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(2012) 02 OHC CK 0022

In the Orissa High Court

Case No : Writ Petition (C) No. 31894 of 2011

G.E.T. Power Private Limited and Another — APPELLANT

Vs

State of Odisha and Others — RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Central Sales Tax (amendment) Act, 1969 — Section 6(2)
Central Sales Tax Act, 1956 — Section 3, 3(b), 6(2), 7, 9
Constitution of India, 1950 — Article 286
Income Tax Act, 1961 — Section 139(1), 139(5), 143(3)
Orissa Value Added Tax Act, 2004 — Section 33, 33(4), 39, 40, 42

Citation : (2012) 50 VST 363

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : V. Raman, M/s. B.P. Moahanty, N. Paikray, A.N. Ray, K.K. Sahoo, P.K. Mishra and J.J. Pradhan, for the Appellant; M.S. Raman, Additional Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—In this writ petition challenge has been made to the legality and validity of the assessment order dated October 29, 2011 (annexure 10) passed u/s 43 of the Orissa Value Added Tax Act, 2004 (for short, "the OVAT Act") for the period October 1, 2008 to January 31, 2011 in which opposite-party No. 2, Sales Tax Officer, Bhubaneswar I, Circle I (for short, "the assessing officer") held that the petitioner is not entitled to avail of exemption from payment of tax u/s 6(2) of the Central Sales Tax Act, 1956 (for short, "the CST Act") claimed in its returns and treating the said transactions, as intra-State sale and further disallowing exemption claimed in respect of some local sales raised a demand of Rs. 91,38,83,592 and issued corresponding demand notice of even date urging various facts and legal contentions. Alternatively, it is prayed to remand the matter to the assessing officer with a direction to pass a de novo assessment order under the OVAT Act after giving opportunity to the petitioner

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to submit certificates obtaining from the contractee agencies to avail of benefit of Notification No. 629/2008 dated December 23, 2008 in respect of transactions claimed to be exempted from payment of tax u/s 6(2) of the CST Act in its returns. Mr. V. Raman, learned Senior Advocate appearing for the petitioners, submitted that petitioner No. 1 is a private limited company and registered as a dealer under the provisions of OVAT Act and CST Act. The self-assessment of petitioner No. 1-company completed u/s 39 of the OVAT Act, which was reopened by way of scrutiny of periodical returns for the period from October 1, 2008 to January 31, 2011. Opposite-party No. 2, Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar, without having any jurisdiction imposed tax on sales which is beyond the legislative competence of opposite-parties.

2. According to Mr. V. Raman, the dispute is only in relation to supply of materials under contracts entered into by the petitioner with PGCIL and NTPC for execution of rural electrification projects under the Rajeev Gandhi Grameen Vidyut Yojna (for short, "RGGVY Scheme"). Under these contracts, the petitioner supplies specified goods and equipments to PGCIL and NTPC, the movement of which is occasioned from a State other than Odisha. In terms of the said supply contracts, the parties contemplated sale of goods in-transit u/s 6(2) of the CST Act. Accordingly, the petitioner in its periodical returns has disclosed the supply made to PGCIL and NTPC as exempted turnover u/s 6(2) of the CST Act. Subsequently, a notice in form VAT 401 issued by the Deputy Commissioner of Commercial Taxes, Enforcement Range, Bhubaneswar (for short, "the STO, Enforcement") under sub-rule (1) of rule 75 was served on the petitioner to produce various accounts. In response to the said notice, the petitioner appeared on February 25, 2011 and produced the relevant documents. On February 28, 2011, the STO, Enforcement Range forwarded tax evasion report bearing No. 89(10-11) to opposite-party No. 2 alleging that taxable sales turnover of the petitioner has escaped assessment and resulted in evasion of VAT. On the basis of such report O. P. No. 2-STO issued notice in Form VAT 307 u/s 43 of the OVAT Act read with rule 50(1) of the OVAT Rules for reopening the assessment of petitioner No. 1 for the period starting October 1, 2008 to January 31, 2011. In response to the said notice, the petitioner appeared before opposite-party No. 2 and filed relevant documents on August 7, 2011 and written submission on August 29, 2011. On October 29, 2011, opposite-party No. 2-STO passed the impugned order, arriving at a finding that the sales claimed as exempted by petitioner No. 1 u/s 6(2) of the CST Act are local sales and therefore denied the benefit of exemption. Opposite-party No. 2 came to the conclusion that the sales transaction treated by the petitioner as "in-transit sales" do not qualify for the exemption u/s 6(2) of the CST Act and therefore such sales shall be liable to tax at appropriate rates under the OVAT Act. It was further argued that actions of opposite-parties are without any jurisdiction insofar as the sales effected by the petitioner qualifies as inter-State sale u/s 3 of the CST Act. The movement of goods in the present case is occasioned from a different State to the State of Odisha on account of the contract between the petitioner and PGCIL or NTPC, as the case may be. As per

