(2016) 03 AHC CK 0241

In the Allahabad High Court

Case No : Writ Tax No. 243 of 2016

M/S Videocon D2H Ltd. APPELLANT

Vs

State of U.P. RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Citation : (2016) 93 UPTC 237

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Advocate : Sri Bharatji Agarwal, Senior Advocate along with Sri Shubham Agarwal and Sri Piyush Agarwal, Advocates, for the Petitioner; S.C, A.S.G.I, B.P. Singh and Sri C.B. Tripathi, Special Counsel, for the Respondent

Final Decision : Allowed

Judgement

1. We have heard Sri Bharat Ji Agarwal, learned Senior Counsel along with Sri Shubham Agarwal and Sri Piyush Agarwal for the petitioner and Sri C.B. Tripathi, learned Special Counsel for the State.

2. By our order dated 14th March, 2016 we had directed the Special Counsel for the State to produce the original record relating to the assessment proceedings. We have perused the same. Based on the order sheet and other records we are proceeding to decide the petition finally without calling for a counter affidavit.

3. The petitioner provides direct to home (DTH) broadcasting service upon being granted a licence under the Indian Telegraph Act, 1885 and under the Indian Wireless & Telegraph Act, 1933. The petitioner has distributors and dealers within the State of U.P., through which Set Top Boxes have been installed to their subscribers. It seems that certain inquiry was initiated by the Assessing Officer on 11th January, 2016 with regard to verification of the consignment sales, which were partly considered and the matter was adjourned finally on 10th February, 2016. In the meanwhile, on 8th February, 2016 the assessing authority issued a direction for issuance of notice for the purpose of making a provisional

assessment for the month of April, 2015 to December, 2015 and directed the office to issue a notice fixing 10th February, 2016 as the first date. The records indicates that the online notice was generated by the office on 9th February,2016 at 5:37 p.m. It is apparently clear that the notice was served thereafter.

4. The petitioner contends in Paragraph 21 that the notice was served at 8:30 p.m. on 9th February, 2016 indicating that the petitioner was required to appear on 10 February, 2016 with regard to the provisional assessment proceedings. The records further indicates that petitioner appeared on 10th February, 2016 and requested for adjournment in order to file a reply. The matter was adjourned and 15th February, 2015 was fixed. The order sheet of 15th February, 2016 indicates that the assessee, namely, the petitioner did not appear nor any application was filed for adjournment. No other order was passed thereafter. The order sheet indicates that an assessment order was passed on 16th February, 2016. The order sheet also indicates that some reply was given by the petitioner on 16th February, 2016 at 5:30 p.m. and, on the instructions given to the Special Counsel, the said reply was taken on record after the assessment order was passed.

5. Be that as it may. We are of the opinion that the entire proceedings initiated by the Assessing Officer for making a provisional assessment was done in haste and in gross violation of the principles of natural justice, which is engrafted under Article 14 of the Constitution of India read with Section 25 (1) of the U.P. VAT Act. For facility Section 25 (1) is extracted hereunder:

25. Assessment of tax for a tax period - (1) Where in respect of any tax period of an assessment year-

(i) any dealer has not submitted tax return with the time prescribed or within the time extended by the assessing authority, or if tax return has been submitted without payment of tax shown payable in such return; or.

(ii) preliminary examination of tax return, by the assessing authority, reveals that computation shown in the tax return are wrong or amount of input tax credit claimed or tax payable shown is incorrect; or

(iii) on the basis of material available on records with the assessing authority, it appears to the assessing authority that the turnover of sales or purchases or both, disclosed by the dealer is not worthy of credence; the assessing authority may, after making such inquiry as it may deem fit and after giving a reasonable opportunity of being heard to the dealer, determine-

(i) to the best of its judgment the turnover, amount of tax payable and amount of input tax credit admissible, where the dealer has not submitted tax return or if the tax return has been submitted, the assessing authority is of the opinion that turnover disclosed by the dealer in such return is not worthy of credence;

(ii) the amount of tax payable and amount of input tax credit admissible, in any other case, by passing a provisional order of assessment for such tax period.

