IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

TUESDAY, THE 29TH DAY OF MAY 2018 / 8TH JYAISHTA, 1940

ITA.No. 26 of 2010

AGAINST THE ORDER/JUDGMENT IN ITA 601/2007 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 17-06-2009

APPELLANT(S)/APPELLANT/REVENUE

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/RESPONDENT/ASSESSEE:

M/S.MALAYALA MANORAMA CO. LTD.,
KOTTAYAM.

BY ADV. SRI.E.K.NANDAKUMAR (SR.)
BY ADV. SRI.P.BENNY THOMAS
BY ADV. SRI.P.GOPINATH
BY ADV. SRI.K.JOHN MATHAI

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 29-05-2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A : **COPY OF ASSESSMENT ORDER UNDER SECTION 143(3) R.W.S.147 DATED 22.3.2005.**

ANNEXURE-B : **COPY OF CIT (A) ORDER IN ITA NO.6/K/CIT(A)-IV/06-07 DATED 19.3.2007.**

ANNEXURE-C : **COPY OF ITAT'S ORDER IN ITA NO.601/COCH/2007 DATED 17.6.2009.**

//TRUE COPY//

PS TO JUDGE.

jg-25/6

K.VINOD CHANDRAN & ASHOK MENON, JJ.

ITA No.26 of 2010

Dated this the 29th day of May, 2018

J U D G M E N T

Vinod Chandran, J.

The questions of law to be decided in this appeal are as follows:-

> "(1) Whether, on the facts and in the circumstances of the case and also in the light of Explanation 3 to Section 147 introduced by the Finance (2) Act 2009 with retrospective effect from 1.4.1989, the Tribunal is right in law in canceling the reassessment?
> (2) Whether, on the facts and in the circumstances of the case is not the reassessment in accordance with law and the ITAT was not justified in interfering with the same?"

2. The relevant assessment year is 1999-2000 and the return of income filed by the assessee conceding a total income of Rs.6,48,88,718/-, was proceeded with under Section 143(1) of the Income Tax Act, 1961. Later, the assessment was re-opened and a revised total income of Rs.8,14,57,229/- was determined. The

challenge of the assessee before the first appellate authority was on the ground that the Assessing Officer had looked into other issues and found escaped assessment on those issues also; which issues were never recorded as reasons for re-opening of assessment under Section 148(2). The reasons recorded for re-assessment were the following as is evident from Annexure-A assessment order.

> "(1) Failure to make addition of Rs.17.64 lakhs with respect to teak plantation to the total income.
> (2) Income from property at Bombay not declared.
> (3) Claim under Section 80(IA) is excessive.
> (4) A sum of Rs.187.32 lakhs shown as deposits from agents, have been included under the head "quasi capital".

3. The second and fourth issues with respect to income from property in Bombay and the deposits from agents; the assessing authority did not make any addition. The addition with respect to teak plantation was not resisted by the assessee. The claim under Section 80(IA) was revised by the Assessing Officer (AO) after taking into account the gains from business of each of the units and apportioning it

proportionally. This was done after calling for the details from the assessee, who had made the apportionment in a different manner. In addition to the above, the AO had also considered two issues with respect to deemed dividend and expenditure with respect to one Mammen Mappillai Hall, which were found to have escaped assessment for reason of not being included in the total income.

4. Annexure-A order of the AO was challenged in first appeal in which Annexure-B order was passed. Additions made with respect to opening work in teak plantation was found to have been admitted by the assessee. Agency deposits and rent from Bombay flat were found to have been not assessed by the AO. With respect to Section 80(IA) claim, the finding of the first appellate authority was that the AO went on a rowing inquiry and called for details from the assessee based on which re-computation was carried out which was impermissible under Section 148(2). The reasons recorded were not sufficient to carry out re-opening and to conduct a rowing inquiry making computations and apportionment in accordance with the details supplied by the assessee, held the appellate authority. The

first appellate authority directed re-computation of the deduction under Section 80(IA) to the extent it was conceded by the assessee.

