

(2011) 12 OHC CK 0016

In the Orissa High Court

Case No : Writ Petition (C) No. 27427 of 2011

M/s. Bhushan Power and Steel Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Central Sales Tax (Orissa) Rules, 1957 — Rule 10, 12, 12(1), 12(2), 12(3)
Constitution of India, 1950 — Article 14
Orissa Value Added Tax Act, 2004 — Section 2(6), 39, 40, 42, 42(7)

Citation : (2012) 47 VST 466

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

Bench : Division Bench

Advocate : Venkat Raman, M/s. Satyajit Mohanty, R.R. Swain and S. Pattnaik, for the Appellant; R.P. Kar, Standing Counsel (Revenue), for the Respondent

Judgement

B.N. Mahapatra, J.—In this writ petition, challenge has been made to the Audit Assessment Order dated 22.9.2011 passed by opposite party No. 3-Deputy Commissioner of Sales Tax (LTU), Sambalpur Range, Sambalpur (for short, "Assessing Authority") under Rule 12(3) of Central Sales Tax (O) Rules, 1957 [for short, "CST (O) Rules"] for the period 06.07.2006 to 31.03.2009 on the ground that such order of assessment is illegal, arbitrary, violative of principle of natural justice and Article 14 of the Constitution of India. Petitioner's case in nutshell is as follows:

Petitioner is a Public Limited Company incorporated under the provisions of the Companies Act, 1956 and a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") as well as Central Sales Tax Act, 1956 (for short, "CST Act") having TIN No. 21241702847. The Audit Assessment proceedings commenced on 05.10.2010 basing on tax audit visit report dated 30.9.2010. This report covers the period from 06.07.2006 to 31.03.2009 suggesting for assessment and demand of tax to the tune of Rs. 2.98 crores. According to the provisions of Rule 12(3)(h) of the CST(O) Rules, the assessment proceeding on the basis of tax audit report has to be completed within a period

of six months from the date of receipt of the audit visit report provided if for any reason the assessment is not completed within six months the Commissioner may on the merit of each case allow such further time not exceeding six months for completion of the assessment proceedings. The petitioner believed that the assessment order would be passed by the opposite party No. 3 before 06.04.2011, i.e., within the period of limitation of six months as provided under Rule 12(3) of the CST(O) Rules. However, the Assessing Authority did not pass any assessment order by that date. While the matter stood thus, the petitioner was served with a notice on 25.06.2011, for the first time, informing that the opposite party No. 3 would also be relying on another report dated 02.5.2011 to complete the assessment proceedings. Pursuant to the said letter, the petitioner appeared on 14.7.2011 and sought for copies of the aforementioned report and reiterated its request again on 22.7.2011. Since the copy of the said report dated 2.5.2011 was not supplied to the petitioner, it approached this Court in W.P.(c) No. 21697 of 2011 which was disposed of on 29.8.2011 with the direction that the Assessing Authority shall specify the required documents needed for completion of the proceedings in terms of Annexure-18 and the petitioner shall furnish the same within one week. Thereafter, the petitioner would be entitled to obtain certified copies of the tax evasion report along with its Annexures on deposit of requisite cost and the Assessing Authority shall give reasonable opportunity of hearing to the petitioner. On 12.9.2011, as directed by the Assessing Authority, the petitioner appeared before him and the Assessing Authority directed the petitioner to deposit a sum of Rs. 24,540/- for obtaining a copy of the tax evasion report along with the Annexures. After deposit of required fees the certified copy of the fraud case report dated 2.5.2011 in 20 volumes comprising of more than 4000 pages were supplied to the petitioner-Company on 14/15.09.2011. The assessment proceeding was adjourned to 21.9.2011. On 21.9.2011, the petitioner appeared before the Assessing Authority and prayed for time. Since the petitioner did not produce its books of account/ documents on 21.09.2011, the learned Assessing Authority passed the impugned order of assessment on 22.9.2011 assessing tax to the tune of Rs. 26,95,22,434.69 and penalty amounting to Rs. 52,65,09,727.38 and issued demand notice for a total amount of Rs. 78,97,64,591.00. Hence, the present writ petition.

