

(2010) 09 KAR CK 0166

In the Karnataka High Court

Case No : Writ Petition No"s. 20781 and 21811-21821 of 2010

Federal Mogul Goetze (India) Ltd., formerly known as Goetze
(India) Ltd.

APPELLANT

Vs

The Assistant Commissioner of Commercial Taxes (Audit),
The Deputy Commissioner of Commercial Taxes (DM-51) and
State of Karnataka

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 35 (4), 59 (1)

Citation : (2010) 09 KAR CK 0166

Hon'ble Judges : Ashok B. Hinchigeri, J

Bench : Single Bench

Advocate : G. Sarangan, for Vani H, for the Appellant; K.M. Shivayogiswamy,
HCGP, for the Respondent

Final Decision : Allowed

Judgement

Ashok B. Hinchigeri, J.—The Petitioner's grievance is over the rejection of its belatedly filed revised returns and passing the reassessment order, dated 24.04.2010 (Annexure-D). The Petitioner has also sought a writ in the nature of declaration declaring that time limit of six months provided in Section 35(4) of the Karnataka Value Added Tax Act, 2003 (for short "the VAT Act") for filing the revised returns is directory.

2. Sri G. Sarangan, the learned Senior Counsel appearing for Smt Vani H. for the Petitioner submits that the original returns filed by the Petitioner contain certain omissions and incorrect statements. It was all because of the changeover from the earlier Karnataka Sales Tax Act (KST Act) regime to the VAT Act regime. The software installed was developed only to meet the requirements of the KST Act, On noticing that the returns already filed were not accurate from the angle and requirement of VAT regime, the Petitioner filed revised returns for the period from July 2005 to March 2006. Their filing took place on 19.08.2006.

3. The learned Senior Counsel submits that the Petitioner's bona fides cannot be disputed with any rate of success because the revised returns involve the payment of additional tax and not seeking the refund of the tax already paid.

4. He brings to my notice the Circular, dated 07.07.2008 issued by the Commissioner of Commercial Taxes. The said Circular directs the officers of the Commercial Tax department to accept the revised returns if they indicate any additional tax liability. The relevant clause/paragraph of the said Circular is extracted here in below:

(iii) Any revised return filed by a dealer beyond six months from the end of relevant tax period is liable to be rejected. However, if such revised return indicates any additional tax liability, then in such a case the return filed should be accepted with any payment made and reassessment proceedings should be got initiated through the jurisdictional JC-DVO.

5. He submits that the legislature itself, in exercise of its wisdom, has reserved the power of issuing instructions and direction to the Government and the Commissioner for the administration of the VAT Act. Section 59(1) of the said Act reads as follows:

59. Instructions to Subordinate Authorities-

(1) The Government and the Commissioner may from time to time, issue such orders, instructions and directions to all officers and persons employed in the execution of this Act as they may deem fit for the administration of this Act, and all such officers and persons shall observe and follow such orders, instructions and directions of the Government and the Commissioner.

6. The learned Senior Counsel submits that the impugned order is passed in flagrant violation of Clause (iii) of the Commissioner's circular extracted hereinabove. He relied on the Apex Court judgment in the case of Commissioner of Sales Tax, U.P. v. Indra Industries reported in (2001) 122 STC 100, wherein it is held that the circulars issued by the Commissioner of Sales Tax are binding on the Department, though not on the Assessee and the Court.

7. Nextly he would advance the contention that a circular issued by the competent authority has the force of law; it can even supplant the law in cases where it is beneficial to the Assessee and has mitigated or relaxed the rigour of the law. In support of his submissions, he has relied on the Kerala High Court decision in the case of Commissioner of Income Tax Vs. Aspinwall and Co. Ltd., .

8. He requests that the machinery provisions are to be construed liberally; only the charging provisions require strict construction. In support of his submissions, he relies on the Hon'ble Supreme Court judgment in the case of J.K. Synthetics Ltd. v. Commercial Taxes Officer reported in (1994) 94 STC 422.

9. He also brings to my notice Rule 39 of the Karnataka Value Added Tax Rules, 2005 (for short VAT Rules"), which enables the concerned officer to issue a

notice to an Assessee if the return is found to be incomplete or incorrect. The said Rule is extracted here in below:

39. Action on apparently incomplete or incorrect return submitted- (1) Where any return submitted is apparently incomplete or incorrect, the jurisdictional Local VAT officer or VAT sub-officer shall issue a notice in Form VAT 150 requiring the dealer to submit a complete or correct return within ten days of issue of the notice.

10. The afore-extracted Rule does not prescribe any period of limitation within which the concerned officer has to issue the notice. Such a Rule is made only to ensure that the mistakes in the returns are corrected and that the return becomes complete in every respect. Similarly, the Assessee should not be rendered helpless and remediless in correcting the returns which he has filed.

11. Sri Sarangan complains of the non-application of mind, as the revised returns filed for some months, which are within the prescribed period are also rejected.

