

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BANGALORE**

**BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA Nos.363 to 368/Bang/2011
(Assessment years: 2001-02 to 2006-07)

Shri K.Radhakrishna Naik,
PWD Contractor,
Uppingady,
Puttur Taluk, ... Appellant
PAN:ABRPN 0749 B

Vs.

Deputy Commissioner of Income-tax,
Central Circle 11(5),
Mangalore. ... Respondent

Appellant by : Shri S.Venkatesan, CA.
Respondent by : Dr. P.K.Srihari, Addl.CIT.

Date of hearing : 20/01/2016
Date of pronouncement : 12/02/2016

O R D E R

Per BENCH :

These appeals are filed by the assessee directed against the respective orders of the CIT(A)-VI, Bangalore, dated 28/01/2011 for the assessment years 2001-02 to 2006-07.

2. The assessee raised the following common grounds of appeal:

"1. The orders of the authorities below in so far as they are against the appellant are opposed to law,

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equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned CIT[A] is not justified in sustaining the assessment made u/s.153A rws 143[3] of the Act, on the ground that he was in-competent to adjudicate this ground having regard to the ratio of the decision of the Hon'ble ITAT in C.RAMIAH REDDY' case reported in 87 ITD 439 and Delhi High Court in the case of M.B.LAL reported in 279 ITR 298, which are inapplicable to the facts of the case.

3. The learned CIT[A] failed to appreciate that the ratio of the aforesaid two decisions in correct perceptive and the decision of the jurisdictional ITAT in the case of C. RAMIAH REDDY in 87 ITD 439 relied upon by him categorically held that the Hon'ble ITAT is competent to look into the validity of the search proceedings after its commencement and the fact of getting the warrant signed after ingress and commencement being illegal, which is not disputed, he ought to have held that the search was illegal and the consequential assessment requires to be annulled.

4. The learned CIT[A] failed to appreciate that the warrant was issued ultra-vires the provisions of Section 132[1][a], [b] & [c] of the Act and further after such illegal initiation, the same came to be executed without the show of warrant before ingress and warrant came to be signed only during the course of the illegal search after start later, which facts are undisputed and not at all denied, which renders the search illegal and the conduct being contrary to the mandatory provisions of section 132[1] of the Act, which are not denied and disputed and consequently, having regard to the decision of the Hon'ble Supreme Court in the case of AJITH JAIN reported in 260 ITR 80, the invocation of the provisions of Section 153A of the Act is illegal and the consequential assessment requires to be annulled.

5. Without prejudice to the above, the learned CIT[A] is not justified in sustaining a sum of Rs.28,74,657/- as creditors not proved, which are not cash credits at all under the facts and in the circumstances of the appellant's case.

5.1 The learned CIT[A] failed to appreciate that the credits arose consequent to liabilities incurred for expenses for the purpose of business and these liabilities have been paid and discharged in the subsequent years and the appellant could not obtain

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confirmation letters after long lapse of time and on account of non-availability of the creditors. The addition is purely on suspicion and surmise, assumptions and presumptions and liable to be deleted.

5.2 Without prejudice to the above, the additions made on account of trade credits in earlier years, as well as disallowances made on account of excess expenditure, if for any reason are sustained, they required to be telescoped with the addition made of Rs.28,74,657/- during the year.

6. The learned CIT[A] is not justified in sustaining a sum of Rs.50,000/- in M/s.Abhinav Wines being the investment made by the joint family of the appellant, which is not even during the previous year relevant to the assessment year under appeal. ". Without prejudice to the right to seek waiver before the Hon'ble DG/CCIT, the appellants denies himself liable to be charged to interest u/s.234A and 234B of the Act, which under the facts and in the circumstances of the appellant's case deserves to be deleted.

8. Without prejudice to the above, the learned A.O. ought to have taken the TCS/TDS of Rs. 6,02,115/- against the tax determined by him on the total income assessed by him and on the balance only he ought to have charged interest u/s.234A and 234B of the Act. Thus the quantum of interest levied u/s.234A and 234B of the Act, requires to be reduced.

9. The learned A.O. is not justified in levying interest u/s.234D of the Act, under the facts and in the circumstances of the appellant's case.

10. 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."

3. Briefly the facts of the case are that the assessee is an individual and engaged in the business of execution of contracts. There was a search operation under the provisions of sec.132 in

the case of the assessee on 16/2/2005. The assessee contended that search and seizure operations are illegal as no warrant of authorization was produced. Brushing aside the contention of the assessee, assessments u/s 143(3) read with sec.153A of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] for the assessment years 2001-02 to 2006-07 were completed.

4. Aggrieved by the orders of assessment, appeals were preferred for all the assessment years before the CIT(A), contending inter alia that the search and seizure operations conducted was illegal and therefore, the assessments made pursuant to such illegal search cannot be upheld. These contentions of the assessee were not acceded to by the CIT(A) by holding that the appellate authority, whether the CIT(A) or the ITAT cannot adjudicate legality of the search and search operations. In support of this, he placed reliance on the decision of the Special bench of the Tribunal in the case of *C. Ramaiah vs ACIT* (87 ITD 439) and also the decision of the Hon'ble Delhi High Court in the case of *M B Lal vs. CIT* (279 ITR 298).

5. Aggrieved by these orders of the CIT(A), assessee is before us in the present appeals.

6. At the outset, learned AR of the assessee submitted that the decision of the CIT(A) rests on the decision of the Special bench of Tribunal in the case of *Ramaiah* (supra). Now, the

special bench decision is reversed by the jurisdictional High Court reported in 339 ITR 210 wherein it has been held that the appellate authorities are competent enough to adjudicate the legality of the search operations u/s 132. Therefore, in light of this decision, it is prayed that the matters may be restored to the file of the AO as the assessee contested the very legality of search even before the AO. In support of this contention, learned AR of the assessee placed reliance on the following decisions:

- i. *Southern Herbals Ltd. vs. Director of Income-tax(Investigation) & others* (207 ITR 55)(Kar)
- ii. *Union of India & others vs. Agarwal Iron Industries* (370 ITR 180)(SC)
- iii. *Director of Income-tax(Investigation) & others vs. Spacewood Furnishers Pvt. Ltd. & others* (374 ITR 595)(SC)
- iv. *K.Radhakrishna Naik vs. DCIT* (ITA Nos.61 & 62/Bang/2011 dt.5/3/2012)
- v. *Prathiba Jewellery House vs. DCIT* (ITA Nos.579 to 585/Bang/2014 dt.21/11/2014)

7. On the other hand, learned Departmental Representative had no serious objection remanding the matter to the file of the CIT(A) instead of to the AO as the assessments for the earlier assessment years viz., 1999-2000 and 2000-01 in the assessee's own case, were set aside by the Tribunal to the file of the CIT(A) by its order dated 6/3/2012 in ITA Nos.61 & 62/Bang/2011 (supra).

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8. Having regard to the submissions made by both the parties, we are of the considered opinion that interest of justice would be met if we restore the matter to the file of the CIT(A) to adjudicate the grounds relating to legality of the search in the assessee's own case. We order accordingly.

9. In the result, all the appeals of the assessee are treated as allowed for statistical purposes.

Order pronounced in the open court on this 12th day of February, 2016

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bangalore
D a t e d : 12/02/2016

srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore