
(2003) 04 MP CK 0101

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 1812 and 1813 of 2002 and M.W.P. No. 186 of 2003

B.P.L. Limited and Another

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 23-04-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1)
Constitution of India, 1950 — Article 226
Madhya Pradesh Commercial Tax Act, 1994 — Section 28, 29, 29(1), 61
Madhya Pradesh Commercial Tax Rules, 1995 — Rule 10

Citation : (2006) 143 STC 316

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : Sumit Nema, for the Appellant; Shashank Shekhar, for the Respondent

Final Decision : Dismissed

Judgement

Arun Mishra, J.—Petitioner is assailing show cause notices P/6 and P/7 issued in December, 2001 and also communication P/10 dated February 2, 2002. As per notices P/6 and P/7 it was proposed to initiate proceedings u/s 28/29 of the Madhya Pradesh Commercial Tax Act, 1994. Petitioner was required to submit the objection within 10 days. Reliance has been placed on the decision of Bajaj Sevashram, Indore v. Commissioner of Commercial Tax, M.P., decided by the Board of Revenue on August 22, 2000 based on the Supreme Court decision. Communication P/10 indicates that there is proposal to initiate proceedings u/s 28/29. It has been observed that the decision in Bajaj Sevashramam has attained finality, as such on the basis of the said decision, proceedings u/s 28/29 can be initiated. A decision has been taken to initiate action u/s 29(1) of the Act after the year 1985-86.

2. In W.P. No. 1813 of 2002 petitioner is praying for the similar relief.

3. Submission of the petitioner is that proceedings u/s 29(1) cannot be initiated.

Petitioner submits that the period of limitation prescribed for reopening the assessment u/s 29(1) is 3 years from the date of any adverse decision rendered by any order of any court or Tribunal which has become final. Vandana Sales Corporation decision dated December 4, 1995 was in the knowledge of the assessing officer. If at all, the department wanted to invoke the provision of section 29(1), it could have done so within three calendar years from December 1, 1995. Therefore, the proposed assessment is without jurisdiction. Subsequent decision cannot be basis for initiating reassessment u/s 29. Thus, the notices P/6 and P/7 and order P/10 are illegal, void and without jurisdiction and are without authority of law. It is further submitted that once the appeal against assessment for 1996-97 is pending, hence, there is no justification in reopening the assessment. Hence, the proposed proceedings are illegal, void and without jurisdiction. Nomenclature of the discount is not decisive of whether the same is permissible as a deduction or not. The overall facts have to be taken into consideration and if trade discount is reduced from the sale price, it certainly is not in the nature of valuable consideration. Accordingly, it should have been held that the sale price does not comprise incentive bonus, it is a permissible deduction in the sale price. Reliance has been placed on *Dharamchand Sikarchand v. Assistant Commissioner of Sales Tax, Sagar* (1997) 30 VKN 171 rendered by this Court.

4. A return has been filed by respondents. It is contended in the return that the assessment proceedings were initiated by respondent No. 2 proposing to disallow the deduction towards the claims of discount given by the petitioners to dealers for the assessment years 1992-93 to 1995-96. The claim of discount has been disallowed by the assessing officer for the assessment years 1996-97 onwards. It is contended that Section 29(1) is self explanatory. The decision in *Aluminum Industries Ltd.* is R/2 and decision in *India Pistons Limited v. State of Tamil Nadu* is R/3, reading of orders R/2 and R/3 demonstrates that version of the petitioner is not correct. The decision in *Aluminium Industries Ltd.*, overrules the decision referred. The decision rendered by the High Court of Madras has been held to be just and proper by the Supreme Court in *Advani Oerlicon's case* [1980] 45 STC 32, as per order R/4. Thus, the assessing officer has rightly rejected the submission of the petitioner. The proposed order dated February 2, 2002 contains just and proper reason for rejection. Filing of objection as contained in P/11 is of no purport for the reasons set forth in the subsequent show cause notice dated May 15, 2002. The procedure as followed by the petitioner comes under the purview of "bonus discount". The grounds tried to be put forth by the petitioner are not sustainable. *Bajaj Sewashram* was decided on August 22, 2000 as per order R/5. Thus, the initiation of reassessment is within the limitation period u/s 29(1). The decision of Vandana Sales could not be considered to be final due to decision of the Supreme Court in *Motor Industries case* [1983] 53 STC 48 and the decision of Madras High Court in the case of *Ultra Marine and Pigments Ltd.* [1980] 46 STC 220. In *Bajaj Sewashram's case* the cases of *Vandana Sales*, *Motor Industries* [1983] 53 STC 48 (SC) and *The State of Tamil*

Nadu Vs. Ultramarine and Pigments Ltd., have been discussed and the law has finally been settled. Pendency of the appeal against the order is no bar u/s 29(1) to reopen an assessment.

5. Shri Sumit Nema, learned Counsel for the petitioner has submitted that the proceedings are barred by limitation and limitation has to be computed with effect from decision in Vandana Sales Corporation Limited which was decided in the year 1995. Limitation for proceedings u/s 29 cannot be computed from Bajaj Sevashram Limited.

6. Shri Shashank Shekhar, has submitted that final order has yet to be passed. Petitioner can raise all the questions in appeal against the final order. Against the proposed order sent to the petitioner along with communication P/10 petitioner has submitted representation P/11, in which virtually same objections have been raised. Authority has yet to decide and pass the final order. Thus, no interference is called for at this initial stage.

7. In my opinion as no final order has been passed at this juncture and it is open to the petitioner to raise all the questions before the authority under the Madhya Pradesh Commercial Tax Act, 1994. Show-cause is just beginning of the matter, not the end. Final order has yet to be passed. Facts are to be gone into, final order has to be rendered by the assessing officer, an order so passed is subject to an appeal u/s 61.

8. The apex Court in Shri Vivekanand Mills Ltd. v. Union of India (1999) 109 ELT 32 (SC) has held that ordinarily in a writ petition facts are not to be investigated, for the purpose of establishing that demand was time-barred under rule 10, it has to be proved that assessment of duty has been made. The apex Court kept open the question of limitation open and directed the question to be raised before the statutory authority as questions of facts are not to be adjudicated in a writ petition.

9. In Union of India (UOI) Vs. Bajaj Tempo Limited and Others, , the apex Court has laid down that there should be no interference with the show cause notice in a writ petition under Article 226 of the Constitution, reply to such notice should be submitted by the assessee, question of fact cannot be determined by the High Court in writ petition, appropriate remedy for the assessee is to file reply to the show cause notice not to approach the High Court under Article 226 of the Constitution of India or to CEGAT. The apex Court has held that :

3. It is clear that the question of exigibility to the duty demanded depends on the facts found relating to the process by which the end-product on which duty is demanded came into existence. The items in question are several and in each case a finding has to be given on the facts pertaining to the particular item. This has not been done by any authority in respect of any of these items or goods. There is thus no finding of fact on which the question of exigibility to excise duty on any of the items or goods can be decided. The appropriate course for the assessee in each case was to reply to the show cause notice enabling the

authorities to record their findings of fact in each case and then if necessary, the matter should have been proceeded to the Tribunal and thereafter to this Court. The trade notice was not decisive of the question either before the Tribunal or in this Court.

10. In *Union of India v. Polar Marmo Agglomerates Ltd.* (1997) 96 ELT 21 the apex Court has considered the jurisdiction of the High Court to interfere at the stage of show cause notice to take over the fact-finding investigation. The decision of the High Court was set aside, it was held by the High Court that respondents' product was not taxable to excise duty, the jurisdiction of the High Court was questioned. Resolving this question, the apex Court has held that fact-finding authority under the relevant statute must be approached first, High Court should not have interfered in a writ petition at the stage of show cause notice to take over fact-finding investigation. The apex Court has observed in para 3, thus :

3. We find that the question involved is a question of fact, "whether the properties and characteristics of agglomerated marble remain the same as those of excavated marble?" we find that the High Court has gone into questions of fact to resolve this question. The resolution of questions of fact such as this should, we think, be best left to the fact-finding authorities constituted under the relevant statute. The High Court should not have interfered, in a writ petition, at the stage of the show cause notice to take over the fact-finding investigation.

11. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , the apex Court has laid down that Article 226 of the Constitution of India is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very "vires" of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the court must have good and sufficient reason to by-pass the alternative remedy provided by statute. The Supreme Court has taken judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice needs to be strongly discouraged. The apex Court has held, thus :

3. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ, held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the prescribed authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory

procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

12. In *Dewas Tools Pvt. Ltd. Vs. Union of India (UOI)*, , this Court has held that at the stage of issue of a show cause notice High Court should not exercise jurisdiction under Article 226 of the Constitution of India.

13. A division Bench of High Court of Calcutta in *Union of India (UOI) Vs. Sigma Electronics*, has held that power under Article 226 of the Constitution is extraordinary in nature, writ court not to intervene without there being any infringement of right. Intervention by the court is not called for at the stage of issue of show cause notice.

14. A single Bench of this Court in *Shree Synthetics Ltd. Vs. Union of India (UOI)*, held that a writ petition which was filed against the show cause notice and revenue had not passed any final order, interference was not required to be made as efficacious alternative remedy was available writ petition was held to be premature. Proceedings before the Revenue authority cannot be forestalled by way of challenging the show cause notice. Similar view, is taken by this Court in *Methodex Systems Pvt. Ltd. Vs. Union of India (UOI)*, . This Court held that show cause notices are not the end but the beginning of the matter. "Absence of jurisdiction" and "erroneous exercise of jurisdiction" are not liable to be inter-mixed. It was not the case that notice was not under the relevant law or provision and not by the appropriate authority ; writ petition was dismissed.

15. In *R.K.K.R. Steels Ltd. Vs. Central Board of Excise and Customs*, it is held that the court refrains itself from exercise of writ jurisdiction on deciding of show cause notice. Show cause notice was challenged on the ground that Assistant Collector was not competent to adjudicate cases involving duty of over rupees fifty thousand, as petitioner was having alternative efficacious remedy, no interference was made in the writ petition.

16. The High Court of Karnataka in *Loharu Steel Industries Ltd. Vs. Collector of Central Excise*, held that as adjudication as to show cause notice is yet to take place, reply has to be filed and evidence has to be adduced, hearing opportunity has to be afforded. Collector was competent to issue the show cause notice on the ground of suppression of facts under proviso to section 11A(1) ; show cause

notice does not suffer from lack of jurisdiction. Certiorari jurisdiction is not intended to by-pass the statutory provisions. It is a different matter after a written statement is filed and evidence is produced, the Collector may come to a different conclusion that the suppression is not proved and may close the proceedings. The extraordinary jurisdiction of the High Court under Article 226 of the Constitution is not to be exercised in such matters.

17. A division Bench of High Court of Allahabad in National Winder Vs. Union of India (UOI), , declined to exercise the writ jurisdiction as no final adjudication was made by the Additional Collector, only show cause notices were issued and reply was filed by petitioner, it was held that Additional Collector has to consider the reply and examine the legal position and may decide to drop the notices. It will not be appropriate for this Court to stall the proceedings which are maintainable under the Central Excise Act. The Additional Collector was directed to decide the issue on merits in accordance with law.

18. Thus, in my opinion as no final order has been passed and petitioner has submitted the representation against the proposed order, no interference is called for in the writ petition. Writ petitions are dismissed. No order as to costs. Consequently M.W.P. No. 186 of 2003 is also dismissed.