IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 9TH DAY OF JANUARY 2018 / 19TH POUSHA, 1939

ITA.No. 78 of 2016

AGAINST THE ORDER/JUDGMENT IN ITA 207/2015 of I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT(S)/APPELLANT/ ASSESSEE

DR.P.SASIKUMAR
"POOJASREE", VALIAPADAM P.O, CHOKKANATHAPURAM, PALAKKAD
678 005.

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN
SMT.DIVYA RAVINDRAN
SRI.V.V.VARGHESE

RESPONDENT(S)/RESPONDENT/REVENUE.:

THE COMMISSIONER OF INCOME TAX (CENTRAL)
5TH FLOOR, KANDAMKULATHY TOWER, M.G. ROAD, KARIKKAMURI,
SHENOYS, KOCHI 682 011.

R1 BY ADV. SRI.K.G.GOURI SANKAR RAI
R BY SRI.KMV.PANDALAI
SRI P K R MENON
SRI JOSE JOSEPH

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 09-01-2018, ALONG WITH ITA 79/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A: TRUE COPY OF THE ASSESSMENT ORDER DATED 27/30.07.2014 ISSUED BY THE ASSESSING OFFICER FOR AY-2007-08

ANNEXURE B: TRUE COPY OF THE ORDER OF THE CIT (APPEALS)iv IN ita nO.t-01 TO t-07/cit(a)-iv/12-13 DATED 22.01.21015 FOR AY-2007-08

ANNEXURE C: CERTIFIED COPY OF THE THE COMMON ORDER IN ITA NO.207/COCH/2015 DATED 09.02.2016 ISSUED BY THE ITAT, COCHIN BENCH FOR AY-2007-08

RESPONDENTS ANNEXURES :NIL

TRUE COPY

P.A TO JUDGE

jma

K. Vinod Chandran & Ashok Menon, JJ.

I.T Appeal Nos. 78 & 79 of 2016

Dated, this the 09th day of January, 2018

<u>J U D G M E N T</u>

<u>Vinod Chandran, J:</u>

The appellant is aggrieved with the penalty order, as modified by the First Appellate Authority, which has been confirmed in appeal by the Income Tax Appellate Tribunal. The question of law raised is as to whether the Tribunal was justified in sustaining the penalty under Section 271(1)(c), for the two assessment years; in the absence of any tangible material recovered in search and seizure forming the basis of addition on the ground of concealment of income. The additions were mere estimations and just as, the penalty with respect to the other years and a sizable quantum for these years, were deleted; so the balance too ought to have been deleted, argued learned Senior Counsel.

2. The assessment years are 2007-08 and 2008-09. The respective orders of penalty imposed an amount of Rs.4,18,627/- and Rs.4,23,111/- for the two years, the exact quantum of tax evaded; which was at the minimum as permitted. Annexure A is the order of penalty produced in both the appeals. The proceedings were taken for block assessment on the basis of a search and seizure operation under Section 132 of the Income Tax Act, 1961, conducted on 05.12.2007.

3. Additions were made by the Assessing Officer in the assessment, which were subjected to an appeal. Some modifications were made in the first appeal and later there were further modification made by the Tribunal. On the basis of the Tribunal's order and the additions sustained by the Tribunal, the Assessing Officer invoked the powers under Section 271(1)(c)

for imposition of penalty; which are the orders impugned here. We are informed that the Revenue filed a further appeal from the order of the Tribunal in which certain additions deleted by the Tribunal were restored by the High Court. However, the consideration of the present appeal stands unaffected by the High Court's orders since the additions which were restored have not been dealt with in the present penalty orders. The assessse did not take up a further appeal from the Tribunal's order and the additions sustained by the Tribunal has attained finality, on which, presently the penalty is imposed.

4. For the assessment years 2007-08, the additions sustained in Second Appeal by the Tribunal were (i) Rs.8,48,400/- as profit from surgery and sale of lenses, (ii) Rs.1,88,250/- being excess salary to employees claimed by the

assessee and (iii) Rs.2,07,033/- the expenses claimed on consumable medicines disallowed by the Assessing Officer. Similarly in the year 2008-09 the respective additions on the very same heads were (i) Rs.8,70,000/-, (ii) Rs.1,88,250/- and (iii) Rs.1,86,745/-.

5. Penalty orders were issued in all the years right from 2002-03 to 2008-09 by the Assessing Officer. Appeals were filed against the penalty orders as produced in the present revision, of the two years and also the other five years before the first appellate authority. The penalty on additions made with respect to excess salary paid to employees and dis-allowance of expenditure on consumable medicine were deleted by the first appellate authority on the ground that they were mere estimates by the Assessing Officer as sustained and modified by the

Tribunal. The additions made in 2002-03 to 2006-2007 also were such estimates which also stood deleted. Eventually by Annexure B appellate order in the seven appeals, what was sustained is only the penalty imposed with respect to the additions made on account of receipt from surgery and sale of lenses, that is Rs.8,48,400/- in the year 2007-08 and Rs.8,70,000/- in the year 2008-09.

6. The learned Senior Counsel would contend that even the said addition is based on an estimate. The sale of lens was found to have generated a profit of Rs.1800/- per lens. The assessee was found to have conceded only very low profit on the sale of lens. The Tribunal found that the price of lens ranged between 100 to 1800 and the average profit could be only 30% of the sale value. The learned Senior Counsel for the Department

would contend that this was not based on mere estimation but was on the basis of the deposition of the assessee and their suppliers.

7. We see from Annexure B order that the order of the Tribunal sustaining the said additions were extracted by the first appellate authority. The assessee on a question being posed to him, admitted that there was some profit margin on sale of PMMA lenses, which was not conceded. The supplier of such lens one M/s. J.N. Surgi Cure; the proprietor of which was examined also could not give any convincing explanation with regard to the selling price of PMMA lens. It was hence the Assessing Officer found that there was a profit element in the sale of lenses which was concealed by the assessee. It was to that extend, the additions were made by the Assessing Officer which

was reduced considerably and confined to 30% of sale price.

8. We are of the opinion that the additions made is not on a mere estimation. Only on the search and seizure and the subsequent statement from the assessee conceding a profit margin, not clearly stated that the addition was made by the Assessing Officer. Neither the assessee nor their supplier could offer a satisfactory explanation for the low profit conceded of the sale of lenses. This is the incriminating evidence which was revealed on the proceedings pursuant to search and seizure that led to the addition. It cannot be said that the same is a mere estimation. We hence sustain the Tribunal's order. However, we make it clear that the Assessing Officer has to redo the penalty and impose it only to the extend of the tax evasion with respect to the additions of Rs8,48,400/- and Rs.8,70,000/- in the respective

years. The tax evaded on that component of addition with respect to the profit derived on lens, would be the penalty, which is at the minimum as permitted in Section 271(1).

Income Tax appeal is rejected answering the question raised on sustenance of penalty to the extent confirmed by the Tribunal, in the affirmative and against the assessee. No costs.

Sd/-
K.VINOD CHANDRAN
Judge

Sd/-
ASHOK MENON
Judge

jma/-

//true copy//

P.A to Judge