

CASE NO.:
Appeal (civil) 5673-5675 of 2002

PETITIONER:
P.R. Metrani

RESPONDENT:
Commissioner of Income Tax, Bangalore

DATE OF JUDGMENT: 15/11/2006

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T

BHAN, J.

These appeals are directed against the judgment and order dated 9.7.2001 passed by the High Court of Karnataka at Bangalore in ITRC Nos. 38, 39 & 40 of 1996 vide which the High Court has allowed the reference cases 39 and 40 of 1996 thereby answering the questions in favour of the Revenue and against the assessee. ITRC No. 38 of 1996 filed by the assessee has been dismissed by the High Court. Since these appeals arise from the common order passed by the High Court, we also propose to dispose them of by a common order.

FACTS

The facts relevant for disposing of these references in short are.

P.R. Metrani and Y.R. Metrani were two brothers and are the members of the Joint Hindu Family. P.R. Metrani (HUF) assessee was a partner in a firm called M/s. R.N. Metrani and Sons. Y.R. Metrani was also a partner in this firm. P.R. Metrani as well as Y.R. Metrani have died during the pendency of these cases.

A search of the residential premises Ranganatha Nilaya was conducted by the Income Tax, Central Excise and Customs Departments on 30.06.1982 and 01.07.1982 and as well as the business premises where the business of the firm was being conducted. The residential premises of J.J. Bakale, nephew of P.R. Metrani were also searched. The search brought to surface unaccounted money, gold biscuits, gold jewellery, silver etc. besides some important documents. For the purpose of assessment for the assessment years 1981-82 and 1982-83 three documents were found to be relevant by the Assessing Officer and they were marked as PRM-1, PRM-7 and PRM-13 at the time of search and seizure, which were seized from the residential premises namely, 'Ranganatha Nilaya'. Statement of J.J. Bakale was recorded at the time of search. P.R. Metrani was away to Rajasthan on a business tour. He was examined after his return to Hubli on 13.7.1982. He denied the possession of PRM-1, PRM-13 and PRM-14. He also denied that these papers contain any writing made by him. The Assessing Authority made a summary adjudication order under Section 132(5) of the Income Tax Act, 1961 (for short "The Act"). He made certain additions and retained the

assets seized.

Notice under Section 139(2) dated 17.9.1982 for the assessment year 1982-83 was served on the assessee on 21.9.1982. The appellant declared a total income of Rs.46,200/- and a net agricultural income of Rs.6,000/-. Notices under Section 143(2) and 142(1) were issued on several dates. Appellant appeared before the authorities on several dates and assessment came to be completed. The following additions were made in respect of the assessment year 1982-83:-

i.
Income from undisclosed sources as discussed in para 3.2 as per PRM-1 and PRM-7

Rs. 28,67,920

ii.
Income from undisclosed sources as discussed in para 3.3 i.e., PRM-13

Rs. 6,66,690

iii
Investment in Durgadabail building at Hubli as per para 5 being 50% of Rs. 5,24,200/-

Rs. 2,62,100

iv
Unexplained expenditure U/s. 69C

Rs. 8,33,525

The assessment for the years 1981-82 was completed after making an addition of Rs.19,93,117/-.

Assessing Authority made an assessment for the construction of a commercial complex in Durgadabailu, the investment for which was declared at Rs. 5,55,000/- for the entire building. Half of the building belonged to P.R. Metrani and other half to Y.R. Metrani. The department had sent the Valuation Officer for enquiry regarding the cost of building and it was fixed by the Department Valuation Officer at Rs. 5,83,000/-. The assessing authority however did not accept the valuation made by the Valuation Officer and held that the total investment on the building was Rs. 6,45,809/-. A source to the extent of Rs. 1,21,627/- was accepted. The balance was rounded off to Rs. 5,24,200/-. Half of this was added to the assessment of P.R. Metrani (HUF) and other half were added in the assessment of Y.R. Metrani.