2. Mr. V. Raman, Learned Counsel appearing on behalf of the petitioner submits that the assessment order passed under Rule 12(3) of the CST(O) Rules is illegal, arbitrary and violative of principle of natural justice and Article 14 of the Constitution of India. The Assessing Authority has not supplied to the petitioner the list of specific documents as mentioned in Annexure-18 pursuant to the order of this Court dated 29.8.2011 passed in W.P.(C) No. 21697 of 2011. The Assessing Authority on 12.9.2011 had sought for freight payments details and weighment slips which were already produced before opposite party No. 3. No reasonable opportunity of hearing was afforded to the petitioner as directed by this Court in the earlier writ petition. It is settled law that if any person is likely

to be affected by the use of any material against him that is to be brought to his notice for rebuttal. This is the requirement of natural justice. The impugned order of assessment has been passed in gross violation of principles of natural justice as the learned Assessing Authority supplied the report dated 02.5.2011 on 14.09.2011 in 20 volumes containing 4000 pages and completed the assessment within 8 days, i.e., on 22.9.2011. The impugned assessment order has not been passed on the basis of the audit visit report dated 30.09.2010 but on the basis of the Vigilance report dated 02.05.2011 and thus the assessment order is one falling under Rule 12(4) of the CST(O) Rules read with Section 43 of the OVAT Act. In that event, the period of limitation is 5 years and it is not six months or one year as applicable to audit assessment. The order of assessment passed under Rule 12(3) of the CST(O) Rules is ab initio void as the same has not been passed exclusively on the basis of the Audit Visit Report dated 02.05.2011. The assessment order suffers from the vice of arbitrariness inasmuch as the same has been made by generalizing the entire claim of stock transfer on the strength of some transactions in complete disregard to the law laid down by the Supreme Court in *Tata Engineering and Locomotive Co. Ltd. vs. Asst. Commissioner of Commercial Taxes, Jamshedpur and others*, (1970) 26 STC 354, wherein it has been held that each and every transaction ought to be examined and it is not permissible to generalize the entire claim of branch transfer in respect of all the transactions on the basis of some transactions. This conduct of the Assessing Authority shows mala fide intention to harass the petitioner-Company by saddling with exorbitant tax and penalty. Since there is no allegation of concealment or misrepresentation or mens rea by the petitioner-Company, imposition of penalty of two times of the tax assessed is illegal, arbitrary and contrary to law and hence the same is liable to be quashed. Rule 12(3) and Rule 12(4) of the CST(O) Rules provide for a very harsh procedure of fixing tax liability which is violative of Article 14 of the Constitution of India for which the said Rules are liable to be quashed. The mandatory provision under Rule 12(3) of the CST (O) Rules for levy of penalty at the rate of twice the tax assessed is the most arbitrary and unguided power conferred upon the Assessing Officer and it violates the fundamental right guaranteed under Article 14 of the Constitution of India. Every transaction of the petitioner-Company is duly reflected and documented in the books of account. The alleged investigation reports have attempted to state that the transactions of stock transfer are not actually stock transfer, but interstate sales which is not correct.

3. It is further argued that law is well settled that once it is a stock transfer, the petitioner is under an obligation to reverse the entire input tax credit. In the present proceedings, the petitioner has reversed an input tax credit of Rs. 7.55 crores for the relevant transactions. The petitioner has effected stock transfer and collected the declaration Form "F" and duly filed with the Department. Instead of effecting stock transfer, had the petitioner effected interstate sales against declaration Form "C", the total tax for the disputed transaction would have been Rs. 13.08 crores, and in that case, the petitioner would have utilized

entire amount of CST by utilizing input tax credit. Thus, there is no revenue loss to the State of Orissa. In addition to the reversal of ITC in the State of Orissa, the petitioner had paid local VAT in all States across the country and there is no loss to the government exchequers in any manner. On the contrary, there is surplus contribution of revenue by the petitioner-Company.

