
(2010) 08 AP CK 0090

In the Andhra Pradesh High Court

Case No : Writ Petition No. 18725 of 2010

Jasper Industries Pvt. Ltd. (Previously known as B. Seshagiri Rao and Sons Industries Ltd) "Golden Edifice" **APPELLANT**

Vs

Assistant Commissioner (CT) (Audit) Punjagutta Division and Others **RESPONDENT**

Date of Decision : 27-08-2010

Acts Referred:

Andhra Pradesh Value Added Tax Act, 2005 — Section 3A, 4(8), 9
Constitution of India, 1950 — Article 226

Citation : (2010) 08 AP CK 0090

Hon'ble Judges : V.V.S. Rao, J;Ramesh Ranganathan, J

Bench : Division Bench

Advocate : Lakshmi Kumaran and Sridharan, for the Appellant; G.P. for Commercial Taxes, G.P. For Revenue, Ponnam Ashok Goud, Assistant Solicitor General for Respondents 5 and 6, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The Petitioner company entered into two contracts, one on 03.2.1995 and the other on 18.2.2004, with M/s. Coromandal Fertilisers Limited, manufacturers of fertilisers, who also produced large quantity of gypsum slurry as a byproduct. Under the first contract, the Petitioner is required to provide one hydraulic excavator to facilitate loading operations for the purpose of lifting phospo gypsum from the pond in contractee premises and dump the same into the trucks of third party buyers identified by the manufacturer. Under the second contract, the Petitioner is required to lift phospo gypsum in the pond, transport and dump it to the Railway siding within the factory premises and when the Railway rakes are ready, the gypsum has to be loaded into the wagons by means of wheel loaders owned and manned by the Petitioner. Indisputably the contracts are being extended from time to time. The Petitioner is a registered dealer with the second Respondent, who issued notice of assessment of Value Added Tax (VAT) in Form 305A on 05.11.2008 proposing to tax: (i) income from material

handling Rs. 3,20,57,633/- and miscellaneous income of Rs. 2,25,86,512/- - both at 12.5%. The Petitioner was requested to file objections. Statedly the Petitioner filed objections on 27.11.2008. The issue appears to be pending even now. Two years thereafter, on 15.7.2010, first Respondent issued a show cause notice (SCN), as to why tax should not be imposed on material handling charges at 12.5% as proposed in the earlier notice of November 2008. The Petitioner company did not submit objections, but approached this Court assailing the SCN.

2. The Senior Counsel for the Petitioner sustains the writ petition urging that (i) first Respondent has no jurisdiction as there is no "transfer of right to use the goods" as contemplated u/s 4(8) of Andhra Pradesh Value Added Tax Act, 2003; (ii) that first Respondent has a pre-determined mind to mulct the Petitioner with unconstitutional levy and collection; (iii) that the impugned SCN is arbitrary; and (iv) that tests laid down by the Supreme Court for considering a transaction as "deemed sale" are absent. He placed reliance on *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, and *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, Per contra, the Special Standing Counsel for Commercial Taxes placing reliance on *State of U.P. v. Anil Kumar Ramesh Chandra Glass Works* (2006) 145 STC 656: (2005) 11 SCC 451 submits that when the authority does not suffer from inherent lack of jurisdiction, the writ petition is not maintainable and the Petitioner can avail all remedies.

3. It is axiomatic that, ordinarily, a writ petition against a SCN would not be entertained. The power of judicial review is exercised under Article 226 of Constitution of India in relation to a decision making process. At the stage of SCN, there is no decision as such and, therefore, except in extraordinarily peculiar cases, writ jurisdiction is not entertained. We may refer to precedents in this regard.

4. In *State of Uttar Pradesh Vs. Brahm Datt Sharma and Another*, the Supreme Court held.:

The High Court was not justified in quashing the show-cause notice. When a show-cause notice is issued to a Govt. servant under a statutory provision calling upon him to show-cause, ordinarily the Govt. servant must place his case before the authority concerned by showing cause and the Courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show-cause notice is to afford opportunity of hearing to the Govt. servant and once cause is shown it is open to the Govt. to consider the matter in the light of the facts and submissions placed by the Govt. servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature. The High Court in our opinion ought not to have interfered with the show-cause notice.

(emphasis supplied)

5. The High Court of Madras in *Medopharam Vs. Superintendent of Central Excise, Madras*, held as under:

... In the writ petition, the Petitioner/Appellant has challenged the show cause notice. The learned Single Judge has gone into the merits of the case and dismissed the writ petition. We are of the view that whenever a show cause notice is issued under the provisions of Central Excises & Salt Act, which provided for adjudicatory forum and also right of first appeal to the Collector and second appeal to the CEGAT, exercise of Jurisdiction under Article 226 of the Constitution is not warranted. In such cases, the exercise of jurisdiction under Article 226 would amount to by-passing the statutory remedy provided under the Central Excises and Salt Act, which is not just and proper.

