IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 15TH DAY OF DECEMBER, 2009

PRESENT

THE HON'BLE MR.JUSTICE K.L.MANJUNATH

AND

THE HON'BLE MR.JUSTICE ARAVIND KUMAR

I.T.A.NOs.64-72 OF 2004

BETWEEN:

1 H MOHANLAL GIRIYA
I FLOOR, SRI VENKATESHWARA MARKET
AVENUE ROAD, BANGALORE

... APPELLANT
(COMMON IN ALL APPEALS)

(By Sri : A SHANKAR, ADV.)

AND :

1 THE INCOME TAX OFFICER (INV)
COMPANY CIRCLE
BANGALORE

... RESPONDENT
(COMMON IN ALL APPEALS)

(By Sri : M V SESHACHALA,ADV.)

These I.T.As. filed u/s. 260A of the Income tax Act, 1961 arising out of order dt. 16.9.2003 passed in ITA No. 1041 to 1049/Bang/89 for the assessment years 1979-80 to 1987-88 praying that this Hon'ble court may be pleased to:

formulate the substantial question of law stated above and allow the appeal and set-aside the order of the Tribunal bearing ITA NO. 1041 to 1049/Bang/89 dated 16.9.2003 on the validity of assessment for the assessment years 1979-80 to 1987-88.

These Appeals coming on for hearing this day, MANJUNATH J, delivered the following:-

JUDGMENT

These appeals are preferred by the assessee challenging the concurrent findings of the order of assessment which has been confirmed by the Commissioner of Income Tax (Appeals) and further affirmed by the Tribunal.

2. ITA Nos.64 to 70/2004 are concerning the reopening of the assessment. Therefore these appeals are taken up together at the first instance.

3. The main contention of the appellant before us is that the Assessing officer before

reopening of the assessment has not recorded any reasons. This contention was negative by the Commissioner of Income Tax (Appeals). Before the Income Tax Appellate Tribunal, the department was directed to produce the records. Inspite of sufficient time granted to the revenue to produce the records, in order to verify whether reasons are really recorded or not before reopening the assessment, the records were not produced. Still the Tribunal dismissed the appeal relying on other circumstances of the case. Challenging the legality and correctness of the order, these appeals are preferred by the assessee on the ground the authorities failed to see that the reopening of the assessment as bad in law since there are no reasons recorded for reopening of the case.

4. In order to find out whether the revenue has recorded the reasons before reopening the case, this Court by its order dt.14th February 2008 had directed the learned counsel for the revenue to make available the records and again the case was adjourned to 25.1.2008. From 25.1.2008 it was adjourned to 1.9.2008. Again on 12.8.2008, a weeks time was granted as a last chance and thereafter the matter was listed on 8.12.2009. On that day, time was granted for the revenue to secure the records. Inspite of directions issued from 14.2.2008 to 8.12.2009, the revenue has failed to produce the records.

5. The learned counsel for the revenue made a submission that he has received a letter on 6.11.2009 from Income Tax Officer stating that the records are not traceable and it is not possible for the revenue to produce

the record before the Hon'ble Court. From the perusal of this letter, it is clear that the revenue is not in a position to produce the records as the record is not traceable.

6. When the appellant has raised a specific contention that there are no reasons recorded by the Assessing Officer for reopening of the assessment, when the revenue has failed to prove the reasons recorded before the Court by producing the records, this Court has no other option than to draw an adverse inference against the revenue. Accordingly, we draw an adverse inference against the revenue.

7. In the result, we have to allow these appeals holding that the reopening of the assessment without recording the reasons is bad in law and that the order of assessment

passed on the reopening of the file is held to be bad in law.

8. Accordingly, ITA Nos.64 to 70 are allowed.

9. In regard to ITA Nos.71 and 72/2004 are concerned these two appeals are pertaining to the assessment years 1986-87 and 1987-88.

10. In regard to ITA No.71/2004 is concerned, the question of law arises is in regard to addition of income in the hands of the assessee in respect of the income belonging to a Trust known as H.M.Jain Trust and also drawing of Rs.7,000/-. So far as these two points are concerned, we are of the view that it is the case of the assessee that the Trust M/s. H.M. Jain Trust has filed the return of its income and in the return filed by the Trust, the amount is included in the

Trust account and the same is assessed to the tax. When the tax has been assessed in the hands of the Trust, the same account cannot be taxed in the case of assessee as it amounts to double taxation. Only on this short ground, ITA No.71/2004 has to be allowed answering the question of law in favour of the assessee.

11. So far as ITA No.72/2004 is concerned, it is for the assessment year 1987-88. The question involved in this case is jewels which are belonging to the appellant-assessee or his wife. It is the contention of the assessee that these were the jewels of his wife and in the revised wealth tax returns, the wife has declared the same as her jewelry and that the same is accepted by the revenue. When once the revenue has accepted the revised return filed by the wife of the assessee holding the jewels as of her, the said jewels

cannot be treated as the jewels of the assessee. On this ground, ITA No.72/2004 has to be allowed answering the question of law in favour of the assessee.

12. In these two appeals, we have also noticed the assessment order as well as the penalty proceedings passed by the Tribunal on the same ground. The Tribunal has given relief to the assessee in regard to the penalty proceedings accepting the reasons assigned by the assessee. Therefore, the assessee contends that in a second preliminary proceedings, if the same explanation is offered, the authorities cannot take different view in different proceedings arising out of the same assessee's case. To support his submission, he has relied upon the Judgment of this Court in the case of ASGAR JAIN VS. COMMISSIONER OF INCOME TAX reported in (2008)

298 ITR 60 (KAR), wherein one of us have taken a view that there cannot be two view on the same issue when the matter was considered by the same authority.

13. Following the aforesaid Judgment, these two appeals are also required to be allowed answering the question in favour of the assessee.

14. In the result, all the appeals are allowed. The order passed by the authorities are hereby set aside.

Sd/-
JUDGE

Sd/-
JUDGE

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