

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

MONDAY, THE 8TH DAY OF JUNE 2015/18TH JYAISHTA, 1937

IT.No. 149 of 2014

AGAINST THE ORDER IN ITA 429/2005 of I.T.A.TRIBUNAL, COCHIN BENCH DATED 20-09-2013

APPELLANT:

JOSE KURUVINAKUNNEL
PARTNER, HOTEL MAYURA, POOVARANI
PALA, KOTTAYAM.

BY ADV. SRI.RAMESH CHERIAN JOHN

RESPONDENT:

THE COMMISSIONER OF INCOME TAX
KOTTAYAM

R1 BY ADV. SRI.P.K.R.MENON, SR.COUNSEL, GOI(TAXES)

R1 BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 08-06-2015, ALONG
WITH ITA. 150/2014 & CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S APPENDIX:

ANNEXURE A: TRUE COPY OF THE ORDER DATED 26-3-2004.

ANNEXURE B: TRUE COPY OF THE ORDER OF THE CIT (A) DATED 23.3.2005.

ANNEXURE C: TRUE COPY OF THE FORM OF APPEAL AND GROUNDS OF APPEAL DATED 1ST APRIL 2005 FILED BEFORE THE APPELLATE TRIBUNAL.

ANNEXURE D: TRUE COPY OF THE COMMON ARGUMENT NOTES (WITHOUT ANNEXURES) FILED BEFORE the APPELLATE TRIBUNAL ARE FOR ASSESSMENT YEARS 1996-97 TO 1999-2000.

ANNEXURE E: TRUE COPY OF THE COMMON ARGUMENT NOTES (WITHOUT ANNEXURES) FILED BEFORE THE APPELLATE TRIBUNAL ARE FOR ASSESSMENT YEARS 1996-97 TO 1999-2000.

ANNEXURE F: CERTIFIED COPY OF THE COMMON ORDER DATED 20-9-2013.

ANNEXURE G: TRUE COPY OF THE ORDER OF ASSESSMENT UNDER SECTION 147 OF THE ACT COMPLETED ON FRANCIS JOSEPH TREATING THE PEAK CREDIT IN THE ACCOUNT IN FEDERAL BANK AS INCOME OF FRANCIS JOSEPH.

ANNEXURE H: TRUE COPY OF THE INTIMATION RECEIVED UNDER THE RIGHT TO INFORMATION ACT.

ANNEXURE I: TRUE COPY OF COMMON NOTICE DATED 23.12.2014 ISSUED BY THE INCOME TAX OFFICER, WARD 2, KOTTAYAM.

// TRUE COPY //

P.A.TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.Nos.149, 150, 153 & 154 of 2014

Dated this the 8th day of June, 2015

JUDGMENT

Antony Dominic, J.

These appeals are filed by the assessee challenging the order of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A.Nos.429, 431, 432 & 430 of 2005. Since issues raised are common, these appeals were heard together and are disposed of by this common judgment treating ITA 149/14 as the leading case.

2. In these appeals, the relevant assessment years are 1996-1997 to 2000-2001, and in I.T.A.149/14 the assessee is challenging the additions made on three counts. First one is deposit of Rs.3,00,000/- in the bank account of one Sri.Francis Joseph, the brother-in-law of the assessee. The second one is the unexplained credit of Rs.5,60,000/- in the capital account of the firm Hotel Mayura of which the assessee is a partner and the third one is relating to a loan of Rs.4,00,000/- taken by the assessee from one Mr.George Joseph.

3. In so far as the addition of deposit of Rs.3,00,000/- in the bank account of Mr.Francis Joseph is concerned, facts show that Sri.Francis

Joseph is the brother-in-law of the assessee. Sri.Francis Joseph had given a statement to the DDIT (Inv) that he had opened S.B.Account No.3075 in his name at the Federal Bank, Poovarani Branch and that he had made initial deposits aggregating to Rs.2,00,000/-, which was withdrawn by him. According to the Mr.Francis Joseph, thereafter all other transactions in the account were operated by the assessee herein using blank cheque leaves signed and given by him. On the basis of this information, the assessment officer collected materials from the bank and after considering the explanation offered by the assessee in response to the notice issued to him, Rs.3,00,000/- was added to the income of the assessee during the assessment year in question. This addition was confirmed by the Commissioner of Income Tax Appeals and the Tribunal.

4. Learned counsel for the assessee contended before us that when the Department proceeded to initiate action on the basis of the statement of Sri.Francis Joseph, Department should have made available Sri.Francis Joseph for cross examination and that it was entirely upto the Department to prove the allegations against him. Counsel also

referred us to Annexure G, an order of assessment in the name of Sri.Francis Joseph, where according to him the very same amount was assessed in the name of Sri.Francis Joseph himself. Therefore, according to the counsel, the addition of this Rs.3,00,000/- to his income cannot be sustained. This contention now raised by the counsel for the assessee was refuted by the learned counsel for the Revenue and according to him, the addition made was perfectly legal.

5. We have considered the rival submissions made. It is true that as held in the judgment in ***P.SAbdul Majeed v. Agricultural Income Tax and Sales Tax Officer and others [209 ITR 821]*** when the Department is proceeding against an assessee on the basis of the statement of a third party, it is necessary that the Department should make available that third party for cross examination and the burden to prove the allegation is also on the Department. However, in so far as this case is concerned, though the proceedings were originated on the basis of the statement of Sri.Francis Joseph, after collecting the details and records from the Bank, all such details were put to the assessee for his explanation. The assessee thereupon admitted that he operated the

bank account of Sri.Francis Joseph, but according to him, such operation of the bank account was on behalf of Sri.Francis Joseph and for his benefit only. According to him, it was therefore that the bank documents, such as cheque leaves and pay in slips, etc. contained his signature.

6. This therefore shows that the fact that the assessee had operated the bank account of Sri.Francis Joseph, was admitted by the assessee himself. If that be so, the further question that remained was whether he was acting for and on behalf of Sri.Francis Joseph as claimed by him. The burden to prove a factual assertion made is upon the person makes the assertion. Therefore, the burden to prove that he was acting on behalf of Sri.Francis Joseph was not on the Department, but on the assessee himself. When the burden is on the assessee to prove the aforesaid factual question, it was the assessee's burden to make available Sri.Francis Joseph for cross examination. In this context, we should also record that the assessing officer had repeatedly issued summons to Sri.Francis Joseph, and that though he stood by his statement, he declined to appear for cross examination for one reason

or the other. This was despite the fact that the burden was that of the assessee to produce him for examination. Therefore, in the facts of this case, we are unable to find fault with the Department for not making available Sri.Francis Joseph for cross examination.

7. In so far as the judgment of the Apex Court in ***Commissioner of Income Tax v. K.Chinnathamban [292 ITR 682] (SC)***, relied on by the counsel for the assessee is concerned, it is true that the principle laid down in the judgment is that when proceedings are initiated based on the bank deposit, it is for the depositor to explain the same. However, that logic cannot be imported into the facts of this case for the simple reason that the assessee himself has admitted of having operated the bank account, though allegedly on behalf of the account holder. In such a case, it is for the assessee who has operated the account to offer the explanation and prove his case and not the deposit holder.

8. However, the contention of the assessee that by Annexure G assessment order, Sri.Francis Joseph himself was assessed to income tax for the year 1997-98, merits consideration. That assessment order also makes reference to the aforesaid bank account in the name of

Sri.Francis Joseph and the amounts available therein. According to the assessee, Annexure G assessment order has also become final.

9. Learned counsel for the assessee has placed reliance on the judgment of the Apex Court in ***Income Tax Officer, A Ward, Lucknow v. Bachu Lal Kapoor Kewal Ram [60 ITR 74]*** and submitted that the Act does not envisage taxation on the same income twice over. The principle that assessment should be in the hands of the right person and that there cannot two assessments for the same income, are too well settled. Therefore, if, as contended by the counsel for the assessee, Annexure G assessment order has become final against Sri.Francis Joseph, the very same amount cannot again be assessed in the name of the assessee also.

