
(2014) 02 JH CK 0055

In the Jharkhand High Court

Case No : W.P. (T) Nos. 1612, 1613 and 1614 of 2013

M/s. Padam Kumar Jain

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Jharkhand Value Added Tax Act, 2005 — Section 13, 23, 24, 35, 35(5)
Wealth Tax Act, 1957 — Section 5(1-A)

Citation : (2014) 02 JH CK 0055

Hon'ble Judges : R. Banumathi, C.J.; S. Chandrashekhar, J

Bench : Division Bench

Advocate : Ananda Sen, Advocate for the Appellant; Mokhtar Khan, ASGI for the Union of India and Mr. Ajit Kumar, AAG for the State, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, C.J. and Shree Chandrashekhar, J.—The assessee namely M/s. Padam Kumar Jain has filed W.P.(T) No. 1614 of 2013 with respect to demand raised for the assessment year 2011-12, W.P.(T) No. 1612 of 2013 with respect to demand raised for the assessment year 2010-11 and W.P.(T) No. 1613 of 2013 with respect to demand raised for the assessment year 2009-10. Since a common question of law has been raised in all the three writ petitions, they were heard together and are disposed of by a common order.

2. In these writ petitions, the petitioner-assessee has challenged the vires of Rule 64D of the Mineral Concession Rules, 1960 and has sought quashing of orders dated 31.01.2013 passed separately for the different assessment years.

3. Though, in the writ petitions, notification dated 10.12.2009 has been challenged and a declaration has been sought that the Central Government by virtue of substitution of Rules 64D of the Mineral Concessions Rules, 1960 has got no authority to fix sale price of Iron Ore which is a de-controlled item, the

learned counsel for the petitioner during the course of argument submitted that the petitioner is not pressing those prayers at this stage and he confined his argument only to the question of violation of the principles of natural justice and prayed for remand of the matter to the Assessing Authority for a fresh decision in the matter.

W.P.(T) No. 1614 of 2013

4 By order dated 05.06.2012, the assessee was directed to appear for verification of the data received from the Mining Department, Chaibasa. Thereafter, the case was fixed on 27.06.2012, 10.10.2012, 17.10.2012, 19.10.2012 and 28.01.2013. On 31.01.2013, the time-petition filed by the assessee was rejected and the Assessing Officer proceeded to calculate tax and interest on the concealed sale price. By order dated 31.01.2013, an amount of Rs. 11,54,29,178.03/- as tax and Rs. 10,25,78,370.86/- as interest, totalling Rs. 21,80,07,548.89/- for assessment year 2011-12 was calculated which the assessee was directed to pay by 16.02.2013.

W.P.(T) No. 1612 of 2013

5. On 05.06.2012, a notice was issued to the assessee for producing record and thereafter, the case was fixed on 13.06.2012, 27.06.2012, 20.07.2012 and 28.01.2013. On 31.01.2013, the time-petition filed by the assessee was rejected and the Assessing Officer proceeded to calculate tax and interest on the concealed sale price. By order dated 31.01.2013, an amount of Rs. 10,48,70,269.30/- as tax and Rs. 11,97,72,500.77/- as interest, totalling Rs. 22,46,42,770.07 for assessment year 2010-11 was calculated which the assessee was directed to pay by 16.02.2013.

W.P.(T) No. 1613 of 2013

6. On 24.05.2011, a notice was issued to the assessee for producing record and thereafter, the case was fixed on 10.01.2012, 15.02.2012, 25.05.2012, 13.06.2012, 27.06.2012, 06.11.2012 and 28.01.2013. On 31.01.2013, the time-petition filed by the assessee was rejected and the Assessing Officer proceeded to calculate tax and interest on the concealed sale price. By order dated 31.01.2013, an amount of Rs. 1,96,56,611.85/- as tax and Rs. 2,59,86,358.63/- as interest, totalling Rs. 4,56,42,970.48 for assessment year 2009-10 was calculated which the assessee was directed to pay by 16.02.2013.

7. We have heard Mr. Ananda Sen, learned counsel appearing for the petitioner and Mr. Ajit Kumar, learned Additional Advocate-General appearing for the respondent-State and perused the documents on record.

