

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2021

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.35076, 13209, 13218, 13368, 35082, 35084,
35086, 35088 & 35090 of 2019
and WMP.Nos.13327, 13332, 13477, 35880, 35885,
35883, 35872, 35874, 35876, 35877, 35879,
35866, 35870, 35871, 13333, 13334, 13478, 13481, 35865 of 2019

M/s.Agni Estates and Foundations Private Limited,
Rep.by its Director T.G. Balaji,
No. 76, Temple Towers, North Mada Street,
Mylapore, Chennai - 600004.

... Petitioner in

W.P.Nos.35076 of 2019, 13368, 35082,
35084, 35086, 35088 & 35090 of 2019

R.N.Jayaprakash.
S/o.R.N.Jayachandran, No.1,
Ranjith Road, Kottur Puram,
Chennai-600 085

... Petitioner in

WP.No.13209 & 19218 of 2019

Vs.

- 1 Deputy Commissioner of Income Tax
Central Circle 2(1) New Income Tax Building
No. 46 MG Road, Nungambakkam,
Chennai - 600034
- 2 Deputy Director of Income Tax (Investigation)
Unit - 3(2) Chennai Income Tax Investigation Wing Building
108 M.G. Road, Nungambakkam,
Chennai 600034
- 3 Principal Director of Income Tax (Investigation)
Income Tax Investigation Wing Building
108 M.G. Road, Nungambakkam,
Chennai 600034

.. Respondents in
35076 of 2019, 35082, 35084,
35086, 35088 & 35090 of 2019

1 Principal Director of Income Tax (Investigation)
Income Tax Investigation wing Building
108, M.G.Road, Nungambakkam,
Chennai-34

... 2nd Respondent in WP.No.13368 of 2019

2 Deputy Director of Income Tax (Investigation)
Unit - 3(2) Chennai,
Income Tax Investigation Wing Building,
108, M.G.Road, Nungambakkam, Chennai-34

... 1st Respondent in WP.No.13368 of 2019

3 Deputy Commissioner of Income Tax
Corporate Circle(1), New Building
Chennai-34.

... Respondents in WP.No.13209 & 13218 of 2019

... 3rd Respondent in WP.No.13368 of 2019

Common Prayer:

W.P.Nos.35076 of 2019, 35082,
35084, 35086, 35088 & 35090 of 2019 :-

Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari to call for the records of the 1st Respondent in the Impugned Notice dated 01.11.2019 and bearing Number ITBA/AST/S/153A/2019-20/1019689674(1) and 1019689675(1), 109689672(1) and 1019689679(1) and 1019689682(1) and 1019689677(1) for the Assessment Year 2013-2014 and 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and quash the same.

WP.Nos.13209 of 2019:- सत्यमेव जयते

Pleaded to issue a Writ of declaration, declaring that the search and seizure conducted by the respondents purportedly under S.132 of the Act in relation to the case of the petitioner and all consequential proceedings thereto as wholly without jurisdiction illegal arbitrary and unconstitutional

WP.Nos.13218 of 2019:-

Pleaded to issue a Writ of Mandamus or any other order writ or direction in the nature of a Writ of Mandamus directing the 2nd respondent to return the seized materials to the petitioner.

WP.Nos.13368 of 2019:-

Pleaded to issue a Writ of mandamus or any other appropriate writ application or order under Article 226 of the Constitution of India for bearing the 1st Respondent from relating the books and documents and other article and or Calling upon the petitioner or its directors or employees to appear before him for the purpose of taking evidence/recording statements with reference to the aforesaid books documents and articles seized from the premises of the petitioner its directors and its employees.

For Petitioner : Mr.Arvind P.Datar Senior Counsel
for Mr.M.V.Swaroop and
for Mr.R.Parthasarathy

For Respondents: Mr.A.P.Srinivas
Senior Standing Counsel

COMMON ORDER

The petitioners in W.P.Nos.35076, 35082, 35084, 35086, 35088 and 35090 of 2019, Agni Estates and Foundations (in short, Company) challenge notices dated 01.11.2019 issued under Section 153 A of the Income Tax Act, 1961 (in short 'Act') by the first respondent, the Deputy Commissioner of Income tax, Central Circle 2(1), (in short, Assessing officer/AO), in respect of assessment years (AY) 2013-14 to 2018-19 ('block period'). The prayer in W.P.13209 of 2019 filed by R.N.Jayaprakash, a director in the company, is for a Declaration to the effect that the search conducted on the premises in terms of Section 132 of the Act is without jurisdiction as are all consequences thereof. The prayer in W.P.No.13218 of 2019 is for mandamus directing the return of documents seized and the prayer in W.P.No.13368 of 2019 is for a mandamus forbearing the respondent from retaining the books and documents and other articles and /or calling upon the petitioner or its directors or employees to appear before him for the purpose of taking evidence/recording statements with reference to the aforesaid books, documents and articles seized from the premises of the petitioner, its directors and its employees.

