

(2009) 04 AP CK 0041

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3832 of 2009

BGR Energy Systems Limited, Formerly Gea Energy System
(India) Limited

APPELLANT

Vs

Assistant Commissioner, Commercial Taxes, Large Tax Payer
Unit

RESPONDENT

Date of Decision : 07-04-2009

Acts Referred:

Andhra Pradesh Value Added Tax Act, 2005 — Section 21(3)
Andhra Pradesh Value Added Tax Rules, 2005 — Rule 25(5)
Constitution of India, 1950 — Article 226
CST Act — Section 3, 6(2)

Citation : (2009) 25 VST 391

Hon'ble Judges : Anil R. Dave, C.J.; Ramesh Ranganathan, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant; K. Raji Reddy, S.C. for Commercial Tax, for the Respondent

Final Decision : Allowed

Judgement

Ramesh Ranganathan, J.—The order of the assessing authority dated 31.1.2009 is under challenge in this writ petition, among others, for the reason that the show cause notices preceding it do not mention the basis on which the turnovers mentioned therein were sought to be taxed and that, as a result, the petitioner was denied an opportunity of effectively putting forward their defence thereagainst.

2. Facts, to the extent relevant, are that the Assistant Commissioner (CT), Nellore Division issued notice dated 20.10.2008 proposing assessment for the period ending June, 2008 on the ground that the petitioner had failed to produce the requisite documents in time. A fresh notice dated 6.12.2008 was issued estimating the turnover at 100% of the works contract turnover, the gross and net turnover was fixed at Rs. 901.78 Crores and Rs. 766.51 Crores respectively and tax thereon, for a sum exceeding Rs. 95.81 Crores, was proposed to be

levied. Thereafter, the petitioner furnished information. The Assistant Commissioner, vide proceedings dated 6.1.2009, informed the petitioner that the proposal to make a best judgment assessment, and determination of turnover on estimated basis, was being dropped and that he proposed to levy tax on the turnover of Rs. 815.52 Crores in addition to the turnover relating to the civil works contract of Rs. 443.92 Crores. In their explanation, the petitioner informed the Assistant Commissioner that the turnover Rs. 815.52 Crores was not amenable to tax under the provisions of the A.P. VAT Act. The Assistant Commissioner passed assessment order dated 31.1.2009, which was served on the petitioner on 5.2.2009, levying tax both on the turnover of Rs. 815.52 Crores, and inter-State purchases of material used in works contract for Rs. 76.69 Crores. The profit element on labour charges for Rs. 4.53 Crores was also disallowed.

3. The petitioner claims to have procured material worth Rs. 815.53 Crores, from various registered dealers situated outside the State of A.P, to comply with the conditions of the supply contract. They would contend that the said goods were moved from places outside the State and were made over to APGENCO by transfer of documents during its movement, that these supplies were exempt from tax u/s 6(2)(b) of the CST Act, that the first seller, in the course of inter-state trade, had paid CST on the strength of the C-forms issued by the petitioner, that APGENCO had also issued C-forms to the petitioner against the corresponding sales effected in their favour and that this turnover of Rs. 815.53 Crores was not exigible to tax, in the hands of the petitioner, under the A.P. VAT Act. The petitioner also claims to have purchased material worth Rs. 76.69 Crores for execution of civil works from sources situated outside the State in terms of Section 3(a) of the CST Act, that movement of goods to the work site of APGENCO was occasioned by way of invoices wherein the petitioner was shown as the consignee and that delivery of the said goods was taken by the petitioner and used in execution of works contracts i.e, civil works. Petitioner would contend that these purchases were specifically earmarked for the work in question with instructions to the vendor to deliver the same at the work site of APGENCO, that the said transaction was an inter-State sale in execution of works contracts, and not intra-State sales in the hands of the petitioner under the A.P. VAT Act.

