IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 979/Coch/2022
(Assessment Year: 2016-17)

Jameson Abraham Emmanuel Cashes Industries Chepara P.O., Kottarakara Kollam 691520 [PAN: AFOPA7312Q]	vs.	Principal Commissioner of Income Tax Thiruvananthuparam
(Appellant)		(Respondent)

Appellant by:	Shri Surendranath Rao, CA
Respondent by:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing:	18.01.2024
Date of Pronouncement:	12.04.2024

O R D E R

Per: Sanjay Arora, AM

This is an Appeal by the Assessee agitating the revision of it's assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter "the Act") dated 18.12.2018 for Assessment Year (AY) 2016-17 by the Principal Commissioner of Income Tax, Thiruvananthapuram (Pr. CIT), vide his order dated 21.01.2021.

2. The filing of appeal is attended by a delay of 124 days, which, however, is saved by the order on the *suo moto* writ petition (C) No. 3 of 2020, dated 10.01.2022 by the Hon'ble Apex Court.

3. The brief facts leading to the instant appeal are that the assessee's return of income for the year was subject to the verification procedure under the Act to verify, *inter alia*, large increase in the sundry creditors. Details were accordingly sought in assessment proceedings in respect of creditors with higher balances, also issuing summons thereto. Observing differences in the disclosed balances, i.e., with

reference to that reported by the concerned creditors in their accounts, as under, the assessee's explanation was sought:

Name of Creditor	As per account of assessee	As per account of creditor	Difference
Roy Cashew Products	12,01,379/-	Nil	12,01,379/-
TCM Logistics	9,04,808/-	4,34,383/-	4,70,425/-
Merliz Logistics	10,64,994/-	64,994/-	10,00,000/-

The assessee's reply finds mention at page 2 of the assessment order, as under:

'a) Roy Cashew Products: The difference arose because of the quality claim adjustment made by the other party on our ledger account in their books on 14.4.2015, we have no information at all. We had not received any debit note inconnection with the same.

b). TCM Logistics: the difference is due to opening balance as all the transactions in current year are correctly shown in both the ledgers by the two parties.

c) Merliz Logistics:

The difference is due to an adjustment made by them on our ledger name in their accounts against M/s. SS Maritime on 12.10.2015, regarding to which we have no information at all.'

Assessment was made, and inasmuch as there is no discussion in the matter in the assessment order there-after, ostensibly accepting the assessee's reply. The ld. Pr. CIT, reviewing the assessment in exercise of his revisionary jurisdiction u/s. 263, *in which proceedings the assessee though did not participate despite proper opportunity*, was of the view that the assessment had been completed without due verification, i.e., in the manner it should have been, so that it is erroneous and prejudicial to the interests of the Revenue. He, accordingly, set aside the assessment in view of the disparities in the returned balances, for redoing it upon due verification upon extending due opportunity of being heard to the assessee. Reliance was placed by him on the decisions in *CIT v. Jawahar Bhattacharjee* [2012] 341 ITR 434 (Gau)(FB) and *CIT v. Emery Stone Mfg. Co.* [1995] 213 ITR 843 (Raj). Aggrieved, assessee is in appeal.

4.1 Before us, the assessee's case was that there was due verification by the Assessing Officer (AO) in the assessment proceedings, and that merely because he

had not elaborated thereon in the assessment order, should not prejudice the assessee, even as held by the Tribunal in it's order in *Nadharsha Pulukuzhi Seethy v. Pr. CIT* in ITA No. 570/Coch/2022, dated 19.12.2022 (copy on record).

4.2 Shri Rao, the learned counsel for the assessee, would then take us through the copies of the accounts of the three creditors in the assessee's accounts as well as that of the assessee in their accounts, as also the reconciliation statement drawn therefrom, highlighting:

(a) entries passed/not passed in their accounts, i.e., by the assessee or the creditor;
(b) difference in account balances, where so, i.e., other than ascribed to (a) above.