2. The petitioners were subject to search and seizure operation under Section 132 of the Act in their premises including the residential premises of promoter/Directors between 05.07.2018 and 09.07.2018.

3. W.P.13209 of 2019 seeks a declaration on the grounds of (i) illegal detention, violation of human rights and irregularity in procedure, both in the conduct of search under Section 132 as well as under Rule 112(13) of the Income Tax Rules, 1962 and Section 65B of the Evidence Act, 1872 (ii) Retention of documents beyond the period of 60 days as contemplated under Section 132(9A) of the Act and (iii) Recording of statements under duress and coercion. Several and serious allegations have been made in regard to the procedure adopted by the authorities in the manner of conduct of search. Statements were recorded in the course of search and several documents seized. R2, the Deputy Commissioner of Income tax (Investigation), Circle 3(2), Chennai, (in short, IO) has filed a counter objecting to the allegations made and denying the accusations levelled in regard to violation of human rights and ill-treatment meted out to the petitioner as well as its employees by the investigating team. The allegations are, no doubt, serious, and have been refuted by the respondent, thus leading to a situation where I would have to contend with facts disputed by both sides. However, the aforesaid allegations were not seriously pursued or emphasized upon in the course of the hearing by learned Senior counsel. Thus, I choose not to interfere or render findings on such disputed matters, but confine the scope of this order solely to the legal issues raised. An issue common to both the writs of Declaration as well as the writs of Certiorari, and one that is stressed upon as forming the substratum of the petitioner's case, is the bar set out in Section 132(9A) of the Act and to this issue, I will advert shortly. W.P.No.13209 of 2019 is closed, as are the connected miscellaneous petitions.

4. Proceedings have been initiated by R2 in terms of the provisions of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (in short 'BM Act') by issue of notices and summons. The petitioner, in order to comply with the notices, had sought return of various documents from out of the seized documents. Since there was no response to the request, the petitioner approached this Court in W.P.No.13218 of 2019 seeking a direction to the second respondent to return seized materials to the petitioner. This Court, by order dated 29.04.2019, stated as follows:

Mr.A.P.Srinivas, learned Senior Standing Counsel accepts notice for all respondents and seeks some time to take instructions and to file counter to the writ petitions as well as the Miscellaneous Petitions.

2.The petitioners have requested the respondents to furnish them with copies of various documents seized as well as statements recorded in the course of the enquiry. This request has been rejected by the Deputy

Director of Income Tax on 04.04.2019 stating that copies of relevant statements and seized documents that are proposed to be used against the assessee for the assessment proceedings will be furnished as and when notices under Section 153A/153C are issued.

3. It is thus clear that assessments in terms of the provision of the Income Tax Act, 1961 are yet to be initiated by the department.

4. Mr. A. P. Srinivas, learned Senior Standing Counsel clarifies that it is only assessment of black money in terms of the provisions of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('Black Money Act') that are ongoing. The normal practice adopted is for furnishing of copies of statement as well as seized materials and records to be supplied to an assessee upon a request made in this regard and payment of copying charges unless the statute places any condition or bar thereupon.

5. The provisions of the Black Money Act, do not prima facie reveal any bar/impose any condition of this nature. Thus, the assessee requests for furnishing of copies of the statements and seized materials will have to be accepted.

6. Let the request be complied with within a period of one (1) week from date of receipt of a copy of this order and upon receipt of necessary copying charges from the petitioners.

7. List on 12.06.2019.

5. Pursuant thereto, the petitioner appears to have reiterated its request for documents and there was exchange of communication in this regard. Suffice it to state that the petitioner continues to allege that the documents sought for by it have not been supplied whereas the respondent, in typed set dated 17.07.2020, has placed on record material to the effect that the documents sought had been sent to the petitioner under cover of letters dated 30.05.2019 and 12.06.2019, but had been returned unclaimed. Be that as it may, neither party very seriously pursues the allegations levelled against each other in regard to the supply of documents, but prefer to be amiable, agreeing that what remains to be supplied would be furnished by the revenue and duly collected by the petitioner. This is recorded and this issue is laid to rest permitting the petitioner to approach the respondent with the list of documents required and directing the respondent to positively furnish the same to the petitioner within four (4) from date of receipt of

the petitioner's request. W.P.No.13218 of 2019 is closed in the aforesaid terms. At this juncture, I expressly record the assurance of the petitioners to the effect that the present writ petitions, in no way, touch upon the conduct of the proceedings under the BM Act and the same may proceed in accordance with law with the petitioners extending their utmost co-operation in that regard. Thus, the proceedings in terms of the BM Act will proceed as scheduled and in accordance with law.

