

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 7TH DAY OF DECEMBER 2016/16TH AGRAHAYANA, 1938

WP(C).No. 11002 of 2014 (A)

PETITIONER :

**M/S. PALAKKAD DIST. CO-OPERATIVE BANK LTD.,
HEAD POST OFFICE ROAD, SULTHANPET, PALAKKAD,
REPRESENTED BY ITS GENERAL MANAGER,
SMT. SEETHADEVI.**

BY ADV. SRI.A.KUMAR

RESPONDENT(S):

- 1. ADDITIONAL COMMISSIONER OF INCOME TAX
PALAKKAD RANGE, PALAKKAD- 678 001.**
- 2. ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE-I, AAYKAR BHAVAN, ENGLISH CHURCH ROAD,
PALAKKAD-678 014.**

**BY SRI.P.K.RAVINDRANATHA MENON,SR, SC,
SRI.JOSE JOSEPH, SC,**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 03-08-2016, THE COURT ON 07-12-2016 DELIVERED
THE FOLLOWING:**

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APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT-P1: A TRUE COPY OF THE RETURNS FOR THE ASSESSMENT YEAR 2007-2008 DATED 1.6.2013.**
- EXHIBIT-P2: TRUE COPY OF THE ORDER PASSED UNDER SECTION 143(3) FOR THE ASSESSMENT YEAR 2007-08 DATED 31.12.2009.**
- EXHIBIT-P3: TRUE COPY OF THE RECTIFICATION ORDER FOR THE ASSESSMENT YEAR 2007-08 DATED 15.3.2010.**
- EXHIBIT-P3(A): TRUE COPY OF THE RECTIFICATION ORDER FOR THE ASSESSMENT YEAR 2007-08 DATED 14.3.2011.**
- EXHIBIT-P4: TRUE COPY OF THE NOTICE DATED 24.9.2012 FOR THE ASSESSMENT YEAR 2007-08.**
- EXHIBIT-P5: TRUE COPY OF THE OBJECTIONS FILED BY THE PETITIONER DATED NIL.**
- EXHIBIT-P6: TRUE COPY OF THE NOTICE ISSUED BY THE 1ST RESPONDENT DATED 27.3.2013.**
- EXHIBIT-P7: TRUE COPY OF THE REQUEST OF THE PETITIONER DATED 6.4.2013.**
- EXHIBIT-P8: TRUE COPY OF THE COMMUNICATION ISSUED BY THE 1ST RESPONDENT DATED 29.7.2013.**
- EXHIBIT-P9: TRUE COPY OF THE REPLY DATED 16.12.2013 OF THE PETITIONER.**
- EXHIBIT-P10: TRUE COPY OF THE RETURN FILED BY THE PETITIONER FOR 2008-09 TOGETHER WITH COMPUTATION STATEMENT DATED 27.3.2009.**
- EXHIBIT-P11: TRUE COPY OF THE ASSESSMENT ORDER FOR 2008-09 DATED 31.12.2010.**
- EXHIBIT-P12: TRUE COPY OF THE NOTICE DATED 13.8.2012.**
- EXHIBIT-P13: TRUE COPY OF THE OBJECTIONS FILED BY THE PETITIONER DATED NIL.**
- EXHIBIT-P14: TRUE COPY OF THE NOTICE ISSUED UNDER SECTION 148 FOR THE ASSESSMENT YEAR 2008-09 DATED 26.3.2013.**
- EXHIBIT-P15: TRUE COPY OF THE PETITIONER'S COMMUNICATION DATED 6.4.2013.**

WP(C).NO.11002/2014

EXHIBIT-P16: TRUE COPY OF THE COMMUNICATION OF THE 2ND RESPONDENT DATED 29.7.2013.

EXHIBIT-P17: TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER DATED 16.12.2013.

EXHIBIT-P18: TRUE COPY OF THE JUDGMENT IN WPC NO.7627/2014 DATED 26.3.2013.

