

(1996) 10 KL CK 0033

In the High Court Of Kerala

Case No : O.P. No's. 8721 and 13027 of 1991 and 723 of 1993 and C.M.P. No. 3667 of 1996 in I.T.R. No. 55 of 1991

Commissioner of Income Tax

APPELLANT

Vs

A. Yonus Kunju

RESPONDENT

Date of Decision : 18-10-1996

Acts Referred:

Income Tax Act, 1961 — Section 147, 148, 256, 271(1), 69A

Citation : (1997) 228 ITR 147

Hon'ble Judges : V.V. Kamat, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : N.R.K. Nair, for the Appellant; T.M. Sreedharan and N. Unnikrishnan, for the Respondent

Judgement

V.V. Kamat, J.—Tax Reference No. 55 of 1991 is already on the file of the registry of this court well nigh nearly for a period of six years by now. In addition it appears that by the order dated October 5, 1994, the original petitions referred to above are ordered to be placed for hearing along with the above Income Tax reference. Obviously, this would create the situation of indefinitely elongating the life of this litigation because with regard to these original petitions, the provisions of Section 256(2) of the Income Tax Act, 1961, would necessitate calling upon the Income Tax Appellate Tribunal with a direction to refer afresh questions with regard to the same proceedings to this court. Our experience shows that in the process, the life of pendency of the Income Tax reference of the year 1991 would get prolonged. In fact, this court in COMMISSIONER OF Income Tax Vs. WANDOOOR JUPITER CHITS (P.) LTD. (IN LIQUIDATION)., , is seen to be very much conscious and at the same time expressing a situation of helplessness of being required to call upon the Tribunal to refer the matter to this court for adjudication. This is more than apparent from the following observations at page 75 of the report :

" Needless to say, this involves avoidable expenditure of time, and delay. If really

this question could have been dealt with by us even at this stage, a few years of time could have been saved, and the parties could also have had the satisfaction of having a final adjudication in the matter, without being left in a state of uncertainty for long. Necessarily, the Tribunal will take its own time to make the reference and it will take a few more years for this court to deal with the matter finally. If, as the Department contends, the matter is really covered by the decision of the Supreme Court, all this will be a cruel waste of the time of this court, the Tribunal and of the parties. The delay occurs only because of the circuitous procedure prescribed by Section 256 to get a decision of this court on the correctness or otherwise of the decision of the Tribunal. Unfortunately, the section, as it stands, does not enable this court, while exercising jurisdiction u/s 256(2), to bring finality to the proceedings, even if the matter is concluded by any decision of this court or of the Supreme Court unless the decision is adverse to the applicant. This court's power is only to call for a reference of a question of law formulated by it. This court could have dealt with this matter with all expedition and rendered a final decision if the matter is dealt with in a direct revision on questions of law, instead of a reference."

2. In fact, there is a suggestion of a remedy.

3. We were posed with the difficulty of a similar nature by reason of the earlier order of this court tagging all these proceedings to be heard with each other, as we have placed it at the outset hereinbefore.

4. Learned counsel for the parties found out a way no less from the judgments of the apex court in Commissioner of Income Tax (Central), Calcutta Vs. Mcleod and Co. Ltd., , Lakshmiratan Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh, , Rajputana Textiles (Agencies) Ltd. Vs. The Commissioner of Income Tax, Bombay City, , to deal with the situation. When the question of law is framed by the Tribunal and is referred to this court on being filed in court for disposal, if a party is aggrieved and wants to contend that certain further facts ought to be stated, or certain questions of law should be raised, he can make an application by way of a notice of motion, to be heard along with the case stated by the Tribunal and referred to this court. In such a situation, this court at the time of hearing the reference can consider both these aspects. The condition is that at a proper time a party to the questions referred, registered as reference, the situation can be brought to the notice of the court either with reference to the necessity of certain other facts or also with regard to the necessity of consideration of certain other questions of law, to be brought for the decision of the court in this process through the notice of motion. In this context, the court dealing with the reference relating to the questions already referred has to consider the notice of motion in question which is to be heard along with the reference with reference to the aspect to be urged in regard thereto. This, however, has to be done in the context of the proper time to take recourse to the above situation flowing from the decisions of the apex court both under the earlier Indian Income Tax Act of 1922 (section 66(2)) and the present Income

Tax Act, 1961 (section 256(2)). Such a step is expected to be taken by the concerned party within six months from the date on which he is served with the notice of refusal from the Tribunal to refer the questions applied for. In other words, the expected notice of motion has to come on the record of this court with respect to the above statutory provision regarding limitation and cannot be allowed, if filed when the reference is about to be taken up for hearing by this court.

