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W.P.No.3625 of 2022 etc.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.07.2022

DELIVERED ON : 10.08.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI, CHIEF JUSTICE

AND

THE HON'BLE MRS.JUSTICE N.MALA

W.P.Nos.3625, 3635, 3661 and 3673 of 2022
and W.M.P.Nos.3785, 3830, 3783, 3772, 3791, 3834, 3835, 3821,
3818, 3827, 3787, 3765, 3767, 3820, 3769 and 3813 of 2022

SRS Mining

Represented by its Partner, K.Rethinam

No.312, Elite Empire G12

Valluvarkottam High Road

Nungambakkam, Chennai – 600 034.

.. Petitioner
in all WPs.

Vs

- 1 The Union of India
through the Secretary, Ministry of Finance
Department of Revenue
Government of India
North Block, New Delhi - 110 001.
- 2 The Ministry of Finance
through the Secretary
Department of Revenue
Government of India
North Block, New Delhi - 110 001.



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3 Central Board of Direct Taxes
Through the Chairperson
North Block, New Delhi – 110 001.

4 The Assistant Commissioner of Income Tax
Central Circle 2(4), No.46, M G Road
Nungambakkam, Chennai – 600 034.

.. Respondents
in all WPs.

PRAYER: Petitions under Article 226 of the Constitution of India seeking issuance of a writ of declaration (i) to declare the impugned insertion / provisions of Section 292CC by the Finance Act 2012 as illegal, arbitrary, unreasonable, unfair and violative of various Articles of Constitution, particularly Articles 14 19 and 21, void, invalid in law, unconstitutional; (ii) to declare the impugned insertion/Explanation of the Finance Act 2017 in section 132 (1) of the Income tax Act 1961 with retrospective effect from 1st April 1962, further inserted an Explanation under section 132 (1A) of the Act with retrospective effect from 01.10.1975 and further inserted an Explanation in section 132A of the Act with retrospective effect from 01.10.1975 as illegal, arbitrary, unreasonable, unfair and violative of various Articles of Constitution, particularly Articles 14 19 and 21, void, invalid in law, unconstitutional; and (iii) to declare the impugned assessment orders passed by the fourth respondent against the petitioner (a) dated 30.9.2021 for the assessment year 2015-2016 bearing DIN in Order No.ITBA/AST/S/153A/2021-2022/1036077130(1) under Section 153A of the Income Tax Act,



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1961 for the assessment year 2015-2016; (b) dated 30.9.2021 for the assessment year 2014-2015 bearing DIN in Order No.ITBA/AST/S/153A/2021-2022/1036074930(1) under Section 153A; (c) dated 30.9.2021 for the assessment year 2017-2018 bearing DIN and Order No.ITBA/AST/S/143(3)/2021-2022/1036074462(1) under Section 143(3) of the Income Tax Act, 1961; (d) dated 30.9.2021 for the assessment year 2016-2017 bearing DIN in Order No.ITBA/AST/S/153A/2021-2022/1036080132(1) under Section 153A, all issued by the fourth respondent ACIT Central Circle2(4) herein as unreasonable, illegal, wholly without jurisdiction and violative of principles of natural justice.

For the Petitioner in : Mr.Mukul Rohatgi, Sr. Counsel
W.P.No.3661 of 2022 for M/s.Nithyaesh and Vaibhav

For the Petitioner in : Mr.A.Shankar, Sr. Counsel
W.P.No.3673 of 2022 for M/s.Nithyaesh and Vaibhav

For the Petitioner in : Mr.Nithyaesh Natraj
W.P.No.3625 of 2022 for M/s.Nithyaesh and Vaibhav

For the Petitioner in : Mr.Vaibhav R.Venkatesh
W.P.No.3635 of 2022 for M/s.Nithyaesh and Vaibhav

For the Respondents : Mr.R.Sankaranarayanan
Additional Solicitor General
assisted by
(i) Mr.Avinash Krishnan Ravi
CGSC, for respondents 1&2
in all WPs.



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- (ii) Mr.A.P.Srinivas, SPC; and
(iii) Mr.ANR Jayaprathap
Standing Counsel
for respondents 3 and 4
in all WPs.

COMMON ORDER

THE CHIEF JUSTICE

THE CHALLENGE IN THESE WRIT PETITIONS:

A batch of four writ petitions has been filed by the petitioner to challenge the constitutional validity of Section 292CC inserted by the Finance Act, 2012 alleging it to be violative of Articles 14, 19 and 21 of the Constitution of India and to pass consequential order in favour of the petitioner.

2. A further challenge has been made to declare the Explanation added under Section 132(1) of the Income Tax Act, 1961 by the Finance Act, 2017 with retrospective effect from 1.4.1962; the Explanation added under section 132(1A) of the Act of 1961 and under Section 132A of the Act of 1961 with



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retrospective effect from 1.10.1975 to be illegal and arbitrary and violative of Articles 14, 19 and 21 of the Constitution of India.

3. A challenge is also made to the assessment orders dated 30.9.2021 passed by the fourth respondent for the assessment years 2014-2015, 2015-2016, 2016-2017 and 2017-2018 under Section 153A of the Act of 1961.

THE FACTUAL MATRIX:

4. The brief facts for filing of the writ petitions to challenge the constitutional validity of the provisions referred to above and even the assessment orders dated 30.9.2021 for four different assessment years are that the petitioner is primarily involved in the business of letting on hire the excavators, equipment and vehicles for sand mining activities to yard owners and various third party clients involved in excavation activities and other related works. The petitioner firm was constituted on 29.11.2013. It was not involved in sand mining, however, a search and seizure under Section 132



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Act of 1961 was conducted on 8.12.2016. Consequent to the search and seizure operation, the case was centralized vide notification of the Principal Commissioner of Income Tax-I, Chennai, dated 12.9.2017. The search was conducted at the business premises of the petitioner firm, residential premises of its partners and at several other places. During the course of search proceedings, the department claimed to have acquired several loose sheets, unverified diaries, unsigned and unsubstantiated books of accounts and such other inadmissible documents. On the basis of the entries in the loose sheets, the department sought to initiate proceedings to harass the petitioner firm.

5. The petitioner has further given brief facts pertaining to other action initiated at the behest of the Assistant Commissioner of Income Tax (ACIT). It was under the Prohibition of Benami Property Transactions Act, 1988, wherein the adjudicatory authority had passed an order on 15.10.2018 in favour of the petitioner firm. Therefore, the attachment of cash and gold seized was lifted by the adjudicatory authority and, therefore, the firm was not involved in



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any benami transaction. An appeal has been filed by the department before the Tribunal.

6. At the instance of the ACIT, the CBI had also registered two FIRs against the petitioner firm. It was without any basis and evidence. The challenge to the FIRs was made before the Madras High Court and vide order dated 27.6.2018 in CrI.O.P.Nos.409 and 560 of 2017, one FIR was quashed therein. The second FIR was subsequently closed by the CBI after investigation and the closure report was accepted by the trial court vide order dated 25.9.2020.

7. The two proceedings – one under the Benami Property Transactions Act, 1988 and the other by the CBI, remain favourable to the petitioner on its challenge.