In each case, the attempt was to show that the difference arose on account of a genuine reason, i.e., non-communication of the entry/s passed by the creditor, etc. or the obtaining difference pertaining to an earlier year. There is, however, nothing to suggest settlement of accounts or the same being tallied by passing corrective entries, either in the current year or subsequent year. Shri Das, the ld. CIT-DR, would submit that in view of the ld. Pr. CIT having set aside the assessment for redoing the same, no interference with his order, i.e., by dwelling on the matter on merits, is called for.

5. We have heard the parties, and perused the material on record.

5.1 The law in the matter is trite. Non enquiry or lack of proper enquiry, where the circumstances are such as warrant an enquiry, would make an order erroneous and prejudicial to the interests of the Revenue. The same, it is to be noted, is an attribute or reflection of non-application of mind, which is among the four infirmities held by the Hon'ble Apex Court in *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83 (SC), upholding the decision reported at [1992] 198 ITR 611 (Ker); the other three being: wrong assumption of facts; incorrect application of law; and without following the principles of natural justice, that would render an order as erroneous. Case law in the matter is legion, representing settled law, followed by the Hon'ble Courts across

the country, including the Hon'ble jurisdictional High Court, as in *Raja & Co. v. CIT* [2011] 335 ITR 381 (Ker), and toward which the ld. Pr. CIT cites two. The same, rather, stands since, i.e., by Finance Act, 2015, w.e.f. 01/6/2015, co-opted on the statute, by way of *Explanation 2(a)* to s. 263(1). As explained in *Gee Vee Enterprises v. Addl. CIT* [1975] 99 ITR 375 (Del), again with reference to judicial precedents, that the order of the AO becomes erroneous on a failure to make enquiry where the circumstances call for it. This is not because there is anything wrong in the order if all the facts stated therein are assumed to be correct. However, the AO is not only an adjudicator but also an investigator and, therefore, cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an enquiry. The scope of inquiry would, as explained in *Emery Stone Mfg. Co.* (supra), include that w.r.t. the applicable provision/s of law. In *Toyota Motor Corporation v. CIT* [2008] 306 ITR 52 (SC), confirming the decision by the Hon'ble High Court reported at [2008] 306 ITR 49 (Del), it was explained that the Tribunal could not have substituted it's own reasons which were required to be recorded by the AO, and ought to have remanded the matter to the latter.

5.2 There is, in the facts of the case, patently, a clear lack of application of mind by the assessing authority. The initial enquiry, incumbent on him considering sundry creditor balances to be one of the areas of verification for which notice u/s. 143(2) dated 23.06.2017 had been issued, was not followed by any other enquiry, nor did the AO examine the difference from the standpoint of or its implication on the assessee's income for the year. We have already noted the absence of any corresponding entry, even if subsequently, in accounts. Non-communication of the transaction/s – itself surprising inasmuch as any transaction is between two parties and, besides, only in pursuance of a contract, and therefore of the corresponding accounting entry/s by the creditor, stated as the reason for non-passing the same by the assesee in his accounts,

is no ground for not disclosing the corresponding income (i.e., where it arises) for the relevant year. Rather, the same clearly shows that the parties had not reconciled their inter-personal accounts; an admission of non-accounting of the relevant transaction/s, so that the accounts are deficient to that extent, and the returned income may need to be adjusted for the same, unless of course the same is disputed, of which there is no whisper, much less contention, and which would, where so, need to be demonstrated. There is accordingly no finding whatsoever by the AO in the matter, i.e., even with regard to the subsequent passing of the entries or reconciliation of accounts. Why, he does not even examine the assessee's explanation for it's veracity and validity. The quality claim, for instance, in the case of Roy Cashew Products, is for Rs. 79,391, while the obtaining difference is Rs.12.01 lakhs, and which in fact represents the actual, obtaining difference, so that by implication the assessee had already accounted for the said claim, booking income, in a preceding year. In other words, the assessee's explanation, citing quality claim, is irrelevant, if not false/invalid. What better proof, one may ask, could there be of non-application of mind.