EXHIBIT-P19: TRUE COPY OF THE ASSESSMENT ORDER PASSED FOR 2007-08 DATED 28.2.2014.

EXHIBIT-P20: TRUE COPY OF THE ASSESSMENT ORDER PASSED FOR 2008-09 DATED 28.2.2014.

EXHIBIT-P21: TRUE COPY OF THE JUDGMENT OF THE DIVISION BENCH OF THE HON'BLE DELHI HIGH COURT IN SAK INDUSTRIES PVT. LTD.VS. DEPUTY COMMISSIONER OF INCOME TAX IN WPC NO.7933/2010 DATED 16.2.2012.

EXHIBIT-P22: COPY OF THE JUDGMENT OF THE DIVISION BENCH OF THE GUJARAT HIGH COURT IN VISHWANATH ENGINEERS VS. ASSISTANT COMMISSIONER OF INCOME TAX REPORTED IN (2013) 352 ITR 549 (GUJ).

EXHIBIT-P23: COPY OF THE JUDGMENT OF THE BENCH OF THE GUJARAT HIGH COURT IN GARDEN FINANCE LTD. VS. ASSISTANT COMMISSIONER OF INCOME TAX REPORTED IN 188 CTR (GUJ) 316.

EXHIBIT-P24: COPY OF THE JUDGMENT OF THE BOMBAY HIGH COURT IN TALATI & PANTHAKY ASSOCIATED PVT LTD VS. DEPUTY COMMISSIONER OF INCOME TAX REPORTED IN 2014 (3) TMI 223.

EXHIBIT-P25: COPY OF THE JUDGMENT OF THE DIVISION BENCH OF THE HON'BLE DELHI HIGH COURT IN THE MATTER OF COMMISSIONER OF INCOME TAX VS.JAGAT NOVEL EXHIBITORS (P)LTD. (REPORTED IN 2012 (2) TMI-121).

EXHIBIT-P26: COPY OF THE NOTICE DATED 11/3/2014

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.S.TO JUDGE

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“C.R.”

A.M. SHAFFIQUE, J.

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W.P. (C) No. 11002 of 2014

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Dated this, the 7th day of December, 2016

J U D G M E N T

This writ petition is filed challenging Exts.P6, P14, P8, P16, P19 and P20 and for a direction to the respondents not to realise the amounts covered by Exts.P19 and P20 assessment orders.

2. The short facts involved in the writ petition would disclose that the petitioner, a Co-operative Bank, being an assessee under the 2nd respondent for the purpose of income tax, filed its return of income for the years 2007-08 and 2008-09. Petitioner's case was selected for scrutiny by issuance of intimation under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) which was later completed under Section 143(3). Subsequently, a rectification order dated 15/3/2010 was passed and thereafter another rectification order dated 14/3/2011 relating to correction of assessee's status was also passed. Thereafter, as per notice dated 24/9/2012, the order was again sought to be rectified alleging that the Bank had debited in the profit and loss account certain figures as reserve for bad and doubtful debts which claim was allowed as per

Section 36(1)(viia) of the Act. Ext.P4 is the said notice. Petitioner filed its objection *inter alia* contending that Co-operative Banks are entitled for such deduction at 7.5% of gross total income plus 10% of the aggregate average advances made by the rural branch of the Bank. In the meantime, it seems that 1st respondent issued a notice dated 27/3/2013 under Section 148 stating that the officer has reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147. Ext.P6 is the said notice. Petitioner submitted a reply to issue a copy of the reasons recorded for invoking Section 148. The 1st respondent by Ext.P8 dated 29/7/2013 informed the petitioner that the petitioner claimed a deduction as provision for bad debts at the rate of 10% of the aggregate average advances made by rural branches, whereas the petitioner does not have rural branches qualifying for such deduction. Ext.P8 is the said communication. Petitioner again filed objection.

3. With reference to assessment year 2008-09 also, similar notice had been issued. Ext.P14 is the notice dated 26/3/2013 under Section 148 for which the petitioner sought for reasons for re-opening the assessment and by Ext.P16, a similar

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set of reasons were given. Ext.P16 is the communication dated 29/7/2013 from the 2nd respondent. Petitioner submits that detailed objections were given to Exts.P8 and P16. However, assessment orders were passed for the year 2007-08 as Ext.P19 and for the year 2008-09 as Ext.P20.

4. The main contention urged by the petitioner is that the reasons furnished under Exts.P8 and P16 do not constitute sufficient grounds for sustaining the reopening of assessment under Section 147. For the same reason, Exts.P19 and P20 assessment orders are bad in law. It is contended that though detailed objection was filed to the reason stated in Exts.P8 and P16, without passing any order as held by the Apex Court in ***GKN Driveshafts (India) Ltd. v. Income Tax Officer*** [(2002) 174 CTR (SC) 577], Exts.P19 and P20 orders were passed. It is further contended that when assessment under Section 143(3) has been completed and all details were explicitly available in the computation sheet filed along with the return of income and there is no lack of disclosure, a situation for reopening assessment does not arise. Further, notices for rectification of the proceedings itself were pending and without disposing of the same, further

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steps under Section 148 could not have been taken. It is contended that the only allegation in the notice is that while completing scrutiny assessment, the assessee have made wrong and excessive claim of deduction under Section 36(1)(viia) of the Act. It is contended that when the assessee had disclosed all the material facts necessary for assessment, then the question of the assessee not disclosing material facts fully and truly does not arise.

5. Statement has been filed by learned standing counsel on behalf of the 2nd respondent. It is *inter alia* contended that while completing scrutiny assessment of the assessee for the year 2010-11, it was found that the assessee bank does not have any rural branches as defined in explanation (ia) to Section 36(1)(viia) of the Act. During the year 2007-08 and 2008-09 as well, the assessee had wrongly claimed the same deduction under Section 36(1)(viia) of the Act at the rate of 10% of the aggregate average advances made in rural branches when the Bank does not have any rural branches. It is further contended that proceedings under Section 154 of the Act was not considered to be proceeded further since it was not a mistake apparent from the records

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whereas it was a case of escapement of income by wrong claims made by the assessee which subsequently came to the notice of the department. The respondent therefore submitted that, even on facts, materials were available for invoking Section 148 and a decision had been taken taking into account all factual circumstances. Further, the assessment orders are appealable and all questions raised by the petitioner can as well be decided in the appeal and there is no reason to invoke the jurisdiction of this Court under Art.226 of the Constitution of India.

6. Heard the learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent.

7. Learned counsel for the petitioner placed reliance on the following judgments:-

(i) ***GKN Driveshafts (India) Ltd. v. ITO & Others*** [(2002) 174 CTR (SC) 577]

(ii) ***IOT Infrastructure & Energy Services Ltd v. Assistant Commissioner of Income Tax & another*** [(2010) 329 ITR 547] (Bom.)

(iii) ***Travancore Cements Ltd v. Asst.Commissioner of Income Tax & another*** [(2008) 305 ITR 170] (KER)

(iv) ***Tolins Rubbers v. Assistant Commissioner of Income Tax*** [(2004) 270 ITR 280] (KER).

(v) ***Techspan India (P) Ltd and another v. Income Tax Officer*** [(2006) 283 ITR 212] (Delhi)

(vi) ***Sahara India Commercial Corporation Ltd v. Deputy Commissioner of Income Tax*** [(2006) 284 ITR 295] (Cal.)

(vii) ***3 Infotech Ltd v. Assistant Commissioner of Income Tax*** [2010 (6) TMI 372] (Bom)

(viii) ***Commissioner of Income Tax v. Popular Kuries Ltd*** [(1995) 214 ITR 38] (KER)

(ix) ***IL& FS Investment Managers Ltd v. Income Tax Officer & Others*** [(2008) 298 ITR 32 (Bom)

(x) ***Comunidado of Chicalim v. Income Tax Officer, Goa and Others*** [(2001) 10 SCC 209]

(xi) ***Ranjit Projects Pvt. Ltd v. Deputy Commissioner of Income Tax*** (2014 (4) TMI 123 (Gujarat High Court)

(xii) ***Duli Chand Singhania v. Assistant Commissioner of Income Tax*** [(2004) 188 CTR 90]

(xiii) ***Universal Subscription Agency (P) Ltd v. Joint***

Commissioner of Income Tax [(2007) 207 CTR 62].

(xiv) **Western Outdoor Interactive (P) Ltd v. A.K.Phute, Income Tax Officer and Others** [(2006) 206 CTR 404].

8. On the other hand, learned standing counsel appearing for the department placed reliance upon the following judgments:-

(i) **NA Malbary and Bros. v. Commissioner of Income Tax, Bombay North** [1964 (L1) ITR 295].

(ii) **Kantamani Venkata Narayana and Sons v. First Additional Income-Tax Officer, Rajahmundry** [1967 (LXIII) ITR 638]

(iii) **Bihar State Road Transport Corporation v. Commissioner of Income Tax Bihar and Others** [1976 (103) ITR 736].

(iv) **Phool Chand Bajrang Lal and another v. Income Tax Officer and another** [1993 (203) ITR 456].

(v) **Commissioner of Income Tax v. Popular Vehicles and Services Ltd.** [2010 (191) Tax Man 333].

(vi) **Commissioner of Income Tax v. Sairabanu** [1993

(203) ITR 145]

(vii) **Commissioner of Income Tax. v Kerala State Cashew Development Corporation Ltd.** [2006 (286) ITR 553] (Ker)

(viii) **B.F.Ditia and Others v. Appropriate Authority, Income Tax Department** [2008 (307) ITR 158 (AP)]

(ix) **Sitaram and Brothers v. State of Rajasthan and Others** [(1995) 1 SCC 257]

9. Before proceeding further to analyse the judgments relied upon, it is useful to understand the scope and effect of Section 147 of the Act, which reads as under:-

***"147.** If the Assessing Officer has reason to believe that any income may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

***Provided** that where an assessment under sub-*

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section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

10. Invocation of the provision under Section 147 arises when the assessing officer has “reason to believe” that any income chargeable to tax has “escaped assessment” for any assessment year, in which event, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or any other income chargeable to tax which has escaped assessment and which “comes to his notice subsequently in the course of the proceedings under this section” or under any other circumstances enumerated therein.

11. Now coming to the facts of the case, Exts.P6 and P14 are the initial notices issued under Section 148(1) in regard to the respective assessment years 2007-08 and 2008-09 wherein the

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officer had stated that "I have reasons to believe that your income chargeable to tax for the assessment year 2007-08 has escaped assessment". To Ext.P6, petitioner has given a reply as Ext.P7 to provide a certified copy of the reasons recorded. A similar reply was sent to Ext.P14 as Ext.P15. To Ext.P7, Ext.P8 is the reply and to Ext.P15, Ext.P16 is the reply. In Ext.P8, it is stated as under:-

"It is seen that during the year you have claimed a deduction as provision for bad debts at the rate of 10% of the aggregate average advances made by rural branches. In fact, you do not have any rural branches that qualifying as per criteria stipulated in the explanation (a) to Section 36(1)(viia) of the I.T.Act."

In P16, also, the same answer is given.

12. Petitioner gave a detailed representation to the aforesaid two notices. Exts.P9 and P17 are the replies. In Exts.P9 and P17, petitioner had taken a contention that while completing the assessment, no discrepancy or illegality was found in respect of the claim at the time of framing the assessment and the then assessing officer correctly understood the meaning of a rural branch with reference to the assessee as not a pre-condition to

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the allowance of claim under that section. In other words, the contention was that, under the said provision, “the word '*and*' was to be understood as a disjunctive phrase which should be read *dehors* the previous condition namely “an amount not exceeding 7½ % of total income”. It was therefore contended that the assessee was entitled to claim deduction under Section 36(1)(viiia) on the first limb of the section rather than the second one. Thereafter the facts disclose that the assessing authority had passed Exts.P19 and P20 assessment orders.

13. The main contention urged by the petitioner is that the very act of the respondents passing an order of assessment without adjudicating on the objection relating to reasons to believe is bad in law. Specific reliance is placed by the petitioner to the judgment of the Apex Court in ***GKN Driveshafts (India) Ltd.*** (supra) in which it was held that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time and on receipt of the reasons, noticee is entitled to file objections to issuance of notice and the assessing

officer is bound to dispose of the same by passing a speaking order. It is further held in the said case that since reasons have been disclosed in the proceedings, the assessing officer was directed to pass a speaking order “before proceeding with the assessment in respect of the aforesaid five assessment years”. It is submitted that a similar view has been taken by various High Courts including this Court. In ***IOT Infrastructure and Energy Services Ltd*** (supra), the Bombay High Court held that an order of assessment passed without considering the objections of the assessee to the notice under Section 148 is not justified as held in ***GKN Driveshafts (India) Ltd.*** (supra). In ***Travancore Cements Ltd*** (supra), Division Bench of this Court held that writ petition is maintainable against a notice under Section 148. That was a case in which the date for completing regular assessment expired. Later, the petitioner was served with a notice under Section 148 alleging escaped assessment and it was held that the details called for under Sections 143(2) and 142 are totally unconnected with the grounds disclosed to the assessee under Section 148 of the Act.

14. In ***Tolins Rubbers*** (supra), this Court placing reliance

on ***GKN Driveshafts (India) Ltd.*** (supra) held that the assessing authority is bound to consider the objection and pass a speaking order. On an overall consideration of the law laid down in the matter, it is clear that when a notice is issued under Section 148 of the Act, the assessee is entitled to seek reasons for issuing notice in which the assessing officer is bound to furnish reasons within a reasonable time. On receiving such reasons, the noticee is entitled to file objections to such reasons and the assessing officer is bound to dispose of the same by passing a speaking order.

15. Now coming back to the facts of the present case, in respect of both the assessment years, petitioner sought for reason to believe which were provided to the petitioner for which the petitioner had given detailed reply. But, instead of passing an order on the reply given with respect to reason to believe, the assessing officer had straight away proceeded to pass the assessment orders as evident from Exts.P19 and P20. In Ext.P19, the assessing officer dealt with two aspects. In other words, a composite order had been passed by the assessing officer stating the reasons for reopening of assessment as well as proceeding to

pass an order of assessment after reopening the same. First question is whether such a method is illegal and contrary to the judgment of the Apex Court in **GKN Driveshafts (India) Ltd.** (supra). It is useful to quote the short judgment, which reads as under:-

"1. Heard learned counsel for the parties.

2. Leave is granted.

3. By the order under challenge, a division bench of the High Court at Delhi dismissed the writ petition filed by the appellant challenging the validity of notices issued under sections 148 and 143(2) of the Income Tax Act, 1961. The High Court took the view that the appellant could have taken all the objections in its reply to the notices and that, at that stage, the writ petition was premature. Accordingly, the writ petition was dismissed on 31st January, 2001. Aggrieved by that order, the appellant is in appeal before us.

4. Mr. M.L. Verma, learned senior counsel appealing for the appellant, submits that the impugned notices relate to seven assessment years; that during the pendency of these appeals, in respect of two assessment years, viz., 1995-96 and 1996-97, assessment has been completed against which appeals have been filed. Notices relating to the other five assessment years, viz., 1992-93, 1993-94, 1994-95, 1997-98 and 1998-99, are now the subject matter of these appeals.

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5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In then instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years.

6. Insofar as the appeals filed against the order of assessment before the commissioner (appeals), we direct the appellate authority to dispose of the same, expeditiously.

With the above observations, the civil appeals are dismissed.

No costs."

16. In this short judgment, the Apex court was considering an instance where notice under Sections 143(2) and 148 were challenged. The High Court held that all objections could be raised by filing a reply. The Apex Court observed that there is no reason to interfere with the impugned orders as during the pendency of

the appeals in respect of two assessment years, assessment had been completed and the other five assessment years alone were the subject matter of appeals. Having observed that there is no reason to interfere with the order under challenge, a clarification has been issued by the Apex Court in regard to the proper course of action when a notice is issued under Section 148. Of course, a Division Bench of this Court as well as various other courts have followed the view that the reason to believe as contemplated under Section 147 has to be valid reasons and validity of the said reason is also subject to judicial review. It is also held that such an order has to be passed before proceeding with assessment.

17. As already stated, the first question to be considered in this writ petition is whether there is any illegality in passing a composite order.

18. Learned counsel for the petitioner submits that while passing a composite order, the opportunity of the assessee to challenge the finding on the reason to believe by way of judicial review is not available. But this argument, I do not think can be sustained. As far as the department is concerned, when they have given the reason to believe, for which an objection is filed,

and they confirm that there is valid reason to believe, definitely they can proceed with the assessment order. As far as the assessee is concerned, the right to challenge the reason to believe is not lost merely for the reason that a composite order had been passed. Therefore, the assessee's right to appeal against the reopening of the assessment as well as the assessment proceedings can as well be taken up in a regular appeal. In other words, no prejudice will be caused to the assessee on account of a composite order being passed and therefore, I do not think such a ground can be sustained. Of course from the judgments cited, it could be said that, it is appropriate to pass a separate order. But, when a composite order is passed, it has to be verified whether it is *per se* illegal or whether any prejudice will be caused to the assessee. I do not think that any such contingency arises in the case.

19. The next question to be considered is whether there is justification to reopen the assessment at all.

20. Perusal of the factual aspects involved in the case would show that according to the department, the assessee has wilfully made a wrong claim of deduction under section 36(1)

(viia) of the Act in respect of aggregate average advances made by rural branches. According to the department, only during the assessment year 2010-11, while completing the scrutiny assessment, it came to their notice that the assessee had no rural branches. This, according to the department, is a valid reason for reopening of an assessment. In other words, according to the department, the benefit of section 36(1)(viia) was available only if the petitioner had rural branches. In such circumstances, the claim made during the respective assessment years were wrong and excessive. It is contended that when the income chargeable to tax has escaped assessment, and it comes to the notice of the assessing officer only subsequently, he is entitled to invoke Section 147 by issuing notice under Section 148.

21. According to the petitioner, in so far as the assessment for the concerned assessment year had been completed and no illegality or discrepancy was found in respect of the claim, on an interpretation of the statutory provision, the assessee was entitled to claim deduction. Merely on account of the fact that there is discrepancy noticed at a later stage does not call for a reassessment in terms of Section 147. It is contended that when

all materials relevant for the assessment were placed before the assessing officer and the assessment was completed after scrutiny of the entire records, a reassessment initiated on matters which are already available on record is not maintainable. In ***N.A. Malbary and Bros.*** (supra), the Apex Court considered the question as to whether a second order of penalty issued against the very same assessee in regard to the very same assessment year was bad in law. It was held that the penalty order has to be co-related to the amount of tax which would have been evaded if the assessee had got away with the concealment. When the income is assessed by way of an estimate, the Income Tax Officer levies penalty on that basis. Later when he ascertains the true facts and realises that a much higher penalty could have been imposed, he was entitled to recall the earlier order and pass another order imposing higher penalty.

22. In ***Kantamani Venkata Narayana and Sons*** (supra), the Apex Court while considering the effect of notice under Section 34(1) of the Income Tax Act, 1922 held that if the Income Tax Officer had *prima facie* reason to believe that the assessee had omitted to disclose fully and truly all material facts, and that

in consequence of such non-disclosure, income had escaped assessment, he has jurisdiction to issue notices. While challenging such a notice under Article 226 of the Constitution of India, the High Court is only concerned to decide whether the conditions which invested the Income Tax Officer with power to reopen the assessment exists or not. It is not within the province of the High Court to record a final decision about the failure to disclose fully and truly all material facts bearing on the assessment and consequent escapement of income from assessment of tax.

