

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON**

THURSDAY, THE 15TH DAY OF MARCH 2018 / 24TH PHALGUNA, 1939

I.T.A.No.377 of 2009

**AGAINST THE ORDER IN I.T.A.No.191/COCH/2005 DATED 30.06.2005
OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
(ASSESSMENT YEAR 1996-97)**

APPELLANT(S):-

THE COMMISSIONER OF INCOME TAX (CENTRAL), COCHIN.

**BY SR.COUNSEL FOR GOI (TAXES) SRI.P.K.R.MENON &
STANDING COUNSEL FOR GOI (TAXES) SRI.JOSE JOSEPH.**

RESPONDENT(S):-

**M/S.PARRISONS ROLLER FLOUR MILLS PVT. LTD.,
CHEROOTTY ROAD, CALICUT.**

**BY ADVS.SRI.E.K.NANDAKUMAR [SENIOR ADVOCATE]
SRI.P.GOPINATH..**

**THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 15-03-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-**

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEXURE A TRUE COPY OF THE RE-ASSESSMENT ORDER.

**ANNEXURE B TRUE COPY OF THE ORDER OF THE COMMISSIONER OF
INCOME TAX (APPEALS).**

**ANNEXURE C CERTIFIED COPY OF THE ORDER OF THE INCOME TAX
APPELLATE TRIBUNAL.**

ANNEXURE D TRUE COPY OF THE LETTER DATED 9.6.1999.

ANNEXURE E TRUE COPY OF THE REPORT DATED 20.5.1999.

**ANNEXURE F TRUE COPY OF THE ASSESSMENT ORDER DATED 30.03.1999
FOR THE ASSESSMENT YEAR 1996-97.**

RESPONDENT'S ANNEXURES:-

**ANNEXURE R1(a) TRUE COPY OF THE LETTER DATED 23.09.1998
SUBMITTED BY THE RESPONDENT BEFORE THE
ASSISTANT COMMISSIONER OF INCOME TAX, CALICUT
(WITHOUT ENCLOSURES).**

**ANNEXURE R1(b) TRUE COPY OF THE ORDER DATED 16.11.1998 ISSUED
BY THE DEPUTY COMMISSIONER OF INCOME TAX, '
CALICUT.**

**ANNEXURE R1(c) TRUE COPY OF THE THE ASSESSMENT ORDER DATED
30.03.1999 ISSUED UNDER SECTION 143(3) BY THE
DEPUTY COMMISSIONER OF INCOME TAX (APPEALS),
COCHIN.**

**ANNEXURE R1(d) TRUE COPY OF THE ORDER DATED 10.11.1999 ISSUED
BY THE COMMISSIONER OF INCOME TAX (APPEALS),
COCHIN.**

**ANNEXURE R1(e) TRUE COPY OF THE ORDER DATED 31.12.2003 IN I.T.A.
NO.104/COCH/2000 FOR THE YEAR 1996-97 ISSUED
BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN
BENCH.**

Vku/-

[true copy]

“C.R.”

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.No.377 of 2009

Dated, this the 15th day of March, 2018

JUDGMENT

Vinod Chandran, J:

The appellant-Revenue is aggrieved with the order of the Tribunal deleting the additions made on re-assessment proceedings, initiated under Section 147(1) of the Income Tax Act, 1956 (for brevity “the Act”). The proceedings were initiated within the six year period but beyond four years. Hence, necessarily there ought to have been either failure to make a return under Section 139 or failure to respond to a notice under Sections 142 or 148 or non-disclosure, fully and truly of material facts necessary for the assessment. The questions of law raised are the following:-

1. Whether, on the facts and in the circumstances of the case and also in the light of the reasoning, approach and conclusion reached by the Supreme Court in 203 ITR 456, the Tribunal is legally and factually correct in holding that the reassessment is without jurisdiction, illegal and time bared.

2. Whether, on the facts and in the circumstances of the case and really and factually the credits being bogus and the same being factually known to the Revenue only subsequent to the completion of the original assessment, the Tribunal is right in law and facts in interfering with the reassessment.