8. Mr. Ananda Sen, the learned counsel for the assessee has submitted that, there is a special procedure prescribed u/s 35 of the Jharkhand Value Added Tax Act, 2005 for assessment of the amount of tax due from a registered dealer or a dealer liable to be registered under the Act. Sub-section (1) to (5) of Section 35 deals with assessment and self-assessment of the amount of tax whereas, Sub-

section (7) of Section 35 provides that if the prescribed authority is satisfied that goods have been sold at a price higher than shown by the dealer, the prescribed authority may determine value of the goods at the time of the sale and proceed to assess the tax on such price. It is submitted that before initiating a proceeding under Sub-section (7) of Section 35 of the Act the prescribed authority is required to record his reasons and before the prescribed authority records his satisfaction and proceeds to determine the value of the goods and tax thereon, a reasonable opportunity of being heard has to be afforded to the assessee. Referring to Section 40 of the Act, it is submitted that Sub-section (1) of Section 40 contemplates five specific instances in which the prescribed authority can proceed to determine amount of tax due from the dealer. It is further submitted that Sub-section (1) of Section 40 deals with "turn over" of the dealer in respect of any period whereas, Sub-section (2) of Section 40 is a provision which provides imposition of interest thereon.

9. It is submitted that the proceeding under Sub-section (7) of Section 35 and Section 40(2) of the Act are two different proceedings. Sub-section (7) of Section 35 of the Act is a proceeding to determine the value of goods at the time of sale and if the Assessing Officer finds that the value of goods shown is much less of the actual sale price, the Assessing Officer may proceed to assess the tax on such price. It is submitted that before initiating the proceeding under Sub-section (7) of Section 35 of the Act, the prescribed authority is required to record his reasons and no order shall be passed without giving proper opportunity of hearing. Whereas, Sub-section (2) of Section 40 of the Act relates to imposition of interest and it provides that the prescribed authority shall, however, give an opportunity of hearing to the dealer by an order in writing and direct that the dealer shall in addition to any tax payable to, pay by way of interest. It is submitted that in each proceeding at every stage there is a requirement of giving a notice and opportunity of hearing. The impugned order is a composite order passed u/s 35(7) and 40(2) of the Act which is not permissible in law and there is no concept of giving a single notice for both the proceedings. The proceeding u/s 35(7) and the proceeding u/s 40(2) are proceedings absolutely different in nature and therefore, separate notices are required to be given to the assessee. It is further submitted that no notice u/s 35(7) was ever issued to the assessee. The order dated 28.01.2013 would indicate that the Assessing Officer on his own came to a conclusion that the assessee has shown a lesser sale price with a view to pay lesser amount of VAT and therefore, notice u/s 40(2) was ordered to be issued. On 31.01.2013 an application seeking one month's time was moved by the assessee however, it was rejected and the Assessing Officer proceeded to pass an order u/s 35(7) and 40(2) of the Act. It is thus contended that the order dated 31.01.2013 has been passed without giving proper opportunity of hearing to the assessee and therefore, the impugned order was passed in gross violation of the principles of natural justice.

10. Mr. Ajit Kumar, the learned Additional Advocate-General has raised a preliminary objection to the maintainability of the writ petition on the ground of

alternative remedy of statutory appeal provided under the JVAT Act, 2005. It is submitted that on perusal of data received from the Mining Office and sale details furnished in returns, it was noticed that in comparison to prevalent market price and the sale price as shown in the sale invoices by the assessee and average sale price as determined by Indian Bureau of Mines, the Iron Ores have been shown by the assessee to have been sold at a much lower selling price. The matter thus, became concealment of actual sale price by under-pricing and therefore, the Respondent-Authority issued notices which were duly served upon the petitioner however, the petitioner did not produce books of account for verification and therefore, the respondent passed order on 31.01.2013, after providing sufficient opportunity to the petitioner.

11. The learned Additional Advocate-General has further submitted that in the present case there is no requirement of issuing a fresh notice for proceeding u/s 35(7) of the Act as it was in continuation of pending proceeding u/s 35 of the Act. It is submitted that sufficient opportunities were afforded to the assessee and several dates were fixed however, the assessee did not produce any evidence in support of the sale price claimed by the assessee and therefore, on the basis of available documents and evidence on record, the Assessing Officer passed the impugned order dated 31.01.2013 in all the cases.

