

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 4TH DAY OF JULY 2016/13TH ASHADHA, 1938

ITA.No. 27 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN ITA 127/COCH/2011 of
I.T.A.TRIBUNAL,COCHIN BENCH DATED 07.09.2012

APPELLANT/RESPONDENT:

M/S.KOTTAKKAL WOOD COMPLEX,
MAIN ROAD, KOTTAKKAL, PAN: AACFK 6874A

BY ADV. SRI.ANIL D. NAIR

RESPONDENT(S)/APPELLANT:

THE DEPUTY COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE-2, KOZHIKODE - 673 001.

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

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
04-07-2016, ALONG WITH ITA. 28, 29, 35, 36, 42 & 53 of 2013,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

: 2 :

APPENDIX

PETITIONER'S ANNEXURES:

- ANNEXURE A : TRUE COPY OF THE ORDER OF ASSESSMENT.
- ANNEXURE B : TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX.
- ANNEXURE C : TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL.
- ANNEXURE D : TRUE COPY OF THE ARGUMENT NOTE.

RESPONDENTS' ANNEXURES: NIL

//TRUE COPY//

P.A. TO JUDGE.

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ.

I.T.A. Nos. 27, 28, 29, 35, 36, 42 & 53 of 2013

Dated this the 4th day of July, 2016.

JUDGMENT

Antony Dominic, J.

These appeals are filed by the assessee aggrieved by the common order passed by the Tribunal for Income Tax Appellate Tribunal, Cochin Bench in I.T.A. Nos. 127-133/Coch/2011 concerning the assessment years 2002-2003 and 2008-2009. By the said order, the appeals filed by the assessee were dismissed.

2. Briefly stated the facts of the case are as follows:

The appellant assessee is a partnership firm, engaged in the business of furniture. Survey under Section 133A of the Income Tax Act was conducted in the premises of the appellant on 12.09.2007 in connection with the search under Section 132 of the Act in the concern, viz, M/s.Classy the Antique Designed Furniture. This resulted in an assessment under Section 153C for the assessment years 2002-2003 and 2007-2008 and an assessment under Section 143 for the assessment year 2008-2009.

3. The assessee filed appeals before the Commissioner

(Appeals), which were partly allowed. Further appeals that were filed before the Tribunal were dismissed by the impugned common order. It is aggrieved by these orders, the assessee has filed these appeals.

4. We heard the learned counsel for the appellant and the learned Senior Standing Counsel for the Revenue.

5. The contention raised by the learned counsel for the appellant is mainly that the entire assessments are based on the statement of Sri. V.A. Ahammed, a Salesman of the appellant, recorded under Section 133A of the Act, and that in the absence of any corroborative evidence, the assessments are illegal. In support of this contention, the learned counsel has placed reliance on the judgments of this Court and the Madras High Court in Paul Mathews and Sons v. Commissioner of Income Tax¹ and Commissioner of Income Tax v. S. Khader Khan Son² respectively and the judgment of the Apex Court in Commissioner of Income Tax v. S. Khader Khan Son³ where the judgment of the Madras High Court was confirmed. On the other hand, the learned senior Counsel appearing for the

¹ 263 ITR 101

² [2008] 300 ITR 157 (Mad)

³ [2013] 352 ITR 480 (SC)

Revenue contended that the statement under Section 133A has its evidentiary value, and according to him, so long as the assessee has not proved that the contents of the statement are incorrect, the assessment made relying on the statement cannot be interfered with. The learned counsel also invited our attention to the assessment order, where in addition to the statement under Section 133A, reliance has been placed on the proceedings for imposition of penalty under Section 67 of the KVAT Act on the allegation of suppression of stock. He also invited our attention to the assessment order where reliance has been placed on letter dated 18.09.2007 issued by Sri. V. Ahamed, a salesman of the appellant. Therefore, according to him, the principle laid down in the judgments of this Court and Madras High Court cannot be applied to the facts of this case. In fact, the learned counsel invited our attention to the judgment of the Bombay High Court in Dr. Dinesh Jain v. ITO (Bom)⁴ where the Bombay High Court has distinguished the judgment in S. Khader Khan Son (supra).

6. We have considered the submissions made. It is a fact that the statement under Section 133A of Sri. V. Ahammed, the salesman

4 [2014] 363 ITR 210 (Bom)

of the appellant, was recorded during the survey conducted. It is also true that an assessment made entirely relying on such a statement cannot be sustained. Law in this behalf has been clarified by this Court in *Paul Mathews and Sons v. Commissioner of Income Tax*⁵, wherein this Court has held thus:

“Section 133A(3)(iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the income-tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. On the other hand, we find that such a power to examine a person on oath is specifically conferred on the authorised officer only under Section 132(4) of the Income-tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under Section 133A, Section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under Section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, there is much force in the argument of learned counsel for the appellant that the statement elicited during the survey operation has not evidentiary value and the Income-tax Officer was well aware of this.”

The judgment in *Paul Mathews* (supra) was relied on by the Madras High Court in *S. Khader Khan Son*. The judgment of the Madras High

⁵ 263 ITR 101

Court was confirmed by the Apex Court by dismissing the appeal filed by the Revenue.

7. However, insofar as this case is concerned, we find force in the submission of the learned Senior Counsel for the Revenue that the assessments made is not based only on the statement under Section 133A of the Act. On the other hand, the assessment order itself reveals that the Revenue has placed reliance on the proceedings initiated against the appellant for imposition of penalty under Section 67 of the KVAT Act based on an inspection held on 17.08.2006. It is seen that the Revenue relied on letter dated 18.09.2007 issued by V. Ahammed to the Assistant Director of Income Tax (Investigation) clarifying his statement under Section 133A of the Act. This shows that the maker of the statement himself has re-affirmed the statement and nothing has been produced by the assessee to show that the contents of the statement are incorrect. In such a situation, we cannot accept the contention now raised by the learned counsel for the assessee and hold the assessments to be illegal.

8. However, we find from the order of the Assessing Officer which now stand confirmed that the quantification of the volume of

suppression allegedly made by the assessee is based on the quantity detected by the authorities under the KVAT Act in the inspection held on 17.08.2006. It is stated that the proceedings for levy of penalty under Section 67 of the KVAT Act were initiated on finding of excess stock of ₹14,38,785, and that the suppression of sale was worked out at ₹17,81,971 by adding gross profit to the excess stock. This is evident from the assessment order, wherein it has been stated thus:

“The contention of the assessee is not accepted. Assessee is asister concern of Classy group which is a family concern of Adattil Mohammed. The modus operandi regarding the suppression of sale by understating the sale is common in all the firms as it is evident from the statement of Sri. Adattil Jabir and Sri. V. Ahammed as mentioned above. There was an inspection by the intelligence officer of Commercial Taxes of Tirur in the case of Kottakkal Wood Complex on 17.08.2006 and excess stock of 14,38,785/- was found and the Department of Commercial Taxes has issued a show cause notice bearing No. TRL-08/06-07 dated 16.10.2007 for imposing penalty u/s.67(6) of the KVAT Act. In response to the said show cause notice assessee vide letter dated 10.04.2007 replied that the stock difference existed only in the case of 12 items out of 31 items. This shows that the assessee is regularly suppressing the sale of goods while computing the understated sale, branded items, sales to Banks etc. are excluded. Further, the sharp fall in GP could not be satisfactorily explained from which it is clear that the assessee has suppressed the sales. Therefore, the suppression of sale worked out as above at Rs.17,81,971/- is added to the total income as undisclosed business income. Penalty proceedings u/s 271 (1)(c) is initiated for concealment of income.”

9. During the course of hearing, the learned for the appellant produced before us order No.TRL-08/06-07 dated 08.08.2007,

whereby the penalty proceedings under Section 67 of the Act were compounded by the assessee on payment of ₹28000/- as compounding fee. This order shows that the total suppression detected was only ₹2,10,595/-. This means that the penalty proceedings were initiated on the basis that there was excess stock of ₹14,38,785. In the final order that was passed, the said amount is now reduced to ₹2,10,595. Since the assessment under the Income Tax Act has been completed quantifying the suppression of sale based on the excess stock detected in the inspection conducted by the authorities under the KVAT Act on 17.08.2006, the reduction in the excess stock as seen in the final order passed in the proceedings under Section 67 of the KVAT Act, should have an impact on the assessment under the Income Tax Act also. Therefore, though we confirm the orders impugned before us, we are of the view that the assessee is entitled to get the benefit of the reduced excess stock as determined by the authorities of the KVAT Act in their order No.TRL-08/06-07 dated 08.08.2007. For that matter, we remit the proceedings to the Assessing Officer, who will issue revised orders taking into account the order dated 08.08.2007 passed by the

Intelligence Officer, Squad No.II, Tirur.

The appeals are accordingly disposed of remitting the matter to the Assessing Officer to pass fresh orders as directed above. This shall be done within a period of six months from the date of receipt of a copy of this judgment.

ANTONY DOMINIC,
JUDGE.

DAMA SESHADRI NAIDU,
JUDGE.

Rv

I.T.A Nos. 27/2013 & connected cases