

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

ITA NO.239 OF 2013

AGAINST THE ORDER IN ITA NO.516/COCH/2007 of INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN DATED 29-05-2013

APPELLANT(S)/RESPONDENT:

DR.NASSAR YUSUF
"SHAMROCK", BALAN K.NAIR ROAD, CALICUT(PAN AALPY3130C)

BY ADVS.SRI.K.SRIKUMAR (SR.)
SRI.K.MANOJ CHANDRAN
SRI.P.R.AJITHKUMAR

RESPONDENT/APPELLANT:

THE COMMISSIONER OF INCOME TAX
CALICUT.

BY ADV. SRI.P.K.R.MENON, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
15-07-2015, ALONG WITH ITA. 240/2013 & ITA 245 OF 2013, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S ANNEXURES:

- ANNEXURE 1 : TRUE COPY OF THE ASSESSMENT ORDER DATED 30.03.2006.
- ANNEXURE 1A : TRUE COPY OF THE 1ST APPELLATE ORDER DATED 30.03.2007.
- ANNEXURE 2 : TRUE COPY OF THE APPELLATE ORDER DATED 24.10.2008.
- ANNEXURE 3 : TRUE COPY OF THE JUDGMENT IN ITA NO.1416/2009 DATED 04.01.2010.
- ANNEXURE 4 : TRUE COPY OF THE ORDER OF DATED 28.06.2013 IN IA NO.1375/2013 IN ITA NO.1416/2009.
- ANNEXURE 5 : CERTIFIED COPY OF THE APPELLATE ORDER IN ITA 516/COCH/2007 DATED 29.05.2013.
- ANNEXURE 6 : TRUE COPY OF THE COVERING LETTER DATED 22.03.2007 WITH COPIES OF PATIENT BILL.
- ANNEXURE 6A : TRUE COPY OF THE COVERING LETTER DATED 24.03.2007 WITH COPIES OF PATIENT BILL.
- ANNEXURE 7 : TRUE COPY OF THE ASSESSMENT ORDER 21.10.2005.

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

P.A. TO JUDGE

smv

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

I.T.A. No.239, 240 & 245 of 2013

Dated this the 15th day of July, 2015

JUDGMENT

Antony Dominic,J.

In view of the common issues that were raised, the appeals were disposed of by a common order of the Income Tax Appellate Tribunal. For that reason itself, these appeals were heard together and are being disposed of by this judgment, treating ITA No.240 of 2013 as the leading case.

2. The appellant is a doctor, who at the relevant time was employed in Fathima Hospital, Calicut. For the assessment year 2000-2001, the appellant filed return of income which was processed under Section 143(1) of the I.T.Act. A survey under Section 133A of the Act was conducted at the hospital. During the survey, documents were unearthed disclosing payments of large amounts to doctors working in the hospital as professional charges for operations performed by them. In so far as the appellant is concerned, the impounded documents showed that in the assessment year 2000-2001, he was paid Rs.40,40,014/-,

which was not shown in the return of income filed by the appellant. Accordingly, notice under section 148 was issued and the appellant filed his reply. Summons under Section 131 was issued and his statement on oath was also recorded. Sworn statements of Mrs.Anju, the Accounting Assistant, Sri.A.K. Ahamed Kutty, the Computer Operator, Miss.Sindhu working in the accounts and cash department of the hospital and Sri.Abdulla Mohammed, the Managing Director of the company which owns the hospital were recorded. Based on the statements and the documents, including a Crystal College Book, unearthed during the survey, assessment under Section 143(1) r/w. Section 147 was completed as per Annexure-1 order.

3. Appeal was filed before the Commissioner of Income Tax (Appeals) who disposed of the appeal by Annexure-1A order, partly modifying the assessment order. In the further appeal filed before the Tribunal, Annexure-2 order was passed. In its order, relying on the order of assessment passed in the case of Fathima Hospital, the Tribunal set aside Annexures 1 and 1A orders mentioned above. Thereupon, the Revenue filed appeal before this Court as ITA No.1144 of 2009. That appeal was

heard along with the connected appeals and the appeals were disposed of by Annexure - 3, judgment. By this judgment, orders passed by the Tribunal were set aside and the Tribunal was directed to re-consider the appeals after verifying the records, particularly the seized accounts and the statements recorded from the employees and the Managing Director and after going through the assessment and records of the hospital/company. Assessee and the department were also directed to be given an opportunity to be heard.

