

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 23RD DAY OF MAY 2018 / 2ND JYAISHTA, 1940

ITA.No. 1123 of 2009

AGAINST THE ORDER IN ITA 1227/2004 of I.T.A.TRIBUNAL, COCHIN BENCH DATED
11-05-2007

APPELLANT(S)/APPELLANT/APPELLANT

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX
SRI P.K MENON, SR COUNSEL, GOVERNMENT OF INDIA (TAXES)

RESPONDENT(S)/RESPONDENTS:

PARRY AGRO INDUSTRIES LTD.,
BRISTOW ROAD, WILLINGDON ISLAND,, KOCHI - 3.

R BY ADV. SRI.P.BENNY THOMAS
R BY ADV. SRI.P.GOPINATH
R BY ADV. SRI.K.JOHN MATHAI
R BY ADV. SRI.E.K.NANDAKUMAR
R BY ADV. SRI.RAJAN P.KALIYATH

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 23-05-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ITA NO. 1123/2009

APPENDIX

APPELLANTS ANNEXURES:

ANNEXURE A: COPY OF ORDER UNDER SECTION 143(3) R.W.S 147 DTD 22.03.2002 FOR THE
ASST. YEAR 1994-95

ANNEXURE B: COPY OF THE ORDER DATED 31.08.2004 OF THE COMMISSIONER OF
INCOME TAX (APPEALS)

ANNEXURE C: COPY OF THE ORDER DT 11.05.2007 OF THE INCOME TAX APPELLATE
TRIBUNAL COCHIN BENCH IN ITA NO. 1227COCH/2004

ANNEXURE A1: TRUE COPY OF THE ASSESSMENT ORDER DT 31.03.1997 FOR THE ASST. YEAR
1994-95

RESPONDENTS ANNEXURES:

ANNEXURE R1(a): THE ORDER DT 15.01.1999 PASSED BY THE COMMISSIONER OF
INCOME-TAX (APPEALS) II, COCHIN

TRUE COPY

P.A TO JUDGE

jma

“C.R.”

K. VINOD CHANDRAN & ASHOK MENON, JJ

I T Appeal No. 1123 of 2009

Dated this the 23rd day of May, 2018

J U D G M E N T

Vinod Chandran, J

The question of re-opening of assessment under Section 147 of the Income Tax Act is up for consideration and the question of law as arising from the above appeal is re-framed as follows:

“Whether in the facts and circumstances of the case, the Tribunal was correct in having interfered with the re-assessment proceedings initiated under Section 147 on the ground that there was absence of full and true disclosure of material facts, as is necessary when such re-assessment proceedings are taken up after four years; mandated by the statutory prescription as available in Section 147?”

2. The assessee is a company having plantations of its own and also carries on trade in tea and coffee. The assessee deals in tea grown in their plantations as also tea purchased from outside sources. For the assessment year 1994-95, assessment was completed by Annexure-A order on 31.03.1997. The loss from Packet Tea Division (PTD) as found in the original assessment order was at Rs.1,86,29,034/-; which was allowed by the Assessing Officer. After four years, notice was issued for re-assessment under Section 147 alleging that the entire loss of PTD cannot be claimed by the company as deduction. The reasoning was that the sale effected by the PTD also included tea grown in its own plantations, at a proportion of 39% of the total tea sales. According to the Revenue 60% of the loss attributable to sale of tea grown in its own plantations has to be apportioned, applying Rule 8 of the Income Tax Rules; ie., 40% towards Income Tax under the Income Tax Act and 60% towards Agricultural Income Tax under the Agricultural

Income Tax Act. The Assessing Officer confirmed the proposal of re-assessment which was challenged in First Appeal.

3. The Commissioner of Appeal reversed the order of the Assessing Officer, finding that there cannot be alleged non-disclosure of full and true facts and the Tribunal too affirmed the view of the first appellate authority. The Tribunal found that what was attempted to be done on re-assessment, was to apply an inference which the original Assessing Officer could have drawn from the facts disclosed in the returns and the books of accounts when the original assessment itself was taken up.

4. The learned Senior Counsel appearing for the Revenue would contend that it was the duty of the assessee to have apportioned the loss as applicable to the sale of tea from the PTD, which was sourced from its own plantations to be adjusted against the agricultural income tax; since the income too is to be apportioned as provided under Rule 8 of the Income Tax Rules. The

apportionment having not been made in the returns, this would lead to non-disclosure of full and true material facts which would enable re-assessment under Section 147, even after the 4 year period is the compelling argument of the revenue.

