(2010) 04 KAR CK 0270

In the Karnataka High Court

Case No : S.T.A. No. 14 of 2008

Saroja Enterprises APPELLANT

Vs

Additional Commissioner of Commercial Taxes and Another RESPONDENT

Date of Decision : 16-04-2010

Acts Referred:
Karnataka Sales Tax Act, 1957 — Section 21 (4), 22 A, 22 A (1), 5 C

Citation : (2011) 38 VST 90

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Vikram A. Huilgol and A. Rama D. Venkatesh, for the Appellant; Geetha Menon, Government Advocate, for the Respondent

Judgement

K.L. Manjunath, J.—The Assessee has filed this appeal by challenging the order dated August 12, 2008 passed by the Additional Commissioner of Commercial Taxes by exercising the power u/s 22A of the Karnataka Sales Tax Act, 1957 (suo motu revision).

2. The facts leading to the filing of this appeal are:

That by order dated April 16, 2003, the Assistant Commissioner of Commercial Taxes after verifying the records and documents for the assessment years 1996-97 to 2000-01 had allowed the exemption on the hire charges received by the Appellant in respect of DG sets and other electrical equipment that had been hired out by the Appellant. The authority had held that the hiring of the said equipment did not amount to a "transfer of right to use goods" as per the provisions of Section 5C of the KST Act, since the control and possession was not transferred to the lessee and hence, the exemption was applicable. Thereafter the Joint Commissioner of Commercial Taxes issued proposition notices u/s 21(4) of the KST Act on April 12, 2004 to revise the assessment order dated April 16, 2003 on the ground that the assessing authority had committed an error in allowing the exemption on the hire charges received by the Appellant and that the transactions could be construed as one amounting to transfer of right to use goods and thus taxable. Subsequently, on May 29, 2004, the revisional authority dropped the proposal to revise the assessment order dated April 16, 2003 by his order dated May 29, 2004 and confirmed the exemption granted on the hire charges that had been received by the Appellant by holding that there was no transfer of effective control over the equipment which had been hired by the Appellant and hence the said transaction could not be categorised as the transfer of right to use goods. Thereafter notice u/s 22A of the KST Act proposing to revise the said order was issued by the Additional Commissioner of Commercial Taxes, the Respondent herein, on the ground that the revising authority had erroneously allowed exemption on the hire charges collected by the Appellant on DG sets and other electrical equipment. By exercising the power u/s 22A(1) of the Act, the Respondent-authority held that the entire turnover of the Appellant relating to hiring of DG sets and other electrical equipment for the assessment years 1996-97 to 2000-01 was for transfer of right to use the goods and that the transaction was covered u/s 5C of the Act and therefore, exercised the suo motu revision powers u/s 22A of the Act and has revised the order dated May 29, 2004. The said order is under challenge in this appeal.

3. We have heard the learned Counsel for the Appellant and the learned Additional Government Advocate for the State and perused the material on record.

4. From the assessment order dated April 16, 2003, it is noted that the assessing authority had verified the books of account and other evidences which were produced by the Appellant/Assessee by engaging its technicians and operators in order to state that he had engaged his own technicians and operators and that the possession and the effective control of the same was never given to the customers. The assessing authority in paragraphs 21 and 22 of the assessment order recorded as follows:

21. In the present case, on verification of books of account and other evidences, it is noticed that the dealer engages his own technicians and operators at the site till the period of hiring is over. He never leaves possession and effective control in the hands of the customers. After the period of hire is over, he dismantles them and brings them back. Thus, it could be inferred that the nature of the transactions of the dealer is not exigible to tax u/s 5C of the KST Act. However, it was felt necessary to make further investigations to understand the nature of these transactions and to verify the veracity of the statements made by the dealer. In the first instance, the clients of the dealer were visited with a view to get the first hand information on the transactions between themselves and the dealer. Some of the clients visited were, M/s. Casmo Diesel, West of Cord Road, Bangalore, M/s. Arjun Motors Pvt. Ltd., Queens Road, Bangalore and M/s. St. Patrick''s Church, 15-K, Brigade Road, Bangalore. Transactions of each one of the above with reference to the dealer were verified and statements were drawn. On verification it was noticed that for specific purposes they have taken D.G. sets on hire and the D.G. sets were managed by the dealer''s representatives. The above

