

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JANUARY 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE RAVI V.HOSMANI

I.T.A. NO.321 OF 2010

BETWEEN:

M/S. SRI. VENKATESHA BOTTLES
KESHAVAPUR EXTNSION, OLD TOWN
BHADRAVATHI 577301
SHIMOGA DISTRICT, PAN:ABBFS7539C
REPRESENTED BY ITS PARTNER
SRI. K. NAGESHAM
AGED ABOUT 62 YEARS
S/O SRI. NAGAI AH.

... APPELLANT

(By Sri. S. PARTHASARATHI, ADV.)

AND:

THE ASST. COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE 2(2), ROOM NO.6
CENTRAL REVENUE BUILDING
(ANNEXE) No.1, QUEEN'S ROAD
BANGALORE-560001.

... RESPONDENT

(By Sri. K.V. ARAVIND, ADV.)

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THIS I.T.A IS FILED UNDER SECTION 260-A OF I.T.
ACT, 1961 ARISING OUT OF ORDER DATED 30-12-2009

PASSED IN IT(SS)A NOS.60 & 61/BANG/2008, FOR THE BLOCK PERIOD 1/4/1990 TO 18/1/2001, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE BENCH 'B' , BANGALORE IN IT(SS)A NOS.60 & 61/BANG/2008 DATED 30/12/2009 TO THE EXTENT URGED IN THE ABOVE APPEAL IN THE INTEREST OF JUSTICE AND EQUITY.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) has been preferred by the assessee, which was admitted by a bench of this court vide order dated 08.11.2010 on the following substantial questions of law:

- (i) *Whether the Tribunal was justified in upholding the validity of assessment passed under Section 158BD read with Section 143(3) of the Act in the absence of valid satisfaction recorded by the assessing officer after application of his mind on the materials gathered in the course of search of partner of the appellant firm?*
- (ii) *Whether the Tribunal was justified in surmising that the alleged undisclosed*

income from transaction of used empty bottles belonged to the Appellant firm and whether the finding in this regard was not perverse and unsupported by evidence?

- (iii) Whether the Tribunal was justified in surmising that the document found in the partner's premises refers to an entity with 9 shares belonged to the appellant firm which has only 5 partners to justify the impugned addition?*
- (iv) When the appellant having complied with the provisions of Section 184 of the Act, can the appellant be assessed in the status of AOP?*
- (v) Whether while computing the undisclosed income, the tribunal was justified in upholding the estimate of undisclosed income in the assessment years fallen within the block period when the actual statement found related only to the excise period from 01.08.1998 to 31/07.1999 and while doing so, the Tribunal was justified in not allowing deduction of payments made to 4 persons than the five partners of the appellant?*

- (vi) *Whether the Tribunal was justified in upholding the levy of interest under Section 158BFA(1) of the Act by passing an order under Section 154 of the Act?*
- (vii) *Whether the impugned order and the demand notice under Section 154 of the Act amending the order of assessment under Section 143(3) read with Section 158BD being not in the name of the appellant was sustainable?*

2. Facts giving rise to the filing of the appeal briefly stated are that the appellant is a partnership firm engaged in the business of buying and selling empty liquor bottles. It is the case of the assessee that the partnership firm comprises five partners as per the partnership deed dated 16.08.1996 and in which one of the partner viz., G.T.Krishna Murthy has 10% share. A search was conducted on HET GROUP in Shimoga on 18.01.2001. A search was also conducted on the premises of aforesaid G.T.Krishna Murthy, from where one of the documents was seized and a panchanama was prepared. The aforesaid document as per the revenue contains the details with regard to sales, gross profit, net

profit of the appellant and share of profit of G.T.Krishna Murthy at the rate of 9/105 pertaining to excise accounting year ending 31.01.1997, 31.07.1998 and 31.07.1999. The statement of G.T.Krishnmurthy was also recorded on 14.03.2009 and it is the case of the assessee that on the basis of the aforesaid statement, a notice under Section 158BD of the Act was issued to the appellant on 10.02.2003, to proceed under Section 158BC of the Act.

