(2013) 02 MP CK 0019

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1491 of 2012

C.P. Industries APPELLANT

Vs

State of M.P. and Another RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

Central Sales Tax Act, 1956 — Section 9(2)
Constitution of India, 1950 — Article 226

Citation : (2013) 198 ECR 165 : (2013) 59 VST 338

Hon'ble Judges : S.K. Gangele, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Pawan Dwivedi, for the Appellant; Vivek Khedkar, Deputy Advocate-General, for the Respondent

Judgement

S.K. Gangele, J.—The petitioner has filed this petition against the orders dated December 24, 2011 (annexure P/1) and dated December 24, 2011 (annexure P/2). The petitioner is a proprietorship firm. It is a registered dealer under the provisions of the Madhya Pradesh Value Added Tax Act, 2002 (hereinafter referred to as "the VAT Act") and the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act"). It is in the business of processing and trading of edible and vegetable oil and oil-cake. The regular assessment of the petitioner for the assessment period of April 1, 2006 to March 31, 2007, April 1, 2007 to March 31, 2008 and April 1, 2008 to March 31, 2009 was completed by the assessing officer vide orders dated April 23, 2009, March 30, 2010 and June 22, 2011.

2. The Deputy Commissioner, Commercial Tax, Anti Evasion Bureau, Bhopal, wrote a letter on October 4, 2010 to the Additional Commissioner, Commercial Tax, Moti Mahal, Guna. It is mentioned in the letter that the Anti Evasion Bureau investigated the transaction of M/s. C.P. Industries, M/s. Asha Oil Industries and M/s. Hajarilal Sandeep Kumar and also investigated the transactions of transporters New Dixit Transport and Gupta Transport Company and came to the

conclusion that M/s. Hajarilal Sandeep Kumar, Gwalior is a bogus firm and it was constituted by M/s. C.P. Industries in order to evade tax. The Anti Evasion Bureau also received information from Udi Barrier (U.P.) and came to the conclusion that M/s. C.P. Industries and M/s. Asha Oil Industries have made transactions through M/s. Hajarilal Sandeep Kumar. The Anti Evasion Bureau also took a note of the fact that the income tax Department also assessed the tax of M/s. C.P. Industries on the basis of transactions in the accounts of Gwalior Nagrik Sakh Samiti Maryadit and assessed the liability of income tax of M/s. C.P. Industries. Anti Evasion Bureau came to the conclusion that these firms have evaded payment of tax of near about rupees twelve crores.

3. After receiving the letter dated October 4, 2010, a show-cause notice under sections 18(4), 20(5), 20(6), 21(1) and 52(2) of the M.P. VAT Act, 2002 was issued to M/s. C.P. Industries for block assessment for the period of April 1, 2006 to August 6, 2008. The petitioner-firm, M/s. C.P. Industries, has been shown as associate firm. It is mentioned in the show-cause notice that the petitioner submitted incomplete tax statements for the period April 1, 2006 to August 6, 2008, hence, the petitioner is liable for block assessment in accordance with section 52(2) of the VAT Act on the basis of past assessment method u/s 20(5). The allegation against the petitioner-firm was that the petitioner-firm was associated in tax evasion, hence, it is liable to pay tax generally and independently u/s 7(3) of the VAT Act. A notice was also issued to the petitioner-firm for imposition of sales tax under the Central Sales Tax Act on the same facts on the basis of the information received from the income tax Department.

4. The petitioner submitted reply and pleaded that it is not at all responsible in regard to tax evasion of other firm. It independently submitted tax returns of the transactions of firm and those returns have been accepted. The petitioner demanded certain documents. Thereafter vide letter dated December 2, 2011, the Department supplied the documents to the petitioner in regard to transaction of goods of Rs. 38,50,42,531 from Udi Carrier, statements of banks received from income tax Department, copy of letter of Deputy Commissioner, Anti Evasion Bureau, Gwalior, statements of Chandraprakash Gupta, Gupta Transport Company, Itawa, Rajeev Dixit, M/s. New Dixit Transport Company and Vishwanath Chandel, sales bills of M/s. C.P. Industries, Asha Oil Industries, Hajarilal Sandeep Kumar, and enquiry report of transactions of New Dixit Transport Commission Agent.