8. The fourth respondent yet issued notices under Section 142(1) of the Act of 1961 referring to the contents of the sworn statements of various persons during search. The petitioner firm sought an opportunity to cross-examine the persons mentioned in



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the notices and relied, but the department failed to afford an opportunity for it. The petitioner firm, therefore, filed W.P.No.21166 of 2019 to challenge the order dated 28.6.2019 issued by the ACIT foreclosing the right of the petitioner of cross-examination. The petitioner sought permission to cross-examine Mr.K.Sreenivasalu, Mr.S.Nagarathinam and Mr.S.Murugesan, whose sworn statements were recorded during the course of search and relied on by the ACIT for the purpose of computation of turnover, expenses and income of the petitioner firm.

9. The Court vide order dated 17.7.2019 allowed W.P.No.21166 of 2019 and permitted the petitioner to cross-examine Mr.Nagarathinam and Mr.Murugesan on 1.8.2019 at 12 noon. As regards Mr.K.Sreenivasalu, considering the submission of the ACIT that he had turned hostile by giving specific retraction statement, this Court held that there would be no need to accord permission to cross-examine him and, accordingly, his statement was not to be relied.



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10. After the order of the High Court, Mr.S.Murugesan was cross-examined, but Mr.S.Nagarathinam did not appear for cross-examination due to health issue and, later on, he sent a communication to the ACIT on 8.8.2019, through his counsel, stating that he already retracted the statement on 5.12.2018, but it was not brought to the notice of the court in the earlier writ petition decided on 17.7.2019. The department stated that only Mr.K.Sreenivasalu has retracted the statement.

11. The petitioner was served with a notice dated 14.11.2018 under section 142(1) of the Act of 1961 proposing to make additions to the return of income filed by the petitioner without furnishing copies of few statements, materials and documents relied by the ACIT against the petitioner like the sworn statement of Mr.Kandan, which was heavily relied upon by the department. The department issued a final show cause notice on 2.2.2021 for all the four assessment years to call upon the petitioner to furnish the reply. A detailed response was sent by the petitioner on 18.2.2021 taking the following objections:



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"a. SRS Mining was not involved in sand mining or Yard operations which is clear from the information obtained from the office of the Chief Engineer, PWD dated 29.11.2019.

b. Shri S.Naga Rathinam whose statement is being relied upon by the ACIT is not the employee of our firm or our group concern.

c. Loose sheets does not belong to the petitioner.

d. The department had proposed to assess a whopping taxable undisclosed income at 2763.33 crores on imaginary basis.

e. The petitioner had requested the ACIT vide letter dated 24.11.2020 to verify and examine the concerned authorities and officers of PWD, Government of Tamil Nadu with regard to illegal mining as the same goes to the root of the matter. Further, we also submitted that any income allegedly earned through sand mining, the additions or assessment of such amount can only be made on the 44 sand lifting contractors or the 42 sand yard license holders and not at the hands of the petitioner.

f. Vide letter dated 24.11.2020, the petitioner had requested the ACIT to examine the concerned officials of the vigilance and anti-corruption



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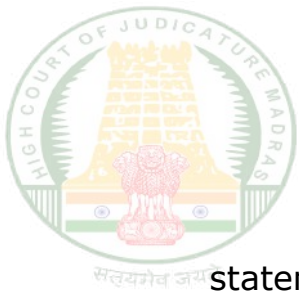


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department within respect to the alleged additions being made for illegal expenditure made to influential people for the conduct of sand mining business.

g. The statements of the yard owners recorded from them between 17.11.2020 to 19.11.2020 were not provided to us even though we had specifically asked for cross examining of all the sand yard owners vide the petitioner's earlier letter dated 23.01.2020. The petitioner had also requested the ACIT to share with them the result of the independent investigation regarding the daily yard statements. Petitioners had also requested the ACIT to share with them the collective turnover out of sale of sand accounted and admitted by the yard owners."

12. The petitioner made a request not to proceed further in violation of the principles of natural justice and, accordingly, sought copies of the statements and documents relied upon by the department. When no response was given, the petitioner sent another communication on 5.4.2021 reiterating the earlier request. The petitioner especially made a request to the ACIT to permit cross-examination of Mr.Arun Pandi and Mr.Kandan, whose



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statements have been relied in the notice under Section 142(1) of the Act of 1961. When a chance of cross-examination was not given, then the petitioner was left with no option but to file another writ petition, being W.P.No.16176 of 2021. The department in their counter stated that they are not going to use the sworn statements of those persons against the petitioner and the same was recorded in the order dated 28.9.2021.

13. The order aforesaid was passed in reference to the counter affidavit filed by the department disclosing that they are not going to use the sworn statements of those persons, who are not put for cross-examination, against the petitioner. Thus, the writ petition was disposed of after recording the fact aforesaid, but the statements of those witnesses were relied not only going against the principles of natural justice, but going against the order of the court and thereby committing contempt of the court's order, where a specific reference of the counter affidavit of the department was given. In fact, the department proceeded with pre-determination to somehow cause assessment of the income and for that they had

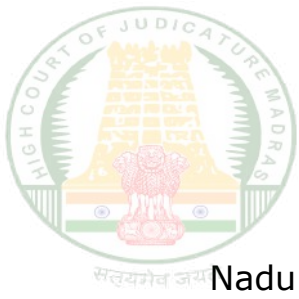


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2021.

even gone beyond their counter affidavit filed in W.P.No.16176 of 2021.

14. It is stated that sand mining in the State of Tamil Nadu is not permissible by the individual, as it is carried out by the State Government through the Public Works Department (Executive Engineer). The aforesaid is the admitted position of fact and is not disputed even by the ACIT. It was even confirmed in the special audit report conducted by the department. The activities of loading, lifting and transportation of sand remain under the control of the State officials, apart from the police, the collectorate, the revenue authorities, the PWD authorities, the mining and vigilance squad department of the State Government. Despite the same, the petitioner was alleged to be involved in sand mining and his income was assessed for it going beyond the provisions of law. The petitioner firm was involved only in the business of letting on hire excavators, equipment and vehicles for sand mining activities to the yard owners and third party clients who were involved in excavation activities for the Public Works Department of the State of Tamil



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Nadu. No allegation against the petitioner was ever made by the Mining Department or any authority, which includes the police or the Public Works Department of the State of Tamil Nadu, showing illegal sand mining by the petitioner, yet the petitioner had been made a victim of the arbitrary action of the department.

THE MAIN PLANK OF CHALLENGE AND THE REBUTTAL THEREOF:

15. On the facts given above, challenge to the assessment orders is made without filing an appeal, as the order was passed not only in violation of the principles of natural justice, but going against the order of this court in W.P.No.16176 of 2021, decided by order dated 28.9.2021. It is also when search warrants were not issued by the competent authority under Section 132(1) of the Act of 1961. Thus, the petitioner was not required to avail the remedy of appeal. It is in view of the judgment of the Apex Court holding that alternative remedy would not be a bar to entertain the writ petition, where order has been passed in violation of the principles of natural justice or lacks competence. It is also in the background



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that the petitioner has challenged the constitutional validity of Section 292CC inserted by the Finance Act, 2012 and even the Explanation added under Section 132(1) of the Income Tax Act, 1961 by the Finance Act, 2017 with retrospective effect from 1.4.1962; the Explanation added under section 132(1A) and under Section 132A of the Act of 1961 with retrospective effect from 1.10.1975. Therefore, the writ petitions were heard by this court to address the issues raised therein.

