IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and CHANDRA POOJARI, AM

I.T.A. No. 375/Coch/2014
Assessment Year : 2005-06

Padinjarekara Agencies Pvt. Ltd., Kodimatha, Kottayam. [PAN: AAACT 7598K]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1, Kottayam.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri Iype John, CA
Revenue by	Shri K.K.John, Sr. DR

Date of hearing	08/10/2014
Date of pronouncement	17/10/2014

O R D E R

Per CHANDRA POOJARI, Accountant Member:

This appeal filed by the assessee is directed against the order dated 05-12-2013 passed by the CIT(A)-IV, Kochi for the assessment year 2005-06.

2. There was a delay of 160 days in filing the above appeal by the assessee before the Tribunal. The assessee has filed a petition seeking condonation of delay and also has filed an affidavit explaining the reasons for delay in filing the appeal before the Tribunal within the due date. The assessee submitted that one of the issues involved in this appeal was the applicability of the

accounting standards. The CIT(A) has not considered this aspect. In the recent judgment in the case of CIT vs. Punjab Stainless Steel Industries & Ors. (364 ITR 144), the Supreme Court has held that meaning given by body of Accountants having statutory recognition can be adopted. So based on the accounting standards, the petitioner was entitled to the claim. This judgment was rendered by the Apex Court only on 05-05-2014 and the copy of the income tax report reporting this case was received only on 07-06-2014. According to the assessee, the delay occurred due to reasons beyond assessee's control and there was no willful latches or omissions or neglect on the part of the assessee in filing the appeal within the due date. The assessee pleaded that if the delay was not condoned and the appeal not admitted, it would cause serious and irreparable hardship and monetary loss to the assessee.

3. The Ld. DR has not raised any serious objection for condonation of delay in filing the appeal by the assessee.

4. We have heard both the parties and perused the record. We find that there exists reasonable cause for not filing the appeal in time and the reasons advanced by the assessee for the delay are

bona fide. Being so, we condone the delay in filing the appeal by the assessee and admit the appeal for adjudication.

5. Regarding the first issue relating to re-opening of assessment, the Ld. AR submitted that the only reason recorded is that agricultural income reduced from the net profit is Rs.81,47,859/- in place of Rs.5,229 in normal computation. Section 115JB stipulates that the amount of income to which the provisions of sec. 10 applies can be reduced from the net profit only if such amount is credited to the P&L account. No agricultural income was credited to the P&L account other than Rs.5,228/- included in the other income. Correct computation of book profit was Rs,1,04,79,620/-.

6. The Ld. AR submitted that the limited objection was that the sum substracted as agricultural income was not credited to the P&L account, as such this figure could not be substracted from the net profit. Being so, the Ld. AR submitted that if the amount of Rs. 81,47,859/- was credited to P&L account, he reasons recorded cannot survive and the notice under section 148 would be without authority of law. According to the Ld. AR, there was no case for the

AO that it was not agricultural income but the case was only that it was not credited to P&L account.

7. The Ld. AR submitted that the CIT(A) referred to the Revenue's stand that profit or loss on the disposal of an asset was to be duly incorporated in the profit and loss account of a company prepared in accordance with Parts II & KKK of Schedule VI to the Companies Act, 1956, the net profit per which is to be adopted by it for computing the 'book profit' under the MAT provisions including 115JB. As such there was no basis for excluding the profit derived from the sale of its agricultural land outside the Municipal limits and was exempt income under section 10. The Ld. AR submitted that the CIT(A) relied on the order of the Cochin Bench of the Tribunal in the case of Harrisons Malayalam Ltd. in I.T.A. No. 54/Coch/2009 and 60/Coch/2009 dated 12-05-2009 wherein it was held that profit accounted on sale of agricultural land namely Rubber Estate was not to be considered for the purpose of computing book profit under section 115JB of the Act. Accordingly, the CIT(A) held that the income was agricultural income and deleted the addition of Rs.23.69 lakhs. Admittedly, the amount was credited to the P&L account and was eligible for deduction. According to the Ld. AR, the order

of the CIT(A) proved that the reasons recorded was based on wrong assumption of facts.