5. The petitioner submitted objections and replied to the show-cause notice vide annexure P/9. It pleaded that the assessment of the tax was done by the competent authority for the period April 1, 2006 to March 31, 2007 vide order dated April 23, 2007 or the Assistant Commissioner, Sales Tax, Gwalior, for the period April 1, 2007 to March 31, 2008 vide order of the Divisional Commissioner Sales Tax dated March 30, 2008 and for the period April 1, 2008 to March 31, 2009 vide order of the Additional Commissioner, Sales Tax dated June 22, 2011. The petitioner further pleaded that M/s. Hajarilal and Sandeep Kumar and Asha

Oil Industries are two separate identities and the petitioner-firm was not associated with the aforesaid firm. The petitioner further raised an objection that for the year 2006-07 on the basis of the documents of the Punjab and Sindh Bank and Citizen Credit Cooperative Society, the total sale was shown of Rs. 97,22,70,800, however, after assessment of tax, total sale has been shown as Rs. 59,44,83,900. Hence, in the enquiry report of Anti Tax Evasion Bureau the extra sale of Rs. 37,77,86,900 has been shown and the basis of the aforesaid conclusion is the entries in the bank account of the Punjab and Sindh Bank and the Citizen Credit Cooperative Bank. The aforesaid conclusion is erroneous because the entries are not in regard to sale and the entries are of personal transactions of different identities. It is further submitted that the income tax Department seized the account books in the year 2008 and those have not been returned. Photo copies provided to the petitioner are not readable, hence, the firm is not in position to file proper reply. Similarly for the year 2008-09, on the basis of the entries in Punjab and Sindh Bank, total sale of Rs. 5,12,15,354 has been shown, however, the details of the entries have not been supplied. The petitioner further filed the reply and stated that liability of tax has been determined on the basis of order passed by the income tax Department. Against the aforesaid order, an appeal is pending. The petitioner further pleaded that the petitioner wants to cross-examine the transport agents and transporters. No transporter has mentioned the name of the petitioner. Hence those transporters be called for cross-examination.

6. The revisional authority, Deputy Commissioner, vide its order dated December 24, 2011 (annexures P/1) passed u/s 55A of the VAT Act has held that the petitioner has made total sale of Rs. 1,71,38,70,798 and liable to pay tax of Rs. 6,33,94,832 and consequently, issued a demand in this regard. Similarly vide another order dated December 24, 2011 (annexure P/2) passed u/s 9(2) of the CST Act read with section 55A of the VAT Act, the authority has held that the total sale of Rs. 12,90,00,000 is not an inter-State sale because there was no C form and the petitioner is liable to pay a tax of Rs. 51,60,000.

7. The learned counsel for the petitioner has contended that the authority has no power and jurisdiction to pass the order because it is beyond the period of limitation neither the Government had power to issue the notification to extend the period. He further submitted that the findings of the authority are based on conjunctures and surmises without calculating the real transaction. Hence, it is against the principle of law. In support of his contentions, learned counsel relied on the following judgments:

(i) Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P.,

(ii) State of Kerala Vs. K.T. Shaduli Yusuff etc.,

(iii) State of Kerala Vs. M.M. Mathew and Another,

(iv) K.N. Falgunan and Another Vs. State of Kerala and Others,

(v) Shreyans Industries Limited Vs. State of Punjab and Others,

(vi) Bharat Heavy Electricals Ltd. v. Assistant Commissioner of Commercial Taxes (Int-1), South Zone, Bangalore, [2006) 143 STC 10 (Karn)

(vii) Oagkan Traders Vs. Sales Tax Officer,

(viii) Shaw Wallace and Co. Ltd. Vs. Deputy Commissioner of Commercial Taxes (Assessments-2),

(ix) S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company,

8. Contrary to this, the learned Deputy Advocate-General has submitted that the orders passed by the authority are well within the power and within limitation. He further raised a preliminary objection about the maintainability of the petition on the ground of availability of alternative remedy. The learned Deputy Advocate-General further submitted that the authority has considered all the evidences on record properly and this court has no power to appreciate the findings of facts which are based on cogent reasons. In support of his contentions, the learned Deputy Advocate-General relied on the judgment of the honourable Supreme Court in the case of Union of India (UOI) and Others Vs. SICOM Ltd. and Another,

9. The findings of the authorities are based on the following facts:

(i) The authorities relied on the enquiry report of Anti Evasion Bureau and the record seized from the New Dixit Transport Commission Agent. It has been held that for the year 2006-07 on the basis of the enquiry report of M/s. Dixit Transport Commission Agent, the sale is Rs. 12,90,00,000. Similarly, for the year 2007-08, the sale is Rs. 2,05,00,000 and for the year April 1, 2008 to August 6, 2008, the sale is of Rs. 25,00,000. Similarly the authority has also considered the information in deciding the sale on the basis of the tax fixed by the income tax Department the Department quantified total income as Rs. 66,94,14,821.