clients gave written statements stating that the possession and effective control were with the dealer and a technician and an operator were handling the machinery who are also employed by the dealer. 22. Since the statements made by the dealer indicated that the dealer himself has employed operators/ technicians to handle the equipments, it was necessary to know whether the dealer has actually incurred expenditure on these heads and also to know other evidences, if any. Therefore, the business premises of the dealer was also visited by the undersigned on March 11, 2003. On verification it was found that the dealer has incurred expenditure on wages, batta, diesel, insurance on vehicle and D. G. sets and expenditure on purchases. Copies of wages paid vouchers, diesel bills, insurance policies on vehicle and D.G. sets spare parts purchase bills on vehicle, Gen. sets and electrical goods and agreement form were obtained.

and concluded that the dealer never transferred either the possession or effective control of the equipments/goods to the customers, which are the essential requirements of a lease transaction. Therefore, the transaction in question was not taxable u/s 5C of the KST Act and accordingly, the proposition notice issued earlier on January 13, 2000 was modified and based on the judgment the assessment order was passed. Subsequently, the Joint Commissioner of Commercial Taxes who had issued notice on April 12, 2004 also dropped the said proceedings by order dated April 29, 2004. It is subsequently, the notice has been issued by the Respondent herein so as to take up the suo motu revision of the order passed by the assessing authority as well as of the Joint Commissioner. The Respondent herein had thus recorded its finding as follows:

After the objections were received and visiting some of the customers/clients of the Respondent, the assessing authority came to an opinion that the proposal made by him to determine the tax liability u/s 5C of the KST Act, 1957 does not survive. The letters he has collected inform that the equipments were maintained and operated by the technicians of the Assessee. After the requirements are fulfilled, they are dismanded and taken back by the Assessee. These letters are considered by him against his well-founded findings in the proposition notices. These letters cannot either themselves the evidences or partake the character of evidences in the light of the fact and law recorded by the assessing authority in the proposition notice. The basis he made on account of these letters is therefore bad in law. He observes further to set aside his own findings in the proposition notice that the possession and effective control were with the dealer and the technicians who are employed by the dealer have handled the equipments. Therefore, the transactions the Assessee has dealt in are not in the nature of deemed sales or sales liable to tax u/s 5C of the KST Act, 1957.

5. From the aforesaid extract it becomes clear that the main reason for the revisional authority to set aside the order of the assessing authority is that the assessing authority after visiting some of the customers or clients of the Assessee came to a conclusion that what has been stated in the notice does not survive for consideration and that the letters which were considered and

submitted by the Assessee were against the findings in the proposition notices and that the other letters could not be evidenced or take the character of the evidence in the light that what had been stated in the notice. It is on that basis the order has been revised. We notice that the Respondent has proceeded on the fact that what has been stated in the proposition notice was in fact what was the actual position without taking into consideration that the response given to the proposition notice by the Assessee and the supporting documents. The proposition notice is based on the prima facie finding which the Department would have been depending on the material collected by it on inspection and it is only after taking into consideration the reply to the said notice and the supporting material produced by the Assessee can come to a conclusion on the issues raised merely because the response of the Assessee and the evidence which are produced by the Assessee in support of the case was contrary to what is stated in the proposition notice. Hence, it cannot be held that the consideration made by the assessing authority on all the material produced before it was improper and that the interest of the revenue was prejudiced. The Respondent has proceeded on the fact that the contents of the proposition notice would in fact be proved and that cannot be so because it is only a prima facie opinion expressed by the Department and the same has to be adjudicated upon after taking all other materials and supporting documents which are furnished by the Assessee. Under the circumstances, we are of the view that the order passed by the Respondent herein dated August 12, 2008 is not in accordance with law and accordingly, the same is set aside. Consequently, the orders passed by the assessing authority is upheld. The appeal is accordingly allowed.