

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-C” BENCH : BANGALORE**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA Nos.2742 to 2744/Bang/2018
Assessment years : 2011-12, 2012-13, 2013-14

Shri. Ambasa R Habib, Prop: M/s. Jayalaxmi Wine Centre, Bellary Galli, Hubli – 580 020. PAN : AECPH 0539 R	Vs.	The Income-tax Officer, Ward – 1[3], Hubli.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Narendra Sharm , Advocate
Revenue by	:	Shri. H. L. Soumya Achar, Addl. CIT

Date of hearing		18.09.2018
Date of Pronouncement	:	5.12.2018

ORDER

These appeals by the assessee are directed against the separate orders of the CIT(A), Hubli, all dated 31.08.2017 for Assessment Years 2011-12 to 2013-14. Since the issues involved in all these 3 appeals are identical and the background facts are common, these appeals are disposed off by way of this common order for the sake of convenience.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, an individual, is partner in M/s. Jayalakshmi Wine Centre and M/s. Shringar Peg Bar, Hubli, which firms are carrying out retail liquor business. The details of returns of income filed and income declared for Assessment Years 2011-12 to 2013-14 are as under:

Assessment Year	Date of filing of return of income	Total income declared (Rs.)
2011-12	24.01.2012	2,15,590/-
2012-13	27.09.2012	6,34,250/-
2013-14	23.09.2013	12,56,580/-

As per the details on record, the above returns of income for Assessment Years 2011-12 to 2013-14 filed by the assessee were not subject to scrutiny assessment.

2.2 A survey u/s 133A of the Income Tax Act, 1961 (in short 'the Act') was conducted on 28.08.2014 in the business premises of one Shri. Kashinatha Khemsa Khode at (i) Mahalaxmi Market, Divatgi Oni, Hubli and (ii) at another business premises at CTS No. 468, Bellary Galli, Hubli. In the course of the survey, it was allegedly found that Shri. Kashinath Khemsa Khode was carrying on the business of purchase and sale of liquor in the name and style of M/s. A. R. Habib & Wines and for this business, was using the Excise Licence standing in the name of the assessee. Therefore, the purchase and sale of liquor business of M/s. A. R. Habib & Wines were made in the name of the assessee. Certain material in the form of loose sheets, note books and diaries were also found and impounded in the survey action. On the basis thereof, a statement of one Shri. Anil Kashinath Khode, son of the aforesaid Shri. Kashinath Khemsa Khode was recorded on the date of survey. In his statement, Shri. Anil Kashinath Khode in Answer to Question No. 3, stated that his father Shri. Kashinath Khemsa Khode was carrying out the purchase and sale of liquor of branded companies in the trade name and style of M/s. A. R. Habib & Wines. On verification of the impounded material, it was noticed that an amount of Rs.2,250/- and Rs.1,750/- was paid every day to Shri. Raju Ambasa Habib and Shri. Vinayaka Ambasa Habib towards rent and that the said amounts were paid by Shri. Kashinath Khemsa Khode through his son Shri. Anil Kashinath Khode. It was noticed that the

total rent of Rs.11,34,000/- was paid to the assessee for Assessment Year 2011-12; Rs.16,97,400/- for Assessment Year 2012-13 and Rs.12,60,000/- for Assessment Year 2013-14.

2.3 On the basis of findings from out of material impounded in the course of survey and for the reason that the aforesaid amounts received by the assessee (supra) have not been offered to tax in his returns of income for Assessment Years 2011-12 to 2013-14, the Assessing Officer ('AO'), after recording reasons in this regard, issued notices u/s 148 of the Act on 30.09.2014 requiring the assessee to file his returns of income for these three years. In response thereto, the assessee filed letter dated 12.10.2014, requesting the AO to treat the returns of income originally filed for these Assessment Years as being filed in response to the notices issued u/s 148 of the Act. Thereafter, the AO took up assessment proceedings and concluded the assessments for Assessment Years 2011-12 to 2013-14 vide separate orders of assessment u/s 143(3) r.w.s. 147 of the Act; all dated 31.03.2016. In these orders of assessment, the AO brought to tax an amount of Rs.11,34,000/- for Assessment Year 2011-12; Rs.16,97,400/- for Assessment Year 2012-13 and Rs.12,60,000/- for Assessment Year 2013-14 as rental income and granted the assessee benefit of standard deduction of 30% for repairs; which resulted in additions of Rs.7,93,800/- for Assessment Year 2011-12; Rs.11,88,180/- for Assessment Year 2012-13 and Rs.8,82,000/- for Assessment Year 2013-14. In making these additions, the AO relied on the statements of Shri. Kashinath Khemsa Khode and his son Shri. Anil Kashinath Khode recorded at the time of survey. In addition thereto, in the orders of assessment for Assessment Years 2012-13 and 2013-14, the AO made disallowance of Rs.4,18,600/- for each of these 2 Assessment Years in respect of Excise Licence Fee paid and claimed by the assessee in his profit and loss account; holding that the assessee was not able to provide the challan for having paid the Excise licence fee.

