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SooperKanoon Citation : sooperkanoon.com/387372

Court : Karnataka

Decided On : Jul-07-2005

Reported in : (2008)11VST143(Karn)

Judge : D.V. Shylendra Kumar, J.

Acts : [Karnataka Sales Tax Act, 1957](#) - Sections 28(3) and 28(6); Karnataka Sales Tax (Amendment) Act, 2004; [Constitution of India](#) - Articles 226 and 227

Appeal No. : Writ Petition No. 3291 of 2005

Appellant : Ramky Infrastructure Ltd.

Respondent : Deputy Commissioner of Commercial Taxes (intelligence-i) and ors.

Advocate for Def. : Nilofur Akbar, Additional Government Adv.

Advocate for Pet/Ap. : Vani, Adv.

Disposition : Petition allowed

Judgement :

ORDER

D.V. Shylendra Kumar, J.

1. Writ petition is by a dealer registered under the provisions of the [Karnataka Sales Tax Act, 1957](#) (for short, 'the Act').

Petitioner is aggrieved by a provisional assessment order bearing No. JCCT (INT) SZ. DCCT (INT-I), INS-02/04-05, dated December 13, 2004 (copy at annexure J), passed by the Deputy Commissioner of Commercial Taxes--respondent No. 1 herein, who had an occasion to inspect the business premises of the petitioner on March 20, 2004 and had followed up by issue of a proposition notice for provisional assessment on March 26, 2004 and the proceedings culminating in the provisional assessment order dated December 13, 2004.

2. The only ground entertained for examination of this writ petition is the challenge to the provisional assessment order on the premise that the respondent No. 1 lacked jurisdiction to pass the said provisional assessment order in terms of Sub-section (6) of Section 28 of the Act for the reason that the provisional assessment order itself has come to be passed beyond the period of 180 days within which period the officer should have passed the order in terms of the fourth proviso to Sub-section (6) of Section 28 of the Act.

3. Notices had been issued to the respondents and the respondents are represented by Smt. Niloufer Akbar, learned Additional Government Advocate, statement of objections has also been filed.

4. I have heard Smt. Vani, learned Counsel for the petitioner and Smt. Niloufer Akbar, learned Additional Government Advocate appearing for the respondents.

5. It is not necessary to go into several contentions urged in the petition as also on behalf of the respondents, having regard to the limited question that is being examined in this writ petition. Normally, this Court will not examine such questions in the exercise of writ jurisdiction under Articles 226 and 227 of the [Constitution of India](#), particularly, as the assessee under the provisions of the Act has statutory remedies and it is for it to avail of such statutory remedies.

6. Such an objection in the present case is also made on behalf of the respondents, pointing out that as against that order, the assessee had availed of

the remedy of appeal; that the appeal came to be allowed in part and it is also the submission by learned Additional Government Advocate that the respondents are contemplating preferring a second appeal to the Tribunal, etc., learned government advocate urged that the petitioner can pursue the matter if the petitioner is also aggrieved by way of second appeal and it is not necessary to entertain this petition.

7. Normally, this would have been the course of action. But, as it was noticed that the respondent No. 1, on a plain reading of the fourth proviso to Section 28(6) of the Act, lacked jurisdiction to pass an order of the nature that he has passed after the expiry of a period of 180 days from the date of the seizure, this writ petition is entertained and taken up for consideration.

8. Submission of Smt. Vani, learned Counsel for the petitioner is straight and simple. Learned Counsel points out to fourth proviso to Section 28(6) of the Act which reads as under:

Provided also that no provisional assessment under this section shall be made in the case of any dealer after one hundred and eighty days from the date of seizure of accounts, registers, records and documents under Sub-section (3).

9. Learned Counsel for the petitioner points out that while the date of seizure is March 20, 2004 the order itself has been passed on December 13, 2004, i.e., more than eight months and at any rate much beyond 180 days referred to in the proviso.

10. Learned Government Advocate put forth several contentions to get over this obstacle. It is firstly pointed out that the proviso itself has come to be introduced by way of an amendment to the proviso to Section 28(6) of the Act in terms of Act No. 26 of 2004 with effect from August 1, 2004, that as on the date of seizure, i.e., on March 20, 2004 this proviso was not on the statute book and therefore the act of seizure should be presumed to be governed by the provisions of Section 28(6) of the Act without such proviso and in which event, there is no limitation on the officer to pass the assessment order.

11. It is alternatively contended that the proceedings itself, for the purpose of provisional assessment, began with issue of notice on July 26, 2004; that when once the proceedings had begun, it should be taken that the provisional assessment is made or proceedings made for it and in which event the period of six months is not relevant for the purpose of passing the order itself. Submission is that the proceedings for provisional assessment order should have begun within a period of 180 days and if this is the understanding of the proviso, then there is nothing wrong with the provisional assessment order and there is no occasion for interference.