8. The Ld. AR submitted that the notice issued under section 148 was on wrong assumption of facts that the sale of Kumarakam property was disclosed in the P&L account, being so, the notice was liable to be quashed in view of the judgment of the Rajasthan High Court in the case of Khem Singh Sankhla vs. Union of India (266 ITR 485) wherein it was held that reasons based on wrong assumption of facts that certain income were disclosed amounts, and other alleged reasons which appear to have been interpolated without the initial of any officer could not be accepted as valid reasons for issuance of notice under section 148 and the impugned notice was quashed. According to the CIT(A), the notice under section 148 was also liable to be quashed also in view of the judgment of the Bombay High Court in the case of Siemens Information System Ltd. vs. ACIT (2007) (293 ITR 548) holding that when notice under section 148 is issued based on a non-existing reasons and had been issued under the mistaken belief, notice was not valid since there was total non application of mind and notice was based on that reasons would amount to non application of mind.

9. The Ld. AR submitted that the case of AO was only that the law does not require AO to limit himself to only the ground on which assessment was reopened. The Ld. AR relied on the judgment of Apex Court in the case of CIT vs. Sun Engineering Works P. Ltd. (1992) (198 ITR 297) wherein it was held that in proceedings under section 147, the AO may bring to charge items of income which had escaped assessment other than or in addition to that item or items which led to the issuance of the notice under section 148. The Ld. AR submitted that this issue arises only at the assessment stage and not at the notice stage. For this, he relied on the judgment of the Calcutta High Court in the case of CESC Ltd. and another vs. DCIT (263 ITR 402) wherein it was held that at the notice stage, there was no question of having any alternative remedy except contesting the proceedings before the authority concerned. The notice was liable to be quashed. He further relied on the judgment of the Rajasthan High Court in the case of CIT vs. Shri Ram Singh (306 ITR 343) wherein it was held the tribunal was justified in holding that the proceedings for re-assessment under section 148/147 were initiated by the AO, on non-existing facts, because ultimately, the assessee has been able to explain the income, which was believed to have been escaped

assessment, was explainable. It was further held that the AO was justified in initiating the proceedings under section 147/148, but then, once he came to the conclusion that the income, with respect to which he had entertained 'reason to believe' to have escaped assessment, was found to have been explained, his jurisdiction, to put to tax, any other income, which were found by him, to have escaped assessment. Thus when the very base of the reopening goes, the reason for reopening also goes. Thus, it was found that the action taken by the AO under section 147/148 was illegal and notice issued under section 148 was ab initio void and was thus quashed.

10. The Ld. AR submitted that the CIT(A) totally omitted to deal with the reasons recorded on objections and after holding that the income credited to P&L account is agricultural income and after deleting the addition made by the AO based on credit in P&L account, the order of the CIT(A) on this ground is a clear contradiction and if there is no credit in P&L account there was no question of allowing the claim which is in total violation of principles of natural justice. For this, the Ld. AR relied on the judgment of Apex Court in the case of 9 SCC 496, a summary of which is given by the Punjab and Haryana High Court in the case

of ATM Forgings vs. CIT (359 ITR 314) wherein it was held that all these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered which is important for sustaining litigants' faith in the justice delivery system. The insistence on reason is a requirement for both judicial accountability and transparency. The reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or rubber stamp reasons is not to be equated with a valid decision-making process and the judgment of the Supreme Court in the case of Tamil Nadu Mercantile Bank Ltd. vs. State reported in 2013 (4) KLT S.N. 143(SC) wherein it was held that reason would mean a justifying reason, or more simple a justification for a decision is a consideration, in a non-arbitrary ways in favour of making or accepting that decision. If there is no justification in support of a decision, such a decision is without any reason or justifying reason. He further relied on the judgment of the Kerala High Court in the case of 2012 (4)KLT SN 131 wherein it was held that non disclosure of reasons is fatal to the decision which is rendered and reasons form the elixir of adjudication process and the result and decision.

11. The Ld. DR submitted that the reasons recorded by the AO are sufficient to justify the reassessment, no matter whether any addition sustained in the assessment with specific reasons or grounds for reopening and there is a valid reason for reopening the assessment and that cannot be the reason to cancel the assessment. For this, the Ld. DR relied on the judgment of the Kerala High Court in the case of CIT vs. TBS Publishers & Distributors (2010) (325 ITR 257) wherein it was held that the Assessing officer having noticed that the assessee has claimed credit based on TDS certificate vis-à-vis rent without disclosing income under the head "Income from house property" and also doubted the genuineness of the sundry creditors, the same constituted sufficient reasons for re-opening of the assessment, even though no rental income was assessed in the reassessment. The assessee's claim that the Assessing officer could have issued notice u/s. 143(2) of the Act was not tenable as such a recourse open to the Assessing officer does not stand in his way of reopening the assessment u/s. 147 of the Act. He also relied on the judgment of Full Bench of the Kerala High Court in the case of CIT vs. Best Wood Industries and Saw Mills (2010) (331 ITR 63) (Ker.) (FB) wherein it was held that in the course of reassessment it comes to the notice of the Assessing officer of any item or items

other than item of escaped income for which original assessment was reopened have also escaped assessment, he is bound to assess such item or items of income also in the course of reassessment.

12. We have heard both the parties and perused the record. In this case, the assessment was reopened on the reason that while computing business loss under the normal provisions of the Act, the assessee added back to the income as per P&L a/c., agricultural expenses amounting to Rs.10,943/- and subtracted agricultural income of Rs.5,228/-. However in computing MAT u/s. 115JB, the assessee subtracted from net profit, a sum of Rs.81,47,859/- as agricultural income. While making adjustments from the net profit, in order to arrive at book profit for the purpose of MAT, only those sums can be deducted which are credited to the P&L a/c (clause ii to explanation to section 115JB). Since the assessee had credited only Rs.5,228 under other income, this alone can be subtracted.

13. Now the contention of the assessee is that when the reassessment proceedings are initiated, the AO need to limit himself to the ground on which the assessment was reopened

and he cannot travel beyond the reasons recorded. For this, he relied on various judgments. As per provisions of sec. 147, once the assessment is reopened, for bringing to tax any income that has escaped assessment, in terms of sec. 148 to 153, then the AO has to assess or reassess such income and also any other income chargeable to tax which has escaped assessment. The purpose of this provision is that if in the process of reassessment initiated under section 147 to bring to tax any item of escaped income it comes to the notice of the AO that any other income has also escaped assessment, then the Assessing officer has to bring to tax such income also. The procedure for income that has escaped assessment under section 147 is contained in section 148 whereunder sub-section (2) makes it mandatory for the Assessing officer to record reasons before proceeding to issue notice. However, once assessment is reopened after recording reasons, the Assessing officer has to complete the income escaping assessment by following the provisions of the Act as if the return furnished against notice u/s. 148 as one filed u/s. 139 of the Act. This obviously means that so far as procedure to be followed is concerned, there is no difference between income escaping assessment and regular assessment because the provisions generally provide for issue of notice, hearing of the assessee and

taking of evidence, etc., which are the same for regular assessment and income escaping assessment. Therefore, in the course of income escaping assessment, if it comes to the notice of the Assessing officer that any other item or items of income other than the item of escaped income for the assessment of which, assessment originally completed was reopened, also have escaped from original assessment, he is bound to assess such item or items of income also in the course of reassessment u/s. 147. In view of the specific provision providing for assessment of other items of income that have escaped assessment, and that comes to the notice of the Assessing officer in the course of income escaping assessment, the reassessments made are valid. Being so, in our opinion, there is no infirmity in the order of the CIT(A) on this issue. More so, this issue is fully covered by the Jurisdictional High Court, cited supra. Accordingly, this ground is dismissed.

