Bombay High Court Commissioner Of Income-Tax vs Mrs. Sandhya P. Naik, Vinay A. ... on 12 December, 2000 Equivalent citations: 2002 253 ITR 534 Bom Author: S P Upasani Bench: P Upasani, R Deshpande JUDGMENT Smt. Pratibha Upasani, J. 1. All these appeals can be disposed of by a common order as the facts and questions of law involved in all these tax appeals are common. 2. All these tax appeals are directed against a common judgment and order dated June 7, 1989, passed by the Income-tax Appellate Tribunal (I.T.A.T.), Pune Bench, Pune. The block assessment period relevant is the period from April 1, 1986, to October 18, 1996. A few facts which are required to be stated are as follows : A search under Section 132 of the Income-tax Act, 1961, was conducted at the residential premises of the assessee at "Thirtharupa", Aquem, Margao, Goa, from October, 1996, onwards. During the search operation, certain valuables were found which belonged to the assessee and his family members. In response to the notice issued under Section 158BC of the Income-tax Act, the assessee filed a return showing income of Rs. 11,05,374. Against this income, the assessment was completed at Rs. 44,20,643, vide order dated December 31, 1997. Aggrieved by this order of the Assessing Officer, the assessee filed appeal before the Income-tax Appellate Tribunal. 3. While assailing the order dated December 31, 1997, the assessee raised as many as 32 grounds. It was contended, inter alia, that the assessing and the authorised officers were biased and hostile to the appellants, that the rules of natural justice were not followed during the course of the proceedings, that the provisions of Section 132(9) were not complied with, etc. The main ground apart from the merits was that the assessment was barred by limitation, the last date of completion being October 31, 1997. 4. The Income-tax Appellate Tribunal thought it fit to take up this ground about the impugned assessment being barred by limitation first inasmuch as it felt that if the assessee succeeded on this vital issue, the other issues would become only academic in nature. Accordingly, the parties were heard on this point only. 5. The case of the assessee was that the search started on October 16, 1996, and the same concluded on October 20, 1996. Since the assessment ought to have been concluded within a period of one year, i.e., on or before October 31, 1997, and since it was completed on December 31, 1997, the assessment was barred by limitation. 6. It was contended by learned counsel appearing for the assessee, that as per the provisions of Section 158BE of the Income-tax Act, the block assessment was required to be completed within a period of one year from the date of the execution of the last of the authorisations of search. By an amendment made by the Finance (No. 2) Act, 1998, it has been further clarified that the last date of the execution of the search would be reckoned from the date of the last of the panchanamas drawn up in the execution of such search. It was contended on behalf of the assessee that there was only one search warrant issued which was executed between October 16, 1996, and October 20, 1996. According to the assessee, after completion of the search on October 20, 1996, an order under Section 132(3) of the Income-tax Act was passed covering one cupboard in which all the silver articles which were found were placed and seated. On October 26, 1996, 6 kgs. of silver vessels from this cupboard were released and a further order came to be passed under Section

132(3) of the Income-tax Act and the cupboard was sealed once again. On the same day, a panchanama was also drawn concluding the search and indicating in the said panchanama the fact that the cupboard containing silver articles had been sealed and an order under Section 132(3) of the Income-tax Act passed in relation thereto. On December 13, 1997, the Assistant Commissioner, Circle-I, Margao, Mr. Ashish Abrol, who was not one of the authorised officers mentioned in the search warrant, removed the seal and made a further order under Section 132(3) of the Income-tax Act, releasing the said silver vessels and articles. According to the counsel appearing for the assessee, a copy of this order was not made available to the assessee despite repeated requests. The contention of the assessee is that it was clear that the restraint order under Section 132(3) of the Income-tax Act does not amount to seizure. It is contended that by terms of Rule 112(7) of the Income-tax Rules, 1962, a panchanama is required to be drawn only in case of seizure and that an order under Section 132(3) is not a panchanama as referred to in Section 158BE of the Income-tax Act. As per the contention of the assessee, the last of the panchanamas in the execution of the search warrant was made on October 16, 1996, and hence, the assessment was barred by limitation on October 31, 1997. 