3. Whether, on the facts and in the circumstances of the case and factually and in reality the credits being bogus will not be the finding of the Tribunal in paragraph 27 that the 'the Assessee has produced every material before the Assessing Officer on the basis of which the Assessing Officer himself has concluded that the said six alleged bogus parties were registered dealers and some of the payments were made by cheques and some by cash" throw light on the ignorance and lack of knowledge of the Assessing Officer reached in the original assessment on the basis of the untrue material produced by the assessee?

4. Whether, on the facts and in the circumstances of the case the Tribunal is right in law and facts in interfering with the reassessment?

2. To buttress the contention of a change of opinion as also there being full disclosure of material facts the assessee respondent has produced Annexure R-I(c) original assessment order. Hence, the narration of facts should commence from that. A regular assessment was made under Section 143(3) as per Annexure R-I(c) computing a total income of Rs.42,48,320/-. There were certain dis-allowances made and what is relevant to the present appeal is the dis-allowance of 20% of the expenditure under Section 40A(3) on the ground that the payments were made in excess of Rs.20,000/- in cash and not by cheque or draft. The said dis-allowance has been over turned by the first appellate authority. Subsequently re-assessment proceedings were initiated

with respect to Rs.63,87,841- which were the payments made to six dealers allegedly from Tamil Nadu. This was included in the total dis-allowance made under Section 40A(3); which totalled Rs.2,03,05,505/- as seen from Annexure R-I(c).

3. A notice was issued under Section 148 and the same related to six specific payments made to six dealers being M/s: Sree Ram Chandan Traders, C.Subramaniam, Guruswami Commission Agents, Raghunath Traders, C.Gani & Co. and Barkath Stores. The reassessment was made on the basis of a report dated 26.9.1999 of the Income Tax Officer Tirupur, who had conducted enquiries about the said six dealers and found them to be non-existent. The assessee then was required to furnish the details of the dealers by a notice under Section 148. Later summons were issued under Section 31 of the Income Tax Act 1961. The said summons were also returned with the postal endorsement that no such addressee is available. The assessee also failed to produce any documents to prove that the said six dealers were actually existing dealers. The assessee contented that for reason of long lapse of time they were unable to produce any evidence to substantiate the payments having been made to

the said six dealers. Additions were made as per Annexure-A reassessment order adding on the said amounts to the total income which was successfully challenged in first appeal, by the assessee. The revenue took the matter in second appeal which was rejected by the Tribunal.

4. The learned Senior Counsel for the Revenue, Shri.P.K.Raveendranatha Menon relied on ***Phool Chand Bajrang Lal v. I.T.O. [(1993) 203 ITR 203]***. It was argued that there was non-disclosure fully and truly of material facts in so far as the assessee having shown in the books of accounts persons who were not in existence, as dealers from whom the assessee had purchased goods. There can also be no contention raised of change of opinion since there has been no finding on facts with regard to the existence of the six dealers and only on subsequent information received, the re-assessment proceedings were taken up for bringing to tax the income escaped assessment .

5. The learned Counsel appearing for the respondent, however, asserted that reassessment of the assessee in the subject year, is clearly a case of change of opinion and there could not be any allegation of non-disclosure fully and truly of

material facts. The learned Counsel would take us through the original assessment order and the Tribunal's order to indicate that there was a finding that the six dealers were registered dealers and existing in places where there were no banking facilities. It is also pointed out that the Assessing Officer in a letter addressed to the assessee, while the regular assessment proceedings were pending, as produced at Annexure R-I(b), had specifically called for the details regarding the sundry creditors and there is a presumption that the genuineness of the parties were accepted by the Assessing Officer. The learned Counsel would rely on two Full Bench decisions of the Delhi High Court in ***C.I.T. v. Kelvinator of India Ltd.*** [(2002) 256 ITR 1 (Delhi)] and ***C.I.T. v. Usha International Ltd.*** [(2012) 348 ITR 485 (Delhi)] as also the decision of the Hon'ble Supreme Court in ***Asst.CIT v. ICICI Securities Primary Dealership Ltd.*** [2012] 348 ITR 299.

