**(2009) 10 KAR CK 0022**

**In the Karnataka High Court**

**Case No :** S.T.A. No''s. 61, 62 and 63 of 2009

R.C. India APPELLANT

Vs

State of Karnataka RESPONDENT

**Date of Decision :** 27-10-2009

**Acts Referred:**
Karnataka Value Added Tax Act, 2003 — Section 38 (7), 64, 66 (1)

**Citation :** (2010) 29 VST 494

**Hon'ble Judges :** L. Narayana Swamy, J;D.V. Shylendra Kumar, J

**Bench :** Division Bench

**Advocate :** M.N. Shankare Gowda, for the Appellant; Geetha Menon, A.G.A., for the Respondent

**Final Decision :** Allowed

## Judgement

D.V. Shylendra Kumar, J.—These three appeals u/s 66(1) of the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as "the Act", for short) are by a dealer/partnership firm, which had not bothered to get itself registered under the provisions of the Act, notwithstanding a statutory requirement to this effect u/s 22 of the Act and because of which reason, it appears, the Deputy Commissioner of Commercial Taxes (Audit)-35, DVO-3, 7th Floor, VTK-1 Gandhinagar, Bangalore, to be precise, took a chance to pass a best judgment assessment order in respect of the appellant for the periods April, May and June of 2005 determining the tax liability of the appellant for these periods, in terms of the order dated March 29, 2008.

2. The appellant, being aggrieved by this order, had preferred a first appeal u/s 62 of the Act to the Joint Commissioner of Commercial Taxes (Appeals) I, Bangalore, and met with success as the Joint Commissioner opined that the officer who had passed the best judgment assessment order in terms of Sub-section (7) of Section 38 was not competent to do so having not been authorized by the Commissioner of Commercial Taxes for performing this duty as is required in terms of the very statutory provision as indicated in his order at paragraph 6

which reads as follows:

On perusal of the records, it is noticed that the field-audit was taken up in view of the assignment issued by the J.C.C.T. (Admn.), D.V.O. 3, Bangalore. The records do not reveal that the assignment so issued was authorized by the Commissioner of Commercial Taxes. The empowering Section 38(7) is very clear that orders u/s 38(7) is to be passed by the authorities if they are authorized by the Commissioner. In the absence of authorization of the competent authority, the impugned order would be an improper order.

3. The appellate authority nevertheless remanded the order to the very authority, though it had opined that he was not the duly authorized officer to pass the best judgment assessment order under Sub-section (7) of Section 38 of the Act.

4. The Additional Commissioner of Commercial Taxes, exercising revisional power u/s 64 of the Act, being of the opinion that the order passed by the first appellate authority is not only erroneous, but also prejudicial to the interest of the Revenue, interfered with the matter, set aside the order passed by the Joint Commissioner and restored the order passed by the original authority under the provisions of Section 38(7) of the Act.

5. It is aggrieved by this order passed by the revisional authority, the present appeals.

6. Notice had been issued to the respondent and the learned Government advocate was also directed to take notice. The respondent is served and represented by Miss Geetha Menon, learned Additional Government Advocate.

7. With the consent of Sri Shankare Gowda, learned Counsel for the appellant and Miss Geetha Menon, learned Additional Government Advocate, the matters which have come up for admission are now taken up for hearing, as a very short and crisp point arises for examination in these appeals.

8. Sri Shankare Gowda, the learned Counsel for the appellant, in the first instance, would urge a technical point that the assessing officer lacked jurisdiction to pass an order in terms of Sub-section (7) of Section 38 of the Act and was not competent to make the order and has drawn our attention to the statutory provision which reads as under:

The authority authorized by the Commissioner in this behalf shall assess a dealer who fails, within the time specified, to get registered though liable to do so, to the best of its judgment for the tax period or periods that would apply to such dealer if he were to be registered, after giving the dealer an opportunity of showing cause against such assessment in writing and the tax assessed and any interest payable shall be paid within ten days from the date of service of such assessment on the dealer.

9. The learned Counsel for the appellant would submit that there are a few more

 

points to urge on the merits but this solitary ground will be sufficient to get over the impugned order for the present and in this view of the submission, the learned Additional Government Advocate was called upon to place before the court the authorization, if any, in favour of the Deputy Commissioner, which had enabled him to pass the order.

10. In response and on receiving instructions from the Department, the learned Government Advocate has placed before the court a copy of the order dated December 19, 2007 indicating that Sri A. B. Samshuddin, Deputy Commissioner of Commercial Taxes, Audit-35, DVO-3, Bangalore, has been assigned the case of the appellant for the purpose of auditing and the period of audit is indicated to be from April 1, 2005 onwards in respect of the ones not audited so far.

11. The appellant being not a registered dealer at all, obviously, no returns would have been filed, no scrutiny would have been there and if the appellant was a dealer which was otherwise liable to pay tax and was also liable, to get itself registered as a dealer under the Act, there is inevitably violation of the statutory provisions, non-registration, non-filing, non-payment of tax, etc., on the part of the appellant.

