

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 1ST DAY OF FEBRUARY 2018 / 12TH MAGHA, 1939

ITA.No. 1596 of 2009

AGAINST THE ORDER/JUDGMENT IN ITA 154/COCH/1997 of I.T.A.TRIBUNAL,COCHIN BENCH
DATED 26-11-2003

APPELLANT(S)/RESPONDENT:

THE COMMISSIONER OF INCOME-TAX,
KOTTAYAM.

BY ADVS.SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/APPELLANT:

THE MALAYALA MANORAMA CO.LTD.,
KOTTAYAM.

R BY SR.ADV. SRI.E.K.NANDAKUMAR
R BY ADV. SRI. P.GOPINATH

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 15-01-2018 AND
THE COURT ON 01-02-2018 DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT(S) ' ANNEXURES:

- ANNEXURE A COPY OF THE ORDER OF THE ASSESSING OFFICER DATED 29-03-1995.
- ANNEXURE B COPY OF THE ORDER OF THE CIT (APPEALS) DATED 14-11-1996.
- ANNEXURE C COPY OF THE ORDER OF THE CIT U/S 263 DATED 25-03-1997.
- ANNEXURE D COPY OF THE PROCEEDINGS DATED 18-08-1997 GIVING EFFECT TO THE ORDER U/S 263.
- ANNEXURE E COPY OF THE ORDER OF THE ITAT DATED 26-11-2003.
- ANNEXURE F COPY OF THE PROCEEDINGS DATED 09-10-2002 FOR THE A.Y.1988-89.

RESPONDENT(S) ' ANNEXURES:

NIL

/TRUE COPY/

PA TO JUDGE

dkr

K.VINOD CHANDRAN & ASHOK MENON, JJ.

I.T.A. No. 1596 of 2009

Dated this the 1st day of February, 2018

J U D G M E N T

Ashok Menon, J.

The Revenue is in appeal assailing the findings of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A.No.154/Coch/97 dated 26-11-2003 for the assessment year 1992-93. The present appeal arises from an order passed by the Commissioner under Section 263 of the Income Tax Act, 1961 (for brevity the “Act”) in an appeal filed by the assessee. By the time the appeal came up for hearing, the Assessing Officer had passed a consequential order; the appeal from which was also posted along with the other appeal. Ideally the Tribunal ought to have considered the appeals together since both raise identical questions and there is no dispute on quantum. The Tribunal set aside the order of the Commissioner under Section 263 and as a result rejected the second appeal of the assessee against the consequential order, which is dependent on the order passed under Section 263. The following substantial

questions of law, as mentioned in the appeal memorandum of the Revenue and modified by us, arise for consideration:

- “1) Is the Tribunal justified in excluding the addition of a sum of Rs 88,007/- towards interest granted under section 244(1A) to the assessee ?*
- 2) Did the Tribunal go wrong in holding that Rs.8,21,916/ incurred towards the construction of the houses to the weaker sections of the society come under business expenditure under section 37 of the Act as it created tremendous goodwill by reason of which there was a consequential many fold increase in circulation of the assessee's daily newspaper and receipt by way of advertisement ?*
- 3) Was the Tribunal correct in holding that the assessee is entitled to depreciation under section 32 for the expenses incurred towards installation of plant and machinery at their Palghat Unit despite the fact that the commercial production of that Unit commenced only in April ,1992 ?*
- 4) Whether on the facts and in the circumstances of the case and also for the reasons given and grounds raised herein, the Tribunal is right in interfering with and setting aside the order of the Commissioner passed under section 263 of the Act ?”*

2. The assessee-company engaged in the business of printing and publishing of news papers and periodicals, filed the return of income for the assessment year 1992-93 on 30-12-1992, declaring a total income of Rs.29,12,700/- and later filed a revised return of income on 05-01-1994 showing a total income of

Rs.25,80,500/-. The assessment was completed under Section 143(3) on 29-03-1995 as per Annexure A, determining the total income at Rs.63,41,520/-. As per Annexure B order of the Commissioner of Income Tax (Appeals) in I.T.A.No.23/DC/K/CIT-I/96-97 dated 14-11-1996, the total income was reduced to Rs.46,04,340/-. We are not concerned with the original assessment, as modified in appeal.