5. On the question of additions made with respect to the expenditure in Mammen Mappillai Hall and the dividend income, the first appellate authority relied on *2006 (4) KLT 344 [Travancore Cements Ltd. v. Assistant Commissioner of Income Tax]* to find that there could be no additional escapement proceeded for, on issues not finding a place in the reasons recorded under Section 148(2). A second appeal by the Revenue, filed before the Tribunal, was rejected.

6. The learned Standing Counsel for Revenue would point out that *Travancore Cements* was overruled by a Full Bench of this Court in *(2011) 311 ITR 63 (Ker) (FB) : [Commissioner of Income Tax v. Best Wood Industries and Saw Mills].* Even then, the AO could not have included the additional items, is the contention of the learned counsel for the assessee relying on the decision in *(2011) 331 ITR 236 (Bom) [Commissioner of Income Tax v. Jet Airways (I) Ltd.],* a decision of the Bombay High Court.

7. We would first look at the decisions placed before us. ***Travancore Cements*** found that notice before assessment, to assess escaped income, is mandatory under Section 148(2). Even if the assessing authority detects on reassessment an escapement, on an issue totally unconnected with the reasons as recorded under Section 148(2), the same cannot be proceeded with on reassessment. A Full Bench of this Court however overruled the said decision. The Full Bench in ***Best Wood Industries Limited*** looked at the main body of Section 147 and found that the Supreme Court in ***(1992) 198 ITR 297 (SC) [CIT v. Sun Engineering Works P. Ltd.]*** has not laid down any preposition as has been found in ***Travancore Cements***. The Full Bench held that if in the course of reopening, for escapement of income, it comes to the notice of the AO that any other item or items of income, other than that recorded as reasons originally for the purpose of re-opening, has escaped assessment; then the AO is bound to assess such item or items of income also in the course of re-assessment under Section 147. The decision in ***(2007) 291 ITR 500 (SC) [Asst. CIT v. Rajesh Jhaveri Stock Brokers P.Ltd.]*** was also relied on by the Full Bench.

The Hon'ble Supreme Court in that decision held that at the stage of issuance of notice under Section 148, the only question is whether there was relevant material on which a reasonable person could have formed requisite belief. Whether it could eventually prove escapement of income is not at all the concern at the stage of re-opening. The decision in ***Travacore Cements*** stood overruled by the Full Bench.

8. Even when the Full Bench had declared so, Explanation 3 to Section 147 was inserted by Finance Act (No.2) of 2009 with effect from April 1, 1989. Explanation 3 reads as follows:

> "Explanation 3 : For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

9. The Division Bench of the Bombay High Court in ***Jet Airways (I) Ltd.***, was considering the effect of the Explanation insofar as reopening of assessment under

Section 148. The Division Bench specifically referred to ***Travancore Cements*** and found that the decision was rendered prior to the insertion of Explanation 3. After introduction of Explanation 3, the decision would cease to reflect the correct position in law. The effect of the Explanation was found to be that *"once an Assessing Officer has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under Section 148, it is open to him to assess or re-assess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under Section 148(2) (sic. Para 19)"*.

10. The Court then went on to consider whether in the circumstances of the original reasons recorded for re-opening, does not conclude in a finding of escapement of income; the other issues on which there were no reasons recorded, but were put to the assessee in the course of the re-assessment proceedings, could be proceeded with. The Division Bench answered the issue in the negative and found that, if on the original reasons recorded, there are no additions made, then necessarily, for the other issues detected in the

course of the re-opening proceedings, there should be a fresh notice under Section 148 with reasons recorded under Section 148(2). We have our own doubts about the dictum so laid down, but however, we need not express ourselves on the issue in the present case, since the said issue would not arise at all here.

11. As was noticed, there were four reasons recorded for re-opening of assessment under Section 148(2) of which two were eventually added on as escaped income. The other issues detected in the course of re-assessment proceedings were put to the assessee and reply/explanation obtained from the assessee. There is no ground urged of violation of principles of natural justice. It is after looking into the explanation offered by the assessee that the additions were made. This is not a case in which additions made, on the issues not originally recorded under Section 148(2) could be deleted, merely on the ground of original reasons recorded having not concluded in an assessment of escaped income. Two of the reasons recorded did conclude in assessment of escaped income. It definitely cannot be a preposition that only if all the recorded reasons ended in assessment of escaped income, could

there be assessment made on issues of escapement; detected during the course of re-opening. We, hence, answer the questions of law framed in favour of the Revenue and against the assessee.

