

B. Damodara Vs. the Additional Assistant Commissioner of Commercial Taxes and ors.

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SooperKanoon Citation : sooperkanoon.com/379585

Court : Karnataka

Decided On : Jun-24-2005

Reported in : ILR2005KAR3159; [2005]142STC454(Kar)

Judge : D.V. Shylendra Kumar, J.

Acts : [Karnataka Sales Tax Act, 1957](#) - Sections 5B, 12(3), 17(6), 21, 21(2) and 22; Karnataka Sales Tax Rules, 1957 - Rule 8B and 8B(1)

Appeal No. : Writ Petition No. 40262 of 2004

Appellant : B. Damodara

Respondent : The Additional Assistant Commissioner of Commercial Taxes and ors.

Advocate for Def. : Niloufer Akbar, AGA

Advocate for Pet/Ap. : S. Narayana, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Shylendra Kumar, J.

1. Writ petition in the second round before this Court is directed against the Order dated 19-7-2004 [Copy at Annexure-D] passed by the Joint Commissioner of Commercial Taxes - Respondent No. 2 herein in the exercise of his powers under Section 21(2) of the [Karnataka Sales Tax Act, 1957](#) [for short 'the Act'] revising the assessment order dated. 1-7-2003 passed by the assessing authority for the period 1-4-2001 to 31-3-2002.

2. Writ Petitioner, a dealer under the provisions of the [Karnataka Sales Tax Act, 1957](#), had approached this Court earlier by filing writ petition No. 41311/2003 when the very Officer had issued a proposition notice invoking the power proposing revision of the order. However, this Court in terms of Order dated. 24-9-2003 while directed the petitioner to submit the objections and pursue the matter before the very authority, nevertheless, reserved liberty to move the Court if there is any necessity.

3. Sri. Narayana, Learned Counsel for the petitioner submits that the respondent No. 2 now in the exercise of the power under Section 21(2) of the Act, has passed the order detrimental to the interest of the petitioner; that the order is illegal and not one that could have been passed in the exercise of revisional power under Section 21 of the Act and therefore the petitioner is constrained to approach this court even by passing the appellate remedy under Section 22 of the Act.

4. Notice had been issued to the respondents. Respondents are represented by Ms. Niloufer Akbar, Learned Additional Government Advocate. Statement of objections have also been filed on behalf of the respondents.

5. I have heard Learned Counsel for the petitioner and learned Government Advocate appearing for the respondents.

6. The brief facts leading to the above petition are that the petitioner, a dealer under the Act and who had undertaken certain contracts, what can be described as works contracts in respect of civil construction and the turnover of which is liable to tax under the provisions of Section 5-B of the Act, had by making an

application dated. 20-4-2001 under Section 17(6) of the Act sought for composition of the tax payable in respect of the turnover which means that the petitioner will have to pay tax at the rate of 4% of the entire receipts irrespective of the labour component and other deductible components in the turnover and the application was with the assessing authority. It is the undisputed case of the parties that in terms of the assessment order dated. 1-7-2003, the Additional Assistant Commissioner of Commercial Taxes concluded the assessment, determining sales tax liability of the petitioner for the period 1 -4-2001 to 31-3-2002 under the provisions of Section 12(3) of the Act independent of any composition provision, but as a return filed and by computing the tax liability at the applicable rate on the taxable turnover of the value of the works contracts executed by the petitioner. Certain tax liability was determined which worked out to Rs. 45,0937-.

7. Later, the respondent No. 2 - Joint Commissioner of Commercial Taxes [Administration], while perusing the record was of the view that the order called for exercise of his revisional jurisdiction under Section 21 of the Act as he was of the opinion that the assessment order was illegal as well as prejudicial to the interest of the revenue. The revisional authority found that with the option for composition if the transaction should have been pinned down to the option of composition, the tax liability for the period worked out to Rs. 2,07,165/ - whereas the assessing authority had without examining the legal provision and the situation allowed the assessee to pay tax in terms of a regular assessment order; that on the face of it, the revenue has lost the amount which is the difference between the liability determined under the assessment order and the one payable in terms of the composition option and therefore the order requires to be revised.

8. Petitioner had filed his objections and as noticed earlier had also approached this court. The revisional authority, on hearing the petitioner has now passed the impugned order where under the revisional authority has taken the view that there was no occasion for the assessing officer to have assessed the turnover of the petitioner on a regular basis; that he should have determined the tax liability only on the premise of the option for composition and the action being bad in law; prejudicial to the revenue, held that the assessee is liable to pay tax only on the basis of the composition and had called upon the assessee to pay the tax liability

in terms of the provisions under Section 17(6) of the Act read with relevant rules. It is this order that is under challenge.