6. The legal issue raised for resolution is the validity or otherwise of the Section 153A notices dated 01.11.2019 for the AYs 2013-14 to 2018-19, on the ground that the time frame set out in Section 132(9A), is mandatory and non-compliance therewith will render the notices issued initiating the process of assessment, invalid.

7. In a common counter affidavit filed in W.P.Nos.35076, 35082, 35084, 35086, 35088 & 35090 of 2019, all of which are filed by the company and challenge notices issued in terms of Section 153A of the Act, the Deputy Director of Income Tax (Investigation)/R2 gives the background to the entire proceeding. A joint search and survey was conducted by the Income Tax Department and Enforcement Directorate (ED) in the premises of Advantage Strategic Consulting Private Limited and others on 01.12.2015. Upon analysis of the electronic devices seized by the ED in that search and handed over to the Department, transactions of purchase of immovable property inter se the petitioner company and Karthi P. Chidambaram and his family were found. The seized details revealed that unaccounted cash had been paid to the sellers and subsequent enquiries showed that the properties in question had been sold to a company by the name of Handhold Ventures Private limited.

8. On the basis of the above intel, action under Section 132 was conducted in the case of the petitioner company, its affiliates and connected personnel from 05.07.2018 to 09.07.2018, covering in all, 21 premises. As per the counter, substantial material including 175 small note books indicating unaccounted cash payments and investments in foreign entities and banks in Mauritius, Seychelles, Hong Kong, the British Virgin Islands and Singapore were found. Serious allegation are made in regard to the alleged escapement of income and assets to tax.

9. The counter is quite detailed in regard to the alleged evasion on the basis of the investments and other financial transactions engaged in by the petitioner and I desist from referring to the details thereof as being unnecessary to the adjudication of the legal issue arising in the matters. Suffice it to say that, according to the revenue, substantial assets have been found, hitherto undisclosed in the income tax returns

of the petitioner. Statements appear to have been recorded and investigations carried out by the Income Tax Authorities in other countries to further the investigation process.

10. The Department officials deny that the search was conducted unfairly or that statements were recorded under threat and reiterate that the conduct of the proceedings was proper and in line with the prescription of statute and connected rules and regulations. The counter also gives details of summons issued both under the Income Tax as well as BM Acts on several dates to various persons in connection with the proceedings, stating that there had either been requests for adjournments or non-appearance by the persons summoned. R2 confirms that some material, in regard to the transactions with T.S.Kuamaraswamy of Christy Friedgram Industry, who had ultimately purchased immovable properties from the petitioner, have been supplied. Both proceedings, under the IT and BM Acts are pending, notices/summons have been issued and the interim orders granted by this Court should be vacated, the respondents pray, to enable R2 to proceed with the assessments. No rejoinder has been filed by the petitioners.

11. The officer, in counter, also quantifies the purported income that has escaped assessment, exactly and minutely, at ground (c) thereof. I refrain from referring to such details in the light of the order that I have finally passed directing that the proceedings for assessments continue and be finalized in accordance with law, conscious that quantification at this stage is premature, seeing as proceedings for assessment are at a preliminary stage. Thus, I have dealt solely with the legal issue raised and argued, the facts of the matter being irrelevant in this regard. However, the averments of the petitioner and respondent as borne out in the pleadings are recorded in the preceding paragraphs only for proper completion of the narrative and serves no other purpose save this.

12. The provisions of Section 153A have been inserted in the Act w.e.f 01.06.2003 and provide for the framing of assessments for a block period of six years in the case of a person subject to search and seizure action under Section 132 of the Act. Section 153A, to the extent it is relevant, is extracted below:

Assessment in case of search or requisition.

153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;
- (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years :
- Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years :
- ...

13. The above provision should be read in conjunction with the provisions of Section 132 to understand the scheme of search and seizure operation under the Act in the context of a Block assessment. The provisions of Section 132, in so far as they are relevant to this matter, are extracted below:

Section 132: Search and seizure.

132. (1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

- (a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any

books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),
then,-

(A) the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, may authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or

(B) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer,

(the officer so authorised in all cases being hereinafter referred to as the authorised officer) to-

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

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(8) The books of account or other documents seized under sub-section (1) or sub-section (1A) shall not be retained by the authorised officer for a period exceeding thirty days from the date of the order of assessment under section 153A or clause (c) of section 158BC unless the reasons for retaining the same are recorded by him in writing and the approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director for such retention is obtained :

Provided that the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director shall not authorise the retention of the books of account and other documents for a period exceeding thirty days after all the proceedings under the Indian Income-tax Act, 1922 (11 of 1922), or this Act in respect of the years for which the books of account or other documents are relevant are completed.

(8A) An order under sub-section (3) shall not be in force for a period exceeding sixty days from the date of the order (9) The person from whose custody any books of account or other documents are seized under sub-section (1) or sub-section (1A) may make copies thereof, or take extracts therefrom, in the presence of the authorised officer or any other person empowered by him in this behalf, at such place and time as the authorised officer may appoint in this behalf.

(9) The person from whose custody any books of account or other documents are seized under sub-section (1) [or sub-section (1A)] may make copies thereof, or take extracts therefrom, in the presence of the authorised officer or any other person empowered by him in this behalf, at such place and time as the authorised officer may appoint in this behalf.

(9A) Where the authorised officer has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c) of sub-section (1), the books of account or other documents, or any money, bullion, jewellery or

other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) seized under that sub-section shall be handed over by the authorised officer to the Assessing Officer having jurisdiction over such person within a period of sixty days from the date on which the last of the authorisations for search was executed and thereupon the powers exercisable by the authorised officer under sub-section (8) or sub-section (9) shall be exercisable by such Assessing Officer.

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14. According to the petitioner, the IO has delayed the handing over of the seized documents to the AO and this vitiates the process of assessment. They refer to the provisions of Section 132(9A) as per which, in cases where the Investigating Officer, if he is not the assessing officer of the assessee concerned, is to hand over the seized material to the AO of the concerned assessee within a period of 60 days. Such delay is sought to be arrived by a series of inferences. However, as the IO, vide common counter dated 24.02.2020, admits the date of handing over of the seized documents as 20.08.2019, beyond the period prescribed under 132(9A), the petitioner is saved the exercise of having to establish the delay otherwise. Ground (h) states as follows:

h. The seized materials were handed over to the 1st respondent vide proceedings DDIT/U-3(2)/Agni/2019-20 dated 20.08.2019 and on the date of issuing of notices U/s 153A, the first respondent was in the possession of the seized materials on the date of issuance of notices u/s.153A.

15. As per the provisions of Section 132(9A), the books of account or other documents, money, bullion, jewellery or other valuable article or thing or assets seized shall be handed over by the IO to the AO having jurisdiction over the assessee within a period of sixty days from the date on which the last of the authorisations for search was executed and thereupon the powers exercisable by the authorised officer under sub-section (8) or sub-section (9) shall be exercisable by such AO. The last of the search authorisations is dated 04.09.2018 and the period of sixty days expires on 03.11.2018 as against which, as per the counter, 28.02.2019 is, admittedly when the seized materials were handed over to R1. Since the handover of assets by IO to AO is admittedly beyond the time permitted under Section 132(9A), the process of assessment is itself vitiated and the notices issued in terms of Section 153A commencing the process of

assessment, liable to be quashed. The petitioner relies on a decision of this Court in the case of K. V. Krishnaswamy Naidu and Co Vs. CIT and Others [166 ITR 244], confirmed by the Supreme Court in CIT Vs. K. V. Krishnaswamy Naidu and Co. [249 ITR 749] arguing that timeline set out in Section 132 (9A) is mandatory.

16. Learned Senior Standing Counsel for the revenue argues that the scheme of Section 132, as the provision read when K. V. Krishnaswamy Naidu (supra) was decided by the Courts, has been considerably amended over the years. Firstly, sub-section (5) of Section 132, stands omitted by Finance Act, 2002 with effect from 01.06.2002 and secondly, sub-Section (9A) was substituted by Finance Act, 2002 within effect from 01.06.2002. Moreover, the mandate in sub-section (9A) to the effect that books of accounts/documents or any asset seized shall be handed over by the authorised officer to the assessing officer having jurisdiction over the searched person/entity within a period of 60 days from the last of the search authorisations, is specific to the exercise of powers by the authorised officer under sub-section (8) and (9) of Section 132 only and cannot be extended any further.

