

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : “C”, BANGALORE**

**BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND**

SMT.BEENA PILLAI, JUDICAL MEMBER

**ITA Nos.783 & 784(Bang)/2011
(Assessment years : 2004-05)**

Shri B.A.Moideen Bava,
“Meshoof”, Chokkabettu,
Mangalore
PAN No.AGIPB1835A

Appellant

Vs

The Deputy Commissioner of Income Tax,
Central Circle-2(3),
Bangalore

Respondent

And

**ITA Nos.785 & 786(Bang)/2011
(Assessment years : 2003-04 & 2004-05)**

Smt Nageena Moideen Bava,
“Meshoof”, Chokkabettu,
Mangalore
Pan No.AGIPB1835A

Appellant

Vs

The Deputy Commissioner of Income Tax,
Central Circle-12(3),
Bangalore

Respondent

**Appellant by : Shri V. Narendra Sharma, Advocate
Revenue by : Shri K.V.Aravind, Standing Counsel for Deptt.**

**Date of hearing : 24-09-2019
Date of pronouncement : 10-10-2019**

ORDER**PER BENCH :**

Present appeals has been filed by assessee for assessment year 2003-04 and 2004-05 arising out of orders passed by Ld.CIT (A)-6, Bangalore dated 30/06/11 on following grounds of appeal:

ITA No.783/B/2011(Assessment year : 2003-04)

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

2.The appellant denies himself liable to be assessed under section 153A r.w.s. 143(3) of the Act under the impugned order on the ground that:-

i.The search initiated in the case of the appellant is illegal and ultra vires the provisions of section 132(1)(a), (b) Et (c) of the Act;

ii.That the search is conducted not on the basis of any prior information or material inducing any belief but purely on the suspicion and therefore, the action under section 132(2) is bad in law [224 ITR 19 (SC)] and consequent assessment under section 153A is null and void-ab-inito on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajith Jain, reported in 260 ITR 80.

iii.The learned authorities below has not discharged the burden of proving that there is a valid initiation of search under section 132(1)(a), (b) Et (c) of the Act, its execution and its completion in accordance with law to render the proceedings valid and to assume jurisdiction to make an assessment under section 153A of the Act.

3.The authorities below failed to appreciate that a valid search is a sine qua non for making a valid assessment under section 153A of the Act on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajit Jain, reported in 260 ITR 80.

4.The order passed by the authorities below is bad in law as the appellant was denied reasonable opportunity of hearing which is against the principles of natural justice under the facts and circumstances of the case.

5. Without prejudice to the above legal Contentions the appellant denies itself liable to be assessed over and above the income returned of Rs. 78,114/- under the facts and circumstances of the case.

6. The Authorities below are not justified in making an addition of a sum of Rs. 8,59,000/- as peak credit in unaccounted bank account under the facts and circumstances of the Appellant's case.

7. Without prejudice the working of the peak credit by the learned authorities is not in accordance with law, the peak credits requires to be worked out based on the actual deposits and withdrawals and not on the cash deposit alone under the facts and circumstances of the case.

8. The Appellant denies itself liable to be charged to interest u/s 234 A, B tt C of the Act under the facts and circumstances of the case. The levy is further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.

9. The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.

10. For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant, prays that the appeal may be allowed and justice rendered.

Grounds raised by assessee in this appeal are as under;

ITA No. 784/B/2011 (Assessment year 2004-05)

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

2. The appellant denies himself liable to be assessed under section 153A r.w.s. 143(3) of the Act under the impugned order on the ground that:-

i. search initiated in the case of the appellant is illegal and ultra-vires the provisions of section 132(1)(a), (b) a (c) of the Act;

ii. That the search is conducted not on the basis of any prior information or material inducing any belief but purely on the suspicion and therefore, the action under section 132(2) is bad in law [224 ITR 19 (SC)] and consequent assessment under section 153A is null and void-ab-inito on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajith Jain, reported in 260 ITR 80.

iii. The learned authorities below has not discharged the burden of proving that there is a valid initiation of search under section 132(1)(a), (b) a (c) of the Act, its execution and its completion in accordance with law to render the proceedings valid and to assume jurisdiction to make an assessment under section 153A of the Act.

