IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George Mathan, JM

ITA No.234/Coch/2016 : Asst.Year 2005-2006

The Income Tax Officer (International Taxation) Kozhikode.	Vs.	Sri. C.Abdul Maharoof Chembayil House, Putharikkal Parappangadi Malappuram – 676 303. [**PAN : AEVPC1104N.**
(Appellant)		(Respondent)

CO No.24/Coch/2016 : Asst.Year 2005-2006

Sri. C.Abdul Maharoof Chembayil House, Putharikkal Parappangadi Malappuram – 676 303.	Vs.	The Income Tax Officer (International Taxation) Kozhikode.
(Cross Objector)		(Respondent)

Revenue by : Sri.Mritunjaya Sharma, Sr.DR
Assessee by : Sri.M.V.Venugopal, CA

Date of Hearing : 17.09.2020		**Date of Pronouncement : 17.09.2020**

O R D E R

Per George Mathan, JM :

ITA No.234/Coch/2016 is an appeal filed by the Revenue and CO No.24/Coch/2016 is a cross objection filed by the assessee in the Revenue's appeal in ITA No.234/Coch/2016, against the order of the CIT(Appeals)-III, Kochi in Appeal No.ITA No.94/Inter/Kochi/CIT-(A)III/2010-11 dated 29.02.2016.

2. Sri.Mritunjaya Sharma, Senior Departmental Representative appeared on behalf of the Revenue and

Sri.M.V.Venugopal, Chartered Accountant appeared on behalf of the assessee.

3. It was submitted by the learned Departmental Representative that the assessee is a non-resident doing business in Saudi Arabia and also receiving rental income, interest income and agricultural income. It was the submission that the original return of income filed by the assessee had been proposed u/s 143(1) of the I.T.Act. Subsequently it came to the attention of the A.O. that the assessee had purchased 28.73 cents of land from one Sri.P.Moideen Koya. The land was situated at Mavoor Road, Kozhikode. It further came to the attention that on-money transaction had taken place in the purchase of the said land. Consequently, the A.O. had issued notice u/s 148 on 04.11.2009. The return in response to the notice u/s 148 came to be filed on 31.08.2010.

4. It was submitted that as per the registered document, 13.73 cents of land was purchased on 06.11.2004 for Rs.29,00,000 and 15 cents of land had been purchased on 15.12.2004 for Rs.22,50,000. The total consideration paid being Rs.51,50,000. It was submitted by the learned DR that statement had been recorded from Sri.Moideen Koya, the seller of the land. Sri.Moideen Koya had stated that he had entered into an agreement with his brother Sri.Valiyal Moosa and his wife Smt.Hajirabi for selling the property at Rs.7,60,000 per cent. It was the submission that subsequently the property was registered to the assessee Sri.C.Abdul Maharoof after receiving the total consideration of

Rs.2,08,26,800. It was the submission that balance of Rs.51.50 lakh was still due. It was the submission that the A.O. had as a consequence from the statement recorded from one Sri.Valiyal Moosa, the brother of the seller, who had asserted that he had received consideration of Rs.8,50,000 per cent, took the stand that the purchase cost of 28.73 cents of land by the assessee from Sri.P.Moideen Koya was at the rate of Rs.8,50,000 per cent and the total consideration was Rs.2,44,20,500 and worked out the on-money payment at Rs.1,92,70,500. Taking this into consideration, the A.O. worked out the cash flow deficit at Rs.2,23,23,046 and made an addition thereof as unexplained income of the assessee invested in the purchase of property. It was the submission by the learned DR that on appeal the learned CIT(A) had deleted the addition without considering the various evidences produced by the A.O., but by simply observing as follows:-

> *"14. It is observed from the above discussions that the entire addition was made based on the statements recorded from the seller Sri.Moideen Koya and his brother Sri. Moosa. However, Sri.Moideen Koya himself has not filed any return of income for the income admitted in his sworn statement. Moreover Moideen Koya himself has stated that he did not have any direct transaction with the appellant and the payments were received only through Sri.Mohammed Anwar and Sri.Kabeer, the broker. It is also to be observed that Sri.Mohammed Anwar has not accepted the on-money payment in his sworn statement dated 06.03.2015 before the Assessing Officer and the sworn statements of Sri.Kabeer has got contradictory versions. But for the sworn statements, the Assessing Officer could not*

> *furnish any direct evidence for the on-money payments. On the other hand there are documentary evidences in the form of registered sale deeds for the payment of Rs.51,50,000 as considerations and these documents cannot be ignored without sufficient and direct evidences."*

5. It was the submission that there was substantial evidences produced and without giving valid reasons, the learned CIT(A) has deleted the addition. It was the prayer of the learned DR that the order of the CIT(A) be reversed and that of the A.O. restored.

6. In reply, the learned AR submitted that in the cross objection the assessee has raised the issue of reopening and that all the explanation were given by the assessee in the course of assessment and before the CIT(A). He vehemently supported the order of the learned CIT(A). It was the further submission that even assuming that an adverse inference has to be taken against the assessee, the A.O. has not given the copy of the return filed by Sri.Valiyil Moosa or Sri.Moideen Koya, wherein they have disclosed the higher consideration. It was the submission that just the statement recorded from the sellers and their agents against the assessee has been provided. It was the submission that no further evidences, if any, has been granted to the assessee. It was the submission that the order of the learned CIT(A) is liable to the sustained on merits. It was the submission that reopening of the assessment on the basis of mere statements was bad in law.

7. We have considered the rival submissions. On going through the facts in the present case and at the time of

hearing, the learned DR was specifically asked as to whether the assessee has been granted the opportunity to cross examine Sri.Moideen Koya and his brother Sri.Valiyil Moosa and such persons whose statements have been used to draw adverse inference against the assessee. To this, it was submitted that the assessee had not asked for the opportunity of cross-examination and therefore, there was no necessity for the same.