10. We find that this issue was neither raised nor considered by the assessing officer nor was this issue properly dealt with by the Tribunal. Since, prima facie, there is force in what is argued, this is an issue that needs to be considered by the Assessing Officer, who will reconsider the liability of the assessee on this account, duly advertent to Annexure G order in the name of Sri.Francis Joseph and with notice to

the assessee.

11. Second issue that arises for consideration is regarding the deposit of Rs.5,60,000/- in the name of the assessee in the capital account of the firm Hotel Mariya, of which he is a partner. Though this addition was confirmed by the Appellate Commissioner and the Tribunal, contention raised by the counsel for the appellant is that when Rs.5,60,000/- was shown to the credit of the assessee in the accounts of the firm, it is for the firm to explain such a credit and the assessee cannot be called upon to explain the same. In support of this contention, he placed reliance of a judgment in ***Commissioner of Income Tax v. Shiv Shakti Timbers [229 ITR 505]***. However, as rightly contended by the learned Standing Counsel for the Department, Rs.5,60,000/- was shown as the deposit made by the assessee in the capital account of the firm and this amount was not reflected in the cash flow statement filed by him before the assessing officer. This, therefore, shows that Rs.5,60,000/- deposited by him in his capital account is an unexplained investment made by the assessee attracting Section 69 of the Income Tax Act. Facts being so, we do not find any illegality in the

order of the Tribunal confirming the said addition.

12. The third addition that is complained of is Rs.4,00,000/- allegedly borrowed by the assessee from one George Joseph. According to the learned counsel for the assessee, Sri.George Joseph in his statement has explained source of this Rs.4,00,000/- by pointing out that Rs.3,00,000/- was availed by him as loan from a bank and Rs.1,00,000/- was from his personal savings. According to the learned counsel, George Joseph is having substantial landed properties and agricultural income and therefore, he having explained the source of the amount advanced to the assessee, the addition ought not have been made.

13. He also contended that the assessing officer himself and the Tribunal having come to a conclusion that the assessee is not maintaining books of accounts, the addition could not have been made under Section 68 of the Income Tax Act. To support this contention, counsel referred us to ***Commissioner of Income Tax v. Shiv Shakti Timbers [229 ITR 505]***.

14. However, the statement of Sri.George Joseph itself show that a part of the amount was borrowed by him from the bank and the remaining part was from his personal savings. Despite this claim made, he did not produce any evidence to substantiate it. Further, as rightly indicated by the Tribunal, it is too improbable and against human nature that a person who has borrowed money on interest, would lend it without levying interest on the same. Therefore, we are unable to accept the case of the counsel that the explanation of Sri.George Joseph should have been accepted as the proof of source of the amount advanced and that the addition should not have made.

15. It is true that Section 68 talks about books of accounts and it is also true that in so far as this case is concerned, the assessee was not maintaining books of accounts. It is on this basis that the counsel contended that Section 68 could not have been invoked. We are unable to agree. If this logic is accepted, it will be possible for any defaulting assessee to escape from the payment of tax. In our view, Tribunal was perfectly justified in its' finding that in case of this nature the cash flow statement could be treated as the account of the assessee. Therefore, in

such circumstances, we cannot accept the case of the assessee. Issues raised being common, the above findings would answer the contentions raised in the remaining appeals also.

16. In the result, we dispose of these appeals setting aside the addition made based on the deposit of Rs.3,00,000/- in the bank account of Sri.Francis Joseph and direct that the assessing officer shall reconsider that issue duly advertent to Annexure G order of assessment issued to Sri.Francis Joseph for the assessment year 1997-98.

In all other respects, the orders will stand confirmed.

SD/-

**ANTONY DOMINIC
JUDGE**

SD/-

**SHAJI P. CHALY
JUDGE**

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