5. All these proceedings relate to the assessment proceedings, in the first instance arising out of the order dated October 12, 1989, of the Income Tax Appellate Tribunal, Cochin Bench, in I. T. A. No. 1 (Coch) of 1989 and thereafter out of simultaneously initiated penalty proceedings u/s 271(1)(c), ending with cancellation thereof by the order dated May 20, 1991, of the Income Tax Appellate Tribunal, Cochin Bench, in I. T. A. No. 988 (Coch) of 1990.

6. As stated above, I. T. R. No. 55 of 1991, relating to the assessment quantum proceedings is brought before us by the assessee, Shri A. Yonus Kunju, Yonus Cashew Industries, Vadakkevila, Quilon. However, the order of cancellation of the penalty is the subject-matter of O. P. No. 723 of 1993. There is no dispute that this is within limitation with regard to Section 256(2) of the Income Tax Act, 1961, and at the instance of the Revenue. For the purpose of narration, the Revenue has filed O. P. No. 8721 of 1991 also undisputedly within limitation. This is with a grievance relating to the rejection of levy of interest u/s 217(1A) of the Income Tax Act, 1961, making a grievance against the order of the Tribunal in regard thereto, the prayer having been rejected for a reference by rejecting the application of the Revenue in the context. At the same time, the assessee has also approached this court by O. P. No. 13027 of 1991 and that too within limitation, the grievance therein appears to be with regard to the questions referred, being the subject-matter of I. T. R. No. 55 of 1991 as reformulated and not ad verbatim as applied for in the application praying for reference. In fact, on reading the petition, the assessee has prayed for a direction for reference of all the 11 questions raised in the application for reference, irrespective of the situation as to whether many of them could be understood to be neatly incorporated in the questions reframed and referred by the Tribunal.

7. In the circumstances specified hereinbefore, we hereby proceed to treat these three original petitions as notices of motion, on the peculiarities of the situation. Accordingly, the three original petitions stand converted here and now and are being heard and decided along with the Income Tax Reference No. 55 of 1991, as notices of motion in view of the observations of the apex court, thereby without finding any difficulty to the adoption of such a course. This would be as if we are considering the questions on the strength of the contents of the petitions as satisfactory statement of case in regard thereto. On hearing learned counsel for the parties in regard to the questions for consideration we find that the 11 questions sought to be referred are more than covered substantially by the questions ultimately referred by the Tribunal, as the subject-matter of Income

Tax Reference No. 55 of 1991. Therefore, the questions expecting our answer would be as follows :

income tax Reference No. 55 of 1991 :

"1. Whether, the provisions of Section 147(a) of the Income Tax Act, 1961, would apply in a case where the Income Tax Officer finds suppression to the quantum of purchase disclosed and makes an addition on that count and later alleges that he has reason to believe that what was determined in the original assessment was less, suppression being more ?

2. Whether the Tribunal in original assessment had held that there were no unaccounted purchases of raw cashew nuts and, therefore, the addition of 3,852 bags of such nuts made by the Income Tax Officer should be deleted in toto, whether in view of the law relating to finality of the Tribunal decisions, the Tribunal was right in sustaining the addition made in the reassessment proceedings on the basis of the admissions made in sales tax proceedings ?

3. Whether, in a case where the reopening on May 30, 1983, u/s 147(a) was without specifying Section 147(a) or (b) in the notice and where there was time u/s 147(a) till March 31, 1984, whether the Tribunal erred in law in not holding that the alleged exercise u/s 147(a) to sustain an assessment made after March 31, 1984, is colourable exercise of power and hence illegal and not permissible and an assessment made thereon void ?

4. Whether the Tribunal was justified in sustaining the action of the Commissioner of Income Tax (Appeals) in refusing the additional evidence ?

5. Whether, the Tribunal is right in law in holding that the assessment is not barred by limitation ? "

Original Petition No. 8721 of 1991 :

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that the levy of interest u/s 217(1A) is not tenable ? "

Original Petition No. 723 of 1993 :

" Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the Department has not discharged its onus of proving that there was concealment on the part of the assessee when the Assessing Officer had considered all the evidence and given a finding of concealment in the proceedings u/s 271(1)(c) ?"

8. In other words, the question would relate both to the assessment proceedings as well as the penalty proceedings and with regard to the levy of interest u/s 217(1A) of the Income Tax Act, 1961.

9. The situation would be different when the Tribunal does not refer any of the questions submitted by any of the parties. It is needless to state that in such a

situation the aggrieved party would have to approach this court by an original petition and this court will have to deal with it. This would be so because in this situation no reference proceedings would be pending in this court.

10. On hearing learned counsel for the parties and going through the entire records of as many as three orders relating to the question of assessment and equal number of three orders relating to the question of penalty, in view of undisputed explosive situation rendering futile finality both to the assessment liability as well as sustainability of the imposition of question of penalty, consequently not requiring to consider the question of levy of interest, a brief resume not only of the travel of the proceedings but also the discussion exhibiting how the authorities missed at appropriate stages this explosive and determinative character, ultimately leading to the situation that both assessment and penalty proceedings would face a situation of dropping down as a result thereof.

11. The year of assessment is 1979-80. The original assessment was completed on November 2, 1982, with reference to income of Rs. 18,82,700. Thereafter, u/s 69A of the Income Tax Act an addition of Rs. 20,99,440 was made with reference to an unaccounted investment of 3,852 bags of raw nuts. In fact information about the existence of unaccounted possession of raw nuts was available from the State Bank of Travancore where the assessee had credit facilities. It appeared that with regard to the State Bank of Travancore, the assessee on the pledge of the stock of raw nuts enjoyed credit facilities and in regard thereto there was an excess of 3,852 bags in the records of the bank. To be precise the assessee had shown 18,507 bags of raw nuts to the bank for enjoying credit facilities whereas it had shown 14,655 bags in the return of income, to mean 3,852 bags less in the process. It is in regard to this the assessment was completed as stated above. The Commissioner of Income Tax (Appeals) and further travel of the original assessment proceedings to the income tax Appellate Tribunal resulted in the deletion leaving the amount of addition of Rs. 7,82,950. This was with reference to the value of closing stock of kernels, by the order dated August 30, 1983.

12. During the pendency of these original proceedings, on April 24, 1979, there was a surprise raid by the Sales Tax Department, Intelligence Wing, and it was found by the said Sales Tax Department, yet another aspect that became the subject-matter not only of the sales tax proceedings but also of the reopening action by the Income Tax authorities. This related to two situations :

(i) for the period from February 14, 1979, up to March 28, 1979, in all 1,815 bags of local cashew nuts were seen arriving at the factory at Ayathil. This was in addition to raw nuts purchased from Cashew Corporation of India or Marketing Federation, to mean in a legal and permissible manner.

(ii) during the period from March 1, 1979, to March 25, 1979, 3,821 bags were also found to have been received at the Asramom godown.

13. In other words, it would be seen that in all 5,636 bags were found to have been received during the above periods at the Ayathil factory and Asramom godown separately.

14. Although not really relevant with regard to the matters of details there is no dispute that these 5,636 bags with reference to the Ayathil factory and Asramom godown became the subject-matter of two parallel proceedings under the Kerala General Sales Tax Act, 1963, and the Income Tax Act, 1961.

15. After compliance with the statutory provisions of Sections 147 and 148, proceedings were initiated u/s 143(3) of the Income Tax Act, 1961, and the Income Tax Officer, Central Circle, Trivandrum, by the order dated March 28, 1988, valued these 5,636 bags of raw nuts at the rate of Rs. 545 per bag under the powers of Section 69 of the Act at Rs. 30,71,620. He also levied interest both under Sections 217(1A) and 139(8) of the Income Tax Act with the usual issuance of notice of demand and challenge and initiation of penalty proceedings which came to be initiated u/s 271(1)(c) of the Income Tax Act, 1961 (subject-matter of Original Petition No. 723 of 1993).

16. In the process of reasoning, the Income Tax Officer has observed that although the assessee was asked to produce the documents seized by the sales tax authorities which were later released to him, this was not complied with. Copies of the sales tax assessment order and the appellate order were filed before the officer and it is from the above orders the officer concluded that unaccounted purchase of 5,636 bags of raw nuts had been subjected to levy of sales tax. The officer also emphasized that there is a process of compounding by payment of Rs. 5,000 in the sales tax proceedings, u/s 47 of the K.G.S.T. Act, 1963, in lieu of prosecution. The Officer has described the sales tax appellate order of the Deputy Commissioner (Appeals) as based on pure technical considerations, The Officer also emphasized that the charge of unaccounted purchases made by the Sales Tax Department had never been denied by the assessee and in fact he admitted it and the offence was compounded.

17. The assessment proceedings initiated under the above circumstances reached the first appellate authority -- the Commissioner of Income Tax (Appeals), Trivandrum. The question of explanation even before the said authority was undisputedly relating to 5,636 bags valued at Rs. 30,71,620 on the basis of Rs. 545 per bag. It appears that the assessee preferred an application dated July 18, 1988, for additional evidence before the first appellate authority and contended in regard thereto that the purchase of 5,636 bags are really not unaccounted but are properly supported by delivery notes. The assessee submitted that he was not able to produce the delivery notes before the Income Tax Officer and sought to produce them urging that the production of delivery notes would be a material fact in the nature of explanation. It must be stated that other submissions were also made before the first appellate authority, illustratively as to whether the provisions of Section 147(a) would apply or those of Section 147(b) would govern the situation. The first appellate authority did not permit production of

the additional evidence as, according to him, the said valid reasons were not spelt out preventing him from producing them before the Income Tax Officer. It is also observed that the stock register of the Asramom godown and Ayathil factory were also not produced. The books and documents that were seized by the sales tax authorities were later released which could have been the material for cross-checking.

18. The first appellate authority observed that the reopening of the assessment resulting into the addition of Rs. 30,71,620 was under justifiable situation and the assessee in regard thereto failed to disclose truly and correctly the material relating thereto. The appeal came to be dismissed.

19. The proceedings came up before the Income Tax Appellate Tribunal. The Tribunal also particularly in paragraph 5 of its order endorsed the decision of the two authorities. The process of reasoning adopted by the Tribunal would also show emphasis with reference to the compounding of the position and acceptance of imposition of penalty of Rs. 5,000 in lieu of prosecution. Although it was urged before the Tribunal that the sales tax appellate authority--the Deputy Commissioner of Sales Tax--had set aside the levy of sales tax in connection with these 5,636 bags, the Tribunal also discarded it by observing that it was on a technical ground. The Tribunal also observed, in the process of reasoning, that the assessee had made some purchases or at any rate the Income Tax Officer had reason to believe that the assessee had made some unaccounted purchases which were not disclosed to the Department. Even in this context, as emphasized that such purchases were unearthed as a result of a raid in the premises of the assessee by the sales tax authorities. In fact, the Tribunal, we are unable to appreciate, has recorded that on the merits there had been no elaborate arguments by the assessee, except that it had entered a plea that the matter should be remitted back to the Income Tax Officer for fresh investigation.

20. In the process of reasoning, the Tribunal considered the additional ground which is as follows :

" In reassessment u/s 147(a) interest should not have been charged under Sections 139(8) and 217(1A) of the Income Tax Act, 1961, particularly when in the original assessment after the Tribunal order it is a case of loss."