7. On behalf of the Department, it was submitted that the assessment was completed within one year of the execution of the search warrant and, as such, the assessment framed was within the statutory time. It was submitted that the search commenced on October 20, 1996, and concluded on December 13, 1996, when the last panchanama was drawn. According to learned counsel appearing for the Department, in between there was a lull because of the invervening holidays and Diwali days. Learned counsel referred to the second proviso to Section 132(1) of the Income-tax Act and submitted that on October 20/21, 1996, at 2.30 a.m. it was not possible to remove from the residence of the assessee 45 kgs. of silverware. It was contended by him that all the silverware was put in the almirah and a prohibitory order was placed as per the second proviso to Section 132(13) of the Income-tax Act and the assessee was directed not to remove/part with the contents of the almirah. He contended that later on, in deference to the representation/wish of the assessee that some of the items placed under the prohibitory order were of religious nature and were required to be used for pooja, etc., 6 kgs. of silver articles were released to the assessee on October 26, 1996, by Mr. M. L. Karmarkar, Assistant Director of Income-tax, Investigation Circle, Belgaum. The contention of the Department is that the original order under Section 132(3) of the Income-tax Act, which was imposed on October 20, 1996, was lifted and a fresh one was imposed by Mr. Karmarkar on October 26, 1996, in respect of the balance of the silver articles. 8. It was then contended by learned counsel appearing for the Department, that on December 13, 1996, Mr. Ashish Abrol, who was the then Assistant Commissioner of Income-tax, Circle-I, Margao, visited the residence of the assessee on the directions of the D. D. I. Investigation, Belgaum, and put a fresh prohibitory order on which date a fresh panchanama was drawn, which was in continuation of the proceedings on October 26, 1996. This panchanama was signed by Mr. Ashish Abrol himself and the son of the assessee, though there were no panchas to sign the said panchanama. Accord-

ing to the Department, there was a deemed seizure on December 13, 1996, as per the second proviso to Section 132(1) of the Income-tax Act. He admitted that there were many defects in the said panchanama–like it was not signed by the assessee and no witnesses were called to sign the same and, hence, the panchanama does not bear the signature of the witnesses. It is also admitted that the said panchanama was drawn at Belgaum and not at Margao, i.e., at the place of alleged seizure. Learned counsel, however, submitted that these defects were "insignificant" defects and would not vitiate the search proceedings. He submitted that even though the signatures were obtained later on, that would not invalidate the search. He also submitted that the prohibitory order in respect of the silver articles in the almirah on December 13, 1996, was part of the panchanama. 9. After hearing both the sides at length and after perusing the relevant documents, specially the affidavit of Mr. Karmarkar, the then A. D. I. T., Investigation Circle, Belgaum, and the affidavit of Mr. Abrol, Assistant Commissioner, Circle-I, Margao, the Income-tax Appellate Tribunal came to the conclusion that the search in this case was concluded on October 20, 1996, when the seizure of cash, jewellery and books of account was made and a valid panchanama was drawn and that the proceedings thereafter were only with regard to the restraint order under Section 132(3) which did not amount to seizure in view of the Explanation to Section 132 of the Income-tax Act. The Income-tax Appellate Tribunal accordingly held that the assessment stood barred by limitation on October 31, 1997. It also held that it was invalid- It further observed that since the assessee had succeeded on the preliminary ground that the assessment was barred by limitation, the other grounds were academic in nature and, therefore, it did not feel it necessary to adjudicate upon the same in view of the judgment of the Nagpur Special Bench in the case of Kabul Kumar Bajaj v. ITO [2000] 241 ITR (AT.) 1 (SB). Thus, the appeal filed by the assessee in each case was allowed. Being aggrieved by the same, the Department, has now approached this court by way of filing these tax appeals. 10. Learned counsel, Shri Rivonkar, made the very same submissions which were made by learned counsel appearing for the Department, before the Income-tax Appellate Tribunal. According to Mr. Rivonkar, the panchanama in spite of all its defects, did not vitiate the search. He also submitted that a fresh panchanama which was drawn on December 13, 1996, was in continuation of the proceedings on October 26, 1996. He further submitted that there was a deemed seizure on December 13,1996, as per the second proviso to Section 132(1) of the Income-tax Act. Relying upon the decision in CIT v. Biju Patnaik [1986] 160 ITR 674 (SC), Mr. Rivonkar submitted that the question arising out of the Tribunal's finding is a question to law and hence these appeals should not be thrashed at the stage of admission. He also relied upon the decision in Oriental investment Co. Ltd. v. CIT [1957] 32 ITR 664 (SC), which lays down, inter alia, that a finding on a question of fact is open to attack as erroneous in law if there is no evidence to support it, or if it is perverse. 11. We have heard Mr. Rivonkar at length. We also made specific enquiries from Mr. Rivonkar whether he could show to the court the authorisation warrant in the name of Mr. Abrol, who on December 13, 1996, went to the assessee's place and passed

further restraint order. Mr. Rivonkar, however, expressed his helplessness and could not produce any such authorisation warrant. 12. Admittedly, only the following officers were authorised to conduct the search. Their names were : 1. Shri K. Ramesh, DDIT (Investigation), Belgaum ; 2. Shri M. L. Karmarkar, ADIT (Investigation), Belgaum; 3. Shri Amol S. Kamat, ACIT, Panaji; and 4. Shri J. B. Chavan, ITI W-2, Belgaum. 13. Admittedly, the name of Mr. Abrol does not figure here. So also admittedly, there was only one search warrant, which was issued on October 16, 1996, and executed between October 16, 1996, and October 20, 1996, and which expired thus on October 20, 1996. The warrant was issued on October 7, 1996, and the search was conducted continuously between October 16, 1996, and October 20, 1996. In between, the search was suspended only during the late hours of the night. On October 20, 1996, having seized all the relevant materials and valuables, the search party obviously had come to the conclusion that there was no further material to be seized and no more search operation to continue. The search comes to an end when the search party leaves the premises after carrying with it the seized material and thus authorisation for search is fully implemented and execution is complete. For this proposition, the Income-tax Appellate Tribunal Bench, Pune, took support of the decision of the Bangalore Bench in the case of Kirloskar Investments and Finance Ltd. v. Asst. CIT [1998] 67 ITD 504. In the present case at hand, the cupboard in which 45 kgs. of silver articles were kept was sealed by making an order under Section 132(3) of the Income-tax Act. The authorised officers were obviously very much aware of the contents of the cupboard and the nature of the articles in view of the inventory made by them. They had also come to the conclusion that the said 45 kgs. of silver articles need not be seized. There was no practical impediment to seizure of the said 45 kgs. of silver, if it was considered by the authorised officer as necessary. The contention of learned counsel for the Department that it was not practical to seize huge quantity of silver at odd hours, was rightly held to be untenable by the Income-tax Appellate Tribunal, because at the same odd hour, the search party seized and removed from the premises of the assessee 5,729 gms. of gold ornaments, cash of Rs. 1,69,000 and books of account, weighing nearly 500 kgs. on October 26, 1996, 6 kgs. of silver articles in the said cupboard were released, a panchanama was made and a further order under Section 132(3) passed with respect to the said sealed cupboard and the seal was placed again. Thus, the Income-tax Appellate Tribunal rightly held that the proceedings. On October 26, 1996, could not be considered as part of the execution of the search proceedings which concluded on October 20, 1996. Indeed, by simply staring in the panchanama that the search is temporarily suspended, the authorised officer cannot keep the search proceedings in operation by passing a restraint order under Section 132(3). Reliance placed by the Department on the judgment of the Allahabad High Court in the case of Sriram Jaiswal v. Union of India [1989] 176 ITR 261, was correct. The restraint order in view of this authority cannot be cancelled and renewed from time-to-time. Action under Section 132(3) of the Income-tax Act can be resorted to only if there is any practical difficulty in seizing the item which is liable to be seized. When there is no such practical difficulty the officer is left

with no other alternative but to seize the item, if he is of the view that it represented undisclosed income. Power under Section 132(3) of the Income-tax Act thus cannot be exercised so as to circumvent the provisions of Section 132(3) read with Section 132(5) of the Income-tax Act. The position has become much more clear after the insertion of the Explanation to Section 132(3) effective from July 1, 1995, that a restraint order does not amount to seizure. Therefore, by passing a restraint order, the time limit available for framing of the order cannot be extended. 14. The Income-tax Appellate Tribunal after perusing the search warrant in original noted that Mr. Amol Kamat, ACIT, Panaji, who was one of the authorised officers, had put the word "executed" and below it put his signature and date as October 16, 1996. It was further noted by the Income-tax Appellate Tribunal, that on October 20, 1996, at about 2.30 a.m. the authorised officer seized and removed while leaving the premises, all the materials (gold, silver, books of account, etc. as mentioned above), on the same day, i.e., October 20, 1996, after completion of the search and thereafter order was passed under Section 132(3) covering one cupboard in which all the silver articles were placed and sealed. 15. It is also very obvious that there was no warrant of authorisation for search in the name of Ashish Abrol. In his own affidavit, so also in his statement when he appeared before the Income-tax Appellate Tribunal, Mr. Abrol categorically stated that he had a very limited role in this entire episode and that he had no locus standi in the matter. 16. As far as the validity of the panchanama is concerned, one has to look to the provisions of the Criminal Procedure Code, 1973. The panchanama is to be drawn as far as possible, keeping in mind the provisions of the Criminal Procedure Code. It has to be said that obtaining of panch witnesses was not an impossible task for Mr. Abrol, who is supposed to have conducted the deemed seizure operation on December 13, 1996. In fact, the Department itself has admitted that there were many defects in the panchanama. They were repeatedly saying that there were many defects in the panchanama and still were saying that "believe in it and accept it", is not acceptable. 17. Having heard both the advocates at length and having gone through the impugned order, so also the various authorities cited by Mr. Rivonkar, in our opinion, no fault can be found with the impugned order of the Income-tax Appellate Tribunal, Pune Bench. The impugned assessment indeed is barred by limitation and also invalid. In view of this, therefore, the impugned assessment was rightly annulled. No interference is therefore warranted. Hence, the following order : All the tax appeals are dismissed in limine.