16. The constitutional validity of the provisions has been challenged mainly on the ground that they could not have been made retrospectively to take away the existing rights. By virtue of Explanation to Section 132(1), "*reason to believe*" need not be disclosed to any person or any authority or the Appellate Tribunal. The Explanation to Section 132(1A) stipulates that "*reason to suspect*" need not be disclosed to any person or any authority or the Appellate Tribunal. Section 132A(1) of the Act of 1961 postulates that specified income tax authority based on "*reason to believe*" can authorise other income-tax authority mentioned



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therein to requisition from some other officer or authority to deliver books of account, documents or assets of the assessee to the income-tax authority so authorised. A challenge to Section 292CC has also been made. It is mainly in reference to the retrospectivity of the provision aforesaid.

17. It is submitted that the non-disclosure of "*reason to believe*" or "*reason to suspect*" to any person or any authority or the Appellate Tribunal would be nothing but to deprive the assessee or even the appellate authority to know the "*reason to believe*" or "*reason to suspect*", thus violate the principles of natural justice.

18. The right of the assessee would be affected as the very basis to cause a notice under Section 142(1), after invoking Sections 132(1) and 132(1A) of the Act of 1961, remains based on the "*reason to believe*" or "*reason to suspect*" and if it is not disclosed even to the Tribunal, the foundation to initiate the proceeding would remain unknown, though it goes to the root of the case. The department has not denied that such "*reason to believe*"



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or “*reason to suspect*” cannot be shown even to the High Court or the Supreme Court. In view of the aforesaid and as the said provisions inserted by the Finance Act, 2017 have been given retrospective effect, they are assailed being violative of Articles 14, 19(1)(g) and 21 of the Constitution of India.

19. At this stage, learned Senior Counsel for the petitioner has made reference of the special audit report on a reference of the assessing authority. The special audit, if was for the purpose sought to be achieved to get a fair report looking to the complication, then there was no reason for the assessing authority not to rely on it and if the special audit was to make assessment to be within the period of limitation, then the assessment order deserves to be set aside being barred by limitation or a direction should be given for the assessment of the income as given in the special audit report. It is more so when the special auditor is appointed by the department and not at the instance of the assessee. The assessing officer has not given cogent reason to discard the special audit report and caused assessment in an



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arbitrary manner, thus challenge to the order of assessment has been made even in reference to the special audit, with a prayer to set it aside.

20. On the facts given above, learned Senior Counsel for the petitioner raised legal arguments and were duly replied by learned Additional Solicitor General of India, which would be dealt with by this court while discussing the issues.

21. On the issue of maintainability of the writ petitions challenging the assessment order, learned Additional Solicitor General of India raised objection alleging that it has been filed with a challenge to the constitutional validity of the provisions only to avoid the remedy of appeal available to the petitioner. All the issues raised on facts can be effectively dealt with by the CIT (Appeals), but instead of preferring an appeal, the present writ petitions have been filed. The writ petitions to challenge the assessment orders may not be entertained.



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22. The detailed arguments on all the legal issues raised by learned Additional Solicitor General would be dealt with while considering the legal arguments of the petitioner.

23. At this stage, learned Additional Solicitor General of India submitted that there was no reason to challenge the constitutional validity of Section 292CC inserted by the Finance Act of 2012, even if it has been given retrospective effect. It is for the reason that the assessment years involved herein are of subsequent periods of the years 2014-2015 to 2017-2018. Thus, Section 292CC inserted by the Finance Act of 2012, even if given retrospective effect, would have no bearing on the facts of this case because the petitioner has not questioned the validity of the said provision but the retrospective effect given to it. Thus, challenge to the said provision should be rejected summarily.

24. Coming to the challenge to the Explanation added under Section 132(1) of the Income Tax Act, 1961 by the Finance Act, 2017 with retrospective effect from 1.4.1962; the Explanation



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added under section 132(1A) and under Section 132A of the Act of 1961 with retrospective effect from 1.10.1975, submitted that the explanations were added keeping in mind the object sought to be achieved. To maintain confidentiality, the Parliament inserted the explanations to the provision aforesaid, which would not otherwise affect any of the fundamental rights of the petitioner guaranteed under Articles 14, 19 and 21 of the Constitution of India. "*Reason to believe*" and "*reason to suspect*" can very well be seen by the High Court or the Supreme Court if a challenge to the order of the appellate authority or the Tribunal is made.

25. Learned Additional Solicitor General has referred to the judgments on the issue to submit that even if those provisions are given retrospective effect, no illegality is attached to it because amendment in Act can be given retrospective effect and the Supreme Court has endorsed those provisions which were given retrospective effect. Thus, it is submitted that there is no constitutional illegality in any of the provisions under challenge. Thus, the writ petitions for challenge to the provisions may be



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dismissed summarily.

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26. Learned Additional Solicitor General has even touched upon all the legal issues raised by the petitioner, though could not contest much in regard to the allegation of violation of principles of natural justice in not providing an opportunity to cross-examine certain witnesses, whose statements were relied on to pass the impugned assessment orders. It is despite a stand taken by them in the counter affidavit filed in W.P.No.16176 of 2021, decided by order dated 28.9.2021. It was however submitted that the statements of those witnesses were relied only for corroboration.

27. In view of the above, the prayer for remand of the matter could not be contested seriously. Learned Additional Solicitor General referred to the judgment of the Apex court to indicate that quashing of the assessment order was not maintained, rather the judgment of the High Court was set aside. The facts of that case were different as the quashing of the assessment order was without its remand.



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28. In view of the above, we would proceed to discuss the legal issues raised by the petitioner and contested by learned Additional Solicitor General.

29. The relevant facts leading to this petition are that a search under Section 132 of the Act of 1961 in the joint names of Mr.Prem Kumar, Mr.K.Sreenivasalu and Mr.J.Sekar Reddy was conducted at some places on 8.12.2016. The panchanama was issued against them and five panchanamas in the joint name of these individuals and the petitioner firm. During the course of search, certain loose sheets and other documents were seized, in addition to the seizure of cash and jewellery. Consequent upon the search, the Revenue issued notice under Section 153A of the Act of 1961 on the petitioner firm for the assessment years 2014-2015 and 2015-2016 on 29.9.2017 and for the assessment year 2016-2017 notice was issued on 26.10.2017. The petitioner filed return of income in response to those notices disclosing their income in addition to the income disclosed in the regular return. For the assessment year



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2017-2018, the return was filed on 4.8.2017 under Section 139(1), which was revised on 31.10.2018 showing the income of Rs.220,04,43,620/-.

30. During the course of the assessment proceedings, the revenue referred the matter to the special audit under Section 142(2A) of the Act of 1961 and, accordingly, appointed M/s.B.Purushottam & Co., Chartered Accountant, as the Special Auditor for the special audit on the terms of reference finalized by the Revenue. By virtue of the statutory provisions, the time to complete the assessment got extended on appointment of the Special Auditor. In any case, the assessment for the years 2014-2015, 2015-2016 and 2016-2017 were completed under Section 153A of the Act of 1961 and for the assessment year 2017-2018, it was completed under Section 143(3) of the Act of 1961.

