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(2010) 11 KAR CK 0160

In the Karnataka High Court

Case No : Writ Petition Nos. 35005-16 of 2010 (T-RES)

Windsor Garden Pvt. Ltd. APPELLANT

Vs

State of Karnataka and another RESPONDENT

Date of Decision : 10-11-2010

Acts Referred:

Citation : (2010) 11 KAR CK 0160

Hon'ble Judges : Ashok B. Hinchigeri, J.

Bench : Single Bench

Final Decision : Allowed

Judgement

Ashok B. Hinchigeri, J.—Sri K.M. Shivayogiswamy, the learned High Court Government Pleader, is directed to take notice for the respondents. The petitioner has called into question the reassessment order, dated October 25, 2010 (annexure F) passed under section 39(1) of the Karnataka Value Added Tax Act, 2003 ("the VAT Act", for short) for the assessment year 2005-06 and the consequent demand notice, dated October 26, 2010 (annexure G).

2. Sri Vikram A. Huilgol, the learned counsel for the petitioner, submits that the impugned order is without the authority of law and without jurisdiction. Respondent No. 2 has no authorisation whatsoever to pass the reassessment order. He has relied on this court''s decision in the case of Model Bucket and Attachments Pvt. Ltd. Vs. Deputy Commissioner of Commercial Taxes (DM), Hubli, , wherein it is held that only an officer, who is authorised by the Commissioner, is competent to make the reassessment. In the said case, this court quashed the reassessment order, as the officer had no express authorisation to do the reassessment.

3. The second contention urged on behalf of the petitioner is that the tax on iron and steel is leviable only at four per cent and not at 12.5 per cent, as is done by respondent No. 2. In support of his submissions, Sri Vikram relies on this court''s decision in the case of Nagarjuna Construction Company Limited and Others Vs.

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State of Karnataka and Others--> . The relevant portion of the said judgment is extracted hereinbelow (page 404 in 45 VST) :

9. Therefore, steel and steel products used as raw material by the petitioners are incorporated into their civil works or other works contracts in the same form except that the same may be fashioned to suit the requirement, before the same merge into the works which is thereafter identified as immovable property. At the time of incorporation, steel and steel products do not lose their nature or form and therefore cannot be subjected to tax, as the said goods are already subjected to tax as declared goods under the CST Act. 4. The third contention urged by Sri Vikram is that the various components used in the execution of the works contract have not been considered separately. In some projects the petitioner has only constructed the compound and sold the immovable properties. When the sale of the immovable property is pure and simple not involving the works contract and not relatable to the sale of goods, the question of imposing sales tax would not arise at all, so contends Sri Vikram.

5. Sri K. M. Shivayogiswamy, the learned High Court Government Pleader appearing on behalf of the respondents, submits that respondent No. 2 is expressly given the assignment of reassessment in respect of the petitioner. He has produced the printout, which is extracted hereinbelow :

ASSIGNMENT NOTE

6. Sri K. M. Shivayogiswamy, the learned High Court Government Pleader has also relied on the letter, dated July 27, 2009, issued by the Additional Commissioner of Commercial Taxes. Its contents are extracted hereinbelow :

Government of Karnataka (Commercial Taxes Department)

No. Adcom (HQ-II CR-1 (Auto Audit)/09/10

Office of the Commr. of Comml. Taxes, (Karnataka), Bangalore, Dated : 27. 07. 2009.

To

All JCS (Admn.) VAT Divisions 1, 2, 3, 4, 5 and 6, Bangalore And VAT Division, Mysore, Malnad, Mangalore, Dharwad, Belgaum, Gulbarga and Davanagere.

Sir,

Sub : KVAT Act, 2003--Assigning of cases for audit?Regarding

Ref: (1) Letter No. Adcom (HQ-II)/CR-10/07-08 dated February 6, 2008.

(2) Letter No. Adcom (HQ-II) CR-01/Auto-Audit/09-10 dated April 20, 2009.

Cases that have been identified using the auto selection process for the purpose of audit and assigned to your audit officers, may please be viewed in your system. DCs, ACs and CTOs (Audit), apart from cases earlier allotted, have now

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been recently assigned inspection cases that are finalised and in respect of which data entries are made in VAT Soft CEN. Please ensure that assignment notes are duly signed and issued to the audit officers concerned so that the important revenue laden inspection reports are utilised and reassessments made at the earliest in the interest of revenue. However, if it is considered necessary to change the audit assignment to another audit officer the same may please be brought to the notice of this office for further necessary action.