9. Submission of Sri. Narayana, Learned Counsel for the petitioner is that no doubt the assessee had applied for composition by his application dated. 20-4-2001, but that in itself is not the end of the matter. The option of composition operates only if the assessing authority permits the option, in the sense that, that the application/request for composition should be accepted by means of an order passed by the assessing authority and in the absence of an order accepting the application for composition, provisions of Section 17(6) of the Act do not operate automatically; that the petitioner, in fact, had not acted on the basis of the application as no order had been passed accepting the application, but, in fact, had filed his return in terms of the return dated. 30-5-2002 in Form No. 4 which is the prescribed form for filing regular returns and not for filing returns in respect of the turnover for which the option for composition is allowed; that the effect of not passing an order accepting the composition application is that the assessee has been permitted to remain outside the composition provision and the very conduct of passing a regular assessment order is confirmative of this position and that the power that is to be exercised under Section 21 of the Act by the revisional authority is in a situation where orders sought to be revised should be in the first instance illegal or lacking in propriety or irregular in procedure and if any such situation has resulted in the loss of revenue, then the revisional power can be exercised; that in the instant case, there is neither any illegality nor irregularity in the order passed by the assessing authority; that the order is in consonance with the legal and statutory provisions and therefore in the absence of any infirmity in the order, the revisional authority cannot assume jurisdiction even assuming that the order passed is one prejudicial to the interest of the revenue.

10. Learned Government Advocate counters this submission and while drawing my attention on the statement of objections filed on behalf of the respondents, submits that the manner in which the application can be filed for the purpose of Section 17(6) of the Act is provided for under Rule 8-B of the Karnataka Sales Tax Rules, 1957 [for short 'the Rules']; that Sub-rule (1) of Rule 8-B providing for submitting the application in Form 8-AA has been amended with effect from 8-6-

2001 in terms of the Notification No. FD 123 CSL 2001; that on and after this date, an application submitted in Form 8-AA for the purpose of seeking composition under Section 17(6) of the Act once filed by the dealer shall not be permitted to be withdrawn by him. If this is the change brought about in the rule, the application filed as on 20-4-2001 which was pending before the assessing authority as on the date when this rule came into existence, in the sense, rule was amended and therefore is governed by the amended rule and the application if cannot be permitted to be withdrawn, the only other result can be that the application is accepted and if so there was no question of the assessee either opting out of the composition request or the assessing authority passing an assessment order on the premise that the turnover of the assessee is assessed on a regular basis and not on the basis of composition.

11. In this regard, learned Government Advocate also draws my attention to the further provisions of Sub-rule (2) of Rule 8-B which has not undergone any corresponding amendment and has remained the same even after the amendment brought about with effect from 8-6-2001, particularly, Clause-(ii) of Sub-rule (2) which reads as under:

'8-B: Composition of tax in the case of dealers executing works contracts -

(2)(ii) : Such permission for composition shall be granted within thirty days from the date of receipt of the application during the year for which the composition is applied for. The permission shall be in Form -8AB and shall be valid for the entire year to which it relates.'

indicates that it is incumbent upon the assessing authority to grant permission within thirty days in which event it also implies that unless it is granted it is not so. If the Officer had not acted, it is a matter for being pursued by the Department for the inaction on the part of the assessing authority in not passing the appropriate order in terms of the rules. But, so far as the assessee is concerned, an application for the purpose of Section 17(6) of the Act filed in Form-8AA becomes operative and functional only when it is accepted by means of a positive order passed by the assessing authority in terms of Section 17(6)(ii) read with Rule 8-B(2) (ii) of the Rules.

12. The resultant position is that in the absence of a positive order accepting the application for composition, there is no composition and as rightly submitted by Sri. Narayana, learned Counsel for the petitioner, without an order it cannot be simply foisted on the assessee just because at a later stage it is found that the assessment of the turnover on a regular basis is not as advantageous to the Department as an assessment in terms of the composition option and the former is detrimental to the interest of the revenue.

13. Yet another reason why the order is not sustainable and not in consonance with the exercise of power under the revisional jurisdiction is that the order sought to be revised by itself is not illegal or irregular. But the illegality or irregularity if at all can be attributed is one in the inaction of the assessing officer in not having passed the order at the appropriate time. So long as the order sought to be revised in itself does not suffer from any illegality or irregularity, such a matter cannot be made subject matter for revision under Section 21 of the Act, even assuming for argument sake, the order resulted in some loss of revenue.

14. In the circumstances, I am of the view that the impugned order No. KST:SMR-I/1 2003-04 dated. 19-7-2004 under Annexure-D passed by the Joint Commissioner of Commercial Taxes (Administration), Malnad Division, Shimoga, respondent No. 2 herein is not sustainable. It is accordingly quashed by issue of a writ of certiorari. Rule issued and made absolute. Writ petition allowed.

15. Consequently, it is directed that if the assessee has paid the taxes in terms of the order which is now quashed, the respondents are bound to refund the same to the petitioner, in accordance with law.