4. On the other hand, the respondent would submit that the petitioner had filed monthly returns in Form-VAT 200 for the period June, 2006 to June, 2008 disclosing a turnover of Rs. 276.12 Crores and payment of tax thereon, that the business premises of the petitioner was audited on 4.8.2008, that, even though the petitioner was called upon to produce their books of accounts, they had failed to do so, that at the time of audit an unsigned statement of turnover was furnished with the assurance that the relevant books of accounts would be produced in due course and, since they were not produced even two and half months thereafter, the respondent, relying on the unsigned statement, had opined that the petitioner had under-declared the turnover through the returns

filed with the department. According to the respondent, it was decided to reject the returns and propose an estimate to the best of judgment, u/s 21(3) of the APVAT Act read with Rule 25(5) of the APVAT Rules, that a show cause notice was issued on 20.10.2008 proposing a turnover of Rs. 824.12 Crores, that, on receipt of the notice, the petitioner had filed details of the works executed in respect of the three projects upto September, 2008 with gross receipts of Rs. 450.88 Crores relating to civil works, that in addition to the material purchased within the State, the petitioner had also purchased goods from outside the State and had supplied the same to APGENCO for use in the three projects, that the respondent had issued notice on 5.11.2008 calling upon them to furnish details of the goods purchased from outside the State and supplied to the contractee for executing the three projects, that, as no reply was received from the petitioner, a revised show cause notice dated 6.12.2008 was issued proposing to levy tax on a turnover of Rs. 450.88 Crores and, in addition, an equivalent sum was estimated and proposed as turnover relating to supply of goods, that the petitioner had filed their objections on 31.12.2008 opposing the proposed assessment, that, while they had accepted the turnover relating to civil works worth Rs. 443.91 crores, they contended that the turnover relating to supply of goods, purchased from outside the State and incorporated in the three projects, was not exigible to tax as the goods were purchased in the course of inter- State trade, that they had filed another letter, along with documentary evidence, informing that supply of material, in respect of the three projects of APGENCO for the assessment period in question, was for Rs. 815.52 Crores, that, in the light of this information, a final show cause notice dated 06.01.2009 was issued proposing to assess these turnovers also, that, during the personal hearing on 12.01.2009, the petitioner had opposed levy of tax on the estimated turnover of Rs. 815.52 Crores, and Rs. 76.69 Crores, contending that they fell within the ambit of inter-state sale and were not exigible to tax under the A.P. VAT Act and, taking into consideration the submissions made, the assessment order was finally passed on 31.01.2009.

5. Sri S.R. Ashok, Learned Senior Counsel appearing on behalf of petitioner, would submit that, except stating that the turnover of Rs. 815.52 Crores was sought to be taxed, the show cause notice was bereft of even the essential particulars which would have enabled the assessee to submit an effective reply thereto, that it made no mention of the basis on which the said turnover was sought to be taxed under the A.P.VAT Act and that, as a result, they could neither submit an effective reply to the show cause notice nor place the documentary evidence necessary to establish that the said turnover was in the course of inter-state sale and that it could not be brought to tax under the A.P. VAT Act. Learned Senior counsel would submit that, since the impugned assessment order was in violation of the principles of natural justice, existence of an alternative remedy of appeal was no bar for invoking the jurisdiction of this Court under Article 226 of the Constitution of India. He would fairly state that it would suffice if the impugned assessment order were to be treated as a show cause notice, the

petitioner given an opportunity to file their reply thereto and place supporting documentary evidence before the respondent during the personal hearing.

6. Sri K. Raji Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that the petitioner had been put on notice that these turnovers were liable to tax and that nothing precluded them from producing evidence, during the personal hearing, to establish that these turnovers could not be brought to tax under the A.P. VAT Act. While denying that the petitioner was deprived of the opportunity of effectively putting forward their defence, or that the assessment order was in violation of principles of natural justice, learned Counsel would submit that the show cause notice dated 06.12.2008, and the revised show cause notice dated 06.01.2009, were issued, that an opportunity of personal hearing was given to the petitioner on 12.01.2009, that they had filed their objections on 31.12.2008 and 12.01.2009 and that it could not be said that they were not put on notice of these turnovers being assessed to tax under the A.P.VAT Act. Learned Counsel would contend that the statutory remedy of an appeal could not have been bypassed and that no case had been made out to invoke the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

7. While reasons are assigned in the assessment order for levy of tax under the A.P. VAT Act on the turnover of Rs. 815.52 Crores, the show cause notice which preceded it merely records that the said turnover was proposed to be taxed under the A.P.VAT Act and makes no reference to the basis, on which the said turnover, was sought to be taxed. The question which necessitates examination is whether or not failure to indicate the basis, for levy of tax, in the show cause notice violates the audi alteram partem rule.

