

**(1971) 08 KL CK 0040**

**In the High Court Of Kerala**

**Case No :** Income-tax Reference No. 13 of 1961

Commissioner of Income Tax

APPELLANT

Vs

Kelukutty

RESPONDENT

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**Date of Decision :** 09-08-1971

**Acts Referred:**

Income Tax Act, 1961 — Section 147, 148

**Citation :** (1972) 85 ITR 102

**Hon'ble Judges :** T.S. Krishnamoorthy Iyer, J;K.K. Mathew, J

**Bench :** Division Bench

**Advocate :** P.K. Krishnankutty Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

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## **Judgement**

Mathew, J.—This is a reference u/s 256(2) of the Income Tax Act, 1961, at the instance of the Commissioner of Income Tax, Kerala. The questions of law referred are :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding that the two firms were different and were not to be treated as one firm for the purpose of Income Tax assessment ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding that the Income Tax Officer was not justified in reopening the proceedings u/s 147(b) ?"

2. The assessment year is 1960-61. The accounting period is the 12 months ended with December 31, 1959. The assessee is a registered firm constituted under a partnership deed dated July 15, 1959 (annexure B). The assessee carried on business till the end of the accounting year, namely, December 31, 1959. Previously there was a firm which was constituted under a deed dated January 1, 1957, a copy of which is annexure A. The partners of that firm were one Kelukutty, his three major and four minor sons. The firm carried on business from January 1, 1959, to July 8, 1959, when Kelukutty died. It was after the

death of Kelukutty that the new firm was constituted on July 15, 1959. There was no deed for dissolving the old partnership. The Income Tax Officer originally treated these firms as two separate entities and passed two separate assessment orders. He assessed the old firm from January 1, 1959, to July 8, 1959, and the new one from July 15, 1959, to December 31, 1959. Subsequently the Income Tax Officer issued notice u/s 148 and initiated proceedings u/s 147(b). That was on the basis of the information gathered from the auditor's inspection note that the old firm was not dissolved but only reconstituted, and so the income of the two firms should have been aggregated and only one assessment made. The assessee appeared in pursuance of the notice and raised several contentions. After considering the contentions of the assessee, the Income Tax Officer found that the income of the two periods should have been clubbed together and passed an assessment order aggregating the income of the two periods on the basis that the old firm was not dissolved but only reconstituted. The assessee appealed against the order to the Appellate Assistant Commissioner and contended that on the death of Kelukutty the firm stood dissolved, that the business carried on by that firm ceased to exist, that a new firm was constituted on July 15, 1959, and so the Income Tax Officer was not justified in clubbing together the income of the two periods. The Appellate Assistant Commissioner rejected the contention holding that there had been no dissolution of the old firm, but that the firm was only reconstituted under the deed dated July 15, 1959. He also held that no business was carried on from July 9, 1959, to July 14, 1959, but that would not amount to discontinuance of the old business. The assessee filed an appeal from the order to the Appellate- Tribunal and reiterated its contentions. The contentions Were accepted. The Tribunal held that the old firm was dissolved and a new firm was constituted on July 15, 1959, and, therefore, the income of the two periods should not have been clubbed together. The Tribunal also held that the Income Tax Officer was not justified in reopening the assessments u/s 147(b), as he had no "information" within the meaning of the sub-section.

3. The first question is whether there were two firms in the accounting year in question. When Kelukutty died on July 8, 1959, there was no dissolution of that firm, for Clause 7 of the partnership deed dated January 1, 1957, specifically provided that the death of any of the members of the partnership would not automatically dissolve the partnership but that the remaining partners should carry on the business. As already stated, in the first partnership there were 8 partners, Kelukutty, his three major sons and 4 minor sons. The proportion in which the profits and the losses are to be shared or borne is specified in the deed. In the partnership dated July 15, 1959, except the fact that Kelukutty ceased to be a partner there was no change in the membership of management of the firm. There was some change in the proportion in which profits and losses have to be shared and that was in consequence of the death of Kelukutty. The firm constituted under the deed dated July 15, 1959, carried on the same business as the old firm and the assets of the old firm became the assets of the

firm constituted under the deed dated July 15, 1959. A mere change in the constitution of the partnership does not necessarily bring into existence any new assessable unit or distinct assessable entity. In other words, a mere change in the personnel of the partners and in their respective shares, without a dissolution of the firm or division of its assets and liabilities, would not be sufficient to bring into being a totally different assessable unit. Since there was no dissolution of the partnership on the death of Kelukutty, but only a reconstitution of the firm, the assessment on the reconstituted firm must be for the entire period from January 1, 1959, to December 31, 1959.