3.The authorities below failed to appreciate that a valid search is a sine qua non for making a valid assessment under section 153A of the Act on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajit Jain, reported in 260 ITR 80.

4.The order passed by the authorities below is bad in law as the appellant was denied reasonable opportunity of hearing which is against the principles of natural justice under the facts and circumstances of the case.

5.Without prejudice to the above legal contentions the appellant denies itself liable to be assessed over and above the income retuned of Rs. 1,49,032/- under the facts and circumstances of the case.

6.The Authorities below are not justified in making an addition of a sum of Rs.4,17,000/- as peak credit in unaccounted bank account under the facts and circumstances of the Appellant's case.

7.Without prejudice the working of the peak credit by the learned authorities is not in accordance with law, the peak credits requires to be worked out based on the actual deposits and withdrawals and not on the cash deposit alone under the facts and circumstances of the case.

8.The Appellant denies himself liable to be charged to interest u/s 234 A, B & C of the Act under the facts and circumstances of the case. The levy is further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.

9.The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.

10.For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.

Grounds raised in this appeal by assessee are as under;

ITA No.785/B/2011(Assessment year :2003-04)

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

2.The appellant denies herself liable to be assessed under section 153C r.w.s. 143(3) of the Act under the impugned order on the ground that:-

i.The mandatory conditions to invoke jurisdiction under section 153C 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.

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

iii.The authorities below have not furnished the reasons recorded, though requested by the appellant asking for reasons if recorded by the learned assessing officer and therefore the assessment requires to be set aside. Reliance is also placed on the parity of reasons of the Apex Court in the case of GKN Driveshafts (India) Ltd. Vs. Income-Tax Officer & Others reported in 259 ITR 19 and Manish Maheshwari Vs. ACIT & Another reported in 289 ITR 341.

3.The authorities below failed to appreciate that a valid search is a sine qua non for making a valid assessment under section 153A of the Act on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajit Jain, reported in 260 ITR 80. The issue of notice under section 153C of the Act on an illegal search is bad in law

and consequently all proceedings based on such illegal search do not have any legs to stand and requires to be cancelled.

4.The order passed by the authorities below is bad in law as the appellant was denied reasonable opportunity of hearing which is against the principles of natural justice under the facts and circumstances of the case.

5. Without prejudice to the above legal contentions the appellant denies herself liable to be assessed over and above the income returned of Rs. 79,896/- under the facts and circumstances of the case.

6.The learned commissioner of Income-tax (Appeals) is not justified in not deleting the entire addition made by the learned assessing officer under peak credit and confirming a sum of Rs.6,16,580/- as peak credit in bank account under the facts and circumstances of the Appellant's case.

7.The Appellant denies herself liable to be charged to interest u/s 234 A, B of the Act under the facts and circumstances of the case. The levy is further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.

8.The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.

9. For the above and other grounds that may be urged at the time of hearing of the appeal, the

Appellant prays that the appeal may be allowed and justice rendered.

Grounds raised in this appeal by assessee are as under;

ITA No.786/B/2011(Assessment year : 2004-05)

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

2.The appellant denies herself liable to be assessed under section 153C r.w.s. 143(3) of the Act under the impugned order on the ground that:-

i.The mandatory conditions to invoke jurisdiction under section 153C 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.

*ii. The reasons for issue of notice under section 153C of the Act have not been given and the appellant has reason to believe **that the same has** not been recorded and consequently the assessment made is bad in law. The mandatory conditions to assume jurisdiction is to record reasons and in the absence of the same the assessment made under section 153C of the Act is bad in law and liable to be cancelled.*

iii. The authorities below have not furnished the reasons recorded, though requested by the appellant asking for reasons if recorded by the learned assessing officer and therefore the assessment

requires to be set aside. Reliance is also placed on the parity of reasons of the Apex Court in the case of GKN Driveshafts (India) Ltd. Vs. Income-Tax Officer Et Others reported in 259 ITR 19 and Manish Maheshwari Vs. ACIT Et Another reported in 289 ITR 341.

3.The authorities below failed to appreciate that a valid search is a sine qua non for making a valid assessment under section 153A of the Act on the parity of the ratio of the decision of the Hon'ble Apex Court in the case of Ajit Jain, reported in 260 ITR 80. The issue of notice under section 153C of the Act on an illegal search is bad in law and consequently all proceedings based on such illegal search do not have any legs to stand and requires to be cancelled.

4.The order passed by the authorities below is bad in law as the appellant was denied reasonable opportunity of hearing which is against the principles of natural justice under the facts and circumstances of the case.

5.The learned Commissioner of Income-tax (Appeals) failed to appreciate that the reference to the District Valuation Officer is bad in law under the facts and circumstances of the case.

6.The authorities below failed to appreciate that the method of valuation adopted by the valuation officer is not in accordance with law and hence the addition is bad in law. The determination of the value based on plinth area method is wrong and erroneous and further the area considered by the valuation officer is far in excess of the actual area under the facts and circumstances of the case.

7.The learned Commissioner of Income-tax (Appeals) failed to appreciate that the valuation and the rates adapted by the District Valuation Officer is as per the CPWD rates whereas for the purpose of valuation the KPWD rates has to be adopted under the facts and circumstances of the case.

8.The learned Commissioner of Income-tax (Appeals) is not justified in restricting the self supervision charges to 8% as against 10% claimed by the appellant under the facts and circumstances of the case.

9. The Appellant denies herself liable to be charged to interest u/s 234 A, B Et C of the Act under the facts and circumstances of the case. The levy is further bad in law as the computation of the interest and the amount, period and interest rate calculations are not explained.

10.The Appellant craves leave to add, alter, amend, substitute, change and delete any of the grounds of appeal.

11.For the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed and justice rendered.

2. Brief facts of the case are as under:

A search action under section 132 of the Act was carried out in case of assessee and his wife in residential premises at Mangalore. During course of search action books of accounts of assessee were seized. The Ld. AO concluded the assessment on 30/11/09 under section 143 (3) read with section 153A of the Act, in case of assessee and assessment order under section 143(3) read with

section 153C of the Act was passed in case of his wife for years under consideration.

2.1 Ld. AO noticed that assessee and his wife deposited cash in bank accounts held by them, for which they could not offer any explanation. It was only submitted that source of deposit was out of sales which has already been offered to tax. Ld.AO not satisfied with explanation worked out peak credits in assessee as well as his wife's case.

3. Aggrieved by addition made by Ld. AO in case of assessee as well as his wife, appeal was filed before Ld.CIT (A). Before Ld.CIT (A) assessee challenged jurisdiction under section 153A and 153C of the Act. Ld.CIT (A) dismissed appeal filed by assessee for years under consideration.

4. Aggrieved by order of Ld.CIT(A), both assessee are in appeal before us now.

Common issue alleged by both assessee for years under consideration are in respect of validity, as well as applicability of section 153A and 153C in case of assessee and his wife respectively where it has been alleged that search action under 132 itself was invalid. It has been submitted that search initiated was without assuming jurisdiction to make assessment under section 153A and 153C of the Act in respective cases.

Admittedly, both sides submitted that this issue is no longer *res integra*, by virtue of *Explanation to Section 132 (1)*, being introduced with retrospective effect by Finance Act 2017.

Accordingly, grounds raised by both assessee challenging validity of search under section 132 stands dismissed.

The issue raised by assessee is on merits is regarding peak credits in unaccounted bank accounts of assessee's.

It has been submitted that peak credit has to be computed on the basis of actual deposits and withdrawal and not on the basis of cash deposit alone. Accordingly, we set aside the issue back to Ld. AO for re-computing peak credit, taking into account both deposits as well as withdrawal during relevant period for assessment years under consideration in case of both assessee is before us.

Accordingly, grounds raised by assessee's on merits stands allowed for statistical purposes.

6. In the result, appeals filed by both assessee is for assessment years under consideration stands allowed partly for statistical purposes.

Order pronounced in the open court on 10-10-2019

Sd/-

(B.R.BASKARAN)
ACCOUNTANT MEMBER

Dated: 10-10-2019

***am**

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

By Order

Asst.Registrar