(ii) In arriving out of the aforesaid findings, the authority has relied on bank statement of UCO Bank, State Bank of India, HDFC Bank, State Bank of India, Jayendraganj. Hence, the authority has fixed the sale of Rs. 64,79,55,275 for the year 2006-07 on the basis of the findings of the income tax Department. Similarly, for the year 2007-08, the authority has fixed the sale of Rs. 9,60,39,265 on the basis of the findings of the income tax Department and for the year 2008-09 the sale has been fixed as Rs. 58,05,868. Thereafter, the authority has finally fixed the amount of sale, which was escaped from tax as under:

10. From the perusal of the orders of the authority, it is clear that the authority has considered the enquiry report of the New Dixit Transport Commission Agent and assessment of income tax of income tax Department for the years 2006-07, 2007-08 and 2008-09. The authority has calculated the amount of sale which was escaped from tax on the basis of the enquiry report of the New Dixit Transport Commission Agent, which was forwarded by the Anti Evasion Bureau

and the assessment of income tax Department of the petitioner-firm for the year 2006-07, 2007-08 and 2008-09. The petitioner has specifically denied the fact that it had transported the goods from the New Dixit Transport Commission Agent. The petitioner also prayed that it be permitted to cross-examine the transport commission agents and all the entries or documents be verified from the evidence of the New Dixit Transport Commission Agent.

11. It is well-settled principle of law that in the case of evasion of tax, the burden of proof would be on the State as held by the honourable Supreme Court in the case of Haleema Zubair, Tropical Traders Vs. State of Kerala, after quoting the judgment of the honourable Supreme Court in Co-operative Company Ltd. Vs. Commissioner of Trade Tax, U.P., The relevant is as under (page 147 in 19 VST):

11. A provision relating to ''reverse burden'', must be construed having regard to the nature of the statute as the general law is that the burden of proof would be on the State, as has been held by this court in Co-operative Company Ltd. Vs. Commissioner of Trade Tax, U.P., in the following terms (SCC page 487 para 16):

16. In absence of any stipulation made in the contract of sale for the purpose of levy of sales tax or otherwise, the Revenue Authorities must arrive at a finding as to whether there had been any implied condition of transfer, burden of proof where for would be on the Revenue. Consideration of (sic for) a part of goods may be held to be a condition precedent for constituting a sale, but therefor each case must be judged on its own facts.

12. The honourable Supreme Court in the aforesaid case has further held that there is a quite difference between the assessment of income under the income tax Act and assessment under the Sales Tax Act. The honourable Supreme Court has held as under after relying on the earlier decision of the honourable Supreme Court in Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P., (page 149 in 19 VST):

15. The High Court furthermore committed a serious error insofar as it failed to draw a distinction between the assessment under income tax and assessment under sales tax. Whereas income tax is levied on income under the income tax Act irrespective of the sources from which such an income had been derived, sales tax is levied only on the quantum of sales and, therefore, the element of transaction of sale is a prerequisite for levy of sales tax.

This aspect of the matter has been considered by this court in Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P., wherein it was held (SCC page 704, para 7; 39 STC pages 33 and 34):

7. The approach which may be permissible for imposing liability for payment of income tax in respect of the unexplained acquisition of money may not hold good in sales tax cases. For the purpose of income tax it may in appropriate cases be permissible to treat unexplained acquisition of money by the assessee to be the assessee''s income from undisclosed sources and assess him as such. As against

that, for the purpose of levy of sales tax it would be necessary not only to show that the source of money has not been explained but also to show the existence of some material to indicate that the acquisition of money by the assessee has resulted from transactions liable to sales tax and not from other sources. Further, whereas in a case like the present a credit entry in respect of Rs. 10,000 stands in the name of the wife of the partner, no presumption arises that the said amount represents the income of the firm and not of the partner or his wife. The fact that neither the assessee-firm nor its partner or his wife adduced satisfactory material to show the source of that money would not, in the absence of anything more, lead to the inference that the said sum represents the income of the firm accruing from undisclosed sale transactions. It was, in our opinion, necessary to produce more material in order to connect the amount of Rs. 10,000 with the income of the assessee-firm as a result of sales. In the absence of such material, the mere absence of explanation regarding the source of Rs. 10,000 would not justify the conclusion that the sum in dispute represents profits of the firm derived from undisclosed sales''.