2.4 Aggrieved by the orders of assessment; all dated 31.03.2016 for Assessment Years 2011-12 to 2013-14, the assessee filed appeals before the CIT(A), Hubli, raising several grounds contending that the aforesaid 2 additions/disallowances were unwarranted. The CIT(A), after hearing the assessee, dismissed the appeals for these three Assessment Years vide the impugned orders dated 31.08.2017; holding that, in respect of the additions made towards rent received for each of the three years, the notings in the impounded materials are unambiguous; are written in the normal course of business and that Shri. Anil Kashinath Khode who looks after the wine business had clearly deposed that the payments are nothing but payments of rent for the use of the liquor licence exploited by Shri. Kashinath Khemsa Khode. The CIT(A) also held that the statement denying the receipt of rental income by the assessee was an afterthought; that it was a self-saving statement and also that the subsequent statement of Shri. Kashinath Khemsa Khode was not reliable. The other disallowance of Rs.4,18,000/- in respect of excise licence fee for Assessment Years 2012-13 and 2013-14 was also upheld by the CIT(A).

3.1 The assessee, being aggrieved by the separate orders of CIT(A)- Hubli, all dated 31.08.2017 for Assessment Years 2011-12 to 2013-14, preferred these appeals before the Tribunal. Since common issues are involved in all three Assessment Years (as regards the addition in respect of rental income – except for change in the quantum of additions made), I am extracting and considering hereunder the grounds raised for Assessment Year 2012-13 for the purposes of adjudicating both the issues involved:

1. *The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

2. *The order of re-assessment u/s.147 of the Act, is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the re-assessment requires to be cancelled.*

3. *The learned CIT[A] is not justified in sustaining the addition of Rs.7,93,800/- made on the ground that the appellant had received rental income for allowing one Sri Kashinatha Khode to exploit the license held by the appellant from the Excise Department for running the liquor shop without appreciating that the appellant had denied the receipt of any such rent and had offered income from the business of running the liquor shop in the return of income filed for the year under appeal and hence, there was no occasion to receive any rent from Sri Kashinatha Khode under the facts and in the circumstances of the appellant's case.*

3.1 *The learned CIT[A] ought to have appreciated that Sri Anil Kashinatha Khode, who had initially stated that his father Sri Kashinatha Khode was paying rent for running the liquor shop of the appellant, had subsequently clarified his statement and filed an affidavit to this effect and he was also produced by the appellant before the learned A.O., who declined to examine him and thus, the clarification of Sri Anil Kashinatha Khode cannot be brushed aside as unreliable and the addition made on this basis is misconceived and the same deserves to be deleted.*

4. *Without prejudice to the above, the learned A.O. ought to have excluded the income returned by the appellant from the business of running the liquor shop consistent with his finding that the appellant was merely in receipt of rent from the said liquor shop being run by Sri Kashinatha Khode under the facts and in the circumstances of the appellant's case.*

5. *Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s. 234-A and 234-6 of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.*

For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

3.2 I have heard the rival contentions of both parties and perused and carefully considered the material on record.

4. Ground Nos. 1 and 6 (Assessment Year 2011-12)

Ground Nos. 1 and 7 (Assessment Years 2012-13 and 2013-14)

4.1 These grounds being general in nature, and not being urged before me, require no adjudication and are accordingly dismissed as infructuous.

5. Ground No. 5 (Assessment Year 2011-12)

Ground No. 6 (Assessment Years 2012-13 and 2013-14) – Charging of Interest u/s 234B and 234D of the Act

5.1 In these grounds, the assessee denies itself liable to be charged interest u/s 234B and 234D of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition is upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and therefore, the action of the AO in charging the said interest is upheld. The AO is, however, diverted to re-compute the interest chargeable u/s 234B and 234D of the Act, if any, while giving effect to these orders.