17. The Division Bench of this Court in K. V. Krishnaswamy Naidu (supra) considered a challenge to an order of the Commissioner of Income Tax under Section 132(8) of the Act. The petitioner in that case, sought the return of documents seized at the time of search under Section 132 on the grounds that firstly, the AO in that case had already passed an order under Section 132(5) which could have been done only if he had been in possession of the seized documents and in any event, the IO could not hold the documents after an order under section 132(5) had been passed, whether such possession be termed 'legal' or 'physical' custody. The provisions of Section 132(5) are also extracted below, merely for the sake of completion:

(5) Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A),⁴ as a result of a search initiated or requisition" made before the 1st day of July, 1995] the⁷ Assessing] Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, 6 shall within 7 Lone hundred and twenty] days of the seizure, make an order, with the previous approval of the⁸ Deputy] Commissioner, estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his

judgment on the basis of such materials as are available with him;

18. In the interim, the IO had made an application to his superior seeking approval to retain the seized documents beyond the period stipulated under Section 132(9A) that came to be granted under Section 132(8). The order granting extension came to be challenged by the petitioner on the grounds that the IO was not his assessing officer and hence the IO ought to have handed over the seized records to his AO who, was the officer competent to have sought an extension in terms of Section 132(8).

19. It was in the context of the above facts that the Bench considered the interplay between the provisions of Section 132(5), (8) and (9A). Section 132(5) provides for the ITO to, after hearing the assessee and making such enquiry as may be prescribed, pass an order within 120 days of the seizure with the previous approval of the Inspecting Assistant Commissioner taking note of the seized material and appraisal reports. Section 132(8) stipulates that the documents seized in the course of the search shall not be retained by the authorised officer for a period exceeding 180 days from the date of seizure except for reasons to be recorded in writing shown to and approved by the CIT. The proviso lays down a further period of 30 days for which the CIT may authorise retention of the documents. Section 132(9A) states that where the authorised officer conducting the search had no jurisdiction over the person/entity searched, books of accounts/documents/assets seized shall be handed over by the authorised officer to the ITO having jurisdiction over the persons seized within a period of 15 days of the seizure and thereupon all powers exercisable by the authorised officer under sub-Section (8) or (9) shall be exercisable by the ITO. Sub-section (9A) is couched in identical language now except that the period has been increased to 60 days from 15 days.

20. In that case, as in the case before me now, there was no identity between the IO and the AO having jurisdiction over the assessee. Thus, the AO could pass an order under section 132(5) only if he were in possession of the seized documents and it is to enable this, that the IO was directed to hand over possession of all seized documents/assets to the AO within 15 days from the date of seizure. The AO received the seized material in early December 1984, issued a notice on 10.12.1984 and passed an order under Section 132(5) thereafter. The request for extension for time was made by the IO on 22.05.1985 after passing of the Section 1132(5) order by the AO, and granted on 24.05.1985, and the Bench, being of the view that no valid extension could have been made in the aforesaid circumstances, quashes the extension granted, holding as follows:

In the circumstances, therefore, there could be no doubt that when sub-s. (9A) refers to an authorised officer having no jurisdiction over the person, it is a reference to an officer other than an Income-tax Officer having jurisdiction to make an order under sub-section (5). Any other construction will make sub-section (5) unworkable. For the same reason, the authorised officer referred to in sub-section (8) is the same authorised officer referred to in sub-section (9A) as having no jurisdiction over the person. The net result, therefore, would be that if the authorised officer is an Income-tax Officer having jurisdiction over the person, he can retain the records himself for 180 days under sub-section (8). But, however, he will have to make an order under sub-section (5) within 120 days. If the records are required by him for any other purpose, for example under section 288(5), that Income-tax Officer also can ask for approval of the Commissioner for such retention. If the authorised officer happens to be an officer other than an Income-tax Officer having jurisdiction over the person to make an order under sub-section (5), that authorised officer shall hand over the documents and assets to the Income-tax Officer having jurisdiction over the person and once that is done, the Income-tax Officer gets jurisdiction not only to make an order under sub-section (5) but also to exercise the powers of an authorised officer under sub-section (8) or sub-section (9) of that section. Thus, though under section 132(1), the Director of Inspection may authorise a Deputy Director of Inspection or an Inspecting Assistant Commissioner or Assistant Director of Inspection or Income-tax Officer and the officer so authorised is referred to as the authorised officer, the provisions of sub-section (8) could not be invoked by such officer unless the happens to be an Income-tax Officer having jurisdiction over the person and who can make an order under sub-section (5). The authorisation given to such officer by the Director of Inspection in turn also only enables such officer to search and seize the documents, records, money, bullion, jewellery or other valuable article or thing and the other powers specifically referred to in the authorisation does not and could not enable that officer to make an order under section 132(5) unless such authorised officer happens to be an Income-tax Officer himself having jurisdiction over such person.