The appellant being aggrieved filed appeals before the Commissioner (Appeals). The Commissioner (Appeals) by separate order disposed of the appeals relating to assessment years 1981-82 and 1982-83. He examined the issue including certain credits, and, on 19.9.1988 confirmed the additions barring the sum of Rs. 36,000/- for the assessment year

1982-83. The orders of the Assessing Authority as well as the Commissioner (Appeals) are based on the presumptions in terms of Section 132 (4A) of the Act. It was held that presumptions under Section 132 (4A) were not confined to the orders passed under Section 132 only, but, were available for framing the regular assessments as well.

The assessee being aggrieved filed a further appeal before the Income Tax Appellate Tribunal, Bangalore (for short "The Tribunal"). The Tribunal relying upon the judgment of the Allahabad High Court in the case of Pushkar Narain Sarraf Vs. CIT, (1990) 183 ITR 388, on the scope of Section 132 (4A) held that the presumptions under Section 132 (4A) are confined to the framing of the order under Section 132 (5) only and are not available for framing the regular assessment. The Tribunal accepted the appeals, set aside the orders passed by the Commissioner (Appeals) as well as assessing authority except to the extent of addition of Rs. 2,62,100/-. At the instance of the Revenue, the Tribunal referred the following two questions for both the assessment years 1982-83 for the opinion of the High Court:-

"(1) Whether the Income-tax Appellate Tribunal was correct in law in holding that the presumption under Sub-section (4A) of Section 132 of the Income-tax Act, 1961, is only for the limited purpose of passing an order under Sub-section (5) of the said section ?

(2) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the documents seized from the residential premises of the assessee-Hindu undivided family were not of the said Hindu undivided family and the entries therein did not pertain to it, particularly when the Income-tax Appellate Tribunal itself has accepted that the entries in the said documents culminating in addition of Rs. 2,62,100 in the assessment for the assessment year 1982-83 pertained to the assessee-Hindu undivided family and upheld the said addition ?"

At the instance of the assessee, the Tribunal referred the following two questions for the opinion of the High Court:

"(1) Whether on the facts the Tribunal was justified in holding that the applicant HUF was liable to be taxed in respect of Rs. 2,62,100/- being alleged unexplained investment in the property invoking the provisions of sec. 69 of the Act?

(2) On the facts whether the Tribunal was justified in holding that the part of the entries in the seized documents could be attributed to the applicant HUF when the applicant had denied the knowledge or ownership of the document?"

The High Court answered all the four questions in favour of the Revenue and against the assessee. On question No.1 regarding presumption under sub-section (4A) of Section 132

of the Act, it has been held that the same is not limited to the passing of an order under sub-section (5) of Section 132 only; the same presumption can be raised for framing the regular assessment as well. The Bench has recorded its dissent with the view taken by the Allahabad High Court in Pushkar Narain Sarraf (supra).

Being aggrieved, the appellant has filed these appeals. Learned counsels for the parties have been heard at length.

The Allahabad High Court in Pushkar Narain Sarraf's case has held that the presumption arising under Section 132 (4A) is available only in regard to and in the context of search and seizure and the same was not available for framing the regular assessment. That Sections 132 to 132B of the Act embody an integrated scheme laying down comprehensively the procedure for search and seizure and the power of the authorities making the search and seizure to order the confiscation of the assets seized under Section 132 of the Act. The presumption arising under sub-section (4A) of Section 132 applies only in relation to the provisional adjudication which is contemplated under Section 132 (5) and the same was not available for framing the regular assessment.

Subsequently the High Court of Delhi in Daya Chand Vs. CIT, (2001) 250 ITR 327, has taken a somewhat similar view and has held "that presumption arising under Section 132 (4A) must be held to be applicable only in relation to the provisional adjudication as contemplated under sub-section (5) of Section 132 and the presumption cannot be said to have the effect of excluding the application of Section 68."