21. In regard to this additional ground in paragraph 7 the Tribunal observes as follows :

" After hearing the parties to the dispute, we are of the view that levy of interest u/s 217(1A) is not tenable. In this connection, reliance can be placed on the decision of the Karnataka High Court in Charles D'souza Vs. Commissioner of Income Tax, Karnataka-II, . The provisions of Section 215(a) under which levy of interest u/s 217(1A) is possible are not available to the Department as they were inserted by the Finance Act, 1984, with effect from April 1, 1985."

22. The Tribunal has, as quoted above, observed that levy of interest u/s

217(1A) of the Income Tax Act is not tenable because the said provisions are not available to the Department as they were inserted by the Finance Act, 1984, with effect from April 1, 1985.

23. Although this is obviously incorrect because Sub-sections (1) and (1A) of Section 217 of the Income Tax Act, 1961, were substituted by the Finance Act, 1969, with effect from 1970 which would obviously mean that the order of the Tribunal in the context is not sustainable. Even if this is the position, our further discussion would show that with regard to the present proceedings of assessment and penalty that is initiated on the basis of reassessment as observed above, the legal position would be a futility. Apart from this being the position it must be stated that the conclusion of the Tribunal with regard to the rejection of levy of interest u/s 217(1A) of the Act is not sustainable.

24. It would be seen that even thereafter the assessee preferred Miscellaneous Petition No. 4 of 1991 for recalling of this order of the Income Tax Appellate Tribunal. Learned senior standing counsel for taxes has made available to us a copy of the order dated July 1, 1991, passed by the Income Tax Appellate Tribunal, Cochin Bench, rejecting the said prayer for recalling the said order. The assessee submitted that the material be taken into consideration and in regard thereto the assessee had made efforts before the Commissioner of Income Tax (Appeals) as well as the Tribunal. The assessee submitted that the disputed addition of Rs. 30,71,620 was made only on the sole basis of the addition made by the sales tax authorities in regard thereto to the assessee's turnover. The assessee contended that the fresh assessment made by the sales tax authorities was set aside and a fresh order of assessment was passed on May 25, 1990, by the Assistant Commissioner (Assessment) III, Sales Tax Office, Special Circle, Kollam. The assessee pointed out that no addition was made on account of the alleged suppression of purchase of 5,636 bags of raw cashew nuts. On the basis of the above position, the assessee contended that obviously there is a mistake in the order of the Income Tax Appellate Tribunal dated October 12, 1989, requiring rectification u/s 254(2) of the Income Tax Act, 1961. We have carefully seen the judgment and we find an unceremonious treatment given to this vital and important aspect. The relevant portion in paragraph 28 of the order requires reproduction in the context and it is as follows ;

" Subsequently, on February 12, 1990, however, the fresh sales tax assessment made on September 30, 1987, was set aside by the Deputy Commissioner (Appeals), Agricultural Income Tax and Sales-tax, Kollam. From the said order of the said authority, it is clear that he had received in evidence the delivery notes which the assessee had not produced for nearly a decade before the sales tax authorities and which he unsuccessfully tried to introduce as additional evidence before the Commissioner of Income Tax (Appeals). We do not know what considerations weighed with him when he decided to accept the so-called delivery notes in evidence in support of the assessee's contention that there was no suppression of purchases, nor was our attention drawn to any provisions of

the Sales Tax Act which, in the facts and circumstances of the case, would have entitled the said authority to accept in evidence the said delivery notes after a lapse of a decade."

25. We have to observe that this situation has not been considered even though the assessee persisted and it was nothing other than reading of the order and the final order passed by the Sales Tax Deputy Commissioner in pursuance thereof.

