

(2015) 04 KAR CK 0145
In the Karnataka High Court
Case No : S.T.R.P. Nos. 331 and 378 of 2014

Pioneer Trading

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 15-04-2015

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 38, 39(1), 4(1)(b), 5(1), 59

Citation : (2015) 3 AKR 556 : (2015) 51 GST 565 : (2015) 82 VST 230

Hon'ble Judges : Vineet Saran, J;S. Sujatha, J

Bench : Division Bench

Advocate : E.R. Indra Kumar, Senior Counsel and E.I. Sanmathi, for the Appellant; S.V. Giri Kumar, A.G.A., Advocates for the Respondent

Judgement

Vineet Saran, J.

1. This is a bunch of 48 revision petitions relating to the tax period April 2006 - March 2010 for the financial years 2006-07 to 2009-10. The question relates as to whether the commodity in question, i.e., White Oats would be exempted under Entry 16 of the First Schedule of the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as The Act" for brevity) or would be subjected to tax under the Act.

2. The brief facts are that in terms of the clarification issued by the Commissioner on 03.06.2006, the petitioner-assessee considered the White Oats to be exempted from tax and thus, for the tax period in question, the assessee had neither collected tax from the customers nor did it deposit any tax with regard to the commodity in question. Then on 16.02.2010, a notice was issued to the assessee under Section 39(1) of the Act requiring the assessee to answer as to why the White Oats should not be subjected to tax and why the assessee be not liable to pay tax along with interest and penalty? This notice was for the assessment years 2006-07 to 2008-09. For the assessment year 2009-10, a separate notice under Section 39(1) of the Act was issued on 18.08.2010 requiring the assessee to explain as to why tax, along with interest and penalty,

be not charged for the said period.

The assessee replied to both the notices. Then for the assessment years 2006-07 to 2008-09 (36 months), by assessment order dated 28.07.2010 passed by the Assessing Officer, the appellant was subjected to tax for the sale of White Oats. For the assessment year 2009-10 (12 months), by a separate order dated 31.01.2011 the appellant was subjected to tax for the aforesaid 12 months.

The assessee challenged the said orders in appeals, which were decided by two separate orders dated 20.12.2012 passed by the Joint Commissioner of Commercial Taxes whereby the appeals of the assessee were dismissed.

Challenging the said appellate orders, the assessee filed appeals before the Karnataka Appellate Tribunal, which have also been dismissed by a common order dated 01.02.2014. Challenging the said orders, these Revision Petitions have been filed.

3. We have heard Sri Inder Kumar, learned Sr. counsel assisted by Sri E I Sanmathi, learned counsel appearing for the appellant as well as Sri Giri Kumar, learned Additional Government Advocate appearing for the respondent and perused the records. We have also heard Sri K P Kumar, learned Sr. counsel assisted by Sri Vikram Hoilgol, on behalf of the intervening applicant M/s. Pepsico India Holdings Private Limited. With the consent of the learned counsel for the parties, these revision petitions have been heard and are being disposed of at the admission stage.

4. The brief facts relevant for these cases are that the Act of 2003 came into force with effect from 01.04.2005. The petitioner/assessee started dealing in White Oats for the first time in the assessment year 2006-07. With regard to the liability of payment of tax on the said commodity i.e., White Oats, vide communication dated 10.04.2006, a clarification was sought by another dealer i.e., M/s. Punjab Stores of Bangalore. By the said communication (along with which the sample of White Oats were also provided), a request was made to the Commissioner of Commercial Taxes to clarify as to whether such oats fall under coarse grain and are exempted from tax or not?

5. On such request, clarification No. CLR. CR- 20/06-07 dated 03.06.2006 was issued by the Commissioner of Commercial Tax (Karnataka), Bangalore under Section 59(4) of the Act which was to the following effect:

"It is hereby clarified that Oats and their flour exempt as per Entry 16 of the First Schedule to the Karnataka Value Added Tax Act, 2003".

The First Schedule to the Act relates to goods Exempted from Tax under Section 5(1) and Entry 16 reads as under:

"16. Coarse grains and their flour excluding paddy, rice and wheat and their flour".

