(2007) 07 MAD CK 0137

In the Madras High Court

Case No : T.C. (A) . No. 867 of 2007

The Commissioner of Income Tax — APPELLANT

Vs

S. Khader Khan Son — RESPONDENT

Date of Decision : 04-07-2007

Acts Referred:
Income Tax Act, 1961 — Section 131(1), 131(3), 131(5), 132(4), 133A

Citation : (2008) 214 CTR 589 : (2008) 300 ITR 157

Hon'ble Judges : P.P.S. Janarthana Raja, J;P.D. Dinakaran, J

Bench : Division Bench

Advocate : T. Ravikumar, for the Appellant;

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—The Revenue has preferred the above tax case appeal against the order of the Income Tax Appellate Tribunal in ITA

No. 479/Mds/2005 dated 13.10.2006, raising the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case, the income Tax Tribunal is right in law in holding that the statement made during a

survey u/s 133A of the Income Tax Act has no evidentiary value?

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in not considering the fact that the Branch

Contractors Agents Account Book in which entries were made subsequent to the survey and not found during the survey nor produced the survey,

could be relied upon?

(iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in not considering the fact that the voluntary statement made without any coercion or duress given during the course of survey action u/s 133A could form the basis of the

assessment?

2.1. The brief facts are : The assessment year involved in this appeal is 2001-02. The assessee filed its return of income on 29.10.2001 disclosing

an income of Rs. 12,640/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 (in short ''the Act'') on 27.8.2002 and notice u/s

143(2) of the Act was issued on 27.8.2002 and served on the assessee on 24.9.2002. In the instant case, a survey action was conducted u/s

133A of the Act on 24.7.2001 in the premises of the assessee at 90, Syed Mada Street, Shevapet, Salem and one of the partners of the firm, by

name Asif Khan, in his sworn statement offered an additional income of Rs. 20,00,000/- for the assessment year 2001-02 and Rs. 30,00,000/- for

the assessment year 2002-03. However, the said statement was retracted by the assessee through its letter dated 3.8.2001 stating that the partner

Asif Khan, from whom a statement was recorded during the survey operation u/s 133A, was new to the management and he could not answer to

the enquiries made and as such, he agreed to an adhoc addition, which could never be achieved by the business owing to the severe competition

and to the legislation by the Government prohibiting smoking in public places. The assessee, thus, contended that the statement of Asif Khan

recorded u/s 133A has no evidentiary value. It was specifically contended that the power to examine a person on oath is specifically conferred on

the authorities only during the course of any search u/s 132(4) of the Act and therefore, it was requested that the survey operations would not

serve any useful purpose and the sworn statement recorded during the survey should not be given any weightage.

2.2. But, the assessing officer found that certain books were not produced or impounded at any time nor were they produced during the course of

survey action and that certain entries in the books were made subsequent to the survey action and only at the time of survey action, the assessee

had come forward with the admissions. Therefore, the assessing officer came to the conclusion that he had reason to believe that the assessee had

evaded production of those books during the survey action and even after the survey action, as it could be seen from the survey folders.

Accordingly, the assessing officer not accepting the book, viz., ''Branch Contractors'' Agent Book'' produced after the survey to support the claim

of manufacturing process, came to the conclusion that it is impounded and accordingly, based on the admissions made by the assessee, which are

directly relatable to the defects noticed during the action u/s 133A of the Act, he recomputed the assessment and sought for the balance tax

payable by his assessment order dated 30.3.2004.

2.3. Aggrieved by the said assessment order dated 30.3.2004, the assessee preferred an appeal before the Commissioner of Income Tax

(Appeals), who, by order dated 30.11.2006, held the issue in favour of the assessee. On appeal, at the instance of the Revenue, the Appellate

Tribunal holding that there was no infirmity in the order of the Commissioner, dismissed the Revenue''s appeal. Hence, the present appeal by the

Revenue, raising the substantial questions of law referred to above.

3. All the three substantial questions of law raised by the Revenue revolve on the vexed question whether the materials collected and the statement

elicited during the survey operation u/s 133A of the Act had any evidentiary value. For the purpose of clarity, it is apt to refer Sections 132(4) and

133A of the Act, which are extracted as hereunder:

132. Search and Seizure.

(1)...

(2)...

(3)...

(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control

of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during

such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.

Explanation. - For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in

respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the

purpose of any investigation connected with any proceeding under the Indian

Income Tax Act, 1922 (11 of 1922), or under this Act.

133A. Power of survey. - (1) Notwithstanding anything contained in any other provision of this Act, an Income Tax authority may enter-

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction, or

(c) any place in respect of which he is authorised for the purposes of this section by such Income Tax authority, who is assigned the area within

which such place is situated or who exercises jurisdiction in respect of any person occupying such place, at which a business or profession is

carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other

person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession-

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such

place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

Explanation. - For the purposes of this sub-section, a place where a business or profession is carried on shall also include any other place, whether

any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of

account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

(2) An Income Tax authority may enter any place of business or profession referred to in Sub-section (1) only during the hours at which such place

is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.

(3) An Income Tax authority acting under this section may,-

(i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be

made extracts or copies therefrom,

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

(4) An Income Tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered,

any books of account or other documents or any cash, stock or other valuable article or thing.

(5) Where, having regard to the nature and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, the

Income Tax authority is of the opinion that it is necessary or expedient so to do, he may, at any time after such function, ceremony or event, require

the assessee by whom such expenditure has been incurred or any person who, in the opinion of the Income Tax authority, is likely to possess

information as respects the expenditure incurred, to furnish such information as he may require as to any matter which may be useful for, or relevant

to, any proceeding under this Act and may have the statements of the assessee or any other person recorded and any statement so recorded may

thereafter be used in evidence in any proceeding under this Act.

(6) If a person under this section is required to afford facility to the Income Tax authority to inspect books of account or other documents or to

check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or

evades to do so, the Income Tax authority shall have all the powers under Sub-section (1) of Section 131 for enforcing compliance with the

requirement made.

Explanation. - In this section,-

(a) ""income tax authority"" means a Commissioner, a Joint Commissioner, a Director, a @Joint Director, an Assistant Director @or Deputy

Director or an Assessing Officer, and for the purposes of Clause (i) of Sub-section (1), Clause (i) of Sub-section (3) and Sub-section (5), includes

an Inspector of Income Tax, if so authorised by any such authority ;

(b) ""proceeding"" means any proceeding under this Act in respect of any year which may be pending on the date on which the powers under this

section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be

commenced after such date in respect of any year.

4. In the instant case, there was a survey operation conducted u/s 133A of the Act in the assessee''s premises and a statement was recorded from

one of the partner. Assuming there were discrepancies and irregularities in the books of accounts maintained by the assessee, an offer of additional

income for the respective assessment years was made by the parnter of the firm. But, such statement, in view of the scope and ambit of the

materials collected during the course of survey action u/s 133A shall not have any evidentiary value, as rightly held by the Commissioner and the

Tribunal, since such statement was not attached to the provisions of Section 133A of the Act. It could not be said solely on the basis of the

statement given by one of the partner of the assessee-firm that the disclosed income was assessable as lawful income of the assessee. Since there

was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee, it could not be

said that the Revenue had lost lawful tax payable by the assessee.

5.1. In the decision in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and Another, , the Apex Court held that an admission is extremely

an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is

incorrect.

5.2. Where a survey was conducted in the premises of the assessee, a medical practioner, and a statement was recorded from him, in which the

assessee surrendered additional income and pursuant to the same, the assessing officer reopened the assessment, but during the course of which

the assessee retracted the additional income offered and contended that the statement was the result of duress, which was not accepted by the

assessing officer and also by the Tribunal holding that the statement is valid and that it was made without duress, a Division Bench of the Allahabad

High Court The Allahabad High Court in Dr. S.C. Gupta v. Commissioner of Income Tax (2001) 248 ITR 782, of course, placing reliance on the

decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and Another, held that the burden that was laid on the

assessee to establish that the admission made in the statement at the time of survey was wrong and that there was no additional income was not

even attempted to be discharged and thus, the order of the Tribunal was based on facts and no question of law arose from it.

5.3. A power to examine a person on oath is specifically conferred on the authorities only u/s 132(4) of the Act in the course of any search or

seizure. Thus, the Income Tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly

provided for it, whereas Section 133A does not empower any Income Tax Officer to examine any person on oath. Thus, in contradistinction to the

power u/s 133A, Section 132(4) of the Income Tax Act enables the authorised officer to examine a person on oath and any statement made by

such person during such examination can also be used in evidence under the Income Tax Act. On the other hand, whatever statement recorded u/s

133A of the Act is not given an evidentiary value, vide a decision of the Kerala High Court in Paul Mathews and Sons Vs. Commissioner of

Income Tax, .

5.4. The scope of Sections 132(4) and 133A also came up for consideration before the Kerala High Court in Paul Mathews and Sons Vs.

