passed on 30.01.2023 without providing any opportunities of personal hearing to the petitioner. Further, in the present case, an issue of suspicion is involved with regard to the collection and maintenance of data by the Department, whereby more than 52,000 files have been

corrupted and some of them have been misplaced by the Department due to the storage of data/files in a very poor and negligent manner. Under these circumstances, before passing the assessment order, the data, which were relied upon by the respondents, have to be corroborated by any additional evidences since the same is mandatory requirement as per the Digital Evidence Investigation Manual and as per the law laid down by the Hon'ble Apex Court as stated above. However, the same was not done. Further, no opportunity of personal hearing was provided to the petitioner before the passing of assessment order. Hence, there is no doubt that the assessment orders were passed in violation of principles of natural justice and accordingly, the same were liable to be quashed. In this regard, it would be apposite to rely upon the judgment of the Hon'ble Apex Court in ***Dhakeswari Cotton Mills Limited*** case, wherein it has been held as follows:

> *"In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any*

opportunity to the company to rebut the material furnished to it by him, and, lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income-tax Officer and the Tribunal seems to be based on surmises, suspicions and conjectures. It is somewhat surprising that the Tribunal took from the representative of the department a statement of gross profit rates of other cotton mills without showing that statement to the assessee and without giving him an opportunity to show that statement had no relevancy whatsoever to the case of the mill in question. It is not known whether the mills which had disclosed these rates were situate in Bengal or elsewhere, and whether these mills were similarly situated and circumstances. Not only did the Tribunal not show the information given by the representative of the department to the appellant, but it refused even to look at the trunk load of books and papers which Mr. Banerjee produced before the Accountant-Member in his chamber. No harm would have been done if after notice to the department the trunk had been opened and some time devoted to see what it contained. The assessment in this case and in the

*connected appeal, we are told, was above the figure of Rs. 55 lakhs and it was meet and proper when dealing with a matter of this magnitude not to employ *civil Appeal NO- 218 Of 1953, not reported, unnecessary haste and show impatience, particularly when it was known to the department that the books of the assessee were in the custody of, the Sub-Divisional Officer, Narayanganj. We think that both the Income-tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion. It is thus a fit case for the exercise of our power under article 136."*

68. As discussed above, the electronic data have been collected without following the various procedures laid down in the Digital Evidence Investigation Manual. Further, this Court had already held that following the said Manual is mandatory and the respondents cannot claim any exemptions as held by the Hon'ble Apex Court in ***State of Kerala vs. M/s.Kurian Abraham Pvt. Ltd., and another*** and ***The Commissioner of Customs vs. Indian Oil Corporation*** (referred supra).

69. Further, as held by the Constitution Bench of the Hon'ble Supreme Court in ***Dhakeswari Cotton Mills Ltd.,*** case (referred supra), "*because it is equally clear that in making the assessment under sub-section (3) of section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3).*" Therefore, if any electronic data is relied upon by the Department, the same has to be corroborated with the evidences. The said aspect is also covered at Chapter 2.7 of the Digital Evidence Investigation Manual, which reads as follows:

> *"**2.7 The sanctity and relevance of Digital Evidence.***
>
> *As in the case of written or oral evidence, digital evidence can also be classified into three main categories:*
>
> *i. **Material evidence**: Material evidence is any evidence that speaks for itself without relying on anything else. In digital terms, this could be a log produced by an audit function in a computer system, the books of account*

maintained a day-to-day basis on the computer, or any inventory management accom maintained on the computer etc, if it can be shown to be free from contamination

ii. ***Testimonial evidence****: Testimonial evidence is evidence supplied by a witness. This type of evidence is subject to the perceived reliability of the witness, But if the witness is considered reliable, testimonial evidence can be almost as powerful as material evidence. For example, word processor documents written by a witness could be considered testimonial as long as the author is willing to depose that he wrote the same.*

iii. ***Hearsay****: Hearsay is any evidence presented by a person who is not a direct witness. Word processor documents written by someone without direct knowledge of the incident or documents whose authors cannot be traced fall in this category? Except in special circumstances, such evidence is not admissible in court of law. But even such evidence may constitute material and may be very relevant in Income-tax proceedings, which are not bound by technical rules of evidences. Otherwise also, they can provide important leads for further investigation.*

Accordingly, merely gathering electronic evidence

is not sufficient. Efforts have to be made to corroborate the contents therein vis-à-vis other evidence such as material and oral. Preliminary and detailed statements of the persons in control of computers/ electronic devices are always very important.”

