
(2010) 03 KL CK 0008
In the High Court Of Kerala
Case No : O.T. Rev. No's. 7 and 12 of 2009

State of Kerala

APPELLANT

Vs

Veenus Traders

RESPONDENT

Date of Decision : 29-03-2010

Acts Referred:

Citation : (2011) 38 VST 145

Hon'ble Judges : P.S. Gopinathan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Mohammed Rafiq, Government Pleader, for the Appellant; V. Chitambaresh , T.C. Suresh Menon, Jibu P. Thomas, P.S. Appu, A.R. Nimod and C.A Anoop, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—Connected revision cases, one filed by the State and the other filed by the assessee, pertain to assessment of the assessee for the assessment year 2005-06. We have heard counsel appearing for the assessee and Government Pleader for the State.

2. The assessee was engaged in purchase, processing, packing and sale of cashew kernels. During inspection conducted on September 27, 2005, stock variation noticed was 3,626 kgs. The offence was compounded by collecting compounding fee of Rs. 5,000. There is a controversy as to how the price was estimated for the suppressed quantity for the purpose of collecting compounding fee of Rs. 5,000. According to the statement of the Tribunal, compounding fee was collected by fixing the price of cashew kernel at Rs. 7 per kg. whereas the assessee's counsel contended that the price fixed was at the rate of Rs. 10 per kg. In any case, we do not think there is any need for us to go into this issue because compounding is not the dispute raised in these revisions. In fact, suppression in quantity was admitted by the assessee and compounding fee was paid after inspection. In the course of assessment, the assessing officer found that the assessee was engaged in undervaluation as well because sale price

accounted was much below the actual sale price. The assessing officer verified the details of 10 tins of cashew kernels sold to one Bombay party and found that the actual sale price realised was Rs. 59.62 per kg. and therefore actual sale price was applied for estimating suppressed turnover. It is also to be noted that receipt of unaccounted sale proceeds through bank account was also detected and even though the assessee tried to explain that credit in the bank represented amount received from his daughter and son in the middle-east, he could not prove the same. In other words, it is proved beyond doubt that the assessee was engaged not only in quantum of suppression but also in undervaluation as well. Rejection of books of account and estimation of turnover were confirmed in first appeal. However, the first appellate authority refixed the suppression at four times the stock variation in quantity and directed to apply the value for 50 per cent of the quantity at the rate estimated by the assessing officer and for the balance quantity the first appellate authority directed acceptance of the sale price returned by the assessee. When further appeal was filed to the Tribunal, the Tribunal changed the pattern of addition and fixed it at Rs. 3 lakhs. So far as purchase turnover is concerned, the Tribunal directed the assessing officer to grant rebate under rule 38(5) on 80 per cent of the purchases u/s 6(2) of the Act. The State has filed revision challenging the relief granted by the Tribunal. The assessee has filed revision contending that once the offence is compounded u/s 74(1) no further addition in assessment is called for u/s 74(2) of the Act.

3. On facts there is no controversy inasmuch as the assessee itself does not canvass for acceptance of books of account and the return filed even though the assessee has a case that after compounding no estimation is permissible in assessment u/s 74(2) of the Act. In other words, if section 74(2) assessment is permissible by rejection of books of account and by estimation of turnover because of the compounding, then the assessee cannot dispute rejection of books of account and estimation of turnover. What is stated in section 74(2) before amendment was as follows :

On payment of such amount under sub-section (1), no further proceedings shall be taken against such person, in respect of that offence."

4. By Amendment Act 22 of 2006 with effect from July 1, 2006, section 74(2) stands amended as follows :

On payment of such amount under sub-section (1) no further penal or prosecution proceedings shall be taken against such person, in respect of that offence.

5. According to the counsel for the assessee, prior to amendment, section 74(2) prohibited assessment also on estimation basis based on compounding done. His further contention is that it is only after the amendment, further action, which is prohibited u/s 74(2) after compounding, was limited to penal and prosecution proceedings. In other words, until amendment to section 74(2) the abovesaid

sub-section prohibited even any addition in assessment based on compounding. The Government Pleader on the other hand contended that section 74(2) does not speak about assessment and speaks about penal and prosecution proceedings. We are unable to accept the assessee's contention because in the first place section 74 providing for composition of offence falls under Chapter VIII which deals with offences and penalties, whereas the provisions for assessment are covered by Chapter V. Further in the budget speech introducing the amendment it is specifically clarified that section 74(2) does not refer to assessment and amendment is only clarificatory. What was prohibited after compounding u/s 74(2) even before amendment is further proceedings that could be taken against a dealer which obviously means proceedings further to detection of offence that led to composition. Assessment of the dealer is indispensable under the Act irrespective of whether the dealer is involved in any offence or not. Therefore further proceedings referred to in section 74(2) pursuant to detection of offence and compounding thereafter cannot refer to assessment proceedings which are permissible as provided under Chapter V. We, therefore hold that even prior to the amendment, prohibition contained in section 74(2) does not deal with assessment at all. So much so, rejection of books of account based on compounding of offence by the assessee was perfectly justified.

6. Since the assessee has conceded that books of account were not properly maintained and offence was compounded, assessee cannot obviously canvass for the correctness of books of account. So far as the challenge against the value adopted for assessment is concerned, we feel the value fixed for the purpose of compounding at Rs. 7 per kg. or Rs. 10 per kg. for cashew kernel is not binding on the assessing officer. In this case, the assessing officer found that the assessee's own records show that the average sale price for sales made to one Bombay party was Rs. 59.62. In fact, Cashew Development Corporation has confirmed to the Department that the average market price during the year was ranging from Rs. 46 to Rs. 115. Even though counsel for the assessee contended that the said communication was issued in 2007, we do not think the date furnished can be ignored particularly when the same is corroborated with actual sale figures of the assessee's sales to Bombay party. Even though the average sale price of cashew kernel based on the data of Cashew Development Corporation is around Rs. 80, the average price adopted by the officer from actual sales made by the assessee during the relevant period is much below the same. We are of the view that the first appellate authority as well as the Tribunal are not justified in deviating from the actual sale figures adopted by the assessing officer from the assessee's own records which also stand proved with the data furnished by the Cashew Development Corporation.

7. The next question pertains to challenge against the pattern of addition sustained by the Tribunal. The suppression estimated by the officer at 12 times the actual suppression detected on one inspection was above Rs. 25 lakhs. This was in fact reduced to around one third by the first appellate authority at Rs. 8,54,728.48. There is nothing to indicate from the Tribunal's order the basis of

their estimation of suppressed turnover at Rs. 3 lakhs. Since we find no basis for the Tribunal to change the pattern of addition, we feel four times the quantity of suppression adopted by the first appellate authority is perfectly in order, and we do not want to disturb the discretionary power exercised by him. However, four times the addition should be on the quantity of suppression and the valuation of the suppressed quantity should be uniformly adopted at the rate of Rs. 59.62 per kg.

8. We do not think it is a fit case, to consider the question raised by the State whether rule 38(5) will apply retrospectively because in this case having regard to the modified additions sustained by us we do not want to disturb the finding of the Tribunal on purchase tax assessment. We direct the assessing officer to follow the Tribunal's order on this issue with the modification of the turnover as fixed above.

9. Tax Revision case filed by the assessee is dismissed and tax revision case filed by the State is partly allowed by modifying the Tribunal's order as above.