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**(2002) 03 KL CK 0041**

**In the High Court Of Kerala**

**Case No : Income-tax Reference No. 319 of 1997**

Commissioner of Income Tax

APPELLANT

Vs

Siva Traders

RESPONDENT

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**Date of Decision : 08-03-2002**

**Acts Referred:**

Income Tax Act, 1961 — Section 139, 142(1), 143(3), 147, 148

**Citation :** (2002) 175 CTR 285 : (2002) 255 ITR 77

**Hon'ble Judges :** V.P. Mohan Kumar, J;K.K. Denesan, J

**Bench :** Division Bench

**Advocate :** P.K.R. Menon, for the Appellant; C. Kochunni Nair and S. Vinod Kumar, for the Respondent

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## **Judgement**

V.P. Mohan Kumar, J.—With respect to the decision rendered by the Income Tax Appellate Tribunal, Cochin Bench in I. T. A. No. 10/(Coch) of 1997, the Revenue framed as many as ten questions for reference to this court u/s 256 of the Income Tax Act, 1961. After considering all the aspects, the Tribunal re-framed and formulated the following question for the answer by this court, viz :

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the reopening of the assessment after a lapse of four years u/s 143(3) read with Section 147(a) of the Income Tax Act, 1961, is invalid and illegal and therefore the addition made in the reassessment cannot be confirmed ?"

2. The brief facts in this case are as under. The assessee is a firm doing business in toddy. The assessment for the year 1986-87 ending with March 31, 1986 is on a total income of Rs. 5,51,700. In the course of assessment, the Assessing Officer had noticed that the following shortages were discovered by the sales tax authorities on the basis of a raid conducted by them on November 6, 1985.

(1) shortage of 2,068.600 litres of arrack ;

(2) difference of 1,223 litres in the stock of vinegar ;

(3) unaccounted purchases of 60,230 litres of arrack from April 1, 1985, to October 30, 1985, from slips recovered.

3. The Sales Tax Department had proceeded to add a sum of Rs. 42,71,520 on account of suppressed sales being the sale value of the above 1,06,760 litres of arrack at Rs. 40 per litre. This issue was agitated by the assessee. This was disputed and was pending at the time of Income Tax assessment proceedings before the Agricultural Income Tax and the Sales Tax Appellate Tribunal. The Tribunal set aside the above addition of Rs. 41,30,060 being the value of the abovesaid liquor made on the ground of suppression. The Income Tax Assessing Officer was aware in the course of the original assessment proceedings itself the claim with respect to the suppressed income. But nevertheless acting on the finding of the Sales Tax Appellate Tribunal he did not add any amount on the ground of the alleged suppression of income. The Tribunal had found as per its order dated December 23, 1987, that the value of the suppressed purchases amounting to Rs. 42,71,520 was not to be included in the assessment order and had proceeded on the basis that there was no concealment. The original Income Tax assessment order for the year 1986-87 was made on January 31, 1989, when the order of the Sales Tax Tribunal was in force. But later the order of the Tribunal was set aside by the High Court by its order dated June 19, 1989, which remitted the matter for fresh disposal by the Tribunal. The Tribunal passed a revised order on August 16, 1990, by which the suppressed turnover of Rs. 41,30,040 was ordered to be added to the sales tax assessment.

4. Subsequently notice u/s 147 of the Income Tax Act was issued by the Income Tax Officer proposing to proceed to reopen the assessment invoking Sub-section (3) of Section 143 of the Act. The principal contention of the assessee was that on the date of reopening of the assessment with respect to the assessment year 1986-87 four years had elapsed and the notice having been issued beyond four years it would be barred by limitation. The Assessing Officer overruled the contention and reassessed and the said order was affirmed in first appeal. But on further appeal, the Appellate Tribunal took the view that the proceedings for reopening are barred by limitation.

5. Before proceeding further it will be appropriate to keep in mind the following dates.

Dale of the order of the Sales Tax Appellate Tribunal holding that there was no suppressed turnover 23-12-1987 Initial assessment of income under the Income-tax Act for the year 1986-87 made on 31-3-1989 Order of the High Court setting aside the order of the Sales Tax Appellate Tribunal and remitting for fresh disposal 19-6-1989 Revised order by the Sales Tax Tribunal calling upon the inclusion of the alleged suppressed turnover 27-3-1990 The period of four years with respect to the assessment year 1986-87 would end with 31-3-1991 Notice u/s 148 was issued on 3-8-1992

6. The material part of Section 147 reads as under :

"147. Income escaping assessment.--It the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. . . . (underlining supplied for easy reference.)"

7. A bare reading of the above section shows that no proceedings can be initiated after the period of four years from the completion of the year of assessment. In this case the last date would be March 31, 1991. The notice u/s 147 was issued admittedly beyond four years, in which event the proviso to the section alone can save the period of limitation. We may therefore concentrate our attention on the proviso which contemplates that in named contingencies the reopening can be effected even after the expiry of four years if,-

(i) any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139, or

(ii) in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or his failure to disclose fully and truly all material facts necessary for the assessment for that assessment year.

8. In this case, as on the date of completion of the initial assessment on March 31, 1989, the Income Tax Officer was aware of the fact that on March 24, 1986, a raid was conducted by the sales tax authorities at the premises of the assessee and certain slips of papers were recovered from his premises which accounted for sales turnover of Rs. 42,71,620. The offence was admittedly compounded by the assessee by paying Rs. 30,000. Therefore, plainly the factum of raid was known to the Assessing Officer at the time of proceedings before him, and the factum of the assessee's admission of the undisclosed quantity of arrack by compounding the offence is also known to the Assessing Officer. The question in such circumstances is what could be the course open to the Income Tax Officer.

9. The Income Tax Act, is a self contained code. The statute confers on the Income Tax Officer to take all the steps necessary to complete the assessment on a person who is assessable to Income Tax. The officer has power to summon a person to appear, to call upon him to produce evidence, to discover documents, to summon a person to appear in connection with Income Tax assessment, to hear a person and complete an adjudicating process. He is exercising the power of an adjudicating body. An assessee has a right to be heard and the decision of the officer affects the right to property of the assessee. It means, in the decision making process there is an element of weighing and sifting of evidence tendered before him or collected by him and coming to his own conclusion. By providing of appellate forum, to examine the correctness thereof, which decision is ultimately subject to scrutiny of this court, the statute has provided an inbuilt mechanism to assess the correctness of the decision, the decision making process and the decision arrived at. It is hence clear that the officer does not do what he likes merely because he is minded to do so but does only what he ought to do.

10. If so, if with all the materials made available to the officer concerned, he draws an inference and such inference is proved to be wrong, can it be said that the same was due to the contribution of the assessee or due to failure on the part of the assessee to make a return u/s 139 of the Act or due to the failure on his part to disclose fully and truly all material facts for making an assessment for that year ? We are of the view that the answer should be in the negative.

11. The Department contends that there has been a failure on the part of the assessee to disclose his income fully. The suppression of the fact has resulted, according to them, in the assessment being incorrect and therefore the Department contends that the proviso to Sub-section (3) of Section 143 stands attracted and limitation is saved.

12. On the contrary, the assessee contends that there has not been any wilful omission on his part and all the facts necessary to make a true and correct assessment were brought to the notice of the concerned Assessing Officer and that a wrong inference has been drawn by the Assessing Officer on the circumstances available in the case. Therefore, for this reason the proviso to the sub-section cannot be invoked to get over the limitation.

13. We have heard Mr. P. K. Ravindranatha Menon, standing counsel for the Revenue, and Sri Kochunni Nair, learned counsel for the assessee.

14. The fact now remains that the sales tax raid was conducted in the premises of the assessee on November 6, 1985. All the details of the recovery made in the sales tax raid were available to the Assessing Officer at the time when the assessment proceedings were proceeded with. The fact that the assessee had compounded the offence was also known to the Assessing Officer. It is also a fact that the assessee withheld this information from the notice of the Assessing Officer on the ground that the Tribunal had set aside any addition of any sum on the basis of the sales tax assessed. This may be an incorrect stand. But from the

set of facts within the knowledge of the Assessing Officer as to what should be the inference to be drawn by the authority concerned is his decision, any inference drawn by the Assessing Officer on the basis of the set of facts available is the realm of his decision making power and cannot attract the proviso to Section 143. The real facts discovered at the time of the raid were not withheld from the knowledge of the Income Tax Officer. These may be material circumstances which may entitle the officer to conclude that there has been a suppression of income. In this case it was open to the Assessing Officer concerned not to accept the verdict of the Sales Tax Appellate Tribunal and proceed as if there is suppression. His failure to act legally cannot be a shield for him to invoke the proviso to Section 143 of the Act. Therefore, we cannot say that the proviso to Section 143 has any application to the present case. Similar is the view taken by the Supreme Court in *Gemini Leather Stores Vs. The Income Tax Officer B Ward, Agra and Others*, wherein it is held that if the Income Tax Officer had all the material facts before him when he made the original assessment and if he drew a wrong inference on the basis of the facts available it cannot be treated as due to any default of the assessee. There their Lordships stated as under (page 4) :

"The law laid down in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, has been restated in several subsequent decisions of this court : *Commissioner of Income Tax, West Bengal, and Another Vs. Hemchandra Kar and Others*, ; *Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar*, and *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, to name only a few. In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income Tax Officer discovered. After this discovery the Income Tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inference as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income Tax Officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income Tax Officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147(a) to remedy the error resulting from his own oversight."

15. Similar view is expressed by the Supreme Court in *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*, wherein it is held as under (page 477) :

"From a combined review of the judgments of this court, it follows that an Income Tax Officer acquires jurisdiction to reopen an assessment u/s 147(a) read with Section 148 of the Income Tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has

reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to Income Tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer, at the time of making the original assessment, could or could not have found by further enquiry or investigation, whether the transaction was genuine or not if, on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and, therefore, income chargeable to tax had escaped assessment. The High Courts which have interpreted The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., as laying down the law to the contrary fell into an error and did not appreciate the import of that judgment correctly."

16. In this case, the High Court had on June 9, 1989, set aside the order of the Sales Tax Appellate Tribunal. The Tribunal made the revised order on March 27, 1990. The period of four years to invoke power u/s 143 de hors proviso expired on March 31, 1991. If that be so, the blame of the laches, if any, cannot be passed on to the assessee by invoking the proviso to Section 143 of the Income Tax Act.

17. In the light of what is stated above, we are of the view that from the facts available on the date of original assessment itself it was open for the Income Tax Officer to come to his own conclusion to include the alleged income. The fact that he drew a wrong conclusion does not mean that there is any default on the part of the assessee and that the proviso to Section 143 of the Income Tax Act be attracted. We are of the view that the view taken by the Tribunal is just and does not call for interference. The question is answered in favour of the assessee and against the Revenue.