6. In *Union of India (UOI) Vs. Bajaj Tempo Limited and Others*, the Supreme Court laid down as under:

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.

We are satisfied that the question of excise duty which has been raised in these matters can be decided only after recording the findings of fact in each case in respect of goods or items given by the appropriate authority.

These matters must, therefore, go back to the Assistant Collector for decision of questions of fact. It would be open to the Assessee in each case to submit its reply to the adjudicating authority within four weeks. The adjudicating authority would then proceed to decide the same in accordance with law. The further remedy thereafter would be available to the aggrieved party in accordance with law. These appeals are allowed in the manner indicated above.

7. In *The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another*, it was held:

This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ Petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and

such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court.

(emphasis supplied)

8. In *Commissioner of Customs and Central Excise and Others Vs. Charminar Nonwovens Ltd.*, the Supreme Court observed as under:

The matter relating to commodity classification, whether it falls under one heading or the other or attracts higher or lower duty has to be decided on facts arising in each case. Even though the decision may have been taken earlier at one point of time but on further investigation/discovery of new fact or the law having changed, as is the stand in the present case, the matter has to be re-examined. It is not at all proper for the High Court to interfere in such matters at the stage of issue of the show-cause notice. We, therefore, set aside the order made by the High Court and remit the matter to the authority concerned for adjudication. It shall be open to the Respondent to file reply to the show-cause notice as it deems fit, if not already filed within a period of one month from today or such further time as may be allowed by the adjudicating authority. We direct the adjudicating authority to dispose of the matter thereafter in accordance with law.

9. In *Anil Kumar Ramesh Chandra Glass Works*, for the period from 1982-'83 to 1984-'85, the competent authority issued SCN under U.P. Trade Tax Act, 1948, to the Respondents, the manufacturers of glass bangles, asking for explanation as to why they should not be held liable for payment of sales tax on account of sales made by them for the period covered by the notices. The SC Ns were assailed in a writ petition in January 1986. During its pendency in February 1988, eligibility certificate granted to Assessee was cancelled. It was assailed before Sales Tax Tribunal unsuccessfully. The revision petitions were filed in the High Court, which were allowed in November 1994. The writ petition filed challenging the SC Ns was also allowed in February 2000. Even though eligibility certificate was for the period after issue of SC Ns, the appeals filed by the State were allowed by the Supreme Court, observing as under:

In any event, this Court had repeatedly held that Article 226 should not be permitted to be invoked in order to challenge show cause notices unless accepting the fact in the show cause notices to be correct, either no offence is disclosed or the show cause notices are ex facie without jurisdiction. That could not be said as far as the eight show

cause notices in question are concerned. The High Court, therefore, should not have interfered and should have left the Respondents to pursue their remedy by way of an appeal u/s 9 of the Act from the order of assessment which, according to the High Court, had admittedly been passed before the writ petition had been filed by the Respondent.

10. The Petitioner does not dispute the legal position. The Senior Counsel

however contends that the impugned SCN is non-est in the eye of law as there is no "transfer of right to use the goods", which can be deemed sale. He has taken this Court to the two contracts and after perusing various clauses we are not able to countenance the submission that the impugned notice is non-est. Indisputably the second Respondent issued notice in Form VAT 305A dated 05.11.2008 proposing to levy VAT on the income from material handling. A reply was promptly submitted by the Petitioner. This only shows that in relation to the disputed levy, the Petitioner has already submitted to the jurisdiction of the assessing authority. In such an event when a further SCN is issued in continuation of the first one - the impugned SCN refers to the earlier SCN as well - it cannot be said that the first Respondent suffers from inherent lack of jurisdiction.

11. The officers appointed by the State Government, in accordance with Section 3A of the VAT Act, acting within the scope of the powers conferred on them, are required to perform the functions under the Act. The jurisdiction of the first Respondent to issue the notice is not in serious dispute. What is contended is that the taxable event is not in existence and, therefore, the SCN is without jurisdiction. The Petitioner is admittedly a VAT dealer. Whether there is a taxable event by reason of the works undertaken by the Petitioner, under the first and second contracts, is certainly a matter for enquiry. By reading of various clauses in the two agreements, a firm conclusion cannot be arrived at. Therefore, in the first instance, it is for the authority who issued SCN to determine the matter. At this stage, no interference is called for. We leave the liberty to Petitioner to submit explanation with all the pleas high-lighted in this writ petition. The first Respondent shall then decide the issues, in the light of the law declared by the apex Court.

12. The writ petition, for the above reasons, is dismissed in limine.