12. One other contention that is urged by the respondents is that the petition has become infructuous, inasmuch as, the petitioner had preferred an appeal to the Joint Commissioner of Commercial Taxes and the Appellate Authority has dismissed/allowed the appeal in part, the order having merged with the appellate order does not survive independently and therefore the writ petition should be dismissed as having become infructuous.

13. May be so in the normal course of statutory remedies, the petitioner might have pursued the appellate remedies, but the order being in the nature of provisional assessment order and the challenge being on the ground of want of jurisdiction or authority to pass such an order itself and that having been examined, it matters little as to whether the order got merged with the appellate order or not. When it is found that the provisional assessment order itself is one passed in the teeth of the fourth proviso to Section 28(6) of the Act and the officer concerned was prohibited from passing an order on the day when he passed the order, that order is one not merely illegal, but one without jurisdiction which cannot operate from its inception. The argument is rejected.

14. Learned Government advocate in support of her submissions has placed reliance on the decision of the Supreme Court in the case of Addl. Assistant Commissioner of Sales Tax, Indore Region, Indore v. Firm Jagmohandas Vijay Kumar [1970] 25 STC 74.

15. I do not find the ratio of this case being attracted to the present case, particularly, as the contention that the Sales Tax Officer to whom the matter had

been remanded by setting aside an assessment order which he had passed on reopening of the concluded assessment on the premise that it was in violation of principles of natural justice, could not proceed for such reassessment after the expiry of the period of limitation for reopening and therefore was to be restrained from acting thereafter was repelled by the Supreme Court for the reason that the reassessment had been initially started within the time prescribed under the statute and the question of prohibiting such officer for reassessment does not arise. At the first instance, the period of limitation operates in terms of the statute which provides for it and if the language of the statute is one for initiation of reopening proceedings within a particular time, what matters is if the proceedings had been initiated. Even otherwise, in the case of Jagmohandas [1970] 25 STC 74, period of limitation did not operate as the assessing officer was exercising power or authority under the liberty reserved by the High Court when remanding the matter by setting aside the assessment order for violating the principles of natural justice, etc. Therefore, the ratio of this case has no application to the present case.

16. The second decision relied upon by the learned Government advocate is in the case of State of Punjab v. Tara Chand Lajpat Rai : [1967]3SCR10 . Here again, an assessment order which was sought to be challenged on the ground of being made after the expiry of the period prescribed by law, was not successful as the proceedings had been initiated within the prescribed time, etc.

17. If the Statute provides for mere initiation of proceedings within a particular point of time, the question as to at what point of time the assessment order was passed becomes not so relevant. In the present case, the language is 'the assessment order should be made'. No assessment order shall be made after the expiry of 180 days. The perception of the 'assessment order made' is passing of an assessment order and not merely initiation of proceedings for an assessment order. In fact, proviso starts with negative language, in the sense that, it is prohibitory on the part of the assessing officer to make an order after the expiry of 180 days from the date of seizure. The proviso has been brought into the statute book may be in view of the past experience and limitation is sought to be placed on the power of the officer passing provisional assessment order and to instill a

sense of urgency. It is such an order. The very order is a provisional assessment order and therefore should be passed at the earliest. If the passing of an assessment order is to be delayed beyond six months, perhaps it can be passed by the regular assessing officer who is not prevented from any such limitation.

18. Reliance is also placed on the decision of this Court rendered in Writ Petition No. 6452 of 2004 dated March 3, 2004 in the case of Premier Traders v. A.C.C.T., Investigation 3, Bangalore [2008] 11 VST 139 : [2004] 56 Kar LJ 407. I find that the decision was rendered in the context of provisions as it existed before the addition of the fourth proviso to Section 28(6) of the Act and the decision has no bearing to the facts and circumstances of the present case. Both on facts and law, the decision is not applicable.

19. The other argument is that the proviso cannot be pressed into service as it has been introduced into the statute book after the date of seizure and it can operate prospectively, cannot be accepted for the reason that on the day the order was passed, the proviso was operative and has to be applied. The proviso being one to ensure expeditious conclusion, follow up action by such assessing officer to relieve the assessee of possible hardship and harassment, it should be given its full effect and should be made applicable in respect of such orders that are passed after the day when the provision itself has become effective. On the day the order is passed, the provision was very much effective in operation and acts as a controlling provision or a prohibition on the officer who passes such an order.

20. The provisional assessment order bearing No. JCCT (INT) SZ DCCT (INT-I), INS-02/04-05, dated December 13, 2004 (copy at annexure J) passed by the Deputy Commissioner of Commercial Taxes-respondent No. 1 herein cannot be sustained and is hereby quashed, by issue of a writ of certiorari

21. Though the provisional assessment order is quashed, it is open to the respondents to pass regular assessment order in accordance with the provisions of the Act and determine the liability and recover such amount as are due to the State. Pending passing of further order on a regular basis, etc., the amount that has been paid by the assessee towards its tax liability on the basis of the provisional order may be retained and be adjusted for such liability which will be

determined on a regular basis.

Writ petition allowed. Rule issued and made absolute.

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