

(2006) 06 KL CK 0058

High Court Of Kerala

Case No: Income Tax A. No. 3 of 2006

Commissioner of Income Tax

APPELLANT

Vs

Abdul Khader Ahamed

RESPONDENT

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**Date of Decision:** June 19, 2006**Acts Referred:**

- Income Tax Act, 1961 - Section 132(4A), 132A, 142, 143(3), 147

**Citation:** (2006) 204 CTR 453 : (2006) 285 ITR 57**Hon'ble Judges:** V. Ramkumar, J; K.S. Radhakrishanan, J**Bench:** Division Bench**Advocate:** P.K.R. Menon and George K. George, for the Appellant; C. Kochunny Nair and Dale P. Kurien, for the Respondent**Final Decision:** Allowed

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**Judgement**

V. Ramkumar, J.

In this appeal filed u/s 260A of the Income Tax Act, 1961, (hereinafter referred to as "the Act"), the Revenue assails the order dated July 27, 2005, of the Income Tax Appellate Tribunal, Cochin Bench, in I. T. A. No. 117/Coch of 2005.

2. As per the impugned order the Income Tax Appellate Tribunal partly allowed the respondent assessee's appeal holding that the notice issued by the Assessing Officer to the assessee u/s 148 of the Act is void ab initio and consequently set aside the reassessment proceedings initiated against the assessee u/s 147 of the Act.

3. The substantial questions of law formulated in the memorandum of appeal are the following :

(i) Whether, on the facts and in the circumstances of the case and the satisfaction contemplated under the statute being prior to and for the issue of notice u/s 148 of the Income Tax Act and the same (satisfaction having been found by the Commissioner of Income Tax (Appeals)) on the perusal of the reasons recorded in

the miscellaneous records (vide paragraph 4 of the order of the Commissioner of Income Tax (Appeals)) the Tribunal is right in law and fact in holding that there is nothing on record to show that the Assessing Officer had applied his mind and is not the finding perverse and without application of mind to materials on record ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact :

(i) in interfering with the reassessment;

(ii) in holding that the proceedings initiated against the assessee u/s 147 are bad in law ?

(iii) Whether, on the facts and in the circumstances of the case should not the Tribunal have considered the issue of satisfaction and the validity of initiation of reassessment in the light of the reasons recorded prior to initiation of reassessment and is not the approach to the issue of satisfaction based on remarks in the assessment order against law, logic, perverse and vitiated ?

4. We heard senior advocate Sri P. K. Raveendranatha Menon, learned counsel appearing for the Revenue, and advocate Sri Dale P. Kurian, learned counsel appearing for the assessee.

The stand of the assessee

5. With a view to persuade us to confirm the order of the Income Tax Appellate Tribunal, advocate Sri Dale P. Kurian made the following submissions before us :

6. The assessment in respect of the assessee u/s 143(3) of the Act had initially been completed on the basis of a return filed by him showing his income pursuant to a notice issued u/s 142 of the Act by the Deputy Commissioner of Income Tax, Investigation Circle-I, Calicut. Reassessment proceedings against the assessee u/s 147 of the Act were initiated by the Joint Commissioner of Income Tax, R2, Kozhikode, acting under the directions and instructions of the Commissioner of Income Tax, Circle-2(1), Calicut, as per annexure F letter dated May 30, 2003. As per the provisions of Section 147 of the Act it is the Assessing Officer who is invested with the power to invoke the said provision for reassessment and that too after complying with the mandatory requirements which include a notice u/s 148 of the Act. Before issuing such notice, the Assessing Officer himself has to apply his mind and form an opinion recording his reasons for initiating proceedings u/s 147. When it is for the Assessing Officer to form the requisite opinion on being satisfied about the existence of reasons for his belief that income has escaped assessment, his independent judgment cannot be allowed to be influenced at the instance of his official superior. In other words, in a case, as the present, where the original authority does something acting under the dictation of his superior, his action will be tainted with illegality thereby rendering the proceedings null and void. But for the direction of the Commissioner of Income Tax in annexure F letter dated May 30,

