IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF FEBRUARY, 2016

PRESENT

THE HON'BLE MR. JUSTICE N.K. PATIL

AND

THE HON'BLE MRS.JUSTICE S. SUJATHA

ITA No.239/2009
c/w
ITA Nos.245/2009, 259/2009, 243/2009, 279/2009,280/2009,247/2009, 263/2009, 241/2009, 265/2009, 266/2009,281/2009.

BETWEEN

1. The Commissioner of Income Tax
C R Building
Central Circle
Queens Road, Bangalore

2. The Deputy Commissioner of Income Tax
Central Circle-1(3)
C R Building
Queens Road
Bangalore .... Common Appellants

(By Sri. K V. Aravind, Advocate)

AND

M/s B J N Hotels Ltd
Golden Orchid
W-2, K block, Lavelle Road,
Bangalore. ... Common Respondent

(By Sri. A Shankar & M Lava, Advocates)

ITA No.239/2009 is filed under Section.260-A of I.T.Act, 1961, to set aside the order passed by the ITAT

Bangalore in ITA No.495/BNG/2008,dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore, in the interest of justice and equity.

ITA No.245/2009 filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.783/Bang/2008,dated 18-12-2008 and confirm the order of the Appellate Commissioner and confirming the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3),Bangalore, in the interest of justice and equity.

ITA No.259/2009 filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.498/Bang/2008,dated 18-12-2008 and confirm the order of the Appellate Commissioner and confirming the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3),Bangalore, in the interest of justice and equity.

ITA No.243/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.784/Bang/2008, dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.279/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.497/Bang/2008,dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.280/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.496/Bang/2008, dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.247/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.782/Bang/2008, dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.263/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.781/Bang/2008,dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.241/2009 is filled under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.494/Bang/2008, dated 18-12-2008 and confirm the order of the Appellate Commissioner and confirming the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3),Bangalore, in the interest of justice and equity.

ITA No.265/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.780/Bang/2008, dated 18-12-2008 and confirm the order of the Appellate Commissioner and confirming the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3),Bangalore, in the interest of justice and equity.

ITA No. 266/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.779/Bang/2008, dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

ITA No.281/2009 is filed under Section 260-A of I.T.Act, 1961, to set aside the order passed by the ITAT Bangalore in ITA No.493/Bang/2008,dated 18-12-2008 confirming the order of the Appellate Commissioner and confirm the order passed by the Deputy Commissioner of

Income Tax, Central Circle-1(3), Bangalore in the interest of justice and equity.

These Appeals coming on for Hearing, having been heard and reserved for Judgment on 2ND February 2016, coming on for pronouncement of Judgment this day, **S. Sujatha J.,** delivered the following:

JUDGMENT

These appeals are filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for short) challenging the orders passed by the Income Tax Appellate Tribunal, Bangalore Bench "A"(the 'Tribunal' for short) for the assessment yeas 2001-02 to 2005-06.

2. Facts in brief are:

- The assessee is engaged in the business of running a hotel. On 17.12.2004, a search was conducted by the departmental authorities under Section 132 of the Act. Proceedings under Section 153(A) of the Act were initiated by issuing the required notice, requesting the assessee to file a return of income for the relevant assessment years. In response, the assessee filed return of income declaring loss. Proceedings by order dated

31.07.2006, initiated under Section 142(2A) of the Act, appointing a special auditor came to be dropped as no opportunity was provided to the assessee. Subsequently, notice was issued on 30.11.2006 under Section 142(2A) of the Act, proposing to send the books of accounts of the assessee for special audit. The assessee objected to the same as there was no complexity in the accounts. However, the Assessing Officer being of the opinion that the accounts were complex in nature and to safeguard the interest of the revenue, obtained the prior permission of the Commissioner on 18.12.2006 and directed the assessee to get the accounts audited, due date for submission of special audit report was on 28.02.2007. Assessments were concluded under Section 153(A) read with Section 143(3) of the Act, by order dated 27.04.2007 and the orders were served on the assessee on 30.04.2007.