The Karnataka High Court in the impugned judgment has taken the following view :

\005\005The Tribunal holds that looking to the scheme it appears that the presumption of Sub-section (4A) is only for the limited purpose of passing an order under Sub-section (5). According to the Tribunal the assessing authority was wrong in drawing an inference under Section 132(4A) in the proceedings. In that view of the matter, the Tribunal rejected the case of the Department. This finding in our view is not correct. The entire object of this Chapter is to levy tax with regard to an undisclosed income of an assessee. Search and seizure is one accepted method adopted by the Revenue authority with regard to digging out undisclosed income by an assessee. If the intention of the Legislature is only to give a limited presumption, under Section 132(4A) they would have said so in so many words. Even otherwise a reading of the entire Chapter would show that it was never the intention of the Legislature to restrict the presumption only to an order under Section 132(5) of the Act. In fact as we mentioned earlier, Sub-section (1) provides for entering, searching, breaking open, seizing, placing marks on the documents and Sub-section (2) provides for police help and Sub-section (3) provides for retention by the owner subject to an order. Sub-section (4) which is a crucial provision categorically states that any books, documents, money, bullion, jewellery or any

statement made by an assessee in the course of search or seizure can be made by use of as evidence in any proceeding under the Income-tax Act. If Sub-section (4A) is read with Subsection (4) it is clear to us that there cannot be any restriction with regard to the presumptive value that can be attached to Section 132(4A) of the Act. Section 132(5) only provides for an order being made in the case on hand. That, by itself, does not take away the presumptive value attached to Section 132(4A) for other proceedings as held by the Tribunal. In fact Section 132(5) provides for an order being passed as a result of search initiated or requisition made before July 1, 1995. Even after this date the section is still available in the statute. Therefore, an inference can safely be drawn in the light of Sub-sections (4) and (5) of Section 132 itself that no limited presumption can be attached to Section 132(4A). At the same time we must also point out that the presumptive value is total in so far as Section 132(5) is concerned, but in so far as other proceeding's are concerned it is only a rebuttable presumption. Therefore, the finding of the Tribunal in this regard in our view requires our interference.

[Emphasis supplied]

It has been further held at page 254 as under:

"Therefore, it is clear to us that the presumptive value to the documents is available in respect of an order to be passed under the Act including an order under Section 132(5) of the Act. Therefore, a reading of the provision with regard to the seized documents clearly indicates that its presumptive value cannot by any stretch of imagination be restricted only to Section 132(5) as held by the Tribunal. It is a "non-rebuttable presumption" under section 132(5) of the Act and in other cases it is a "rebuttable presumption".

Mr. G. Sarangan, further has placed before us a judgment of the Allahabad High Court in the case of Pushkar Narain Sarraf v. CIT, (1990) 183 ITR 388. With respect we are unable to subscribe to the view of the decision of the Allahabad High Court. We have carefully gone through the said judgment. We find in the said case that no reasons are forthcoming as to why the said presumption is to be restricted to Section 132(5) only. In fact that judgment on the other hand states that Section 68 cannot said to have been excluded for regular assessments."

[Emphasis supplied]

Sections 132 to 132B of the Act embody an integrated scheme laying down the procedure comprehensively for search and seizure and the power of the authorities making the search and seizure to order the confiscation of the assets seized. Section 132A gives power to the authorities to requisition books of account in consequence of the information in its possession. Section 132B provides the manner in which the assets retained under sub-section (5) of Section 132 can be dealt with.

Section 132 is a Code in itself. It provides for the conditions upon which and the circumstances in which the warrants of authorization can be issued. Sub-section (2) authorizes the authorized officer to requisition the services of any police officer or of any officer of the Central Government or of both to assist him for all or any of the purposes for which the search is conducted. Under sub-section (4) the authorized officer can during the course of search or seizure examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such persons during such examination may thereafter be used in evidence in any proceeding under the Act. Sub-sections (4A) and 5 are set out in detail as it existed at the relevant time.

"(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

- (i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person ;
- (ii) that the contents of such books of account and other documents are true ; and
- (iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

"(5) Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A), the Assessing Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall, within one hundred and twenty days of the seizure, make an order, with the previous approval of the Deputy Commissioner],--

- (i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him ;
- (ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income-tax Act, 1922 (11 of 1922), or this Act;
- (iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian Income-tax Act,

1922 (11 of 1922), or this Act, as if the order had been the order of regular assessment;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default, and retain in his custody such assets/or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii), [(iia)] and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized :

Provided that if, after taking into account the materials available with him, the Assessing Officer is of the view that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized and may also determine the interest or penalty, if any, payable or imposable accordingly:

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (ii), (iia) and (iii) or any part thereof, the Assessing Officer may, with the previous approval of the Chief Commissioner or Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case.

Sub-section (6) provides that assets retained under sub-section (5) may be dealt with in accordance with the provisions of Section 132B. Sub-section (7) provides that if the assessing officer is satisfied that the seized assets or any part thereof were held by such person for or on behalf of other person, the assessing officer may proceed under sub-section (5) against such other person and the provisions of Section 132 shall apply to such other persons as well. Sub-section (8) provides that the books of account or other documents seized under sub-section (1) and (1A) shall not be retained by the authorized officer for a period exceeding 180 days from the date of the seizure without recording reasons for retaining the same in writing and taking approval of the Chief Commissioner or Commissioner for such retention. Chief Commissioner is mandated not to authorize the retention of books of account and other documents under the proviso to sub-section (8) and not to retain the books of account and other items for a period exceeding 30 days after all the proceedings under the Act in respect of the years for which the books of account, other documents, money, bullions, jewellery or other valuable articles or things are relevant. Under sub-section (9) the persons from whose custody the books of account and other documents are seized is entitled to make notes thereof and take extracts therefrom in the presence of the authorized officer. Sub-sections (9) and (10) are of the same nature. Sub-section (11) provides that if any person

objects for any reason to an order made under sub-section (5), he can within 30 days of the date of such order make an application to the Chief Commissioner stating the reasons therein for such objections and requesting for appropriate relief in the matter. Further, sub-section provides for applicability of Code of Criminal Procedure and making of rules by the board in search or seizure etc.

The section considered as a whole, shows that it has its own procedure for the search, seizure, determination of the point in dispute, quantum to be retained and also the quantum of the tax and interest on the undisclosed income. Under sub-section (11) as it existed till 31.5.2002, the person aggrieved has been given the right to file an application (in place of appeal) objecting to the order passed under sub-section (5) and request for appropriate relief in the matter. It has all the fortifications of a code. This provision exists in complete isolation of the other provisions of the Act. It has the trappings of small code in itself.

The proceedings under Section 132(5) as it existed till 31.5.2002 are of a quasi-judicial nature as it provided affording of reasonable opportunity to the person concerned of being heard and pass an order after making an enquiry as might be prescribed. Enquiries under sub-section 132(5) is to enable the assessing officer to determine the tax liability of the assessee in a summary manner and determine the undisclosed income in relation to the money, bullion, jewellery etc. seized under Section 132 and retain the assets seized till the regular assessment is framed. The order passed under Section 132 (5) is for the purpose of retaining the assets seized and it is subject to the framing of the regular assessment. Whatever portion of the money or other articles seized is explained in a satisfactory and reasonable manner by the person from whom the same was seized, are returned to him and the rest are to be retained. As stated earlier, no appeal lies against the order passed under Section 132, only an application lies to the Chief Commissioner or Commissioner as permitted by Section 132(11).

Search and seizure under Section 132 is a serious invasion into the privacy of a citizen, therefore, it has to be construed strictly. Sub-section (4A) was inserted by Taxation Law (Amendment) Act, 1975 with effect from 1.10.1975 to permit a presumption to be raised in the circumstances mentioned therein. Before the insertion of sub-section (4A) the onus of proving that the books of account, other documents, money bullion, jewellery etc. found in possession or control of a person in the course of a search belonged to that person was on the Income Tax Department. Sub-section (4A) enables an assessing authority to raise a rebuttable presumption that such books of account, money, bullion etc. belonged to such person; that the contents of such books of account and other documents are true, and, that the signatures and every other part of such books of account and other documents are signed by such person or are in the handwriting of that particular person.

Raising of such presumption has been enacted by the Legislature to enable the assessing authority to make a provisional adjudication within the time frame prescribed under Section 132. Otherwise it may not be possible to do so. The object of introduction of Section 132 is to prevent the evasion of tax, i.e., to unearth the hidden or undisclosed income or property and bring it to assessment. It is not merely an information of undisclosed income but also to seize

money, bullion etc. representing the undisclosed income and to retain them for the purposes of realization of taxes, penalties etc. Search and seizure is a serious invasion in the privacy of the person. Section 132 which is a complete code by itself provides that the money, bullion or the books of account etc. should not be retained unnecessarily and that the provisional assessment made under Section 132 for the purpose of retention of the books is passed within a specified time in accordance with law. It provides that the books of account, money and bullion which are not required are not retained unnecessarily thereby causing harassment to the person concerned. In order to see that the assessment order is framed within the time frame provided under Section 132, legislature provided for a rebuttable presumption to be raised against the person from whose possession and control the books of account, money, bullions etc. are seized so that the order can be passed within the time frame provided under Section 132.