14. The next ground is with regard to disallowance of provision of sales tax of Rs.2,36,99,806/-.

14.1. Ld. AR submitted that the disallowance of provision for sales tax of Rs.2,36,99,806/- was not sustainable. According to the AO, the provisions relate to demands from A.Y. 1982-93 to

1999-2000 based on assessment orders and the matter was still in the stage of appeal, reassessment etc. and the assessee has not paid the demand. Therefore, as per section 43B, this amount cannot be allowed under normal computation. Against this, the Ld. AR submitted that the claim is under section 115JB. According to the Ld. AR, addition as per the Explanation in clause (c) is only in respect of amount or amounts set aside to provisions made for meeting liabilities other than the ascertained liabilities. According to the Ld. AR, the liabilities have not crystallized and hence it does not relate to the previous year in question. The only dispute is whether it is an ascertained liability or not.

15. The Ld. AR submitted that in the P&L account, the provisions for sales tax of Rs.2,36,99,808/- was made and the above provision relates to the assessment years 1982-83 to 1999-2000. According to the Ld. AR, just because the appeals are pending, that does not make it unascertained liability not to be provided for. The Ld. AR relied on the judgment of the Kerala High Court in the case of CIT vs. Kumaran and Co. (194 ITR 85) and the judgment of Apex Court in the case of CIT vs. Apollo Tyres Ltd. (255 ITR 273). Moreover the issue was covered by judgment of the Delhi High Court in the case of CIT vs. Khetan

Chemicals and Fertilizers Ltd. (307 ITR 150) and the latest judgment of the Apex Court in the case of CIT vs. Punjab Stainless Steel Industries & Ors. (364 ITR 144).

16. The Ld. AR relied on the judgment of Kerala High Court in the case of M/s. Abad Fisheries vs. CIT reported in 1995 TAX L.R. 571. However consequent to subsequent appellate orders, the assessee got refund of Rs. 2,53,49.742/- for assessment year 2012-13 which was credited in the P&L account and offered for assessment. The Ld. AR relied on the decision of the Apex Court in the case of Union of India vs. National Federation of the Blind reported in 2013 (4) KLT SN 51 wherein it was held that while interpreting any provision of a statute the plain meaning has to be given effect and if language therein is simple and unambiguous, there is no need to traverse beyond the same. The Ld. AR also relied on Constitution Bench judgment of the Apex Court in the case of Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service Inc. & Others reported in (2013) 180 Company Cases 311 wherein it was held that the provisions in the 1996 Act must be construed by their plain language/terms. It is not permissible for the court while construing a provision to reconstruct the provision. In other words, the court cannot produce a new jacket, whilst

ironing out the creases of the old one. Being so, the Ld. AR submitted that the provision for sale tax is an ascertained liability and is to be deducted. According to the Ld. AR, the CIT(A) confirmed the addition by holding that the liability has not been quantified as the assessments were in various stages of appeal revision assessment etc.

17. On the other hand, the Ld. DR submitted that provision made on account of sales tax was not an ascertained liability.

18. The Ld. DR submitted that the liability has not crystallized as on date and has also raised the issue as to why the assessee has not provided any explanation as to why the provision was made in the previous year and not in any of the years preceding. It was also clear, according to the Ld. DR, that the liability would crystallize only on the outcome of such appeals/reassessment, etc. Further, the Assessing officer has applied the ratio in the case of Bharath Earth Movers vs. CIT (2000) (245 ITR 428), wherein it was held that if a business liability has arisen in the relevant accounting year the deduction should be allowed although the liabililty is quantified and discharged at a later date. According to the Assessing officer what should be certain is the incurring of

liability and it should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. According to the Ld. DR, the provision is not an ascertained liability and the Assessing officer has further distinguished the decision of the Kerala High Court in CIT vs. Kumaran & Co. (1991) (194 ITR 85) which has been relied upon by the assessee. According to the Ld. DR, in this case, the assessee is an abkari contractor who incurred a liability to pay licence fee and the assessee paid a part of it and made a provision in the accounts towards rest of the account and interest thereon. Later a court decision came that ended the liability for which the provision was made. Accordingly, the Ld. DR submitted that the Assessing officer and the CIT(A) disallowed the provision and the ITAT and the High Court allowed it.

19. According to the Ld. DR, the issue is not whether prior period items can be allowed while computing tax u/s. 115JB. The issue is whether the prior period item involved is an ascertained liability or not. The assessee has received the refund of sales tax of Rs.2,53,49,742/-. For the assessment year 2005-06, the provision for sales tax liability of Rs.2,36,99,808/- was made which was treated by the Assessing officer as unascertained liability and

added back both in regular computation and u/s. 115JB. According to the Ld. DR, in retrospect, it is now amply clear that it is not only that the liability was unascertained but rather, non-existent which means that the Assessing officer has rightly inferred and added the liability for the computation of income including u/s. 115JB of the Act. The Ld. DR submitted that since the liability has not been quantified as the assessments are in various stages of appeals/revision/reassessment, etc., the Assessing officer was justified in making the addition.

20. We have heard both the parties and perused the record. The assessee had contended that the Assessing officer was not entitled to make adjustments to book profit shown in the audited accounts. The question that had arisen was whether the Assessing officer was entitled to disturb the net profit shown by the assessee in the profit and loss account prepared as per the Companies Act, 1956.

21. As per the provisions of section 211 of the Companies Act, the companies have to follow the applicable accounting standards. However, if the profit and loss account and the balance sheet do not comply with the accounting standards, such companies are

required to disclose about the deviation, reasons thereof and the financial impact thereon. This is provided so in sub-section (3A) and (3B) of section 211 of the Companies Act.

22. The accounting standards prescribe the method of treating various types of income and expenditure for the purpose of preparing the financial statements. Hence, in order to ensure uniform accounting practices and disclosures, the accounting standards have been made mandatory for the companies and, hence, they are required to follow them while preparing the financial statements. If any company deviates from the prescribed accounting standards, it has to disclose, inter alia, the financial effect arising due to such deviation. Thus, there is an option for the companies not to follow the accounting standards, if it feels so for any reason. Such deviation may have impact to the profit disclosed in the profit and loss account prepared in accordance with Part II and part III of Schedule VI of the Companies Act. Hence in order to enable anybody to understand the implication of such deviation, it was made mandatory for the companies to disclose the financial implications of such deviation. Such kind of deviations are acceptable under the Companies Act, however, they are not always acceptable to the income-tax

authorities. Under the income-tax, the Assessing officer is entitled to examine the said deviations, particularly when it has an impact on the book profit. There cannot be any dispute that it is the responsibility of the assessee to substantiate the legality of any item of expenditure/income found debited/credited in the profit and loss account by drawing support from any document or business practices or accounting requirements.

23. With regard to the claim of prior period charges/credits in the Profit and Loss account, the assessee's explanation is that it was crystallized in this assessment year. From the explanations furnished by the assessee, it was evident that the assessee had passed the entry for prior period credits/charges in the assessment year only to ensure that the final book profit (surplus) was to be reduced. On making careful observations of the facts of the case, the said intention of the assessee was very much apparent and glaring. Besides, the assessee also could not substantiate the said claim with a legally tenable explanation. It was also not shown that the booking of such kind of entries are permitted under the accounting principles.

24. The question that would arise, thereafter, was whether the Assessing officer was still debarred from making any adjustment to the net profit shown in the profit and loss account, even if any entry made therein could not be properly explained in accordance with the accounting principles/business practices. The answer could be no only. That was in view of the fact that when the assessee could not furnish legally tenable explanation and also could not show that it was in accordance with established accounting principles, then it could not be said that the financial statements had been prepared in accordance with the provision of the Companies Act, even if the management/auditors were silent on that point. Admittedly, in the present case, the provision made by the assessee relates to the sales tax demand for the assessment years 1982-93 to 1999-2000, based on the assessment order of the respective years. There is no evidence brought on record by the assessee to suggest that these assessment orders have been received by the assessee in the assessment year under consideration. The assessee, having received the sales tax assessment orders not in this assessment year and the liability being quantified in the earlier assessment years, it cannot be claimed in the assessment year under consideration. In other words, it was not an ascertained liability of

the assessment year under consideration. Being so, the provision made by the assessee cannot be considered as allowable expenditure in the assessment year under consideration. In such kind of situations, the Assessing officer would definitely be entitled to make suitable adjustment to the net profit shown by the assessee to nullify the effect of such kind of accounting entries.

25. In view of the foregoing discussion, we hold that the Assessing officer was entitled to adopt the net profit after suitable adjustment for the purpose of computing the book profit u/s. 115JB. The judgment relied upon by the assessee in the case of Apollo Tyres, cited supra, cannot be applied to the present facts and circumstances of the present case. Accordingly, this ground is rejected.

26. The next ground is with regard to validity of assessment passed under section 147 of the I.T. Act.

26.1 Ld. AR submitted that the above order was passed without authority. According to the Ld. AR, pursuant to return filed on reopening, it was not processed under section 143(1). According to the Ld. AR, the return was processed under section 143(1) on

the basis of original return on 24-01-2006 and the order was passed under section 147 and not under section 147 read with section 143(3) which may be due to non issuance of notice under section 143(2). The Ld. AR submitted that in view of judgments of the Calcutta High Court in the case of Indian Aluminium Co. Ltd. vs. Union of India & Ors. (271 ITR 73), Jodhpur Bench of the Tribunal in the case of Smt. Mansukhi Devi Bihani Jan Hitkari Trust vs. CIT (94 ITD 1) and the Apex Court judgment in the case of L.N. Hota & Company vs. CIT (301 ITR 184), the order passed is without authority.

27. The Ld. DR submitted that this issue cannot be adjudicated at this stage as there is no such issue raised before the lower authorities and there is no petition for admission of additional ground.

28. We have heard both the parties and perused the record. In this case, the assessee had continuously appeared before the assessing authority as well as before the CIT(A) and participated in all the re-assessment proceedings, answered all queries raised by the Assessing officer. It is not the case of the assessee that no proper opportunity was given in this case. The only contention is

that there was no notice u/s. 143(2) before completing the re-assessment. Another relevant point that must be taken into account is that the assessee by letters dated 10-09-2007, 17-09-2007, 18-07-2008 etc., sent various submissions to the Assessing officer in response to the various letters issued by the Assessing officer, explaining the assessee's position. Being so, the Assessing officer might have thought that it was not necessary to give notice in the prescribed format u/s. 143(2) of the Act. Taking into account the above factors, it is clear that even if there is any discrepancy in the format of the notice u/s. 143(2), i.e., non-adherence to some prescribed rule or mode of proceedings, it does not make the assessment orders null and void. Nullity is where there is a void act or an act having no legal force or validity. In this case, the Assessing officer, having followed the rule prescribed, has given adequate opportunity of hearing to the assessee and there is no failure to consider the various objections raised by the assessee in its letters, does not amount to nullity in law. The same is to be upheld. Accordingly, we are inclined to dismiss this ground of the assessee.

29. In the result, the appeal filed by the assessee is dismissed.

Pronounced accordingly on 17-10-2014

sd/-	sd/-
(N.R.S.GANESAN)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 17th October, 2014
GJ
Copy to:
1. Padinjarekara Agencies Pvt. Ltd., Kodimatha, Kottayam.
2. The Assistant Commissioner of Income-tax, Circle-1, Kottayam.
3. The Commissioner of Income-tax(Apeals)-IV, Kochi.
4. The Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin