

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY ,THE 25TH DAY OF FEBRUARY 2019 / 6TH PHALGUNA, 1940

ITA.No. 303 of 2013

AGAINST THE ORDER/JUDGMENT IN ITA 44/2013 of
I.T.A.TRIBUNAL,COCHIN BENCH DATED 26-07-2013

APPELLANT/S:

K.P.ABDUL MAJEED
"SANA", KOTTARAM ROAD, CALICUT

BY ADVS.
SRI.MATHEWS K.UTHUPPACHAN
SMT.SMITHA GEORGE
SRI.P.RAGHUNATH
SRI.TERRY V.JAMES

RESPONDENT/S:

THE ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE-
CIRCLE-I(1), CALICUT - 673 001.

OTHER PRESENT:

SRI JOSE JOSEPH SC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2019, ALONG WITH ITA.304/2013, ITA.305/2013,
ITA.306/2013, ITA.307/2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY , THE 25TH DAY OF FEBRUARY 2019 / 6TH PHALGUNA, 1940

ITA.No. 304 of 2013

AGAINST THE ORDER/JUDGMENT IN OTHERS 47/2013 of
I.T.A. TRIBUNAL, COCHIN BENCH DATED 26-07-2013

APPELLANT/S:

K.P.ABDUL MAJEED
SANA KOTTARAM ROAD, CALICUT

BY ADVS.
SRI.MATHEWS K.UTHUPPACHAN
SMT.SMITHA GEORGE
SRI.P.RAGHUNATH
SRI.TERRY V.JAMES

RESPONDENT/S:

THE ASSISTANT COMMISSIONER OF INCOME - TAX,
CIRCLE
CIRCLE 1-(1), CALICUT 673001

BY ADVS.
SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH SC FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2019, ALONG WITH ITA.307/2013, ITA.306/2013,
ITA.305/2013, ITA.303/2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY , THE 25TH DAY OF FEBRUARY 2019 / 6TH PHALGUNA, 1940

ITA.No. 305 of 2013

AGAINST THE ORDER/JUDGMENT IN ITA 46/2013 of
I.T.A. TRIBUNAL, COCHIN BENCH DATED 26-07-2013

APPELLANT/S:

K.P. ABDUL MAJEED
'SANA', KOTTARAM ROAD, CALICUT.

BY ADVS.
SRI.MATHEWS K.UTHUPPACHAN
SMT.SMITHA GEORGE
SRI.P.RAGHUNATH
SRI.TERRY V.JAMES

RESPONDENT/S:

THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 1 (1), CALICUT-673001.

BY ADVS.
SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH SC FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2019, ALONG WITH ITA.307/2013, ITA.306/2013,
ITA.304/2013, ITA.303/2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY ,THE 25TH DAY OF FEBRUARY 2019 / 6TH PHALGUNA, 1940

ITA.No. 306 of 2013

AGAINST THE ORDER/JUDGMENT IN ITA 48/2013 of
I.T.A.TRIBUNAL,COCHIN BENCH DATED 26-07-2013

APPELLANT/S:

K.P. ABDUL MAJEED
'SANA',KOTTARAM ROAD, CALICUT

BY ADVS.
SRI.MATHEWS K.UTHUPPACHAN
SMT.SMITHA GEORGE
SRI.P.RAGHUNATH
SRI.TERRY V.JAMES

RESPONDENT/S:

THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 1(1)CALICUT-673001

BY ADVS.
SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH SC FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2019, ALONG WITH ITA.307/2013, ITA.305/2013,
ITA.304/2013, ITA.303/2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY , THE 25TH DAY OF FEBRUARY 2019 / 6TH PHALGUNA, 1940

ITA.No. 307 of 2013

AGAINST THE ORDER/JUDGMENT IN ITA 45/2013 of
I.T.A. TRIBUNAL, COCHIN BENCH DATED 26-07-2013

APPELLANT/S:

K.P. ABDUL MAJEED
'SANA', KOTTARAM ROAD, CALICUT.

