IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 13th DAY OF FEBRUARY, 2008

PRESENT

THE HON'BLE MR. JUSTICE DEEPAK VERMA
AND
THE HON'BLE MR. JUSTICE K.L.MANJUNATH

I.T.A.NO.411 OF 2003

BETWEEN:

1 R D MENDON & SONS
SILICA SAND DEALER
KAUP POST, UDUPI TALUK
REP BY PARTNER
SRI.BHASKAR R MENDON
S/O. RAMA P MENDON
AGED 54 YEARS

... APPELLANT

(By Sri: S PARTHASARATHI,ADV.)

AND :

1 THE INCOME TAX OFFICER
WARD - 1,
UDUPI

... RESPONDENT

(By Sri: M V SHESHACHALA,ADV.)

This I.T.A. is filed u/s. 260A of the INcome Tax Act, 1961 arising out of order dt. 29.5.2003 passed in ITA No. 568/Bang/99 for the assessment year 1994-95 praying that this

Hon'ble court may be pleased to: allow the appeal anad set-aside the order of the Income Tax Appellate Tribunal bearing ITA No. 568/Bang/99 dt. 29.5.2003 and etc.

This appeal coming on for hearing this day, DEEPAK VERMA, J, delivered the following:

JUDGMENT

Heard Sri. S.Parthasarathi for the appellant and Sri.M.V.Seshachala for the respondent.

2. The assessee feeling aggrieved by the order dt.29.5.2003 passed by the Income Tax Appellate Tribunal, Bangalore Bench in ITA No.568/Bang/99 for the assessment year 1994-95 is before us challenging the same under Section 260-A of the Income Tax Act (hereinafter referred to as 'the Act').

3. The Appeal before the Tribunal was preferred by the revenue, which came to be allowed. Hence this appeal by the assessee.

4. The short material facts for deciding this appeal are as under:

According to the assessee, it should have been assessed in the status of Firm only since assessee had complied with the Notice under Section 148, 143(2) of the Act and the assessment had also been completed under Section 143(3) of the Act. As per the assessment order, the assessee confirmed an income of Rs.37,221/-.

5. The notice under Section 143 of the Act was issued and served on the assessee as the assessee had failed to file the return. Section 139(4) of the Act required the assessee to furnish the return within 31 days from the date of issuance of such notice. The status of the assessee firm was treated as AOP under Section 184(5) of the Act as there was a default committed by assessee as mentioned under Section 144 of the Act.

6. In response to the notice issued under Sec.143(2) the Assessee along with the Accountant of the assessee appeared and produced the books of accounts and other details. The same were verified. The assessee had claimed interest on capital of Rs.99,974/- and remuneration to patners of Rs.1,10,000/-. As the status of the firm was taken as AOP, the assessee's claim of remuneration and interest as mentioned above were disallowed and thus the assessment was completed. The assessee was constrained to file an Appeal against the said order of the Assessing Officer before the CIT (Appeals). The CIT (Appeals) allowed the appeal of the assessee. Aggrieved by the said order passed by the CIT (Appeals), the revenue preferred an appeal before the Tribunal wherein its appeals has been allowed. Hence this Appeal by the Assessee. Tribunal came to the conclusion that the Assessing **Authority was** right in treating the assessee as an AOP basically relying on a judgment of the Supreme Court in the case of C.I.T. VS. P.K.NOORJAHAN (1999) 237 I.T.R. 570.

7. Even though the appellant has formulated four substantial questions of law, but after having heard the learned counsel for the parties and after perusal of records, we are of the considered opinion that it is to be heard only on the following substantial questions of law:

1) Whether on the facts and In the circumstances of the case, the Tribunal was right in treating the appellant as AOP as against the claim of 'firm', when the return filed to though belated had been entertained and the assessment had been completed under Section 143(3) of the Act and when the Assessing Officer had not proceeded to pass an ex-parte order as contemplated under Sec.144 of the Act?

8. The learned counsel appearing for the parties have not disputed before us that the said question has already been answered by a

Division Bench of this Court passed on 20.2.2004 in ITA No.4/04 against the revenue and in favour of the assessee. Paragraphs 9 and 10 of the said order read as hereunder:

> "9. It is true that when there is a 'failure' on the part of the assessee as enumerated in section 144, the direction in Section 184(5) that the firm should be assessed as an 'association of persons' is mandatory. But the question is whether there is a failure as mentioned in Section 144. Section 144 provides that in the event of there being any of the three failures as enumerated in Sub-Section (1) of Section 144, after giving due opportunity to the assessee to show cause, the Assessing Officer may proceed to pass a best judgment assessment. But, the Assessing Officer has not proceeded to pass a best judgment assessment under Section 144 which he ought to have done if there was

any failure as mentioned in Section 144. The fact that the Assessing Officer did not do so clearly leads to an inference that there was 'no failure' as mentioned in Section 144. When it is not possible to comply with a provision, it is not possible to say that there is 'failure to comply with a provision'. In the circumstances, the first question also does not arise. We are of the view that Tribunal was justified in holding that the status of the assessee should be treated as 'registered firm' and not as AOP."

10. As neither of the questions of law raised by the Revenue arises for consideration on the facts of the case, the appeal is dismissed."

9. In view of the aforesaid, we are of the opinion that no question of law arises for re-consideration as the same has been answered already by this Court.

10. In view of the aforesaid, the appeal filed by the assessee is hereby allowed and the order of the Tribunal stands hereby quashed.

Sd/-
Judge

Sd/-
Judge

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