4. The matter was accordingly considered by the Tribunal afresh and by the impugned order, the Tribunal disposed of the appeals upholding Annexure- 1 and Annexure -1A orders. It is in this background, these appeals are filed by the assessee, framing the following questions of law:

- A. On the facts and circumstances of the case, whether the Hon'ble Income Tax Appellate Tribunal was right in disposing the appeal filed by the appellant without verifying records of the hospital company and order of assessment of the hospital company in spite of a specific directions by this Hon'ble Court?
- B. Whether the Hon'ble Income Tax Appellate Tribunal erred in not calling for the records and

order of assessment of the Hospital company in spite of specific application filed by the appellant ?

- C. On the facts and circumstances of the case, whether the Income Tax Appellate Tribunal was right in relying on the passing comments made by this Hon'ble Court instead of following the directions given by this Hon'ble Court?
- D. Whether passing comments in a judgment is having a binding effect on the lower authorities especially when the law is well settled that the statement which are in the nature of obiter dicta are not authoritative and binding?
- E. Whether principles of natural justice violated by the Income Tax Appellate Tribunal in not providing an opportunity as directed by this Hon'ble Court especially when reasonable opportunity would take in verification of the records and order of assessment of the hospital company?
- F. The addition of income made to the declared income of the appellant whether amounts to double taxation when the very same income is separately included in the income of the hospital company in their assessment order ?

5. We heard the learned Senior Counsel for the appellants and the learned Senior Standing Counsel appearing for the Revenue.

6. The first contention raised by the learned Senior Counsel appearing for the appellants was that the Tribunal was

un-necessarily influenced by the observations contained in Annexure -3 judgment of this Court. According to him, these observations, being in the nature of obiter dicta, were not binding on the Tribunal and as the Tribunal has relied upon these observations, the order passed by the Tribunal is untenable. In support of this contention, the learned Senior counsel placed reliance on judgment of the Apex Court in **Arun Kumar Aggarwal v. State of Madhya Pradesh and Others** [AIR 2011 SC 3056].

7. In the judgment mentioned above, the principle of obiter dicta was explained as opinions of a judge which do not embody the resolution or determination of the Court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself. It was also explained that obiter dicta are opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects. According to the court, it is mere observation by a judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him. In the light of

this principle, it has to be seen whether the observations made by the Division Bench in Annexure - 3 judgment in ITA No,820 of 2009 and connected cases are mere obiter dicta which should have been eschewed by the Tribunal when the appeals were re-considered.

8. This contention was raised in the context of the references made by the Tribunal to the findings of this Court regarding the assessment order passed against the company which owns Fathima Hospital. As we have already stated, the appeals were filed by the Revenue challenging the orders of the Tribunal setting aside Annexures - 1 and 1A orders of the Assessing Officer and the First Appellate Authority respectively. In the order impugned in this Court, the Tribunal had relied on the order of assessment passed against Fathima Hospital, Calicut and according to the Tribunal the income assessed in the hands of the appellant herein was already assessed at the hands of the hospital. While considering the legality of this conclusion of the Tribunal, this court necessarily had to make reference to the assessment order passed against the hospital. It was accordingly that in the judgment this Court referred to the assessment order

and made the observations which are extracted by the Tribunal in paragraph 8 of its order. These observations and findings, were essential for the disposal of the appeals and therefore embody resolution or determination of the dispute which arose in those appeals and were made on full consideration of the issues that arose in the appeals. Therefore, these findings were on the main issue raised before this Court and not on collateral subjects to be eschewed as obiter dicta. If that be so, when the appeals were re-considered, the Tribunal necessarily had to take note of the findings in Annexure - 3 judgment and its scope of enquiry was circumscribed by the findings therein. Therefore, this contention raised by the counsel deserves only to be rejected and we do so.