It is in reference to the above that a clarification was sought by a dealer dealing

in similar products (White Oats) and the aforesaid clarification dated 03.06.2006 was issued by the Commissioner under Section 59(4) of the Act. In view of the aforesaid clarification, the assessee did not pay tax on the aforesaid commodity i.e., White Oats until notice dated 16.02.2010 was issued to the assessee under Section 39(1). The said notice was issued immediately after a second clarification was given by the Commissioner with regard to the said product (i.e., White Oats) vide Clarification No. CLR/CR-95/09-10 dated 20.01.2010, which was to the following effect:

"The clarification is made with regard to fixing of tax on "Pre Cooked and Processed White Oats" at 12% under Section 4(1)(b) of Karnataka Tax Assessment Rule, 2003".

6. There is no dispute about the fact that White Oats which are dealt with by the assessee are processed White Oats. As such, after the second clarification was issued on 20.1.2010, there was no ambiguity or doubt with regard to the said product being subjected to tax under the Act. It is for the period up to 20.1.2010 which is in dispute i.e., whether for this period the assessee was liable to pay tax or not?

7. The submission of the learned Sr. counsel appearing for the petitioner is two fold:

"Firstly it is submitted that after the clarification was issued by the Commissioner on 03.06.2006 for the commodity in question (White Oats), the sample of which was supplied to the Commissioner which was similar to the product being dealt with by the assessee, no tax could have been levied on the sale of such White Oats carried on by the petitioner. In this regard, it is submitted that the assessee did neither collect tax from the customers nor did it pay any tax. It is also submitted that for the tax period in question, the assessee had filed its regular monthly returns and at no point of time there was any question raised by the department with regard to the applicability of tax on the sale of such goods by the appellant and as such, the returns had been accepted, which would amount to "deemed assessment". It is further submitted that there is no allegation of the petitioner concealing any material facts or information from the authorities and according to the assessee, since the department itself had issued a clarification with regard to the commodity in question on 03.06.2006, there was no occasion for the assessee to collect tax on sale of such commodity or payment of the same to the department.

Secondly, it is contended that White Oats which was being sold by the appellant was nothing but processed flakes of Oats and the processing did not change the essential characteristic of Oat as nothing was added while processing Oats as Flakes and if the flakes were crushed then it becomes flour (powder) and as such, on merits also, the White Oats being sold by the petitioner/assessee would be exempted from tax in terms of the clarification dated 03.06.2006 as the Oats as well as its Flour were held to be exempted from tax."

8. In view of the fact that the assessee has, after the issuance of the second clarification dated 20.01.2010, started paying taxes at the rate fixed in the said clarification, which was after collecting such tax from the customers, we would not like to go into the question of taxability on sale of such commodity or its exemption after 20.01.2010. What we have to consider is as to whether the assessee/petitioner could be subjected to tax, particularly after the issuance of the first clarification dated 03.06.2006, whereby the exemption was granted for Oat and its Flour, and till the issuance of the second clarification dated 20.01.2010, whereby the processed Oats which was the commodity sold by the assessee, were clarified to be subject to tax.

9. Sri Giri Kumar, learned Addl. Government Advocate for the respondent has vehemently argued that the notice dated 16.02.2010 and 18.08.2010 (both under Section 39(1) of the Act) were issued independent of the second clarification dated 20.01.2010. According to the respondents, the processed Oats were always subjected to tax. Under Section 38 of the Act, the assessee gives a self-assessment and files its returns and according to the respondents, when the said product was liable for payment of tax, the assessee ought to have paid tax on the same. It is contended that by not having done so, the assessee had evaded payment of tax and thus, notice under Section 39(1) of the Act had rightly been issued, which was well within the period of limitation.

10. Having heard learned counsel for the parties and considering the facts and circumstances of this case, we are of the view that till the issuance of the second clarification dated 20.01.2010, the assessee was not liable for payment of tax.

The primary reason for coming to this conclusion is that the first clarification dated 03.06.2006 was issued by the Commissioner itself on a query made by another dealer with regard to the sale of White Oats, which was a product similar, if not identical to the product being dealt with by the assessee herein. When along with the query, the sample of the product had also been furnished by the dealer, it would be presumed that only after examining the said sample, the Commissioner had issued the clarification dated 03.06.2006. Once such clarification had been issued for exempting the product White Oats from payment of tax (even though the clarification order may have mentioned only Oats and not White Oats), then the question of payment of tax on the same would not arise. In fact, not only the assessee but the department itself was under a genuine belief or impression that the product in question was exempted from tax, as the department did not raise any question with regard to the monthly returns filed by the assessee right from April 2006 onwards and it accepted the same, which would amount to "deemed assessment". No-doubt, under Section 39(1) of the Act the limitation for issuing a notice for reassessment is 5 years and the tax period in question is within such period of limitation, but, the reassessment under Section 39(1) of the Act can be made only in cases where there is evasion of tax by the assessee giving wrong particulars or giving wrong information by concealing material information. This may not have been

specifically stated in the said Section, but it can certainly be so inferred, as the language of the said Section is to the effect that the prescribed authority should have grounds to believe that in any return furnished by the assessee, it understates the correct tax liability which would mean that some wrong information is stated or given by the assessee in its returns. In the facts of the present case where the Commissioner itself had issued a clarification dated 03.06.2006 with regard to the commodity in question, the assessee/dealer would be presumed to have a genuine belief that it was exempted from tax and thus, it cannot be said to be a case where the assessee had furnished any wrong information or concealed any material information. It is not the case where the sale of White Oats had not been disclosed by the assessee. It is not the assessee alone but, in the facts of the present case, we can safely say that even the department was under the genuine belief that the commodity in question was exempted from tax, until the second clarification dated 20.01.2010 was issued. After the issuance of the said clarification, the assessee (instead of getting into litigation by raising a dispute regarding the White Oat flakes being subjected to tax or not) started paying taxes on sale of the said commodity.

11. The Tribunal dealt with the merits of the matter as to whether the Oats in question which were processed as Oat Flakes were Coarse Grain or Coarse Oat or not, and after finding that the Processed Oat Flakes would not be classified as Coarse Oat, held that the said commodity would not be covered under the exemption clause. The Tribunal, however, did not consider the question that on a query with regard to an identical product i.e., White Oat Flakes, the Commissioner had itself given a clarification on 03.06.2006 and held it to be exempted from tax. After the issuance of the said clarification, the question of payment of tax, till the second clarification dated 20.01.2010 had been issued, would not arise.

12. Even otherwise, the tax, in the present case, is such which is to be collected from the customers and then paid to the department. It cannot be doubted that after the issuance of the clarification dated 03.06.2006, the assessee had a genuine belief that the commodity in question was exempted from tax. The assessee thus did not collect any tax from the customers and consequently did not pay to the department. The department did not raise any question after the returns had been filed, whereby the assessee did not pay tax, treating itself to be exempted from tax for such commodity. As we have already held above, the department itself was under the genuine belief or impression that after the clarification dated 03.06.2006, the commodity in question was exempted from tax and hence, did not raise any query by issuing any notice to the assessee after it had filed regular monthly returns, ever since April 2006. From the aforesaid facts, it is evident that it was only after the second clarification dated 20.01.2010 was issued, that for the first time the matter was sought to be reopened under Section 39(1) of the Act by way of issuance of notice dated 16.02.2010. Such being the position, we are of the clear opinion that imposition of tax for the sale of the commodity in question prior to the issuance of the

clarification dated 20.01.2010 cannot be justified in law.

13. In the end we may just mention that Sri Giri Kumar, learned Additional Government Advocate, appearing for the respondent has stated that the first clarification issued on 03.06.2006 was in the case of another dealer i.e. M/s. Punjab Stores and not in the case of present assessee and as such, the petitioner/assessee could not have claimed benefit of such clarification.

14. It is not disputed that the clarification dated 03.06.2006 was issued under Section 59(4) of the Act. Such clarification is not applicable merely in the case of the applicant seeking clarification, but, to all registered dealers which are liable to pay tax under the Act. The clarification issued under Section 59 is different from the clarification or advanced ruling given under Section 60. In the latter case, the ruling of the authority would be binding only on the applicant which seeks such clarification, whereas in the former case (under Section 59 of the Act), it would be applicable to all registered dealers liable to pay tax. As such, the said argument of the learned Addl. Government Advocate does not have any force.

15. In view of the aforesaid, we allow these revision petitions and set-aside the order dated 01.02.2014 passed by the Tribunal as well as the orders passed by the authorities below, to the extent that the assessee/petitioner shall not be held liable for payment of tax with regard to the commodity in question (i.e., White Oats) till 20.01.2010 i.e., the date when the second clarification was issued by the Commissioner.

16. The revision petitions stand allowed to the extent indicated above.