2003, the Deputy Commissioner would not have issued the notice u/s 148 of the Act. Hence, the consequential action for reassessment of income initiated by the Deputy Commissioner of Income Tax is vitiated. Reassessment proceedings initiated by the assessing authority without himself forming the requisite belief u/s 147 of the Act, but instead, reopening the assessment on the directions of his superior, are liable to be quashed, (vide [Chunnilal Onkarmal \(Pvt.\) Ltd. Vs. Income Tax Officer, "A" Ward and Others,](#); [Sheo Narain Jaiswal and Others Vs. Income Tax Officer and Others,](#) . The Assessing Officer had initially completed the assessment on the premise that the assessee was a carrier of 48 gold biscuits in question the value of which was not treated as the income of the assessee. Going by his statement, the gold biscuits really belonged to one V. Ahammed. When there was no failure on the part of the assessee to disclose any material fact original, the assessment cannot be corrected in reassessment proceedings (vide [Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad,](#) and [Lokendra Singh Vs. Income Tax Officer and Another,](#) . It was on the direction of the Commissioner of Income Tax that the Deputy Commissioner changed his opinion to hold the view that the sum of Rs. 26,46,000 invested for purchasing the gold biscuits had escaped assessment for the assessment year 1998-99. There cannot be any reopening of assessment for the mere reason that the Assessing Officer had subsequently changed his opinion (vide [Sita World Travels \(India\) Ltd. Vs. Commissioner of Income Tax and Another,](#) . The order of the Tribunal does not call for any interference and may be confirmed. However, the dismissal by the Tribunal of grounds Nos. 2, 4 and 5 as not pressed, is not correct since those grounds were also pressed by the assessee.

Judicial evaluation

7. We are afraid that we find ourselves unable to agree with the above submissions.

The factual matrix

8. On April 26,1997, the Airport Security at the Trivandrum Airport seized 48 gold biscuits weighing 5595 gms. from the assessee. They handed over the assessee along with the seized gold to the Valiyathura Police who registered a case as Crime No. 104/97. The assessee was arrested and produced before the J. F. C. M.❖I, Thiruvananthapuram, who remanded him to judicial custody. Invoking the provisions of Section 132A of the Act, the Income Tax authorities requisitioned the seized gold from the police authorities. The assessee moved this court challenging the request made by the Income Tax authorities. This court set aside the action taken by the Income Tax authorities and ordered return of the gold to the magistrate's court. Thereafter a notice was issued to the assessee on December 13,1999, u/s 142 of the Act calling upon him to file a return of his income for the assessment year 1998-99. In response to the said notice, the assessee filed his return showing "nil" income. The return filed by the assessee was processed and no further action was taken. In the meanwhile, the Income Tax authorities returned the

gold to the magistrate's court in obedience to the direction of his court. Even though the Income Tax Department moved the magistrate for the custody of the gold biscuits alleging that the same were acquired by the assessee out of undisclosed income, their request was disallowed by the magistrate. Thereupon the Department moved the Sessions Court, Thiruvananthapuram. The sessions court ordered to hand over the gold to the Income Tax Department. In the meantime, noticing that the Sessions Court, Thiruvananthapuram, had ordered return of the gold biscuits seized from the assessee to the Income Tax Department and that, thereafter the Department had taken possession of the same on May 7, 2003, and had deposited the gold biscuits with the Reserve Bank of India, Thiruvananthapuram, for safe custody, the Commissioner of Income Tax, Kozhikode, as per annexure F letter dated May 30, 2003, directed the Deputy Commissioner of Income Tax, Circle-2(1), Kozhikode, to initiate Income Tax proceedings by issuing notice u/s 148 of the Act after recording his reasons for the same. The text of the letter reads as follows :

Copies of the judgment of the Additional Sessions Judge, Thiruvananthapuram, and other relevant documents are enclosed herewith.

As per the judgment referred to above, gold biscuits weighing 5.597 kg were ordered to be handed over to the Income Tax Department and the same were taken possession of by the Income Tax Officer (CIB) on 7-5-2003, and deposited with the Reserve Bank of India, Thiruvananthapuram, for safe custody. The Assessing Officer is hereby directed to initiated Income Tax proceedings by issue of notice u/s 148 after recording his reasons for the same. The gold biscuits were seized by police on 26-4-1997, from Abdul Khader. So, Section 148 proceedings are to be initiated with respect to that date. The Assessing Officer is to comply with all the requirements of law while initiating action. The assessment may be completed as early as possible.