9. Counsel then complained that before the Tribunal, Annexure-6 and 7, affidavit of the Managing Director of the hospital, accounts of the hospital and the assessment order of the hospital for the assessment year 2000-2001 were produced and that the Tribunal did not even refer to these documents. Reading of the affidavit of the Managing Director shows that in the affidavit, he has explained about the accounts of the hospital

and about the assessment proceedings leading to Annexure-7 assessment order. Annexure - 6 is the corresponding accounts of the hospital and it shows certain receipts which are recorded in the ledger maintained by the hospital during the period from 01.04.1999 to 29.02.2000. Annexure - A7 assessment order, as we have already stated, is the one passed against the hospital during the assessment year 2000-2001. Since the complaint of the appellant is that despite the direction of this Court, in the operative portion of Annexure- 3 judgment, requiring the Tribunal to re-consider the appeals after verifying the records and with opportunity to the appellant, the Tribunal did not do so, we have to necessarily examine whether there was any failure on the part of the Tribunal.

10. Reading of Annexure - 3 judgment of this Court shows that referring to the accounts of the hospital and the assessment order passed against it for the year 2000-2001, this Court held thus:

“However, the case of surgical consumables accounted in the name of Dr.P.K.Asokan is Rs.37,93,329/- and Dr.Nasser Yousuf is Rs.21,06,918/-. So far as Dr.Anita Ashokan is

concerned, even though she is a Gynaecologist counsel submits that she was fairly Junior Doctor and it is not known whether she was involved in Surgery. In any case, we do not know how a hospital accounted purchase of surgical consumables in the name of Doctors, who are not even Surgeons. Strangely, the assessing officer at Mumbai accepted all the contentions of the hospital treating the authorised representative's statement as gospel truth. In any case, we do not find any justification for the Tribunal to interfere with the assessment orders confirmed in appeal merely based on the finding of the assessing officer at Mumbai in the case of hospital. In fact, the amounts assessed in the hands of the respondents/assesseees are not found to be genuine expenditure by the assessing officer in the assessment of the hospital. Further, since income is not accounted and expenditure proved by the hospital, the same does not bar the assessment of the income at the hands of the respondents/assesseees if it is proved to be their income. We are constrained to hold that the assessing officer, who completed the assessment of the hospital at Mumbai, did not do a responsible job because, without verifying the correctness of the statement from authorised representative, accepted it on its face value in a controversial case where the Department had unearthed unaccounted collection and distribution of money among

Doctors by the hospital.”

11. The above findings in Annexure - 3 judgment, which have become final and binding on the appellant, shows that this Court has in categorical terms disapproved the accounts maintained by the hospital and also Annexure - 7 assessment order passed against the hospital. It was on that basis that the matter was remitted to the Tribunal, directing it to re-consider the appeals. Once the accounts and the assessment order were disapproved by this Court and held it to be un-reliable, even if these documents were pressed into service by the appellant, the Tribunal could not have taken cognizance of these documents. Therefore, if the Tribunal has eschewed these documents from its consideration, the Tribunal was perfectly justified in doing so.

12. Counsel then referred us to the statements recorded during the course of survey and contended that there was no evidence of un-accounted payments made to the doctors. Reading of the assessment order and the Tribunal's order shows that there was sufficient indications in the statements recorded during the survey. These findings, being purely factual, we decline to undertake its appreciation afresh.

13. In so far as ITA No.239 of 2013 is concerned, one additional fact which was pointed out by the learned Senior Counsel for the appellant therein was Annexure - 6, certain bills, certain letters of third parties and bills issued by the hospital to those persons. It was contended that no cash payments were made to the doctor who is the appellant in this case, who is also permanently employed in the hospital. In our view, when the Revenue had sufficient other materials to sustain a finding of cash payments made by the hospital, these documents now produced are inadequate to upset those factual findings.

In the result, we do not find any illegality in the orders of the Tribunal. Therefore, answering the questions raised against the appellant, these appeals are dismissed.

Sd/-

**ANTONY DOMINIC
JUDGE**

Sd/-

**SHAJI P. CHALY
JUDGE**

smv