13. The honourable Supreme Court further in State of Kerala Vs. M.M. Mathew and Another, has held as under in regard to legal proof of evasion of tax:

In the instant case held that the charges of submission of untrue returns, failure to keep true and complete accounts and fraudulent evasion of tax were not brought home to the accused. The evidence raised a strong suspicion against the accused but strong suspicion, strange coincidences and grave doubts could not take place of legal proof.

14. The honourable Supreme Court in the case of State of Kerala Vs. K.T. Shaduli Yusuff etc., , has held as under in regard to opportunity to prove the correctness and completeness of the return by the assessee and right of the assessee to cross-examine the witnesses (pages 484 and 485 in 39 STC):

...The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the books of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to an opportunity to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessees in both cases applied to the Sales Tax Officer for summoning Hazi Usmankutty and other wholesale dealers for cross-examination, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.

15. The honourable Supreme Court in the case of Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P., has held as under in regard to the approach for imposing liability for payment of income tax in sales tax case (page 33 in 39 STC).

The approach which may be permissible for imposing liability for payment of income tax in respect of the unexplained acquisition of money may not hold good in sales tax cases...

16. From the aforesaid judgment of the honourable Supreme Court that the payment of income tax in respect of the unexplained income may not hold good in sales tax case because in sales tax case the authority has to hold the actual amount of sale, which has been concealed by the assessee. But in the present case, the authority has relied on the assessment, in fixing the amount of sale, of the tax fixed by the income tax Department for the year 2006-07, 2007-08 and 2008-09. Similarly, the authority has relied on the report of the New Dixit Transport Commission Agent. The petitioner specifically requested to summon the witnesses and permit the petitioner to cross-examine the witness of the transport authority, but the authority has not examined the aforesaid witness. It has simply relied on the statement of the transport agent before the Anti Evasion Bureau, which were the part of the report of Anti Tax Evasion Bureau.

17. From the perusal of the orders passed by the authority it is clear that the authority has fixed the amount of sale, which was escaped from income, on the basis of the report submitted by the Anti-Evasion Bureau. However, the authority was performing the quasi-judicial function. Hence, it was obligatory on the part of the authority to arrive on its own findings and the authority was obliged to adopt the procedure, which is known to the law.

18. From the perusal of the findings of the orders, as discussed above, in our opinion, the procedure adopted by the authority is against the law and perverse.

The authority relied on the income tax returns and the findings of the enquiry report of New Dixit Transport Commission Agent without assessing the contents independently. Hence, there is no independent assessment by the authority in regard to total amount of sale. Hence, it is perverse and against the law.

19. The honourable Supreme Court in the case of Agarwal Oil Refinery Corporation, Kanpur Vs. The Commissioner of Trade Tax, U.P. Lucknow, has held in regard to power of the court in interfering with the findings of facts. In the aforesaid facts, the honourable Supreme Court specifically held that if the findings recorded by the authorities are perverse or based on apparently erroneous principle, which are contrary to law, or the authority has arrived on the findings by a flagrant abuse of judicial power or gross violation of justice, then it could be interfered by the High Court. In our opinion, in the present case, the findings recorded by the authority are perverse based on erroneous principle and contrary to law. Hence, this court has power to interfere the aforesaid findings of fact under article 226 of the Constitution of India and writ is maintainable even if the remedy of appeal has not been availed of by the petitioner. The honourable Supreme Court in the case of Union of India (UOI) and Others Vs. Mangal Textile Mills (I) P. Ltd. and Others, quoted the observations of the earlier judgment of the honourable Supreme Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and has held as under in regard to alternative remedy:

7. We find substance in the contention of the learned counsel for the appellants. It is true that power of the High Court to issue prerogative writs under article 226 of the Constitution is plenary in nature and cannot be curtailed by other provision of the Constitution or a statute but the High Courts have imposed upon themselves certain restrictions on the exercise of such power. One of such restrictions is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction under article 226 of the Constitution. But again, this rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertaining a writ petition but is a rule of discretion to be exercised depending on the facts of each case.