31. The challenge to the assessment orders, apart from the constitutional validity of certain provisions has been made through these petitions.



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DISCUSSION AND FINDINGS ON THE LEGAL ISSUES:

32. Mr.Mukul Rohatgi and Mr.Shankar, learned senior counsel, challenged the assessment order on the ground of violation of principles of natural justice. The statements of witnesses were relied without giving an opportunity of cross-examination to the petitioner. The reliance on the statements of witnesses was made by the department despite a sworn affidavit filed in W.P.No.16176 of 2021, decided by the order dated 28.9.2021. The said writ petition was filed by the petitioner when the assessing officer did not allow cross-examination of certain witnesses. The respondent department filed a sworn affidavit giving out that the statements of those witnesses who were not put for cross-examination, would not be used.

33. The assessment orders made a reference of the statements of those witnesses who were not put for cross-examination by the petitioner and thereby the challenge to the



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assessment orders has been made in reference to the violation of the principles of natural justice and for that a writ petition would be maintainable without availing the remedy of appeal.

34. Learned Senior Counsel made a reference of the detailed order passed by this court in the said writ petition [W.P.No.16176 of 2021] and submitted that going contrary to the counter affidavit submitted by the Revenue in the said writ petition, the statements of many witnesses, which includes Mr.N.Kandan and Mr.Arun Pandi, were relied. It is nothing but a contemptuous act of the assessing authority and otherwise, he tried to mislead the court by submitting that they would not use the statements of the witnesses who were not put for cross-examination. Therefore, on the aforesaid ground itself the assessment orders deserve to be set aside.

35. Learned Additional Solicitor General vehemently contested the issue aforesaid. The argument aforesaid is said to be erroneous for the following reasons: (i) the statements have been used only for corroboration and it has not been solely used as the basis of the



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assessment order; (ii) the non-grant of cross-examination is a curable defect that can be cured at the appellate stage before the Commissioner of Income Tax (Appeals); and, (iii) the statements of hostile witnesses can be used and relied upon without granting cross-examination.

36. Learned Additional Solicitor General submitted that the statement of Mr.Kandan and Mr.Arun Pandi have been used only to corroborate the existing material and do not form the basis of the assessment order. Referring to the judgment of the Apex Court in the case of **ICDS Limited v. Commissioner of Income Tax and another, (2020) 10 SCC 529**, it was submitted that the assessment order need not be set aside, rather a direction can be given to the Commissioner of Income Tax (Appeals) to grant an opportunity of cross-examination to the petitioner firm before passing orders.

37. It is further stated that there were five such witnesses referred in the assessment order. Mr.S.Nagarathinam retracted the



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statement given him him under Section 132(4) of the Act of 1961 after two years. Mr.K.Sreenivasalu retracted the statement after four months. The retraction of statement is not provided under the Act of 1961, but is common in revenue proceedings. Retraction means withdrawal of the statement made by the witness at the time of search and seizure. If such a person is called in the evidence, then he would give evidence adverse to the party calling him. That witness is said to have become hostile. The statement of a hostile witness can be relied if it is corroborated by the evidence and they are not required to be subjected to cross-examination by the assessee. Therefore, learned Additional Solicitor General would urge that a case is not made out to cause interference with the assessment orders on that count and if at all the department has relied on the statements of the witnesses without providing an opportunity to the petitioner to cross-examine them, the Commissioner of Income Tax (Appeals) can permit cross-examination of the witnesses in appeal.

38. Learned Additional Solicitor General further submitted that



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summons were served on Nagarathinam on 3.6.2019 and 18.7.2019, but he refused to attend the cross-examination citing retraction of his statement. Another witness, K.Sreenivasalu turned hostile and, therefore, there was no need to cross-examine him. Mr.Arun Pandi was served with summons on three occasions, but he did not turn up to make himself available for cross-examination. The provisions of the Code of Civil Procedure were referred to submit that even after summoning, if a witness does not turn up, the revenue need not wait indefinitely because the proceedings are time bound and the procedure followed by the civil court need not be followed in income tax proceedings.

39. In view of the above, he has justified the action of the respondents on the issue and submitted that there is no violation of the principles of natural justice.

40. The further case of the revenue is that the statement of Mr.Kandan was relied for the limited purpose relating to the ownership of sand yards. Mr.Kandan was a government official,



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who is said to have been paid money by the petitioner, and in any case, the statements of those witnesses were not put for cross-examination and were used only to corroborate the material seized during the course of search proceedings.

41. We have considered the rival submissions of the parties and perused the record.

42. To deal with the issue of violation of principles of natural justice, we need to first refer to the order of this court dated 28.9.2021 passed in W.P.No.16176 of 2021. Paragraphs 13, 18 and 19 of the said judgment are quoted hereunder:

"13. This Court finds that the stated position of the Revenue that the sworn statements are not going to be used against the writ petitioner itself puts an end to the controversy in the captioned matter, regarding 17.07.2019 order, it is a case where request for cross examination is acceded to and therefore, it is more in the nature of a consent order and therefore it does not come to the aid of the writ petitioner in the case on hand.



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18. In the considered view of this Court, stated position of the Revenue, which has been captured supra more particularly, the stated position that the sworn statements are not going to be used against the writ petitioner as set out in the counter affidavit and as captured in this order elsewhere supra by itself douses the request for cross-examination. In other words, it draws the curtains on the request for cross examination.

19. If statements are not going to be used against the writ petitioner, it cannot be gainsaid that the persons, who made the sworn statements have to be cross-examined. Therefore, it is not necessary to further dilate into 'NJP' ['Natural Justice Principle']."

43. The earlier writ petition by the petitioner was dismissed by the court in reference to the sworn affidavit of the revenue to the effect that they are not going to use the statements of persons named therein against the writ petitioner. As against the aforesaid, now the revenue is trying to qualify the counter-affidavit to the effect that the statements of witnesses who were not put for cross-examination or did not turn up for cross-examination despite



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service of summons were used only for corroboration of the existing material. The aforesaid plea of the respondents is going against the order in W.P.No.16176 of 2021, wherein it is specifically recorded that sworn statements would not be used against the petitioner. Contrary to the aforesaid, the statements of those witnesses were relied by the assessing authority. Such an act of the assessing authority is otherwise contemptuous in nature and otherwise, if they intended to rely on the statements of witnesses not put for cross-examination or who did not turn up, they should have not mislead the court in the earlier writ petition.

44. In view of the aforesaid, the assessing authority could not have relied on the statement of those witnesses for any purpose. If it is used to corroborate the material collected during the course of search and seizure, it could not have been without an opportunity of cross-examination. It is quite surprising that contrary to the sworn affidavit, the statements of the witnesses were used against the petitioner firm. The order of the court in the earlier writ petition does not qualify aforesaid. We seriously deprecate the practice of



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the revenue in going against their own statement made before the court in W.P.No.16176 of 2021 and the order passed therein.

