

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**

THURSDAY, THE 17TH JANUARY 2008 / 27TH POUSHA 1929

OTC.No. 5 of 2005()

ITA.7/2001 of AGRL.I.T.ADDL.BENCH,KOZHIKODE

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REVISION PETITIONER/APPELLANT/ASSESSEE:-

**CHANDRA PRABHA CHARITABLE TRUST,
KALPETTA NORTH 673 122, REPRESENTED BY ITS
PRESIDENT, M.J.VIJAYAPADMAN.**

**BY ADV. SRI.C.KOCHUNNY NAIR
SRI.DALE P.KURIEN**

RESPONDENT: RESPONDENT/REVENUE:-

**STATE OF KERALA, REPRESENTED BY
ITS CHIEF SECRETARY TO GOVERNMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

BY GOVT.PLEADER SRI.K.P.PRADEEP.

**THIS OTHER TAX CASES HAVING BEEN FINALLY HEARD
ON 17/01/2008, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

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

O.T.C.NO.5 of 2005

Dated this the 17th day of January, 2008.

ORDER

C.N. Ramachandran Nair, J.

This tax revision case is filed under Section 78 of the Kerala Agricultural Income Tax Act, 1991 (for short 'the Act'), challenging the order of the Tribunal produced as Annexure C, confirming the petitioner's assessment for 1994-95. The petitioner, claiming to be a charitable trust, admittedly did not file return on the due date provided under Section 35(1) of the Act. However, a belated return was filed on 12.7.1995. The assessing officer completed the assessment on 13.3.2000 whereunder, the petitioner's claim for exemption from payment of tax as a charitable institution, was also declined. The petitioner challenged the assessment in first appeal on the ground of limitation as well as against disallowance of exemption claimed under Section 16 of the Act. The first appeal was dismissed, against which the second appeal filed before the Tribunal, was also dismissed. In this revision petition filed against the said order of the Tribunal, the petitioner has raised the question of limitation against the assessment as well as against disallowance of exemption claimed as a

charitable institution, under Section 16 of the Act.

2. We have heard learned counsel for the petitioner and learned Govt. Pleader.

3. Learned counsel for the petitioner contended that the assessment completed for the assessment year 1994-95 on 13.3.2000 is barred by limitation, because Section 39(6) of the Act provides limitation only upto two years from the date of filing of the return. According to the petitioner, the return having been filed on 13.7.1995, the last date for completion of assessment was 13.7.1997 and since the assessment was not completed within that time, it is barred by limitation.

4. Learned Govt. Pleader, on the other hand, submitted that since return was not filed in time, the officer had time up to 10 years from the end of the financial year for which tax is due, for completing the assessment, under Section 41 of the Act. According to the learned Govt. Pleader, even though Section 41 is not mentioned in the assessment order, it is still an assessment under Section 41 read with Section 39(4) of the Act. Learned counsel for the petitioner relying on the Division Bench judgments of this court reported in **Commissioner of Agri. Income Tax v. K.V. Sebastian** (1996 KLJ (Tax Cases) 238) and **STO, Perumbavoor v. Pathrose** (44 STC

223), contended that a re-assessment under Section 41 is permissible only after completion of the regular assessment and since in this case there is only one assessment, it cannot be stated to be an assessment under Section 41 of the Act as contended by the department. Learned counsel has specifically stated that the assessment made by the officer is one under Section 39(4) of the Act and therefore the period of limitation available is only two years from the date of filing of the return as provided under Section 39(6) of the Act.

5. In the first place, we find that both the decisions relied on by the petitioner are rendered on the provisions of 1950 Act and the assessment involved in this case is under 1991 Act. More over, in one case referred above, the assessing officer had issued notice to the assessee against which he filed regular return and in the other case the assessee had in fact filed return and in both cases assessments were made based on return. However, in this case the assessee neither filed return before 30.6.1994 as required under Section 35(1) of the Act nor did the officer issue any notice calling upon the assessee to file any return in terms of Section 35(2) of the Act. The next question to be considered is what is the consequence of filing a belated return by the assessee. The assessing officer is not bound to make an assessment based on a belated return. However, if he is satisfied that it is

an income escaping assessment, he can initiate an assessment under Section 41, no matter whether such information was gathered by him from the belated return filed by the assessee or not. Section 39 provides limitation for a regular assessment and Section 41 prescribes time limit for making income escaping assessment. Therefore, limitation has to be computed by identifying the nature of assessment completed. In this case, the assessment is one completed under Section 39(4) of the Act which provides for making a best judgment assessment in cases where the assessee failed to furnish return as required under Section 35 or fails to comply with the notice issued under sub-section (4) of Section 35 of the Act. Admittedly, the assessee did not furnish the return under Section 35 of the Act in as much as no voluntary return was filed on due date and the officer did not issue notice calling for the production of accounts, under Section 35(2) of the Act. Since the belated return is not a return under Section 35 of the Act, the assessing officer has taken it only as an information for commencing an assessment based on it. A notice issued pursuant to such a belated return can only be an income escaping assessment under Section 41. But for the initiation of assessment proceeding based on the belated return, the income chargeable to tax would have escaped assessment. Section 41 obviously does not provide for any procedure for assessment and the mandatory

procedure for assessment prescribed under clauses (4) and (5) of Section 39 consequently applies to an assessment under Section 41 of the Act. Therefore, if the assessee fails to comply with the notices for production of accounts, an income escaping assessment also has to be completed to the best of judgment of the assessing officer as required under Section 39(4) of the Act. We are, therefore, of the view that a Section 39(4) assessment can be either a regular assessment pursuant to filing of return under Section 35 (1) or under Section 35(2) or can be an income escaping assessment which can be commenced even based on a belated return filed by the assessee. Therefore, in this case even though Section 41(1) is not mentioned in the assessment order and the section under which assessment is completed, is stated to be under Section 39(4), still the factual position proves that the assessment is, in substance, an assessment under Section 41, wherein the limitation available is 10 years from the end of the financial year for which tax is payable.

6. The next contention raised by the assessee based on the decision of this court referred to above, is that a re-assessment under Section 41(1) is permissible only if there is a regular assessment. We cannot accept this contention because Section 41(1) with the proviso extracted hereunder does not say so.

“41. Income escaping assessment.- (1) If for any reason agricultural income chargeable to tax under this Act has escaped assessment in any financial year or has been assessed at too low a rate, the Agricultural Income Tax Officer may at any time within ten years of the end of that year and subject to the provision of sub-section (2), serve on the person liable to pay the tax, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 35 and may proceed to assess or reassess such income and the provisions of this Act, shall, so far as may be apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment, as the case may be:

Provided further that the Agricultural Income tax Officer shall not issue a notice under this sub-section unless he had recorded his reasons for doing so.”

It is clear from the opening words of the section that an income escaping assessment under Section 41 of the Act is permissible, if the income chargeable to tax under the Act has escaped assessment for any reason. The legislature has not confined the authority of the officer to make income escaping assessment to any particular situation or impose any condition for it. On the other hand, assessment is authorised in all situations where income chargeable to tax under the Act has escaped assessment. Escapement of income can happen when there is no assessment at all or when there is an under assessment or an assessment involving granting of

excessive relief in the form of rebate, reduction or exemption. We are, therefore, of the view that all situations where agricultural income chargeable to tax have escaped assessment, are covered by Section 41(1) of the Act. So much so, it is not a requirement that for making an assessment under Section 41 of the Act, there should be an earlier under assessment or wrong assessment. In short, an assessment under Section 41 of the Act can be made as a first assessment which only means that entire income would have escaped assessment, but for the income escaping assessment made under Section 41 of the Act. We, therefore, hold that the assessment in this case, is in substance, one made under Section 41(1) of the Act which is within time and is not barred by limitation.

7. The next issue raised pertains to the claim of exemption as a charitable institution, under Section 16 of the Act. We find from the Tribunal's order that the petitioner neither produced the original certificate of registration for claiming exemption under Section 16 or the later order of the Deputy Commissioner, as claimed by him. It is further stated in the Tribunal's order that the petitioner has filed the return not as a charitable institution but an association of persons. Therefore, we are of the view that the claim of exemption under Section 16 of the Act does not really arise from the Tribunal's order, as the petitioner has not established compliance

of the procedure for getting exemption. Besides, the benefit which the charitable trust constituted by the petitioner enures only to members of the Jain community and it is to be noted that the Supreme Court in **State of Kerala v. M.P.Shanthi Varma Jain** ((1998) 6 KTR 461), held that a charitable institution constituted for the benefit of a community, is not entitled to exemption.

In view of the above findings, the contentions raised by the petitioner are not tenable and consequently the revision petition is dismissed.

(C.N. Ramachandran Nair, Judge.)

(T.R. Ramachandran Nair, Judge.)

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

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JUDGMENT

10th January, 2008.

