IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 31ST DAY OF JANUARY 2019 / 11TH MAGHA, 1940

ITA. No.211 of 2010

AGAINST THE ORDER IN ITA NO.827/2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH DATED 25-09-2009

APPELLANT/APPELLANT:

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT:

M/S.CORDIAL COMPANY
NARAYANA BHAVAN,
TC-9/2196, KURUP'S LANE, SASTHAMANGALAM,
THIRUVANANTHAPURAM.

BY ADVS.
SMT. NIVEDITA A.KAMATH
SRI.ANIL D. NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 31.01.2019, ALONG WITH ITA NOS.226/2010 & 366/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 31ST DAY OF JANUARY 2019 / 11TH MAGHA, 1940

ITA. No.226 of 2010

AGAINST THE ORDER IN ITA NO.755/2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH DATED 25-09-2009

APPELLANT/APPELLANT:

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT:

M/S.CORDIAL COMPANY
NARAYANA BHAVAN,
TC-9/2196, KURUP'S LANE, SASTHAMANGALAM P.O.,
THIRUVANANTHAPURAM.

BY ADVS.
SMT. NIVEDITA A.KAMATH
SRI.ANIL D. NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 31.01.2019, ALONG WITH ITA NOS.211/2010 & 366/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 31ST DAY OF JANUARY 2019 / 11TH MAGHA, 1940

ITA. No.366 of 2010

AGAINST THE ORDER IN ITA NO.824/2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH DATED 25-09-2009

APPELLANT/APPELLANT:

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT:

M/S.CORDIAL COMPANY
NARAYANA BHAVAN,
TC-9/2196, KURUP'S LANE, SASTHAMANGALAM,
THIRUVANANTHAPURAM-695 010.

BY ADVS.
SMT. NIVEDITA A.KAMATH
SRI.ANIL D. NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 31.01.2019, ALONG WITH ITA NOS.211/2010 & 226/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

K. Vinod Chandran, J.

These income tax appeals are connected for reason of the respondent-assessees being sister concerns having more or less the same partners. The issue in ITA Nos.211 and 366 of 2010 relating respectively to M/s.Cordial Company and M/s.Cordial Developers, is with respect to undisclosed investment found on the basis of documents recovered in search of one another firm's premises. The investment was said to be on account of purchase of certain landed properties for the purpose of building multistoreyed complexes in a project named Cordial Regency. Assessment was made on M/s.Cordial Developers and on a protective basis, it was made on M/s.Cordial Company, both of which were set aside by the first appellate authority, which order stood confirmed by the Income Tax Appellate Tribunal.

2. The questions of law are re-framed as follows:

(1) Whether, on the facts and in the circumstances of the case, the document recovered on search can be presumed to be true and correct under Section 292C of the Income Tax Act, 1961 (Act for short)?

(2) Has not the Tribunal committed an error insofar as putting the burden of proof on the Department?

(3) Whether the first appellate authority erred in not having remanded the matter to the Assessing Officer in the context of fresh materials, by way of sale deeds with reference to which the undisclosed investments were found, having been produced by the assessee before the first appellate authority?

3. The proceedings were a direct consequence of the search conducted in the business premises and the residential houses of the partners of one M/s.Artech Group which had close connections with the assessee-firms. One

of the partners of M/s.Artech Group was also a partner in the assessee-firms. Documents were recovered in the search conducted in that other firm which related to the assessee-firms as also its partners. On the basis of those documents, notice was issued under Section 153C read with Section 153A. The assessee's first failed to respond, but however later on, on a subsequent notice, filed a nil return.

4. The Assessing Officer (AO) found that the documents recovered showed both black and white payments having been made to M/s.Artech Group, obviously in pursuance of the purchases made of landed properties for the purpose of the assessees' project, M/s.Cordial Regency. The AO found that there were entries in the books of accounts and the bank statements with respect to the amounts shown as white. The AO also found that the documents had handwritten recitals which tallied with the

handwriting of one of the partners of the assessee-firms being Sri.N Ayyappan Unnithan. The AO, hence, made an addition of Rs.80,34,100/- as undisclosed investments under Section 69. Notice was initially issued under Section 68, proposing addition of unexplained credits; but eventually the additions were made under Section 69 as undisclosed investments. There was a further addition made of Rs.7,48,750/-, which was a cheque payment made by one of the assessee-firms to T.S.Asok, one of its partners, which was said to be refund of advance paid on a property. The same was added on as unexplained credit.

5. The learned Standing Counsel, Government of India (Taxes) would contend that the white payments corresponding to the black payments as found from the documents were very evident from the books of accounts and the bank

statements. Section 292C is also relied on to contend that there is a presumption in favour of the Department, insofar as the documents recovered on search, and hence it was for the assessee-firms to specifically prove that there never was an investment in excess of that shown in their books of accounts. It is also argued that the assessee-firms had never challenged the documents as such and their contention was merely that there were no investments made as seen from the said documents.

6. The learned counsel for the assessee, however, would submit that there was absolutely no material as disclosed from the order of the assessing authority to corroborate the documents recovered from that another firm. It is also pointed out that the assessee themselves have voluntarily produced the sale deeds with respect to the transactions revealed from their books of accounts before the first

appellate authority. The sale deeds were executed in three different years while the assessments were carried out only in the year 2005-06. It is argued that there is absolutely no question of law arising from the order of the Tribunal. It is also pointed out that the first appellate authority had, in fact, called for a remand report from the AO and then set aside the additions made.

7. Having gone through the assessment orders, we cannot but agree with the appellate authority that there is absolutely no corroborative evidence disclosed from the said orders. The proposal as extracted in the assessment orders would indicate that the AO had been relying on certain handwritten notes made by one of the partners of the assessee-firms (Sri.Ayyappan Unnithan) as an evidence against the assessee-firms. However, it is not clear as to what was the admitted handwritten

document, which was verified by the AO to find that the documents seized from another firm showed the handwriting of one of the partners of the assessee-firms. The learned Standing Counsel would argue that such strict rules of evidence may not apply in the case of assessment for income tax. We do not find any strict rule being applied herein, since what we have indicated is only the fundamental aspect which has to be verified when a handwriting is said to be of one of the partners of the assessee-firms. It has to be verified necessarily from an admitted document, where the handwriting of that partner appears. The learned Standing Counsel has referred to the document produced along with ITA No.366/10 as Annexure-A3 which is a cheque said to have been issued by the said partner. However we do not see any cross verification having been made by the AO with Annexure-A5 notes produced along

with ITA No.366/10, as evident from the assessment orders. It is trite that the Revenue cannot supplement reasoning, by a counter-affidavit or arguments addressed directly; which does not find a place in the order of the AO.

8. Further, the AO has also categorically stated that the payments shown as white have been disclosed in the books of accounts. The assessee-firms admit to such payments and also have produced some documents relating to the transactions before the first appellate authority. At least when a remand report was called for, it was only proper for the AO to have verified the fair price as fixed under the Kerala Stamp Act, 1959. Though we agree with the learned Standing Counsel that at times no purpose would have been served by issuing notice to the sellers themselves, that was also a mode of verification, which the AO

had not resorted to. It cannot also be said that in all instances the sellers would support the purchasers. We cannot, nor can the A.O assume that the sellers or their circumstances, would not disclose payments having been made in excess of that shown in the sale deeds.

9. Again we also observe that the specific bank transactions referred to by the AO, have not been cross verified with the exact amounts shown as investments in the documents seized from M/s.Atech Group. We cannot but find that the assessment has been carried out in a slip-shod manner especially noticing the fact that the firm and the partners individually are seen to have made investments in black in the document recovered from that other firm. There are no proceedings taken against the partners individually. But however, a protective assessment has been made in the

name of one another firm, where the partners are almost identical.

10. Section 292C speaks of a presumption insofar as books of accounts, other documents, money, bullion, jewellery or other valuable article or thing recovered in the course of a search under Section 132 or survey under Section 133A; as belonging to such person whose premises were searched and the contents of such books of accounts and other documents as being true. This presumption would essentially apply against the person in whose premises the search is conducted and there should be something more insofar as an assessment against any other person on the basis of the documents recovered in search from that person whose premises was searched. The initial burden necessarily has to be discharged by the department especially when the additions are proposed on one, other than the person

whose premises were searched from where the documents were recovered.

11. As to the addition made of Rs.7,48,750/- the assessee had no satisfactory explanation was the finding of the A.O. The fact that the amounts were paid to Sri. T.S.Asok by way of cheque was admitted by the assessee firm. The explanation was that it was refund of excess amounts paid by the said Asok. The A.O found that if the transaction was a legitimate one the credit and the debit would both be disclosed in the accounts. Here the payment alone was reflected in the accounts of the assesssee. The explanation offered by the assesssee as to the credit was not credible and hence disbelieved by the A.O. The first appellate authority rightly found that the cheque payment was a debit as seen from the accounts of the assessee and there was no reason to assume an unexplained credit. We

perfectly agree with that and find no question of law arising therefrom.

12. The first two questions of law has to be answered against the Revenue and in favour of the assessee. Insofar as the first appellate authority having not remanded the matter, on facts it is seen that the first appellate authority specifically called for a remand report from the AO; along with the documents produced by the assessee-firms before the first appellate authority. The AO even then did not carry out a proper enquiry. We, hence, find that the third question of law does not arise at all from the order of the Tribunal.

13. I.T.A. Nos.211 & 226 of 2010 are filed with the Cordial Company as the respondent-assessee. In addition to the questions already answered in favour of the assessee in I.T.A.

No.211 of 2010, there is one another question arising, with respect to the addition made on a regular basis against the assessee firm. The question of law, as we noticed earlier is, similar and is on application of Section 292C of the Act. We would not frame a seperate question since it is identical to that framed as (i) in the other appeals.

14. Pursuant to the search conducted in Artech group, certain documents were recovered and a search was conducted also in the business premises of Cordial Company. Based on certain documents recovered from the assessee firm, an addition of Rs.64,22,800/- was made. The addition made were with respect to the undisclosed income, which is the balance consideration received from five purchasers of apartments in the assessee firm's project 'Cordial Tower'. Against the addition, the assessee was in appeal before the First Appellate Authority. One of the purchasers

gave a confirmation letter that there was no such additional amount given in cash. The First Appellate Authority deleted the addition made of Rs.40 lakhs with respect to that purchaser, by name Smt.Valsala Raj. The addition with respect to the other four purchasers were confirmed.

15. Both the Revenue and the assessee were in appeal before the Tribunal. The Tribunal set aside the entire addition on the ground that there was absolutely no corroborative evidence to find any additional sum having been received by the assessee firm.

16. Here we find Section 292C of the Act to be squarely applicable, since the document relied on was with respect to the assessee firm itself. One of the seized documents A34 [page 33 and page 4] showed that Smt.Valsala Raj paid Rs.40 lakhs by cash and the actual purchase price of the flat was Rs.1,33,06,300/-. The actual price was evidenced by seized document [A33 page

72], which is a printed sheet giving the details regarding payments received for flat booking of Cordial Tower. In that particular sheet, the amount received by cheque is clearly shown and the balance to be received is worked out. From the initial balance amount shown outstanding of Rs.59,21,300/-, an amount of Rs.40 lakhs was subtracted and the balance shown is Rs.19,21,300/-. Similar workings were seen in the case of the other four persons also. The total of the amounts subtracted in each of the 5 purchasers came to Rs.64,22,800/-. The figures tallied to the last pie. These were the documents recovered from the asessee's premises and there is presumption in so far as such documents, which squarely applies as against the assessee under Section 292C of the Act.

17. The statement made by one of the purchasers, we find, is a self serving statement, which would not dispel the fact of receipt, of

excess amounts, evidenced by documents recovered from the assessee's premise itself. On the specific transactions for which addition was made of Rs.64,22,800/- and the documents relied on by the Department, we answer the question framed in favour of the Revenue and against the assessee. The order of the Tribunal, deleting Rs.64,22,800/-, is set aside and the order of the Assessing Officer, making such addition, is restored.

18. I.T.A. No.366 of 2010 would stand rejected. I.T.A. No.226 of 2010 is allowed. I.T.A. No.211 of 2010 is partly allowed.

Sd/-

K. VINOD CHANDRAN,
JUDGE.

Sd/-

ASHOK MENON,
JUDGE.

sp/01/02/19 **//True Copy//**

P.A. To Judge

APPENDIX OF ITA NO.211/2010

PETITIONER'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE ORDER U/S. 153 A READ WITH SECTION 143(3) OF THE ASSESSING OFFICER DATED 24.12.2007.**
ANNEXURE B	**TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 09/04/2008.**
ANNEXURE C	**TRUE COPY OF THE ORDER OF THE APPELLATE TRIBUNAL DATED 25/09/2009.**

APPENDIX OF ITA NO.226/2010

PETITIONER'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE ORDER U/S 153A READ WITH SECTION 143(3) OF THE ASSESSING OFFICER DATED 24/12/2007.**
ANNEXURE B	**TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX [APPEALS] DATED 09/04/2008.**
ANNEXURE C	**TRUE COPY OF THE ORDER OF THE APPELLATE TRIBUNAL DATED 25/09/2009.**

APPENDIX OF ITA NO.366/2010

PETITIONER'S EXHIBITS:

ANNEXURE-A	TRUE COPY OF THE RELEVANT SHEETS OF SEIZED MATERIAL ANNEXURE A63 & ATVI.
ANNEXURE-B	TRUE COPY OF THE RELEVANT SHEET OF SEIZED MATERIAL IN ANNEXURE A 108.
ANNEXURE-C	TRUE COPY OF THE ASSESSMENT ORDER U/S. 153A OF THE ASSESSING OFFICER DATED 21/12/2007.
ANNEXURE-D	TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 08/04/2008.
ANNEXURE-E	TRUE COPY OF THE APPEAL MEMORANDUM.
ANNEXURE-F	TRUE COPY OF THE ORDER OF THE ITAT DATED 23/04/2010.
ANNEXURE-A	TRUE COPY OF THE RELEVANT SHEETS OF SEIZED MATERIAL ANNEXURE A63 & ATVI.
ANNEXURE-B1	TRUE COPY OF THE RELEVANT SHEET OF SEIZED MATERIAL IN ANNEXURE A 108.
ANNEXURE-B2	TRUE COPY OF THE RELEVANT SHEET OF SEIZED MATERIAL IN ANNEXURE A 108.
ANNEXURE-C	TRUE COPY OF THE ASSESSMENT ORDER U/S. 153A OF THE ASSESSING OFFICER DATED 21/12/2007.
ANNEXURE-D	TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 08/04/2008.
ANNEXURE-E	TRUE COPY OF THE APPEAL MEMORANDUM.
ANNEXURE-F	TRUE COPY OF THE ORDER OF THE TRIBUNAL DATED 23/04/2010.