**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

**DATED THIS THE 27TH DAY OF JANUARY, 2010**

**PRESENT**

**THE HON'BLE MR.JUSTICE D V SHYLENDRA KUMAR**

**AND**

**THE HON'BLE MR.JUSTICE N ANANDA**

*Income Tax Appeal No.379 of 2009*

**Between:**

M/s. POONJA ARCADE
K.S.ROAD, MANGALORE
REP. BY ITS MANAGING DIRECTOR
SRI PRABHAKAR N.POONJA
AGED ABOUT 56 YEARS
S/O. SRI NASRU LINGU POONJA ... APPELLANT

[BY SRI P.DINESH, ADVOCATE FOR SRI PARTHASARATHI, ADVOCATE]

**And:**

THE ASSISTANT COMMISSIONER OF INCOME-TAX
CIRCLE 2(1)
MANGALORE. ... RESPONDENT

[SRI ARAVIND, Jr. STANDING COUNSEL FOR SRI M.V.SESHACHALA, STANDING COUNSEL]

THIS APPEAL IS FILED UNDER SECTION 260-A OF I.T.ACT, 1961, ARISING OUT OF ORDER DATED 30.05.2008, PASSED IN ITA No.850/BNG/2005, FOR THE ASSESSMENT YEAR 1985-86, PRAYING TO ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA No.850/BNG/2005 DATED 30.05.2008, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL COMING ON FOR ADMISSION, THIS DAY, D V SHYLENDRA KUMAR.J., DELIVERED THE FOLLOWING:

**JUDGMENT**

Appeal under section 260-A of the Income Tax Act, 1961 (for short, 'the Act') relating to the assessment year 1985-86.

2. The assessee is a partnership firm. This appeal is directed against the order dated 30.05.2008 [copy at Annexure-A], passed by the Income Tax Appellate Tribunal (for short, 'the tribunal) in Appeal No.850/Bang/2005 is sought to be examined on the following questions of law, said to be arising in the course of the impugned order and on the premise that the questions have been erroneously decided by the tribunal:-

1. *Whether the tribunal was justified in holding the provisions of section 254(2) of the Act were not applicable to apply the ratio of the jurisdictional High Court rendered in a judgment subsequent to the delivery of the order of the tribunal?*

2. *Whether the ratio laid by the jurisdictional High Court in the judgment was not law in existence forever within the jurisdiction of the High Court to be applied by the authorities subordinate as held by the Hon'ble Supreme Court in the case of ACIT vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC)?*

3. *Whether the provisions of section 150(1) of the Act were applicable to the case of the appellant and the limitation in reopening of the assessment under section 147 read with section 149 stood lifted and whether the tribunal was justified in upholding the validity of the reopening under section 147 of the Act in the case of the appellant?*

4. *If the answer to the question No.3 is in affirmative, the tribunal was justified in restoring the order of the assessing authority without restoring the case to the file of the Commissioner (A) to decide the merits of the additions made in the reassessment especially when the Commissioner (A) did not give a finding in this regard while the appeal was originally disposed of?*

5. *Whether in the interest of natural justice the tribunal was required to restore the case back to the file of the Commissioner (A) to dispose of the case on merits having upheld the validity of the reopening of the assessment under section 147 of the Act?"*

3. There was a delay of 278 days in preferring this appeal and an application in Misc.Cvl.No.11829/2009 had been filed for condonation of delay.

4. The respondent-revenue had been put on notice and the learned standing counsel has entered appearance.

5. In our order dated 25.01.2010, we have condoned the delay in preferring the appeal in the absence of serious opposition to the application by the respondent-revenue and the appeal has come up for admission.

6. We have heard Sri Dinesh, learned counsel appearing for the appellant at great length to find out if the appeal can be admitted on any questions of law raised by the learned counsel for the assessee and if such questions have not only arisen in the course of the order but have also been erroneously decided by the tribunal, calling for correction at our hands.

7. We have also heard Sri Aravind, learned junior standing counsel for the respondent-revenue as the respondent has been put on notice at the time of application for condonation of delay was considered as aforestated. Sri Aravind, learned junior standing counsel on merits of the appeal, would submit there is nothing that is required to be examined in this appeal for admitting the appeal; the order

of the tribunal, in fact, does not give raise to such questions and the tribunal has not erroneously decided any questions to invoke the jurisdiction of this court.

8. The brief facts leading to the filing of the present appeal has its origin to the return of income filed by the appellant-firm, way back on 21.06.1985, relating to the assessment year 1985-86. This return of income was filed by the assessee, claiming income of the firm to be not beyond taxable limits has been accepted, in terms of the assessment order dated 28.03.1988, in the result, the tax liability had been determined to be nil.