45. At this stage we may clarify that mere service of summons and non turning-up of the witnesses would not allow the revenue to rely on the statement of such witnesses, when they were not put for cross-examination by the assessee. The presence of the witnesses for cross-examination should be ensured if to be relied, but the procedure was not applied and the reason for it is said to be time constraint. The aforesaid excuse of the revenue cannot be accepted when they themselves submitted in the earlier writ petition not to rely on the statement without qualifying it on any ground whatsoever and for that even for corroboration. The use of the statement even for corroboration could not be without an opportunity of cross-examination, otherwise it cannot be termed to be an admissible evidence.

46. Learned Additional Solicitor General has made a reference of the witnesses who retracted their statement or turned hostile and



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submitted that those witnesses were not required to be put to cross-examination. Retraction is not provided either in the Act of 1961 or the Indian Evidence Act. A statement of hostile witness can be relied to the extent it is corroborated by the other evidence, but to declare a witness to be hostile, he has to be produced before the authority and if he does not support the party called for evidence, can be declared hostile. No such procedure was applied in this case. The retraction not provided under the Act of 1961 was yet taken to treat the witness to be hostile, thus not to put the witness for cross-examination is going against the basic procedure of law.

47. If the respondent department was clear in their mind that the statements of few witnesses named by the petitioner in the earlier writ petition, being W.P.No.16176 of 2021, would be relied by the department for the purpose of corroboration, an order or clarification for it should have been taken from the court and knowing it well that few witnesses have retracted their statements or turned hostile, it should have been made known to the court. The order in W.P.No.16176 of 2021 was pronounced on 28.9.2021



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and by that time, things were clear to the revenue that certain witnesses have retracted their statements or turned hostile. The order quoted does not refer to any such clarification by the revenue. Thus, we find that the department has played the game of hide and seek with the court as well as the assessee. Such an approach of the assessing authority cannot be accepted.

48. Learned Additional Solicitor General further submitted that if the cross-examination of certain witnesses is necessary, an opportunity for it can be provided by the Commissioner of Income Tax (Appeals). The argument aforesaid has been raised in ignorance of the order dated 28.9.2021 passed in W.P.No.16176 of 2021 where it has been recorded that the sworn statements are not going to be used against the writ petitioner. When the department had earlier taken a stand not to use the statements of those witnesses, then now they cannot take a u-turn to say that those witnesses can be put for cross-examination before the CIT(A). The stand aforesaid is in contradiction to the order passed in W.P.No.16176 of 2021 and cannot be allowed. In fact, no one



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prevented the revenue to take a stand in the said writ petition to the effect that those who have turned hostile are not required to be put for cross-examination and they would be using the statements of other witnesses. The question of cross-examination of the witnesses now after the categorical statement of the revenue, which is reflected in the order in the earlier writ petition, cannot be accepted. It seems that the department is changing their stand which was accepted by this court in W.P.No.16176 of 2021. Therefore, we find force in the argument of learned Senior Counsel appearing for the petitioner that not only there is violation of the principles of natural justice, but even action of the respondents is contemptuous in using the statements of witnesses who were not made available for cross-examination by the assessee. Thus, the the said statements of witnesses would not qualify to be evidence in the eye of law. The view aforesaid is supported by the judgments of the Apex Court in the cases of (i) **Andaman Timber Industries v. CCE, (2015) 324 ELT 641 : (2016) 15 SCC 785**; (ii) **CIT v. Sunita Dhadha, (2018) 100 Taxman.com 526 (SC)**; and (iii) **Kishinchand Chellaram v. CIT, (1980) 125 ITR 713 (SC)**.



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49. The revenue cannot be allowed to take a stand in contradiction to what was taken by them in the earlier W.P.No.16176 of 2021 and an order without a clarification that the reliance of the statement of witness would be for corroboration of the material collected during the course of search and seizure. It could have been otherwise after affording an opportunity of cross-examination to the assessee, because even for corroboration, the statement was used against the petitioner firm. The loose sheets could not have been relied upon in the absence of supportive evidence to prove it. Therefore, we conclude the issue aforesaid in favour of the assessee and against the revenue. The matter would thus require to be remanded for a fresh assessment.

MAINTAINABILITY OF THE WRIT PETITIONS:

50. We would be referring to the judgment of the Apex Court in the case of the **Assistant Commissioner of State Tax v. Commercial Steel Limited, 2021 SCC OnLine SC 884**. The



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scope of interference in the order of assessment was restricted under Article 226 of the Constitution of India and has been permitted only on few grounds which are (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation. The judgment aforesaid has been cited by learned Additional Solicitor General to contest the maintainability of the writ petitions. Relevant paragraphs of the judgment are quoted hereunder:

*"11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. **The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:***

- (i) a breach of fundamental rights;***
- (ii) a violation of the principles of natural justice;***
- (iii) an excess of jurisdiction; or***



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(iv) a challenge to the vires of the statute or delegated legislation."

[emphasis supplied]

51. In view of the judgment aforesaid and the fact that the assessment order has been passed in violation of the principles of natural justice as held by us while dealing with the issue aforesaid, the writ petitions to challenge the assessment orders would be maintainable even if we ignore that the constitutional validity of certain provisions has been challenged. In fact, violation of the principles of natural justice would itself be a ground to allow the jurisdiction of this court under Article 226 of the Constitution of India because it violates Articles 14 and 19 of the Constitution of India. It is also when challenge to the authorization of warrant for search has also been made for want of competence of the officer. It is alleging that warrant for search was not issued by the competent officer and, therefore, the search itself would vitiate. In view of the aforesaid, the writ petitions would be maintainable.

CONSTITUTIONAL VALIDITY:



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52. The petitioner has challenged the constitutional validity of Section 292CC of the Act of 1961 brought by the Finance Act of 2012 giving retrospective effect. A serious contest to the aforesaid has been made by learned Additional Solicitor General. It is mainly on the ground that even the retrospectivity of the provision aforesaid has no effect on the facts of this case for the reason that search was conducted on 8.12.2016, while the amendment was brought by the Finance Act of 2012. The amendment is otherwise clarificatory in nature and was brought to deal with the controversy on account of two conflicting judgments of the Allahabad High Court.

53. We find substance in the argument of learned Additional Solicitor General, inasmuch as the retrospectivity of the provision has no effect on the case on hand, because the search was conducted much after the amendment and not by applying the provision retrospectively. It is otherwise clarificatory in nature. Therefore, the challenge to the constitutional validity of Section



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292CC of the Act of 1961 is summarily rejected and the issue is decided against the petitioner and in favour of the revenue

54. Now comes the challenge to the Explanations added to Section 132(1), 132(1A) and 132A(1) of the Act of 1961. It is mainly on the ground that by virtue of the retrospective amendment "reason to believe" need not be communicated to the assessee or the authority or the Tribunal. Thus, the amendment has even taken away the power of the CIT (A) and the ITAT from adjudging the validity of the search going through the "reason to believe". It was submitted by learned Additional Solicitor General that the addition of Explanations was to maintain secrecy and to serve the object sought to be achieved for amendment, thus the provisions aforesaid are constitutionally valid even if they are given retrospective effect.

55. It is clarified that action to record "reason to believe" or "reason to suspect" is an administrative action and it does not form part of the assessment itself. The addition of the explanations is to



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serve the object for which the amendment was made and it is not offending any of the constitutional provisions, including Articles 14, 19 and 21 of the Constitution of India. It is also added that the CIT (A) cannot go into the adequacy of the “reason to believe”, inasmuch as it is an administrative action. Owing to their nature, the Apex Court has from time immemorial held that the sufficiency or adequacy of the reasons cannot be gone into and the only aspect to be seen is whether the reasons have a rational connection or have a bearing to the formation of the belief. A reference of the judgment in the case of **Dr.Pratap Singh v. Director of Enforcement, (1985) 3 SCC 72** has been given.

56. A further reference of the judgment of the Apex Court in the case of **Vijay Mandanlal Choudhary and others v. Union of India, SLP (Criminal) No.4364 of 2014**, has been given, where the constitutional validity of Section 44 with retrospective effect was upheld.

57. As against the argument of learned Additional Solicitor



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General, learned Senior Counsel for the petitioner submitted that “reason to believe” or “reason to suspect” lays the foundation to proceed for assessment. It may be true that the power of the CIT(A) or the ITAT is limited, but, if no reason to believe germane to the facts or reason to suspect exist, the CIT(A) or the ITAT is having authority to decide the issue in reference to it, thus, no reason exists to deprive the CIT (A) or the ITAT to know and peruse the “reason to believe” or “reason to suspect” even for limited purpose. This otherwise affects the petitioner's fundamental right guaranteed under Articles 19 and 21 of the Constitution of India, apart from Article 14 thereof and such provisions giving unbridled powers to the respondents to conduct search and seizure without recording cogent reasons need to be struck down.

58. We have considered the rival submissions. The Explanations added to Section 132(1), 132(1A) and 132A(1) of the Act of 1961 have been given retrospective effect for the purpose given in the objects and reasons for such amendment. The retrospectivity of the amendment is affecting the case on hand,



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because at the time when search was conducted, the Explanations introduced by the Finance Act, 2017 were not available. The “reason to believe” or “reason to suspect” is to be examined at the time of hearing of the appeal by the CIT(A) or the ITAT, but in view of the addition of Explanations by the Finance Act of 2017, the aforesaid power would not be available to the CIT(A) and the ITAT as such, though the said restriction does not apply to the High Court and the Supreme Court.

59. It is however a fact that the CIT(A) and ITAT cannot consider the “reason to believe” or “reason to suspect” on merit, but was only for limited purpose. In view of the above, even if the explanations to the provisions referred to above have been added by the Finance Act, 2017, it cannot be said to be offending Articles 14, 19 or 21 of the Constitution of India and otherwise retrospectivity of the amendment is permissible unless it remains otherwise unconstitutional. Thus, we summarily reject the challenge to the addition of Explanations to Sections 132(1), 132(1A) and 132A(1) of the Act of 1961 by the Finance Act of 2017



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and hold it to be constitutionally valid.

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60. Thus, the issue is decided against the petitioner and in favour of the revenue.

NON-CONSIDERATION OF THE SPECIAL AUDIT REPORT:

61. The petitioner has challenged the assessment orders on the ground that the special audit report has not been considered and such special audit was conducted only to prolong the assessment, so as to bring it within the limitation period. It is more so when the special audit has referred to and reflected certain vital aspects, which includes a finding that *"there was no trace of evidence that the material on record seized during the proceeding of search belongs to the assessee."*

62. Learned Senior Counsel for the petitioner submits that while the special audit report may not be binding on the assessing officer, it cannot be brushed aside completely holding it to be



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irrelevant. The assessing authority needs to give cogent reasons to ignore it and, therefore, not to be guided by the special audit report. It is more so when the auditor is appointed by the revenue itself and not at the instance of the assessee. The detailed audit report was submitted by the special auditor, which even goes to the root of the case, and if a realistic approach would have been taken by the assessing authority, the complexion of the assessment orders would have been different.

63. Learned Senior Counsel for the assessee has submitted that the special auditor has considered the allowable business expenditure under Section 37(1) of the Act of 1961 on the basis of the analysis of the entire seized record, but the same was discarded by the assessing authority holding it to be not allowable business expenditure based on his own suspected reasons.

64. Learned Additional Solicitor General seriously contested the issue aforesaid. It is submitted that the special audit report is not binding and rather the matter is referred for special audit only



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in cases of complicated accounts and not for making comment in reference to search and seizure and the material recovered therein. The special auditor considered certain expenditure to be allowable business expenditure, though he was not having authority to examine the issue aforesaid, but to submit the report in regard to the accounting system. In view of the above, the assessing authority rightly ignored the special audit report and, therefore, it is urged that the prayer of the petitioner to consider the special audit report for the purpose of the assessment may be rejected summarily.

65. We have gone through the issue aforesaid in reference to the special audit report.

66. At the outset, it needs to be clarified that the report of the special auditor is not as such binding on the assessing authority, but at the same time, it cannot be ignored without giving cogent reasons, otherwise the special audit would remain for the sake of it



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and would not serve the purpose for which the provision was kept in the Act of 1961. The assessing authority has given reasons not to rely on the audit report and it is vehemently argued by learned Additional Solicitor General that huge expenses not permissible as allowable business expenditure were allowed in favour of the assessee. It is further submitted that the opinion of the special auditor that there was no trace against the assessee was out of the scope of the special audit.

67. A perusal of the order passed by the assessing authority shows that the reasons not to rely on the special audit report are not very sound so as to completely discard it. It may be that the special audit report may not be accepted completely, but to the extent no reason to discard exists, the assessing authority would have relied on it while passing the assessment order, though it may be limited to make better understanding of the complicated books of accounts.

68. Learned Additional Solicitor General however urged that



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the assessment orders are in line with the special audit report and variance arose on the question of allowable expenses. The special audit has contained three figures based on the extent of expenses allowable under the Act of 1961, whereas the question of disallowance under Section 37 of the Act of 1961 lies entirely with the assessing authority and can be challenged only on merits before the Commissioner of Income Tax (Appeals). The case of the revenue is that the special audit report is relied by the petitioner only to the extent that there is no link to trace the evidence against the petitioner. The said opinion was given by the special auditor in contradiction. However, these arguments have been raised, but the reasons do not find place in the assessment orders, which very summarily refused to rely on the special audit report.

69. We conclude the issue holding that though the special audit report is not binding on the revenue, the reasons for discarding it have to be recorded by the assessing authority after proper discussion and could not have been discarded summarily, thus needs to be considered appropriately on remand of the case.



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VALIDITY OF WARRANT OF AUTHORISATION:

70. Learned Senior Counsel for the petitioner submitted that the panchanamas submitted by the respondent department in the compilation typed-set show that search was conducted in the names of three joint names of Mr.Prem Kumar, Mr.K.Sreenivasalu and Mr.J.Sekar Reddy, referred in the warrant of authorisation issued in the name of the Director of Income Tax, Chennai/Additional Director of Income Tax (Investigation). In five panchanamas, in addition to the names of three individuals, the name of the petitioner firm is also mentioned jointly as person searched and it records that such warrant of authorisation was issued by the Director of Income Tax (Investigation), however, from a perusal of the panchanamas, it does not contain his signature for authorisation.

