

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&

THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 4TH APRIL 2008 / 15TH CHAITHRA 1930

ITR.No. 215 of 1999()

AGAINST THE ORDER IN RA 214/COCH/98 IN
ITA.31/COCH//1997 of I.T.A.TRIBUNAL,COCHIN BENCH
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APPLICANT:

COMMISSIONER OF INCOME TAX, KOCHI.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT

RESPONDENTS:

BINOY MATHAI, MUVATTUPUZHA.

BY ADV. SRI.P. BALAKRISHNAN
SRI.R.AMRITHARAJ

THIS TAX REFERENCE HAVING BEEN FINALLY HEARD
ON 04/04/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**C.N. Ramachandran Nair &
T.R. Ramachandran Nair, JJ.**

I.T.R.No.215 of 1999

Dated this the 4th day of April, 2008.

JUDGMENT

C.N. Ramachandran Nair, J.

The reference case arises out of the order of the Income Tax Appellate Tribunal disposing of the respondent/assessee's appeal against the assessment under Section 158BC of the Income Tax Act for the block period 1.4.1985 to 27.12.1985. A search was conducted in the premises of the assessee who is a medical practitioner, on 27.10.1985. Based on the materials gathered, assessment was made for the entire block period which included income assessable for the assessment year 1995-96. In the appeal filed by the assessee, the Tribunal noticed that the time for filing return for the assessment year 1995-96 was extended by the Board of Direct Taxes, till 31.10.1995 and therefore the assessee had time to file return for the assessment year 1995-96 as on the date of search. He, therefore, allowed the assessee's claim by deleting from the income assessed for the block period so much of the income returned by the assessee and assessed for the year 1995-96 by granting the benefit of Section 158 BB(1)(d) of the Act. At the request of the Department, the Tribunal has referred the following

question for our decision:

“Whether, on the facts and in the circumstances of the case and on an interpretation of clause (d) of Sec.158BB of the Incometax Act, the Tribunal is right in law and fact in holding that the assessing officer is not justified in including in the block assessment the sum of Rs.1,69,278 as the undisclosed income for the assessment year 1995-96?”

Learned Standing Counsel appearing for the Revenue contended that the assessee is not entitled to exclusion of income returned for the assessment year 1995-96, even though time for filing return was not over as on the date of search, for the reason that Section 158BB(1)(d) does not authorise exclusion of returned income but only income seen as accounted in the books of accounts by the assessee at least on or before the date of search.

2. Learned counsel for the assessee, on the other hand, contended that there is no finding in the block assessment that the assessee has not recorded the amount in the books of accounts before the date of search and the assessment itself is based on the income returned in the return filed for the assessment year 1995-96. In order to appreciate the contentions, we have to refer to two provisions which are relevant for the disposal of this appeal. The same are extracted below:

“158BA. Assessment of undisclosed income as a result of search

1. x x x x x x x x x x

2. x x x x x x x x x

3. Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.”

158BB. Computation of undisclosed income of the block period:

(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined,--

(a) to © x x x x x x x x x

(d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(e) & (f) x x x x x x x x x

Both the above provisions provide for exclusion of income of the previous year for which the time for filing return was not over as on the date of

search. In this case, even though the time for filing the return under Section 139(1) was over, by virtue of general extension of time granted by the Board of Direct Taxes for filing return for the assessment year 1995-96, the assessee had time till 31.10.1995 to file the return. In fact, the assessee had filed the return on the due date and what is added in the block assessment under challenge was the income returned by the assessee in the return for the assessment year 1995-96. The question is whether on these facts, the assessee is entitled to the exclusion of income returned for the assessment year 1995-96 in the block assessment.

3. We find from a combined operation of the above two provisions that income of the previous year for which time for filing return was not over as on the date of search, could be excluded only if such income or transactions pertaining to such income are recorded in the books of accounts or other documents maintained in the normal course of business on or before the date of search. Therefore, exclusion can be granted for the income of the previous year, in respect of which time for filing return was not due or not over, only if the assessee is found to have entered in the books of accounts such income or the transactions pertaining to such income on or before the date of search. Unfortunately, this crucial issue is not considered by any of the authorities including the Tribunal while

disposing of the appeal. We are in agreement with the argument of the learned counsel for the Revenue that even though time for filing return was not over as on the date of search, the assessee was entitled to exclusion only if he is found to have recorded the returned income or the transactions pertaining to such income in the books of accounts. Therefore, the order of the Tribunal excluding such income without a finding that the said income or transactions pertaining to such income were recorded in the books of accounts maintained by the assessee, at least on the date of search is not tenable. Even though in principle we uphold the contention of the Revenue, we are not inclined to remand the matter for verification of the books of accounts pertaining to the search that took place more than 13 years back. In the absence of any finding by the assessing officer in the block assessment or by the Tribunal in the appellate order that the assessee has not entered the income returned for the year 1995-96 in the books of accounts or the transactions pertaining to the same in the books of accounts at least on the date of search and since assessment is based on income returned, we have to assume that the assessee filed return based on the books of accounts only.

In the above view of the matter, we answer the question in favour of the assessee and against the Revenue. The Reference Case is disposed of

as above.

The Registry is directed to forward a copy of the judgment to the Tribunal for passing consequential orders under Section 260(1) of the Act.

(C.N. Ramachandran Nair, Judge.)

(T.R. Ramachandran Nair, Judge.)

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C.N. Ramachandran Nair &
T.R. Ramachandran Nair, JJ.

I.T.

JUDGMENT

17th March, 2008.