12. Having appreciated the contentions of both the parties, we are inclined to hold that in the present case, there was no requirement of issuing separate and fresh notices u/s 35(7) and 40(2) of the JVAT Act, 2005 to the assessee. It is not the case of the assessee that the assessment u/s 35(5) of the Act was accepted by the Assessing Officer. Rather, from the proceeding before the Assessing Officer, it appears that the Assessing Officer in the pending proceeding of the self-assessment as filed by the assessee called for data and on verification when it was found that actual sale price was not disclosed, the Assessing Officer proceeded to assess the value of goods u/s 35(7) of the Act. Proviso to Section 35(7) provides that prescribed authority is required to record reason and afford opportunity of being heard to the dealer. In the present case the proceeding before the Assessing Officer discloses that when it was found that the sale price as disclosed by the assessee in the return and the data received from the Department of Mines, Chaibasa were not in conformity and the assessee had intentionally paid less VAT by showing lesser sale price, the Assessing Officer proceeded to assess the value of goods and consequently tax and penalty u/s 35(7) and 40(2) of the Act respectively. It is thus, clear that a separate notice under Sub-section (7) of Section 35 of the JVAT Act, 2005 was not required to be issued as the Assessing Officer has proceeded u/s 35(7) of the JVAT Act, 2005 in a pending proceeding for the regular assessment. The proceeding before the Assessing Officer clearly indicates that the Assessing Officer has recorded reason and thereafter, proceeded in the matter. In fact, the data from the mining office was called for and the proceeding was initiated after the report of Justice M.B. Shah Commission.

13. With respect to applicability of Section 40(2) of the Act, it is clear from the bare reading of the provision u/s 40(2) that the Assessing Officer is authorized to pass an order u/s 40(2) of the Act during the proceeding u/s 35 or Section 36 or Section 38 or even before the assessee is assessed u/s 35 of the Act. The provision itself uses the word "is" or "may be". It provides that the prescribed authority shall direct the dealer that he in addition to any tax payable which "is" or "may be" assessed u/s 35 or Section 36 or Section 38, pay by interest a sum at the rate of 5% for each month of such suppression or concealment or for furnishing incorrect particulars; on the amount of tax payable under the Act or on the suppressed turn over or on concealed turn over or for furnishing incorrect particulars. u/s 40(2) of the Act, the Assessing Officer is not required to issue a fresh notice to the assessee though, in the present case a notice u/s 40(2) was issued to the assessee on 28.01.2013

14. It is well accepted that a taxing statute is to be strictly construed. Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words: "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

15. In a classic passage Lord Cairns stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."

16. In *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , the Hon"ble Supreme Court has observed that a taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed and it cannot imply anything which is not expressed.

17. In *Saraf Trading Corporation Vs. State of Kerala*, , the Hon"ble Supreme Court has observed as under:

22. It is clearly provided in the principles of interpretation of statutes that when the meaning and the language of a statute is clear and unambiguous, nothing could be added to the language and the words of the statute. This Court in *CST Vs. Modi Sugar Mills Ltd.* observed as follows: (AIR p. 1051, para. 11)

11. ... In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.

18. In (1994) 206 ITR 688 (SC) , rejecting the contention that strict interpretation of the proviso to Section 5(1-A) of the Wealth Tax Act, 1957 would

cause hardship to small depositors, the Hon''ble Supreme Court has held that taxation statute has to be strictly construed and that there is no equity in a taxing provision.

19. In view of the aforesaid discussion, we are of the view that a requirement of issuing a fresh notice u/s 35(7) and u/s 40(2) of the Act cannot be read into the provisions u/s 35(7) or u/s 40(2) of the Act as it mandates a requirement of affording an opportunity of hearing only.

20. The learned counsel appearing for the petitioner has contended that the impugned order dated 31.01.2013 is composite order u/s 35(7) and 40(2) of the Act, for which there is no provision in the Act. Per contra, Mr. Ajit Kumar, the learned AAG appearing for the respondents has submitted that the impugned order dated 31.01.2013 would disclose that separate assessment u/s 35(7) and u/s 40(2) of the Act has been done by the Assessing Officer and therefore, a composite order can be passed.