3. Exercising *suo motu* revisional powers conferred under Section 263 of the Act, the Commissioner of Income Tax vide: Annexure C order dated 25-3-1997, interfered with certain allowances granted by the Assessing Officer (A.O). The assessment order, to the extent: (i) interest granted under Section 244 (1A) escaped inclusion in the income chargeable to tax, (ii) allowed depreciation of plant and machinery of Palghat Unit, and (iii) amount of Rs. 8,21,196/- expended for Poor Housing Scheme being allowed as business expenditure; were found to be prejudicial to the interest of revenue and directed re-computation.

4. Consequently, the assessment was recomputed by the A.O. vide: Annexure D order dated 18-08-1997 and the total income was determined at Rs.65,02,910/-.

5. The impugned order of the Tribunal set aside Annexure C order of the CIT passed under Section 263. The observations of the Tribunal for holding the order of the CIT under Section 263 of the Act as erroneous, were the following :

- 1) The assessee was informed of the grant of interest under Section 244(1A) only by order dated 09-10-1992; pertaining to the assessment year 1988-89. The orders received by the assessee for the assessment year 1988-89 were those dated 22-03-1991, 19-02-1992 and 09-10-1992; only the last of which contained the order of interest. The assessee was perfectly right in including such interest as income in the return for the assessment year 1993-94 and not in the year 1992-93;*
- 2) Since the expenditure on account of housing scheme for the poor had substantially helped the assessee in increasing the circulation and in creating tremendous goodwill and since the details of such expenses were already available before the Assessing Officer while completing the assessment, the assessment cannot be taken as erroneous under Section 263; and*
- 3) As the plant & machinery of the Palghat Unit were installed prior to 31-03-1992 and were kept ready for use and since evidence were already available before the assessing officer while completing the assessment, the order under Section 263 amounts to only a change of opinion and hence beyond the scope of Section 263.*

6. We heard the learned Senior Counsel Shri P.K.Ravindranath Menon appearing for the Revenue and Advocate Shri P.Gopinath appearing for the assessee.

7. The order of the Tribunal is assailed by the Revenue mainly on the following grounds:

(i) The Tribunal should have found that the order dated 19-02-1992, which was admittedly received by the assessee, included an interest of Rs.98,244/- under Section 244(1A), which was later reduced to Rs.88,007/- vide order dated 09-10-2002 and should have included it as income in the assessment year 1992-93.

(ii) The scheme devised by the assessee of construction of houses for the poor, as part of the Centenary celebrations, is at best a measure of charity, which cannot be treated as business expenditure and allowed under Section 37.

(iii) The plant and machinery at the Palakkad Unit even if installed earlier, started commercial production only in April 1992, and hence no depreciation could be allowed for the AY 1992-93, under Section 32.

8. The learned Counsel for the assessee submits that:

(i) Regarding payment of interest under Section 244(1A), there was no information received regarding the refund and hence it was not included as income for the relevant assessment year.

(ii) In support of expenditure incurred to finance housing scheme for the poor and claim for exemption under Section 37, the learned Counsel for the assessee relies on the decision in ***Sri Venkata Satyanarayana Rice Mill Contractors Co. v. CIT, [1997] 223 ITR 101 (SC)***, which held thus:

“..... any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on of the assessee's business or which results in benefit to the assessee's business has to be regarded as an allowable deduction under Section 37(1) of the Act. Such a donation, whether voluntary or at the instance of the authorities concerned, when made to the Chief Minister's Drought Relief Fund or a District Welfare Fund established by the District Collector or any other fund for the benefit of the public and with a view to secure benefit to the assessee's business, cannot be regarded as payment opposed to public policy. It is not as if the payment in the present case had been made as an illegal gratification. There is no law which prohibits the making of such a donation. The mere fact that making of a donation for a charitable or public cause or in public interest results in the Government giving patronage or benefit can be no ground to deny the

assessee a deduction of that amount under Section 37(1) of the Act when such payment had been made for the purpose of assessee's business."

(iii) The learned Counsel for the assessee also argues that the Palakkad Unit of the company was made ready for production in the relevant assessment year and therefore, the claim under Section 32(2) of the Act cannot be rejected only on the ground that the actual functioning of the plant started only in April, 1992. It was hence the expenditure was taken into consideration for the relevant assessment year. He relies on the decision reported in *Khimji Visram and Sons (Gujarat) Private Limited v. CIT, [1994] 209 ITR 993 (Guj.)* in support of his argument, wherein it is held as follows:–

"The assessee was running its business at Ahmedabad. The assessee was having his office at Ahmedabad. For expansion of its business activities, it purchased the premises at Mittal Towers in Bombay in July, 1975, and for furnishing it, it handed over its possession to its agent and after furnishing and repairs were over, it commenced its business from January, 1977, from the said premises. Hence, it would be apparent that in the present case, as the assessee had taken on lease (sic) the premises at Mittal Chambers at Bombay for the purpose of its business or setting up of the business and that it took over the possession in July, 1975, and handed over the same to its agent for furnishing and repairs, it can be said that, after taking over the possession, the said premises were used

for the purpose of business. May be the actual commencement of business might have started only in January, 1977."

9. Our decision on each of the three additions directed by the Commissioner under Section 263, pertaining which the first three questions of law were raised is as follows:

(i) The addition of interest under Section 244(1A) granted on 28-2-1992 for the assessment year 1988-89 was directed to be added by the Commissioner in his order under Section 263. The department contented that the refund was granted on 28-2-1992 and therefore, it was assessable for the assessment year 1992-93. On facts the Tribunal has found that at the time of original assessment, pertaining to A.Y 1988-89, on 22-03-1991, no interest was allowed. The interest, which was originally assessed at Rs.98,244/- and later reduced to Rs.88,007/-, was allowed for the first time by order dated 09-10-2002. On the basis of that order, it was accounted by the assessee for the assessment year 1993-94. We are therefore, in agreement with the findings of the Tribunal that there was no failure on the part of the assessee, to disclose the interest under

Section 244(1A); as alleged by the Revenue, since it was received only in the financial year 1992–93 and therefore, the finding of the Tribunal as regards the exclusion of interest, is sustained. No question of law arises from the said finding of the Tribunal; the last fact finding authority, who had verified the various orders pertaining to A.Y 1988–89 and found the interest having been granted in the financial year 1992–93; the previous year of the A.Y 1993–94, in which A.Y it was included in the taxable income.

(ii)(a) The next question that arises for consideration is regarding the dis-allowance of expenditure on poor housing scheme to the tune of Rs.8,21,916/–. The assessee had a scheme for construction of houses for weaker and poor sections of the society in connection with the centenary celebrations of the company. About 104 houses were constructed with the help of Nirmithi Kendra at an approximate cost of Rs.20,000/– per house. The beneficiaries are spread through out the State of Kerala. The finding of the Tribunal is that this act of the company helped the assessee in creating tremendous goodwill to the assessee-company and that it has substantially helped the assessee to increase its

circulation of news paper and consequent escalation of revenue from advertisement. This is the reason cited for claiming the amounts expended under the scheme, to be business expenditure; for reason of the benefit derived by the business.

(ii)(b) The facts in the decision relied on by the learned Counsel for the assessee in *Sri Venkata Satyanarayana Rice Mill Contractors Co. (supra)* can be clearly distinguished. Therein, a rice miller, had contributed amounts to a welfare scheme implemented by the District Collector and claimed it as business expenditure. The scheme was evolved by the District Collector in consultation with the Rice Millers Association and the contribution was insisted upon for issuance of a permit, without which no export could be made. Under the scheme, each member of the Association was to deposit in the Andhra Bank an amount of 50 paise per quintal of rice, for export from Andhra Pradesh and the application for the export permit was to be in a form wherein the applicant had to state the amount of contribution deposited by him. The contribution to the welfare fund was a precondition for the grant of the export permits, and therefore, the assessee contended that the

contribution was a compulsory payment extracted from it as a price for granting export permits. The Income-tax Officer disallowed the claim on the finding that the contribution was neither mandatory nor statutory. The High Court though found that the contribution was a precondition for issuance of export permit, disallowed the deduction on the ground that the payment to the scheme was against public policy. On appeal, the Supreme Court held that it was a voluntary scheme with which the District Collector was associated and payments to such fund was made openly by all millers; which fund was being used for public benefit and could not be regarded as being opposed to public policy. Quoting *CIT v. Chandulal Keshavlal & Co., ([1960] 38 ITR 601)*, it was held that the correct test would not be the compulsory nature of the levy but the commercial expediency. If the payment made is for the purpose of business and was not by way of any penalty incurred for infraction of law, the same would be allowable as a deduction, was the finding. We are unable to find any identity in the expenditure made in the cited case and the one we are called upon to decide. The philanthropic act of building houses for the poor and needy, at the

time of the company's centenary celebrations does not reveal any commercial expediency or a business requirement.

