
(2014) 11 OHC CK 0045
In the Orissa High Court
Case No : Writ Petition (Civil) No. 165 of 2009

Chandrika Sao

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 26-11-2014

Acts Referred:

Orissa Value Added Tax Act, 2004 — Section 42, 42(2)

Citation : (2015) 120 CLT 760 : (2015) 2 ILR 228 : (2015) 1 OLR 628 : (2015) 81 VST 86

Hon'ble Judges : I. Mahanty, J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with a prayer for quashing the order of assessment dated 18.6.2008 (Annexure-1) passed by opposite party No. 2-Assessing Authority under Section 42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as "OVAT Act") for the tax period from 1.4.2005 to 30.11.2006 on the ground that the said order is barred by limitation and has been passed without complying with the statutory requirement of Section 42(2) of the OVAT Act and is in gross violation of the principles of natural justice.

2. The petitioner's case in nutshell is that it is a proprietorship concern dealing with gunny bags on wholesale basis and it is registered under the OVAT Act. It has filed its return for the tax period from 1.4.2005 to 30.11.2006. Opposite party No. 1-Sales Tax Officer, who is the head of the Audit Team, after conducting audit at the business premises of the petitioner for the aforesaid tax period submitted the Audit Visit Report to the Assistant Commissioner of Sales Tax on 12.12.2006 for completion of audit assessment under Section 42 of the OVAT Act. On the basis of the Audit Visit Report, opposite party No. 2-Assessing Authority issued notice to the petitioner in Form VAT-306 under memo No. 6477 dated 23.8.2007 enclosing the Audit Visit Report dated 12.12.2006 for the aforesaid tax period. The Assessing Authority vide its order dated 18.06.2008 passed an ex parte assessment order under Section 42 of the OVAT Act for the

aforesaid tax period raising a demand of Rs. 38,03,766/- which includes penalty of Rs. 25,35,844/-. The said assessment order was issued under Memo No. 4774 dated 24.10.2008 and was received by the petitioner on 24.11.2008. Hence, the present writ petition.

3. Mr. P.K. Jena, learned counsel appearing for the petitioner submitted that as per sub-section (6) of Section 42 of the OVAT Act, an assessment under Section 42 of the OVAT Act shall be completed within a period of six months from the date of receipt of the Audit Visit Report, but the proviso to sub-section (6) says that if for any reason, the assessment is not completed within the time specified in sub-section (6) i.e. within six months from the date of receipt of the Audit Visit Report, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding. Sub-section (7) of Section 42 provides that no order of assessment shall be made under sub-section (3) or sub-section (4) of Section 42 of the OVAT Act after expiry of the period of one year from the date of receipt of the Audit Visit Report. The Audit Visit Report having been submitted on 12.12.2006, the last date for completion of the audit assessment under Section 42 of the OVAT Act expired on 11.06.2007. The assessment order under Annexure-1 having been passed on 18.6.2008, it is clearly barred by limitation prescribed under sub-section (6) of Section 42 of the OVAT Act. Hence, the said order of assessment is liable to be quashed.

Mr. Jena further contended that the notice for audit assessment under Section 42 of the OVAT Act was issued on 23.8.2007 enclosing the Audit Visit Report submitted to the Assessing Authority on 12.12.2006, which is much after expiry of the period of limitation of six months on 11.06.2007. He further contended that if the statute requires to do a thing in a particular manner, the authority is to follow the same. In support of his contention, he relied upon the judgment of this Court dated 25.9.2014 passed in W.P.(C) No. 2971 of 2009 in the case of M/s. Delhi Foot Wear v. Sales Tax Officer and others.

It was also submitted that the order of assessment under Annexure-1 is not sustainable in law as the same has been antedated.

4. Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue, on the contrary, submitted that the notice for audit assessment was issued on 23.8.2007 and the order of assessment has been passed on 18.6.2008, which is within one year from the date of issuance of notice for assessment and therefore the same is not barred by limitation. In similar circumstances, this Court vide order dated 22.8.2013 in W.P.(C) No. 11647 of 2010 in the case of M/s. Chandramani Engineers v. Commissioner of Sales Tax quashed the order of assessment and remanded the matter back to the Assessing Officer to exercise his power under proviso to Rule 12 (3)(h) of the CST (O) Rules and thereafter pass fresh order of assessment by assigning reasons.

Mr. Kar further submitted that due to clerical mistake, there has been a delay of

four months in dispatching the order of assessment. Therefore, the allegation that the order of assessment has been antedated and passed after expiry of the period of limitation is not correct. Since the impugned order of assessment was served within four months, it cannot be said that there is an unreasonable delay. Therefore, no adverse inference can be drawn. In support of his contention, he relied upon the judgment of Andhra Pradesh High Court in the case of Shaw Wallace and Co. Ltd. Vs. State of Andhra Pradesh, .

5. On the rival contentions of the parties, the following questions arise for consideration by this Court.

"(i) Whether the impugned order of assessment dated 18.6.2008 under Annexure-1 has been passed within the period of limitation?

(ii) Whether the impugned order of assessment dated 18.6.2008 under Annexure-1 has been antedated and passed after expiry of the period of limitation?"

6. To deal with the Question No. (i), it may be relevant to note that on 12.12.2006, opposite party No. 2-Assessing Authority has received the Audit Visit Report. As per the provisions of sub-section (6) of Section 42 of the OVAT Act, which stood at the relevant time, the assessment under Section 42 of the OVAT Act shall be completed within a period of six months from the date of receipt of the Audit Visit Report. In view of the said provision, the period of limitation of six months for completion of the audit assessment expired on 11.06.2007. It was contended by the Revenue that this Court in the case of M/s. Lalchand Jewellers Private Limited v. Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar in W.P.(C) No. 11864 of 2007 disposed of on 9.10.2007 held that the period of limitation of six months shall run from the date of receipt of the Audit Visit Report by the assessee. Further contention of the Revenue is that since the assessment order has been passed within one year from the date of issuance of notice for audit assessment, the assessment is valid in law.

It is true that the order of assessment has been passed within one year from 23.8.2007 i.e. the date of issuance of notice for audit assessment. However, being asked, it was fairly stated by Mr. Kar, learned Standing Counsel for the Revenue that permission of the Commissioner for completion of the assessment proceeding within a further period of six months as provided under proviso to sub-section (6) of Section 42 of the OVAT Act was not obtained prior to or after passing of the assessment order on 18.06.2008.

7. In view of the above, the impugned order of assessment passed under Annexure-1 is bad in law.

8. To deal with the Question No. (ii), it may be relevant to note that the order of assessment was purportedly passed on 18.6.2008 and was communicated to the petitioner on 24.10.2008. Thus, there is a delay of more than four months in communicating the order of assessment to the petitioner. Explanation of the

opposite party-Department is that delay was caused due to clerical mistake and the said delay is not inordinate.

9. The High Court of Andhra Pradesh in the case of Sanka Agencies Vs. Commissioner of Commercial Taxes, held as under.

"We have seen the record. Record also shows that while the impugned order bears the date May 17, 1996, the order was sent to the appellants by despatching it only on November 1, 1996. There is no explanation in the record nor any explanation has been given by the respondent, as no counter is filed. Therefore, there is strong apprehension that in order to give an impression that the impugned order was passed within the period of limitation, the order bears the dated May 17, 1996, whereas it has been passed much after that. In this connection, the learned Counsel for the appellants has placed reliance on a judgment of the honourable Supreme Court in State of Andhra Pradesh V.M. Ramakishiaiah & Co. [1994] 93 STC 406, wherein under similar circumstances, the Supreme Court held that in the absence of any explanation, whatsoever, for the delayed service on the petitioner, of the order, the court should presume that the order was not made on the date it was purported to have been made."

10. In the instant case, there is no explanation for the delay of more than four months caused in issuing the assessment order to the petitioner except stating that due to clerical mistake there has been a delay of four months. Nothing has been stated in detail as to when the order of assessment has been handed over to the dispatch section and who is responsible for such delay. Therefore, we have no hesitation to hold that the order of assessment under Annexure-1 was not made on the date it was purported to have been made. In order to give an impression that the impugned order of assessment was passed within the period of limitation, the order bears the date 18.6.2008 whereas it has been passed much later that.

11. For the reasons stated above, we allow the writ petition and quash the impugned order dated 18.6.2008 passed under Annexure-1 as well as consequential demand notice for the tax period from 01.04.2005 to 30.11.2006.

12. Before parting with the case, we think it proper to bring it to the notice of the Commissioner that this Court in several cases finds that the Assessing Officers are not passing the order in strict compliance of the provisions of Section 42 of the OVAT Act and/or there is unreasonable delay in communicating the order of assessment to the dealers which often causes huge loss to the Revenue. Therefore, we suggest that the Commissioner may take appropriate steps to block the revenue loss on this account and if necessary, in appropriate cases, Departmental Proceedings may be initiated against the erring officers.

Compliance of the above direction may be intimated to the Registry of this Court within three months from today.