(2013) 01 AP CK 0040

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 34610 and 34619 of 2012

PJSC Stroytransgaz APPELLANT

Vs

Assistant Commissioner (CT), VMU-II and Another RESPONDENT

Date of Decision : 02-01-2013

Acts Referred:

Citation : (2013) 64 VST 183

Hon'ble Judges : M.S. Ramachandra Rao, J;G. Raghuram, J

Bench : Division Bench

Advocate : G. Narendra Chetty, for the Appellant; B. Venkatadri, Special Government Pleader for Commercial Taxes, for the Respondent

Judgement

M.S. Ramachandra Rao, J.—Since common issues of law and fact arise in these writ petitions, they are being disposed of together. Heard Sri S. Narendra Cherry, counsel for the petitioner and Sri Venkatadri, Special Government Pleader for Commercial Taxes in both cases.

2. With the consent of both sides, the writ petitions are being disposed of at the stage of admission.

3. The petitioner in both these cases is a public joint stock company set up under the laws of Russia. It is engaged in the business of construction of oil and gas pipelines of varying diameters. It was awarded in 2006 the work of construction of the 48" diameter pipeline for transportation of natural gas by M/s. Reliance Gas Transport Infrastructure Limited from Kakinada in Andhra Pradesh to Bharuch in Gujarat, to construct associated facilities like dispatch compressor stations, intermediate compressor stations, main line valve stations and tap of stations.

4. The petitioner got itself registered as a dealer under the Andhra Pradesh Value Added Tax Act, 2005 on the rolls of the second respondent with effect from October 1, 2006.

5. The first respondent took up the audit of the assessment of the petitioner as per the direction of the Deputy Commissioner (CT), Secunderabad and passed "notice of assessment of value added tax" in form VAT 305 dated August 18, 2009 for the tax period 2006-07 and 2007-08, separately. These orders were served on the petitioner on August 31, 2009.

6. Aggrieved thereby, the petitioner filed appeals before the Appellate Deputy Commissioner (CT), Secunderabad on September 30, 2009 contending that the first respondent did not have authorization from the Deputy Commissioner for making assessment but was having authorization only for conducting audit apart. It also raised other objections on merits. The petitioner also filed stay petitions along with the appeals seeking stay of collection of the balance disputed tax pending disposal of the appeal.

7. When the appeals and stay petitions were pending, the second respondent issued garnishee notices dated October 9, 2009 to the contractee u/s 29 of the Act. Challenging the same, the petitioner filed W.P. No. 24221 of 2009 and W.P. No. 24271 of 2009, respectively. By orders dated November 10, 2009 and November 13, 2009, the said garnishee notices were quashed.

8. Subsequently, the Appellate Deputy Commissioner (CI) rejected the stay applications by separate orders dated November 27, 2009 for 2006-07 and 2007-08 which were served on the petitioners on December 14, 2009.

9. Aggrieved thereby, the petitioner filed revision petitions before the Additional Commissioner (CT), Legal on January 18, 2010. These revision petitions were rejected on February 2, 2010.

10. The Appellate Deputy Commissioner (CT), Secunderabad Division, on June 13, 2011 vide a common order in Appeal Nos. S/130 and 131/09-10/V allowed the appeals on the ground of lack jurisdiction following the judgment of this court in Sri Balaji Flour Mills Vs. The Commercial Tax Officer and Others, . In the said case, it was held that the authorization to audit u/s 43 read with rule 59(1)(7) by itself does not enable the audit officer to undertake assessment. Following the said decision, the Appellate Deputy Commissioner held that the impugned order dated August 18, 2009 of the second respondent is without jurisdiction and directed the second respondent to make necessary correspondence with the Deputy Commissioner concerned for taking appropriate steps. He also returned the material received from the regular assessing authority intact.

11. Thereafter, as no assessment was made within the period of limitation of four years from the date of filing of the return (as prescribed by section 21(3) of the Act), on July 15, 2012, the petitioner applied for refund of the 50 percent of the disputed tax with interest (which had been paid by the petitioner during the pendency of the appeals before the Appellate Deputy Commissioner as per the conditional interim orders granted by the High Court dated March 10, 2010 in W.P. No. 5266 of 2010).