71. The provision of Section 132(1) of the Act of 1961 unambiguously provides that while a Director of Income Tax is one of those authorities who has general power to issue the warrant for



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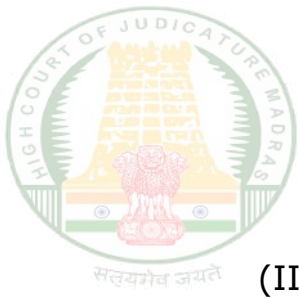
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conducting the search, the Additional Director of Income Tax does not possess such general powers, but he can issue a warrant of search if he is specifically empowered on this behalf by the authority having competence. Despite the aforesaid legal position, the search warrant was issued by the official not competent for it and no material was produced to show authorisation of the official therein or by the Director of Income Tax. In view of the above, the search proceedings itself has been challenged.

72. Learned Additional Solicitor General has contested the issue aforesaid firstly on the ground that the argument was raised by the petitioner for the first time while arguing the writ petitions and otherwise the warrants of search were issued by the competent authority. Therefore, a serious contest was made in regard to the competence of the officer who issued the panchanamas referring to Section 132(1) of the Act of 1961. It was stated that following are the officers competent:

(I) Principal Director General or Director General; or

(II) Principal Director or Director; or



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- (III) Principal Chief Commissioner or Chief Commissioner; or
(IV) Principal Commissioner or Commissioner; or
(V) Additional Director or Additional Commissioner; or
(VI) Joint Director or Joint Commissioner

If the above officers have information in their possession for reasons as given in sub-clauses (a), (b) and (c) of Section 132(1) of the Act of 1961, such officers may authorise the Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, to conduct the search. The Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may also authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer to conduct the search. Accordingly, it was submitted that the panchanamas were issued by the competent officers so authorised under the Act of 1961.

73. Narrating the facts, it is stated that the Additional Director



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of Income Tax (Investigation) is one of the official stated under Section 132(1) of the Act of 1961 and such an official in possession of various information if has a "reason to believe", then can issue warrant of authorisation to conduct the search. The alternative argument of learned Additional Solicitor General is that the Additional Director as referred under clause (B) to Section 132(1) of the Act of 1961 can issue warrant of authorisation if he is so authorised by the competent officer, i.e., the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. In view of the above, the Additional Director of Income Tax (Investigation) was competent to issue the warrant of authorisation.

74. The Central Board of Direct Taxes has clarified the issue vide notification dated 11.11.2009 empowering all the Additional Directors/Joint Directors of Income Tax working under the Director General of Income Tax (Investigation) and Director General of Income Tax (Intelligence) to issue authorisation under sub-section



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(1) to Section 132 of the Act of 1961 and, thereby, the Additional Director/Joint Director (Income Tax) working under the Director General of Income Tax ((Investigation) was competent enough to issue the warrant of authorisation.

75. To analyze the issue, we need to refer to Section 132(1) of the Act of 1961, which is quoted hereunder:

"132. Search and Seizure:

(1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any



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books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property), then,—

(A) the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may



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authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or (B) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, (the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iia) search any person who has got out of, or is about to get into, or is in, the building, place, vessel,



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vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorised officer the necessary facility to inspect such books of account or other documents;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

Provided *that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business;*

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;



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(v) *make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing :*

Provided *that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the area of jurisdiction of any Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, but such Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then, notwithstanding anything contained in section 120, it shall be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner having jurisdiction over such person may be prejudicial to the interests of the revenue :*

Provided further *that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may serve an order on*



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the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii):

Provided also that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business:

Provided also that no authorisation shall be issued by the Additional Director or Additional Commissioner or Joint Director or Joint Commissioner on or after the 1st day of October, 2009 unless he has been empowered by the Board to do so.

Explanation.—For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.”

[emphasis supplied]

76. Section 132(1) of the Act of 1961 provides for action as



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given under Section 132(1)(a), (b) and (c) and it can be by the officers named therein, but the provision further provides that the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer. The provision aforesaid has to be read properly and it does not *per se* authorise the Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer to take the course given under the said provision, unless so authorised by the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. The issue aforesaid goes to the root of the case and has been raised on filing of the panchanamas by the revenue in the typed-set and effectively referred during the



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course of the argument. No document was produced by the revenue to submit that the specific authorisation was made in favour of the Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer by the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner for search warrant on the petitioner firm, though notification of the CBDT was submitted.

77. The issue aforesaid, thus, requires consideration because if there was no authorisation as per Section 132(1) of the Act of 1961 in favour of the officer who conducted search, then the entire search may vitiate.

78. Learned Additional Solicitor General, however, made a reference of the amendment under Section 132 of the Act of 1961 by the Finance Act of 2009 with retrospective effect and pursuant to



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the said amendment, a notification was issued by the CBDT empowering the Additional Directors of Income Tax and Joint Directors of Income Tax working under the Director General of Income Tax (Investigation) and Director General of Income Tax (Intelligence) to issue authorisation under sub-section (1) of Section 132 of the Act of 1961. In view of the above, the argument of the revenue is to endorse the authorisation as per law.

79. To appreciate the argument, we have gone through the search panchanamas and find that other than one search warrant issued under the authorization of the Additional Commissioner of Income Tax, the other warrants of authorisation were issued by the Deputy Commissioner of Income Tax and other officers below the rank of Additional Commissioner of Income Tax, who are not having authority for issuance of authorisation on their own, unless so authorised by the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or



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Joint Commissioner. The petitioner has raised an issue on the authorisation of the warrants because if the Deputy Commissioner of Income Tax has authorised the warrant of search without authorisation in his favour, it would offend Section 132 of the Act of 1961 and the issue goes to the root of the case. Thus, we find a case to remand the issue to the assessing authority keeping it open to the assessee to raise the argument aforesaid and in that case, the assessee would be disclosed and allowed to peruse the authorisation of warrant of search.

80. It is not only that authorization should be of the competent authority, but it is on satisfaction of the authority that search warrant can be issued and it can be only of the competent officer. Therefore, we hold that if the search warrant was not issued by the competent officer, then it would vitiate the search and, accordingly, the issue aforesaid would be analyzed by the assessing authority while passing the assessment order afresh on remand of the case. It would be in the light of the finding recorded above.



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81. Accordingly, we conclude the issue with the aforesaid.

PROCEEDINGS UNDER SECTION 153A OF THE ACT OF 1961:

82. Learned Senior Counsel for the petitioner submitted that while issuing search notice under Section 132 of the Act of 1961, it was in the joint names of Mr.Prem Kumar, Mr.K.Sreenivasalu and Mr.J.Sekar Reddy, and only in five warrants of search along with the name of the petitioner firm. During the course of the search, certain loose papers and other material were seized, in addition to seizure of cash and jewellery from three persons named above. If any of the material collected against the three named assesseees is to be used against the petitioner firm to which notice under Section 132 of the Act of 1961 was not issued, then the proceeding against the firm could have been initiated by invoking Section 153C of the Act of 1961 and not under Section 153A of the Act of 1961. The provisions of Section 153A of the Act of 1961 could have been applied limited to cases where the joint search was even against the



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petitioner firm. However, ignoring aforesaid, while Section 132 was invoked against three individuals and not against the petitioner firm, the material seized therein was used for the proceedings under Section 153A and not under Section 153C of the Act of 1961, as required.

