

(2014) 01 KL CK 0127

High Court Of Kerala

Case No: IT Appeal Nos. 90 to 93, 124 to 126, 133, 136, 142 to 144, 146 to 150, 152, 157 to 160, 163 to 165, 168, 169 and 187 of 2013

Sunny Jacob Jewellers and
Wedding Centre

APPELLANT

Vs

Deputy Commissioner of Income
Tax

RESPONDENT

Date of Decision: Jan. 2, 2014

Acts Referred:

- Income Tax Act, 1961 - Section 132, 139, 144, 153A

Citation: (2014) 267 CTR 361

Hon'ble Judges: Manjula Chellur, C.J; A.M. Shaffique, J

Bench: Division Bench

Advocate: Raju Joseph and K.T. Poulose, Advocate for the Appellant; P.K.R. Menon and Jose Joseph, Advocate for the Respondent

Judgement

Dr. Manjula Chellur, C.J.

These appeals are filed challenging the common judgment of the Tribunal dt. 16th Nov., 2012. By consent of both sides appeals are heard and disposed of by a common order. Following substantial questions of law were raised for consideration:

(i) Has not the Tribunal gone wrong in not considering the aspect as to whether materials detected in a search conducted under s. 132 of the I.T. Act, 1961 in the business premises of another assessee could be a reason or basis for best judgment assessment against the assessee?

(ii) Can suppression of income in any year could be the sole reason for rejecting the return of any previous year and sole basis to resort to best judgment assessment under s. 144 of the I.T. Act, 1961?

(iii) The unit of assessment under the I.T. Act being previous year to assessment year, can be suppression of income during any other year be a basis for estimation of income in any other year?

(iv) Whether the authorities below had gone wrong in relying on the proceedings of the Commercial Tax Department that too before the same had attained finality for the purpose of coming to the conclusion that the assessee had been issuing estimate slips instead of sale bills?

The undisputed facts that led to filing of the above appeals are as under:

There were six jewellery business concerns of the appellants which are admittedly sister-concerns. There were two shops at Thiruvananthapuram, two shops at Kottayam, one at Kollam and another at Kottarakkara. All the six business concerns pertain to Sunny Jacob & family. So far as assessment for income tax and commercial tax, all the six are different entities, though the partners of all the six business concerns belong to one and the same family. In this background, one has to appreciate the challenge made by the appellant assessee so far as order of the Tribunal.

2. The entire litigation arises on account of search conducted by the Revenue on 21st Aug., 2007 in the business concerns of the appellant assessee, apart from various residential houses. Based on the pre-search enquiry conducted on 24th July, 2007, by purchase of gold ornament by the personnel from the Investigation Wing of the Department, the entire process commenced. Said purchases from two shops of the appellants, one pertains to purchase of 2.040 gms. of gold valuing about Rs. 1,940 and another was 1.540 gms. of gold. However, no sale bills were issued. During the search operation, apart from examining the partners of the business Mr. Sunny Jacob, statements of cashier Mr. Joshy Abraham and another staff by name Pintu T. Jacob, computer operator at M/s. Sunny Jacob 916 Jewellery Pazhavangadi, Thiruvananthapuram came to be recorded. It is also borne on record, from M/s. Sunny Jacob Hyper Market, Kollam, during the search three note books marked as MSB-1, MSB-2 and MSB-3 were found and seized. The details from the computer maintained in the assessee's shop that is M/s. Sunny Jacob 916 Jewellery Pazhavangadi, Thiruvananthapuram were examined to see the log on time and all the entries in the computer for the day. So far as sales, they indicate sales were done within two to five minutes. During the search operation daily summary sheet relating to previous day i.e. 20th Aug., 2007 was also seized.

3. Based on the above material, notices were issued. In response to the same, fresh returns were filed. However, the income shown in the fresh returns was the income earlier shown by them for the previous six years for which already the assessments were completed in respect of six business concerns. The AO based on the above material and the material during inspection of the taxpayer's premises on 24th Feb., 2006, which revealed that the taxpayers were selling gold ornaments only through

estimate slips and were not in the habit of issuing sales bills, proceeded with the assessment for the asst. yr. 2008-09 and passed orders of reassessment for the previous six years. So far as additions made by the AO in respect of previous six years, it became the subject matter of challenge before the CIT(A) along with the assessment made for 2008-09. CIT(A) deleted all the additions made so far as previous six years and confirmed the assessment made for asst. yr. 2008-09. Aggrieved by the same, Revenue preferred appeals before the Tribunal. So far as asst. yr. 2008-09, assessee also approached the Tribunal. All the appeals were heard and disposed of by a common order dt. 16th Nov., 2012.

4. The Tribunal by abovesaid order categorized the order into three portions. One portion was with reference to six previous years assessments prior to the assessment year in which search was made. Second portion was with reference to asst. yr. 2008-09 during which a search was made and the last portion was with reference to asst. yr. 2001-02 in I.T. Appeal No. 692 of 2010 pertaining to alleged gift of Rs. 3,47,580 received from Sri George Joseph through banking channel.

5. The Tribunal, so far as previous six years assessments from 2002-03 to 2007-08, opined that the statements of cashier and other persons, so also other material collected from the Commercial Tax Department need to be examined after giving an opportunity to the taxpayer, since the taxpayer had no occasion to explain the material collected by Sales-tax Department during their inspection on 22nd April, 2006. It also opined that as the proceedings initiated were under s. 153A, the AO can take into account all evidence, including the material found during the course of search operation. Therefore, in all fairness, one more opportunity should be given to the appellant assessee to present their case before the AO. Hence, the orders of the AO pertaining to asst. yrs. 2002-03 to 2007-08 were set aside and the entire issue with regard to addition of suppressed sale was remitted back to the file of AO with a direction to consider the issue afresh in the light of observations made by the Tribunal.

6. Then coming to asst. yr. 2008-09, the Tribunal opined that the decision that may be taken for the previous six years assessments (2002-03 to 2007-08) would have an impact on the asst. yr. 2008-09, it would be just and proper to have a comprehensive adjudication of the matter. Therefore, the assessment for the year 2008-09 was also set aside and the matter was remitted back to the AO to decide the matter afresh in the light of observations made so far as asst. yrs. 2002-03 to 2007-08.

7. Then coming to the asst. yr. 2001-02, receipt of gift of three lakhs and odd from one Mr. George Joseph through banking channel, the Tribunal opined that, except the entries in the bank passbook and other details no other material was forthcoming indicating the capacity and other details of the donor Mr. George Joseph, therefore in the absence of confirmation letter, there was no justification to place reliance on the transaction made through banking channel and opined that one more opportunity may be given to the taxpayer to prove the identity of the

donor, so also genuineness of the transaction. In other words, all the orders were set aside and matters were remitted back for fresh consideration in the light of observations made by the Tribunal. Aggrieved by the said order of the Tribunal, the appellant assessee is before us.

8. According to learned counsel appearing for the appellant assessee, so far as asst. yr. 2008-09 he has no grievance in remitting back the matter for fresh consideration as it pertains to relevant year in which the search was made and certain information was gathered. But, according to him, the information gathered during the course of search and so also the pre-enquiry information as well as information from Commercial Tax Department cannot become basis for reopening the previous six years assessments from 2002-03 to 2007-08 as none of the material pinpoint any transactions of like nature in the previous years. Therefore, in the absence of any material with reference to any particular year in the previous six years, there was no justification for remitting back the matter to the AO. Hence this opinion of the Tribunal deserves to be set aside and order of the CIT(A) deserves to be confirmed.