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the mandate of section 9(1) of the CST Act such sale is liable to be taxed under this Act and the tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced. The impugned order is contrary to the provisions of article 286 of the Constitution of India. The procedure, statutory form and the documents unequivocally demonstrate that the sale is exempted from the payment of CST u/s 6(2) of the CST Act. The order of assessment has been passed without following the principles of natural justice.

3. It was alternatively argued that even assuming for the sake of argument that the petitioner is not entitled to the exemption u/s 6(2) of the CST Act, the sale transaction, has expressly been exempted from levy of OVAT under Notification No. 629/2008. In case of any adverse finding, opposite-party No. 2 should allow two months time to obtain requisite certificate. Opposite party No. 2 denied benefit of exemption under the notification issued u/s 17A of the OVAT Act on the limited ground that petitioner No. 1-company is not in a position to submit the requisite certificates which were required to be issued by PGCIL and NTPC. In the meantime, the petitioner has approached the PGCIL and NTPC for issuance of required certificates and collected the same and accordingly requested opposite-party No. 2 to pass an order u/s 81 of the OVAT Act. The opposite-party No. 2 did not accept such petition in spite of request. The sales effected by the petitioner are completely exempted from OVAT Act under the exemption notification which was issued in exercise of the power vested u/s 17A of the OVAT Act wherein the State Government in public interest can exempt the sale. Placing reliance on a judgment of the Madras High Court in the case of State of Tamil Nadu v. Arulmurugan and Company [1982] 51 STC 381 (Mad), it was submitted that the statutory form C can be filed by an assessee even at the appellate stage. Placing reliance on another judgment of the Madras High Court in the case of Ramco Cement Distribution Co. P. Ltd., Rajapalayam v. Deputy Commercial Tax Officer, Rajapalayam [1974] 33 STC 180 (Mad)], it was submitted that in a matter where the statute itself gave exemption and if that exemption has been inadvertently not claimed by the petitioner, it is certainly a case where the taxing authorities also should equitably view the situation and render justice. Non-acceptance of rectification of mistake is arbitrary and unfounded in law. Both levy and collection of tax is without authority of law.

4. Further placing reliance on the decisions of the honourable Supreme Court in the cases of Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another, , Atlas Cycle Industries Ltd. v. State of Haryana AIR 1979 SC 1149, V.C. Shukla and Others Vs. State (Delhi Administration), The Quarry Owners Association Vs. The State of Bihar and Others, Bank of India and Others Vs. O.P. Swaranakar etc., The Prohibition and Excise Supdt., A.P. and Others Vs. Toddy Tappers Coop. Society, Marredpally and Others, , Veneet Agrawal Vs. Union of India (UOI) and Others, K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka, it was submitted that though section 17A says that the notification shall be laid before the assembly for 14 days, if the same is not followed that

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would not affect the members of the public governed by such notification. Laying down of notification as required u/s 17A is not mandatory, but directory. Placement of notification before the State Legislature is for a limited purpose. Therefore, the impugned notification is a valid notification having force with effect from December 23, 2008 when it is published in the Orissa Gazette, though the same was laid before the Orissa Legislative Assembly on July 7, 2009. Referring to paragraph 3 of the additional affidavit, it was submitted that no sale or purchase was effected prior to date of notification dated December 23, 2008. Concluding his argument, Mr. V. Raman submitted that the matter should be remanded to the assessing officer with a direction to give opportunity to the petitioner to produce before it necessary certificates obtaining from the contractee agencies, as required under notification in question.

5. Mr. M. S. Raman, learned Additional Standing Counsel appearing for the Revenue, acceded to the prayer of the petitioner and suggested to set aside the assessment order and remand the matter back to the assessing officer with a direction to give opportunity to the petitioner to submit certificate as required under Notification No. 629/2008 dated December 23, 2008 to avail of exemption. Further placing reliance on the judgment of the honourable Supreme Court in the case of A. P. Ismail (Anwar Traders) v. State of Kerala reported in [2006] 144 STC 476 (Ker), he supported the contention of the petitioner and submitted that force of the statute from the date of its publication does not depend upon the laying. A simple laying requirement, providing no affirmative procedure is only directory and does not affect the validity of law or its coming into force.

6. At this juncture, the question arises as to whether a writ court should pass the order allowing prayer of the petitioner particularly when the same is accepted and supported by the learned counsel appearing for the Revenue without making any reference to the reasons/grounds assigned by the assessing officer in the impugned order of assessment to disallow the claim of exemption made by the petitioner in its returns. Admittedly, Mr. M. S. Raman, learned counsel appearing for the Revenue, has not thrown any light on the assessment order. On the other hand, the stand taken by Mr. M. S. Raman supporting the case of the petitioner runs contrary to the case of the assessing officer. In absence of any assistance from the side of learned counsel appearing for the Revenue for proper adjudication of the issues involved in the present case with reference to the contentions urged by the learned counsel appearing for the petitioner, it is felt necessary to know about the reasons assigned by the assessing officer for raising such huge demand and the stand taken by the petitioner before the assessing officer, and to what extent the writ court can resolve the controversy.

7. The case of the assessing officer in a nutshell is that the self-assessment u/s 39 of the OVAT Act was completed earlier accepting the exemption claimed by the dealer-petitioner in its periodical returns filed for the periods from October 1, 2008 to January 31, 2011. Subsequently, a tax evasion report bearing No. 89(10-11) dated February 28, 2011 was received from the STO, Enforcement,

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Office of the Deputy Commissioner of Commercial Taxes, Enforcement Range, Bhubaneswar vide their letter No. 143 dated February 28, 2011, which prima facie established the escapement of taxable sales turnover and evasion of VAT. Therefore, statutory notice in VAT-307 was issued as per the provisions under rule 50(1) of the OVAT Rules, 2005 and served upon the dealer-petitioner. After availing of several opportunities the petitioner-company caused appearance and produced the books of accounts and documents including the list of claim of exempted sale u/s 6(2) of the CST Act, utilization statement of Government way-bills and declaration form C, statement of purchase, sale, payment of VAT and ET. The petitioner was allowed to go through the contents of allegations lodged in the tax evasion report at the stage of assessment.

8. The contents of the tax evasion report as narrated in the assessment order in a nutshell is that the dealer received advance payment from the contractee-agencies before the movement of goods from the vendor and the vendor issued sales invoices in favour of the dealer describing it as the consignee on the body of the invoices before movement of goods. There is no endorsement of sale by transfer of documents of title to goods. Upon arrival of goods inside the State, the representative of the dealer receives the goods under consignment by endorsing on the back of the LR that the goods are received in good condition and then representative of the purchasing agency verifies the goods and upon satisfaction receives the goods from the dealer''s representative again by endorsing on the back of the LR that the goods are received in good condition which violates sections 3(b) and 6(2) of the CST Act because (a) identity of the ultimate buyer is known before movement of goods; (b) part consideration in the form of advance of 15 per cent has been received before movement of goods; (c) the movement of goods in course of inter-State trade comes to an end once the representative of the dealer receives the goods inside Odisha; (d) the agency verifies the goods and then takes delivery of the goods from the dealer which is nothing but another transaction of sale within the State of Odisha exigible to VAT.