3. Being aggrieved by the said assessment orders, the appellant carried the matters in appeals.

The Appellate Commissioner allowed the appeals in part.

4. Being aggrieved, the assessee as well as the revenue preferred appeals before the Tribunal. The Tribunal held that the assessment orders passed are barred by time and on the other grounds urged, findings are given in favour of the assessee.

5. Being aggrieved by the said common order of the Tribunal, the revenue is before this Court.

6. Though the matter was admitted on several substantial questions of law raised by the appellants in the Memorandum of appeals, at the time of hearing the matters, we have reframed the substantial questions of law as under:

> *"1. Whether the Tribunal was correct in law in holding that the time for furnishing the special audit report could not have been extended beyond 27.01.2007 being 180 days from 31.07.2006 being the date of the first direction and the order of assessment ought to have been made by 26.03.2007 and consequently the assessment order passed on*

27.04.2007 is barred by limitation on the facts and circumstance of the case?.

2. Whether the tribunal is correct in law in holding that the Assessing Officer does not have the power to unilaterally withdraw the direction for audit under section 142(2A) of the Income Tax Act as the original direction was made with the approval of the commissioner of Income tax on the facts and circumstance of the case?.

3. Whether the Tribunal was correct in law in holding that the assessment order passed on 27.04.2007 is barred by limitation as successive direction under section 142(2A) is not permissible and the second direction given to obtain the audit report before 28.02.2007 is to elongate the assessment proceedings and also contrary to Section 142(2C) of the Act on the facts and circumstance of the case?.

4. Whether the assessment order is barred by limitation as it was made beyond the period of limitation on the fact and circumstances of the case?".

7. Heard the learned counsel Sri K V Aravind appearing for the revenue as well as Sri A Shankar, learned counsel appearing for the assessee.

8. Firstly, we are considering the substantial question of law No.4, relating to the limitation since it goes to the root of the matter. The undisputed facts are that the assessment orders were required to be issued on or before 26.03.2007, the period prescribed under law considering sixty days from 27.01.2007, due date for Special Auditor report as specified under Section 142(2C) of the Act. The assessment orders are dated 27.04.2007. Taking the second reference of the Commissioner of Income Tax, dated 18.12.2006 for special audit report, due date for submission of special audit report being 28.02.2007, the assessment orders would have been issued on or before 29.04.2007. The copies of the assessment orders were served on the assessee on 30.04.2007.

9. However, learned counsel appearing for the revenue would contend that the Assessing Officer passed the orders on 27.04.2007 and the same was dispatched to the assessee. On our direction to produce the original records, the same are placed before us. We have noticed certain over writings in

the order sheet as regards date of passing of the order by the Assessing Officer and moreover, a particular page of the order sheet is maintained on a rough sheet (in an unusual manner) different from other pages of the order sheet. Besides this flaw in the records, learned Counsel for the revenue is neither able to point out from the records that the Assessment Orders were dispatched on 27.04.2007 nor produced the dispatch register to establish that the orders are complete and effective i.e., it is issued, so as to be beyond the control of the authority concerned within the period of limitation i.e., 29.04.2007. Admittedly, the assessment orders were served on the assessee on 30.04.2007. Hence, we are of the considered opinion that the assessment orders passed are barred by limitation.

10. An identical issue was before this Court in ITA No.832/2008 (D.D. 14.10.2014) in the case of ***M/s. Maharaja Shopping Complex vs. Deputy Commissioner Of Income Tax.*** This Court following the Judgment of Kerala High Court in the case of

Government Wood Works vs. State of Kerala (1988) 69 STC 62 has held that in the absence of dispatch date made available to the Court from the records, to prove that the order is issued within the prescribed period, order passed by Assessing Officer is barred by limitation. The said Judgment squarely applies to the facts of the present case.

11. In the result, substantial question of law No.4 is answered in favour of the assessee and against the revenue. In view of the above, it is not necessary for us to examine the other questions.

Accordingly, Appeals are dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

Brn