9. During the course of arguments, he also contended that, though all the six shops are sister concerns, information collected from one of the shops cannot be the information for other sister concerns. Therefore, there is no justification in placing reliance on the information collected during pre-search enquiry for all the six business concerns of the taxpayers. According to him, wherever the information was collected such information has to be considered with reference to that particular assessee and not other assessee. This is in addition to the argument that whatever information collected during the course of search proceedings cannot be made relevant for the previous six years by initiating action under s. 153A.

10. As against this, learned standing counsel for the Department contends that proceedings under s. 153A also have to be concluded based on best judgment after proceeding with the matter in accordance with the procedure contemplated under s. 153A of the Act. According to him once a reply is given to the show-cause notice issued by the Department, the proceedings have to be considered in accordance with the procedure contemplated for regular assessment treating the returns as if it is a return filed under s. 139 of the Act.

11. He also contends that there is vast difference between the proceedings under Chapter XTV-B and the proceedings under s. 153A, though basis for both the proceedings could be search operations. Chapter XIV-B refers to undisclosed income and s. 153A refers to assessment or reassessment depending upon the facts and circumstances of each case. He further contends, even if the assessment was not completed for any of the years in the previous six years they shall abate and the proceedings under s. 153A would overtake such assessment.

12. In other words, s. 153A proceedings have to be followed as if it is a regular assessment by following the procedure. He also places reliance on [Commissioner of](#)

[Income Tax Vs. Hotel Meriya, .](#) He places reliance on this judgment to substantiate his contention that the information gathered during the search need not be relevant to any particular previous year as there is no mandate that for making reassessment or assessment for previous six years that material has to be found for each and every year. In other words, according to him, the materials found during the search operations would be good enough with reference to previous six years proceedings under s. 153A of the Act.

13. We have gone through the orders of the Tribunal and also the contentions raised in the present appeals. Earlier to search on 21st Aug., 2007 when the personnel of the Investigation Wing of the Department purchased some gold ornaments from two business concerns, except issuing estimate slip, no sale bills were given. This gave rise to suspicion regarding bona fides in maintaining correct accounts by the business concern of the appellant assessee. Therefore, according to the Department, they conducted search in all the six business concerns and also residential places of the partners concerned. During the course of search, statement of Mr. Sunny Jacob was recorded by the Asstt. Director of the IT. The estimate slips collected from shops of Kottayam, Kollam and Thiruvananthapuram were shown to him. This was with reference to question No. 5 during the statement of Mr. Sunny Jacob recorded as stated above. According to Mr. Sunny Jacob, the estimate slips were issued for showing the customer, but they issue bills on finalization of the sales. This statement of Mr. Sunny Jacob was considered with reference to other information collected. Daily summary sheet pertaining to business transactions a day prior to the search, that is 20th Aug., 2007, was recovered and seized during the search operations. There were 37 sales as per the daily summary sheet. The actual sales recorded in the day book were much less than the details recorded in the summary sheet. In other words only 30.84 per cent of the real sales were recorded. Mr. Bijimon, manager of the Kottarakkara showroom was not able to give any explanation for the above discrepancy as per the observations of the AO.

14. During the course of search at the premises of Sunny Jacob 916 Jewellery, Pazhavangadi, Thiruvananthapuram, Mr. Joshy Abraham, cashier gave statement explaining the difference in the sale bill and the sales effected through estimate slips. He replied that, when customers select particular item for purchase, estimate slips are prepared through the computer. However, as per the estimate slip given to the customer, ornaments would be handed over to the customer. Mr. Mathew Eapen, floor supervisor of the shop has stated that sale bills were not issued for all the sales effected though estimate slips were issued to the customer. He also admitted that in the cash book maintained, all the sales effected in the shop were not recorded.

15. Computer operator Mr. Pintu T. Jacob pointed out that he was not aware whether bill was prepared for the sales as per the estimate slips. However, he admitted that actual sales were not recorded in the hard disk of the computer. No

purchase bills were issued for exchanging old gold ornament but the purchases were recorded in the estimate slips only. This was from M/s. Sunny Jacob, 916 Jewellery, Pazhavangadi, Thiruvananthapuram.