BY ADVS.
SRI.MATHEWS K.UTHUPPACHAN
SMT.SMITHA GEORGE
SRI.P.RAGHUNATH
SRI.TERRY V.JAMES

RESPONDENT/S:

THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-1 (10, CALICUT-673001.

BY ADVS.
SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH SC FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2019, ALONG WITH ITA.306/2013, ITA.305/2013,
ITA.304/2013, ITA.303/2013, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

JUDGMENT

[ITA 303/2013, ITA.304/2013, ITA.305/2013,
ITA.306/2013 & ITA.307/2013]

Vinod Chandran, J

The questions of law arising from the appeals as found in the memorandum of appeal are as follows:-

- a. Whether the provisions of Section 68, 69 and 69A of the Act can at all be applied to the appellant when the IT Department's own case was that the appellant was only a money launderer or hawala operator ?
- b. Whether after having added 2% commission on the money received to the appellant's income on the footing that the appellant was a money launderer, was it at all

lawful or permissible for the IT Department to also treat the money itself as the undisclosed income of the appellant ?

- c. Does not the impugned order passed by the ITAT suffers from patent and fatal internal inconsistency and patent error of law in as much as the appellant cannot possibly be considered to be both a money launderer and also the owner of the money laundered ?
- d. Whether the impugned order passed by the ITAT is perverse, arbitrary and wholly unreasonable and unjustified inasmuch as in the case of the other person Surendran Kumar against whom identical allegations of money laundering were made, commission

only @1% of the money received was added to his assessed income but not the amount of the money transacted ?

e. Is the impugned order of the ITAT perverse, arbitrary, discriminatory and wholly unreasonable and unjustified because in the case of Surendran Kumar the rate of hawala commission was taken as @1% whereas in the matter of appellant same was taken @ 2% without any warrant or justification whatsoever ?

2. The assessee who is the appellant herein had been carrying on a lodge and had also filed returns of income for the assessment years involved in the above case; 2002-03 to 2005-06. An action under Section 147 was initiated on information received of the assessee having opened various bank accounts in the name of partnership firms

constituted of the relatives and employees of the assessee. Substantial amounts came into such Bank accounts in all the subject assessment years and there were withdrawals made immediately on the deposits having come to the account. The Income Tax authorities took up the matter on information supplied by the Enforcement Directorate (ED). As we see from the proceedings of the ED, which was called for by the Commissioner of Appeals, the officers of the ED unearthed a huge hawala operation of money sourced from the middle east, deposited in Mumbai and then transferred to different persons all over the country who are said to have acted as agents for distribution of the amounts to various people. The assessee refused to own up the accounts and also refused to file a return in pursuance of the notice issued under Section 148.

3. The Department took up the enquiry on

the basis of the statements recorded from the various persons who appeared in accordance with the summons issued and the materials collected, of the details of the Bank accounts and completed proceedings against the assessee. The assessments were completed by two separate Assessing Officers in the year 2002-03, 2003-04 and 2005-06 by one and of the A.Y 2004-05 by another. The peak credit in the accounts recovered were assessed under Section 68, 69 and 69A as unexplained cash credits and investments. Considering the fact that the entire transactions were hawala transactions, commission at the rate 2% was also assessed as income of the assessee. The First Appellate Authority and the Tribunal confirmed it, against which the present appeal is filed. For the year 2004-05, the entire amounts deposited in the accounts was taken as income.

4. The Assessing Officer who took up the

peak credit, adopted it as revealed from each of the accounts and assessed it for the respective years. The Appellate Tribunal however, directed that the incremental peak credit, meaning, those available in the respective years, as available from all the accounts has to be adopted for the purpose of addition.