83. It is thus submitted that the material collected in the search against three persons, i.e., Mr.Prem Kumar, Mr.K.Sreenivasalu and Mr.J.Sekar Reddy, could have been used against the firm only by invoking Section 153C of the Act of 1961 and not under Section 153A of the Act of 1961.

84. The issue aforesaid has been contested by learned Additional Solicitor General and submitted that Section 153C of the Act of 1961 is not applicable in the case on hand. It applies only when search is conducted against a person and material recovered therein is to be used against other person not subjected to such search. In the instant case, search was conducted not only against three persons, but also against the firm, and, therefore, the



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material so collected therein was rightly considered for invocation of Section 153A of the Act of 1961. It was not a case that falls within the purview of Section 153C of the Act. The assessment could not have been under Section 153A and 153C against the same assessee.

85. To consider the issue aforesaid, it is appropriate to quote Sections 153A and 153C of the Act of 1961 hereunder:

"153A. Assessment in case of search or requisition.

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003 but on or before the 31st day of March, 2021, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the



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relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to in this sub-section pending on the date of initiation of the



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search under section 132 or making of requisition under section 132A, as the case may be, shall abate:

Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years:

Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

- (a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or*



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more in the relevant assessment year or in aggregate in the relevant assessment years;
(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and
(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.—For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.—For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.



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(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.—For the removal of doubts, it is hereby declared that,—

- (i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;*
- (ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the*



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rate or rates as applicable to such assessment year.

153C. Assessment of income of any other person.

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of



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account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A:

Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :

Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six



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assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years as referred to in sub-section (1) of section 153A except in cases where any assessment or reassessment has abated.

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year—

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under



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*sub-section (2) of section 143 has expired,
or*

*(c) assessment or reassessment, if any, has
been made,*

before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.

(3) Nothing contained in this section shall apply in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A on or after the 1st day of April, 2021."

86. We have considered the rival submissions of the parties and find that the panchanamas issued by the respondents in certain cases were in the names of three individuals and in some cases it is even in the name of the firm, apart from the three individuals. The material collected pursuant to the search jointly conducted against



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the three persons and the firm would not require to be dealt with under Section 153C, but would be under Section 153A of the Act of 1961. It is, however, necessary to clarify that if the material collected in the search against such person is used against other person, then proceeding can be taken under Section 153C of the Act of 1961 and not under Section 153A of the Act of 1961. Whether the material collected in the case of search upon the individuals can be considered in the hands of the firm without following the mandate of Section 153C and in the order under Section 153A of the Act of 1961 would be permissible in law is another issue that requires consideration. Thereby on remand, the assessing authority would examine the issue aforesaid.

87. The issue is answered accordingly and in view of the remand of the case, the issue aforesaid would be considered in the light of the finding given above.



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ADDITION OF INCOME BASED ON SAME SET OF MATERIALS
AGAINST TWO ASSESSEES

88. It is also the case of the petitioner firm that before completion of the assessment in the case of the petitioner firm, the same assessing officer had completed the assessment of few yard owners, where same material was used for making addition of the amount in the hands of those yard owners, namely Mr.K.Muthu, Mr.M.Chockalingam, Mr.S.Gopal, Mr.Karuppiyah and Mr.K.T.Ramaiah. Therefore, the assessing officer made addition of income in the hands of the yard owners so also the petitioner firm based on the same material obtained during search. Thus, the same set of documents have been used by the same assessing authority for making addition of the amount at two places, namely in the hands of the yard owners and again in the hands of the petitioner firm going against the settled law. The department could not have recorded satisfaction about belongingness or ownership of the same documents in the names of two different persons for making the addition in the hands of two different assessees.



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89. Learned Additional Solicitor General has contested the issue on the ground that the assessment in the case of yard owners and the petitioner firm is independent and, thus, cannot be disputed by the petitioner.

90. We find that the same assessing officer has assessed the income with addition of income in the hands of the yard owners and at the same time the same material was used against the petitioner firm and, therefore, one and the same material was used for addition of income in the hands of the yard owner and the petitioner firm. The approach of the same assessing authority in doing so is wholly illegal. In fact, same material could not have been used for addition of income of the yard owner and the petitioner firm.

91. We further find that search was conducted in the joint names of three persons, namely Mr.Prem Kumar, Mr.K.Sreenivasalu and Mr.J.Sekar Reddy, and if the material collected therein was to be used for addition of the income of the petitioner firm, the assessing authority should have arrived at a conclusive satisfaction



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that the said material belongs to the petitioner firm and represents and discloses its income. Instead of discharging the onus of such satisfaction before using the material against the petitioner firm, the assessing authority strangely first used the same material for addition of income of the yard owners showing it to be their income and in contrast made addition of income on the basis of some material subsequently in the hands of the petitioner firm.

92. The assessment against the yard owners named above was completed under Section 153C of Act of 1961 on 29.8.2021. The same assessing authority thereafter passed the assessment order against the petitioner firm, though prior to it he was satisfied that material found from the search belongs to the yard owners. Therefore, addition of income in the hands of the petitioner firm becomes illegal.

93. The issue aforesaid goes to the root of the case and, therefore, on remand the assessing authority would be directed to make assessment afresh eliminating the material used in the



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assessment of the yard owners to make addition of income of the petitioner firm.

DISALLOWANCE OF EXPENDITURE:

94. A challenge to the disallowance under Section 40A(3) of the Act of 1961 for alleged cash payment of business expenditure was raised by learned counsel for the petitioner firm. It is submitted that Section 40A(3) of the Act of 1961 does not apply where the income is not computed on the basis of regular books of accounts. It was not a case where the petitioner firm has claimed certain expenditure where the question of its allowance or disallowance would become relevant. It is a case of computation of income of the petitioner firm by the assessing authority on the basis of certain seized documents comprising loose sheets, etc., keeping the regular books of accounts of the petitioner firm aside. The disallowance under Section 40A(3) of the Act of 1961 could not have applied in these circumstances. We find substance in this argument, however, we are not dealing with quantum of income in



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this order and the same be considered in remand proceedings.

95. In view of the discussion made above, while we hold the provisions of Section 292CC and the Explanations added to Sections 132(1), 132(1A) and 132A of the Act of 1961 to be constitutionally valid, an interference with the assessment orders is made for the reasons recorded above and, accordingly, the assessment orders are set aside with remand of the case to the assessing authority to pass assessment orders afresh and it would be after taking into consideration the findings recorded by this court. The assessee would be at liberty to advance all the submissions in that regard.

With the aforesaid, the writ petitions are disposed of. There will be no order as to costs. Consequently, connected miscellaneous petitions are closed.

(M.N.B., CJ.) (N.M., J.)
10.08.2022

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- 1 The Secretary
Union of India
Ministry of Finance
Department of Revenue
Government of India
North Block, New Delhi - 110 001.
- 2 The Secretary
Ministry of Finance
Department of Revenue
Government of India
North Block, New Delhi - 110 001.
- 3 The Chairperson
Central Board of Direct Taxes
North Block, New Delhi - 110 001.
- 4 The Assistant Commissioner of Income Tax
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Nungambakkam, Chennai - 600 034.



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THE HON'BLE CHIEF JUSTICE
AND
N.MALA,J.

(sasi)

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