(2011) 08 AP CK 0009

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22880 of 2011

Kirby Building Systems India Limited — APPELLANT

Vs

Deputy Commissioner (CT), Charminar Division and Others — RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:
Andhra Pradesh Value Added Tax Act, 2005 — Section 2(8), 20, 32, 32(1), 32(2)

Citation : (2012) 56 VST 230

Hon'ble Judges : N. Ravi Shankar, J;Goda Raghuram, J

Bench : Division Bench

Advocate : M.V.K. Moorthy, for the Appellant;

Final Decision : Allowed

Judgement

Goda Raghuram, J.—The first respondent by the impugned order dated July 29, 2011 revised the order of assessment dated June 8, 2009 passed by the second respondent and determined a tax liability of Rs. 1,19,05,444 as against Rs. 33,78,017 determined by the second respondent, for the tax period 2008-09; exercising revisional power u/s 32(2) of the Andhra Pradesh Value Added Tax Act, 2005 (for short, "the 2005 Act"). This order is assailed principally on two grounds; (a) that the first respondent despite the plea of the petitioner failed to exercise the discretion of deferring the revision in abdication of the powers u/s 32(5) of the 2005 Act and (b) despite successive requests for a personal hearing, the first respondent failed to afford a personal hearing before passing the order of revised assessment, despite the revision resulting in an abnormal increase of the tax liability of the petitioner, thereby denying him reasonable opportunity. On June 4, 2011, the first respondent issued a notice in form 305A proposing to revise the assessment in exercise of powers u/s 32(2) of the 2005 Act. In response thereto, on July 2, 2011, the petitioner submitted its objections and thereat requested for a personal hearing before conclusion of the revisional proceedings. A revised notice of assessment (modifying the proposals for revision initially contained in the revision notice dated June 4, 2011) was issued by the first respondent on July 11, 2011 sensitizing the petitioner to a further tax liability of Rs. 1,19,05,444. In response, the petitioner lodged its objections on July 18, 2011 and reiterated the request for a personal hearing. In this representation, the petitioner also stated that JTC Projects (I) Limited had filed Writ Petition Nos. 15854 and 15894 of 2010 before this court pertaining to the assessment years 2007-08 and 2008-09 questioning disallowance of LTC in respect of sales made to SEZ units and that this question of law is pending adjudication before this court; requesting the first respondent to ascertain this fact from the learned Government Pleader concerned and; to defer the revisional proceedings, exercising the discretion u/s 32(5) of the 2005 Act. On July 25, 2011, the petitioner lodged another set of objections amplifying and reiterating the objections already made on two occasions and reiterating the request for personal hearing, to clarify the issues set out in its objections.

2. Nevertheless the first respondent, without affording any personal hearing passed the impugned revisional order dated July 29, 2011.

3. Sri Moorthy would contend that the impugned order is vitiated for the reason that the first respondent failed to advert to the plea of the petitioner for exercise of the discretion u/s 32(5) of the 2005 Act, for deferment of the revisional proceedings, in view of the pendency before this court of an issue relating to disallowance of ITC in respect of the sales made to SEZ units pending consideration in this court in the writ petitions filed by M/s. JTC Projects (I) Limited; and for failing to afford a personal hearing to the petitioner before passing the revisional order.

4. Section 32 of the 2005 Act sets out the contours of the revisional powers consecrated in the Commissioner and other enumerated authorities. Subsection (1) confers powers on the Commissioner to suo motu call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to him, under the provisions of the Act, including sub-section (2) and if such order or proceeding recorded is prejudicial to the interests of Revenue, may make such enquiry, or cause such enquiry to be made and subject to the provisions of the Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order in reference thereto as he thinks fit by the Commissioner. Sub-section (2) inheres revisional powers conferred on the Commissioner under sub-section (1), on the Additional Commissioner, Joint Commissioner, Deputy Commissioner and Assistant Commissioner, in the case of orders passed or proceedings recorded by the authorities, officers or persons subordinate to them. The proviso under sub-section (2) enjoins that the powers under sub-section (1) or (2) shall not be exercised by the authority specified therein, in respect of any issue or question, which is the subject-matter of an appeal before or which way decided on appeal by the Appellate Tribunal u/s 33. The further proviso enjoins that this restriction is not applicable in respect of other issues or questions, which are not the subject-matter of an appeal before the Appellate Tribunal. Sub-section (5) reads:

It shall be lawful for the Commissioner to defer any proceeding under this section by the reason of the fact that an appeal or other proceeding is pending before the High Court or Supreme Court involving a question of law having a direct bearing on the order or proceeding in question.