8. On this aspect, the following observations by the Constitution Bench of this court in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, , which still holds the field, are quite apposite (AIR pages 1509-10, para 10):

''10. The passages in the judgments of this court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and that in a matter which is thus preeminently one of the discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court.''

9. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, enumerating the contingencies in which the High Court could exercise its writ jurisdiction in spite of availability of the alternative remedy, this court observed thus (SCC page 110, para 7):

''7....that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged''.

20. As per the judgment of the honourable Supreme Court quoted in para 9 in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , where there is violation of principle of natural justice and where the proceedings are wholly without jurisdiction, the writ is maintainable. In the present case as discussed above, there is violation of principle of natural justice and the proceedings are against the law and well-settled principle of law. Hence, in our opinion, this is a fit case, where this court can exercise writ jurisdiction in the interest of justice.

21. The arguments advanced by the learned counsel for the petitioner that the assessment is beyond the power of authority and beyond the period of limitation could not be accepted because in the present case, the assessment is for block period, which is in accordance with section 55A of the VAT Act and it was introduced vide Amendment Act No. 26 of 2007. The section is as under:

55A. Special provision for assessment of cases relating to detection and prevention of tax evasion.--Notwithstanding anything contained in any other provisions of this Act,--

(a) where a requisition is made under clause (a) of sub-section (3) of section 55 or an inspection is conducted under clause (b) of the said sub-section against a dealer, the dealer, subject to such restrictions and conditions and in such manner as may be prescribed, may opt to pay in lieu of tax, interest and penalty payable under the Act, a lump sum amount equal to twice the amount of evasion of tax agreed to by the dealer relating to the block period on the basis of evidence found as a result of requisition or inspection, of books of account or other documents and such other materials or information as is available with the

Commissioner and relatable to such evidence, at the time of requisition or inspection;

(b) Once the dealer has exercised the option under clause (a), he shall not have any right to challenge the evasion of tax agreed to by the dealer in any forum:

(c) The Commissioner shall proceed to assess the amount of tax evaded by the dealer during a block period in accordance with the provisions of this Act, and the amount in respect of which option to pay lump sum has been exercised under clause (a) shall be excluded from the amount of evasion of tax assessed under this clause:

(d) the total evasion of tax relating to the block period shall be assessed irrespective of the year or years to which such tax relates and irrespective of the fact whether regular assessment for any one or more of the relevant years is pending or not;

(e) the assessment under this section shall be in addition to the regular assessment in respect of each year included in the block period:

(f) the total evasion of tax relating to the block period shall not include the tax assessed in any regular assessment or the tax paid alongwith the returns filed by the dealer, as tax of such block period;

(g) the tax assessed under this section shall not be included in any regular assessment of any year included in the block period:

(h) where the dealer proves to the satisfaction of the Commissioner that any part of the tax referred to under this section relates to a year for which the year has not ended or the date of filing returns has not expired, and the transactions relating to such tax are recorded on or before the date of requisition or inspection, in the books of account or other documents maintained in the normal course relating to such years, the said tax shall not be included in the block period: (i) the provisions of section 20 shall mutatis mutandis apply to the assessment made under this section.

Explanation.--For the purpose of this section the expression ''block period'' shall mean the period comprising of six years preceding the year in which the requisition was made or the inspection was conducted and shall include the period up to the date of requisition or inspection.

22. From the Explanation of the aforesaid section, it is clear that the block period shall mean the period comprising of six years preceding the year in which the requisition was made or the inspection was conducted. In such circumstances, vide notification dated April 6, 2011 (annexure P/10) filed by the petitioner along with the petition the Government has power to extend the period of limitation because at that time, the period of limitation was not expired. Hence, the contention of the learned counsel for the petitioner in this regard is hereby rejected. Consequently, the petition of the petitioner is disposed of with the

following directions:

(1) That the impugned orders dated December 24, 2011 (annexure P/1 and P/2) are hereby quashed, however, it is hereby clarified that the authorities are at liberty to make assessment of the petitioner in accordance with law after following the procedure as mentioned in the order.

No order as to costs.