12. Thereafter, the first respondent obtained authorization from the Deputy Commissioner for making assessment on the petitioner on August 6, 2012 and issued separate show-cause notices dated August 17, 2012 for 2006-07 and 2007-08, respectively to the petitioner to show cause why the petitioner cannot be assessed on the same turnovers for which it was assessed in the earlier assessment order.

13. The petitioner submitted a reply dated August 30, 2012 to the first respondent contending that the proposed assessment was barred by limitation prescribed by section 21(3) of the Act and sought withdrawal of the notice apart from refund of 50 percent of the disputed tax deposited by the petitioner.

14. The first respondent issued a notice dated September 5, 2012 asking the petitioner to also submit its objections on the merits and that the objections regarding the limitation will also be examined along with its objections on the merits.

15. The petitioner, thereafter, submitted another reply dated September 18, 2012, submitting its objections on the merits also apart from limitation.

16. Thereafter, the impugned assessment orders dated October 17, 2012 have been passed by the first respondent once again assessing the petitioner on the same turnovers for the tax periods 2006-07 and 2007-08, respectively, rejecting the petitioner''s objections both on the merits and jurisdiction.

17. The said orders are impugned in these two writ petitions.

18. It is the contention of the counsel for the petitioners that the present assessment orders dated October 17, 2012, passed by the first respondent cannot be said to be made in consequence of or for giving effect to the appellate order; that it is an assessment made by the first respondent by obtaining authorization from the Deputy Commissioner and therefore would be a "fresh assessment order" falling u/s 21 of the Act; and that it is not "in pursuance of or in consequence of or to give effect to any finding or direction contained under sections 31 to 35 or in any order of any court in a proceeding otherwise than by way of appeal or revision" as envisaged u/s 37 of the Act. He further contended that once an assessment made was set aside by the appellate authority as being without jurisdiction, what necessarily follows is that a fresh assessment has to be necessarily framed and for framing a fresh assessment, the respondents were bound by the limitation laid down in section 21 of the Act. He also contended that the limitation in section 21 cannot be bypassed by the respondents by relying upon section 37 of the Act which specifically covers only the situations laid down therein.

19. The Government Pleader, however, contended that the present orders dated October 17, 2012 are pursuant to proceedings initiated consequent to the orders of the Appellate Deputy Commissioner only; that the order of the Appellate Deputy Commissioner reveals that while setting aside the original assessment

order, on the question of jurisdiction, he clearly directed the assessing authority to correspond with the Deputy Commissioner concerned for taking appropriate steps; that the Deputy Commissioner (CT), Secunderabad Division on coming to know of the order of the Appellate Deputy Commissioner, authorized the first respondent to assess the petitioner for 2006-07 and 2007-08, respectively; that the present proceedings are initiated in pursuance of the directions of the Appellate Deputy Commissioner and hence the limitation of three years (from the date of receipt of the order of the appellate authority as provided for u/s 37 of the Act) applies to these proceedings, but not the limitation prescribed u/s 21(3) of the Act which applies to the original assessment.

20. We have considered the respective submissions of the parties.

21. Section 21 of the Act states as follows:

21. Assessments.--(1) Where a VAT dealer or TOT dealer fails to file a return in respect of any tax period within the prescribed time, the authority prescribed shall assess the dealer for the said period for such default in the manner prescribed.

(2) If a VAT dealer or TOT dealer submits a return along with evidence for full payment of tax, subsequent to the prescribed time the assessment made under sub-section (1) shall be withdrawn without prejudice to any interest or penalty leviable.

(3) Where the authority prescribed is not satisfied with a return filed by the VAT dealer or TOT dealer or the return appears to be incorrect or incomplete, he shall assess to the best of his judgment within four years of due date of the return or within four years of the date of filing of the return whichever is later.