9. The only significant aspect of the return is that the firm itself had been constituted in terms of partnership deed dated 29.11.1981, comprised of six partners and also indicated profit and loss ratio of partners, apart from spelling out the activities of the firm. The activity of the firm was to purchase immovable property by name "Ranga

Bhavan", located in Mangalore, to develop and sell the said property. This activity constituted business activity.

10. The firm in terms of its partnership deed dated 29.11.1981 had purchased property on 21.07.1982 for a consideration of Rs.30 lakhs. Subsequently, it appears that the firm was reconstituted on 02.02.1985 to admit one more partner in the name of M/s. Hotel Poonja International Private Limited. It is incidental to state the shareholders of this company were also the partners of M/s.Poonja Arcade.

11. It appears M/s.Poonja Arcade, which was reconstituted on 02.02.1985 was dissolved on 28.02.1985 and in the process of dissolution, the assets of the firm namely Ranga Bhavan was allotted to the share of incumbent partner M/s. Hotel Poonja International Private Limited and erstwhile six partners shared Rs.30 lakhs amount, which had been brought in by M/s.Hotel Poonja International Private Limited, in their respective profit sharing ratios in the profit of the firm, in terms of partnership deed of the firm.

12. The assessment order dated 28.03.1988, accepting the assessable income of the firm for the assessment year 1985-86 to be nil came to the hands of the Commissioner of Income Tax, who exercising suo moto revisional power under section 263 of the Act, revised the order in terms of order dated 12.03.1990, by setting aside the assessment order, with a direction to the assessing officer to treat difference between the current market value of the asset and cost of acquisition to be the business income of the firm and to tax it on such premise, both in the hands of the firm and its partners.

13. Very strangely, five of the partners appealed against the order of the tribunal by filing five appeals albeit in the name of the firm in the sense, each partner is described by the name as M/s. Poonja Arcade, from which it can be inferred that five of the partners on behalf of the firm had appealed against the order of the Commissioner in five

separate appeals, which were numbered as 1544 to 1548/Bang/90.

14. The tribunal on examination of such appeals in terms of its common order dated 12.06.1998, very strangely opined that the liability of the firm cannot be determined directly on the premise of notional profit of the firm at the time of dissolution, taking the account by revaluing stock-in-trade of the firm, though on merits, did agree with the Commissioner, by holding that the property purchased in the year 1982 should only be treated as stock-in-trade and further held that shall be treated as business profit of the firm arrived at in the year of dissolution of the firm as the said profit was realised after transfer of property namely Ranga Bhavan by the firm and it constituted business profit.

15. The tribunal having opined that individual partners cannot be subjected to tax, unless the firm itself in the first instance was subjected to tax, thought it fit to set aside the order of Commissioner and cancelled the order.

16. This order of the Commissioner dated 12.06.1998 found in the appeal papers at Annexure-B has attained finality, neither the assessee nor the revenue has chosen to question the order.

17. The assessing authority having chosen to issue show cause notice during November 1998, purporting to be sequel to the appeal order passed in the five appeals of the individual partners of the firm and styling the show cause notice as one under sections 148 and 150(1) of the Act, the appellant-firm responded to the notice by filing the reply dated 23.11.1998 and questioned the very jurisdiction for reopening of the assessment of the firm on the basis of assessment of the firm and for issuing notice under section 148 read with section 150(1) of the Act.

18. The assessee contended that the notice was bad in law; that the assessing authority had not understood the scope and true contents of the order of the tribunal passed in five appeals of the individual partners of the firm; that the

Tribunal having allowed the appeals and having set aside the order passed by the Commissioner, there was nothing more to be considered by the assessing authority; therefore there is no need to take further action in the matter.

19. The assessing authority nevertheless having proceeded to pass the assessment order dated 30.03.2001 [copy produced at Annexure-C] determining the tax liability of the firm to be in a sum of Rs.7,94,250/- on the premise that business income of the firm was Rs.30 lakhs, which also happened to be total income and attributed to the transfer of stock-in-trade of the firm namely Ranga Bhavan, the property, for which purpose the assessing authority had elaborately considered the submissions of the assessee and the order purported to be passed in terms of section 143(3) read with section 254 of the Act. The assessee chose to prefer an appeal to the appellate commissioner against this order and met with success before the Commissioner of appeals, in terms of his order dated 17.02.2005, as the Commissioner of Income Tax very strangely held that order

passed by the assessing authority was by way of re-opening assessment under section 147 of the Act, which in fact was not the case and therefore, thought it proper to cancel the re-assessment order of the assessing authority dated 30.03.2001 at Annexure-C.