70. Under these circumstances, this Court is of the considered view that since the respondents had not followed the Digital Evidence Investigation Manual while collecting and preserving the evidences, as per the law laid down by the Hon'ble Apex Court, if there is no corroborative evidence and proved in the manner known to law, the digital data collected by the Department in the course of search and seizure and thus, the said search and seizure is against the law and *ab initio* bad

71. Further, in the present case, within a short span i.e., 10 days of time, after the show cause notice was issued without providing any time limit, the assessment orders were passed. Further, neither the opportunity of personal hearing nor the opportunity to cross-examine the witnesses,

was provided to the petitioner. Therefore, no doubt, the assessment orders were passed in violation of principles of natural justice and accordingly, the assessment order dated 30.03.2023 pertaining to writ petition in W.P.No.11176 of 2023 is liable to be set aside. Further, in similar way, the other three assessment orders dated 31.12.2022 are also liable to be set aside for the simple reason that a mere filing of appeal will not make this Court powerless to mould the relief sought for in the present petitions.

72. Eventhough the scope of the reliefs sought by the petitioner is very limited, this Court can mould the relief by rather dismissing the petition. In this regard, he referred to the judgment of the Hon'ble Apex Court in ***Madras Refineries Limited vs. The Assistant Commissioner, Central Assessment Circle IV*** reported in ***2010 SCC Online Mad 564***, wherein it has been held as follows:

> *".....It is true that there are certain self-imposed limitations on the powers of the High Court to issue writs. When a litigant approaches the High Court with a prayer to issue a particular writ and on an*

examination of the material facts, if it is found that he is not entitled for the said writ, it is open to the High Court to issue an appropriate writ. The attempt of the Court in such cases should be to mould the relief rather than dismissing the writ petition on account of a formal defect in couching the prayer. Technicalities have no say in exercising the writ jurisdiction by the High Court. The Courts are functioning only for rendering justice. It should be the attempt of the Courts to avoid multiplicity of proceedings."

73. As held in the above judgement, this Court can mould the reliefs sought for in these writ petitions rather than dismissing the same on the account of a formal defect in couching the prayer.

74. In such view of the matter, this Court is not inclined to allow the petitioner to go before the Appellate Authority, since the Appellate Authority will not have complete power in entirety to remit the matter back for re-consideration, which would be ultimately against the interest of the revenue. In this regard, it would be apposite to extract Section 251(1)(a) of the Act, which reads as follows:

"***251. Powers of the Commissioner (Appeals)].—***

(1) In disposing of an appeal, the Commissioner (Appeals)] shall have the following powers—

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment"

75. A reading of the above provision makes it clear that there is no power has been provided to the Appellate Authority to set aside and remit the matter back in entirety to the Officer concerned. Further, it would be apposite to extract Rule 46A(3) and (4) of the IT Rules, wherein it has been stated as follows:

"***46A.Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).-***

(1) and (2) .....

(3)The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-(a)to examine the evidence or document or to cross-examine the witness produced by the appellant, or(b)to produce any evidence or

document or any witness in rebuttal of the additional evidence produced by the appellant.

4) Nothing contained in this rule shall affect the power of the first appellate authority to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271."