6. A perusal of the aforesaid provision indicates that an assessment order is required to be made by the Assessing Officer after making such inquiry as it deems fit and after giving an opportunity of being heard to the dealer. The words "reasonable opportunity of being heard" is of wide import. In the instant case, the assessment has been made in gross violation of the principles of natural justice as engrafted under Article 14 of the Constitution of India read with Section 25 of the Act. Mere issuance and service of notice is not sufficient. Reasonable opportunity of representing and filing of objections is one aspect and thereafter reasonable opportunity of being heard is the other aspect, which in the instant case was lacking. Apparently directions to initiate provisional assessment proceedings were issued by the Assessing Officer on 8th February,2016 directing the office to fix 10th February,2016 in the notice. The notice of the provisional assessment was issued at 5:37 p.m. on 9th February, 2016 and was served thereafter. The petitioner was directed to file reply by 10th February, 2016 which was not possible and, accordingly, the petitioner rightly applied for adjournment,which was granted fixing 15th February,2016. The order sheet shows that the petitioner did not appear on 15th February, 2016, but at the same time, we find that if on the second date the petitioner did not appear, the Assessing Authority had the option to proceed ex parte or fix another date, which in the instant case did not happen. If the Assessing Officer proceeded ex parte, he could have fixed another date for ex parte hearing or after recording the absence of the petitioner could have proceeded ex parte and passed an assessment order on that date itself, which in the instant case did not happen. Therefore, any assessment order made on the next date i.e. on 16th February,2016 becomes erroneous, as no date was fixed for 16th February,2016 for making an assessment. Such assessment order passed on 16th February, 2016 without due notice is apparently in gross violation of the principles of natural justice. The principles engrafted in Sangram Singh v. Election Tribunal, AIR 1955 SC 425 is squarely applicable.

7. In the light of the aforesaid, we are of the opinion that the procedure relating to granting adequate opportunity as provided under Article 25 (1) of the U.P. VAT Act was not followed. Reasonable opportunity of being heard was not given. Proper inquiry was not made and therefore, the ex parte assessment order cannot be sustained.

8. The petitioner in the present writ petition has challenged the ex parte provisional assessment order dated 16th February,2016 for the months of April 2015 to December, 2015 under the U.P. VAT Act. Even though, the petitioner has a remedy of filing an appeal, we are of the opinion that in the instant case it would not be proper for the writ court to relegate the petitioner to avail the remedy of filing an appeal as provided under the U.P. VAT Act. In exceptional and in extraordinary circumstances as has happened in the instant case, the Court is of the opinion that a writ of certiorari should be issued in order to dispense justice to the assessee. There has been a gross violation of Article 14 of the Constitution of India. Adequate opportunity of hearing has not been provided nor

the sufficient time was given to file objections.

9. In Aroma Chemical v. Union of India, 2014 (310) E.L.T. 427 (All.) a Division Bench of this Court held that a period of 7 days'' time given for filing reply to the show cause notice was found to be insufficient and in violation of the principles of natural justice and, accordingly, the order was quashed.

10. In M/s. Rameshwaram Paper Mills v. State of U.P. and others, VSTI 2010-B-991 a Division Bench of this Court held that allowing the assessee only 24 hours'' time for filing a reply was in violation of the principles of natural justice and that the conduct of the assessing authority was deprecated. The Court held that:

"It is not expected from the petitioner to file his reply in less than 24 hours before respondent no. 2. Undue haste and speed with which respondent no. 2 has exercised his jurisdiction under Section 21 (2) of the Act in our opinion should be discouraged. The doctrine of fairness is complementary to the principle of natural justice and to ensure rule of law and to prevent the failure of justice. It is distressing feature and reprehensible and is a matter of great concern. The law frowns upon such conduct and must be deprecated. The respondent no. 2 has committed a manifest error and a serious procedural illegalities."

11. In the instant case, provisional notice was issued on 9th February, 2016 and an assessment order was passed on 16th February, 2016 within a period of one week.

12. In our opinion, undue haste and speed was exercised by the Assessing Officer. The Court fails to fathom as to what was the urgency in proceeding in such a cavalier fashion. There could have been some urgency if the period of limitation was expiring for making an assessment order which in the instant case was not existing.

13. We are of the opinion that the assessment order passed within a week from the date of issuance of the notice was done in undue haste without giving an opportunity of hearing. This period itself tells its own story. Consequently, for the reasons stated aforesaid the assessment orders cannot be sustained and are quashed.

14. The writ petition is, accordingly, allowed at the admission stage.

15. It would be open to the assessing authority to proceed afresh after giving an opportunity of hearing to the petitioner.