4. M. R.P. Kar, Learned Counsel appearing for the Revenue supporting the order of assessment passed by the Assessing Authority vehemently argued that there is no infirmity or illegality in the impugned assessment order. The assessment having been completed under Rule 12(3) of the CST(O) Rules read with Section 42 of the OVAT Act, the Assessing Authority has no option but to complete the assessment during the period of limitation provided in Rule 12(3) of the CST(O) Rules. The Assessing Authority has not committed any illegality in utilizing the fraud reports submitted by the Vigilance wing in the audit assessment proceedings. With the above submissions, Mr. Kar vehemently urges for dismissal of the writ petition.

5. In the alternative, Mr. Kar makes a prayer that in case the Court comes to the conclusion that reasonable opportunity of hearing has not been afforded to the petitioner-Company and/or that the Assessing Authority has no power/authority to utilize the report submitted by the Vigilance Department in making audit assessment, the matter may be remanded to the Assessing Authority to make the assessment afresh and in that event the petitioner-Company should give an undertaking that it will not take any technical points with regard to the limitation or validity of the re-assessment proceedings. Pursuant to the said submission of Mr. Kar, the petitioner files an affidavit inter alia stating that it agrees to file a statutory appeal in terms of Section 77 of OVAT Act against that part of the impugned order levying tax on the strength of audit visit report dated 30.9.2010. The petitioner further undertakes to appear before opposite party No. 3 to complete the adjudication proceeding as this Court may be pleased to set aside that portion of the assessment order passed on the strength of vigilance report dated 2.5.2011. The petitioner also undertakes by way of affidavit that at no point of time the bar of limitation of one year fixed in terms of Rule 12(3)(h) of the CST (O) Rules shall be raised or agitated in the adjudication proceedings after the impugned assessment order dated 22.9.2011 is set aside.

6. On the above rival contentions, the questions that fall for consideration by this Court are as follows:-

(i) Whether the Assessing Authority is empowered to utilize any adverse report other than the audit visit report against a dealer while making audit assessment under Rule 12 (3) of the CST(O) Rules read with Section 42 of the OVAT Act?

(ii) If the answer to question No. (i) is in affirmative, whether the period of limitation as provided in Rule 12(3) of the CST (O) Rules read with Sec. 42 of the OVAT Act for making audit assessment is applicable to such assessment?

(iii) Whether the Assessing Authority is justified in utilizing the fraud report dated

2.5.2011 submitted by the Vigilance Department while making audit assessment on the basis of the audit visit report dated 30.9.2011 ?

(iv) Whether the impugned assessment order has been passed in gross violation of principles of natural justice and disobedience to the order passed by this Court on 29.8.2011 in W.P.(C) No. 21697 of 2011 ?

(v) Whether the Assessing Authority is justified to pass the impugned assessment order by generalizing the entire claim of stock transfer on the strength of findings arrived at on scrutinizing some transactions of stock transfer?

7. Question nos.(i) to (iii) being interlinked, they are dealt with together. The scheme of VAT Act provides various types of assessment for the purpose of determination of tax liability under the OVAT Act. Such assessments are self assessment (Section 39), provisional assessment (Section 40), audit assessment (Section 42), escaped assessment (Section 43), assessment of dealer who being liable to pay tax fails to register (Section 44), assessment of casual dealer (Section 45). Similarly, in Rule 12 of the CST (O) Rules provides various types of assessment including audit assessment and assessment of escaped turnover. In the present case, we are concerned with the audit assessment and assessment of escaped turnover.

8. Section 2(6) of the OVAT Act defines "Audit Assessment" which means an audit assessment made u/s 42. Under the CST (O) Rules, Audit Assessment is provided in Rule 12(3) of the CST (O) Rules. According to Rule 12(3)(a), where the tax audit conducted under Rule 10 results in detection of suppression of purchases or sales or both, erroneous claims of exemption or deductions under the Act and the rules made thereunder, evasion of tax or contravention of any provisions of the Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under sub-rule (1) or (2), serve on such dealer a notice in Form IV along with a copy of the "Audit Visit Report", directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirement of clause (b) of Rule 12(3) of CST(O) Rules.