76. On perusal of the above, it is clear that Rule 46A of the IT Rules only talks about the production of any additional evidences before the Deputy Commissioner (Appeals) and Commissioner (Appeals). In the present case, there is no question with regard to the production of additional evidences but the entire case is revolving around the failure on the part of the respondents to supply the documents, which they have relied upon in the show cause notice and thereafter, providing an opportunity for cross-examination of the witnesses, who had made

sworn statements against the petitioner and also with regard to the failure to provide the opportunity of personal hearing before the passing of assessment orders. Therefore, it is not that a particular evidence alone needs to be produced or cross-examined by the petitioner and for that extent alone, the Appellate Authority can ask the Assessing Officer to provide the opportunity of personal hearing or cross-examination, etc. On the other hand, in the present case, the matter has to be re-adjudicated in its entirety since no procedure has been followed, which is complete violation of principles of natural justice as discussed above. Taking all these aspects into consideration and to avoid the multiplicity of proceedings, it would be appropriate to set aside all the assessment orders, which are under challenge in the present writ petitions and thereafter, remit the matter back for re-consideration to the Authority concerned and to pass appropriate orders in accordance with law.

78. Accordingly, this Court is inclined to pass the following orders:

i) The four assessment orders in DIN.Nos.ITBA/AST/M/143(3)/2022-23/1048382622(1), ITBA/AST/M/143(3)/2022-23/1048382560(1) and ITBA/AST/M/143(3)/2022-23/1048382654(1) dated 31.12.2022 and DIN.No.ITBA/AST/S/147/2022-23/1051677092(1) dated 30.03.2023 passed by the 2nd respondent is hereby set aside;

ii) While setting aside the said assessment orders, this Court remits the matter back to the Authority concerned for re-consideration.

iii) The Digital Evidence Investigation Manual has been issued by the CBDT by virtue of powers available under Section 119 of the IT Act and hence, the Income Tax Authorities and all the other persons employed in the execution of this Act are bound to observe and follow such orders, instructions and directions issued by CBDT. In the case of ***Commissioner of Customs*** (referred supra), the Hon'ble Apex Court had culled out the principles, which has to be followed while conducting search and seizure of evidences and the same has been extracted at paragraph No.50 of this order. Hence, it is mandatory for the

respondents to follow the Digital Evidence Investigation Manual issued by CBDT while conducting search and seizure and it is not optional.

iv) The electronic data have been collected in .txt files in violation of the provisions of Digital Evidence Investigation Manual.

v) Though the procedures have not been followed while collecting the electronic data in .txt files, the data collected by the respondents can be relied upon only if the said data are supported by the corroborative evidences.

vi) The 2nd respondent is directed to provide all the documents relied upon by them in the Show Cause Notice as requests by the petitioner. Further, the 2nd respondent is also directed provide a period of 21 days to the petitioner to file their reply and thereafter, if any request is made by the petitioner for further time, a reasonable time may be provided after considering the reasons assigned by them.

vii) If any oral/documentary evidence is relied upon to corroborate the electronic data, the 2nd respondent is directed to allow the Assessee to cross-examine the

witnesses, whose oral evidence is relied upon to corroborate the electronic data collected by the respondents.

viii) After completion of the cross-examination and before passing the final assessment order, the 2nd respondent is directed to provide an opportunity of personal hearing to the petitioner to put forth their case before the Assessing Officer;

ix) Thereafter, the Assessing Officer is directed to pass the assessment order in detail taking into consideration of the deposition of the witnesses, during the cross-examination, whose statements are relied upon by the 2nd respondent to corroborate the electronic data collected by them.

x) The Assessing Officer is directed to follow the above procedures in the event of issuance of any further show cause notices in connection with the present search and seizure relating to other assessment years.

79. With the above directions, these writ petitions are disposed of. No cost. Consequently, the connected miscellaneous petitions are also closed.

23.02.2024

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
nsa

Note: *Issue order copy today (23.02.2024)*

KRISHNAN RAMASAMY.J.,
nsa

W.P.Nos.9753, 9757, 9761 & 11176 of 2023
and
W.M.P.Nos.11043, 9838, 9842 & 11041 of 2023

23.02.2024