Further, when issuing assignment notes to the audit officer please instruct them to take up audit for the tax periods from April 5 to March 9. However, in cases where audits have been taken up earlier the audit officers may be instructed to exclude the period/s already audited.

Further more, when recommending a case to this office for audit assignment please ensure that the case has not already been audited or assigned. The TIN and the periods for which audits are to be taken up and officer to whom the assignment must be given may also be mentioned.

Yours faithfully, SD/- (Kavery Monnappa) Adcom. Commr. of Comml. Taxes, (H.Q)-2, Bangalore.

7. Nextly, he relies on note Nos. 15 and 16 of auto audit assignment 2009-10. The entire note Nos. 15 and 16 are extracted hereinbelow :

15. As per instructions, the following is submitted for kind consideration

(i) There are six VAT Division located in Bangalore with jurisdiction based on Postal PIN Codes in Bangalore city, Jurisdiction over Tumkur District, Kolar District and Bangalore District (other than city) are distributed as follows :

(i) Division 2 - Channapatna and Ramanagar

(ii) Division 4 - Kolar, Chintamani, KGF and Bangarpet

(iii) Division 5 - Dodaballapur and Chikaballapur

(iv) Division 6 - Tumkur, Tiptur and Madhugiri

(ii) However, audit assignments are being given to the audit officers in these Six Divisions of Bangalore in respect of dealers across the Six Divisions without confining to their respective Divisions.

(iii) During the course of meetings held on 14th and 15th July all the JCs of Bangalore have expressed that this cross division assigning of cases is causing them a lot of administrative problems and that they are unable to keep track especially where inspection report cases are concerned. Further, the authority who is to take up revision (SMR) in respect of these reassessed cases is also not determinable.

(iv) In view of all these problems their request is for confining the audit cases to their respective divisions as it is in respect of outside Divisions.

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(v) Apart from the above they have also expressed concern over the fact that the inspection reports received from the enforcement wings are not being audited. There are a large number of such cases remaining unaudited.

In view of the circumstances explained above the following steps may be taken :

(i) Confine the jurisdiction of audit officers in Bangalore to their respective Divisions; and

(ii) Allocate all inspections reports to the audit officers over and above numbers earlier specified at 30, 40 and 40 for DCs, ACs and CTOs, respectively.

For order, please

16. Approve.

8. Sri Shivayogiswamy submits that based on the afore-extracted nothings and communications, it cannot be disputed that respondent No. 2 has the authorisation to do the reassessment work. When he is authorised to do the auditing work, it invariably implies that he has to do the reassessment work also. According to Sri K. M. Shivayogiswamy, there is no difference between auditing and reassessing. They are one and the same. As respondent No. 2 is expressly authorised to audit and verify the books of the petitioner, he also has to perform the consequential duty of reassessing, if he finds any discrepancy between the returns filed and the inspection of the accounts.

9. Sri K. M. Shivayogiswamy submits that the petitioner''s reply has been considered in its entirety and that respondent No. 2 has passed a detailed order. With reference to returns filed and accepted under section 35 of the VAT Act, he submits that the petitioner has not sought any deduction. If it is the case of the petitioner that the turnover is not properly considered, its remedy would be to file an appeal before the Joint Commissioner of Commercial Taxes invoking section 62 of the VAT Act.

10. To consider the first formidable submission urged on behalf of the petitioner, certain provisions of the VAT Act and the Karnataka Value Added Tax Rules, 2005, have to be noticed.

S. 2. Definitions.--

(24) ''prescribed authority'' means an officer of the Commercial Taxes Department, authorised by the Government or the Commissioner to perform such functions as may be assigned to him.

58. Appointment of Commissioner, Additional Commissioners, Joint Commissioners, Deputy Commissioners, Assistant Commissioners, State Representatives and Commercial Tax Officers.--(1) The State Government may appoint a Commissioner of Commercial Taxes and as many Additional Commissioners, Joint Commissioners, Deputy Commissioners, Assistant Commissioners, State Representatives and Commercial Tax Officers, as they

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think fit for the purpose of performing the functions, respectively, conferred on them by or under this Act or by or under any other law for the time being in force.

61. Jurisdiction of officers and change of incumbent of an office.--

(1) The Additional Commissioners, Joint Commissioners, Deputy Commissioners, Assistant Commissioners and Commercial Tax Officers shall perform their functions in respect of such areas or of such dealers or classes of dealers or of such cases or classes of cases as the Commissioner may direct.

46. Notice of reassessments.--The Commissioner may authorise any officer to make a reassessment under section 39.

11. The printout produced by Sri Shivayogiswamy shows that the reassessment work is entrusted to respondent No. 2. However, it is issued by the Joint Commissioner of Commercial Taxes. Under section 39(1) of the VAT Act, only the prescribed authority is competent to reassess the dealers tax liability. The "prescribed authority" as defined in section 2(24) of the Act is an officer of the Commercial Tax Department, authorised by the Government or the Commissioner to perform such functions as may be assigned to him. Section 58(1) of the VAT Act empowers the State Government to appoint the Commissioner and other officers of the Commercial Taxes for performing the functions under the VAT Act. Under rule 46 of the VAT Rules also, the Commissioner may authorise any officer to make the reassessment under section 39 of the VAT Act.

12. A combined reading of all these provisions would not leave anybody in doubt that the officer of the Commercial Taxes, who had to do the reassessment, has to be expressly authorised either by the Government or by the Commissioner. Such an authorisation has to be express, not implied, automatic or consequential. Note Nos. 15 and 16 and the communication, dated July 27, 2009, also do not come to the rescue of the respondents for sustaining the impugned reassessment order. The perusal of note Nos. 15 and 16 does not reveal any authorisation, much less the express authorisation in favour of respondent No. 2 to do the reassessment. Similarly, the communication, dated July 27, 2009 extracted hereinabove, is again in respect of audit assigned and that too by the Additional Commissioner of Commercial Taxes. Despite the best endeavours made by Sri Shivayogiswamy, he is not in a position to lay hands on any document, which is issued by the Government or the Commissioner of Commercial Taxes giving authorisation to respondent No. 2.

13. The last ditch submission urged on behalf of the respondents that the terms "audit" and "assessment" are one and the same also does not commend itself to me. To drive home the subtle distinction between "audit" and "assessment", it is profitable to refer to the Law Lexicon, Second Edition (Reprint) 2001. The said source defines "audit" as follows :

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Audit. As a verb; to draw up or present an account; to make an official investigation and examination of accounts and vouchers.

As a noun; an examination of accounts in general; a formal or official examination and authentication of accounts; setting of accounts; the process of auditing accounts; the hearing and investigation had before an auditor.

14. The said source gives the meaning of "assessment" as follows :

Assessment: The word assessment has been used in the sense of ''computation of income''. At best the word is used in the sense of ''the determination of the amount of tax payable''.

Assessment is the official determination of liability of a person to pay a particular tax.

The word ''assessment'' is used in a comprehensive sense and includes all proceedings, starting with the filing of the return or issue of notice and ending with the determination of the tax payable by the assessee.

The word ''assessment'' can comprehend the whole procedure for ascertaining and imposing liability upon the taxpayer.

The word ''assessment'' includes not only computation of income but also the entire machinery and procedure for imposing and enforcing the tax liability.

The expression ''assessment to tax'' covered all the various stages leading up to the calculation and statement of the amount of tax due.

15. The plain reading of the meaning of the two terms--audit and assessment--clearly shows that audit is only a part of assessment process. Auditing may begin and end with investigation and examination of accounts and vouchers. It may or may not result in assessment. On the other hand, assessment includes auditing. Every auditing need not lead to the assessment or reassessment.

16. It is also profitable to refer to the Division Bench judgment of this court in the case of R.C. India Vs. State of Karnataka, . The relevant paragraph of the said judgment is extracted hereinbelow (page 498 in 29 VST) :

11. 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. 17. Considering the afore-referred statutory provisions and interpretation which they have received in Model Bucket and Attachments Pvt. Ltd. Vs. Deputy Commissioner of Commercial Taxes (DM), Hubli, ; [2010] 69 KLJ 290 and in

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R.C. India Vs. State of Karnataka, , I have no hesitation in holding that there is no authorisation, much less any express authorisation for respondent No. 2 to make the reassessment in respect of the petitioner. I therefore allow these petitions on the short ground of the impugned reassessment order being the one without jurisdiction.

18. As the impugned reassessment order is held as the one without jurisdiction, there is no need for this court to examine the merits or otherwise of all other contentions raised on behalf of the petitioner.

19. The Government or the Commissioner is directed to issue the express authorisation to one of the officers of the Commercial Taxes to act as a prescribed authority in the instant case within one month from today. Thereafter the prescribed authority shall complete the reassessment within two months. The petitioner is directed to co-operate with the prescribed authority in the speedy disposal of the reassessment matter. These petitions are accordingly allowed. No order as to costs.

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