(2005) 07 KL CK 0009

In the High Court Of Kerala

Case No : Writ Petition (C) 13404 of 2005-U

P.T. Antony and Sons APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 19-07-2005

Acts Referred:

Income Tax Act, 1961 — Section 132(1), 143(3), 245D, 245D(4), 245I
Kerala General Sales Tax Act, 1963 — Section 35

Citation : (2005) 148 TAXMAN 165

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : M. Ramesh Chander, for the Appellant; Raju Joseph, Rajesh Nair and George K. George, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—The business premises of the petitioner, a firm, a dealer in gold ornaments and an assessee under the Kerala General Sales Tax Act, 1963, hereinafter, the "KGST Act", for short, and the residence of its managing partner, were searched on 20-11-1990, by the competent authorities u/s 132(1) of the income tax Act, 1961, for short, the "income tax Act", resulting in the seizure of certain documents, including two slips showing unaccounted sales. On the basis of the said slips, the Assessing Officer under the income tax Act inferred an average daily unaccounted sale at Rs. 1,50,000 and worked out the unaccounted sales for the year ending 31-3-1991 at Rs. 4.50 crores, since the showroom worked for 300 days. The profit on the turnover was worked out and the assessment under the income tax Act for the year 1991-92 was made u/s 143(3) of the said Act by making an addition of Rs. 38,74,500, on account of unaccounted sales. The petitioner raised various objections and also filed appeal, but ultimately moved the income tax Settlement Commission, hereinafter referred to as "the Settlement Commission"; in terms of Chapter XIX-A of the income tax Act. The Settlement Commission issued Ext. P1 order, settling the case of the petitioner in respect of the year 1991-92 by reckoning the profit on the unaccounted turnover at Rs. 18 lakhs.

2. In exercise of suo motu revisional power u/s 35 of the KGST Act, Ext. P2 assessment order under that Act, for the year 1990-91, was re-opened as per Ext. P3 order dated 20-3-2000, by the competent authority, with prior notice and after hearing the petitioner, on ground of suppressed turnover, having been established on the basis of the suppressed business income determined by the Settlement Commission, as per Ext. P1 order. The file was remanded, resulting in consequential issuance of Ext. P9 revised assessment order dated 29-3-2005 by the Assessing Authority, for the year 1990-91.

3. In the meanwhile, petitioner had challenged Ext. P3 revisional order, by filing T.A. No. 376/2000 before the Sales Tax Appellate Tribunal. The said appeal, though allowed as per Ext. P4 order dated 7-6-2002, that decision was recalled in review, as per Ext. P5 order dated 17-10-2002 on Int. P. No. 172/2002 and the said T.A. No. 376/2000 stands restored and is, as of now, pending before the Tribunal for final disposal.

4. This writ petition is, however, filed seeking a declaration that "the conclusiveness as to matters settled under the order of the Settlement Commission u/s 245D of the income tax Act applies to the proceedings under the Kerala General Sales Tax Act also" and praying that Ext. P3 revisional order and the consequential Ext. P9 revised assessment order, under the KGST Act, be quashed.

5. It is pointed out on behalf of the State that the impugned Ext. P9 is an appealable order and that Ext. P3 revisional order is still pending in appeal before the Tribunal, following Ext. P5 order on the petition for review. However, it is urged on behalf of the writ petitioner that the issue may be decided in view of the declaration sought for, as regards the effect of the order of the Settlement Commission. Ext. P2 KGST assessment order dated 30-3-1996 was not challenged and the assessee has challenged before the Tribunal, only the revisional order, reopening Ext. P2 assessment order on the sole ground of suppressed turnover, determinable on the basis of the suppressed business income finalized as per Ext. P1 order of the Settlement Commission, the effect, of which, if any, on the KGST liability, is urged and is being examined in this writ petition. Hence T.A. No. 376/2000, pending before the Tribunal, will depend upon the decision in this writ petition.

6. As already noticed, the reopening of the assessment under the KGST Act in exercise of the suo motu power under that Act was made only on the basis of the suppressed assessment as detected by the income tax Authorities and statutorily concluded, in so far as the petitioner is concerned, as per Ext. P1 order of the Settlement Commission. It is the admitted situation that the authorities under the KGST Act have not taken into account any other suppression of materials. All that has been done, as per Exts. P2 and P9 orders, is the rational re-determination of the total turnover on the basis of the suppressed business

profits determined as suppressed business income, as settled by the Settlement Commission. In fact, there is no dispute as regards any of the elements of the impugned decisions, other than the reliance placed by the authorities under the KGST Act on Ext. P1 order of the Settlement Commission.

7. The only contention urged on behalf of the petitioner is that the order of the Settlement Commission has such conclusiveness as would exclude any further proceedings under the KGST Act, as regards any matter referable to unearthing of the unaccounted business income of the petitioner by the income tax Department.

8. Now, proceeding to consider the said contention, the scheme of the Chapter XIX-A of the income tax Act needs to be examined. It provides for the constitution of the Settlement Commission, prescribes its jurisdiction and enables an assessee who is qualified to apply under the provisions of the said Chapter to apply for settlement of cases relating to income, which has not been disclosed before the Assessing Officer. The procedure to be followed by the Commission is prescribed. The Settlement Commission has the power to reopen completed proceedings and the power to order provisional attachment to protect revenue. In passing the order that it may do, the Settlement Commission may grant immunity from prosecution and penalty etc. The said proceedings are judicial proceedings and the order of settlement is to be conclusive as per the provision, of which we are immediately concerned of, namely, section 245I of the income tax Act which reads as follows:

Order of settlement to be conclusive. -Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

9. The afore-quoted provision enjoins that an order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein. It is, therefore, apposite to immediately read section 245D(4) which is as follows:

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under sub-section (1) or sub-section (3).

10. This means that the conclusiveness prescribed by section 245I is as regards

the matters covered by the order of the Settlement Commission on the matters covered by the application of the assessee and such matters relating to the case, not covered by the application, but referred to in the report of the Commissioner under sub-sections (1) and (3) of section 245D of the income tax Act. So much so, the conclusiveness provided by section 245I is only regarding such matters as are determined by the Settlement Officer, meaning thereby, the matters regarding the liability of the assessee under the income tax Act for the undisclosed income, which becomes the subject-matter of consideration before the Settlement Commission. By the provision in section 245I that no matter covered by such order shall be reopened in any proceedings under the income tax Act or under any law for the time being in force, the reopening that is prohibited is only of such matters that are covered by the order of the Settlement Commission u/s 245D(4). Indisputably, the liability of the petitioner to levy under the KGST Act for the year 1990-91, or its liability under the KGST Act to be subjected to procedures for re-assessment, including by the invocation of the suo motu revisional power u/s 35 of the KGST Act are not matters covered by Ext.P1 order of the Settlement Commission issued u/s 245D(4). If the contention of the petitioner is to be accepted, section 245I will have to be read as a provision that precludes proceedings under all other laws under which an assessee would be liable to any type of tax, duty or other levy. There is not any room to do so. The conclusiveness given by section 245I is only as regards the liability under the income tax Act. Section 245D of the income tax Act does not clothe an order of the Settlement Commission u/s 245D(4) with such conclusiveness as to exclude any proceedings under the KGST Act on the basis of the undisclosed business income found by the Settlement Com-mission in its order. Hence, a declaration, as sought for by the petitioner, that "the conclusiveness as to matters settled under the order of the Settlement Commission u/s 245D of the income tax Act applies to the proceedings under the Kerala General Sales Tax Act also" cannot be granted.

11. By issuing the impugned order of remand in exercise of suo motu power u/s 35 of the KGST Act and in passing the revised order of assessment, the authorities under the KGST Act have not in any manner reopened or impaired the conclusiveness of the order passed by the Settlement Commission u/s 245D(4). All that they have done is, to rely on the Settlement Commission''s order, which is a statutory one, in which it has been determined, on an adjudication, at the instance of the assessee, that the assessee had an undisclosed income of the particular amount so found, for the year 1990-91. The evidentiary value of an order u/s 245D(4) is such that, the reliance placed exclusively on such material would only exclude arbitrariness in the matter of determining the suppressed income for all purposes for the assessment year, as regards the assessee in question, and his suppressed turnover for authorized re-assessment of commercial taxes, particularly when the undisclosed income that has been determined by the Settlement Commission is part of the business income only and not referable to any other source. The admitted situation is so in this case,

though the liability arising out of the Settlement Commission''s order would have been satisfied by the petitioner from out of its income from ''other sources''.

So much so, the authorities under the KGST Act cannot be found fault with for having relied on Ext. P1 order of the Settlement Commission to determine the suppressed turnover for re-determination of the tax liability under the KGST Act. The action taken under the KGST Act is only to bring the suppressed turnover of the petitioner into the tax net of the State, legitimately, under the KGST Act, by basing such proceedings on the insurmountable fact situation, as to suppressed business income, lawfully determined and settled by the order of the Settlement Commission under the income tax Act and determining the suppressed turnover on the basis of such determination of the suppressed income. Hence, there is no illegality in the orders impugned in this writ petition.

12. In the counter-affidavit of the assessing authority under the KGST Act, it is contended that since, in terms of Lists I & II in the Seventh Schedule in the Constitution, the making of income tax Act falls under the relevant legislative heads in the Union List and the competence to legislate the KGST Act is referable exclusively to the relevant legislative head, namely, Entry 54, in the State List, the provisions in section 245I of the income tax Act, as to the conclusiveness of the orders passed u/s 245D(4) of that Act and prohibition therein against re-opening, cannot, at any rate, apply in such a manner as to affect any proceedings under the KGST Act. On behalf of the petitioner, it is urged that section 245I of the income tax Act is a piece of residual legislation, available in the exclusive domain of the Parliament in view of Entry 97 in the Union List and that therefore it has to be held to apply to affect and impair any proceedings under the KGST Act. This argument is only to be repelled because provision of section 245I in Chapter XIX-A of the income tax Act, is predominantly relatable to collection and enforcement under the income tax Act and the fields covered by the KGST Act and the income tax Act are referable to their respective distinct and exclusive legislative heads under the State List and the Union List respectively. No other inference is possible, even on application of the pith and substance rule, as suggested on behalf of the petitioner. The reference made on its behalf to the decision of the Apex Court in S.P. Mittal Vs. Union of India (UOI) and Others, is also of no aid to the petitioner, since even that case was decided by holding that the subject-matter of the legislation made by the Union, that fell for consideration in that case, was not a subject in the State List. Referring to the decision of the Apex Court in Nirmal and Navin P. Ltd. and Others Vs. D. Ravindran, , it was urged on behalf of the petitioner that the immunity and finality as provided by section 245I is not one that is confined, but would extend to transactions covered by the order of the Settlement Commission. That decision relates to the prosecution under the income tax Act itself and the law laid was that the transactions obtain immunity from being the cause of action for prosecution under the income tax Act. The same is no authority applicable in favour of the petitioner, on the issue at hand.

In the result, this writ petition fails and is accordingly dismissed with costs to the State, fixed at Rs. 10,000.