9. An audit assessment is required to be completed within a period of six months from the date of receipt of the audit visit report. If, for any reason, the assessment is not completed within the time specified, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months from completion of the assessment proceeding. However, no order of assessment shall be passed after expiry of one year from the date of receipt of the audit visit report. Thus, the maximum period to complete the audit assessment provided under Rule 12(3)(h) read with Section 42 (7) of the OVAT Act is one year from the date of receipt of the audit visit report. Perusal of the Rule 12(3) and Sec. 42 makes it clear that audit assessment has to be completed on the basis of the materials available in the audit visit report. Therefore, no other material can be

utilized while making audit assessment. Thus, there was no scope for the Assessing Authority to utilize any materials other than the materials available in the audit report while making the audit assessment under Rule 12(3) of the CST (O) Rules read with Section 42 of the OVAT Act. Since in the present case the impugned assessment order has been passed under Rule 12(3) of the CST(O) Rules, the assessment is certainly an audit assessment and the Assessing Authority is obliged under the statute to make the audit assessment on the basis of materials available in audit report. The Assessing Authority cannot travel beyond the materials available in the audit report. Utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment and the same is not permissible.

10. Apart from the above, under the scheme of assessment, audit assessment under Rule 12(3) of CST(O) Rules read with Section 42 of OVAT Act and escaped assessment under Rule 12(4) of the CST(O) Rules read with Section 43 of OVAT Act are separate and distinct.

So far as assessment of escaped turnover is concerned, it is only where, after a dealer is assessed under sub-rules (1), (2) or (3) of Rule 12 for any tax period, the Assessing Authority, on the basis of any information in his possession is of the opinion that the whole or any part of the turnover of the dealer in respect of any period or periods has escaped assessment or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed to set off of input tax audit in excess of the amount admissible in clause (c) of the sub-rule (3) of Rule 7 of these Rules, he shall serve a notice in Form IV(a) on the dealer for the purpose of making assessment on escaped turnover. Sub-rule (e) of Rule 12(4) of the CST(O) Rules provides that no order of assessment shall be made under Rule 12(4) after expiry of 5 years from the end of the tax period in respect of which the tax is assessable.

11. Thus, the audit assessment and assessment of escaped turnover cover separate and distinct field for the purpose of assessment. While in the case of audit assessment, the maximum period of limitation is one year, in the case of assessment of turn over escaping assessment, the period of limitation is 5 years. Both the assessments have to be completed within the respective period of limitation as provided under the statute. As stated above, while making audit assessment as provided under Rule 12 (3), the Assessing Authority has no power/ authority to utilize any material against the dealer other than the materials available in the audit report. Therefore, the period of 5 years provided under the statute for completing assessment of escaped turnover cannot be restricted to one year as provided in case of audit assessment.

12. 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 other course is not permissible. (See Taylor v. Taylor, (1876) 1 Ch.D.426; AIR 1936 253 (Privy Council) Indian Banks' Association, Bombay and Others Vs. Devkala Consultancy Service and Others, .

13. In view of the above, the Assessing Authority is not justified in utilizing the fraud report dated 2.5.2011 against the petitioner-dealer while making audit assessment on the basis of audit visit report dated 30.9.2010.

14. Question No. (iv) is as to whether the impugned assessment order has been passed in gross violation of principles of natural justice and disobedience to the order passed by this Court on 29.8.2011 in W.P.(C) 21697 of 2011. Undisputedly, the petitioner was supplied with a copy of the report dated 2.5.2011 on 14.9.2011 and the assessment was completed on 22.9.2011, i.e., within 8 days from the date of supply of copy of the report.

