

(2009) 03 KL CK 0078
In the High Court Of Kerala
Case No : ST. Rev. No. 158 of 2008

State of Kerala

APPELLANT

Vs

Molly Babu

RESPONDENT

Date of Decision : 02-03-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 47, 5(1), 5A

Citation : (2009) 2 KLJ 415 : (2010) 29 VST 75

Hon'ble Judges : K. Surendra Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Vinod Chandran, G.P, for the Appellant; Arikkat Vijayan Menon and Harisankar V. Menon, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The tax revision cases are filed by the revenue challenging the orders of the Tribunal whereby the Tribunal has directed acceptance of books of accounts for sales tax assessments of the respondent assessee for the assessment years 2002-03, 2003-04 and 2004-05.

2. We have heard Special Govt. Pleader appearing for the State and Shri. Harisanker V. Menon for the respondent.

3. The respondent commenced business in gold jewellery and in precious stones and diamonds in the year 2001 and continued the same without taking registration or making payment of sales tax. The clandestine business transactions carried on in the residential premises and in two business places were detected on search conducted by the inspection team. In the course of search, the search team examined the business slips, stock statements, note books, scribbling pads etc maintained by the assessee and estimated the purchase and sales during all the four years. It was noticed that the business transaction of the respondent in the individual capacity in 2001 -02 was not of the magnitude that attract sales tax liability. However on evaluation of the seized records for the remaining three years, the department found that the respondent while carrying on business in the name of the partnership firm by name Ross "N"

Glow evaded estimated sales tax of Rs. 1,01,200/- for 2003-04 and Rs. 2,98,763/- for 2004-05. The respondent assessee however made application u/s 47 and offered to compound the offence for non-maintenance of books of accounts and for non-payment of tax dues and the request for compounding was accepted by the department. The respondent accordingly remitted Rs. 1,02,200 for 2002-03 and Rs. 2 lakhs each for the assessment years 2003-04 and 2004-05. The respondent thereby avoided prosecution and penalty.

4. The proceedings of compounding u/s 47 by the Intelligence Officer produced in this Court is dated 31.1.2005. The respondent assessee however applied for registration under the KGST Act only on 14.8.2006. Even though it is stated that the assessee has discontinued the business there is nothing on record to show that the assessee had in fact taken registration or carried on business. When assessments were taken up for all the above three years the assessee returned the turnover estimated by the Intelligence Officer in the proceedings for compounding issued on 31.1.2005. However, from the assessment orders it is clear that tax is not paid. The Assessing Officer however estimated the assessee's turn over based on the seized records and in addition to the actual suppression estimated by the Intelligence Officer, the assessing officer made addition of two times. The assessments were contested in appeal before the first appellate authority who held that since the entire records are recovered there is no scope for further addition. However still he sustained the addition of one time to the suppression noticed on inspection. When this was challenged by the assessee before the Tribunal in second appeal the Tribunal allowed the appeals holding that assessment should be made based on the suppression noticed by the intelligence officer in the compounding proceedings issued by him. It is against these orders the Revenue has filed these revisions before this Court. The issue raised is whether the estimates made by the Intelligence Officer in the course of permitting compounding binds the assessing officer or whether he is entitled to reappraise the seized records, verify the books of accounts produced by the assessee and make his own estimate for finding whether the turnover disclosed by the assessee is acceptable. The contention raised is that, compounding u/s 47 is different from the assessment process and findings in compounding proceedings as such will not bind the assessing officer. However the contention of the counsel for the assessee is that entire records were seized from the respondent's residence and two business premises of the assessee and based on the seized records the Intelligence Officer has arrived at certain conclusions and since seized records are the only materials based on which the assessment is made, the assessing officer is bound to follow the findings of the Intelligence Officer, The further contention raised by the counsel for the assessee is that the first appellate authority had in fact held that no addition is justified over and above the suppression noticed by the Intelligence Officer and this was not challenged by the department in the second appeal and so much so, the department cannot raise this issue before this Court. In answer to this the special Govt. Pleader submitted that each and every finding of the first appellate

authority need not be challenged by the department if the conclusions are accepted by the department. According to him in spite of the findings and observations in favour of the assessee the first appellate authority sustained an addition of one time, in addition to the turnover declared by the assessee which was acceptable to the department. We are unable to accept the technical objection raised by the assessee that in the absence of a second appeal by the department, the department was precluded from challenging the orders of the Tribunal in this Court by which the Tribunal directed acceptance of the turnover returned by the assessee who has not taken registration or filed any monthly returns or maintained regular books of accounts. We are however in agreement with the proposition put forward by the counsel for the assessee that if the entire records of clandestine business are seized the assessment should not lead to any addition to the turnover, over and above what is disclosed in the records. However, the question to be considered in this case is whether seized books of accounts relate to the entire transactions. The argument raised can be accepted only if it is established that the seized records cover the entire transactions of assessee and if it does not disclose full business transactions then the turnover has to be estimated based on available materials. On going through the proceedings of the intelligence officer dated 31.1.2005 we find that the following are the items seized from the residence:

1. Business slips 234 sheets
2. Business slips 505 sheets
3. Stock statements 222 sheets
4. Business slips 29 Nos.
5. Financial position statement etc for the year 2000-01, 01-02, 02-03,03-04 80 Nos.
6. Bill book of Ross "N" Glow Chalakudy 16 Nos.
7. Note books, pocket book Diary A/c books etc. 22 Nos.
8. Copy of bills of Beaut Diamonds, Ross "N" Glow etc 407 Nos.
9. Income Tax Files 2 Nos.
10. Stock Statement as on 22.12.2004 30 Nos.

In addition to the recoveries of the above items from the residence of the assessee the department has traced the following records from the business premises IX/457:

1. Account Books 9 Nos.
2. Note book 1 No.
3. Pocket Books 5 Nos.

4. Order Form/Prod. Order Forms 65 Nos.

5. Account Slip etc. 14 Nos.

It is seen that he has made his own estimates of purchase and sales and estimated the tax evaded for the purpose of compounding. However, on going through the assessment notice we find that the respondent had filed returns and produced records in support thereof. The assessing officer on verifying the returns filed and the records produced and those available with the department he did not accept the records as full and complete and therefore, rejected the returns filed and the books of accounts produced and made estimation by adding two times the turnover returned by the assessee which was reduced by the first appellate authority to equal addition. The Tribunal however directed acceptance of books of accounts and ordered assessment based on the returns by the assessee.

5. We are unable to accept contention of the assessee that the turnover returned by the assessee which is exactly the same turnover estimated by the intelligence officer should be accepted and the assessing officer has no justification to make any estimation or addition to the turnover. In the first place as already held by us proceedings for compounding is a proceeding different from regular assessment. As per the scheme of compounding, the assessee who has been detected of an offence has to pay compounding fee which during the relevant years was double the amount of tax or Rs. 2 lakhs whichever is higher. In fact for the year 2003-04 the tax sought to be evaded by the assessee has been estimated by the Intelligence Officer at Rs. 2,15,443/-. Similarly for the year 2004-05 tax sought to be evaded is Rs. 2,98,763. For both these years the assessee was permitted to compound the offence and to avoid the prosecution and penalty on payment of Rs. 2 lakhs each. The estimation of tax evasion by the Intelligence Officer in the compounding application is not for the purpose of assessment but for the purpose of collecting, compounding fee, When the tax sought be evaded is found to be more than the compounding fee, then there is no necessity for the Intelligence Officer to exactly estimate the actual amount of tax that was evaded by the dealer. In fact it is for the assessing officer to assess the exact tax that is payable by the dealer. Therefore we are of the view that proceedings in the course of compounding will not bind the assessing officer for the purpose of assessment. The assessing officer is the authority who has the exclusive duty to make assessment pertaining to the tax liability of the dealer. The Tribunal in our view was not justified in directing acceptance of books of account which are admittedly not maintained by the assessee in accordance with the rules. However, we agree with the contention of the assessee that if the transactions can be co-related from the seized records and if it is proved that entire business carried on in the clandestine manner are covered by entries in the seized records, then there is no scope for further addition. However, it is for the assessee to establish and co-relate entries in the business slips, bill books, note books, purchase bills, sales bills etc. and in the absence of any co-relation it is

for the officer to reject books of accounts as incomplete and estimate turnover based on relevant materials.

6. We therefore set aside the orders of the Tribunal and that of the first appellate authority and remand the matter back to the assessing officer for giving opportunity " to produce the books including the seized records if released to the assessee and to make fresh assessment based on the above observations. However, since the assessee has closed the business and since the department has not filed second appeal against the orders of the first appellate authority we give an option to the assessee to accept the first appellate authority's order and on the assessee's acceptance the assessing officer shall complete the assessment by making an addition equal to the turnover in terms of the first appellate authority's order.

7. Yet another issue raised in addition to the estimation of turnover is assessee's liability for purchase tax u/s 5A on the value of the diamonds and other precious stones sold in studded ornaments. Diamonds and precious stones are high value items which are separately billed when studded jewellery is sold. If assessee has done this, there is no scope for levy of tax u/s 5A. on the stones and diamonds purchased because the commodity suffers tax at sale point u/s 5(1). This is a matter for verification by the assessing authority in the course of re-assessment.