5.3 The assessment, accordingly, has to be, as held by the revisionary authority, redone *qua* the relevant aspect thereof. Two things need to be borne in mind. Firstly, the assessment of income is not subservient to or dependent on the passing or, as the case may be, non-passing of accounting entries. Income, and which includes deduction of admissible expenditure, is to be assessed irrespective of the entries, for the right year; each year being an independent unit of assessment (*KedarnathJute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC); *Sutlej Cotton Mills vs. CIT* [1979] 116 ITR 1(SC)). True, income is to be assessed in accordance with the method of accounting regularly followed, but implicit in the dictum is the proper maintenance of accounts, only which would lead to determination of correct income. *How could that be claimed when the parties had not reconciled their accounts, and differences are admitted*? Sure, it is perfectly permissible for an assessee to pass entries in

consonance with the underlying reality of the transaction/s, i.e., the crystallization of liability on settlement of a dispute, resolution of uncertainty, etc., which may not agree with the creditor's version or position in the matter, but then, as afore-noted, there is no enquiry, much less finding in its respect in the instant case.

5.4 We may also, if only for the sake of completeness of our order, advert to the aspect of the difference in accounts, i.e., where the same is stated as a carryover from a preceding year, implying that no adjustment in its respect could be made in the computation of income for the current year. The matter would require being examined factually, which has not been. Two, the pertinent question in this regard would be as to whose accounts, i.e., of the assessee or the creditor, are correct and complete, i.e., in agreement and accord with the truth of the matter, which would require being established on the basis of materials, duly examined in light of the explanations furnished by the parties. This is as one set of accounts cannot by itself be falsified on the basis of the other, in which case both can alternatively be indicted or vindicated. Nothing therefore turns *per se* on there being an opening difference, import of which remains to be examined. Two, equally, the Revenue having proceeded, as it is entitled to, on the premise of the truth of the assessee's accounts, accepting the income returned in the past on their basis, the pertinent question that arises is if it is permissible in law to act for the year in which the book liability is found non-existing or, correspondingly, an asset is found as not accounted for. Sections 68 to 69D may need to be examined for their applicability. The assessee, after all, cannot be heard to say 'you accepted my falsehood earlier, and are therefore bound by it now' (refer:*Phool Chand Bajranj Lal v. ITO* [1993] 203 ITR 456 (SC)). The principle at work here is that one cannot by his own wrong prejudice the other (*B.M. Malani v. CIT*[2008] 306 ITR 196, 207 (SC)). Two, the assessee cannot assume a position contrary to it's accounts, which is also the purport of *Explanation 1* to s. 41(1) (also see *CIT v. TV Sunderam Iyengar & Sons Ltd*. [1996] 222 ITR 344 (SC)).

The Revenue, sure, can disregard the same where the same are found as false or incorrect. Income, it needs to be appreciated, is a term of wide amplitude, defined inclusively in s. 2(24) (*Kedar Narain Singh v. CIT* [1938] 6 ITR 157 (All)); it's accrual or receipt largely a matter of fact, would have to be satisfied if an income, not admitted or disclosed, is to be brought to tax by the Revenue. The burden to prove that a receipt is in the nature of income is on the Revenue. We may here hasten to add that where there is a specific position of law, as s. 41(1), it's parameters and conditions need to be satisfied as, for instance, cessation or remission of liability in the relevant year, for an income to be brought to tax there-under. The income specified therein, we may add, would stand to be assessed even independent of s. 41(1) inasmuch it represents a benefit arising in the course of business; the deeming introduced thereby renders inconsequential the actual carrying on thereof during the relevant year. An appropriate finding, including as to the year of assessment, inasmuch as it may lead to remedial action for another year, absent, is a must.

5.5 The assessment order, as stands clarified, is *sans* any examination and, consequently, issue of finding/s of facts, which ought to have preceded the assessment of income. We, therefore, have no hesitation in upholding the impugned order. We may though add that we may not be construed as having expressed any opinion in the matter, but only emphasizing that the issue has both factual and legal aspects – non-examined, to it, and which would therefore need to be adjudicated upon, also highlighting some of the issues deemed pertinent for being addressed. Each of the propositions of law stated in this order represent, we may add, well-settled law, case law on which is legion. Further, that, the open nature of the set aside by the ld. Pr. CIT, is not disturbed in any manner. We decide accordingly.

6. In the result, the assessee's appeal is dismissed.

Order pronounced on April 12, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: April 12, 2024
n.p.

<u>Copy to:</u>
1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The CIT-DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin