

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL (IT) NO.1101 OF 2017

Commissioner of Income Tax-8, Mumbai. ... Appellant
V/s.
Pashupati Granites Pvt. Ltd. ... Respondent

Mr.Arvind Pinto, Advocate for the Appellant.
Mr.Prakul Khurana with Ms.Ankita Sovani i/by M/s R V J
Associates, Advocate for the Respondent.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : FEBRUARY 12, 2020**

P.C.:-

1. Heard Mr.Arvind Pinto, learned standing counsel, Revenue for the appellant; and Mr.Prakul Khurana alongwith Ms.Ankita Sovani, learned counsel for the respondent- assessee.

2. This appeal under Section 260A of the Income Tax Act, 1961 (briefly "the Act" hereinafter) has been preferred by the Revenue assailing the order dated 26th July, 2013 passed by the Income Tax Appellate Tribunal, Mumbai Bench "C", Mumbai (briefly "the Tribunal" hereinafter) in Income Tax Appeal No.(SS)644/Mum/2002 for the block period 1st April, 1988 to 15th September, 1998.

3. The appeal has been filed projecting the following questions as substantial questions of law:-

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was legally correct in dismissing the revenue’s appeal by completely ignoring Explanation 2 to Section 158BE of the Act inserted by the Finance (No 2) Act, 1998 with effect from 01.07.1995?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was in error in ignoring the fact that 2nd Explanation to Section 158BE, was clarificatory in nature and therefore upholding the annulment of the assessment order was going against the true reading of the provisions of the Act?

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in ratifying the order of the CIT (A), where the latter had adjudicated on an administrative order namely the restraint order passed u/s 132(3) that is beyond the scope of Section 246A of the Act?”

4. From the above it is evident that the core issue in the appeal requiring adjudication is annulment of the assessment order for the block period under consideration passed under Section 158BC of the Act by holding the same to be beyond the limitation period prescribed under Section 158BE(b) of the Act.

5. It may be mentioned that following search and seizure in the premises of the respondent/assessee by the departmental authorities assessment proceedings under Section 158BC was taken up for the block year under consideration and ultimately, the assessment order was passed on 27th December, 2000.

6. Respondent challenged the said assessment order in appeal before the Commissioner of Income Tax(Appeals) Central-VIII, Mumbai, also referred to as the first appellate authority, contending that the said assessment order passed on 27th December, 2000 was beyond the limitation period of two years, the search having taken place on 15th September, 1998. After an elaborate discussion the first appellate authority concluded that the search which was carried out pursuant to warrant of authorization dated 14th September, 1998 was executed on 15th September, 1998 itself. Therefore, having regard to the limitation of two years from the end of the month in which the authorization was executed, the first appellate authority held that the time limit for passing the assessment order under Section 158BC was available till 30th September, 2000 only. The assessment order passed on 27th December, 2000 was beyond the limitation period of two years and accordingly, it was annulled vide the appellate order dated 11th September, 2002.

7. Aggrieved thereby Revenue went in appeal before the Tribunal. Tribunal by the order dated 26th July, 2013 affirmed the view taken by the first appellate authority by holding that the search operations were over in the month of September, 1998. The limitation period of two years was available till 30th September, 2000. The assessment order having been passed on 27th December, 2000 was therefore barred by limitation. Accordingly, the appeal of the Revenue was rejected.

8. Hence, this appeal.

9. Submissions made by learned counsel for the parties have been considered.

10. Before advertng to the rival contentions, it may be apposite to refer to certain relevant provisions of the Act and the Income Tax Rules, 1962 (briefly “the Rules” hereinafter) to have a proper perspective.

11. Section 132 of the Act deals with search and seizure. The authority mentioned under sub-section (1) can carry out a search and seizure operation if he has reasons to believe in consequence of information in his possession that any person has failed to produce any books of account etc upon summons or notice or is in possession of any money etc. which has not been or would not be disclosed for the purpose of the Act. As per sub-section (3) the officer who is so authorized to carry out search and seizure where it is not practicable to seize any such books of accounts, other documents, money, bullion, jewellery or other valuable articles or thing, shall serve an order on the owner or on the person in immediate possession or control not to remove or part with or otherwise deal with it except with the the previous permission of such officer. As per the Explanation thereto, it is declared that serving of an order under sub-section (3) shall not be deemed to be seizure of such books of accounts,

other documents, bullion, jewellery or other valuable articles or things in terms of sub-section (1) clause (iii).

12. The consequence of such search is to have assessment of undisclosed income as a result of such search which is provided in Section 158BA as per which the Assessing Officer shall proceed to assess the undisclosed income of such person for the related block period.

13. Block period is defined in Section 158BA to mean the period comprising previous years relevant to 10 assessment years preceding the previous year in which the search was conducted under Section 132 or any requisition was made under Section 132A.

14. Procedure for block assessment is provided in Section 158BC.

15. What is relevant for the present case is Section 158BE which lays down the time limit for completion of block assessment. As per sub-section (1)(b), the assessment order under Section 158BC in the case of search under Section 132 or requisition under Section 132A made on or after 1st January, 1997 should be passed within two years from the end of the month in which the last of the authorizations for search or requisition was executed. Section 158BE(1)(b), which is relevant and as it stood at the relevant time, is extracted hereunder:-

“158BE-(1) The order under section 158BC shall be passed-

(a)

(b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997."

16. As per Explanation 2 it has been declared that the authorization referred to in sub-section (1) shall be deemed to have been executed, in the case of search, on the conclusion of search as recorded in the last panchanama drawn in relation to any person in whose case the warrant of authorization has been issued.

17. Having noticed the relevant legal provisions as above, we may now advert to the facts of the present case.

18. Search warrant was issued by the Director of Income Tax (Investigation), Mumbai on 14th September, 1998. As per panchanama drawn on 15th September, 1998, documents marked as Annexure A-1 to Annexure A-11 were seized and a prohibitory order under Section 132(3) was put up on the CPU of the computer of the respondent/assessee. The first appellate authority noted that the search party had come to the conclusion that there were no further materials to be seized and no further search to be conducted; the search had ended on that day i.e. 15th September, 1998. Thus, the first appellate authority concluded that the authorization for the search was fully implemented and its execution was completed on 15th September, 1998.

19. The first appellate authority also noted that though there were warrants of authorization on 15th September, 1998, 13th October, 1998 and 14th December, 1998, after 15th September, 1998 the authorized officer had nothing to search or seize and could not have lawfully conducted any search. Life term of search warrant issued on 14th September, 1998 came to an end on 15th September, 1998, when it was duly executed. It was noticed that back up copy of the CPU of the computer was taken by the authorized officer on 13th October, 1998 by passing prohibitory order. However, there was no purpose to keep or continue the same under prohibitory order. Therefore, what was done on 14th December, 1998 was final revocation of the order under Section 132(3) relating to the CPU of the computer and it was held that such final revocation of the order under Section 132(3) was wholly irrelevant for the purpose of determining limitation under Section 158BE. The first appellate authority accepted the contention of the respondent/assessee that search operation was completed on 15th September, 1998 and nothing connected with the search was done on subsequent dates. It was held as under:-

“17. It is notable that once the back up copy of the CPU of the computer had been taken by the authorised officer on 13.10.98 there was practically no purpose in keeping the same under prohibitory orders up to 14.12.98. Seen from this perspective also, there was no need to put fresh prohibitory order on the CPU of the computer on 13.10.98. Thus there is substance in the contention of the appellant that the search operations in this case were completed on 15.9.98

and nothing connected with the search operation was done on 13.10.98 and 14.12.98.”

20. Referring to a decision of this court in **CIT Vs. Mrs. Sandhya P. Naik, 253 ITR 534**, the first appellate authority held that the warrant of authorization having being executed on 15th September, 1998, the limitation period of two years for passing assessment order under Section 158BE was available till 30th September, 2000. The block assessment order passed on 27th December, 2000 was thus beyond limitation and was accordingly annulled by holding as under:-

“23. As I have concluded that the search was completed and warrant of authorization dated 14.9.1998 was executed on 15.9.1998 itself, the assessment order, could have been framed by the AO till 30.9.2000 only. The order dated 27.12.2000 passed by the AO, which is beyond the period of two years and is barred by limitation is thus not maintainable and is therefore annulled.”

21. While annulling the assessment order as above the first appellate authority observed that if for an indefinite period a search is continued under the whims of the searching party without any real purpose or for any collateral purpose and if the search party goes on visiting the premises off and on having a panchanama on each day without carrying out any search operation, Explanation 2 to Section 158BE cannot validate such invalid panchanama.

22. We would again refer to Explanation 2 to Section 158BE of the Act on which much reliance has been placed by Mr.Pinto after we deal with the order passed by the Tribunal. As already

noted above, by the order dated 26th July, 2013, Tribunal had affirmed the order passed by the first appellate authority. Before the Tribunal also revenue heavily relied upon Explanation 2 to Section 158BE. However Tribunal did not accept the contention of the revenue and declined to interfere with the order passed by the first appellate authority by holding as under :-

“4. We have heard the rival submissions and perused the material before us. It is found that while deciding the issue, special bench had specifically dealt with the question of retrospective amendment and decided that if nothing connected with the search was done on a particular day time limit for assessment will not extend to that date. In other words time limit available to the AO is upto the date of actual conduct of search. In the case under consideration FAA has given a finding of fact that search operations were over in the month of September, 1998 and after that only panchanamas were drawn. In these circumstances, we are of the opinion that there is no need to interfere with the orders of the FAA. So respectfully following the order of the Special bench delivered in the case of Shree Ram Lime Products Ltd.(supra), we uphold the order of the FAA. Grounds of appeal 1-3 are decided against the AO. As we have upheld the order of the FAA, who have annulled the block assessment order, so we are of the opinion that other rounds do not need any adjudication by us.”