4. The second question is whether the Income Tax Officer has jurisdiction to reopen the assessments u/s 147(b). Section 147(b) provides :

"If... notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 - 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in Sections 148 - 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

- (a) where income chargeable to tax has been under-assessed ; or
- (b) where such income has been assessed at too low a rate ; or
- (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922; or
- (d) where excessive loss or depreciation allowance has been computed ....."

5. Two conditions have to be satisfied before proceedings can be initiated u/s 147(b) : (1) the Income Tax Officer must have reason to believe that the income has escaped assessment ; and (2) it should be in consequence of information received after the original assessment that he should have reason to believe that the income has escaped assessment. If either condition is not satisfied the action would be without jurisdiction. Commenting on the second condition Shah J., speaking for the Supreme Court in Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, ., said :

"Jurisdiction of the Income Tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment. That information must, it is true, have come into the possession of the Income Tax Officer after the previous assessment, but even if the information be such that it could have been obtained

during the previous assessment from an investigation of the materials on the record, or the facts disclosed, thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income Tax Officer is not affected."

6. So even if the information that there was no dissolution of the firm constituted by the deed dated January 1, 1957, by virtue of the clause therein that notwithstanding the death of any partner, the firm shall not be dissolved but carried on by the remaining partners, could have been obtained at the time of the previous assessments from an investigation of the records, but was not in fact obtained or its legal effect not appreciated, that would not affect the jurisdiction of the Income Tax Officer to initiate proceedings u/s 147(b). The availability of the two partnership deeds to the Income Tax Officer, when he made the previous assessments after granting registration to the two firms, would not mean that the Income Tax Officer appreciated the legal implication of Clause 7 of the partnership deed dated January 1, 1957. That he committed a demonstrable error in making the two assessments became known to him only when the audit pointed it out. *Rajagopalan J. observed in Salem Provident Fund Society Ltd. Vs. Commissioner of Income Tax, Madras, :*

"Suppose a mistake in the original order of assessment is not discovered by the Income Tax Officer himself on further scrutiny but it is brought to his notice by another assessee or even by a subordinate or a superior officer, that would appear to be information disclosed to the Income Tax Officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Income Tax Officer in such circumstances is in one sense extraneous to the record. It is difficult to accept the position that while what is seen by another in the record is "information" what is seen by the Income Tax Officer himself is not "information" to him. In the latter case he just informs himself. It will be information in his possession within the meaning of Section 34. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment."

7. A mistake apparent on the face of the record would itself constitute "information". Whether someone else gave the information to the officer or whether he informed himself is quite immaterial. In *United Mercantile Co. Ltd. Vs. Commissioner of Income Tax, Kerala, , the Kerala High Court said :*

" "To inform" means "to impart knowledge" and a detail available to the Income Tax Officer in the papers filed before him does not by its mere availability become an item of information. It is transmuted into an item of information in his possession only if, and only when, its existence is realised and its implications are recognised."

8. This power to act on the information is not to be confused with the power to

revise. The rule that the Income Tax Officer is entitled to act on information obtained after the original assessment from the records of the assessment itself does not permit fresh application of the mind to the same issue or enable the Income Tax Officer to correct his own or his predecessor's errors of judgment. The Income Tax Officer cannot take any action under this section merely because he happens to change his opinion or to hold an opinion different from that of his predecessor, on the same set of facts. But, the word "information" does not necessarily imply factual material in contradistinction to the legal aspect of the case. Information may be factual, but the word also includes some cases of information as to the state of the law. The decision of an appellate authority, for instance, under the Income Tax Act on the question as to which assessable entity is chargeable in respect of a particular income is an information on the strength of which the Income Tax Officer can act. The note put up by the audit to the effect that the assessment ought to have been made on the reconstituted firm for the entire income of the two periods, and, therefore, the Income Tax Officer committed an error, was instruction or knowledge derived from an external source and so it would constitute "information" within the meaning of the term in Section 147(b). It was only when the audit pointed out this circumstance that the Income Tax Officer came to realise the mistake he has committed. He committed the mistake because he did not realise the legal implication and significance of Clause 7 of the partnership deed dated January 1, 1957, when he made the original assessment. As already indicated, the mere fact that the partnership deeds were in the records when he made the original assessment would not constitute information for the Income Tax Officer if he did not realise the legal implication of Clause 7 of the deed dated January 1, 1957. The Income Tax Officer was, therefore, perfectly competent to initiate proceedings u/s 147(b).

9. The questions are answered in the negative.

10. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal.