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**(1987) 07 KL CK 0043**

**In the High Court Of Kerala**

**Case No :** Income-tax Reference No's. 85, 86, 87 and 88 of 1982

P.N. Sasikumar and Others

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision :** 03-07-1987

**Acts Referred:**

Income Tax Act, 1961 — Section 139(2), 147, 148, 2(31), 282(2)

**Citation :** (1988) 69 CTR 78 : (1988) 1 ILR (Ker) 320 : (1988) 170 ITR 80

**Hon'ble Judges :** K.S. Paripoornan, J;K. Sreedharan, J

**Bench :** Division Bench

**Advocate :** P. Radhakrishnan, for the Appellant; P.K.R. Menon, for the Respondent

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## **Judgement**

K.S. Paripoornan, J.—These four Income Tax reference cases give rise to common questions of law. The Income Tax Appellate Tribunal has referred the following two questions for the decision of this court:

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in coming to the conclusion that the proceedings by notice dated September 2, 1977, were validly initiated ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal had material to come to the conclusion that the notice issued to the individual was only a mistake curable and not one which affects the jurisdiction although the assessment was made in the status of an "association of persons" ?"

2. The respondent is the Revenue. The matter relates to the assessment years 1974-75 to 1977-78. For these four years, no return of income was furnished in respect of "Archana Hotel", Kottayam. On September 2, 1977, the Income Tax Officer issued notices u/s 148 of the Income Tax Act for the first three years and issued a notice u/s 139(2) read with Section 148 of the Act for the assessment year 1977-78 to one Sasikumar with address at Hotel Archana, T. B. Road, Kottayam. As to whether the notice was issued against the individual, Sasikumar,

or in any other capacity like the principal officer or the member of an association or body of individuals, was not specifically stated in the notice. Under the circumstances, the Appellate Tribunal proceeded on the basis that the notices were issued only to the individual, P. N. Sasikumar. He filed "nil" returns in his individual status for the first three years and returned an income of a few thousand rupees for the assessment year 1977-78. The Income Tax Officer completed the assessments in the status of an "association of persons" consisting of Sasikumar and certain others. Tax was also levied as per the assessments. In the appeals, the Appellate Assistant Commissioner took the view that notices u/s 148 (and Section 139) of the Income Tax Act were not specifically issued against Sasikumar in his capacity as "principal officer" or member thereof and were issued only in his capacity as "individual". It was held that there were no proceedings against the "association of persons" and the assessments made on the "association of persons" are invalid. The four assessments were cancelled. The Revenue tiled appeals before the Appellate Tribunal. Reliance was placed on Section 292B of the Income Tax Act and it was contended that the omission to specify "Sasikumar", to whom notice was sent as a member of an "association of persons" or "principal officer thereof", is only a mistake, defect or omission in the notices. It was argued that the notice was sent or proceedings were initiated to reopen or call for the return of income which is in substance and effect in conformity with or according to the intent and purpose of the Income Tax Act. The Appellate Tribunal held that the object of issuing the notice to Sasikumar was to assess the income of the business of Hotel Archana whoever may be the person in control and management of the business and the omission to specify the status as an "association of persons" is only an irregularity which will not invalidate the assessments. It was held that the Income Tax Officer was competent to go into the question whether the assessment is to be made on the individual or "association of persons" and that Section 292B cures such defects or omissions. The orders passed by the Appellate Assistant Commissioner were set aside and the matter was remitted for fresh disposal. The assessee has come up by way of references in these four cases.

3. We heard counsel for the petitioners, Mr. Balachandran, as also the counsel for the Revenue, Mr. Menon. Innumerable decisions were brought to our notice by counsel appearing on both sides. We are referring only to the few authorities which are necessary for resolving the controversy in these cases. It is evident that no return of income was furnished in respect of Archana Hotel for these four years. The Income Tax Officer issued notices on September 2, 1977, u/s 148 of the Act for the first three assessment years and u/s 139(2) read with Section 148 of the Act for the assessment year 1977-78 to one Sasikumar. It is agreed that the notices did not specify the capacity in which it was issued to Sasikumar. The Appellate Tribunal proceeded only on the basis that the notices were issued only to the individual. It is settled law that the issue of a notice u/s 148 of the Income Tax Act is a condition precedent or a matter of jurisdiction to the validity

of any reassessment order to be passed u/s 147 of the Act. It is also settled law that if no such notice is issued or if the notice issued is invalid or not in accordance with the law or is not served on the proper person in accordance with law, the assessment would be illegal and without jurisdiction. The notice should specify the correct assessment year and should be issued to the particular assessee. u/s 2(31), "person" includes an individual or a Hindu undivided family or company, firm, an association of persons or body of individuals, whether incorporated or not, etc. They are distinct and different assesseees. The service of a prescribed notice, on a particular assessee, who is to be assessed, is a condition precedent to the validity of any assessment to be made u/s 147 of the Act. It is the very foundation of the jurisdiction of the Income Tax Officer. The above aspect of the matter is succinctly stated in Kanga and Palkhivala's Law and Practice of Income Tax, Vol. I, page 910. In the present case, the assessments were made on an "association of persons". It is an entity which is distinct and different from the various persons who are members of the unii, ""association of persons". There is no material to show that the prescribed notices were sent to any "association of persons" or to Sasikumar as representing the "association of persons". In this view of the matter, it is clear that the notices u/s 148 of the Act were not served in accordance with law and the said assessee, who was assessed, was not called upon to file the returns. The notice was addressed only to an individual, Sasikumar. The Income Tax Officer did not make it clear or plain that the proposal was to assess the "association of persons" consisting of Sasikumar and others. So, on the basis of the notices sent, the Income Tax Officer was incompetent to assess the "association of persons" consisting of Sasikumar and others. The entire proceedings are illegal and without jurisdiction. The proceedings are patently or ex facie illegal and so loudly obtrusive that it leaves an indelible stamp of infirmity or vice. The decisions reported in Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others, , Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty, , Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, and Ravinder Narain Vs. Income Tax Officer, New Delhi and Others, , and the relevant passages at page 910 of Kanga and Palkhivala's Law and Practice of Income Tax, Vol. I. (1976 edition), make the position clear.

4. But, the Appellate Tribunal held that Section 292B cures the defects or omissions in the instant case. Section 292B is as follows:

" No return of income, assessment, notice, summons or other proceeding furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

5. In the statement of objects and reasons, published in the Gazette dated May 9, 1973, for Bill No. 34 of 1973 [1973] 89 ITR 33, it is stated, at Clause 80, referring to Section 292B, that it seeks to provide against purely "technical objections" without substance coming in the way of the validity of assessment proceedings, etc. So also, in the Departmental Circular No. 179 dated September 30, 1975 [1976] 102 ITR 28, explaining the scope of Section 292B, as could be seen from Chaturvedi and Pithisaria's Income Tax Law, Third edition, Vol. VI, page 5283, it is stated that the provision has been made to provide against purely "technical objections" without substance coming in the way of the validity of assessment proceedings, etc. The sole question that arises for consideration is whether Section 292B will cure the defect or irregularity in the instant cases as stated by the Tribunal.

6. We have already held that the issue and service of a notice u/s 148 is a condition precedent or a matter of jurisdiction. In that view, before assessing an "association of persons", as enjoined by Section 282(2)(c) of the Income Tax Act, the notice should be addressed to the principal officer or a member thereof. Admittedly, it has not been done in this case. That means, there was no notice to the "association of persons" which was assessed to tax. We are of the view that it is a case where "no notice" was sent to "the assessee", the "association of persons" as enjoined by law. The entire proceedings are, in the circumstances, void and illegal and totally without jurisdiction. Such a fundamental infirmity cannot be called a "technical objection" or a mere "irregularity" and such vital infirmity cannot be cured or obliterated by relying on Section 292B of the Income Tax Act. It is not a case of a notice issued or served, but which is beset with any mistake, defect or omission. This is a case of "no notice" to "the assessee". As stated by the Calcutta Court in Sunrolling Mills P. Ltd. Vs. Income Tax Officer, , Section 292B does not empower the Income Tax Officer to act without jurisdiction. In that case, the Calcutta High Court held that Section 292B does not authorise the Income Tax Officer to convert a proceeding u/s 147(b) of the Act into a proceeding u/s 147(a) and that action cannot be justified by taking recourse to Section 292B of the Act. It was not a mere technicality and it is a question of jurisdiction. We are of the view that the said reasoning will apply in this case also. On this basis, we hold that the Appellate Tribunal was in error in holding that Section 292B is applicable in the instant case and in reversing the orders of the Appellate Assistant Commissioner for these four assessment years.

7. Counsel for the Revenue placed heavy reliance on the decisions in RADHEY LAL BALMUKAND IN RE., , MOHD. HANEEF Vs. COMMISSIONER OF Income Tax., and Mahabir Prasad Poddar Vs. Income Tax Officer, "B" Ward and Others, . The decisions in RADHEY LAL BALMUKAND IN RE., and MOHD. HANEEF Vs. COMMISSIONER OF Income Tax., were discussed by the court in Ravinder Narain Vs. Income Tax Officer, New Delhi and Others, and were distinguished on facts. The facts of the present case are somewhat similar to the facts in Ravinder Narain Vs. Income Tax Officer, New Delhi and Others, . We should state that the decision in Mahabir Prasad Poddar v. ITO [1975] 102 ITR 478 also is

distinguishable. It is evident from page 102 ITR 483 that the notices for reopening were not challenged in the proceedings in that case. The assessments which were made pursuant to the notices alone were challenged. That makes all the difference. It should also be noticed that the decisions in RADHEY LAL BALMUKAND IN RE., and MOHD. HANEEF Vs. COMMISSIONER OF Income Tax., were rendered long before the Supreme Court decisions, mentioned in page 84 (infra) above.

8. In the result, we answer question No. 1 referred to us in the negative and in favour of the assessee and against the Revenue and we answer question No. 2 referred to us also in the negative, against the Revenue and in favour of the assessee.

9. A copy of this judgment shall be sent by the Registrar of this court, under his signature and seal, to the Income Tax Appellate Tribunal, Cochin Bench.