12. Per contra, Sri K.M. Shivayogiswamy, the learned High Court Government Pleader appearing for the Respondents has raised the threshold bar to the very maintainability of the writ petitions. He submits that the Petitioner is not justified in resorting to the duality of the recourses. The Petitioner has also filed the appeal before the Appellate Authority urging more or less the similar grounds raised in this petition.

13. Sri Shivayogi Swamy submits that the VAT Act is a self-contained code. When the Act itself has prescribed an outer limit of 6 months for filing the revised returns, there is no question of the Petitioner filing the returns beyond six months from the (sic) end of the tax period. Neither the Government nor the Commissioner can issue any circular or clarification contrary to the statutory provision.

14. Sri Shivayogi Swamy submits that if there is conflict or repugnancy between the Act and the circular, the Act will prevail over the circular. He has relied on this Court's decision in the case of Sri Dinakar Ullal v. Commissioner of Income Tax reported in ILR 2010 KAR 2799 to buttress his submission that no authority can issue directions/instructions in excess of what is stated in the statute itself. The relevant paragraph of the said decision is extracted here in below:

12. In *State of M.P. v. G.S. Dall and Flour Mills*, the Apex Court held that executive instructions can supplement a statute or cover areas to which the statute does not extend but they cannot run contrary to statutory provisions or whittle down their effect. In *Kerala Financial Corporation v. C.I.T.*, following the opinion of Mukharji, J., at paragraph 42 in *State Bank of Travancore v. C.I.T.*, that circulars cannot detract from the Act the Apex Court held that a circular of the Board u/s 119 cannot override or detract from the Act in as much as, what Section 119 has empowered is to issue orders, instructions or directions for the "proper administration of the Act" or for such other purpose specified in Sub-

section (2) of that Section and that such an order, instructions or direction cannot override the provisions of the Act which would be destructive of all the known principles of law as the same would really amount to giving powers to a delegated authority to even amend the provisions of the law enacted by the parliament.

15. Sri Shivayogi Swamy has also relied on the Kerala High Court decision in the case of J and S Granites Company Vs. State of Kerala and Others, . He read out the head note, which reads as follows:

The power of the Commissioner to decide a dispute is a power to clarify to resolve the dispute as to the application of the statutes in question and not beyond. The provisions in Section 59A of the Kerala General Sales Tax Act, 1963 and Section 94 of the Kerala Value Added Tax Act, 2003 amount only to the statutory recognition of the authority, to clarify, meaning thereby, to make clear; to elucidate; to explain. The scope of any exercise with reference to those provisions is only to remove the confusion, if any. The "power" to issue clarification does not include the authority to issue any clarification or circular contradicting the provisions of the Acts and Rules framed thereunder. No power is conferred on the Commissioner under the 1963 Act or the 2003 Act, to impose tax. When statutory provisions govern the field, there is no room for any executive decision, including by the issuance of statutory circulars or orders, which deviate from the effect of the provisions of a statute or statutory rules framed thereunder. Therefore, any clarification, issued contradicting the legal effect of the Act and the Rules, would be plainly ultra vires those primary and secondary legislations.

16. He also brought to my notice the Hon"ble Supreme Court's judgment in the case of Jhunjhunwala and Others Vs. State of U.P. and Others, , wherein it is held that the Commissioner by issuing a circular cannot create liability where there is none under the statute. The relevant paragraph of the said judgment is extracted here in below:

11. It was, therefore, necessary to be established that the seller was a manufacturer-dealer. The Commissioner's circular could not have created a liability by drawing an inference that the purchases from farmers who have grown, cut or sawn timbers, ballis, bamboos will bring them within the umbrella of expression "manufacturer". The view that the tax liability has been prescribed at the manufacturer's and importer's points and therefore after the amendment traders who purchase the timber from unregistered dealers fall within the category of manufacturer is indefensible. There is no logic for such a conclusion, where the statutory definition does not say so. It needs no emphasis that the circular cannot create a tax liability. That is precisely what has been done which the High Court has failed to notice. Therefore, to that extent the circular cannot be of any assistance for levying tax. The crucial words in the definition of "manufacturer" is the sale of goods "after their manufacture". As noted above, the expression "manufacture" cannot cover types of transactions referred to in

the Commissioner's circular, Whether an activity amounts to manufacture has to be factually determined. There cannot be a direction to treat a particular type of transaction to be a manufacturing activity without examining the factual scenario. There cannot be a generalisation in such matters.

17: Sri Shivayogi Swamy submits that If any act is prejudicial to the Interest of the revenue, the Joint Commissioner u/s 63-A and the Additional Commissioner and the Commissioner u/s 64 of the VAT Act can always exercise their revisional power for determining the correct liability of an Assessee to pay the tax.

18. Even when Sri Shivayogi Swamy resisted this petition tooth and nail, he fairly submits that not entertaining of the returns for two months, February and March 2006, constitutes an error on the part of the first Respondent. He undertakes to have the revised returns filed for the month of February and March 2006 considered and consequentially have those portions of the impugned reassessment orders rectified.

19. Sri Sarangan's rejoinder submission is that the appeals are filed against the reassessment orders; on the other hand the main grievance ventilated in these writ petitions is only the non-acceptances of the revised returns on the ground of delay.