23. Explanation 2 was inserted in Section 158BE of the Act by the Finance (No.2) Act, 1998 with retrospective effect from 1st July, 1995. It clarifies that the authorization referred to sub-section (1) of Section 158BE shall be deemed to have been executed in the case of a search (with which this appeal is concerned) on the conclusion of search as recorded in the

last panchanama drawn in relation to any person in whose case the warrant of authorization has been issued. Therefore, what Explanation 2 clarifies is that for the purpose of computing the limitation period of two years from the end of the month in which the authorizations for search was executed would mean the last panchanama drawn in respect of such search which therefore is indicative of a scenario where a number of panchanamas are drawn in relation to the search. Therefore, in the case of multiple panchanamas being drawn it is the last panchanama drawn on the conclusion of the search which would be relevant for the purpose of computation of the limitation period of two years in terms of Section 158BE(1)(b) of the Act.

24. Having noticed the above, we may also refer to Rule 112 of the Rules which lay down the procedure following search and seizure carried out under Section 132. What is of relevance is sub-Rule (7). Sub-Rule (7) says that the search as contemplated under Section 132(1) shall be made in the presence of witnesses as provided in the rules and a list of all things seized in the course of such search and of the places in which they were respectively found shall be prepared by the authorized officer and signed by such witnesses but no person witnessing a search shall be required to attend as a witness of the search in any proceedings under the Act unless specifically summoned.

25. Sub-Rule (7) of Rule 112 would go to show that a search is to be conducted in the presence of witnesses and whatever

things or materials are seized in the course of the search, a list of all such things shall be prepared by the authorized officer which should have the signature of the witnesses. Though the word “panchanama” has not been used in sub-Rule (7) it is evident that the reference to the list of all things seized in the course of such search bearing signature of the witnesses is nothing but a panchanama drawn at the conclusion of the search.

26. Delhi High Court in **Commissioner of Income-Tax Vs. S.K. Katyal, (2009) 177 Taxman 380** examined the meaning of the expression “panchanama” as occurring in Explanation 2(a) to Section 158BE of the Act. Delhi High Court held that the word “panchanama” is not defined in the Act. However, panchanama which is mentioned in Explanation 2(a) to Section 158BE is nothing but a document recording what happened in the presence of the witnesses (panchas). It documents the conclusion of a search.

27. In **Sandhya P. Naik (supra)** this court held that by simply stating in the panchanama that a search is temporarily stopped, the authorized officer cannot keep the search in operation by passing a restraint order under Section 132(3). Action under Section 132(3) can be resorted to only if there is any practical difficulty in seizing the things which are likely to be seized. When there is no such practicable difficulty, the officer is left with no other alternative but to seize any item if he is of the view that it represented undisclosed income. This court categorically held that power

under Section 132(3) cannot be exercised so as to circumvent the provisions of Section 132(3). Referring to the Explanation to Section 132(3), this court held that a restraint order does not amount to seizure. By passing a restraint order, the time limit available for framing of assessment order cannot be extended.

28. Adverting to the facts of the present case, we find that the first appellate authority had recorded a clear finding of fact that as per panchanama drawn on 15th September, 1998, the search which was carried out in terms of authorization dated 14th September, 1998 was fully executed. After 15th September, 1998 there was no search or seizure. On 13th October, 1998 a prohibitory order was passed under Section 132(3) regarding the computer CPU of the respondent/ assessee which was revoked on 14th December, 1998. The first appellate authority had rightly held that passing of prohibitory order and revocation thereof were wholly irrelevant for the purpose of determining limitation under Section 158BE. Tribunal had considered the submission of the Revenue regarding Explanation 2 to Section 158BE but did not accept the same and rightly so.

29. Finding returned by the first appellate authority as affirmed by the Tribunal is a finding of fact and we do not find any element of perversity in such finding of fact. In the absence thereof, no question of law, much less any substantial question of law, can be said to arise therefrom,

there being concurrent findings of facts by the two lower appellate authorities.

30. Consequently we do not find any merit in the appeal. Appeal is accordingly dismissed. No cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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