9. The contentions of the dealer before the assessing officer, inter alia, are as follows :

(i) That the Government of India introduced a rural electrification scheme throughout India under "Rajiv Gandhi Grameen Vidyut Karan Yojana" (RGGVY) for the purpose of connecting electric line to rural area and for the said purpose Government of India appointed different public sector undertakings such as PGCIL, NTPC and NHPC, etc., as nodal agencies for implementation of the said scheme.

(ii) That pursuant to the above scheme of Government of India, PGCIL and NTPC awarded two divisible contracts such as supply of equipments and erection and commissioning of electrification work. Under supply contract, the goods like PSC polls, conductors and transformer, etc., have been purchased and transported from outside the State of Odisha to PGCIL/NTPC and certain goods have been purchased within the State of Odisha and supplied to PGCIL/NTPC for use in the

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implementation of rural electrification project under the RGGVY Scheme.

(iii) That pursuant to the orders received, the dealer-company supplied above-mentioned goods by purchasing within the State of Odisha and also effected transit sales and claimed exempt from payment of tax u/s 6(2) of the CST Act.

(iv) That since the dealer-company is a registered dealer it has been filing returns under the OVAT and OET Acts as well as the CST Act and it has claimed exemption from payment of tax in respect of sales in course of inter-State sale falling u/s 6(2) of the Central Sales Tax Act. The goods in question coming from outside the State of Odisha are being used in the RGGVY Scheme, in terms of the contracts awarded by the PGCIL and NTPC, etc.

(v) That in the instant case, the outside suppliers dispatched the goods through road transport wherein it has been clearly mentioned the name of the consignor, name of the consignee, i.e., Executive Engineer, Electrical Stores Division, GRIDCO Colony, CESCO, Cuttack 12 as the case may be which was also accompanying the Government way-bill by the respective consignee. The physical delivery of goods was taken up by the respective consignee named in the L. R. Hence, at no point of time the dealer has taken the delivery of goods.

(vi) That the respective consignee will issue C forms and outside suppliers will also issue E 1 forms which fulfils the conditions stipulated u/s 6(2) of the CST Act.

(vii) That the consignor of goods has paid Central sales tax to the respective State as per section 9 of the CST Act from where the movement of goods commence.

(viii) That the allegation of reporting officer is not tenable in the eye of law which has been well-settled in law and no matter in which State the property in goods passes, it may pass in either State but it is an inter-State sale.

(ix) That under the similar facts and circumstances the judgment of the honourable apex court in the case of A & G Projects and Technologies Ltd. v. State of Karnataka reported in [2009] 19 VST 239 (SC) is applicable in the instant case.

(x) That since the dealer fulfils the conditions of section 6(2) of the CST Act the supply of goods used in RGGVY Scheme for rural electrification work does not attract the levy of tax under the OVAT Act.

(xi) That assuming that the sales in-transit claimed by the dealer is not accepted then entire sales will be exempted from payment of tax under OVAT Act, 2004 in view of the notifications of the Finance Department vide No. 629/2008 dated December 23, 2008.

10. The opposite-party No. 2-assessing officer rejected the petitioner''s claim of exemption u/s 6(2) of the CST Act and under Notification No. 629/2008 dated December 23, 2008, inter alia, for the following reasons :

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(i) That the dealer has entered into separate and divisible contract with PGCIL and NTPC for both (a) execution of works contract of electrification in rural area under RGGVY Scheme; and (b) for supply by way of sales of equipments and gets an advance of ten per cent for works contract and 15 per cent for supply of equipments.

