

(2008) 10 KL CK 0006

In the High Court Of Kerala

Case No : S.T. Rev. No's. 133 of 2006 and 480 of 2004

Alukkas Jewellery

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-10-2008

Acts Referred:

Income Tax Act, 1961 — Section 263

Kerala General Sales Tax Act, 1963 — Section 35(1), 35(2), 35(2A)

Citation : (2009) 26 VST 584

Hon'ble Judges : H.L. Dattu, C.J.;C.N. Ramachandran Nair, J;A.K. Basheer, J

Bench : Full Bench

Advocate : Jose Joseph, for the Appellant; Vinod Chandran, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The question raised in the connected sales tax revision cases, one filed by the assessee and the other filed by the State, is whether the Deputy Commissioner of Sales Tax has jurisdiction u/s 35(2A) of the Kerala General Sales Tax Act, hereinafter called the "KGST Act", to order reopening and revision of a best judgment assessment based on the subsequent information that pursuant to raid by Income Tax Department the assessee conceded unaccounted sales and business income based on which revised Income Tax assessment was concluded by orders of the Settlement Commission. Revisions happened to be filed on the same issue by both sides because of the conflicting views taken by two Benches of the Sales Tax Appellate Tribunal which heard the cases pertaining to two assessment years. A Division Bench of this court, which heard the cases, felt that the order of the Tribunal in favour of the assessee for one year is based on the decision of this Court which was rendered without referring to earlier decisions expressing contrary view. Therefore the Division Bench referred the matter to Full Bench and hence these cases are before us. We have heard Special Government Pleader appearing for the State and counsel appearing for the assessee.

2. Since facts are similar, it is enough we refer to the facts of one case and

therefore we refer to the facts which led to STRV No. 133 of 2006 filed by the assessee which pertains to the assessment year 1994-95. The assessee is engaged in jewellery business. In the accounts produced in support of returns though the assessee had conceded substantial sales and gross profit, the result was net loss of Rs. 4,66,906. However, the total loss disclosed before the Income Tax Department was Rs. 1,02,069. In the course of regular assessment, the assessing officer noticed that having regard to the stock-in-trade, and business name of the assessee, the sales turnover returned did not appear to be correct and further inspection of business places by the intelligence squad on September 1, 1994 revealed stock difference. Consequently assessment was completed by making an addition of 25 per cent to the declared turnover. Though the addition was sustained in first appeal, the Tribunal on second appeal cancelled the addition to the turnover. Even though original assessment got confirmed through Tribunal's order, the Deputy Commissioner collected information pertaining to Income Tax assessment of the assessee, finalised through orders of the Settlement Commission, wherein the assessee conceded additional income of Rs. 15 lakhs in jewellery business. The concession made by the assessee and recorded in the order of the Settlement Commission based on which the Deputy Commissioner initiated proceeding u/s 35(2A) of the KG ST Act, are in the following words:

The books of account maintained did not reflect the full and correct volume of purchases and sales. The applicant has explained that the customers were insisting on purchase without bills to avoid payment of sales tax. In order to survive in the business in the face of stiff competition, the applicant had to accede to the request of the customers in this regard and, therefore, a certain portion of purchases and sales had to be omitted to be recorded in the relevant books of account. It is claimed that the applicant was offering the undisclosed income in the return.

3. Based on the assessee's admission accepted in the settlement commission's order that the assessee had practised unaccounted purchases and sales and earned profit in jewellery business, the Deputy Commissioner issued orders u/s 35(2A) of the KGST Act for revision of assessment originally completed and finalised in appeals. This was resisted by the assessee on the ground that since the very same issue, namely, estimation and addition to the turnover was subject-matter of appeal, the same cannot be the basis for revision of assessment u/s 35(2)(b) read with Section 35(2A) of the KGST Act. Even though the assessee's contention was rejected by the Tribunal holding that the basis of reopening of assessment u/s 35(2A) is new information received by the Deputy Commissioner, which was not subject-matter of appeal, another Bench of the Tribunal allowed the assessee's case following earlier order of the Tribunal in the assessee's own case, which again was based on decision of this court. The question, therefore to be considered, is whether based on facts above stated, the Deputy Commissioner was justified in ordering revision of assessment once completed and got finalised in one round of appeals. In order to appreciate the

contention, we have to refer to the relevant section which is extracted hereinbelow:

35. Powers of revision of the Deputy Commissioner suo motu.--(1) The Deputy Commissioner may, of his own motion, call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him other than an Appellate Assistant Commissioner which in his opinion is prejudicial to revenue and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under subsection (1) if,--

(a) the time for appeal against the order has not expired;

(b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court; or

(c) more than four years have expired after the passing of the order referred to therein.

(2A) Notwithstanding anything contained in Sub-section (2), the Deputy Commissioner may pass an order under Sub-section (1) on any point which has not been decided in an appeal or revision referred to in Clause (b) of Sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in Clause (c) of the sub-section whichever is later.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

4. Counsel for the assessee has relied on the decision of this Court in *Alukkas Jewellers v. State of Kerala* [2002] 126 STC 153 : [2001] 3 KLT 917 and the decision in *S. Unnikrishnan v. State of Kerala* [2000] 120 STC 530, and contended that revision of assessment is not permissible u/s 35(2)(b) read with Section 35(2A) of the KGST Act based on declaration of income for assessment under the Income Tax Act.

5. The main question to be considered is whether the Deputy Commissioner is barred from exercising jurisdiction u/s 35(2)(b) read with Sub-section (2A) because the estimation and addition of turnover in the original assessment was subject-matter of appeal. Of course, the Deputy Commissioner u/s 35(2)(b) is barred from exercising revisional jurisdiction when assessment order was subject-matter of appeal. However, Sub-section (2A) of Section 35 entitles the Deputy Commissioner to exercise jurisdiction on any point that has not been decided in appeal. The question therefore to be considered is whether the issue decided in appeal in this case is the one on which revision is exercised by the Deputy Commissioner. It is clear from the facts that in the original assessment, addition was made merely because of some stock variation noticed in the course of

inspection and the officer's doubt about genuineness of accounts because the turnover returned did not appear to him to be realistic compared to the value of stock-in-trade. Apart from these, the officer had no specific material for making addition to the returned turnover. As the reasons for addition did not appear to be tenable, the Tribunal in second appeal cancelled the addition also. However, the Deputy Commissioner exercised jurisdiction u/s 35(1) read with Section 35(2A) based on specific information of admission of unaccounted sales by the assessee before the Income Tax authorities which was accepted by the Settlement Commission. It is seen that specific income of Rs. 15 lakhs was offered by the assessee for assessment before the Income Tax Settlement Commission after declaring that the same represents income from unaccounted sale of jewellery. Estimation of turnover after rejection of books of accounts has to be based on materials. In fact, in appeal reasonableness of estimation or addition of the turnover is tested based on materials on which such estimation is made. Estimation of turnover therefore has two aspects, one is the material based on which it was done, and the other is reasonableness of estimation made based on such materials. A point could be said to have been decided in appeal, only when it arises from the order of assessment which was the subject-matter of appeal. In fact, the information that the assessee offered specific income from unaccounted sales before the Income Tax authorities was not available before the Sales Tax Officer and he had not considered this information for making estimation of turnover in the original assessment. Admittedly, the turnover estimated by him is based on other materials whether tenable or not. Therefore the question decided in appeal, though pertaining to addition, is not the one based on which the Deputy exercised jurisdiction u/s 35(2A) of the KGST Act. So long as the material based on which estimation is made in the original assessment which was subject-matter of appeal is not the same based on which Deputy Commissioner has initiated proceedings u/s 35(1), it cannot be said that the Deputy Commissioner is barred from exercising jurisdiction u/s 35(2)(b) merely because estimation of turnover was an issue decided in appeal. If the principle canvassed by counsel for the assessee is accepted, then addition of even one rupee to the turnover by the assessing officer and decision in appeal on the issue will bar the Deputy Commissioner to order revision of assessment to bring to tax escaped turnover even if he gets specific information about the quantum of suppression. Therefore we are of the view that in order to bar jurisdiction of the Deputy Commissioner u/s 35(2)(b) read with Section 35(2A), the basis for revision adopted by him should be exactly the same decided in appeal and not anything in relation to it. In other words, if the point raised by him was not the issue decided in appeal, the Deputy Commissioner is free to invoke jurisdiction.