8. A perusal of the facts in the present case as also the order of the learned CIT(A) shows that in para 14 of his order, the learned CIT(A) has categorically given a finding that Sri.Moideen Koya himself has not filed any return of income for the income admitted in his sworn statement. Moreover, in the said order, the learned CIT(A) has recorded that Sri.Moideen Koya himself has stated that he did not have any direct transaction with the assessee and that the payments were received only through Sri.Mohammed Anwar and Sri.Kabeer, the broker. It was noticed that the statement of Sri.Kabeer has also been recorded. A perusal of the statement of facts as submitted by the assessee before the learned CIT(A) in the grounds of appeal and Form No.35 filed in para 8 shows that there is a clear cut statement that both the seller Sri.Moideen Koya and his brother Sri.Valiyil Moosa were examined by the A.O. and the appellant was asked to cross examine them. The assessee had appeared at Kochi on 17.12.2010 but the cross examination could not take place as the statement in chief was not completed by the A.O. on that date. The assessee’s Authorized Representative requested for

another opportunity to cross-examine them. On 20.12.2010, the assessee was asked by telephone to appear on 21.12.2010. On which date the assessee could not undertake the long journey on account of his ill-health. In para 11 of the statement of facts, it is mentioned that in the written objections dated 18.12.2010 filed by the assessee in para 6, attention of the A.O. was drawn to the fact that the assessee's Authorized Representative had requested permission to cross-examine the witnesses, but this was declined by the A.O. insisting that the appellant should be personally present and it was for that reason that the opportunity to cross-examine could not be availed. In the statement of facts in para 17, the assessee has submitted that he had made several requests in the course of assessment and after receipt of the assessment order to furnish copies of statements recorded from Sri.Moideen Koya on 17.01.2008 by the ADIT, Income-tax, Calicut.

9. A perusal of the assessment order at para 12, it is mentioned by the A.O. that opportunity for cross-examining the witnesses was provided to the assessee. But on 09.12.2010 and 20.12.2010, the assessee did not appear on the ground of his ill-health. He further goes to state that on 17.10.2012 though he appeared, the statement in chief was not completed, the cross-examination could not take place. The A.O. further goes to state that on 20.12.2010 the assessee's Counsel contacted over phone and he was directed to inform the assessee that he may appear on the next day and then he would be given the copies of the statements and

an opportunity to offer his comments, to which the Counsel had agreed and as the assessee has not appeared as agreed, the AR was contacted again and again on the following days. A perusal of the papers filed in the present case shows that at pages 23 to 30 is the statement recorded from Sri.P.Moideen Koya on 09.12.2010 and pages 5 to 21 is statement of Sri.Valiyil Moosa recorded on 17.12.2010 and 20.12.2010. There is no discussion in the assessment order that the assessee's Counsel had been denied the opportunity to cross-examine in the absence of the assessee.

10. It is trite law that the principles of natural justice is sacrosanct when any evidences are being considered against the assessee. We are live to the fact that Evidence Act does not apply to Income-tax proceedings. The requirement of cross-examination is not a technical rule but it is a rule of essential justice. Violation of the principles of natural justice can result in total nullity of the entire addition. As has been held by the Hon'ble Supreme Court in the case of *M/s.Andaman Timber Industries v. Commissioner of Central Excise [(2015) 281 CTR 241 (SC)].* We are also live to the fact that the said decision relates to a Central Excise matter.

11. A perusal of the statement recorded from Sri.Valiyil Moosa, which has also been extracted by the A.O. in his assessment order in para 11 clearly records the facts that the transactions were not done directly by Sri.C.Abdul Maharoof, the assessee, but were done by his nephews Sri.Anwar and Sri.Bappooty. There is no direct dealings between the

purchaser and the seller. There is total absence of any written agreement between the assessee and the seller Sri.Moideen Koya or Sri.Valiyil Moosa. The order of the learned CIT(A) records that the seller Sri.Moideen Koya has not filed any return of income admitting the income in his sworn statement. The Revenue has not produced any evidence to show whether Sri.Valiyil Moosa has admitted any income from the said transaction. This stand of the Revenue as to whether the said on-money which has been allegedly admitted by Sri.Valiyil Moosa has led to an assessment of higher capital gain tax or whether the said amount has been assessed under any other heads is also not known. These are evidences which would go to lay down the facts properly.

12. In these circumstances, as admittedly there has been violation of principles of natural justice also, we are of the view that the issues in this appeal must be restored to the file of the A.O. for re-adjudication after granting the assessee adequate opportunity. The A.O. shall provide all such persons whose statements are being used against the assessee for his cross-examination. The presence of the assessee shall not be insisted upon for the purpose of cross-examination. The Authorized Representative shall be permitted to cross-examine the witnesses. Any and all such evidences which are proposed to be used by the A.O. against the assessee shall be given to the assessee and adequate time granted to him to rebutt the same. The principles of natural justice are to be complied with.

13. As the issues in the appeal are restored to the file of the A.O. for re-adjudication after granting adequate opportunity to the assessee, the issues raised by the assessee in his cross objection are also restored to the file of the A.O.

14. In the result, the appeal filed by the Revenue and the cross objection filed by the assessee are partly allowed for statistical purposes.

Order pronounced on this 17th day of September, 2020.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin, dated 17th September, 2020
Devadas G*

Copy to :
1. The Appellant / Applicant
2. The Respondent
3. The CIT(A)-III, Kochi.
4. The Pr.CIT, Kochi.
5. The DR, ITAT, Kochi
6. Guard File.

Asst.Registrar/ITAT/Kochi