Commissioner of Income Tax, . In the said case, the assessee therein made an attempt to draw a distinction between the two provisions, viz.,

Sections 132(4) and 133A. According to the assessee, there is no provision to administer oath or to take any sworn statement and that a mere

admission or an acquiescence cannot be a foundation for an assessment and that any statement given during a survey has no effect as an

admission"" nor can it be a statement on oath. According to the assessee, his statement during the survey with reference to any books of account

can hardly be the basis for any assessment. It was also contended on behalf of the assessee that any material collected or any statement recorded

during the survey u/s 133A cannot be put against the assessee, as the same has no evidentiary value. The Division Bench of the Kerala High Court,

appreciating the stand taken by the assessee and after referring to Section 133A of the Act, held as hereunder:

...we find that the power to examine a person on oath is specifically conferred on the authorised officer only u/s 132(4) of the Income Tax Act in

the course of any search or seizure. Thus, the Income Tax Act, whenever it thought fit and necessary to confer such power to examine a person on

oath, the same has been expressly provided whereas Section 133A does not empower any Income Tax Officer to examine any person on oath.

Thus, in contradistinction to the power u/s 133A, Section 132(4) of the Income Tax Act enables the authorised officer to examine a person on

oath and any statement made by such person during such examination can also be used in evidence under the Income Tax Act. On the other hand,

whatever statement is recorded u/s 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not

authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, the

statement elicited during the survey operation has no evidentiary value and the Income Tax Officer was well aware of this.

(emphasis supplied)

5.5. Similarly, when the issue, whether the expression ""such other materials or information as are available with the Assessing Officer"" in Section

158BB of the Income Tax Act, 1961, would include the materials gathered during the survey operation u/s 133A, came up for consideration

before this Court in Commissioner of Income Tax Vs. G.K. Senniappan, , a Division Bench of this Court, in which one of us was a party P.P.S.

Janarthana Raja, J.), answered the question in the affirmative, against the Revenue and in favour of the assessee, holding that the materials collected

during the survey u/s 133A cannot be taken into consideration while determining the undisclosed income in respect of block assessment as per

Section 158BB, as the same has no evidentiary value.

5.6. Again, when an identical question whether the material found in the course of survey in the premises of the builder could be used in the block

assessment of the assessee, came up for consideration before this Division Bench in an unreported case in T.C.(A) No. 2620 of 2006, this Court,

by order dated 22.11.2006, of course, following the earlier decision of this Court in Commissioner of Income Tax Vs. G.K. Senniappan, , while

confirming the order of the Tribunal, answered the question in favour of the assessee, in limine.

6. What is more relevant, in the instant case, is that the attention of the Commissioner and the Tribunal was rightly invited to the circular of the

Central Board of Direct Taxes dated 10.3.2003 with regard to the confession of additional income during the course of search and seizure and

survey operations. The said circular dated 10.3.2003 reads as follows:

Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during

the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the

concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey

operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of

income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly,

while recording statement during the course of search & seizure and survey operations no attempt should be made to obtain confession as to the

undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course

of search/survey operations or thereafter while framing the relevant assessment orders.

7. From the foregoing discussion, the following principles can be culled out:

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the

admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not

correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and

Another, ;

(ii) In contradistinction to the power u/s 133A, Section 132(4) of the Income Tax Act enables the authorised officer to examine a person on oath

and any statement made by such person during such examination can also be used in evidence under the Income Tax Act. On the other hand,

whatever statement is recorded u/s 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not

authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews

and Sons Vs. Commissioner of Income Tax, ;

(iii) The expression ""such other materials or information as are available with the Assessing Officer"" contained in Section 158BB of the Income Tax

Act, 1961, would include the materials gathered during the survey operation u/s 133A, vide Commissioner of Income Tax Vs. G.K. Senniappan, ;

(iv) The material or infomration found in the course of survey proceeding could not be a basis for making any addition in the block assessment,

vide decision of this Court in T.C. (A) No. 2620 of 2006 between Commissioner of Income Tax v. S. Ajit Kumar;

(v) Finally, the word ""may"" used in Section 133A(3)(iii) of the Act, viz., ""record the statement of any person which may be useful for, or relevant

to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the

survey u/s 133A are not conclusive piece of evidence by itself.

8. For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated

10.3.2003, extracted above, for arriving at the conclusion that the materials collected and the statement obtained u/s 133A would not automatically

bind upon the assessee, we do not see any reason to interfere with the order of the Tribunal.

Accordingly, finding no substantial question of law arises for consideration, the tax case appeal stands dismissed.