6. The next contention raised by counsel for the assessee is that order of assessment cannot be said to be prejudicial to the interest of Revenue and so much so the Deputy Commissioner has no jurisdiction to invoke his power. Counsel has relied on the above referred decisions of this Court wherein this

Court has taken the view that in order to exercise jurisdiction u/s 35(1) the order should be erroneous and should be prejudicial to the revenue administration. This Court has further proceeded to observe that mere loss of revenue should not be the sole consideration for invoking power of revision. Special Government Pleader, on the other hand, cited the decisions of the Supreme Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, and Master Cables Pvt. Ltd. v. State of Kerala [2007] 7 VST 355 and contended that when the assessment leads to loss of tax, such order will be prejudicial to the interest of the Revenue. The Supreme Court in the decision first above referred held that order involving loss of tax is an order prejudicial to the Revenue because the purpose of Revenue is to collect tax. Of course, the words "prejudicial to the interest of revenue" are not always confined to loss of tax. We notice that first above decision is rendered in the context of Section 263 of the Income Tax Act wherein suo motu revisional power is conferred on the Commissioner, only if the order involved is not only prejudicial to the interest of the Revenue, but should also be erroneous. However, u/s 35(1) of the KG ST Act, the Deputy Commissioner is authorised to exercise suo motu revision if the order is prejudicial to Revenue. Since the order involved is an order of assessment which is nothing but determination of tax liability due to the State, such order will be prejudicial, if, but for it's correction in revisional proceedings, it leads to loss of tax. Whatever else may be orders prejudicial to the revenue, we are inclined to hold that assessment leading to loss of tax is an order prejudicial to the interest of the Revenue which should be rectified u/s 35(1) of the KG ST Act. In our view, one test that can be safely applied to find out whether assessment is prejudicial to the interest of Revenue is to see whether there will be loss of tax to the State if the order is not revised in proceedings u/s 35(1) of the KGST Act. If the answer is in the affirmative, then revisional authority has jurisdiction to order revision of assessment u/s 35(1) subject to the limitations contained in Sub-section (2) read with Sub-section (2A) of Section 35. We are constrained to observe that it is high time that assessing officers test the correctness of accounts produced by the assesseees in a realistic manner. The doubt about the correctness of turnover returned expressed by the assessing officer in the original assessment is proved to be true later when the assessee was found to have admitted unaccounted sales, and conceded additional income for assessment in the Income Tax assessment proceedings. But for the revisional jurisdiction exercised by the Deputy Commissioner based on information available from the Income Tax records, the assessee would have evaded payment of substantial amount of sales tax. We feel if the accounts are critically examined with reference to business realities, evasion of tax could be avoided to a large extent. Normal presumption is that business is carried on for profit and the presumption gets strengthened if the assessee is in the same business for a long period. If result of accounts produced is no gain or loss for the assessee, then it is a case for critical examination of accounts by reckoning investment, recurring business expenditure and genuineness of sources of fund. Once accounts are rejected, the assessing officer is free to assume that the business is

viable and profitable. Thereafter he should estimate the income which can keep the business going with reasonable profit and then project turnover based on it. We feel if this principle is followed, subsequent revision of assessment and controversy of this nature could be avoided. We therefore dismiss STRV No. 133 of 2006 filed by the assessee upholding the order of the Tribunal and restoring that of the Deputy Commissioner and allow STRV No. 480 of 2004 by quashing the order of the Tribunal and restoring that of the Deputy Commissioner issued u/s 35(1) of the KGST Act.