(ii) The claim of sales made out of the purchases effected from outside vendors and claimed as exempted sales under sections 3(b) and 6(2) of the CST Act does not fulfil the conditions stipulated in the Act in the following manner :

(a) The dealer gets advance of 15 per cent before supply of goods and before issuance of purchase order;

(b) The dealer places the order with the vendor and goods are inspected by the representative of the dealer-company and then supplies to the agencies;

(c) After the goods reach at boarder check gate the waybills of the agencies are utilized;

(d) Once the goods reached within territory of Odisha one representative of the dealer receives the goods from the transporter by endorsing on the backside of the LR as "received goods in good condition.

(e) After receipt of the goods by the representative of the dealer inside the State of Odisha one representative of the agencies conduct the verification of the goods under consignment in terms of the packing list and after satisfaction of verification by the representative of the agency the goods are delivered to the agency by the dealer.

(f) Then after receipt of the goods by the agency, the dealer raises tax invoice in favour of the agency;

(g) The agency does not issue any exemption certificate against transaction made in case of execution of works contract;

(h) There is no mention of endorsement of sale by transfer of documents of title to goods;

(i) After arrival of goods inside the State under consignment the representative of the dealer receives the goods by endorsing on the back of LR that the goods received in good condition and then the representative of the agency verifies the goods and upon satisfaction receives the goods from the dealer''s representative again endorsing on the back of the LR that the goods received in good condition, which signifying the said delivery to be another transaction of sale within the State of Odisha exigible to tax under the OVAT Act and OET Act.

(j) The irregularity of claim of exemption being detected, the dealer in its written submission at the assessment stage stated that it will submit the required exemption certificate against the transactions made u/s 6(2) of the CST Act from the agencies that goods so supplied and utilized in the RGGVY Scheme, but failed

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to produce the same in course of assessment proceedings. Hence, the claim of exempted sales claimed u/s 6(2) of the CST Act is not acceptable and the dealer is liable to be taxed in the State rate on such supplies of goods.

(k) Further placing reliance upon judgment of this court in the case of Voltas Limited v. State of Orissa [2008] 15 VST 401 (Orissa), the learned assessing officer has held that in case of the petitioner all the following conditions to avail of exemption u/s 6(2) of the CST Act have not been satisfied.

(i) A movement of goods in pursuance to a prior sale is the first prerequisite to a subsequent sale for exemption which means the first sale must have been a sale in the course of inter-State trade or commerce.

(ii) Subsequent sale must have taken place, during the movement under the first sale which means the second sale must have been effected before the journey of goods ends or before the goods reach their destination.

(iii) The subsequent sale is effected by a transfer of documents of title to the goods.

(iv) The subsequent sale must be one that comes within clause (b) of section 3.

(v) Subsequent sale must be either to (a) Government or (b) to a registered dealer u/s 7 of the Central Sales Tax Act.

(vi) The dealer effecting subsequent sale has to produce before assessing authority forms E-I and E-II as the case may be, obtained from the dealer when he purchased the goods and also produced form C or D as the case may be obtained from the dealer or a person to whom the subsequent sale is effected.

(l) On the basis of above findings, the learned assessing officer disallowed the claim of exemption to the tune of Rs. 233,12,66,900.40 u/s 6(2) of the CST Act and treated the entire sale as intra-State sales and taxed under appropriate rate of tax under the State Act.

(m) While rejecting the petitioner''s claim of exemption under Notification No. 629/2008 dated December 23, 2008 in respect of transactions of sale claimed to be exempted u/s 6(2) of the CST Act in its return, the assessing officer further held that the agencies did not issue any tax exemption certificate against the transactions covered under inter-State sale as in case of execution of works contract of rural electrification.

11. Mr. V. Raman, learned Senior Advocate appearing for the petitioner, has attacked the order of assessment basically on two grounds. His first ground of attack is that though the sale transactions in question reflected in returns are inter-State in nature and the same being "in-transit sales" are exempted from payment of tax u/s 6(2) of the CST Act, the assessing officer has illegally disallowed such exemption. Alternatively it is argued that even if the sales in question are treated as intra-State sales the same are also exempted from payment of the OVAT under Notification No. 629/08 dated December 23, 2008

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which claim of the petitioner should have been allowed by the assessing officer.

