IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " B "

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.989/Bang/2010 (Assessment Year : 2002-03)		
M/s. Paresh Exports Pvt. Ltd., NO.104, 1st Floor, 56 Centre Point, Residency Road, Bangalore-560 025 PAN AAACP 8236G	Vs.	Asst. Commissioner of Income Tax, Central Circle 1(4), Bangalore.
Appellant		Respondent.

Appellant By : None. Respondent By : Ms. Neera Malhotra, CIT (D.R)

Date of Hearing : 04.10.2016.
Date of Pronouncement : 13.10.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.15.6.2010 of Commissioner of Income Tax (Appeals)-VI, Bangalore for the Assessment Year 2002-03.

2. None has appeared on behalf of the assessee when the apepal was called for hearing. It transpired from the record that despite repeated notices issued through RPAD, the assessee is not responding and pursuing this appeal. Some

of the notices have received back unserved with the postal remark "Addressee Left". Inthese facts and circumstances of the case, we propose to dispose off this appeal ex-parte.

3. The assessee has raised the following grounds in this appeal :

1. The order of the authorities below in so far as it is against the Appellant, is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.

2. The assessment is bad in law as the mandatory conditions to invoke the jurisdiction under section 153A of the Act did not exist or having not been complied with and consequently the assessment made is bad in law for want of requisite jurisdiction.

3. The assessment is further bad in law as reasons for issue of notice under section 153 A of the Act have not been given and the appellant has reasons to believe that the same has not been recorded and consequently the assessment is bad in law. The appellant submits that mandatory conditions to assume jurisdiction is to record reasons and in the absence of the same the assessment is bad in law and liable to be cancelled.

4. The authorities below are not justified in law in invoking the provisions of section 142(2A) of the Act for getting the accounts audited of the appellant under the facts and circumstances of the case.

5. The authorities further failed to arrive at a conclusion that there exists complexity in the transactions of the appellant and without making a honest effort to understand the transactions invoked the provisions of section 142(2A of the Act under the facts and circumstances of the case.

6. Without prejudice the appellant denies itself liable to be taxed on the total income as determined by the ld. Assessing Officer of Rs.92,62,153 as against the returned income of Rs.17,62,153 under the facts and circumstances of the case.

7. The authorities below are not justified in law in treating a sum of Rs. 75,00,000/- as unexplained investment in share application under section 69 of the Income tax act, 1961 under the facts and circumstances of the case.

8. The authorities below ought not to have made additions u/s. 69 being investment in share application money in the hands of the appellant under the facts and circumstances of the case. Reliance is placed on the decision of the Hon'ble Apex Court in the case of CIT Vs. Steller Investment Ltd., 251 ITR 263.

9. The Appellant denies its liability to be charged to interest u/s. 234B and 234C of the Income-Tax Act, 1961, under the facts and circumstances of the case.

10. The Appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

11. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity.

4. We have heard the learned D.R. and considered the relevant material on record. The assessee has challenged the validity of assessment as well as the directions issued under Section 142(2A) of the Income Tax Act, 1961 (in short

'the Act') for getting the accounts of the assessee audited. The CIT (Appeals) has given a detailed finding in para 2.1.2 on the issue of validity of direction for statutory audit under Section 142(2A) of the Act as under :

2.1.2. The above arguments of the appellant are not found acceptable in view of the facts discussed below :-

(i) From the submission made by the appellant, it is undisputed fact that the direction under Section 142(2A) of the Income Tax Act was issued by the Assessing Officer with the previous approval of the Commissioner of Income Tax (Central), Bangalore. The section requires that having regard to the nature and complexity of the accounts of the assessee and the interest of revenue, if the Assessing Officer is of the opinion that the books of accounts and documents are required to be audited, the Assessing Officer with the previous approval of the Chief Commission or Commissioner can direct the assessee to get the books of accounts and documents audited and submit report in the prescribed form, verified in the prescribed manner. Before granting prior approval, the Assessing Officer is required to place all materials before the approving authority to show that he intends to take recourse to the power under Section 142(2A) having regard to nature and complexity of the accounts of the assessee and the interest

of the revenue. Once the approving authority is satisfied about the nature and complexity of accounts and the interest of the revenue, the authority is competent to accord the prior approval to the Assessing Officer for issue such direction. The appellant failed to produce any evidence to support that after issue of such direction by the Assessing Officer, the jurisdiction for such issue of the direction was challenged or objected. Further, adequate safe guard has been provided in the statute by providing the approval from the Chief Commissioner or Commissioner to avoid the arbitrary use of the power by the Assessing Officer. Therefore, no appeal under Section 246 has been provided against the direction under Section 142(2A) of the Income Tax Act. Hence the argument of the appellant is not tenable in law.