21. It is not in dispute that, the Assessing Officer is empowered to proceed u/s 35(7) of the Act and he is also empowered to proceed u/s 40(2) of the Act. A common form, that is Form JVAT 302 is issued for notice of hearing under JVAT Act, 2005. It is also well-settled that even if source of power is not referred to or a wrong provision of law has been referred while exercising power, that by itself would not vitiate the order. The proceeding before the Assessing Officer clearly demonstrates that the Assessing Officer has recorded reason and thereafter proceeded in the matter. We find that the Assessing Officer has not committed any error while passing order u/s 35(7) and 40(2) of the Act vide the impugned order dated 31.01.2013.

22. The learned counsel for the assessee has submitted that the impugned order dated 31.01.2013 is vitiated on account of gross violation of the principles of natural justice. Per contra, the Additional Advocate-General has submitted that sufficient opportunity has been afforded to the assessee and the assessee having knowledge of the nature of the proceeding before the Assessing Officer, cannot complain of violation of the principles of natural justice.

23. As noticed above, we find that when data supplied by the District Mining Officer, Chaibasa and the return filed by the assessee were compared and verified and on such verification, difference was found and therefore, notices were issued to the assessee. The proceeding before the Assessing Authority continued on several dates. The proceeding before the Assessing Officer clearly indicates that the assessee was informed about the ongoing proceeding. In view of the facts noticed in paragraph Nos. (4) to (6) above, we hold that sufficient opportunity was afforded to the assessee and therefore, the impugned order dated 31.01.2013 cannot be said to have been passed in violation of the principles of natural justice.

24. Coming to the objection taken by the respondents with respect to maintainability of the writ petition, we find that under the JVAT Act, 2005, a

complete mechanism for statutory remedy of appeal, review and revision, is provided. The JVAT Act, 2005 provides forums for appeal, review and revision of the orders passed under Act. Section 79 provides that against the order of assessment or penalty or both passed by the prescribed authority appeal lies to the Joint Commissioner or the Deputy Commissioner especially authorised in this behalf. Sub-section (5) of Section 79 provides that the Appellate Authority may confirm, annul, reduce, enhance or otherwise the order passed by the prescribed authority or set-aside the order directing the Assessing Authority to make fresh order. Thus, there cannot be any doubt that Appellate Authority has vast powers u/s 79 of the Act. Similarly, Section 80 makes a provision for revision to the Tribunal against an order passed in the Appeal. Section 81 provides that against the order passed by the Tribunal u/s 80 of the Act, review would lie to the State Government. In the present writ petition, the petitioner has not disclosed any reason for not approaching the statutory Authority under the Act.

25. The learned counsel appearing for the petitioner relied on the judgment reported in *State of Rajasthan Vs. Prakash Chand and Others*, and the learned Additional Advocate-General has relied on the decision reported in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, and *United Bank of India Vs. Satyawati Tondon and Others*, .

26. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , the assessee aggrieved by the order of assessment made by the Sales Tax Officer approached the High Court. The Hon''ble Supreme Court held that since the Act provides for a complete machinery to challenge an order of assessment, the impugned Order of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. The Hon''ble Supreme Court has observed as under:

11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of S. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of S. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under S. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.....

12. Furthermore, the Act provides for an adequate safeguard against an arbitrary or unjust assessment. The petitioners have a right to prefer an appeal under sub-s. (1) of S. 23 of the Act subject to their payment of the admitted amount of tax as enjoined by the proviso thereto. As regards the disputed amount of tax, the

petitioners have the remedy of applying for stay of recovery to the Commissioner of Sales Tax under Cl. (a) of the second proviso to sub-s. (1) of S. 13 of the Act.....

27. In Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , the Hon"ble Supreme Court has observed that Article 226 is not meant to short circuit or circumvent statutory procedures. The Hon"ble Supreme Court has observed as under:

3.It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Art. 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Art. 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

28. In view of the aforesaid discussion, we hold that the present writ petitions cannot be entertained by this Court as Section 79 of the JVAT Act, 2005 provides an effective remedy of appeal to the assessee and accordingly, the writ petitions are dismissed. However, it is made clear that we have not expressed any opinion on the merits of the case. Since huge amount of revenue is involved, a liberty is granted to the assessee to move the appellate authority, if so advised within a period of four weeks from today. However, if the assessee does not move to the appellate authority within the aforesaid period, the respondent No. 3 - The Deputy Commissioner, Commercial Taxes Department, Govt. of Jharkhand, Chaibasa Circle, Singhbhum West is directed to proceed against the assessee, in accordance with law.