12. Undisputedly, in the instant case, in its returns, the dealer-petitioner has claimed exemption from payment of tax u/s 6(2) of the CST Act on the ground that the sales in question are "in-transit sales" and such claim of the dealer had been accepted in the self-assessment. The completed self-assessment u/s 39 of the OVAT Act was, reopened on the basis of tax evasion report submitted by the STO, Enforcement, on the ground that the dealer is not entitled to avail of exemption u/s 6(2) of the CST Act and the transactions in question are intra-State sale and taxable under OVAT Act. In paragraph Nos. 10 and 11 above, we have noted the rival contentions urged by the dealer in support of its claim and the reasons given by the assessing officer for rejecting such claims respectively. The dispute is whether the transaction in question is sale in course of inter-State trade or intra-State trade. According to the petitioner, it is inter-State sale for the reasons stated in the writ petition as well as grounds taken before the assessing officer as stated in paragraph 10 above. On the contrary, the assessing officer''s case is that the transaction in question is intra-State sale for the reasons stated in paragraph 11 above and therefore, the dealer is not entitled to get exemption u/s 6(2) of the CST Act. A perusal of the rival contentions taken in paragraphs 10 and 11 by the petitioner and the assessing officer in support of their respective claims shows that pure disputed questions of fact are involved. For example specific finding of the assessing officer is that once the goods reaches within the territory of Odisha one representative of the dealer receives the goods from the transporter by endorsing on the backside of the LR as "received the goods in good conditions". After receipt of the goods by the dealer inside the State of Odisha one representative of the agencies conducts the verification of the goods under consignment in terms of the packing list and after verification by the representative of the agency, goods are delivered to the agency by the dealer.

13. Further in assessment order, the assessing officer has referred to the report of the STO, Enforcement, wherein it is reported that the dealer has submitted photocopy of one sample sale invoice issued by M/s. NMPA Electricals (P) Ltd., bearing No. 428/ dated October 4, 2010, related copy of LR No. 284B/2010-11 dated October 4, 2010 of M/s. Deepak Transport Company, On the backside of the transporters LR copy there is an endorsement or receipt of the goods by the representative of GET Private Ltd., dated November 6, 2010 and another endorsement of receipt of the goods after physical verification by the representative of the Assistant Engineer, GRIDCO on November 24, 2010. As against the above findings/ report of the assessing officer and STO, enforcement a dispute was raised by the petitioner-dealer contending that the outside suppliers dispatch the goods through road transport wherein the name of the consignor and the name of the consignee Executive Engineer, Electrical Stores Division, GRIDCO Colony, CESCO, Cuttack 12, as the case may be, has been clearly mentioned. The goods were accompanied by the Government way-bills of the respective consignee and physical delivery of the goods were taken by the consignee named in the LR. At no point of time, the dealer has taken physical

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delivery of the goods.

14. The above rival contentions involve serious disputed questions of fact which go to the root of the case being fundamental/germane to decide the nature of the transaction, i.e., whether sale transactions in question are "inter-State" or "intra-State" in nature and the same can only be effectually adjudicated by fact-finding authority rather than by this court in exercise of its writ jurisdiction.

15. Assessing officer has already recorded its findings on facts and materials available on record. The assessing officer having taken a view on the basis of various factual aspects involved in the transactions that the sales in question are intra-State sales, there is no reason to remand the matter to him to examine the issue once again. The petitioner is required to avail of the alternative remedy of appeal which is a substantive statutory right. Under the OVAT Act there is provision for first appeal and second appeal. The first appellate authority being fact-finding authority the factual controversy involved in the case can be effectually adjudicated by the appellate authority. Needless to say that appeal is continuation of assessment and appellate authority is empowered to re-appreciate the facts and material evidence available on record. Therefore, it is a fit case where the petitioner should approach the first appellate authority for appropriate relief.