A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) "may presume", (ii) "shall presume" and (iii) "conclusive proof". "May presume" leaves it to the discretion of the Court to make the presumption according to the circumstances of the case. "Shall presume" leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it. In this sense such presumption is also rebuttable. "Conclusive proof" gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.

The words in sub-section (4) are "may be presumed". The presumption under sub-section (4A) therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4A) is a irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of Section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in Section 132 or any other provisions of the Act which could warrant such an inference or finding.

Presumption under sub-section (4A) would not be available for the purpose of framing a regular assessment. There is nothing either in Section 132 or any other provision of the Act to indicate that the presumption provided under Section 132 which is a self contained code for search and seizure and retention of books etc. can be raised for the purposes of framing of the regular assessment as well. Wherever the legislature intended the presumption to continue, it has provided so. Reference may made to Section 278D of the Act which provides that where during the course of any search under Section 132, any money, bullion, jewellery or other valuable articles or things or any books of account etc. are tendered by the prosecution in evidence against the person concerned, then the provisions of sub-section (4A) of Section 132 shall, so far as may be, apply in relation to such assets or books of account or other documents. This clearly spells out the intention of legislature that wherever the legislature intended to continue the presumption under sub-section (4A) of Section 132, it has provided so. It has not been

provided that the presumption available under Section 132 (4A) would be available for framing the regular assessment under Section 143 as well.

This is also evident from the fact that whereas the legislature under Section 132 (4) has provided that the books of account, money, bullion, jewellery and other valuable articles or things and any statement made by such person during examination may thereafter be used as evidence in any other proceedings under the Act but has not provided so under sub-section (4A) of Section 132. It does not provide that the presumption under Section 134A would be available while framing the regular assessment or for that matter under any other proceeding under the Act except under Section 378D.

Section 132 being a complete code in itself cannot intrude into any other provision of the Act. Similarly, other provisions of the Act cannot interfere with the scheme or the working of Section 132 or its provisions.

Presumption under Section 132 (4A) is available only in regard to the proceedings for search and seizure and for the purpose of retaining the assets under Section 132(5) and their application under Section 132B. It is not available for any other proceeding, except where it is provided that the presumption under Section 132 (4A) would be available.

In our considered view, the High Court of Allahabad in Pushkar Narain Sarraf (supra) and the High Court of Delhi in Daya Chand (supra) have taken the correct view in holding that the presumption under Section 132(4A) is available only in regard to the proceedings for search and seizure under Section 132. Such presumption shall not be available for framing the regular assessment. The High Court of Karnataka in the impugned judgment has clearly erred in holding to the contrary. Consequently, question No.1 of the Revenue is answered in the affirmative, i.e. against the Revenue and in favour of the assessee.

It may be clarified that though presumption under Section 132(4A) is not available to authorities while framing the regular assessment but the material seized can be used as a piece of evidence in any other proceedings under the Act, all contentions are left open.

For the reasons stated above, appeals are accepted and the order passed by the High Court is set aside. The orders passed by the assessing authorities as well as the CIT (Appeals) are vitiated as they have proceeded to frame the assessment raising the presumption under sub-section (4A) of Section 132. The same are set aside and the case is remitted back to the assessing authority for framing the assessment afresh in accordance with law. Question No. 2 claimed by the Revenue and the question No. 2 claimed by the assessee are returned unanswered as the case is being remitted back to the assessing authority for framing a fresh assessment.

We are not recording any opinion as to the merits of the case. The assessing authority shall now frame the assessment in accordance with law, without being influenced by any of the observations made in the previous orders or this order.

Accordingly, appeals are allowed. There will be no order as to costs.