5. The learned Senior Counsel would challenge the finding of the Tribunal that there was a consideration by the Assessing Officer in Annexure A1 as to the loss from PTD, pointing out the mere computation carried out in Annexure A1. This does not lead to a presumption that the matter was considered elaborately by the Assessing Officer; is the argument. The learned Senior Counsel relies on *[1967] 66 ITR 714 [Killick Nixon and Co. v. Commissioner of Income-Tax, Bombay City I]* to urge that a mere conclusion recorded cannot lead to a presumption that the evidence available was considered. Reliance was also placed on *[1970] 78 ITR 466 [Malegaon Electricity Co. P. Ltd. v. Commissioner of Income Tax, Bombay]*. It was argued that the cryptic statement of

the Income-tax Officer referring to the loss from PTD as declared by the assessee, having been allowed cannot lead to an assumption of consideration by the Assessing Officer of the apportionment between agricultural income tax and income tax; in the original assessment. Reliance is also placed on *[1961] 41 ITR 201 [Calcutta Discount Co. Ltd. v. Income-tax Officer]* and a decision of this Court reported in *[2018] 403 ITR 389 (Ker) [Commissioner of Income-tax v. Tata Ceramics Ltd.]*, to draw a parallel to the instant case; in which, according to the learned Senior Counsel, there is absence of disclosure of full and true material facts necessary for assessment; insofar as the apportionment of loss in the very same proportion of apportionment of income under Rule 8 having not been followed by the assessee in the return filed.

6. The learned Counsel appearing for the assessee would argue that the apportionment of income under the Agricultural Income-tax Act and the Income-tax Act was a matter specifically

considered and effectuated by the Assessing Officer. If at all there had to be an apportionment of loss in the very same proportion under Rule 8; it was an inference which could have been drawn by the Assessing Officer from the materials available. This is so especially since the said rule was applied in apportioning the income and it was very evident that the loss occasioned in the PTD was with respect to sale of tea grown in the assessee's own plantations and that procured from third parties. There cannot be a re-assessment proceedings initiated after four years on the ground of non-disclosure of full and true material facts especially since the Assessing Officer does not refer to any new facts detected; leading to reassessment. The only ground is that the assessee did not apportion the loss; as was done in the case of income under Rule 8 in the returns, which is not possible of being taken up on re-assessment.

7. The Income-tax Act by Section 143 provides for the Assessing Officer to assess any income or make such dis-allowances contrary to that claimed by the assessee in its returns. The Act also by Section 147 provides for bringing to tax any income, which escaped assessment within four years; without anything more than sufficient reasons being recorded under Section 148(2). The Revenue cannot exercise such right to reassess for all time especially when the statute prohibits it, other than on specific contingencies as laid out in the proviso to section 147, beyond the period of limitation of four years. One of such contingency is failure to disclose fully and truly all material facts; which is resorted to in the instant re-assessment.

8. The first argument is that the original assessment having not considered the apportionment of loss, in the same proportion as the income; the reassessment beyond four years is not a mere change of opinion. *Killick Nixon and Co.* and *Malegaon*

Electricity Co. P. Ltd. were relied on to urge that a mere conclusion recorded, in assessment or appeal, cannot be taken as a proper consideration of the various aspects. It is the submission of the learned Senior Counsel appearing for the Revenue that merely because the original assessment order, which is produced as Annexure A1, indicates deduction having been allowed for “loss from Packet Tea Division”, there can be no presumption that the Assessing Officer had considered the issue of apportionment of loss in proportion to the apportionment made of income under the Agricultural Income Tax Act and Income Tax Act.

9. ***Killick Nixon and Co.*** was a case in which the Appellate Assistant Commissioner estimated the value of three assets, which was affirmed by the Tribunal. The specific contention of the assessee before the Tribunal was that there was evidence on record showing that the market value exceeded the estimated value. The mere affirmation made by the Tribunal and the conclusion

recorded could not be deemed to have been on a proper consideration of the evidence, was the finding.

10. *Malegaon Electricity Co. P. Ltd.* was a case in which though sale of assets and consideration received were shown in the return, the written down value was never brought to the notice of the Assessing Officer; despite the fact that the consideration received was far in excess of the written down value. The Income Tax Officer had, in the original assessment, made a cryptic statement that no adjustment is necessary based on which the Tribunal held that the reassessment was on a mere change of opinion. The assessee argued that the sale of assets and the consideration received were before the Assessing Officer and there could be no allegation raised of non-disclosure of full and true facts. The Hon'ble Supreme Court found that the written down value having not been placed before the Assessing Officer there could not be said to be disclosure of all full and true material facts.

The matter was remanded to the Tribunal to first examine whether the amounts received as consideration in excess of the written down value could be deemed to be profit and if that question is answered in the affirmative, there could be no flaw found in the reassessment proceedings. The Hon'ble Supreme Court found that the Tribunal was not justified in drawing the inference that the ITO had considered all the relevant facts from a cryptic statement made that there need be no further adjustment made. We do not think the situation in this case is in any way similar to the decisions relied on.

11. The reliance placed, on *Calcutta Discount Co. Ltd.* by the Hon'ble Supreme Court and *Tata Ceramics Ltd* by this Court, does not support the Revenue's view. The judgment of this Court was one in which the judgment of the Hon'ble Supreme Court was relied on and there was found absence of full and true disclosure of material facts necessary for assessment. In *Tata Ceramics Ltd.*, the assessee filed a return disclosing a total income just above

Rs.3lakhs, which included interest income, which according to the assessee, was not liable to tax. In the original assessment, the contention was rejected and the interest income was taxed. Later, it was found that the interest income itself came to more than Rs.38lakhs, which was sought to be assessed to tax, as escapement of income, under Section 147. The four year period had elapsed and hence there was a contention raised that there was disclosure of full and true material facts necessary for assessment. The allegation in *Calcutta Discount Co. Ltd.* was with respect to non-disclosure of regular business of trading in shares. The assessee had produced audited accounts in which the sale of shares were expressly mentioned. In the regular assessment, the Assessing Officer had also considered the issue of sale of shares and opined that there was only a change in investment. The regular trading in shares being easily discernible and having been returned; the finding was that there could be no allegation raised of

non-disclosure of full and true material facts.

12. *Tata Ceramics Ltd.*, referring to *Calcutta Discount Co. Ltd.*, found a distinction on facts but relied on the dictum as laid down by *Calcutta Discount Co. Ltd.*, itself, but on facts upheld the re-assessment in that case. As had already been noticed there was only a portion of the interest income disclosed in the returns. There was hence non-disclosure of full and true material facts which resulted in the re-assessment proceedings being upheld. We are of the opinion that in the present case, the facts are more similar to that in *Calcutta Discount Co. Ltd.*, than that of *Tata Ceramics Ltd.*

13. We see from the Annexure A1 order that the question of application of Rule 8 was specifically taken into account by the Assessing Officer. Income from tea under Rule 8, ie: 40% of the income so computed was assessed to tax leaving 60% to be assessed under the Agricultural Income-tax Act. The sale carried out by the assessee from the PTD would obviously include the tea

grown in its own plantations, the income from which was apportioned under Rule 8. The loss from the PTD as returned by the assessee without any further disclosure in the returns would take in the component of tea grown in its own plantations as also that purchased from outside sources. It is relevant that the Assessing Officer while allowing the loss from PTD failed to differentiate the loss with respect to that occasioned by the sale of tea grown in the assessee's own plantations and apportion it in the same manner, the income was apportioned under Rule 8. What is discernible is that the re-assessment was initiated not on the detection of new facts which were not disclosed at the first instance but only for application of Rule 8 of the Income-tax Rules.

14. Rule 8 was applied to the income generated from agricultural operations and the Assessing Officer merely failed to apply it in the case of loss occasioned. Even within the four year period the question would arise whether it was a mere change of

opinion or otherwise. To permit a re-assessment after the four year period, there should be failure to disclose all full and true material facts, on detection of which alone there could be proceedings under Section 147. This element of non-disclosure we fail to see in the instant case.

We hence answer the question of law in favour of the assessee and against the revenue and as a consequence reject the appeal. No order as to costs.

Sd/-
K. Vinod Chandran, Judge

Sd/-
Ashok Menon, Judge

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