23. In ***Bihar State Road Transport Corporation*** (supra), a Division Bench of Patna High Court placing reliance on ***Kantamani Venkata Narayana and Sons*** (supra) held that mere production of books or other evidence would not necessarily amount to disclosure. If the assessee does not discharge his duty to disclose fully and truly material facts necessary for the assessment of the relevant year by merely producing the books of account or other evidences, and even if it is assumed that from the books so produced, the Income Tax Officer, if he had been circumspect, could have found out the truth, he is not on that account precluded from exercising power to assess income which

had escaped assessment.

24. In ***Phool Chand Bajrang Lal*** (supra), the Apex Court was again considering the question as to what would amount to failure to disclose fully and truly material facts. It was held that an Income Tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) only if, on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to tax has escaped assessment. It is further held that it would be immaterial whether the Income Tax Officer, at the time of making the original assessment, could or could not have found by further enquiry or investigation whether the transaction was genuine or not. If, on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed under Section 147(a) that the assessee had not made a true and full disclosure of the material facts at the time of

original assessment, and therefore, the income chargeable to tax had escaped assessment, proceedings can be taken.

25. In ***Popular Vehicles and Services Ltd.*** (supra), Division Bench of this Court held that if excessive deduction of interest is allowed under 36(1)(iii) of the Act, then certainly it is a case of income escaping squarely covered by Explanation 2 to Section 147 of the Act. It is further held that there is no presumption anywhere in the provisions of the Act to the effect that every regular assessment completed is after due consideration of every claim under the provisions of the Act. Placing reliance on Section 147, it is held that when the scope of section after amendment is large enough whereby deductions have been wrongly or excessively granted, the Tribunal has no authority to restrict powers of the assessing officer by holding that change of opinion is not a ground to reopen the assessment under Section 147 of the Act.

26. In ***Kerala State Cashew Development Corporation Ltd.*** (supra), another Division Bench of this Court held that when the assessee had claimed a benefit, which it should not have claimed, a fact which was well within the

knowledge of the assessee, and it was later noticed that there is non disclosure, the reassessment is valid. It is argued that the judgment in **GKN Driveshafts (India) Ltd.** (supra) does not deal with any such situation where a composite order had been passed and does not even go to the extent of stating that a separate order has to be passed. It only states that reason to believe has to be given before assessment proceedings.

27. Learned counsel also placed reliance on a judgment in **B.F.Ditia and Others v. Appropriate Authority, Income Tax Department** [2008 (307) ITR 158 (AP)] in which the Division Bench of Andhra Pradesh High Court had occasion to observe that judgments of Courts are not to be construed as statutes. The principles governing statutory fiction and consequences arising therefrom cannot be extended to judgments of courts.

28. As already stated, in this case, the revenue had proceeded on the basis that there is non disclosure by which the petitioner have derived a benefit which they were not entitled to. They claimed deduction which they were not entitled which fact came to the notice of the department only in 2010-11 when it was verified whether the petitioner had rural branches. This, according

to me, is a valid reason for reopening the assessment as held by the Apex Court in the judgments referred to above and other judgments of this Court as well as other High Courts.

29. The next question is whether the assessment proceedings are valid and justifiable. This question, I do not think this Court should be keen to answer especially when the petitioner has an appellate remedy available under the statute.

In the said circumstances, this writ petition is dismissed with liberty to the petitioner to file appeal before the competent appellate authority. However, it is made clear that the period during which this writ petition was pending shall be excluded from the period of limitation prescribed for filing an appeal as per the statutory provision.

Sd/-
A.M. SHAFFIQUE, JUDGE

Rp

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P.S to Judge