5. Sri.Raghunath, learned counsel appearing for the appellant would primarily contend that there was absolutely nothing to connect the assessee to the accounts. Further it is submitted that admittedly when the Department accepted the position that the assessee was carrying on hawala proceedings, there could be no assessment of the amounts which came into the accounts, and withdrawn immediately, as an unexplained cash credit or unexplained investment. The very allegation of hawala transaction would indicate that the money which came into the accounts did not belong to the

assessee; but to those persons to whom it was distributed. In the teeth of the very allegation, there could not have been any addition made on the basis of the peak credit and even the incremental peak credit for an year as directed by the Tribunal is flawed.

6. As to the Commission applied it is argued that one of the other agents who had been implicated in the case by the ED was assessed by another officer in Coimbatore at 1% commission without any addition made under Sections 68, 69 and 69A. In fact, the said assessment orders produced along with the records clearly indicate that the officer had conducted enquiries and found that there was no evidence of assets acquired by the said agent; using the amounts that came into similar accounts maintained by that assessee. In the present case, the Assessing Officer had not attempted any such inquiry and the liability to

commission, if at all has to be confined to 1% as in Surendran's case.

7. The Appellate Tribunal raised two issues, as arising in the appeal, which found in Annexure B order are as follows:-

(a) Whether the money transactions carried out through the bank accounts opened in the name of various partnership firms constituted by the employees and relatives of the assessee, belong to the assessee or not?

(b) If the answer to the above question is in affirmative, then whether the quantum of income determined by the assessing officer and confirmed by Id CIT(A) is correct.

8. On the first issue the Tribunal

discussed the various evidences unearthed with respect to the details of the accounts which were opened in the name of partnership firms. There were nine accounts opened in Centurion Bank, Kozhikode Branch in the name of partnership firms, The firms had different partners; all of whom were alleged to be relatives or employees of the appellant. None of these partners had any source of income which would justify the opening of such accounts nor had they carried on any business in the name of the partnership firm, in which name, the accounts were opened.

9. All the partnership firms had one address as revealed from the details supplied by the Bank, which was a building belonging to the assessee wherein he was also residing earlier. The telephone number, again of all the partnership firms, furnished at the Bank, was the same and this was a telephone which was installed in the premises

when the assessee was residing therein. None of the partners on enquiry were found to have any capacity to carry on financial transactions of the magnitude revealed from the accounts. Many of them examined on summons also stated that they had opened the accounts at the behest of the assessee and had withdrawn amounts deposited therein, on his behalf.

10. The Bank details again contained two mobile numbers which were found to be of the assessee's wife. The assessee's wife also gave a statement to the effect that these mobile numbers belong to her. The call details, obtained by the Department also indicate regular calls having been made by the assessee and his son to the mobile numbers.

11. The assessee's son had opened a NRI account with the Centurion Bank and deposited Rs.50,00,000/-, on the strength of which deposit a

loan was sanctioned to one of the partnership firms. The Branch Manager, who opened the account also deposed that, considering the quantum of the loan availed, the bank had insisted for additional security which was provided by the assessee's son. This is another clinching factor in linking the assessee to the bank accounts. It was also the Managers deposition that the assessee was instrumental in opening the deposit account in the name of his son. It has also come out in evidence that eventually the loan account was settled with the 50,00,000/- deposited in the name of the assessee's son. Considering all these evidences, the lower authorities including the Tribunal found that the accounts were opened on behalf of the assessee and the transactions were also regulated by the assessee. We do not find any infirmity in the appreciation of the facts as revealed on enquiry and we refuse to interfere with that in

this appeal, where substantial questions of law are to be considered. We do not find any perversity in the fact finding of the lower authorities and no question of law arise.

12. The questions raised are on the additions made as against the assessee; which are asserted to be perverse on facts and not possible of taxation going by the very position adopted by the Department of a hawala transaction. A hawala transaction is a money laundering exercise where the ill gotten gains of one is attempted to be brought into the country for oneself or for distribution to other beneficiaries; without the same being subject to any liability to tax or duty, levied by statutory enactments on such income or receipts.