(ii) Appellant's argument that the order has been passed beyond the limitation is not acceptable as in Explanation (ii) to Sub Section (1) of Section 153B it has been clearly provided that for computing the period of limitation for the purpose of Section 153B(1), the period commencing from the day on which the Assessing Officer directs the assessee to get his account audited under Sub Section (2A) of Section 142 and ending on the day on which the assessee was required to furnish the audit report shall be excluded. In the case, the appellant was directed to submit the audit report on 30.04.2007, but the appellant failed to submit the report in the prescribed time, hence the Assessing Officer proceeded to make assessment under Section 153A as the appellant did not ask for extension of time to submit the audit report. Proviso to Sub Section (1) of Section 153B provides that if after exclusion of the period as per explanation (ii) if the time available for making an order of assessment or reassessment is less than 60 days, then the remaining period shall be extended to 60 days. Thus the order passed under Section 153A of the Income Tax Act is within the time limit provided under Sub Section (1) of Section 153B

after exclusion of the time as per the Explanation and proviso to Section 153B(1). Hence this argument is also not tenable in law.

(iii) The argument that no opportunity of proper hearing was allowed is not found acceptable in view of the facts narrated by the Assessing Officer in the Assessment Order according to which during the course of the search on 28.01.2005 in the statement recorded the appellant was specifically asked to produce the evidences to prove the share application money of Rs 75,00,000/- introduced during the year in cash. Another letter was issued to the assessee on 08.02.2005 to provide the evidences to prove the cash introduced in the form of share application money in response to that instead of filing the evidences to prove the share application money, the appellant asked for 60 days time, however even after 60 days no details were filed. After that the notice under Section 153A was issued on 18.04.2005 which was not complied by the appellant. After that the notice under Section 142(1) was issued on 11.06.2007 which was also not complied and therefore the Assessing Officer issued the final show cause notice on 18.06.2007 however, appellant failed to furnish any evidences till the date of the completion of the assessment on 25.06.2007.

(iv) On perusal of the assessment records, it is noticed that the Addl CIT Central Range-1, Bangalore accorded the approval as per his letter No. F.No.Approval/Addl.CIT/CR-I/07-08 dated 25th June 2007, therefore the argument that the order was passed before obtaining the approval from the Addl CIT as required under Section 153D of the Income Tax Act is not found acceptable. Even otherwise, if the argument of the appellant is accepted that the order was approved by the Addl.CIT, on 26.06.2007, it is evident from the record that the order was served to the appellant on 30.06.2007 which means the order was not dispatched to the appellant before obtaining the approval from the Add.CIT under Section 153D of the Income Tax Act.

In the absence of any contrary facts and arguments brought before us, we do not find any error or illegality in the order of the CIT (Appeals) for this issue.

5. AS regards the validity of assessment under Section 153A, the CIT (Appeals) has dealt with this issue in paras 2.2.2 & 2.2.3 as under :

2.2.2. The above arguments of the appellant are not found acceptable in view of the facts discussed below :-

There is no provision under the Income Tax Act to provide copy of the reasons recorded for initiation of the search. This view has been upheld by the Hon'ble ITAT, Bangalore in the order passed in ITA No.1149 to 1155, 1156 to 1162 and 1163 to 1169/B/08 where Hon'ble ITAT after considering the decision of the Apex Court in the case of Union of India vs Ajith Jain (quoted supra) on which the reliance has been placed by the appellant held that " *it has not dealt with the power of the Tribunal with regard to considering the validity of the search or not.* "

(ii) There is no provision under Section 153A either to record the reason for issue of notice under Section 153A or to provide the copy of such reasons recorded, Section 153A of the Income Tax Act provide that " *in the case of person where search is initiated under Section 132 ....., the Assessing Officer shall issue notice to such person requiring him to furnish the return and assess or reassess total income for six assessment years immediately preceding the assessment year relevant to the previous year in*

which the search is conducted." In the case of the appellant, it has not been disputed that search has not been initiated, once the search is initiated under Section 132, the Assessing Officer is fully empowered to make assessment as per clause (b) of Sub Section (1) of Section 153A of the Income Tax Act. The decision of the Hon'ble Apex Court in the case of Manish Maheswari vs ACIT (289 ITR 341) on which the reliance has been placed is not applicable to the fact of the case of the appellant as in that case, issue before the Hon'ble Supreme Court was in regard to the applicability of Section 158BD of the Income Tax Act where in view of the specific provision of the Act, the Hon'ble Supreme Court held that the Assessing Officer of searched persons has to record the reason that undisclosed income belongs to other person. There is no such requirement under Section 153A of the Income Tax Act , in respect of a person in whose case the search under Section 132 has been initiated.

(iii) The validity of search inconsequence to which the notice under section 153A of Income Tax Act has been issued, cannot be challenged before the appellate authorities i.e the Commissioner of Income Tax (Appeals) and the ITAT. This view has been upheld by the Hon'ble ITAT special bench, Bangalore in the case of C Ramaiah vs ACIT (2003) 87 ITD 439 and also by the Hon'ble Delhi High Court in the case of M B Lal vs CIT (279 ITR 298) where the Hon'ble High Court held that *"it was no longer open to the assessee to re-agitate the question of validity of the authoritsation and the legality of the search proceedings before the Commissioner or before the Tribunal for that matter."*

(iv) The decision in the case of CIT vs Chitra Devi Soni 313 ITR 174, GKN Driveshafts Vs ITO (259 ITR 19) and Sri T S Chandrasekhar (17 DTR 194) on which the reliance has been placed by the appellant are in the different context and not applicable to the fact of the case of the appellant.

2.2.3. In view of the reasons given in paragraph 2.2.2. above, the **appeal on the above ground is dismissed**.

In the absence of any specific illegality or error pointed out in the finding of CIT (Appeals), we uphold the order of the CIT (Appeals) on this issue.

6. The next issue is regarding addition of Rs.75 lakhs on account of share application money introduced by the assessee in the books of accounts. We find that the CIT (Appeals) has dealt with each and every argument of the assessee and given a finding that the assessee has failed to explain the source of share application money and therefore the addition made under Section 69 of the Act was confirmed by the CIT (Appeals). The relevant conclusion of the CIT (Appeals) is given in para 2.3.3 as under :

2.3.3. From the facts discussed above, it is clear that the appellant failed to discharge his onus to prove the cash of Rs 75,00,000/- introduced in the books of accounts of the appellant during the financial year, hence the same is assessable as income under Section 68 of the Income Tax Act. There are several judicial pronouncements in which it has been held that where the credit is introduced in the name of third parties, the onus is on the assessee to prove identity and capacity of the creditors and genuineness of the transactions (Shankar Industries vs CIT 114 ITR 689). It has also been held that where any sum is found credited in the books of the assessee for any previous year it may be charged to income tax as the income of the assessee for that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer is not satisfactory (Sumati Dayal vs CIT 214 ITR 801 (SC)). The Hon'ble Calcutta High Court even went to the extent that even if the income tax details are filed , they are not sufficient to prove genuineness of the cash credit (CIT vs Korlay Trading Company Ltd 232 ITR 820) and even if the transaction is through cheque it can still be assessed under Section 68 (CIT vs Precision Finance P. Ltd (208 ITR 465). The Punjab and Haryana High Court in the case of Raunaq Ram Nandlal vs CIT (254 ITR 617) held that if the cash are deposited before issue of the cheques which have been introduced as cash credits , the same is assessable under Section 68 of the Income Tax Act as the transaction is not genuine, whereas in the case of the appellant the cash of Rs 75,00,000/- is introduced in the books of accounts as share application money without even mentioning of the names of the alleged share applicants and after availing sufficient opportunities the appellant failed to produce the evidences to prove identity of the alleged share applicants, credit worthiness of the alleged share applicants and genuineness of the transactions and therefore, the Assessing Officer was right in making addition of Rs 75,00,000/- however he made the addition under Section 69 of the Income Tax Act, which is modified as under Section 68 of the Income Tax Act. Accordingly **appeal on this ground is accordingly dismissed.**

We find that despite sufficient opportunity was given to the assessee, the assessee has not produced any evidence to prove the identity of the share

applicant. Since it is private limited company and shares of the private limited company can be issued only to the known and close persons of the existing share-holders/promoters of the company therefore, it is the primary onus of the assessee to prove the genuineness of the transaction. Hence we do not find any error or illegality in the order of the CIT (Appeals) on this issue.

7. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 13th Oct., 2016.

Sd/-	Sd/-
(A.K. GARODIA)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Bangalore,
Dt.13.10.2016.

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore