

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 24TH DAY OF JANUARY 2018 / 4TH MAGHA, 1939

I.T.A.No.186 of 2013

AGAINST THE ORDER IN I.T.A.NO.690/COCH/2007 DATED 08-02-2013
OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
[ASSESSMENT YEAR 1999-2000]

APPELLANT(S)/RESPONDENT/ASSESSEE:-

DR.A.V.SREEKUMAR,`
"FRAGRANCE", VELLUR, PAYANNUR, KANNUR.

BY ADVS.SRI.V.V.ASOKAN [SENIOR ADVOCATE]
SRI.K.I.MAYANKUTTY MATHER
SRI.MAHESH V RAMAKRISHNAN
SRI.P.RAHUL

RESPONDENT(S)/APPELLANT/REVENUE:-

1. THE COMMISSIONER OF INCOME TAX,
CENTRAL, KOCHI-682015.
2. ASSISTANT COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE, CALICUT-673001.

BY SENIOR COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.P.K.R.MENON.
BY STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.JOSE JOSEPH.

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 24-01-2018, ALONG WITH
I.T.A.NO.217 OF 2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

I.T.A.NO.186 OF 2013

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEUXRE-A TRUE COPY OF THE ASSESSMENT ORDER PASSED BY THE ASSESSING AUTHORITY
FOR THE ASSESSMENT YEAR 1999-2000 DATED 26.12.2006.

ANNEUXRE-B TRUE COPY OF THE APPELLATE ORDER WITH REFERENCE TO THE ASSESSMENT
YEAR 1999-2000 DATED 16.04.2007.

ANNEXURE-C TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL,
KOCHI BENCH IN ITA.690, 691 AND 692/COCH/2007 DATED 08.02.2013.

RESPONDENT'S ANNEXURES:-

NIL.

vku/-

[true copy]

“C.R.”

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.Nos.186 of 2013 & 217 of 2013

Dated, this the 24th day of January, 2018

JUDGMENT

Vinod Chandran, J:

The appellant, the authorised legal heir of the assessee, has filed the above two appeals relating to two assessment years 1999-2000 and 2000-2001. The assessments relate to the deceased mother of the appellant, who had a total of five children, four of whom authorized the appellant herein to contest the matter since the mother died on 24.02.2006, after the search effected in her premises as also the notice issued under Section 153A of the Income Tax Act, 1961 [for brevity “the Act”].

2. We first notice the facts, which from the perspective of the assessee, are as hereinafter. The Department conducted searches of the residential premises of the assessee under Section 132 on 02.03.2005 and 20.04.2005. A notice was issued under Section 153A of the Act on 06.01.2006, alleging *inter alia* that the assessee entered into transactions of a property having total extent of 16 cents; 8 cents of which was sold in the assessment year 1999-2000 and the balance 8 cents in the assessment year 2000-2001. The

assessee had returned a total amount of Rs.32,00,000/- as consideration; 16 lakhs in each of the assessment years. Two documents received, before the search, by the Department through a Tax Evasion Petition, allegedly filed by one of the brokers involved in the transaction, revealed the total consideration as Rs.1,01,00,000/-. The assessee died on 24.02.2006 and the appellant, filed a return on 09.10.2006, accepting the total consideration to be Rs.60,00,000/-, more than that returned originally. Returns were filed for the respective years showing a receipt of Rs.44,00,000/- in the financial year 1998-99 and Rs.16,00,000/- in the financial year 1999-2000. A notice under Section 143 was issued on 29.10.2006, pursuant to which the assessment orders were passed for the respective years making an addition of Rs.34,50,000/- in both the years. Computation of capital gains was also done and an assessment was made for the assessment year 1999-2000 determining the total income at Rs.30,20,525 and for the assessment year 2000-2001 at Rs.31,35,980/-.

3. The assessee filed an appeal raising three grounds. One that the assessment year 1999-2000 cannot be taken up for consideration of block assessment, since it is beyond the six year period provided under Section 153A of the Act. The contention was

advanced on the premise that the last of the search on 20.04.2005 was in 2006-2007 and the block years have to be computed from the date of the panchnama as prepared by the officer conducting the last of the searches. Yet another contention was with respect to the documents relied on to make additions, being not one seized in the search conducted and hence the proceedings under Section 153A read with Section 143 being *non est*. There was also an objection raised with respect to the computation of capital gains.

4. The first appellate authority rejected the contention with respect to the assessment year 1999-2000 not being liable for consideration in the 6 year block period. The argument as to no proceedings being possible under Section 153A, for reason of the same being not based on material recovered at search was also rejected. With respect to the documents relied on, the Assessing Officer found that there could have been no reliance placed on the consent letters received by the Department and termed them to be "dumb documents". The first appellate authority found that they were photo copies in which the purchaser has not signed and there is no further material unearthed to come to a conclusion that the assessee had received consideration in excess of that returned pursuant to the notice under Section 153A. The first appellate authority directed the

assessment to be completed as per the returns filed pursuant to the notice under Section 153A and the computation of capital gains to be as returned by the assessee and not that adopted by the Assessing Officer.

5. The Revenue was in appeal before the Tribunal; in which appeals cross objections were filed by the assessee. The ground with respect to assessment year 1999-2000 not being includable within the block period of 6 years, based on the assessment year in which the last of the search was conducted, was rejected confirming the findings of the first appellate authority. The Tribunal also found that there was no mandate in Section 153A, as to the proceedings being confined to the material seized in the search. On the documents relied on by the Department, the consent letters; the Tribunal found that the statement of the witnesses showed that the consent letters were signed in the presence of the buyer. There were also amounts paid to the assessee through other persons who did not have sufficient means and who deposed before the Assessing Officer that they had encashed the cheques and passed over the amounts to the husband of the assessee. It was also found that the Assessing Officer had verified the Bank account of the purchaser and noticed that he has withdrawn Rs.50,50,000/- after the registration of

the first deed which was on 01.07.1998. The said withdrawal was also equivalent to the sale price of the remaining 8 cents of land, which was registered on 10.05.1999. The Tribunal, hence, upheld the order of the Assessing Officer, reversing to that extent the order of the first appellate authority. The computation of capital gains was remanded back to the Assessing Officer after setting aside the order of the CIT (A) directing adoption of capital gains as returned by the assessee.

6. We have heard the learned Counsel appearing for the appellant as also the learned Senior Counsel for Government of India (Taxes). At the time of admission this Court had framed the questions of law, which are as follows:

- “(i) Can the Assessing Officer rely on materials already available with him (much prior to the search) in a proceeding under Section 153A? Is not such exercise a colourable one and consequently irregular and vitiated?
- (ii) Is not the impugned assessment proceedings barred by limitation?”

7. Though common questions are raised in the appeals the one on limitation framed as (ii) is confined to assessment year 1999-2000. The question raised essentially is whether the Tribunal was correct in finding that the assessment year 1999-2000 would be

liable to be included under the block period of 6 years as provided under Section 153A of the Act when the last of the searches conducted under Section 132 and the panchnama prepared was on 20.04.2005 in the assessment year 2006-07. The question at (i), common to both years raise the issue whether the reliance placed on the consent letters obtained by the Department by way of a Tax Evasion Petition could be sustained as valid to initiate proceedings under Section 143 read with Section 153A when the said document was not one recovered in the search conducted in the premises of the assessee.

8. The learned Counsel for the appellant has, in seeking an affirmative answer on the question framed as (ii), taken us through the provisions of Sections 153A & 153B. Section 153A deals with assessment in case of search or requisition. It is a *non-obstante* clause, where a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A enabling notice to such person requiring him to furnish the return of income in respect of each assessment year falling within six assessment years referred to in clause (b). Clause (b) speaks of assessment or reassessment of the total income of six assessment years immediately preceding the assessment year relevant to the

previous year in which such search is conducted or requisition is made. Clauses (a) and (b) of Section 153B(1) speaks of finalisation of the assessment or reassessment within the period specified therein. The limitation specified in clause (a) and (b) of Section 153B(1) commences from the end of the financial year in which the last of the authorisation for search or for requisition was executed. Reference is also made to sub-section (2) of Section 153(B), which deems such authorisation to be that recorded in the last panchnama drawn in relation to any person pursuant to a search conducted in his premises. Hence going by the limitation for finalisation commencing from the last panchnama drawn, the 6 year block period should also be determined from the assessment year in which the last panchnama was drawn, is the argument.

9. We are unable to accept the argument so raised by the appellant. Sections 153A and 153B deal with two different aspects of the very same proceedings. Section 153A is a provision for assessment in case of search and seizure. This enables the assessment or re-assessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted. In the present case, the search was conducted on the close of the assessment year

1999-2000 on 02.03.2005 and then on the opening of the next assessment year 2005-2006, on 20.04.2005. The computation of the block period in which such assessment or reassessment are taken up under Section 153A; sub-clauses (a) & (b) of Section 153A(1) specifies it to be the six preceeding assessment years relevant to the previous year in which the search is conducted or requisition made. The authorisation under Section 132 or Section 132A or the last of such authorisation issued, is relevant only for considering the limitation for finalisation of assessments and not for computing the block period of six years. The limitation period with respect to finalisation of assessment cannot be applied for computaion of the assessment years which are enabled to be assessed or reassessed under Section 153A.

10. On the facts of the present case, the first search was conducted on 02.03.2005 in the assessment year 2005-06. Hence, it enabled assessment or reassessment for 6 prior assessment years from the assessment year on which the search was conducted. The first search being in the assessment year 2005-2006, the 6th assessment year prior to the search, is 1999-2000; on the previous year of which the first transaction occured. There is hence no limitation as to the assessment year reopened, ie: 1999-2000 and we

answer question No.(ii) against the assessee and in favour of the Revenue.

11. The other question raised by the appellant, for both the assessment years, is that the proceedings under Section 153A is not sustainable insofar as there being no incriminating material recovered in search and there was no basis on which the block assessment was proceeded with. The appellant relies on the decision in ***CIT v. Kabul Chawla [(2016) 380 ITR 573 (Delhi)]***. It is the contention of the appellant, as revealed from the manner in which the questions are framed in the memorandum of appeal, that the Department had purposefully initiated a proceeding under Section 153A, since, otherwise, the consent letters which were received by way of a Tax Evasion Petition could not have been proceeded with for reason of limitation.

12. We agree with the decision of the Delhi High Court in ***Kabul Chawla*** and as relevant to the instant case, we extract the following legal position as laid down by their Lordships sitting in division:

“(iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can

be related to the evidence found, it does not mean that the assessment “can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material””.

Therein no incriminating material was unearthed during the search and, hence, no additions could have been made to the assessment, was the finding. Therein the additions, which were deleted, were on account of additions made on deemed dividend, corresponding to additions made on protective basis in the hands of Companies in which the assessee was a shareholder. We are, however, convinced that the said proposition of law, to which we respectfully agree, cannot lead to a deletion of additions at the hands of the deceased assessee herein, represented by the appellant-legal heir.

13. We started the narration of facts with the rider of that being 'from the perspective of the assessee' since the facts herein are not so simple as to merely apply the principle of no incriminating evidence having been recovered in search. Viewed from the departmental perspective, we notice that the Department received a Tax Evasion Petition in which copies of two consent letters were enclosed. The Department initiated a search in the premises of the

assessee on the basis of the said materials which were incriminating by themselves. The search could have revealed further defalcations or could have revealed further incriminating material with respect to the same transaction. True, there were no further incriminating materials received on the land deal. But it was revealed that the assessee had rental income from a flat purchased by the assessee at Bangalore. The purchase was in the year 1998-99 and it was sold in the assessment year 2004-05 upon which certain additions were made for that year. The additions made for that year was modified by the Tribunal, on which there is no appeal. But it is of significance that the return filed pursuant to the notice under Section 153A, conceded the rental income in the block period and the consideration received from the land deal was also shown as more than that originally returned. There was incriminating material seized, with respect to the rental income, which was conceded to by the assessee in the return filed pursuant to the search and seizure. There can hence be no ground taken that the other material which were already available with the Department cannot be relied on in the proceedings. Further, the proceedings pursuant to the search also disclose incriminating evidence having been unearthed with respect to the land deal also.

