(1996) 08 KL CK 0030

In the High Court Of Kerala

Case No : T.R.C. No''s. 144 and 145 of 1991

A.S. Ramachandran Pillai APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 06-08-1996

Acts Referred:

Kerala Agricultural Income Tax Act, 1950 — Section 18, 31, 34, 34(1), 34(2)

Citation : (1997) 1 ILR (Ker) 753 : (1998) 231 ITR 98

Hon'ble Judges : V.V. Kamat, J;P.A. Mohammed, J

Bench : Division Bench

Advocate : C. Kochunni Nair, M.A. Firoz and Dale P. Kurien, for the Appellant; V.C. James, Govt. Pleader, for the Respondent

Judgement

P.A. Mohammed, J.—These tax revision cases have been presented u/s 78 of the Kerala Agricultural Income Tax Act, 1991.

2. The petitioner is an assessee under the provisions of the Agricultural Income Tax Act. The assessment years involved are 1970-71 and 1971-72. The original assessments in these cases were completed by the assessing authority as per orders dated June 13, 1972, assigning the status as "registered firm". Subsequently, the Commissioner of Agricultural Income Tax and Sales Tax in exercise of the powers u/s 34 of the Act cancelled the original assessments assigning the status as "registered firm". Consequently, the Commissioner directed the assessing authority to modify the assessments assigning the status as "unregistered firm". Pursuant to the direction issued by the Commissioner revised assessment orders assigning the status as "unregistered firm" were passed. These revised assessment orders were challenged in first appeal before the Appellate Assistant Commissioner by the assessee. The Appellate Assistant Commissioner accepting the contentions urged by the assessee, directed the assessing authority to modify the assessments assigning the status as "registered firm". It is against the said order, the Revenue filed appeals before the Sale''s Tax Appellate Tribunal. The Tribunal observed that the order passed by

the Commissioner u/s 34(1) has become final and conclusive inasmuch as the petitioner has not filed any reference as required under Sub-section (2) of Section 34. The Tribunal further found that the appeal as against the revised assessment order is not competent. In that view of the matter, the appeals were allowed by the Tribunal. The order of the Appellate Assistant Commissioner was cancelled and the order of the assessing authority was restored to operation. It is against the said common order passed by the Tribunal that these tax revision cases have been filed.

3. Two questions arise for consideration in these cases. The first question is, whether the status assigned to the assessee as "unregistered firm" by the Commissioner is final and conclusive ? The second question is, whether an appeal against a revised assessment order passed pursuant to the order of the Commissioner u/s 34 is maintainable ?

4. As per the original assessment order dated June 13, 1972, the assessing authority assigned the status of the petitioner as "registered firm". The Commissioner in exercise of the powers u/s 34 cancelled the assessment assigning the status as "registered firm" and directed the assessing authority to assign the status as "unregistered firm". The only dispute at that stage was with regard to the status. The Commissioner has passed the order u/s 34. Section 34 authorises the Commissioner to call for the record of any proceeding under the Act which has been taken by any authority subordinate to him and make such enquiry or cause such enquiry to be made on his own motion or on application of the assessee. An order under Sub-section (1) shall not be passed without giving an opportunity of being heard to the person affected. Sub-section (2) says that any order passed under Sub-section (1) shall be final subject to any reference that may be made to the High Court u/s 60. It is admitted in this case that no reference as required by Sub-section (2) has been made to this court. In the absence of such a reference by the assessee, the order passed by the Commissioner has become final and conclusive. The contention advanced by counsel for the petitioner is that reference to the High Court u/s 60 is not mandatory. We cannot agree with this submission because Sub-section (2) is very specific that the order passed by the Commissioner shall be final subject to reference that may be made to the High Court. The provision contained in Sub-section (2) itself shows that it is a mandatory provision and it cannot be ignored by saying it to be a directory provision. The order passed by the Commissioner u/s 34(1) is prejudicial to the assessee since the status assigned to the assessee by the assessing authority has been altered and assigned a different status, namely, "unregistered firm". Therefore, the status assigned to the assessee in this case by the Commissioner is final and conclusive.

5. As far as the second question is concerned the Tribunal observed that the order passed by the assessing authority pursuant to the direction given by the Commissioner in exercise of powers u/s 34(1) is not an appealable order. The reason given by the Tribunal is that no lawful distinction can be made between

the order passed by the Commissioner u/s 34 and the subsequent revised assessment order passed by the assessing authority to give effect to the direction issued by the Commissioner. According to the Tribunal from the order passed by the assessing authority pursuant to a direction given by the Commissioner an appeal is not competent before the Appellate Assistant Commissioner. Section 31 deals with appeal against assessment. The said provision prescribes that any assessee objecting to the amount of income assessed or tax determined or loss computed u/s 18 or denying his liability to be assessed under the Act or objecting to any order under any of the provisions of Sections 19, 20, 21, 25, 29, and 41 made by the Agricultural Income Tax Officer or to the cancellation by him of the registration of a firm or to the refusal to register a firm may appeal to the Assistant Commissioner against the assessment or against such order. What the main part of the said provision says is that any assessee objecting to the amount of income assessed or tax determined or loss computed. As a consequence of treating the assessee as "unregistered firm" the amount of income has to be determined in accordance with the provisions of the Act. In the present case, the order passed by the assessing authority treating the assessee as "unregistered firm" is an order u/s 18 of the Act. The assessee can very well object to the quantum of tax or fixation of income if any such objection is available. In this case the status of the assessee had been concluded by reason of the order of the Commissioner. But if the assessee had any other objection apart from the status the same can be adjudicated in appeal u/s 31. That opportunity is always there to the aggrieved assessee. Therefore, the view expressed by the Tribunal that no appeal is maintainable against the order passed by the assessing authority pursuant to the direction issued by the Commissioner cannot be said to be correct. We, therefore, hold that an appeal in the present set of facts is maintainable u/s 31 of the Act as against the order passed by the assessing authority assigning the status prescribed by the Commissioner in exercise of the power u/s 34 of the Act:

6. The Tribunal has cancelled the order passed by the Appellate Assistant Commissioner and the order of the assessing authority has been restored to operation. In the view we have taken, we direct the Appellate Assistant Commissioner to dispose of the appeal on the merits treating the assessee as "unregistered firm". Counsel for the petitioner pointed out that the petitioner may be allowed to agitate the contention with regard to quantum and other points on merits. We make it clear that no contention can be advanced on the question of status which has already been concluded. Subject to the above observation, the tax revision cases are disposed of.