

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-A” BENCH : BANGALORE**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.155/Bang/2019
Assessment year : 2009-10

M/s. Vishwadeepa Trading Company, Municipal Complex, P. B. Road, Ranebennur – 581 115, Haveri Dist. PAN : AAGFV 0051 Q	Vs.	Income Tax Officer, Ward – 1, Haveri.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Narendra Sharma, Advocate
Revenue by	:	Shri. Priyadarshi Misra, JCIT

Date of hearing	:	06.06.2019
Date of Pronouncement	:	17.07.2019

ORDER

This appeal by the assessee is directed against the order of CIT(A), Davangere, dated 27.11.2018 for Assessment Year 2009-10.

2. Briefly stated, the facts of the case are as under:-

2.1 The assessee, a firm engaged in business as commission agents, filed its return of income for Assessment Year 2009-10 on 30.03.2010 declaring total income of Rs.1,580/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short ‘the Act’) and the case was subsequently taken up for scrutiny. The assessment was concluded under section 143(3) of the Act

vide order dated 27.12.2011 wherein the assessee's income was determined at Rs.19,80,390/-. This was in view of an addition of Rs.19,78,810/- in respect of certain sundry creditors whose confirmations were not filed and consequently whose balances were treated as income of the assessee and brought to tax.

2.2 Aggrieved by the order of assessment dated 27.12.2011 for Assessment Year 2009-10, the assessee preferred an appeal before CIT(A)-Davangere raising grounds on both merits of the addition as well as on the legal issue of the order of assessment for Assessment Year 2009-10 dated 27.12.2011 being passed beyond the period of limitation as per the Explanation to Section 153(1)(a) of the Act. In respect of the details filed by the assessee, the CIT(A) called for remand report from the Assessing Officer (AO). In the impugned order, the CIT(A), on the basis of the AO's remand report, sustained the addition on account of unproved sundry creditors to the extent of Rs.2,75,585/-; whereby the assessee was allowed relief of Rs.17,03,225/-. In ground No.3, before the CIT(A), the assessee contended that the order of assessment for Assessment Year 2009-10 is barred by limitation as per Explanation to section 153(1)(a) of the Act and is therefore liable to be set aside. In this regard it was contended in the statement of facts No.7 that though the impugned order of assessment for Assessment Year 2009-10 is dated 27.12.2011 and ought to have been passed by 31.12.2011, it was despatched from the Office of the AO by speed post only on 24.01.2012 and served on the assessee only on 25.01.2012. It was contended that in the above factual situation, it is to be presumed that the impugned order for Assessment Year 2009-10 dated 27.11.2011, which ought to have been completed and served on the assessee on or before 31.12.2011, was actually not completed within the time specified i.e., 31.12.2011 or the given date of order i.e., 27.12.2011; but only thereafter on 24.01.2012 and therefore the impugned order of assessment for Assessment Year 2009-10 is barred by limitation and

requires to be quashed / cancelled. The CIT(A), however, dismissed this technical ground raised by the assessee as not pressed.

3. Aggrieved by the order of CIT(A), Davangere, dated 27.11.2018 for Assessment Year 2009-10, the assessee has preferred this appeal before the Tribunal, wherein it has raised the following grounds:-

1. *The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

2. *The learned CIT[A] is not justified in erroneously holding that the appellant's AR had not pressed the ground challenging the order of assessment passed as being barred by limitation since the said order was dispatched after the expiry of the period of limitation prescribed in terms of Sec. 153[1][a] of the Act under the facts and in the circumstances of the appellant's case.*

3. *The learned CIT[A] ought to have appreciated that the assessment order passed was in transgression of the provisions of sec. 153[1][a] of the Act and hence, he ought to have annulled the assessment order passed under the facts and in the circumstances of the appellant's case.*

4. *Without prejudice to the above, the learned CIT[A] is not justified in sustaining a sum of Rs.2,75,585/- from out of the original addition made of Rs.19,78,810/- as unexplained Sundry Creditors under the facts and in the circumstances of the appellant's case.*

5. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s 234-A, 234-B, and*

234-D of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

6. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.*

4. **Ground Nos. 1 and 6 (supra)**, being general in nature, no adjudication is called for thereon.

5. **Ground No.5 – Charging of interest under section 234A, 234B and 234D of the Act**

5.1 In this ground (supra), the assessee denies itself liable to be charged interest u/s 234A, 234B and 234D of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and I, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234A, 234B and 234C of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234A, 234B and 234D of the Act, if any, while giving effect of this order.

6. **Ground Nos. 2 and 3 – Assessment order for Assessment Year 2009-10 – being barred by limitation as per Section 153(1)(a) of the Act**

6.1.1 In these grounds (supra), the assessee submits that the CIT(A) has erroneously held that the assessee's AR had not pressed the ground No.3 before him, wherein the assessee had raised the contention that the impugned order of

assessment for Assessment Year 2009-10 dated 27.12.2011 was barred by limitation as per Explanation to Section 153(1)(a) of the Act as the said order was despatched from the Office of the AO after 31.12.2011. Whereas, in the facts and circumstances of the case and as per the law, the CIT(A) ought to have annulled the impugned order of assessment for Assessment Year 2009-10.

6.1.2 The learned AR for the assessee reiterated the submissions put forth in the grounds raised (supra) and the submissions / arguments put forth in ground No.3 and statement of facts raised before the CIT(A). The learned AR drew the attention of the Bench to pages 10 and 11 of the paper book filed, which is a copy of the speed post / postal cover whereby the order of assessment for Assessment Year 2009-10 dated 27.12.2011 was despatched and served on the assessee. As per the details on the copies of the postal cover, the said order was despatched by the ITO, Ward-1, Haveri on 24.01.2012 and served on the assessee on 25.01.2012 vide speed post No.EK633148875N. According to the learned AR, in the above factual situation of the case, the presumption that has to be drawn is that the impugned order of assessment for Assessment Year 2009-10 dated 27.12.2011 has not been passed within the time stipulated under section 153(a)(a) of the Act and consequently this order of assessment passed by the AO is barred by limitation and requires to be cancelled.

6.1.3 As regards the observations by the CIT(A) in the impugned order that the said ground No.3 raised by the assessee, on the issue of the order of assessment being barred by limitation, was not pressed by the assessee, the learned AR submitted that the said observation was factually erroneous. It is contended on the contrary, the assessee vide written submissions filed on 12.02.2016 (copy placed at page 9 of paper book) had made elaborate factual and legal submissions strongly urging quashing of the impugned order of assessment for Assessment Year 2009-10 dated 27.12.2011. Therefore, it is

inconceivable that the assessee had not pressed this issue as contended by the CIT(A). In support of the assessee's contentions that the impugned order of assessment for Assessment Year 2009-10 dated 27.12.2011 is barred by limitation, the learned AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of M/s. Globe Transport Corporation Vs. ACIT in ITA Nos. 629 to 631/Bang/2014 dated 04.01.2019.

6.2 Per contra, the learned DR supported the order of the CIT(A).

6.3.1 I have considered the rival contentions / submissions and carefully perused the material on record; including the judicial decision cited. From an appraisal of the material on record; the fact that is not disputed or controverted is that the order of assessment for Assessment Year 2009-10 in the case on hand was despatched by the AO to the assessee by speed post No.EK633148875N on 24.01.2012 and served on 25.01.2012; which is beyond the date of limitation for the Assessment Year 2009-10 i.e., 31.12.2011 as per the provisions of section 153(1)(a) of the Act. In the case on hand, the question which arises for consideration is, whether the date of dispatch has to be construed as the date of order of assessment and consequently the order of assessment for Assessment Year 2009-10 has to be held as bad in law. This issue has been considered in detail by a Co-ordinate Bench of this Tribunal in the case of M/s. Globe Transport Corporation Vs. ACIT in ITA Nos. 629 to 631 and 643 to 645/Bang/2014 dated 04.01.2019; wherein at paras 10 to 17, it has been held as under:-

10. We have heard the rival submissions. As we have already observed, it is undisputed that the order of assessment was despatched by the AO only on 09.01.2012 and that the last date of limitation for passing

the order of assessment, pursuant to the directions of the Tribunal in all the three assessment years was 31.12.2011. The question which arises for consideration is, whether the date of despatch has to be construed as the date of order of assessment and consequentially the orders of assessment have to be held as bad in law.

11. On the above question, the Id. counsel for the assessee has drawn our attention to the decision of the Hon'ble High Court of Karnataka in the case of *Maharaja Shopping Complex v. DCIT, ITA No.832/2008, judgment dated 14.10.2014*. In the aforesaid case, the facts were identical as the facts in the present case.

12. In the aforesaid case, the time limit for passing the order of assessment was 31.03.2006, the order of assessment was dated 28.02.2006. The order of assessment was, however, served on the assessee only on 18.04.2006. The question before the Court was, whether the order of assessment was barred by limitation and the date mentioned in the order of assessment should be ignored and only the date on which it was despatched to the assessee should be taken as the date of the order. The Hon'ble High Court placed reliance on the decision of the Hon'ble Kerala High Court in the case of *Govt. Warehouse v. State of Kerala, [1988] STC Vol. 69 Pg. 62*, wherein the Hon'ble Kerala High Court in para 14 observed as follows:-

“14. The order of any authority cannot be said to be passed unless it is in some way pronounced or published or the party affected has the means of knowing it. It is not enough if the order is made, signed, and kept in the file, because such order may be liable to change at the hands of the authority who may modify it or even destroy it, before it is made known, based on subsequent information, thinking or change of opinion. To make the order complete and effective, it should be issued, so as to be beyond the

control of the authority concerned, for any possible change or modification therein. This should be done within the prescribed period, though the actual service of the order may be beyond that period. This aspect of the matter had not come up for consideration in the cases of Viswanaihan Chettiar [1954] 25 ITR 79 (Mad.) and Laxmidas & Co. [1969] 72 ITR 88 (Bom) where the only question dealt with was whether service of the order after the prescribed period rendered it invalid. Unless, therefore, the order of the Deputy Commissioner in this case had been so issued from his office within the period prescribed, it has to be held that the proceedings are barred by limitation. This question has not been considered by the Tribunal. The Tribunal, which passed the order, apparently did not have the benefit of the decision in Malayil Mills case (T. R. C. Nos. 15 and 16 of 1981 decided on 7th June, 1982-Kerala High Court) which, so far as we could see, remains, unreported. The matter has therefore to go back to the Tribunal for an examination of the records to ascertain whether the order of the Deputy Commissioner had been issued from his office within the period of four years prescribed in Section 35(2) of the Act. The Tribunal will adjudicate the matter in the light of the observations contained herein and in the judgment in the case of Malayil Mills (T.R.C. Nos.15 and 16 of 1981 decided on 7th June, 1982 – Kerala High Court) extracted earlier.”

13. The Hon'ble Kerala High Court thereafter held that the date of despatch of the order of assessment should be construed as the date of order of assessment and consequently quashed the orders of assessment as barred by limitation with the following observations:-

“5. Learned counsel for the revenue is unable to point out from the records whether the assessment order was dispatched from the office before 31.03.2006. Therefore, it is clear when the same was received by the assessee on 18.04.2006, it might have been dispatched few days prior to that and subsequent to 31.03.2006. In that view of the matter, the law laid down as

aforesaid squarely applies to the facts of this case and therefore, any just conclusion that could be reached is that the order passed is barred by law of limitation. In that view of the matter, the additional substantial question of law framed today is answered in favour of the assessee and against the revenue. Accordingly, the appeal is allowed. The impugned orders are set-aside.”

14. In our view, the facts of the aforesaid case are squarely applicable to the facts of the present case. Following the aforesaid judgment of Hon'ble High Court of Karnataka, the orders of assessment have to be held as barred by time and all the orders of assessment are therefore liable to be annulled and are hereby annulled.

15. The Id. DR, however, placed reliance on the decision of the Hon'ble Calcutta High Court in the case of *CIT v. Subrata Roy [2014] 45 taxmann.com 513 (Calcutta)* wherein the Hon'ble Court took the view that assessment order passed within limitation period cannot be doubted merely because the demand notice was served after 47 days of the limitation period. We are of the view that the aforesaid decision is contrary to the law laid down by the Hon'ble High Court of Karnataka which is the jurisdictional High Court as far as this Tribunal and the present appeal is concerned. We are therefore bound to follow the decision of the jurisdictional High Court.

16. In view of the decision on the preliminary point, the other issues raised by the assessee in its appeals and the grounds raised by the revenue in its appeals do not require any adjudication.

17. In the result, the appeals of the assessee are allowed, while the appeals by the revenue are dismissed.

6.3.2 I find that the decision of the Co-ordinate Bench of this Tribunal in the case of *Globe Transport Corporation Vs. ACIT (supra)*, which followed the decision of the Hon'ble Karnataka High Court in the case of *Maharaja Shopping Complex Vs. DCIT, ITA No.832/2008 dated 14.10.2014*; is squarely

applicable to the facts of the case on hand. In the case on hand also, the order of assessment for Assessment Year 2009-10 was despatched by speed post only on 24.01.2012; which has to be reckoned to be the date on which the order of assessment has been passed. The order of assessment for Assessment Year 2009-10 had to be passed on or before 31.12.2011. In that view of the matter, and drawing support from the aforesaid decisions of the Hon'ble Karnataka High Court in Maharaja Shopping Complex (supra) and in the case of Globe Transport Corporation (supra), it is held that the impugned order of assessment for Assessment Year 2009-10 passed by the AO under section 143(3) of the Act dated 27.12.2011 is barred by limitation as per the provisions of section 153(1)(a) of the Act and the same is consequently cancelled. Ground Nos. 2 and 3 of assessee's appeal are allowed.

7. In view of the decision on the preliminary point of limitation raised in grounds Nos.2 and 3 of this appeal, the other issues raised by the assessee on merits in ground No.4 is rendered academic and therefore not adjudicated.

8. In the result, the assessee's appeal for Assessment Year 2009-10 is allowed as indicated above.

Order pronounced in the open court on this 17th day of July, 2019.

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 17th July, 2019.

/NS/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.