It is stated by the learned Senior Advocate for the petitioner that the said report comprises of 20 volumes covering more than 4000 pages. There is no denial by the Revenue to such statement. From the assessment order we also find that one of the reasons given by the Assessing Authority to complete the assessment hurriedly is that since the extended period of assessment allowed under Rule 12(3)(h) of the CST(O) Rules by the C.C.T.(O), Cuttack vide Memo No. 4940 dated 23.3.2011 was going to be expired on 30.9.2011, he did not find any alternative but to complete the assessment ex parte to the best of his judgment. This being the position, it is difficult to accept that reasonable opportunity was afforded to the petitioner to rebut the charges raised against him in the report dated 2.5.2011. Further, this Court vide order dated 29.8.2011 passed in W.P.(C) No. 21697 of 2011 has categorically observed that the Assessing Authority shall provide reasonable opportunity of hearing to the petitioner and if he does not participate, the Assessing Authority shall proceed in the matter in accordance with law.

Reply to a fraud report is a vital piece of material to be considered for making assessment. Giving opportunity to the dealer to file his reply to the fraud report is not an empty formality. The causal approach to such requirement is not at all permissible. The dealer has a right to receive the report submitted by any person/ agency against him, if the same is intended to be utilized against him. He has also right to avail a fair opportunity to meet, explain and controvert such allegation before he is condemned. Both dictate providing of reasonable opportunity as well as to follow principles of natural justice, which requires that before the Assessing Officer comes to his own conclusion, the dealer should have an opportunity to reply the report submitted against him.

15. In the instant case, giving 8 days time to explain the allegations raised against the dealer-petitioner in the report dated 02.05.2011 which is in 20

volumes covering more than 4000 pages cannot be said that reasonable opportunity of being heard has been afforded to the petitioner before passing the impugned order of assessment.

16. Question No. (v) is as to whether the Assessing Authority is justified in passing impugned assessment order by generalizing the entire claim of stock transfer on the strength of findings arrived at on scrutinizing some transactions of stock transfer. Needless to mention that while examining the transaction of stock transfer, the Assessing Authority is required to examine each and every transaction to find out the genuineness of the claim. Law is well settled that the onus of proving always lies upon the taxing authority to show that a particular sale or sales is/are exigible to tax under the Act. Therefore, while examining the genuineness of the stock transfer, each individual transaction has to be examined. The Hon''ble Supreme Court in Tata Engineering and Locomotive Co. Ltd. (supra), held as follows:

Another serious infirmity in the order of the Assistant Commissioner was (a matter which even the Advocate-General quite fairly had to concede) that instead of looking into each transaction in order to find out whether a completed contract of sale had taken place which could be brought to tax only if the movement of vehicles from Jamshedpur had been occasioned under a covenant or incident of that contract the Assistant Commissioner based his order on mere generalities. It has been suggested that all the transactions were of similar nature and the appellant's representative had himself submitted that a specimen transaction alone need be examined. In our judgment this was a wholly wrong procedure to follow and the Assistant Commissioner, on whom the duty law of assessing the tax in accordance with law, was bound to examine each individual transaction and then decide whether it constituted an inter-State sale exigible to tax under the provisions of the Act.

17. In view of the above legal position and our observations made hereinabove supra, we set aside the impugned order of assessment dated 22.9.2011 passed for the period from 6.7.2006 to 31.03.2009 with a direction to the Assessing Authority to pass the Audit Assessment order afresh exclusively on the basis of Audit visit report within a period of four weeks from the date of appearance of the petitioner-dealer before him for this purpose which is fixed to 20.12.2011. If the petitioner-dealer is aggrieved of the audit assessment order it may prefer statutory appeal. On the date of appearance of the petitioner on 20.12.2011, the Assessing Authority shall serve notice on the petitioner-dealer in the prescribed form for the purpose of making assessment under Rule 12(4) of CST(O) Rules. Needless to mention that the Assessing Authority shall complete the assessment under Rule 12(4) of CST(O) Rules after affording reasonable opportunity of hearing to the petitioner-dealer and shall examine petitioner's claim of branch transfer keeping in mind the judgment of the Hon''ble Supreme Court in Tata Engineering Locomotive (P) Ltd. (supra). With the above observations/directions the writ petition is disposed of.