(emphasis supplied)

9. On receipt of annexure F letter the Deputy Commissioner after verifying the records recorded the following reasons (annexure E) in support of his belief that the income had escaped assessment.

Reasons for the belief that income has escaped assessment :

On April 26, 1997, the Thiruvananthapuram Airport Security seized 48 gold biscuits weighing 5.595 gms from one Abdul Khadar and the seized articles were handed over to the Valiathura Police. The gold biscuits were handed over to the Income Tax Department as per the provisions of Section 132A of the Income Tax Act. Later on, these articles were returned to the court. As per the order in Crl. A. No. 25 of 2000 and Crl. A. No. 358 of 2000 of the Addl. Sessions Judge, Thiruvananthapuram,. These gold biscuits were again handed over to the Income Tax Department. The assessee did not disclose the source of income for purchase of gold weighing 5595 gms value of which works out to Rs. 26,46,000 in the original return filed on January 31, 2000.

Therefore I have reason to believe that income invested in purchase of gold biscuits has escaped assessment for the assessment year 1998-99. The tax effect including interest under Sections 234A and 234B comes to Rs. 20,87,292. The action u/s 148 is therefore, necessary.

10. As per annexure A order dated October 23, 2003, the Deputy Commissioner completed the assessment treating the sum of Rs. 26,46,000 as the escaped income which constituted the source for acquiring 48 gold biscuits weighing 5596 gms. An appeal preferred by the assessee before the Commissioner of Income Tax (Appeals)-I, Calicut, was unsuccessful as evidenced by annexure B order dated August 23, 2004. Thereupon the assessee filed an appeal as I. T. A. No. 117/Coch/05 before the Income Tax Appellate Tribunal, Cochin Bench, which as per annexure C order dated July 27, 2005, allowed the appeal in part and set aside the reassessment proceedings initiated u/s 147 of the Act, for the reasons that the notice u/s 148 of the Act issued by the Assessing Officer acting under the dictation of his superior and without applying his mind was void ab initio.

The legal issues

11. We will first dispose of a contention urged on behalf of the assessee that grounds Nos. 2, 4 and 5 raised before the Tribunal were also pressed by the assessee and the statement to the contrary contained in annexure C order of the Tribunal is wrong. The Tribunal has unequivocally observed in paragraph 1 of its order that out of the five grounds raised by the assessee, counsel appearing for the assessee submitted that he was pressing only grounds Nos. 1 and 3. The Tribunal accordingly dismissed as not pressed grounds Nos. 2, 4 and 5. It is pertinent to note that it is not counsel who appeared for the assessee before the Tribunal below who has chosen to dispute the statement in the order. It is a different counsel who has now come out with a denial and that too by means of a verified petition. That is clearly not permissible. Even if a wrong record has been made in the order as to what transpired before the court or Tribunal the remedy of the aggrieved party is not to dispute the record before a higher forum but to seek a review before the lower forum itself. The judge's record is conclusive and neither the lawyer nor the litigant is entitled to contradict it except before the judge himself and nowhere else. It is not open to the assessee to dispute before us the correctness of the above observation in the order of the Tribunal. The question as to what transpired before a court or Tribunal, it can be gathered from the proceedings or order of the Tribunal, then no party will ordinarily be permitted to take exception to or contradict the statement to that effect in the order. What has been stated in the order should be taken as the last word on that question. If the parties or their counsel are permitted to indulge in a controverting exercise then there will be no end to it. (See [State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another](#), [Sankara Pillai Kujukrishna Pillai Vs. Ananda Pillai Bharathi Amma](#), [Sumangali v. Kochumatha](#) [1959] KLR 1043, [The Works Manager, Bihar State Superphosphate Factory, Sindri Vs. Sri C.P. Singh](#)

[and Others, etc.,](#), [Bank of Bihar Ltd. Vs. Mahabir Lal and Others,](#), [Gauri Shanker Vs. Hindustan Trust \(Pvt.\) Ltd. and Others,](#), [Daman Singh and Others Vs. State of Punjab and Others,](#), [Mohamamed Shafi v. Mohamamed Haji](#) [1986] KLT 55, [Ramanujamma Vs. Nagamma and Another,](#), [Vela-yudhan v. Joseph](#) [1955] KLT 276 and [Madhavan Pillai v. Bhaskaran Pillai](#) [1985] KLT 47).