16. There are also some other disputed questions of fact which are required to be adjudicated by the appellate authority, who is a fact-finding authority. For example, from the assessment orders it reveals that in course of examination of accounts the assessing officer has noticed that in respect of local sales reflected in its return the dealer has claimed exemption from payment of tax in respect of supply of goods under RGGVY Scheme to the tune of Rs. 54,66,81,510, but it has furnished the required certificate of exemption from competent authority to the tune of Rs. 42,73,60,710.56 only and failed to furnish certificate of exemption for balance amount of Rs. 11,93,20,799.94 which has been taxed, under appropriate rate of tax, i.e., at 12.5 per cent. Whether there was sufficient reason for not furnishing the certificate of exemption as required under the statute for the balance amount before the assessing officer during reassessment proceeding u/s 43 of the OVAT Act initiated in the year 2011 for the period October 1, 2008 to January 31, 2011 is also a disputed question of fact since the petitioner''s case is that no reasonable opportunity was afforded to it to produce the balance declaration forms whereas according to assessing officer sufficient opportunity was afforded to the petitioner before passing the impugned assessment order. This disputed question of fact can only be adjudicated by the appellate authority.

17. The alternative prayer of the petitioner is that assuming that the sales in question are intra-State sales such sales are exempted from payment of tax under Notification No. 629/2008 dated December 23, 2008. Though the second prayer of the petitioner appears to be very simple it is not so. Had it been a case of the petitioner that in its return it claimed exemption under Notification No.

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629/2008 dated December 23, 2008, in respect of sales in question but for some sufficient reason it could not be able to collect necessary certificates from the contractee agencies as required under the said notification and for non-production of such certificates the assessing officer denied its claim of exemption from payment of tax, we may not have any hesitation to remand the matter to the assessing officer to redo the assessment giving opportunity to the petitioner to produce necessary certificate from the contractee agencies. But here is a case where the petitioner in its returns claimed exemption u/s 6(2) of the CST Act and produced statutory forms C and E-I to avail of the exemption and the same was accepted. Subsequently, only when in a tax evasion report it was alleged that the petitioner was not entitled to avail of such exemption from payment of tax and wrongly/erroneously such exemption was claimed and allowed and on examination of books of account and other evidence, the assessing officer also came to the same conclusion, the petitioner is trying to change its stand which is contrary to its claim made in the regular returns. It is also not even a case where the Department all along denying the petitioner''s claim of exemption made in the regular returns u/s 6(2) of the CST Act for which the petitioner changes its stand. It is a case where the Department accepted the petitioner''s claim of exemption u/s 6(2) of the CST Act in self-assessment. Subsequently, on the basis of tax evasion report the reassessment proceeding was initiated u/s 43 of the OVAT Act in the year 2011 to assess the turnover escaped from self-assessment for the period from October 1, 2008 to January 31, 2011. Now, therefore the question arises as to whether the petitioner is entitled to claim exemption from payment of tax on a ground not reflected in its return filed under the OVAT Act.

18. The assessment u/s 43 of the OVAT Act is meant for assessment of the turnover escaped from original assessment. It is only after a dealer is assessed under sections 39, 40 and 42 for a tax period, if the assessing officer on the basis of any information in his possession is of the opinion that a whole or any part of the turnover of the dealer in respect of such tax period has escaped assessment or been under-assessed or been assessed at a rate lower than a rate at which it is assessable or that a dealer has been allowed wrongly any deduction from his turnover or input-tax credit of which he is not eligible, the assessing officer upon giving the dealer a reasonable opportunity of being heard and making such enquiry as he deems necessary has to proceed to assess the best of his judgment the amount of tax due from the dealer. That is why there is a provision u/s 43 for imposition of penalty, which is twice the amount of tax additionally assessed u/s 43. The purpose behind it is to prevent the assessee from making any false/wrong claim of turnover, exemption/ deduction, etc., in its return and to ensure filing of true/correct return. On this background, the second prayer of the petitioner is to be considered.

19. Needless to say, under the scheme of direct or indirect tax, an assessee is statutorily required to disclose its income, sales, purchases, as the case may be, in its return within the statutory time along with the claim in respect of various

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exemptions/deductions permitted under the statute. After filing the return, if the petitioner discovers any omission/wrong in its return, statute provides to revise its return, within the statutory period. Under sub-section (4) of section 33 of the OVAT Act, the dealer is entitled to file revised return. Section 33(4) runs as follows :

(4) If any dealer, having furnished returns under sub-section (1) or sub-section (2),--

(a): discovers any omission or error in any return so furnished, or

(b) where there is requirement for adjustment of the sale price or tax or both, as the case may be, in relation to sale of any goods, makes such adjustment by way of issue of credit note or debit note, as the case may be, he may file a revised return within three months following the tax period to which the original return relates.

20. There is no provision under the OVAT Act to enable an assessee to revise its claim made in the returns in any manner other than by way of filing revised return within statutory period as provided u/s 33(4) of the OVAT Act.

21. The honourable Supreme Court in the case of Goetze (India) Limited Vs. Employees State Insurance Corporation, held that the assessing officer has no power to entertain fresh claim made by the assessee after filing of the original return other than by filing of revised return.

22. This court in the case of Orissa Rural Housing Development Corporation Ltd. v. Assistant Commissioner of income tax [2012] 343 ITR 316 (Orissa) (W. P. (C) No. 4554 of 2011) disposed of on December 15, 2011 held that the learned assessing officer is fully justified in completing the assessment u/s 143(3) of the income tax Act on the basis of the original return filed u/s 139(1) without taking into consideration the revised statement filed on December 8, 2008 in absence of revised return as contemplated u/s 139(5) of the income tax Act and the CIT is also justified in confirming the view of the learned assessing officer.

23. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following of other course is not permissible. (See Taylor v. Taylor [1876] 1 Ch. D. 426, AIR 1936 253 (Privy Council) , Ram Phal Kundu Vs. Kamal Sharma, and Indian Banks'' Association, Bombay and Others Vs. Devkala Consultancy Service and Others, .

24. Further, at the time of scrutiny of the return under any of the provisions of the statute the assessee is required to adduce evidence in support of his particulars disclosed in the return/revised return validly filed under the statute

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including the claim of exemption/deduction.

25. In the instant case, the dealer-petitioner in its periodical return claimed exemption u/s 6(2) of the CST Act. Such claim of the petitioner had been accepted by the Department while completing self-assessment. It is only on the basis of the tax evasion report proceeding u/s 43 of the OVAT Act has been initiated to assess the escaped assessment with the provision for penalty. It is nobody''s case that any revised return has been filed as required under the statute claiming exemption under Notification No. 629/2008 dated December 23, 2008 in respect of transactions claimed to be exempted u/s 6(2) of the CST Act in its periodical returns.

26. Therefore, the question arises as to whether the assessee can change its stand in course of reassessment proceeding u/s 43 of the OVAT Act when its claim of exemption u/s 6(2) of the CST Act is disallowed on the basis of a tax evasion report and the dealer is entitled to take altogether a different stand and to submit new evidence in support of its changed stand.

27. In view of the above, if the petitioner fails to establish its claim of exemption u/s 6(2) of the CST Act made in its return, the appellate authority while dealing with its alternative prayer claiming exemption under Notification No. 629/2008 dated December 23, 2008 shall adjudicate various issues arise out of such claim keeping in mind our observations made hereinbefore.

28. In the fact-situation, it is open to the petitioner to approach the first appellate authority challenging the impugned assessment order (annexure 10) if so advised taking all its contentions both factual and legal. If any such appeal is filed within two weeks from today, the appellate authority is directed to adjudicate all the issues raised before it, after affording opportunity of hearing to the appellant and pass order in accordance with law. With the abovesaid observations/directions, the writ petition is dismissed.

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