13. The learned Standing Counsel for the Department, Sri Jose Joseph asserts that the assessee refused to divulge any details with

respect to any transactions unearthed in the various accounts, with which the assessee was inextricably found to be connected. It is in such circumstances that the peak credit was assessed in the name of the assessee as also further assessment at 2% commission made in years other than 2004-05. The Tribunal modified the said assessment directing the peak credit to be the incremental peak credit of the subject year and the commission at 2% as decided by the Assessing Officer on the total amounts credited to the accounts. For all we know the amounts credited in the accounts would have been enjoyed by the assessee himself; is the argument.

14. The question of law raised by the assessee is as to whether the credit found in the Bank account could be taken as undisclosed investment or cash credit especially when the books of accounts referred to in Section 68,69 and 69A

are that of the assessee. Here there was absolutely no books of accounts maintained by the assessee; admittedly. In fact, we revisit the fact that when notice was issued to the assessee, he refused to file a return. Despite the overwhelming evidence unearthed regarding the inextricable link the assessee had with the various accounts maintained in the name of bogus partnership firms, the assessee refused to acknowledge the same. The assessee maintained a stoic silence insofar as the source of the amounts deposited in the accounts as also the destination of the said amounts. It is in such circumstances, the Tribunal accepted the addition made on the basis of the peak credit in the subject years.

15. The Tribunal found that the assessee had failed to discharge the initial burden of proof as required under Section 68, 69 and 69A and hence the addition made in the name of the assessee under

the above provision was justified. The peak credit as determined in the subject year represented the funds available with the assessee; was the finding of the Tribunal. The Tribunal also held that the deduction could have been made for an outgoing in the form of expenses and investments and the balance amounts should be considered as funds available in the hands of the assessee as income taxable under the Act. We cannot but observe that since there is no explanation offered as to the source or destination of the amounts which came into the bank account there is no illegality in making addition of the peak credit. Of course the same has to be confined to the peak credit in the respective years and not on each of the accounts. This is the only concession possible on the assertion of the Department that the deposits were for money laundering. The destination of the amounts which were deposited and later withdrawn

having not been disclosed or substantiated; it is not reasonable to assume that the entire amounts would have been disbursed, with only the commission appropriated. Virtue among thieves is an adage which cannot be imported, as a principle, to statutory assessment of income to tax.

16. Money laundering can also be for oneself and there can be no presumption that it is for others, especially when the assessee refuses to divulge the details of the persons to whom the money was distributed. When the assessee contested the proceedings with a stout denial and nothing more; the various accounts being found to have been opened and operated on behalf of the assessee, the entire deposits therein has to be treated as his income. One Assessing Officer for a solitary Assessment Year did just that. However, the Department having not filed an appeal from the order reversing it and maintaining that at

incremental peak credit; we would not interfere. In the other years the Assessing Officer himself adopted the peak credit in each year, which again was modified to incremental peak credit. Despite our above observations, we find no way in the present appeal to import these principles into the assessment impugned. Nor is it warranted in an appeal under Section 260A filed by the assessee. But we find the adoption of incremental peak credit as income to be quite a plausible view, presuming at least that, to be the income of the assessee.

17. The assessee cannot dissociate himself from the various accounts in view of the overwhelming evidence unearthed by the Department connecting him to the various accounts maintained in the Centurion Bank, Kozhikode Branch and the depositions of the various witnesses summoned. Despite the fact that the ED had found the assessee to be a hawala operator or money

launderer, we find the assessment under Section 68, 69 and 69A of the incremental peak credit of the respective years, in the subject assessment years, taken from all the accounts to be perfectly in order. There can be a reasonable assumption that the incremental credit would be the income of the assessee, the remittances being found in favour of the assessee and the disbursal not having been proved or even admitted.

18. The next question is as to the commission which could have been assessed at the hands of the assessee for which also the assessee refused to state anything as to the actual percentage. The assessee's contention is that the same should be confined to that fixed on one another assessment made in the case of one another agent who was also implicated as a part of the network unearthed by the ED. We cannot find any inconsistency in the Assessing Officer having not

adopted the commission as adopted by another officer in a different location. At the outset it cannot be pleaded that the commission adopted in a case should be adopted in the case of another without reference to the various factors regulating a hawala transaction; which *per se* is illegal.

19. Evidently the other person was an agent operating in Tamil Nadu. The assessee herein belongs to the State of Kerala which has the maximum expatriates insofar as the Middle East is concerned. We do not find any patent error or inconsistency in the assessment made against the appellant herein and hence we reject the appeal finding the questions of law in favour of the revenue and against the assessee. We however notice that when incremental peak credits are taken as the income of the assessee for a particular year the said quantum shall not be treated for the purpose of 2% commission and no addition shall be

made on that count. Hence the commission shall be only on the amounts deposited, other than the incremental peak credit adopted for each year.

The above appeals are rejected. No order as to costs.

Sd/-
K. Vinod Chandran,
Judge

Sd/-
Ashok Menon,
Judge

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APPENDIX OF ITA 303/2013

PETITIONER'S/S EXHIBITS:

ANNEXURE-A

TRUE COPY OF THE COMPLETE SET OF THE
FOUR VOLUMES RELATING TO THE APPEALS
FILED BY THE APPELLANT BEFORE THE
INCOME TAX APPELLATE TRIBUNAL, COCHIN
BENCH.

APPENDIX OF ITA 304/2013

PETITIONER'S/S EXHIBITS:

ANNEXURE-A **TRUE COPY OF THE ASSESSMENT ORDER DATED
30/12/2010 FOR THE YEAR 2005-06**

ANNEXURE-B **TRUE COPY OF THE COMMON APPELLATE ORDER
DATED 17/12/2012 OF THE COMMISSIONER OF
INCOME TAX (APPEALS)-I, CALICUT.**

ANNEXURE-C **TRUE COPY OF THE IMPUGNED COMMON ORDER
DATED 26/7/2013 OF THE INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH IN ITA
NO. 47/COCH/2013.**

APPENDIX OF ITA 305/2013

PETITIONER'S/S EXHIBITS:

- ANNEXURE-A** TRUE COPY OF THE ASSESSMENT ORDER DATED
30/12/2009 FOR THE YEAR 2004-05.
- ANNEXURE-B** TRUE COPY OF THE COMMON APPELLATE ORDER
DATED 17/12/2012 OF THE COMMISSIONER OF
INCOME TAX (APPEALS)-I, CALICUT.
- ANNEXURE-C** TRUE COPY OF THE IMPUGNED COMMON ORDER
DATED 26/7/2013 OF THE INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH IN ITA
NO. 46/COCH/2013.

APPENDIX OF ITA 306/2013

PETITIONER'S/S EXHIBITS:

ANNEXURE-A TRUE COPY OF THE ASSESSMENT ORDER DATED
30/12/2010 FOR THE YEAR 2003-04

ANNEXURE-B TRUE COPY OF THE COMMON APPELLATE ORDER
DATED 17/12/2012 OF THE COMMISSIONER OF
INCOME TAX (APPEALS)-I, CALICUT.

ANNEXURE-C TRUE COPY OF THE IMPUGNED COMMON ORDER
DATED 26/7/2013 OF THE INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH IN ITA
NO. 48/COCH/2013.

APPENDIX OF ITA 307/2013

PETITIONER'S/S EXHIBITS:

ANNEXURE-A TRUE COPY OF THE ASSESSMENT ORDER DATED
29/12/2006 FOR THE YEAR 2003-04

ANNEXURE-B TRUE COPY OF THE COMMON APPELLATE ORDER
DATED 17/12/2012 OF THE COMMISSIONER OF
INCOME TAX (APPEALS)-I, CALICUT.

ANNEXURE-C TRUE COPY OF THE IMPUGNED COMMON ORDER
DATED 26/7/2013 OF THE INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH IN ITA
NO. 46/COCH/2013.