14. Pertinent is the fact that it is pursuant to the search and the enquiry conducted thereafter that the suppressed account maintained by the assessee in which the unaccounted consideration from the purchaser was unearthed. There was also unearthed, evidence with respect to two individuals, connected to the assessee, but with no sufficient means, in whose accounts considerable amounts had been credited on encashment of the cash cheques, issued by the purchaser. The said individuals on oath admitted that the encashment was made on the request of the husband of the assessee and the amounts handed over to him.

15. The notice issued under Section 153A, after the search, hence was not solely on the basis of the copies of the consent letters received along with the Tax Evasion Petition. We have already found that the ground of limitation with respect to assessment year 1999-2000 relating to the first transaction, which was occasioned in the financial year 1998-1999, is not sustainable. Even then, the assessee's contention is that the proceedings under Section 153A was illegal and not validly instituted for reason of there being no incriminating material recovered on search. Even if there was no incriminating material seized on search, the Department was perfectly within its authority to proceed on the basis of the consent

letters received. However, then the proceedings ought to have been taken under Section 147 read with Section 149 of the IT Act.

16. In this context, we have to examine the assessee's contention as to the Department having deliberately proceeded under Section 153A, to get over the difficulties in proceeding otherwise as permitted by the IT Act; and giving a “fresh life” to the proceedings initiated on the materials already available with them, by way of the Tax Evasion Petition. Section 147 provides for reopening of assessment for reason of escapement of income. The materials received along with the Tax Evasion Petition definitely speaks of escapement of income, which gives a valid ground for the Department to proceed under Section 147. Then what has to be examined is whether the Department could have proceeded under Section 147 in tune with the limitation as provided under Section 149. As per Section 147, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, for any assessment year, he 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. The proviso restricts any such proceeding after the expiry of four years

from the end of the relevant assessment year if an assessment under sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year unless there is a failure on the part of the assessee to make a return under Section 139 or in response to notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for the assessment. Issuance of notice, where income has escaped assessment, as provided for in Section 148, is subject to the limitation provided under Section 149. No notice under Section 148 shall be issued for the relevant assessment year if four years have elapsed from the end of the said year under clause (a) of sub-section (1) of Section 149. However, the limitation, as per clause (b) of Section 149(1), extends for a further period of two years if the income chargeable to tax, which has escaped assessment, amounts to one lakh rupees or more for that year.

17. In the present case, the legal heir of the assessee filed a return of income on a notice issued under Section 153A providing an additional income of Rs.34,50,000/- in the first financial year, being 1998-99 and stuck to the return already filed of Rs.16,00,000/- for the financial year 1999-00. The returns were filed admitting the receipt of an amount of Rs.60,00,000/- as against the

original returned amount of Rs.32,00,000/- for the two transactions carried out in the financial years 1998-1999 and 1999-2000. The assessee, as per the return, admitted a receipt of Rs.44,00,000/- in the assessment year 1999-2000 and 16 lakhs in the assessment year 2000-2001. Hence there was a failure on the part of the assessee to disclose fully and truly all materials necessary for assessment. The limitation of four years as provided in the proviso to Section 147 does not apply. The tax effect for the year is more than one lakh and by virtue of the sub-clause (b) of Section 149 (1) proceedings can be taken for six years.

18. As far as the assessment year 1999-2000 is concerned, the limitation commences from 31.03.2000, as per Section 149. The notice under Section 153A was dated 06.01.2006, i.e: in the financial year 2005-2006. Hence, if it was a notice under Section 149, the same would have been sustainable since for the relevant assessment year, i.e., 1999-2000 the income chargeable to tax which has escaped assessment, is far more than one lakh. The proceedings have been taken in the 6th year the last of the years in which the Department was entitled to initiate such proceedings under section 149, i.e, on 06-01-2006, in assessment year 2005-2006. The limitation comences from 31.03.2000. If that be so, there is no

limitation with respect to the next assessment year also, being 2000-2001, which extends upto the year 2006-2007. We do not find any benefit having been derived by the Department insofar as initiating proceedings under Section 153A. Even if the search did not result in seizure of any incriminating material, the Department could have proceeded under Section 149 based on the materials received along with the Tax Evasion Petition.

19. The mere fact that without proceeding under Section 147 read with Sections 148 and 149, the Department proceeded under Section 153A would not by that alone absolve the assessee from making good the tax relating to the income which has escaped assessment. The mere fact that the provision under which the Department proceeded was not proper, would not vitiate the entire proceedings especially since there is no procedural requirement distinguishing a notice under Section 148 or one under Section 153A.

20. Now we have to look at whether the escapement of income is proved and established. The appellant has a contention that the assessee did not accept the signature in the copy of the consent letters. Nor could a verification of the signature with admitted signatures be attempted, for reason of the material received by the Department being mere photo copies. There was no evidence

unearthed, according to the appellant, as to the assessee having received any amounts other than that returned, i.e., Rs.60,00,000/-; Rs.44,00,000/- in the financial year 1998-99 and Rs.16,00,000/- in 1999-2000. That is a question of fact and we would not have normally looked into the same; and there is also no question on that aspect raised in the appeal. But, if there is no material available, definitely the findings of the Tribunal could be held to be perverse.

21. This question is also inextricably linked with the contention of the appellant that there was no incriminating material unearthed on search. Hence, we looked into the assessment orders. We find from the assessment orders that the purchaser had issued cheques to two persons unconnected with the transaction, but very close to the assessee, one Lakshmanan and another Kamala. They were nominees of the assessee and did not have any financial transaction with the purchaser. These persons admitted on oath that the cash cheques issued by the purchaser in their names were encashed on the instructions of Sri.Karunakaran, the husband of the assessee who handed over the said cheques to the two persons. The proceeds, after encashment, were also stated to be handed over to Sri.Karunakaran. One of the witnesses to the agreement (consent letter), one E.C.Manoharan was examined on oath and he admitted

that he had witnessed the same. The proceeds of cheques issued by the purchaser, which were not disclosed by the assessee, were credited to the undisclosed bank account of the assessee. That and those encashed through close allies came to Rs.28,00,000/-.

22. The details of such evidence were communicated to the legal heir of the assessee, who did not seek cross-examination of any of the said witnesses; but merely filed a reply denying the existence of the consent letters and the statement of the witnesses. In the cash flow statement filed on behalf of the assessee, the assessee had shown a total receipt of Rs.60,00,000/- from one K.N.Abdul Hameed, the purchaser, out of which Rs.44,00,000/- is said to have been received in the assessment year 1999-2000. The first transaction, transferring half of the right in the property, was made by execution of a sale deed on 01.07.1998 after which the purchaser Abdul Hameed was found to have withdrawn Rs.50,50,000/-. Hence, there was clear evidence as to the total consideration received, being Rs.1,01,00,000/- in the two transactions; establishing the information as disclosed from the copy of the consent letters received along with the Tax Evasion Petition. The first transaction took place in the financial year 1998-1999, in which the assessee admitted receipt of only Rs.44,00,000/- and after

the execution of the first sale deed, there was a withdrawal of Rs.50,50,000/- from the purchaser's account. This obviously was for the second transaction, the sale deed of which was executed on 10.05.1999, at the commencement of the next financial year 1999-2000. The exact amount of income escaped from assessment is supported by ample evidence. We do not see any reason to interfere with the orders of the Tribunal.

The questions of law are answered in favour of the Revenue and against the assessee. The appeal is rejected affirming the order of the Tribunal. The computation of capital gains shall be proceeded with by the Assessing Officer and finalised expeditiously; if not already done. The parties are left to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

vku/-

[true copy]