8. A person should not be deprived of his vested right, or be made to suffer any disadvantage or detriment, without telling him why such an action was warranted and without giving him an opportunity to say why it should not be taken. The requirement of audi alteram partem has two elements-notice of what action is proposed, why it is proposed, and adequate opportunity to show that the action is uncalled for. A corollary of the audi alteram partem rule, namely "*qui aliquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit*" is that "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right" or in other words, as is now expressed, "justice should not only be done but should manifestly be seen to be done". The notice must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. (*Canara Bank and Others Vs. Shri Debasis Das and Others*, ; *Canara Bank Vs. V.K. Awasthy*,). The person proceeded against must know that he is required to meet the allegations which might lead to a certain action being taken against him. (*S.L. Kapoor Vs. Jagmohan and Others*,). A proper hearing must always include a "fair opportunity to those who are parties to the controversy for correcting or contradicting anything prejudicial to their view".(4) A crucial aspect of a fair

hearing is having a right to know the grounds or the opposing case in advance.(5)

9. If prejudicial allegations are made against a person he must, normally, be given particulars of them. He must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision. (6) It is essential to state the particulars to enable the person to answer the case against him. A notice which does not mention the particulars, on which the case against the person is based, cannot provide a foundation for the proceedings that follow. (Nasir Ahmad Vs. Assistant Custodian General, Evacuee Property, Uttar Pradesh, Lucknow and Another, . The show cause notice which preceded the impugned assessment order make no mention of the grounds or the basis on which the turnover of Rs. 815.52 crores, among others, is proposed to be taxed under the A.P. VAT Act. The petitioner- assessee has, thereby, been denied the opportunity of effectively showing cause why such turnover is not liable to tax under the A.P. VAT Act. The show cause notices, in the present case, violate the audi alteram partem rule.

10. This question can be examined from another angle also. It is only if the proposed turnover is liable to tax under the A.P.VAT Act, would the respondent have jurisdiction to pass the assessment order levying tax under the A.P. VAT Act. The fact or facts upon which the jurisdiction of an authority depends is a "jurisdictional fact" the existence of which is the sine qua non, or condition precedent, to the assumption of jurisdiction by the authority. Once such a jurisdictional fact is found to exist, the authority has the power to decide adjudicatory facts or facts in issue. (Carona Ltd. Vs. Parvathy Swaminathan and Sons, ; Halsbury's Laws of England (4th Edn.), Vol.1, Para 55, p.61; Reissue, Vol.1(1), Para 68, pp.114-15; Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi, , Arun Kumar v. Union of India (2007) 1 SCC 732). The show cause notice should reflect the jurisdictional facts based on which the final order is proposed to be passed. The assessee would then have an opportunity to show cause that the authority had erroneously assumed existence of a jurisdictional fact and, since the essential jurisdictional facts do not exist, the authority does not have jurisdiction to decide the other issues. This requirement is also absent in the show cause notices issued in the present case.

11. Viewed from any angle, failure to indicate the basis for levy of tax under the A.P. VAT Act in the show cause notice on, among others, the turnover of Rs. 815.52 crores falls foul of the audi alteram partem rule necessitating the impugned assessment order being set aside on the ground of violation of principles of natural justice.

12. It is well settled that existence of an alternative remedy is not a bar for exercise of jurisdiction under Article 226 of the Constitution of India and that in situations where the writ petition is filed for enforcement of fundamental rights or where there has been violation of principles of natural justice or where the order is wholly without jurisdiction or the vires of an Act is challenged the High Court would not, ordinarily, relegate the parties to the alternative remedy

available under the Statute. (Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another,). It must also be borne in mind that if natural justice is violated at the first stage, the right of appeal is not so much a true right as a corrected initial hearing. As a general rule, failure of natural justice in the original body cannot be cured by a sufficiency of natural justice in an appellate body. There is a manifest need to avoid treating an appeal as an overall substitute for the original proceeding. (Wade's Administrative Law, 5th Edn., Institute of Chartered Accountants of India Vs. L.K. Ratna and Others,).

13. While, ordinarily, we would have quashed the order leaving it open to the respondent to issue a notice afresh calling upon the petitioner to show cause, in view of the submission of Sri S.R.Ashok, Learned Senior Counsel, that it would suffice if this Court were to direct that the assessment order itself be treated as a show cause notice, we quash the impugned order, direct that it be treated as a show cause notice and permit the petitioner to file their objections to the proposed assessment within a period of two weeks from today. The respondent shall, after affording the petitioner an opportunity of personal hearing, pass orders afresh in accordance with law.

14. The writ petition is allowed. However, in the circumstances, without costs.