20. The question that would fall for my consideration is whether the Commissioner's circular is to be acted upon. Section 59(1) of the VAT Act, the provisions of which are extracted hereinabove, confers the power on the Government and the Commissioner to issue such orders, instructions, directions to all the officers as they deem fit for the administration of the VAT Act. The next part of the said Sub-section contains a mandatory or compulsive element. It states that all officers shall observe and follow such orders, instructions and directions of the Government and the Commissioner.

21. I do not propose to examine the hypothetical issue of whether the officers should obey the Commissioner's circulars, if they are issued in contravention of any statutory provision because that question has not arisen in this case, as the Commissioner's circular cannot be said to be in excess of or in violation of any statutory provision.

22. The decisions relied upon by Sri Shivayogi Swamy do not make the position of the Respondents better in any way. They have no application for the facts of this case. In *J & S Granites Co. and Jhunjhunwala* (supra), the circulars pertain to a substantive provision i.e. regarding the levy of tax. Besides in the case of *J & S Granites*, the circular was issued u/s 59A of the Kerala General Sales Tax Act. The provisions in the said Section of Kerala enactment are not in pari materia with the provisions contained in Section 59(1) of the Karnataka VAT Act. In the said case, the Kerala High Court has rightly held that the Commissioner does not have the power to impose the tax. In the instant case, clause/paragraph (iii) of the Commissioner's circular does not impose any tax as such. In the case of *Jhunjhunwala* (supra), certain clauses were brought within the definition

Manufacturer". Further the cases where the circulars were held to be bad are all at the instance of the Assesseees.

23. In the case of Dinakar Ullal (supra), this Court has held that the applicant's claim for the refund of amounts has to be considered on the basis of the law as it then existed and not on the instructions subsequently issued. This Court in the said case has held that the executive instructions cannot override the provisions of the Act.

24. As held by the Hon'ble Supreme Court in the case of Fertilizer Corporation of India Ltd. (supra), the machinery provisions are required to be interpreted liberally and generously, so long as the principle object of the provision is not frustrated. With this ratio at the back of my mind, let me refer to the statement of objects and reasons of the VAT Act. Its object No. VII is to promote -

Voluntary compliance by providing for acceptance of returns filed by the dealers on self-assessment basis and for scrutiny of books of account only in selected cases.

25. Rule 39 of VAT Rules provides for taking action by the concerned officer on an apparently incomplete and incorrect return submitted. The rationale behind Section 35(4) of the VAT Act and Rule 39 of the VAT Rules is only to lessen the imperfections. The errors cannot be left uncorrected and the returns cannot be left in the incomplete state. Viewed in this perspective, the Commissioner's order is laudable; the order cannot be held to be illegal or inconsistent with the provisions of the VAT Act or the Rules framed thereunder. If it were illegal, it would have been withdrawn by the Department.

26. Yet another aspect of the matter which cannot be lost sight of is that by filing the revised returns, the Petitioner has come forward to pay the additional tax. It is not that it has filed the returns to seek refund of the tax already paid. If the belated returns are therefore entertained and the additional tax is accepted, as directed by the Commissioner, it does not affect the interest of the revenue adversely in any way. Filing of the belated revised returns and their acceptance by the concerned officer would not put the exchequer to any prejudice.

27. Considering all these aspects of the matter, this Court has no hesitation in holding that the Respondent No. 1 has not considered the Petitioner's belated revised returns, though submitted with additional tax in accordance with the circular in question.

28. For yet another reason too, the Commissioner's circular is absolutely sustainable. The sudden introduction of VAT regime has created an unfamiliar situation. To soften the rigors of change-over from one regime to another regime, a well thought out circular is issued. The Commissioner may have issued the circular to solve the teething problems.

29. As held by the Apex Court in the case of Commissioner of Sales Tax, U.P (supra), the Commissioner's orders are definitely binding on the officers of the

Department. The Kerala High Court, in the case of Commissioner of income tax (supra) has held that a circular of the Central Board of Direct Taxes has the force of law and can even supplant the law in cases where it is beneficial to the Assessee and has mitigated or relaxed the rigour of the law.

30. The Respondent No. 1 ought not to have passed the impugned order in defiance of the Commissioner's circular. There is not even a cursory reference to the circular. The order thus suffers from the non-consideration of the relevant material.

31. Not entertaining the revised returns for the month of February and March 2006, even they were filed within the prescribed period of limitation is reflective of the non-application of mind on the part of the Respondent No. 1.

32. For all the aforesaid reasons, I quash the impugned reassessment order and the consequential demand notice. The matter is remanded to the first Respondent for considering the Petitioner's revised returns in keeping with the Commissioner's circular, dated 07.07.2008. It is made clear that no opinion whatsoever is expressed on the Petitioner's tax liability.

33. At this juncture, the Petitioner's learned advocate undertakes to withdraw the appeals wherein the same reassessment orders are impugned.

32. These petitions are allowed to the extent indicated hereinabove. No order as to costs.