12. What now survives for consideration is the question as to whether the 12 order of the assessing authority is vitiated for the reason that he was acting under the dictation of his superior. On the merits of the case we are of the view that there is nothing in annexure F letter of the Commissioner of Income Tax extracted herein above so as to conclude that the assessing authority was acting under the dictation of his superior. No doubt the Commissioner has directed the assessing authority to initiate Income Tax proceedings. But the further direction was to issue notice u/s 148 after recording his reasons for the same. There is still another direction that the Assessing Officer should comply with all the requirements of law while initiating action. The reassessment proceedings initiated by the Deputy Commissioner was after applying his mind to all the relevant materials and also after recording the grounds of his belief as already extracted herein -above. It is not even remotely discernible from annexure E that the Deputy Commissioner was mechanically obeying the directions of his official superior. There is not even a reference to annexure F letter. Even if there is advertence in the reassessment proceedings to the direction of the superior officer, that by itself will not vitiate the resultant proceedings as long as the Assessing Officer has independently applied his mind to all the relevant aspects and has arrived at the reasons for his belief. On the facts and circumstances of the case, we have no hesitation to conclude that annexure F letter has only alerted the Assessing Officer of his statutory obligation in the light of the subsequent turn of events culminating in the gold biscuits seized from the assessee having been entrusted with the Income Tax Department. The pendency of the criminal proceedings and the ultimate order passed by the sessions court, etc., were not within the knowledge of the Assessing Officer. Those supervening events were conveyed to the Assessing Officer by the Commissioner at whose level the litigations were conducted. Reminding an officer of his statutory duty and directing him to proceed in accordance to law after arriving at the requisite satisfaction under the statute cannot amount to a dictation to act in a particular way. The officer to whom such a reminder is given also cannot be said to abdicate his function if he proceeds according to law uninfluenced by any direction from his superior. If the direction by the Commissioner was to reopen the assessment u/s 147 of the Act by bypassing the statutory formalities, that would have probably amounted to dictating his subordinate to act in a particular way thereby taking away the discretion vested in the subordinate. On the contrary, annexure F letter only asks the Deputy Commissioner to issue a notice of reassessment u/s 148 of the Act and that too after recording the requisite grounds of belief. The Deputy Commissioner also proceeded only after satisfying himself that there existed adequate grounds of belief to initiate

reassessment proceedings. As rightly observed by the appellate authority in annexure B order, the assessee has been assessed on the basis of the presumption u/s 132(4A) of the Act to the effect that any valuables, books of account, cash, etc., found on a person during a search shall be deemed to be his own unless proved otherwise with sufficient evidence. The presumption u/s 132(4A) applies equally to action u/s 132A and the appellant who was given sufficient opportunities to rebut the presumption, failed to do so. It is clear from the reasons recorded by the Assessing Officer that he had prima facie reason to believe that the assessee had omitted to disclose fully and truly all material facts and that as a consequence of such non-disclosure income had escaped assessment within the meaning of Section 147 of the Act. The facts of [Sheo Narain Jaiswal and Others Vs. Income Tax Officer and Others](#), cited by counsel for the assessee are unique. When under the law the requisite belief u/s 147 of the Act must be that of the Assessing Officer, the Income Tax Officer in that case, instead of forming his own belief, was merely acting at the behest of his superior authority. In fact, the Income Tax Officer was holding the view against the taxability of the assessee in that case. Likewise, in [Chunnilal Onkarmal \(Pvt.\) Ltd. Vs. Income Tax Officer, "A" Ward and Others](#), cited on behalf of the assessee it was found that there had been no omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Moreover, the Commissioner of Income Tax had by a letter directed the Income Tax Officer that "immediate action should be taken u/s 147" thereby leaving no discretion to the Assessing Officer who without the basis of his own independent satisfaction, was mechanically obeying the directions of his superior. But that is not the factual position in the case on hand.

13. After an anxious consideration of all the aspects of the case, we are of the view that the Tribunal misdirected itself on the matter which came up for its consideration. We answer the questions of law in favour of the Revenue and against the assessee and set aside the impugned order of the Tribunal and restore that of the Commissioner of Income Tax (Appeals).

14. In the result, this appeal is allowed as above.