3. The appellant furnished NIL return on the basis of commercial tax returns showing the retail trade business on 17.10.2003. Notices under Section 142 as well as Section 143(2) dated 07.10.2003 and 25.11.2003 respectively were also served by the Assessing Officer. The Assessing Officer proposed to determine the appellants income with the help of seized material. On 22.01.2004, the Assessing Officer sent questionnaire to persons who were alleged to be sharing profits of the firm. In response to the aforesaid questionnaire, the appellant stated that the persons named by G.T.Krishna Murthy were not even aware of the name of the firm and filed affidavit to that effect. The Assessing

Officer made assessment of the appellant's total income under Section 158BD read with Section 143(3) of the Act for the block period by proportionately determining appellant's income by an order dated 28.02.2005, on the basis of income of G.T.Krishna Murthy. Thereafter, the Assessing Officer issued a notice dated 04.1.2006 under Section 154 of the Act proposing to levy interest under Section 158BFA(i), which was omitted to be charged in the order of assessment. By an order dated 24.01.2006, the Assessing Officer charged interest under Section 158BFA(i) vide order under Section 154 of the Act for the block period in the name of M/s Venkateshwara Bottles.

4. Being aggrieved, the appellant preferred appeals before the Commissioner of Income Tax (Appeals), which were disposed of by orders dated 26.05.2008. Being aggrieved, the revenue filed appeals before the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). The appellate tribunal has allowed the appeal preferred by the revenue. In the aforesaid factual background, this appeal has been filed.

5. Learned counsel for the appellant submitted that warrant was issued against G.T.Krishna Murthy and his residence was searched. However, no satisfaction has been recorded for initiating the proceedings under Section 158BC of the Act against aforesaid G.T.Krishna Murthy. It is further submitted that the aforesaid provision is held to be mandatory by the Supreme Court in the case of **'COMMISSIONER OF INCOME TAX-III VS. CALCUTTA KNITWEARS', (2014) 362 ITR 0673 (SC)** and recording of a satisfaction note is a prerequisite for the purpose of Section 158BD of the Act. In this connection, reference has been made to Circular No.24/2015 dated 31.12.2015. It is pointed out that the appellant is a firm with five partners and if the return is not filed, the Assessing Officer should have invoked Section 147 of the Act. It is also pointed out that G.T.Krishna Murthy was a sleeping partner in the firm. It is also submitted that the appellant has been treated to be an association of persons, whereas, the appellant which is a firm is altogether a different entity from association of persons and the income of the firm cannot be clubbed with the income of association of persons. It is submitted that all the

four persons whose name do not appear in the partnership deed have filed affidavits stating that they are not partners in the firm. It is also submitted that a fresh notice should have been given when the assessment was being made in respect of association of persons. The finding recorded by the Income Tax Appellate Tribunal that assessee has been indulging in two types of businesses in the same line and the parallel business was being carried out clandestinely with active participation of four other persons is based on surmises and conjectures and an association of person cannot be treated as firm.

6. On the other hand, learned counsel for the revenue has submitted that aforesaid G.T.Krishna Murthy in his statement has admitted that he is a partner in M/s Venkateshwara Bottles. Our attention has also been invited to the statement of G.T.Krishnamurthy in support of the submission that four persons viz., Mallikarjuna, H.V.S., Vijay Kumar Shetty and Kareem Sab were being paid the profits. The aforesaid witness has further stated that he does not know as to why the profits of the firm were being given to

them. Learned counsel for the revenue has also invited our attention to trial balance sheet, in which names of aforesaid persons have been mentioned and percentage of profits have been shown. It is also pointed out that in the statement, G.T.Krishna Murthy has not stated that there is another partnership firm, which is carrying on the same business with nine partners. It is also pointed out that the requirement contained in Section 184 of the Act has not been complied with and therefore, the appellant cannot be treated as firm and rightly been treated as Association of persons.

7. We have considered the submissions made by learned counsel for the parties and have perused the record. The Circular dated 31.12.2015 clearly provides that satisfaction note has to be prepared by the Assessing Officer in respect of such other person under Section 158BD of the Act. It has further been clarified that even if Assessing Officer finds that the "searched person" and the "other person" is one and the same then also he is required to record his satisfaction. The Assessing Officer in the instant case, has recorded a satisfaction note, which reads as under:

"BLOCK ASSESSMENT (158 BD)

M/s Sri.Venkatesha Bottles
Keshavapur Extension
Old Town
Bhadravathi

10.02.2003

Search under Section 132 was carried out in HED Group of cases, Shimoga on 18.01.2001. During the course of search, Exhibit No.A/GTK/1 was seized from the residence of Mr.G.T.Krishna Murthy. This contained the share of profit earned by Mr.G.T.Krishna Murthy as partner in the firm M/s Sree Venkatesha /Bottles. As on the date of search, no returns of income were filed by this firm for any of the years. This firm is involved in purchase and sale of used bottles. Mr.Krishna Murthy's share of profit is 9/105. Mr.G.T.Krishna Murthy profit for various yeas is recorded in page No.9 of A/GTK/1, and the accounting years is as per the excise accounting years i.e., August to July.

Based on this, the profit of M/s Sree Venkatesha Bottles is worked out as follows:

<i>Year Ending</i>	<i>Profit of G.T.Krishna Murthy</i>	<i>Profit of M/s Sree Venkatesha Bottles</i>
<i>31.07.97</i>	<i>94,329</i>	<i>11,00,015</i>
<i>31.07.98</i>	<i>85, 887</i>	<i>10,02,015</i>
<i>31.07.99</i>	<i>1,32,600</i>	<i>15,47,000</i>
<i>Total</i>		<i>36,49,520</i>

Mr.G.T.Krishna Murthy also admitted this fact under oath in a statement recorded during the search. In order to bring this amount to tax, Notice under Section 158BC read with Section 158BD is issued. This case has been notified to this circle by the Commissioner of Income-Tax, Davanagere vide order No.F.No.Jurs/CIT/DVG/2001-02 dated 18.02.2001 from Ito, Ward-3, Shimoga.

8. Thus, from perusal of the aforesaid satisfaction note, it is evident that the satisfaction note has been recorded in respect of the appellant and the profit of G.T.Krishna Murthy as well as profit of M/s Sree Venkatesha Bottles has also been worked out. Therefore, we are satisfied that the requirement as laid down by the decision of the Supreme Court in case of **Calcutta Knitweaves Supra** as well as the Circular dated 31.12.2015 issued by Central

Board of Direct Taxes has been complied with. In result, substantial question of law No.(i) framed by this court is answered in favour of the revenue and against the assessee.

9. From the perusal of the statement of G.T.Krishna Murthy, it is evident that he is a partner in M/s Venkateshwara Bottles and he has affirmed that he has a share of 9% out of 105%. From perusal of the statement of aforesaid G.T.Krishna Murthy, it is also evident that when he was confronted with the document seized during the course of search, he admitted that he is not aware as to why the shares are given to Mallikarjuna, H.V.S., Vijay Kumar Shetty and Kareem Sab. The aforesaid witness in his evidence has not stated that there is another partnership firm with nine partners, which deals in same business. From the trial balance sheets of the appellant's firm, it is evident that the aforesaid persons names have been reflected and their percentage of profit has also been shown. On the basis of the trial balance sheet seized during the search operation, the tribunal has recorded a finding that names of all nine partners including the five partners of the assessee firm

appear therein, which goes to prove beyond any shadow of doubt that assessee firm has been indulging in two types of business in the same line and parallel business was being carried out clandestinely with the active participation of four other persons. The aforesaid finding is a finding of fact which has been recorded by the Income Tax Appellate Tribunal on the basis of meticulous appreciation of material on record. Therefore, the substantial question of law Nos.(ii), (iii) and (viii) are answered against the assessee and in favour of revenue.

10. Section 184 of the Act deals with assessment as a firm. Section 184(1) provides that a firm shall be assessed as a firm for the purposes of this Act if the partnership is evidenced by an instrument and the individual shares of the partners are specified in that instrument. In the instant case, even though, in a registered partnership firm though names of five partners appear yet, in fact, there are nine partners. Therefore, in the fact situation of the case, the provisions of Section 184 of the Act do not apply. In result, the substantial question of law No.(iv) is answered against the assessee.

11. Since, it has been the specific case of the appellant that the appellant is a partnership firm comprising of five partners, therefore, in view of the stand taken by the appellant himself, substantial question of law No.(v) does not arise for consideration in this appeal. Accordingly, the same is answered. This court has upheld the validity of the order of assessment passed under Section 158BD read with Section 143(3) of the Act, we hold that Assessing Officer was justified in levying interest under Section 158BFA(1) of the Act. Accordingly, substantial question of law No.(vi) is answered in the affirmative and against the assessee.

In view of preceding analysis, we do not find any merit in this appeal. The same fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**