IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 14TH JANUARY 2008 / 24TH POUSHA 1929

ITA.No. 13 of 2001()

ITA.279/COCH/1996 of I.T.A.TRIBUNAL,COCHIN BENCH
....

APPELLANT:

THE COMMISSIONER OF INCOME TAX,
COCHIN.

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

RESPONDENTS:

M/S.BENHUR TRADES & INVESTMENTS
PVT. LTD., MAS BUILDING, COCHIN-18.

BY ADV. SRI.T.M.SREEDHARAN
SRI.T.S.ARUNKUMAR
SRI.P.BALAKRISHNAN (E)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD
ON 14/01/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C.N.RAMACHANDRAN NAIR &
T.R.RAMACHANDRAN NAIR, JJ.

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I.T.A. No.13 of 2001

....

Dated this the 14th day of January, 2008.

JUDGMENT

C.N.Ramachandran Nair, J.

Even though four questions are raised, actually only two issues are involved which pertain to addition of estimated unpaid dividends from chitty business and estimation of foreman's commission on the date of auction. We have heard counsel appearing for the appellant and counsel appearing for the respondent-assessee.

2. It is clear from the orders of the Tribunal and that of the first appellate authority and the assessment order that the assessee which was engaged in different lines of business including chitty, did not produce entire books of accounts. If assessee does not produce books of accounts to substantiate the return and profit and loss account filed, assessment should have been completed under Section 144 as provided under Section 145(3) of the Income Tax Act and not under Section 143(3). However, the Assessing Officer has accepted the profit and loss account and made certain additions based on a guess work. However, he has made addition towards undistributed dividend by reference to Section 41(1) of the Income Tax Act.

The first appellate authority as well as the Tribunal did not approve the addition under Section 41(1) and therefore, they deleted the same. We agree with the orders of the Tribunal and the appellate authority because Section 41(1) has no application in this case. It was for the assessee to have proved with evidence before the Assessing Officer that dividend though not distributed along with subscriptions, was in fact distributed to the subscribers at the end of the chit as claimed by counsel in this court, if that is the factual position. The terms of chitty contained in the variola are also not referred by the Assessing Officer, which would have disclosed whether subscribers who default payment of subscription are entitled to dividend at the end of the kury as is claimed in this court. Veethapalisa is normally distributed among subscribers who remit the kury amount in time and once subscribers forfeit the benefit, it goes to the foreman. So far as foreman's commission is concerned, it is not known what is the date on which petitioner credited it. It may be credited on the date of auction or on the date of payment to the successful bidder i.e., the date on which prize amount is paid. Strangely the officer has not considered any of these and petitioner admittedly did not produce books of accounts. We are not in a position to uphold the Tribunal's order confirming the first appellate order which is based on certain assumption of facts. We, therefore, set aside the orders of the Tribunal and that of the first appellate authority and remand the matter to the Assessing Officer for reconsideration. The petitioner is directed to produce books of accounts. The assessing authority will call for the accounts and make fresh assessment. The assessing authority will give an opportunity to the assessee to produce accounts and other details to make fresh assessment. There will be a direction to the Assessing Officer to modify the assessment within three months from date of receipt of copy of this judgment. If books are not available at this distance of time and the assessee is in business, the Assessing Officer can find out the practice followed by the assessee in the following years accepted in assessments and if in the later period assessee's claim was accetped, then there is no scope for addition for this year also.

The appeal is disposed of as above.

C.N.RAMACHANDRAN NAIR
Judge

T.R.RAMACHANDRAN NAIR
Judge

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