16. The three note books marked as MSP(1), MSP(2) and MSP(3) from Gold Hyper Market contained accounts of purchase and issue of gold ornaments. When the details of these books compared with the regular stock register maintained by them, there was vast variance in accounting purchases and sales as per the registers. The AO at p. 6 of the order has indicated datewise the total details found in these books and difference in grams was about 1,018.93 of gold. The computer also showed sales were recorded within two to five minutes as noted at p. 3 of the order and according to the AO it was improbable situation if the sales were recorded when the sales were actually effected.

17. The above material was the basis for reassessments for six years and assessment for the year 2008-09. As noticed above, estimate slips were recovered from five business concerns as indicated in the assessment order. Pre-search enquiry into purchases refers to two concerns of the assessee. Note books were seized from one of the business concerns of the appellant assessee. All the partners or the proprietary concerns where Sunny Jacob is running jewellery business are members of one family, but with different combination of partners in all the six business concerns. Two of the partners are common in all the business concerns.

18. In this background whether the material recovered on 21st Aug., 2007 and also other information during the course of search could be the material for previous six years to initiate proceedings under s. 153A of the Act has to be seen. It is clear that in the pre-search enquiry and course of search proceedings the information collected was mostly with, reference to asst. yr. 2008-09. However, the information gathered during the search proceedings with reference to Commercial Tax Department pertains to 2006. Inspection by Commercial Tax Department was on 24th Feb., 2006. Commercial Tax Department also found similar deficits in the maintenance of accounts and the records by the appellant assessee. Commercial Tax Department also opined, sales bills were not issued for the entire sales made by them though estimate slips were prepared for the actual sales.

19. In other words, though the estimate slip reflects the actual purchase and sale of gold made in the business concerns of appellant assessee, the sale bill was always for lesser quantity than the details reflected in the estimate slip. By this process actual sales were not reflected was the information gathered during 2006 by the Commercial Tax Department. Search was in 2007. There was material in black and white at least for these two years. Therefore, there was enough information and material to presume the nature of accounting and also modus operandi in maintaining the records by the assessee.

20. In the case of Hotel Meriya (supra) it was held that none of the provisions under Chapter XIV-B mandates for making block assessment there shall be evidence regarding the concealment of income for every year for the block period. Though technically we are not concerned with the block assessment, based on the information as stated above for six previous assessment years under s. 153A the Department can assess or reassess in accordance with the procedure contemplated. Therefore, there is no prohibition or embargo on the Department to consider this information for assessment or reassessment contemplated under s. 153A. There is also no requirement under s. 153A and other provisions requiring the Department to collect information and evidence for each and every year for the six previous years under s. 153A. Therefore, argument of learned counsel for the appellant assessee that the information gathered either during pre-search enquiry or during the course of search cannot be made use so far as six previous assessment years, is unsustainable.

21. Then coming to the assessment year of 2008-09, learned counsel fairly concedes that he has no grievance so far as order of remittance of the matter back to the assessing authority by the Tribunal.

22. As a matter of fact Department has not challenged the orders of the Tribunal seeking confirmation of the assessing authority's order which was very much within their discretion to question. The fact remains only the appellant assessee is before us. Therefore, we have to consider only whether the order of the Tribunal in remitting back matters to the AO is justified or not. In the above circumstances, as there was no explanation called for from the assessees, so far as the materials collected from statements of the employees of the assessee and also the other material, in all fairness, we are of the opinion that the Tribunal exercised its jurisdiction with all magnanimity in remitting back the matter to the AO giving opportunity to the assessees to explain and substantiate their stand before the assessing authority. This would mean that the assessee has one more opportunity to convince the Department regarding their stand by explaining the controversies raised by the Department based on the information gathered by them during the search.

We find no good ground to interfere with the order of the Tribunal. Accordingly, appeals are dismissed.