5. Sri Moorthy contends strenuously that since the power of revision is conferred and consecrated not only on the Commissioner under subsection (1) of section 32 but on the other specified authorities enumerated in sub-section (2) as well, the discretion conferred under sub-section (5) (to defer any proceedings u/s 32 by reason of the fact that an appeal or other proceeding is pending before the High Court or the Supreme Court involving a question of law having a direct bearing on the order or proceeding in question (subject to the revisional exercise)) is on a parity of logic available to be exercised not only by the Commissioner but by the Additional Commissioner, Joint Commissioner, Deputy Commissioner and Assistant Commissioner; as the case may be, who exercise the power of revision by virtue of the powers u/s 32(2).

6. On a true and fair construction and on interactive analysis of the provisions of sub-sections (1), (2) and (5) of section 32 of the 2005 Act, the contention urged on behalf of the petitioner does not commend acceptance by this court Sub-section (5) confers discretion on the Commissioner to defer any revisional proceedings, if the circumstances enumerated in the said sub-section are satisfied. The expression "Commissioner" is defined u/s 2(8) of the 2005 Act to mean any person appointed by the Government to be the Commissioner of Commercial Taxes u/s 3A. Section 3A enables the Government to appoint a Commissioner of Commercial Taxes and as many Additional Commissioners, joint Commissioners of Commercial Taxes, etc., as they think fit, for the purpose of performing the functions respectively conferred on them by or under the Act. Section 3A further enjoins that such officers shall perform the said functions within such area or areas or the whole of the State, as the Government or any authority or officer empowered by them in this behalf may assign to them. The power conferred u/s 3A to appoint a Commissioner, a joint Commissioner, Appellate Deputy Commissioner, Deputy Commissioner, Assistant Commissioner, Commercial Tax Officers and Deputy Commercial Tax Officers is coupled with the authority to specify the functions to be performed by each of such appointees. The Commissioner of Commercial Taxes appointed by the Government in exercise of powers u/s 3A and in the context of the definition of the expression "Commissioner" u/s 2(8) of the 2005 Act is the Commissioner, Commercial Taxes and not an Additional Commissioner, Joint Commissioner or other Commissioners, Deputy Commissioners or Commercial Tax Officers; unless any provision of the 2005 Act so assigns or authorizes such additional officers to also exercise the powers of the Commissioner (illustrated by section 32(2)). It is this singularity in the performance of the functions of the Commissioner that is extended in subsection (2) of section 32, whereby a specific legislative authorization, the powers of revision conferred on the Commissioner under sub-section (1), may also be exercised by other officers enumerated.

7. It requires to be noticed that sub-section (2) does not enact that the entirety of the powers of revision u/s 32 may also be exercised by an Additional Commissioner, etc. It is only, the revisional power referred to in sub-section (1) that may be exercised by the Additional Commissioner and other enumerated officers under sub-section (2). Coming to sub-section (5), the discretion to defer revisional proceedings is clearly conferred on the Commissioner and not on officers specified in sub-section (2), In the context of the different phraseology employed in section 32(1), (2) and (5) there is no warrant for an assumption that the expression "Commissioner" occurring in sub-section (5) would embrace the other authorities authorized to exercise the powers of revision under sub-section (2); i.e., the discretion to defer revisional proceedings, if conditionalities of subsection (5) are satisfied and the authority is satisfied that a proper case is made out for exercise of such discretion.

8. On the analysis above, we are clearly of the opinion that on a true and fair construction of the provisions- of sub-section (5), read with subsections (1) and (2) of section 32 of the 2005. Act, it is the Commissioner as defined u/s 2(8) and appointed as such u/s 3A who alone is authorized to exercise the discretion to defer revisional proceedings.