20. Quite naturally, the revenue appealed to the tribunal by filing an appeal under section 254 of the Act.

21. The revenue succeeded in its appeal under ITA No. 850/Bang/2005, which was directed against the order of the appellate commissioner as the tribunal opined that the appellate commissioner had clearly failed to understand the true scope and meaning of the provisions of section 150 read with section 153 of the Act. The assessing authority in passing the assessment order in terms of the order dated 30.03.2001 at Annexure-C had not committed any error or illegality, nor had exercised any jurisdiction not vested in her and that order was a natural consequence of the order passed by the tribunal and based on the above observations

contained in the order itself. Therefore, the order passed by the assessing authority was well within the scope of section 153 of the Act.

22. It is aggrieved by the order of the tribunal, the present appeal under section 260-A of the Act by the assessee.

23. Submission of Sri Dinesh, learned counsel for the appellant is that the impugned order of the tribunal suffers from many errors of law; that the tribunal failed to take notice of the fact that the assessee, namely the firm, was not a person, who had been heard before the tribunal, while the tribunal passed a common order in the five appeals filed by the individual partners of the erstwhile partnership firm; the firm being not a party to the order dated 12.06.1998, copy produced at Annexure-B, it was incumbent upon the tribunal to give an opportunity of hearing to the firm before passing a common order and it had not been done. Submission is that such an order is passed to reassess the concluded assessment of the firm and that the order of the

tribunal is not a direct result of any appeal or revision proceeding, which is pursued either by the firm or in the name of the firm and in this view of the matter, the tribunal has committed an error in holding that the assessing authority had assumed jurisdiction very correctly to pass an order in terms of section 150 of the Act.

24. That apart, Sri Dinesh, learned counsel for the assessee would draw our attention to explanation 3 to section 153(3) of the Act to submit that even if said provision permits re-assessment of a concluded assessment of any other person, as a consequence of an appeal/order passed in an appeal or revision by some other person and when third persons' assessment orders are sought to be reviewed or re-assessed as a consequence of appeal or revisional order in terms of the explanation, such person should necessarily be accorded an opportunity. The learned counsel would further submit that the tribunal having not given such an opportunity, the order of the tribunal suffers from errors and it is in contravention of the explanation 3 to section 153(3) of

the Act and therefore, that order is not sustainable in law and on merits.

25. To appreciate the above submissions, we have to necessarily examine the statutory provisions of section 150(1) and section 153(3) and explanation 3 to section 153(3) of the Act, which reads as follows:-

***Provision for cases where assessment is in pursuance of an order on appeal, etc.***

*150(1). Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision.*

***Time limit for completion of assessments and reassessments***

*153(3) The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, [subject to the provisions of sub-section (2A),] be completed at any time – (i) where a fresh assessment is made under section 146;*

*(ii) Where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 [or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act];*

*(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.*

| | | | |
|---|---|---|---|
| *[Explanation 1:* | *xxx* | *xxx* | *xxx* |
| *(i)* | *xxx* | *xxx* | *xxx* |
| *(ii)* | *xxx* | *xxx* | *xxx* |
| *(iii)* | *xxx* | *xxx* | *xxx* |
| *(iv)* | *xxx* | *xxx* | *xxx* |
| *(iva)* | *xxx* | *xxx* | *xxx* |

| | | | |
|---|---|---|---|
| *(v)* | *xxx* | *xxx* | *xxx* |
| *Explanation 2:* | *xxx* | *xxx* | *xxx* |

*Explanation 3: Where, by an order [referred to in clause (ii) of sub-section (3)], any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purpose of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."*

26. Submission of Sri Dinesh, learned counsel for the assessee is that based on these statutory provisions, in the first instance, the tribunal has committed an error in proceeding to make observations, which could possibly give rise to an order or enable the assessing authority to pass an order in terms of section 150(1) and secondly, the assessing authority also has committed an error in issuing notice, invoking the provisions of section 148 of the Act when

without any dispute, the period of limitation in terms of clause (b) of sub-section (1) of section 149 of the Act was over i.e., long after expiry of four years from the end of the relevant assessment year namely 1985-86. The provisions of section 149(1) of the Act, which were prevalent at the relevant period reads as under:-

> "***Time limit for notice***
>
> *149 (1). No notice under section 148 shall be issued,*
>
> *(a) in cases falling under clause (a) of section 147 –*
>
> *(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under sub-clause (ii);*
>
> *(ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;*
>
> *(b) in cases falling under clause (b) of section 147, at any time after the expiry of four years from the end of the relevant assessment year."*

Even in terms of section 149 as it was prevailing then, if a notice has been issued under this section, independent of any enabling provision in terms of section 150, reopening within the period of limitation, as having regard to the extent of taxable income, which, according to the assessing authority, had actually escaped attention is a sum of Rs.30 lakhs, much more than Rs.50,000/-, referred to in clause (a)(ii) of section 149 and therefore, this argument of learned counsel for the appellant that the assessment order was barred by time is not sustainable on the face of it.