6. Ground No. 3, 3.1 and 4 – Addition on account of Rental income

6.1 In these grounds (supra), the assessee assails the additions made by the AO and sustained by the CIT(A) in respect of the alleged rent received by the assessee, based on the statement of Shri. Anil Kashinath Khode recorded in the course of survey conducted at the business of the Shri.Kashinath Khemsa Khode on 28.08.2014. In this regard, the learned AR of the assessee contended that the findings of the AO and CIT(A) are erroneous as their entire conclusions are based on the statement of

Shri. Anil Kashinath Khode recorded in the course of survey on 28.08.2014. It is submitted that in the re-assessment proceedings, Shri. Kashinath Khemesa Khode and his son Shri. Anil Kashinath Khode have filed sworn Affidavits dated 09.11.2015 before the AO explaining the correct factual situation. It was pointed out that in the Affidavits (copies placed at pages 55 to 58 of the paper book), it was explained that Shri. Anil Kashinath Khode was an employee of the assessee and that the amounts paid to the assessee was only to accumulate cash separately to pay the Excise Licence Fee, shipment and other expenses and therefore the amounts which were recorded in the impounded diaries were not paid as rent. It is also contended that the statement given by Shri. Anil Kashinath Khode on 28.08.2014 was completely denied both by Shri. Kashinath Khemesa Khode in his statement recorded in this regard on 17.03.2016 and Shri. Anil Kashinath Khode in his statement recorded on 18.03.2016. The aforesaid Affidavits dated 19.11.2015 and statements dated 17.03.2016 and 18.03.2016 were not confronted but just brushed aside by the AO/CIT(A). In support of the proposition that the Affidavits filed by Shri. Kashinath Khemesa Khode and Shri. Anil Kashinath Khode is a valid piece of evidence and cannot be ignored, the learned AR placed reliance on the decision of the Hon'ble Apex Court in the case of M/s. Mehta Parikh & Co., (30 ITR 181) (SC). According to the learned AR, the assessee was running the business of the Wine Store and not Shri. Kashinath Khemesa Khode as stated in the earlier statement dated 28.08.2014 of Shri. Anil Kashinath Khode. In this regard, it was further contended that the assessee has filed the returns of income for the aforesaid three Assessment Years declaring income from the business of purchase and sale of liquor in the name and style of M/s. Jayalaxmi Wine Centre and thus making an addition on account of rent on the very same business amounts to double taxation.

6.2 Per contra, the learned DR for Revenue submitted that the statement recorded from Shri. Anil Kashinath Khode in the course of survey on 28.08.2014 clearly states that the assessee was receiving daily rent and cannot be ignored as it is an important

piece of evidence. According to the learned DR, the subsequent Affidavits of Shri. Kashinath Khemsa Khode and Shri. Anil Kashinath Khode dated 19.11.2015 and statements dated 17.03.2016 and 18.03.2016 were only afterthoughts and the same ought not to be considered.

6.3 In rejoinder, the learned AR of the assessee submitted that the statement of Shri. Anil Kashinath Khode recorded on 28.08.2014 in the course of survey, has no evidentiary value and cannot be the sole basis for making an addition. In support of this proposition, the learned AR placed reliance on the decisions of the Hon'ble Delhi High Court in the case of CIT Vs. Dhingra Metal Works (328 ITR 384); CIT Vs. Khader Khan Son (2008) 300 ITR 157 (Mad), and submitted that the SLP filed by Revenue against the Hon'ble Madras High Court decisions (supra) was dismissed as reported in 254 CTR 228.

6.4.1 After having heard the rival contentions and carefully perused the material on record, I find that the said statement of Shri. Anil Kashinath Khode recorded during the survey on 28.08.2014 is the basis for re-opening the assessee's case for Assessment Years 2011-12 to 2013-14. It is also seen that the assessee was not confronted with the aforesaid statement of Shri. Anil Kashinath Khode in the course of survey or immediately thereafter and it is only in the course of assessment proceedings that the same was brought to this assessee's notice. As soon as the said statement was brought to the assessee's notice, both Shri. Kashinath Khemsa Khode and his son Shri. Anil Kashinath Khode filed Affidavits dated 19.11.2015 clarifying that the liquor business is carried on by the assessee and not by Shri. Kashinath Khemsa Khode. The books of M/s. Jayalaxmi Wine Centre are audited and the income derived from the business of sale/purchase of liquor have been offered to tax for the three Assessment Years under consideration.