21.The order of the Division Bench was carried in appeal to the Supreme Court at the instance of the revenue and in the case of CIT Vs. K.V.Krishnaswamy Naidu and Co. [249 ITR 749] and was affirmed in the following terms:

Having heard counsel for the parties and in view of the provisions of Sub-section (i)A) of Section 132 of the Income-tax Act, 1961, we are in agreement with the judgment of the High Court (reported as [1987] 166 ITR 244) that the Assistant Director of Inspection, who was the authorised officer for the purposes of carrying' out search and seizure but was not the Income-tax Officer who could pass an order under Sub-section (5) of Section 132 could not retain the seized documents etc., beyond 15 days and, therefore, he could not moot a proposal under Sub-section (8) for further retention of the documents beyond 180 days. This appeal is accordingly dismissed with costs.

22.On a harmonious construction of Sections 132 (5), (8) and (9), the Bench holds that unless the authorised officer also happens to be the ITO having jurisdiction over the assessee, the seized records must be handed over to the ITO having jurisdiction within 15 days from date of seizure to enable the ITO to pass an order in terms of Section 132(5). This case is thus, not an authority for the proposition whether the time limit under Section 132(9A) is mandatory or not, but decides the validity of an order extending the time for retention of documents by the IO, when the possession of the documents by the IO is itself contrary to the scheme of Section 132. The Bench concludes that a strict compliance within the procedural formalities is sine qua non for ensuring validity of the orders meaning that the passing of an order under Section 132(5) implies that the documents have been handed over the concerned AO by the IO and the question of the IO seeking extension of time thereafter does not arise. I am of the view that the decision of the Supreme Court in K.V.Krishnasamy would not advance the case of the petitioner since the challenge therein was altogether different.

23.Substantial changes have been made to the scheme of Section 132 in 2002, vide Finance Act 2002. The scheme of search and seizure under the Income Tax Act as set out in Section 132 is that sub-section (1) authorises the search of a premises, sub-sections (2) to (7) provide for the modalities of the search itself, the manner of conduct of the search, the requirement for panchas and other formalities to be observed in the course of a search in order to ensure that the same is valid.

24. Section 132(8) provides for the retention by the authorised officer of seized records and assets for a period of 30 days from the date of order of assessment under Section 153A or Section 158BC(c) or within such extended period as may be authorised and granted by the officers stipulated. Section 132 (8A) says that an order under sub-section (3) shall not be in force for a period exceeding 60 days from the date of the order and relates to an order served on the owner or the searched person who is in possession or control of assets or other records to the effect that such owner or person in possession shall not remove part with or dealt with such record/asset except with the previous permission of the officer.

25. Section 132(9) states that the person from whose custody books/records/documents are seized may make copies thereof or take extracts therefrom in the presence of the authorised officer at a stipulated place and time. Section 132 (9A) specifically refers to the powers exercisable under sub-section (8) and (9) and therefore, according to the revenue, cannot be extended any further.

26. As regards the main contention of the petitioner in regard to delay in handing over the seized materials to R1, R2 confirms that the seized materials were handed over by him to R1 on 22.08.2019 and R1 was thus in possession of the same when he issued the notices under Section 153A. This, according to the revenue, satisfies the statutory prescription in this regard.

27. No doubt, there is a time limit for handing over of the seized document by the investigating officer to the assessing officer and this is to ensure that sufficient time is available to the receiving officer to complete the assessment within the overall limitation provided.

28. In the present case, the revenue in counter has admitted that the documents were handed over beyond the period of 60 days from the date of search but, this lapse in procedure will not vitiate the notices under section 153A as, in my considered view, the period of sixty days is not critical to the legality of the notices impugned before me.

29. The Division Bench of the Delhi High Court in Dr. Nalini Mahajan Vs. Director of Income Tax (252 ITR 123) considered various issues that arose in the context of search proceedings initiated on that petitioner and connected persons and entities. One of the issues framed for consideration was whether the provisions of Section 132(9A) are mandatory or directory and the decision of the Bench on this issue (placitum H at page 155 of the report in ITR) is extracted below:

'The question, which now falls for consideration, is as to whether the books of accounts and the documents belonging to the petitioner could be retained by the authorised officer/assessing officer. Sub-section (9A) of Section 132 mandates that where the authorised officer has no jurisdiction over the person referred to in Clause (a) or Clause (b) or Clause (c) of Sub-section (1), the books of account or other documents or assets seized under that Sub-section shall be handed over by the authorised officer to the Income-tax Officer having jurisdiction over such person within a period of 15 days and thereupon, the powers exercisable by the authorised officer under Sub-section (8) or Sub-section (9) shall be exercisable by such Income-tax Officer. In the instant case, the petitioner was being assessed at Panipat. Authorizing Officer therefore ought to have complied the provisions of the said statute.