(ii)(c) The learned Senior Counsel for the Revenue also relies on the decision reported in ***Malayala Manorama Co.Ltd. v. CIT, [2006] 284 ITR 69 (Ker.)***, wherein it is held as follows:

“Expenditure laid out or expended wholly and exclusively for the purpose of business or profession alone shall be allowed in computing the income chargeable under the head “Profits and gains of business or profession”. In order to be deductible under this section, expenditure should be incurred for the purpose of business which is carried on in the accounting year. The section requires that the expenditure should be wholly and exclusively laid out for the purpose of business. The contribution effected should be expended entirely and completely for the purpose of the business.”

The claim raised by the assessee in the above cited decision was identical to that raised herein. Therein the amounts donated to a charitable trust created by the assessee for rehabilitation of earthquake victims were claimed as business expenditure. The contention was similar in so far as the expenditure made by the assessee having paved the way for business promotion by reason of the wide publicity received, enhancing the prestige of the publication and increase of its readership. The Division Bench of

this Court rejected the claim for deduction under Section 37, on the ground that the expenditure was not one wholly and exclusively for the purpose of business. The purpose was found to be charitable and philanthropic and not for promotion of business. The object of the trust established was not business promotion. The indirect benefit by way of goodwill earned of the earthquake victims and the general public cannot be deemed to be expenses “wholly and exclusively” for business was the categorical finding.

(ii)(d) We cannot agree with the argument advanced by the learned Counsel for the assessee in the teeth of the declaration made by the Division Bench of this Court in the assessee's case itself, on more or less similar facts. The justification given by the Tribunal that the charity resulted in escalation of revenue by way of advertisement also cannot be accepted. It was the assessee's own initiative to provide houses for poor, an act of charity, done in connection with their centenary celebrations. Although the assessee may have got popularity in carrying out the noble cause, with considerable expenditure, resulting in enhanced circulation, it cannot be termed as an expenditure incurred wholly or exclusively

for the business of the assessee under Section 37 of the Act. The benefit derived by the business was only incidental and the assessee never intended it as a business promotion. If it had been a mere business promotion it is doubtful whether the act would have generated goodwill amongst the public or would have increased circulation. The assessee in taking up such a contention casts a cloud on the charitable intentions; which alone could have resulted in the popular acclaim won by such an act of philanthropy. The expenditure hence cannot be allowed under Section 37, being not one “wholly or exclusively laid out or expended for the business” of the assessee. The findings of the Tribunal in this regard are erroneous and has to be set aside and the Commissioner's order passed under Section 263 of the Act restored on that count.

(iii)(a) The next point for consideration is regarding the claim of depreciation on the amount spent for installation of plant and machinery in the Palakkad Unit, which started commercial production only in April, 1992. The Tribunal has relied on the decision reported in *Khimji Visram and Sons (Gujarat) Private Limited (supra)* to arrive at the conclusion that the actual

commencement of the business may not be necessary for granting the relief under Section 32 of the Act. Therein the assessee carrying on business in cotton, purchased a new premises for its business in another State and handed over the same for repairs and furnishing, which took about two years and commenced business in January 1977. The assessee claimed deduction of ground rent, municipal taxes & maintenance charges as business expenditure and also depreciation; both of which were found to be allowable in the A.Y 1976–77. The claim for depreciation for plant and machinery of the Palghat Unit is identical, was the finding of the Tribunal.

(iii)(b) In *Liquidators of Pursa Ltd. v. CIT*, [1954] 25 ITR 265 (SC), interpreting the purport of Section 10(1) of the Income Tax Act 1922, it was held so:

“The words ‘used for the purposes of the business’ obviously mean used for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be used for the purpose of that business which is actually carried on and the profits of which are assessable under Section 10(1). The word ‘used’ has been read in some of the pool cases in a wide sense so as to include a passive as well as active user. It is not necessary, for the purposes of the present appeal, to express any opinion on that point on which the High Courts have expressed different views. It is, however, clear that in order to

attract the operation of clauses (v), (vi) and (vii) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year, no allowance can be claimed under clause (vii) in respect of them and the second proviso also does not come into operation.”

Following the above decision, the Madhya Pradesh High Court in ***CIT v. Jiwaji Rao Sugar Co.Ltd., [1969] 71 ITR 319,*** has held as follows:

“In our opinion, the basic concept underlying this allowance is that depreciation should result as a consequence of the machinery being actually used or employed in the earning of income. That being so, it is not material whether or not the machinery is kept ready for use so long as it is not actually used in the earning of income. That being our view, we are unable to accept the wider interpretation of the word “used” as given in the Bombay and Patna cases.”

(iii)(c) In yet another decision of the Rajasthan High Court reported in ***CIT v. Udaipur Mineral Development Syndicate Pvt.Ltd. [2004] 269 ITR 263,*** it is held thus:–

“However, depreciation is permissible only in cases where the machinery has been actually used for production. When the machinery in question was not put to use in the year under consideration even for a day and the business remained closed, there is no justification to allow the depreciation on such machinery which has not been used even for a day in

the whole year. The Tribunal has committed an error in allowing the depreciation on machinery which has not been used even for a day in the previous relevant year in question.”

(iii)(d) The Bombay High Court (Nagpur bench) has held thus in ***Dineshkumar Gulabchand Agrawal v. CIT, [2004] 267 ITR 768,***

“The word “used” denotes actually used and not merely ready for use. The expression “used” means actually used for the purposes of the business. The view is taken by the Tribunal. In this view of the matter, no substantial question of law is involved.”

(iii)(e) On going through the catena of precedents on the point, we are of the opinion that the depreciation under Section 32 of the Act for the plant and machinery installed by the assessee is permissible only in case where it was actually put to use in the year under consideration. We respectfully express our dissent from the decision of the Gujarat High Court; especially in the context of the authoritative declarations made by the Honourable Supreme Court and other High Courts; fore cited. In the instant case, the actual business of printing and publishing commenced at the Palakkad Unit only in April, 1992 and therefore, it has to be held

that the plant and machinery was not put to use during the assessment year under consideration. The Tribunal was therefore, not justified in allowing the depreciation on that account to the assessee. The order of the Tribunal to that extent too is therefore liable to be set aside and that of the Commissioner under Section 263 restored.

10. We answer the first question framed, being one on facts, in favour of the assessee and against the department. The assessee was perfectly right in having included the interest received in 1992-93 in the A.Y. 1993-94, as income. The deletion made by the Tribunal of the addition of a sum of Rs.88,007/- towards interest granted under Section 244(1A), was perfectly justified.

11. We accept the argument of the learned Senior Counsel for the Revenue, on the other two counts that the Commissioner was exercising powers under Section 263 to undo the erroneous assessment carried out by the A.O; which were prejudicial to the interest of the Revenue. The Tribunal egregiously erred in qualifying the amounts expended by the assessee in charity, as one “wholly and exclusively” laid out or expended for the purpose

of business; for reason of the incidental goodwill and popularity garnered by such charitable act. The question has to be answered against the assessee and in favour of the Revenue. The third question too has to be answered in favour of the Revenue and against the assessee since the assessee had not commenced production in the relevant assessment year and the depreciation claim on the basis of the installation of plant and machinery and readying the unit for use for business purposes, cannot be sustained in the wake of the overwhelming precedents noticed against such a claim. The Tribunal went wrong in upsetting the decision of the Commissioner under Section 263 of the Act, on two counts ie: on the dis-allowance of the claims, under Section 37; as business expenditure and under Section 32; as depreciation. The interest under Section 244(1A) had been rightly conceded in the next assessment year and to that extent the Commissioner's order under Section 263 is liable to be set aside and we affirm the Tribunal's order to that extent.

12. On perusal of the records, we cannot but observe that the order of the Commissioner, under Section 263, rightly exercised

the *suo motu* powers of revision on the two counts mentioned above, for reason of prejudice occasioned to the Revenue. It cannot be said that there was no application of mind. The ground of mere change of opinion as found by the Tribunal would not apply to orders passed under Section 263. To sustain the order of the Commissioner under Section 263, we garner further support from the decision reported in ***Appolo Tyres Ltd. v. Deputy Commissioner of Income Tax, [2014] 360 ITR 36 (Ker.)*** . The appeal is allowed in part. No costs.

13. Before we leave the matter, we have to bestow our attention to the consequence of restoration of the order under Section 263. Especially since the consequential order of the A.O. has been set aside by the Tribunal, on the order under Section 263 having been set aside. As we noticed at the outset there is no dispute on quantum raised by the assessee and a remand to the Tribunal would be an empty formality and unnecessary. The grounds on which *suo motu* revision was made, on definite, determinable quantum, has been considered elaborately by the Tribunal and this Court. We would hence direct the A.O. to

expeditiously pass consequential orders making the demand on the two heads permitted herein above.

Sd/-
K.VINOD CHANDRAN
Judge

Sd/-
ASHOK MENON
Judge

dkr