12. We notice that the deletions were made on the assumption that there could be no other issues dealt with on re-opening other than what was recorded as reasons under Section 148(2). We have found otherwise based on the Full Bench judgment as also the judgment of the Division Bench of the Bombay High Court. In such circumstances, we would have remanded the matter for consideration of the quantum appeal. The issues requiring fresh consideration are (i) Section 80(IA), (ii) deemed dividend and (iii) expenditure with respect to Mammen Mappillai Hall.

13. Then, the learned counsel appearing for the assessee placed before us two decisions of this Court in which the issue under Section 80(IA) and of deemed income was considered and the same having acquired finality. When ordering a remand we have to notice that there are issues already settled, in the assessees own case, which need not now be addressed. The issue of deemed dividend is no longer *res-integra* being covered

by the common judgment of another Division Bench in ITA No. 167 of 2008 dated 03.01.2018.

14. On the reasons recorded under Section 148(2), excessive relief granted under Section 80(IA) was a specific ground. The AO had called for explanation which was supplied and on the basis of the details supplied with respect to the business in the various units, there was an apportionment made by the AO, contrary to what was conceded by the assessee. The first appellate authority had found that there were no sufficient reasons recorded to conduct a rowing enquiry and directed the AO to accept the computation as conceded by the assessee on the reopening effected. We would not delve further into that issue especially since this Court had in an earlier assessment year answered the question in favour of the assessee and against the Revenue in ***Malayala Manorama Co.Ltd Vs. C.I.T (2002) 257 ITR 633.*** We see from the assessment order that the Assessing Officer noticed the decision but sought to draw a distinction. However yet another Division Bench again for another assessment year followed the aforecited decision in ***C.I.T. Vs.***

Malayala Manorama Co.Ltd [I.T.A No. 655 of 2009 judgment dated 03.11.2017].

15. Further in the present case, which is a reassessment proceeding, quite surprisingly, the Assessing Officer proceeded to assess the escapement of income in the following manner: "*The assessee has not explained why there is discrepancy in the sales as per the old statement and the new statement except for the discrepancy in Trichur. After due consideration this year I am making a departure from the old method and allocating the sales as per the old statement as the sales but with certain changes"(sic).* This definitely is not permissible and falls foul of the principles of reassessment for reason of it being a mere change of opinion. The power conferred under Section 147 is not one of review and is of reassessment for reasons recorded. These reasons recorded has to emanate from some material coming to the notice of the Assessing Officer after the original assessment; which is absent at this instance. On the ground of binding precedents, inter-parties, in the other assessment years as also on the ground of the reassessment proceedings being incompetent, we are of the opinion that the direction

of the First appellate Authority on the issue of Section 80(IA), need not be touched. We affirm the order to that extent and the consequences flowing from the said directions necessarily follow.

16. Hence there would be no purpose served in remanding those two issues. What remains is the expense incurred for maintaining Mammen Mappilai Hall. The expenses is in the nature of salary paid to a sweeper for cleaning the premises. Though the Hall is in the name of the founder of the assessee, it is not owned by the assessee. The claim is that in keeping the Hall clean the assessse's business gets enhanced good will. A similar claim for business expenditure, was held to be not permissible in a binding precedent in the asessee's own case for another assessment year; reported in *[2006] 284 ITR 69 (Ker) Malayala Monorama Co.Ltd. v. Commissioner of Income-Tax.* The amount is also only Rs.2,45,33/- and there can be no dispute on quantum looking at the facts pleaded. Hence there is no reason for a remand.

We answer the questions of law as framed by the Revenue in favour of the Revenue and against the assessee on the reasoning above. But the additions

under Section 80(IA) will be as directed in the first appellate authority's order and the addition on deemed dividend stands reversed. The addition on the expenses incurred for Mammen Mappillai Hall stands sustained. The Income Tax Appeal is partly allowed.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE

jg