9. Sri Moorthy would contend that where revisional power is exercised not by the Commissioner but by any other authorized officer under sub-section (2), it would cause prejudice to the assessee, if the power to defer revisional proceedings cannot be exercised by such other authorized officer as well, and if the power to defer the revisional proceeding were confined only to the Commissioner. In effect, Sri Moorthy would invite us to interpret the provisions of sub-section (5) expansively to incorporate in the expression "Commissioner" any other authorized revisional authority exercising power under sub-section (2) of section 32 of the 2005 Act as well.

10. We are inclined to decline this invitation. It is an established principle of interpretation that an expansive or purposive construction is employed only when the statutory language is ambiguous susceptible to alternative constructions. The principle is settled that true effect must be given to the legislative mandate. We see no ruck in the fabric of the expression (Commissioner) employed in sub-section (5) warranting ironing of a crease to hold that authorized revisional authorities other than a Commissioner are also a "Commissioner" for exercise of the discretion under sub-section (5). On the aforesaid analysis, the contention of Sri Moorthy does not commend acceptance and it is accordingly rejected.

11. The petitioner has successively in his representations dated July 2, 2011, July 18, 2011 and July 25, 2011, requested the first respondent to afford a personal hearing to amplify and clarify the objections lodged by the three representations. It is the demonstrable factual scenario that the first respondent did not afford personal hearing and proceeded to pass the impugned order of revision. Section 32, in terms, does not enjoin the affording of a personal hearing but only requires issuance of a notice calling for an explanation. However, a

learned Division Bench of this court in S. Lalaiah & Co. v. Deputy Commissioner (CT), Saroornagar Division, Nampally, Hyderabad [2007] 45 APSTJ 116, while dealing with an exercise of revisional power u/s 20 of the APGST Act, 1957 which is in pari materia the contours of the revisional power conferred u/s 32 of the 2005 Act, has held that an order enhancing the assessment cannot be passed unless an opportunity is given to the assessee to show-cause against the proposed enhancement and he is given a reasonable opportunity of being heard. Amplifying on this observation, the learned Division Bench ruled:

...Though the expression ''reasonable opportunity of being heard'' has not been defined either under the Act or the Rules, the same deserves to be interpreted in the light of the expansive meaning given by the courts to various facets of the rules of natural justice. In a matter like the present one where huge tax liability has been created against the petitioner by suo motu revision of the assessment order, the request of personal hearing made by the petitioner''s representative ought to have been entertained because the same would have enabled him/her to convince respondent No. 1 that the assessment made by respondent No. 2 by applying rule 6(3) is correct and rule 6(2) cannot be invoked for revising the assessment. This view of ours finds support from the judgment of the Division Bench in Tirumala Milk Products Limited, Kadiveda Village, Nellore District v. Government of India, Ministry of Finance [2005] 41 APSTJ 6.

12. In the facts of this case as well, the liability of the petitioner has been enhanced from Rs. 1,14,858 as determined by the assessing authority to Rs. 1,19,05,444 in the impugned revisional proceedings and involving plurality of facts and law. In the context of the petitioner''s representations seeking personal hearing, there was no justification for the first respondent to have refused personal hearing.

13. In view of the decision in S. Lalaiah''s case [2007] 45 APSTJ 116, the impugned revisional order dated July 29, 2011 cannot therefore be sustained, since the first respondent failed to provide personal hearing to the petitioner.

14. On the aforesaid premises, the impugned order passed by the first respondent bearing R.R. No. 3/2011-12, dated July 29, 2011 is set aside. It is however open to the first respondent or any other revisional authority authorized u/s 32 of the 2005 Act to pass a fresh order in accordance with law. In case the Commissioner proceeds to revise the assessment order in exercise of powers conferred u/s 32(1) of the 2005 Act, the petitioner is at liberty to make an application to the Commissioner of Commercial Taxes to exercise discretion u/s 32(5) of the 2005 Act and if such an application is made, the Commissioner may consider passing an appropriate order in accordance with law on such application. The writ petition is allowed as above. However, there shall be no order as to costs.