6. The thrust of the arguments of the assessee is based on the original assessment order which is produced as Annexure R-I(c). Admittedly, there was a discussion between the Assessing Officer and assessee regarding the payments made otherwise than by cheque or drafts amounting to

Rs.2,03,05,505/-. The issue was discussed only in the context of the dis-allowance proposed under Section 40A(3). The assessee offered an explanation that the payments were made at places where no bank facility was available. However, the Assessing Officer found that there was no evidence furnished to show the absence of banking facilities. The specific reliance placed is on the statement. *“All the above payments have been made to a few registered dealers of wheat at Tamil Nadu and they are all located in towns with bank facilities” (sic-para-3 of Ann:R-1(c))*. Obviously, the finding of the Assessing Officer was on the submission of assessee that they were registered dealers and looking at their addresses, as supplied in response to Annexure R-1(b); which indicated the towns where there exist banking facilities.

7. It cannot be said that there was any enquiry on the aspect of the existence as such of the said six dealers or any other dealers to whom payments were made in excess of Rs. 20,0000/- by cash. The issue discussed was only with respect to the dis-allowance under Section 40A(3); of having paid amounts in excess of Rs.20,000/-, otherwise than by cheque; which was explained by the assessee to be for reason of lack of access to

banking facilities. We do not think that there is any finding or enquiry as to the existence or genuineness of the dealers to whom the payments were said to have been made.

8. The additions were deleted by the first appellate authority in an appeal from the regular assessment. It is based on the aforementioned statements made in the assessment order, that the Tribunal allowed the claim of the assessee affirming the order of the first appellate authority. The Tribunal has found that the Assessing Officer, at the time of original assessment had made detailed enquiries in respect of payments made to the six parties and made dis-allowances in respect of cash payments under Section 40A(3). We do not think such an enquiry was made at the time of assessment especially when the dis-allowance of 20% of expenses was for reason of the expenditure otherwise than by cheque or draft and not on any suspicion raised of the existence of the dealers.

9. There never arose a question of the genuineness or existence of the dealers, to whom such payments in cash were made at the time of regular assessment. What can be discerned from a reading of the assessment order, at best, is that the

Assessing Officer found the towns, in which the dealers were said to be existing, having proper banking facilities. The question to be decided was only as to whether there was any reason why the payments were made in cash and not by cheque or draft. This does not necessarily require an enquiry as to the genuineness of the dealers and the finding was only as against the contentions raised by the assessee that cash payments were necessitated only for the reason of there being no access to bank facilities. We do not think that the Tribunal was correct in arriving at a finding that detailed enquiries were made with respect to the dealers at the time of original assessment.

10. The Tribunal has noticed the report made by the ITO at Tirupur based on which the reassessment proceedings were initiated. The Tribunal has frowned upon the Assessing Officers delay in so far as action taken on the report of the ITO dated 26.09.1999; much later on 26.8.2002. We also see that there is considerable delay and if the reassessment proceedings were initiated immediately, then necessarily there would have been no question of non-disclosure, since then the action would have been justified, for mere escapement of income, without

anything more, within the limitation period of four years. However, if there is non-disclosure fully and truly of material facts for assessment purposes, then despite the fact that there was a delay occurred in acting upon the report; if the period of six years has not elapsed, the proceedings cannot fall foul on the aspect of delay or limitation. In the present case there is no ground that the period of six years have elapsed.

11. ***Phool Chand Bajrang Lal*** was almost on similar facts. The assessee-firm had claimed borrowings from a Calcutta Company of Rs.50,000/-, which was entered in its books of accounts. The I.T.O. completed the assessment for the subject years accepting the genuineness of the loan and allowing deduction of the interest. Thereafter on enquiry, the I.T.O. having jurisdiction to assess the Calcutta Company informed the assessee's I.T.O. that the Managing Director of the Calcutta Company had made a confession to the effect that the Company was only a name lender and had never advanced any loan to any person. Based on this information, proceedings were taken for re-assessment, which were upheld by the Supreme Court.

12. The reliance placed by the assessee is on two Full

Bench decisions of the Delhi High Court in ***Kelvinator of India Ltd.*** and ***Usha International Ltd.*** The question posed before the Full Bench was as to whether a mere change of opinion by the I.T.O. could lead to an action under Section 147 for reassessment. In ***Kelvinator of India Ltd.***, the reassessment was proposed *inter alia* seeking to disallow rent and depreciation, which were earlier allowed under Section 30 and 32 of the IT Act in regular assessment. The re-assessment was made confirming the addition of the rent and depreciation relying also upon the order of the Commissioner of Income Tax (Appeals) for the assessment year 1986-87, the previous assessment year. It was contended by the Department that the reassessment was also on the basis of the tax audit report. The Full Bench of the Delhi High Court found that the assessment was re-opened on 20.04.1990, whereas the first appellate authority's order was on 27.07.1990. In such circumstance, there was no possibility of the re-opening having been made on the basis of the first appellate authority's order, which was later to the re-opening. It was also found that the tax audit report was already available in the files and, hence, there could not have been a re-opening on that basis. While

setting aside the re-opening, a reservation was made in the following words:

“We, however, may hasten to add that if “reason to believe” of the Assessing Officer is founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act”.

In the present case, admittedly the re-opening was on the basis of the report of the I.T.O., Tirupur, which informed the Assessing Officer that the dealers to whom payments were said to have been made in cash, were bogus.

13. ***Usha International Ltd.*** laid down the following guidelines:

- “(1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.
- (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of “change of opinion”.
- (3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original

assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The assessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons”.

14. The Full Bench in ***Usha International Ltd.*** followed ***Kelvinator of India Ltd.***, which was upheld by the Supreme Court. The expression “change of opinion” was found to postulate formation of an opinion and then a change thereof. It was found that merely because an opinion was not expressed in the assessment order, that would not entitle the Assessing Officer to reopen it and contend that there is no change of opinion. It was held that, experience shows that the Assessing Officers do examine several aspects and raise queries, but when the written opinion is expressed in the form of an assessment order, there would be no discussion or elucidation on certain aspects and issues, which has been discussed with the assessee and held in the assessee's favour. The assessee is not the author of the

assessment order and, hence, he could not be held liable to only that which is specifically expressed in the assessment order, was the finding. However, if new facts, material or information comes to the knowledge of the Assessing Officer, which were not on record and available at the time of regular assessment, the principle of “change of opinion” was held to be not applicable. It was specifically held:

“Opinion” formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of “change of opinion” (sic).

In the instant case, the aforesaid dictum squarely applies. The Assessing Officer considered the expenditure of payments made to suppliers and a dis-allowance was made to the extent of 20%, wherein money transaction was made other than by way of cheque or draft. The explanation of the assessee that the suppliers did not have access to banking facility was specifically declined noting the address of the suppliers furnished by the assessee. There was no further enquiry made, which is evident from the assessment order. The re-assessment was on the basis of the report of the I.T.O., Tirupur pointing out that six dealers to

whom payments were said to have been made are bogus. The opinion formed for the purpose of dis-allowance to the extent of 20% was on incorrect facts and, hence, there is no infirmity in the re-assessment proceedings.

15. There is definitely acquisition of fresh information, specific in nature and reliable in character relating to the concluded assessment in the present case. The Income Tax Officer having jurisdiction over the area in which certain dealers to whom the assessee had made payments, were situated, had made enquiries and found that they were non-existent. This information of bogus dealers as supplied by the ITO having jurisdiction over the disclosed address of the dealers, was relied on by the Assessing Officer of the assessee to initiate reassessment.

16. On the issue of non-disclosure of fully and truly of material facts required for assessment, it has to be noticed that the dealer had supplied the details of persons who were non-existent, in the returns filed. The dealer had claimed purchases from the said non-existent persons as also entered in the books of accounts payments made to them, which were also

cash payments. The non-disclosure in the return, as also in the books of accounts, is insofar as the dealers having been shown as existing registered dealers to whom payments were made by the assessee in the course of their business. The non-disclosure germane to the facts herein was that the six dealers were bogus and there was in the regular assessment, no such question raised or enquiry conducted. We do not think that there was any reason for the first appellate authority or the Tribunal to interfere with the findings of the Assessing Officer. We reject the contentions of the assessee; both on the ground of change of opinion and on disclosure of true and material facts required for assessment. We answer the questions of law in favour of the Revenue and against the assessee.

The appeal is allowed. No costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

skv-vku/-

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