12. Though there may be proof of violation of statutory provisions committed by any person, who otherwise would become a dealer and who is required to comply with the statutory provisions, and the statutory authorities, viz., the original authority, the Joint Commissioner and the Deputy Commissioner, who are all functioning under the provisions of the Act, nevertheless are also required to adhere to the provisions of the Act as they are the statutory functionaries and function within the four corners of the statute. The power conferred by the statute on the Commissioner for the specific purpose of authorizing any function of the Commercial Tax Department in terms of the provisions of Sub-section (7) of Section 38 of the Act is to enable such an officer to pass what is known as best judgment assessment order in respect of a person who has to get himself registered, but had failed to do so, for determining, the tax liability.

13. In the instant case, we find that the so-called original authorization which is placed before the court, notwithstanding the claim to this effect is only an order internal notes of the Joint Commissioner of Commercial Taxes (Admn.) DVO-3, Bangalore, with the intimation of assignment for audit in respect of the appellant. Though this note is only quoting the order of the Commissioner dated December 6, 2007 for the purpose of assigning the respondent the power and function to audit the accounts of the appellant-dealer for the period April 1, 2005 onwards the original enabling order of the Commissioner is conspicuously absent.

14. The Joint Commissioned of Commercial Taxes, having exercised his power, authorized the Deputy Commissioner for the purpose of passing the best judgment assessment order on the appellant for the reason that it had remained an unregistered dealer though in law, the appellant was required to be registered as a dealer.

 

15. Therefore, the learned Additional Government Advocate who had been directed to place the original records from the office of the Commissioner of Commercial Taxes indicating the very order, also has placed before the court, the Additional Commissioner''s investigation report to verify the very order passed by the Commissioner. However, what is placed before the court is the records from the office of the Additional Commissioner of Commercial Taxes containing a xerox copy of the order sheet of the Commissioner of Commercial Taxes and our attention is drawn to the notes figuring at item Nos. 14 and 15 occurring at pages 5 and 6 and here again, what is pointed out to us is some proposal which appears to have been communicated from the Deputy Commissioner and the note indicating that the Commissioner has agreed with that and in our considered opinion such an order of the Commissioner agreeing to certain proposal put up by the Deputy Commissioner is not at all an order in terms of Sub-section (7) of Section 38 of the Act.

16. It is rather strange and noteworthy that whenever the State Government officials are directed to place the records before the court to support their stand, the original records are seldom produced and more often, than not the Government comes up with a most convenient answer that the records have been lost. What we find from the records produced now is only a copy of the original records that too, not from the office where the order is passed, but is only the file at the office of the Additional Commissioner, who is the revisional authority and whose order is in challenge in this appeal.

17. A perusal of the records only betrays an incorrect, inadequate understanding of the provisions of the Act by the officers of the Commercial Tax Department and the most unprofessional, negligent careless manner of performing their duties.

18. An authorization in favour of an officer by the Commissioner in terms of Section 38(7) of the Act for the purpose of passing the best judgment assessment order on the person who is carrying on the business without getting himself registered as a dealer should be precise and for the specific purpose and can and should only be passed by the Commissioner himself but what is placed before the court is some proposal by the Deputy Commissioner and agreement approval of the Commissioner and that too, for the purpose of carrying on audit in respect of the appellant-dealer for the period April 1, 2005 onwards.

19. To say the least, the records which are placed before the court are only inadequate to establish there was compliance with the requirements of the statutory provisions of Sub-section (7) of Section 38 and what surprises us is that such records are sought to be placed before the court as though it is one such record which can pass the test of statutory provisions quoted above.

20. The order passed by the assessing authority cannot be supported in law in the instant case for the reason that the officer was not competent to pass the same.

 

21. However, we opine that the assessee may be otherwise liable to pay the tax as quantified and determined by the revisional authority. The tax as quantified and determined by the revisional authority if has not yet got time-barred and the appellant was liable to pay this amount by way of tax to the State and the respondents are serious about ensuring that, definitely they can do that; in fact it is their duty but that can be achieved only if the respondents, the officials of the Commercial Tax Department take care to follow the statutory provisions at least now and not to act in a negligent and careless manner as had been done hitherto.

22. We are also surprised about the manner in which the Additional Commissioner has chosen to exercise his revisional powers to set aside the order of the appellate authority which was undoubtedly a correct order for the reason of the original authority not having jurisdiction to pass the best judgment assessment order.

23. It should be realized by the statutory authorities that they are acting as statutory functionaries and as quasi-judicial authorities and it is not as though, an order is passed, as though a dealer is an adversary in a litigation with the Revenue and that the Commercial Tax Department being in the position of rival to the assessee or the dealer. While it may be the duty of the functionaries under the Act to ensure that proper revenue is realized to the State, it can only be in accordance with law and not de hors the statutory provisions. Any power and authority can be exercised only in a proper, bona fide manner and not to betray, even a semblance, animosity or prejudice against even an erring dealer.

24. Though the present appeals merit mulcting the respondents with costs, they are spared the costs with the fond hope that they will take note of the observations made in the course of this judgment and will improve henceforth.

25. Impugned orders are set aside. Appeals are allowed.