The submission of Mr. Khanna, however, is that the Madras High Court in K.V. Krishnaswamy Naidu and Co. v. Commissioner of Income-tax and Ors., (1987) 166 ITR 244 has held that the said provision is for the benefit of the Revenue to enable an assessing officer to pass order under Section 132(5) within statutory period but as the said provision is not applicable for searches after 1st July 1995, the object of the said provision has to be examined in the light of new provisions, in terms whereof, the provisions for block assessments have been made.

The submission of the learned counsel cannot be accepted for more than one reason. The seized documents are required to be handed over to the Income-tax Officer for certain purpose. The statute provides that the received documents should be returned to the assessed within the time specified therefore. The assessed would require the seized documents for different purposes. They may be liable to produce such documents before other statutory authorities. Book of accounts may be required for carrying on day-to-day business. By reason of the said provision, a duty has been cast upon the authorities concerned. The said provisions involve public interest. The court, in the absence of any express provision, cannot read any words in the statute to the effect that the same was enacted only for the benefit of the Revenue.

The question whether a provision shall be construed to be mandatory or directory, depends upon

the scope and purport thereof. The expression "shall" has been used. Prima facie the said provision is mandatory in nature. The statutory provision uses a negative form, which also provides an indication that the provision is mandatory. By reason of such a provision, the authorities cannot be held to have been conferred with an unlimited power of releasing the seized books of accounts etc. An assessee is required in law to maintain its books of accounts for various purposes. Such books of accounts may be required for several other purposes. A statute must be construed having regard to the doctrine of 'justness'.

In Hindalco Industries Ltd. v. Union of India and Ors. it has been held that the word 'may' in the context of Section 250 of the Industrial Disputes Act should be read as imperative. Furthermore, even a directory provision has to be substantially complied with.

The respondents, in the instant case, have not pleaded even substantial compliance of the said provision. Sub-section (9A) of the Section 132 has been enacted for achieving a specific object, i.e., for making the assessment complete. It was, therefore, obligatory on the part of the authorities to comply with the said provision, if not within 15 days, within reasonable time thereafter.'

30. The Allahabad High Court, in Digvijay Chemicals Ltd. Vs. Assistant Commissioner of CIT (248 ITR 381) has decided this issue holding that the purpose of Section 132(9A) is to assist the Assessing Officer in making a speedy assessment and not for the benefit of the assessee. Thus, and bearing in mind this object, even if there were delays in handing over the seized material, there is no bar to the Officer taking the same into account. The period fixed under Section 132(9A) is not mandatory but directory and must be construed as a reasonable period to aid the process of assessment. This was an appeal under Section 260 A of the Act and the question was whether an assessment under Section 158BD would be valid if the time limit under Section 132(9A) had not been adhered to. The judgment in K.V.Krishnasamy Naidu (supra) was not cited before the Bench.

31. In Sambhu Prasad Agrawal Vs. Director of Income Tax [254 ITR 498], a learned Single Judge of the Calcutta High Court considered the same issue as well as reliance by that assessee in the case of K.V.Krishnaswamy Naidu. The Court records the argument of the revenue counsel to the effect that the ratio of the judgment in K.V.Krishnaswamy Naidu would be valid only qua the legal position prior to amendment of the Act, and that by

interpretation of chapter XIVB bringing into vogue block assessments, with effect from 01.06.2001, the earlier legal position was virtually given a go-bye. According to the revenue, the aforesaid judgment is no longer good law.

32. The provisions of Section 153B set out the limitation by when an order of assessment under Section 15A is to be passed as being twenty-one months from the end of the month when the last of the authorizations for search under Section 132 or for requisition under Section 132A was executed. The period set out under Section 132(9A) is a measure to enable the respective parties to adhere to the process in an orderly fashion facilitating the completion of the assessment in time. It is relevant to note that there is no time stipulated for the issuance of notice under Section 153A and instances are rife when notices are issued long after the seized material is handed over to the AO. The integrity of the assessment process would thus be dependent upon the principles of natural justice being observed and proper sequence of procedure being followed. Time limits set out under Section 132 (9A) are not only for the purposes of Section 132 (8) & (9) but also to facilitate reasonable time to the AO to complete the assessment where the identity of the IO and AO is different.

33. The undisputed position in this case is that the IO and AO are not one and the same. The last of the authorisations in this case is on 04.09.2018 and the seized materials ought to have been handed over, in terms of Section 132(9A) on or before 03.11.2018. Admittedly, the handing over has been only on 20.08.2019, more than nine months beyond the stipulated date. Though this constitutes a gross procedural irregularity, it does not, in my considered view, vitiate the notices issued, as assuming a situation where the handover had been within time, the notices might still have been issued only on 01.11.2019. Thus, the jurisdiction assumed cannot be faulted on this score.

34. W.P.Nos. 35076, 35082, 35084, 35086, 35088 and 35090 of 2019 are dismissed. Proceedings for assessment will continue and be completed in line with the extended periods of limitation applicable now. W.P.No. 13368 and 13209 of 2019 are also dismissed. Connected Miscellaneous Petitions are closed with no order as to costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

S1

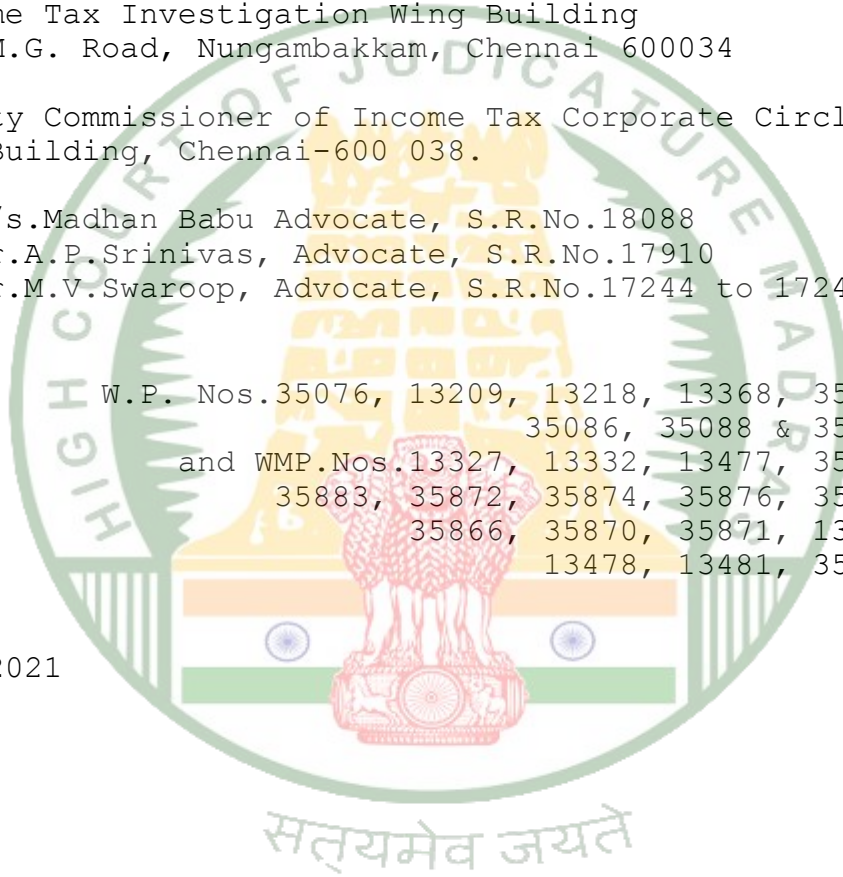
To

- 1 Deputy Commissioner of Income Tax
Central Circle 2(1) New Income Tax Building
No. 46 MG Road, Nungambakkam,
Chennai - 600034
- 2 Deputy Director of Income Tax (Investigation)
Unit - 3(2) Chennai Income Tax Investigation Wing Building
108 M.G. Road, Nungambakkam, Chennai 600034
- 3 Principal Director of Income Tax (Investigation)
Income Tax Investigation Wing Building
108 M.G. Road, Nungambakkam, Chennai 600034
- 4 Deputy Commissioner of Income Tax Corporate Circle 1(1)
New Building, Chennai-600 038.

+1cc to M/s.Madhan Babu Advocate, S.R.No.18088
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.17910
+9cc to Mr.M.V.Swaroop, Advocate, S.R.No.17244 to 17247

W.P. Nos.35076, 13209, 13218, 13368, 35082, 35084,
35086, 35088 & 35090 of 2019
and WMP.Nos.13327, 13332, 13477, 35880, 35885,
35883, 35872, 35874, 35876, 35877, 35879,
35866, 35870, 35871, 13333, 13334,
13478, 13481, 35865 of 2019

AD(CO)
CS/22/04/2021



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