26. It is for this reason that the assessee was required to place the final order through C. M. P. No. 3667 of 1996. The final order is based on a notice u/s 17(3) of the K.G.S.T. Act, 1963 (Annexure P to C. M. P. No. 3667 of 1996). What has been held by the Deputy Commissioner (Appeals) is quoted ad verbatim in the said order and it is on the basis of this notice u/s 17(3) of the K.G.S.T. Act, 1963, the Assistant Commissioner (Assessment) III, Sales Tax Office, Special Circle, Quilon, has passed the final order dated May 25, 1990. The quotation from the notice u/s 17(3) is as follows :

"Ground No. 1. -- The officers of the Sales Tax Department inspected the business places of the appellant on April 25, 1979. As a result of inspection the quantum of suppression was arrived at Rs. 17,75,340 in respect of purchase of raw nuts and Rs. 9,712 in respect of sale of shells. At the time of hearing, the learned authorised representative pointed out that the raw cashew nuts despatched from head office to Ayathil branch and Ashramam branch as per delivery notes were not fully taken into account before arriving at the suppression of Rs. 17,75,340. According to him, the suppression of Rs. 17,75,340 related to 1,875 bags + 2,342 bags of cashew nuts transferred to the above branches through delivery notes issued from head office. I have verified the triplicate copies of certain delivery notes. There is some truth in the contentions. A few examples of such despatches from head office to Ayathil branch and Asramam branch which were not taken into account to work out the actual suppression are narrated below :--

To AYATHIL BRANCH

Delivery Note

Date

No. of bags.

771853

20-2-79

100 bags

771873

26-2-79

35 "
771893
5-3-79
30 "
771657
21-2-79
125 "
771674
28-2-79
120 "
771558
21-2-79
130 "
771559
21-2-79
125 "
771660
21-2-79
125 "
771563
22-2-79
125 "
771564
22-2-79
125 "
771565
22-2-79
100 "
771566
22-2-79

70 "
771577
12-3-79
20 "
771580
4-3-79
10 "
771584
15-3-79
25 "
771588
16-3-79
55 "
771555
14-3-79
75 "
45230
25-2-79
73 "
45231
28-2-79
98 "
45232
28-2-79
91 "
771884
1-3-79
111 "
771885
1-3-79

109 "
45233
1-3-79
99 "
45234
2-3-79
116 "
45235
2-3-79
120 "
45236
3-3-79
116 "
771604
4-3-79
125 "
771605
4-3-79
125 "
45237
14-3-79
81 "
45238
14-3-79
105 "
45239
14-3-79
105 "
45240
14-3-79

118 "

45241

15-3-79

120 "

45242

16-3-79

124 "

45243

16-3-79

125 "

45244

17-3-79

94 "

45245

19-3-79

59 "

45246

19-3-79

108 "

45247

22-2-79

120 "

Most of the quantities mentioned in the delivery notes used for the transfer of goods from the head office to Ashramam branch co-relate to the entries in the seized note book as recorded at page 377 of the assessment file. Similar is the case of Ayathil branch also. For arriving at the purchase suppression of Rs. 17,75,340,1,815 bags of local raw cashew at Ayathil and 3,821 bags of raw nuts at Ashramam were taken into account. Hence, the case required re-examination by the assessing authority in order to arrive at a correct finding on the suppression of purchase turnover of cashew nuts for the year 1978-79. When the very basis of assessment is vitiated by error it is premature to consider the other contentions now."

27. The misfortune of the situation is that the assessee is kept away from the

court and it is his fortune that all these proceedings especially the assessment proceedings have not received finality because Income Tax Reference No. 55 of 1991 is pending before us. We find that there is clear material that 5,636 bags referable to Ayathil Branch and Ashramam godown are reflected in the delivery notes showing transfer of goods from the head office to the branch office obviously meaning that the necessary record would be with the head office. Be that as it may, when the very initiation and origin of the action under the Income Tax Act, 1961, owes wholly to the action taken by the sales tax authorities and in view of the situation of the two proceedings being of a parallel character, these observations concluding the sales tax proceedings resulting into the final order in regard thereto have more than sufficient strength to knock down the very basis of assessment action.

28. In regard to the penalty proceedings (the subject-matter of Original Petition No. 723 of 1993), in fact our above conclusion with regard to the assessment proceedings would be futile because if there cannot be any sustained and valid assessment there is no question of penalty in regard thereto. However, we must record that even before the Income Tax Appellate Tribunal dealing with the question of penalty it was contended that the sales tax authorities set aside the question of assessment on technical grounds. This is the misfortune of the situation. However, we are more surprised to find that even on behalf of the assessee the submissions were made on the assumption that the sales tax proceedings got terminated on technical grounds. In fact counsel for the assessee has gone on record and it is observed by the Tribunal that he made it abundantly clear that he is not relying on such technical grounds. Even in spite thereof, the Tribunal on its own has considered the question in the context of sustenance of penalty. It is observed that the concerned delivery notes were produced before the Income Tax authorities and at a later stage in the quantum appeal and in the penalty proceedings also. The Tribunal has observed in the following manner with regard to the question :

" The Deputy Commissioner of Sales-tax (Appeals), Quilon, had found substance in the contention of the assessee that the delivery notes produced before him in a majority of cases correlated with the entries found in the note books which were recovered in the course of inspection and that they represented goods transferred from the head office to the branches. So what would be relevant is not verification with the stock register but the existence of the delivery notes supporting the arrivals in the two branches, the lack of which led to the additions initially in the sales-tax assessments and, therefore, in the Income Tax assessment. As the reassessment had proceeded on the basis of the findings in the sales tax assessments and based on the materials recovered in the course of a raid by the Intelligence Wing of the Sales Tax Department, it is rather too late for the Income Tax Officer to turn round and reject the explanation of the assessee which was accepted by the sales tax appellate authority as regards the arrival of goods in the Asramom godowns and Ayathil factory. The reason is that the sales tax appellate authority has found that the delivery notes produced by

the assessee before him were relevant material which satisfactorily explained in a majority of cases the arrivals in these branches. Therefore, relevancy of the delivery notes in the context of the explanation of the assessee cannot be brushed aside lightly. The arrivals in the Ashramam godowns and Ayathil factory have been accepted by the sales tax authorities to have come from the head office purchases and represented the branch transactions. Therefore, it cannot be said that the assessee's explanation remained unsubstantiated."

29. In view of the above position it must be stated that the material was on the record of the proceedings and when we are required to deal with both the proceedings of assessment as well as levy of penalty it is next to impossible to see the situation in a blind-folded manner. The observations found quoted in the notice u/s 17(3) of the K.G.S.T. Act, 1965, stare penetratingly not only in the face of the record of the assessment proceedings but also justify its cancellation by the Tribunal.

30. Reading the five questions in Income Tax Reference No. 55 of 1991, in the light of our above discussion, the question to be answered would be only one and it would be as follows :

"Whether in the light of the final order dated May 25, 1990, of the Assistant Commissioner (Assessment) III, Sales Tax Office, Special Circle, Quilon, based on notice u/s 17(3) of the K.G.S.T. Act, 1963, the assessment proceedings initiated on the basis of sales tax raid dated April 25, 1979, reopening of the proceedings u/s 143/147 of the Income Tax Act, 1961, ending in the order dated March 28, 1988, of the Income Tax Officer, Central Circle, Trivandrum, as confirmed by the first appellate authority and the Income Tax Appellate Tribunal would be sustainable ?"

31. Our answer in regard thereto would be that such reassessment proceedings would not be sustainable.

32. In view of this answer we have yet to consider one more submission of learned senior standing counsel for taxes and that too with regard to the penalty proceedings as is submitted whether to be considered in the context of the determination by the Income Tax Appellate Tribunal at Rs. 7,82,950 as stated at the outset. It is not possible to accept the submission in view of the clear situation that the penalty gets initiated simultaneously with the order dated March 28, 1988, as a result of the conclusion in regard thereto having definite relation with the reassessment based on the raid by the sales tax authorities.

33. Our answer to the question relating to penalty (subject-matter of Original Petition No. 723 of 1993), would be in the affirmative, against the Revenue and in favour of the assessee. Our answer to the question raised in Original Petition No. 8721 of 1991 relating to the levy of interest would be in the negative, in favour of the Revenue and against the assessee, but as observed it would be a futility in the context. As regards Original Petition No. 13027 of 1991, we have not reproduced the question because in view of the above discussion this petition

also would be a futility and would, therefore, get disposed of not needing any treatment to it at our hands. C.M.P. No. 3667 of 1996 is granted because it only produces the orders of the authorities.

34. A copy of the judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, as required by law.