6.4.2 I find force in the contentions of the assessee that the additions of rental income for Assessment Years 2011-12 to 2013-14 have been made basically on the statement of Shri. Anil Kashinath Khode given at the time of survey and that there are no other corroborative evidences brought on record to support the same. The entries in the diary found in the course of survey are admittedly not in the assessee's handwriting and the payment of rent to the assessee has also been denied by both Shri. Anil Kashinath Khode and his father Shri. Kashinath Khemsa Khode in Affidavits dated 19.11.2015, filed in the course of assessment proceedings. I have also perused the statement of the assessee recorded on 17.03.2016 and the statement of Shri. Kashinath Khemsa Khode recorded on 18.03.2016 recorded in the course of assessment proceedings; wherein they have completely denied that the assessee had received any rent from Shri. Kashnath Khemsa Khode for using the Excise Licence for carrying on the liquor business and the said statements corroborate the submissions in the Affidavits filed by Shri. Anil Kashinath Khode and Shri. Kashinath Khemsa Khode; all of which have been merely brushed aside by the authorities below as mere afterthoughts and as being unreliable without controverting the declarations made therein. It is settled position that Affidavit filed have evidentiary value and the same cannot be ignored; as has been held by the Hon'ble Apex Court in the case of M/s. Mehta Parikh & Co., Vs. CIT (30 iTR 181) (SC). Therefore, the Affidavits filed by Shri. Anil Kashinath Khode and Shri. Kashinath Khemsa Khode explaining the facts which has not been controverted by authorities below, cannot be disbelieved, ignored and brushed aside as an afterthought. In the case on hand, the facts on record indicate that the impounded diaries are not prepared by the assessee but by third party and there is no signature of the assessee to even remotely suggest that the assessee has been paid rent by Shri. Kashinath Khemsa Khode for carrying out liquor business under the Excise Licence of the assessee. While it is true that admission is an important piece of evidence; unless corroborated, it cannot be said to be conclusive and it is open to the person who has made the admission to show that it is incorrect; which in my considered opinion has been

successfully done in the case on hand. Before me, Revenue has failed to controvert the averments made in the Affidavits dated 19.11.2015 filed by the Khodes and the clarifications by the assessee and Shri. Kashinath Khemsa Khode and Shri. Anil Kashinath Khode in statements dated 17.03.2016 and 18.03.2016 respectively. In this factual matrix of the case, as discussed above, the additions made by the AO and upheld by the CIT(A) on account of Rent for Assessment Years 2011-12 to 2013-14 are hereby deleted. Consequently, ground Nos. 3 and 3.1 raised by the assessee in the appeals for Assessment Years 2011-12 to 2013-14 are allowed. Since the assessee succeeds on the main grounds of appeal for these three Assessment Years, the alternate ground No. 4 raised by the assessee is rendered academic and infructuous and is accordingly dismissed.

7. Ground No. 5 (Assessment Years 2012-13 and 2013-14)
- Disallowance of Excise Licence Fees paid

7.1 This ground raised by the assessee for Assessment Years 2012-13 and 2013-14 (supra) assails the disallowance made by the AO and upheld by the CIT(A) in respect of Excise Licence Fee paid of Rs.4,18,600/- each for both Assessment Years for want of challan. According to the learned AR, the said amounts have been paid to the State Government towards Excise Licence Fee without which the assessee could not have carried on his liquor business. It is further submitted that the assessee's accounts have been audited u/s 44AB of the Act and the amounts in question have admittedly been claimed in the assessee's accounts and therefore no disallowance can be made for want of challan. Copies of which are placed at pages 65 and 66 of paper books. It is prayed that the disallowances made be deleted.

7.2 Per contra, the learned DR supported the orders of the authorities below.

7.3.1 I have heard the rival contentions and perused the material on record. Copies of the challans for payment of Rs.4,18,600/- for Excise Licence for Assessment Years 2012-13, paid on 28.06.2011 and for Assessment Year 2013-14, paid on 26.06.2012 are placed on pages 65 and 66 of the paper book filed. Even otherwise, as the assessee's books of accounts have been audited u/s 44AB of the Act; copies of challans for payment of Excise Licence Fees to government are filed to corroborate the assessee's claims for such expenditure and the fact that the assessee admittedly carried on the business of sale of liquor during the impugned Assessment Years 2012-13 and 2013-14, I am of the view that the same is allowable expenditure. In the light of the aforesaid evidence and in this view of the matter, the disallowance of the expenditure on Excise Licence Fee made by the AO and sustained by the CIT(A) is factually unsustainable for Assessment Years 2012-13 and 2013-14 and therefore the same are deleted. Ground No. 5 raised by the assessee for Assessment Years 2012-13 and 2013-14 are allowed.

8. Ground No. 2

8.1 Since the assessee's grievances/grounds raised on the merits of the additions of rental income for Assessment Years 2011-12 to 2013-14 and disallowance of payments of Excise Licence Fees to the state government for Assessment Year 2012-13 and 2013-14 have been addressed by deleting the said additions/disallowances, ground No. 2 challenging the AO's assumption of jurisdiction u/s 147 / 148 of the Act is rendered academic and requires no adjudication at this stage.

9. In the result, the assessee's appeals for assessment years 2011-12 to 2013-14 are partly allowed as indicated above.

Order pronounced in the open court on this 5th day of December, 2018.

Sd/-

(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 5th December, 2018.

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Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.

TAXPUNDIT.ORG