27. That apart, we are of the view, the assessment authority had in fact, invoked provisions of section 150(1) of the Act and had rightly done so, as in our opinion, the order of the tribunal, though was one allowing the appeal of the assessee and setting aside the order of the commissioner, exercising suo moto power of revision, giving rise to invoking power under section 150(1) of the Act by the assessing authority, as the tribunal had given sufficient indication and has made sufficient observations to enable the assessing

authority to re-assess the actual liability of the firm for the assessment year 1985-86, particularly as the tribunal did affirm the findings of the Commissioner, both on the aspect of property being treated as 'stock-in-trade' and question of evaluating the property for ascertaining the profits of the firm for the assessment year 1985-86.

28. The only choice of the assessing authority, in terms of the order of the tribunal, was to re-assess the income of the firm in terms of observations made by the tribunal, reversing the findings of the Commissioner, who had expressly set aside the assessment order of the assessing authority as initially passed, accepting the nil income return filed by the firm.

29. In this state of affairs, it cannot be said that the tribunal has committed any error in allowing the appeal of the revenue and restoring the assessment order passed by the assessing authority and set aside the order of the appellate commissioner. In this view of the matter,

question No.3 has to be necessarily answered against the assessee and in favour of the revenue.

30. We have also examined questions 4 & 5 as raised in the memorandum of appeal and in the wake of our answers above, particularly holding that the tribunal was very correct in affirming the view taken by the Commissioner on ascertainment of profit and income of the firm, based on the valuation method adopted by the Commissioner. These questions also are to be answered against the assessee and in favour of the revenue, in the affirmative, particularly question No.4 as framed does not arise in its form, as this is not a question of any addition to the income already determined, but only re-determination of income in the hands of the firm for the year in question. Question No.5 is consequently answered against the assessee and in favour of the revenue, in the affirmative.

31. Sri Dinesh, learned counsel for the assessee, in support of the submission that the tribunal has committed

an error insofar as it relates to answers found in the order relating to questions 1 & 2, has drawn our attention to the judgment of this court dated 13.08.2008, rendered in ITA No.91 of 2004, in the case of C.I.T. Vs. Munibyrappa.

32. Based on this judgment, submission is that this court has clarified the legal position insofar as the statutory provisions of section 150(1) of the Act is concerned and if the present appeal is examined in the light of this statutory provision, the answer given by the tribunal as in the impugned order is not sustainable and therefore, to this extent, the order calls for correction at our hands.

33. Having regard to facts and law that obtained at the relevant point of time, we hold judgment relied upon by learned counsel for the assessee has no bearing on the present set of facts. Insofar as questions 1 and 2 are concerned, we find that the judgment of this court, referred supra has neither laid down any general principles for interpretation of section 153(3) of the Act nor the judgment

can be taken to be containing a ratio, which is a precedent to be followed and applied to the present appeal. We say so, as the question as had been posed in judgment cited supra was whether in the facts and circumstances of the case, the appellate tribunal and the Commissioner were justified in holding that the assessment was barred by limitation, holding that Section 150(1) of the Act has no application to the case of the appellant.

34. An answer to a question of this nature, necessarily has implication only for that very case and cannot have any bearing on any other case as to whether the impugned order was passed on the basis of the provisions of section 150(1) and particularly if the order was directed as an answer, in a particular case and this cannot have any applicability to the present question and particularly to the applicability of section 150(1) of the Act as to whether the provisions of section 150(1) of the Act in any given case as it prevailed in any other case. Therefore, we are of the view that this

judgment does not advance the case of the present appellant in any manner to answer the question in favour of the appellant-assessee. Therefore, these two questions are also answered against the assessee and in favour of the revenue and question No.1 is answered in the affirmative and question No.2 is answered in the negative. In the circumstances, there is nothing else left for us to answer, warranting admission of this appeal for further examination and accordingly, this appeal is dismissed.

35. To our surprise, neither the learned counsel for the assessee nor the learned junior standing counsel appearing for the revenue were in a position to inform us as to the manner in which the consequences of the assessing order resulted in tax liability of Rs.7,94,250 in the hands of the firm has been followed up in the hands of the respective partners, who are partners of the firm and who had apportioned the profit in the ratio in terms of the partnership deed, as it prevailed at the relevant point of time, while we are of the view that the assessing order

should have been necessarily followed up for re-opening the assessment of the partners to bring it to tax, respective income in the hands of the partners, who had apportioned the profit of the firm, in terms of the partnership deed.

36. We direct the assessing authority to ascertain this aspect of the matter and to take follow up action if any assessment order has not been passed in terms of the impugned order, it should be done on the strength of the direction issued in this appeal, subject to the assessee being given an opportunity to present its case before revising the respective assessment orders.

Sd/-
JUDGE

Sd/-
JUDGE

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