(4) The authority prescribed may, based on any information available or on any other basis, conduct a detailed scrutiny of the accounts of any VAT dealer or TOT dealer and where any assessment as a result of such scrutiny becomes necessary, such assessment shall be made within a period of four years from the end of the period for which the assessment is to be made.

(5) Where any wilful evasion of tax has been committed by a dealer, an assessment shall be made to the best of his judgment by the authority prescribed within a period of six years of date of filing of the return or the first return relating to such offence.

(6) The authority prescribed may reassess, where an assessment was already made under sub-sections (1) to (5) and such assessment understates the correct tax liability of the dealer, within a period of four years from the date of such assessment.

(7) Where any assessment has been deferred on account of any stay order granted by the High Court or where an appeal or other proceedings is pending before the High Court or Supreme Court involving a question of law having a

direct bearing on the assessment in question, the period during which the stay order was in force or such appeal or proceedings was pending shall be excluded in computing the period of four years or six years as the case may be for the purpose of making the assessment.

(8) Where an assessment made has been set aside by any court, the period between the date of such assessment and the date on which it has been set aside shall be excluded in computing the period of four years or six years as the case may be, for making any fresh assessment.

22. Section 37 of the Act states as follows:

37. Limitation in respect of certain assessments or reassessments ordered.--Notwithstanding anything contained in sections 21 and 32 where an assessment, reassessment, rectification in or revision of an assessment is made in respect of a dealer or any person, in pursuance or in consequence of or to give effect to any finding or direction contained in an order under sections 31, 32, 33, 34 and 35 or in an order of any court in a proceeding, otherwise than by way of appeal or revision; such assessment, reassessment, rectification in or revision, of an assessment shall be made within three years from the date of receipt of such order by the prescribed or revising authority as the case may be:

Provided that if such appeal, order or order of any court has been subjected to further appeal, either partially or entirely, and if there are orders of stay prohibiting the authority concerned to pass consequential orders, the period of three years shall get extended by the period during which such stay orders were in force:

Provided further that if the subsequent appeal results in modification of such appeal, order or order of any court which is subjected to further appeal, either partially or wholly, the period of three years shall be computed from the date of receipt of subsequent order of appeal but not from the date of receipt of the original appeal, order or order of any court which was subjected to further appeal.

23. In this case, for both the tax periods 2006-07 and 2007-08, the petitioner was assessed to tax by orders dated August 18, 2009 by the second respondent pursuant to an authorization for audit issued to the second respondent. These assessment orders dated August 18, 2009 of the second respondent were set aside by the Appellate Deputy Commissioner (CT), Secunderabad Division, by orders dated June 13, 2011 on the basis of the decision of this court in Sri Balaji Flour Mills Vs. The Commercial Tax Officer and Others, and it was held that the second respondent had passed the orders of assessment without permission from the higher authorities to make assessment and as such, those orders were without jurisdiction and are set aside. It was also held that the CIO, Gandhinagar, shall make necessary correspondence with the Deputy Commissioner concerned for taking appropriate steps.

24. A reading of the order of the appellate Deputy Commissioner indicates that

he did not go into the merits of the petitioner''s claim as he clearly observed "therefore, if the above appeals are decided on merits, they are to be remanded to the regular assessing authority for fresh assessment with reference to all the evidence and other material supported by the books of accounts, etc.

25. The question for consideration is whether the impugned orders of assessment dated October 17, 2012 of the first respondent are barred by limitation having been initiated by show-cause notices dated August 17, 2012 more than four years (prescribed u/s 21(3) of the Act for making assessment) from the due date of return or the date of filing of the return, whichever is later or are within limitation prescribed u/s 37 of the Act.

26. Section 21(3) prescribes the period of limitation of four years from due date of return or within four years of the date of filing of the returns, whichever is later, for making assessment by the competent authority. In the present case, originally returns were filed for both 2006-07 and 2007-08 and orders of assessment were passed on August 18, 2009. The orders of assessment dated August 18, 2009 were set aside by the Appellate Deputy Commissioner in an appeal (under section 33 of the Act preferred to him by the petitioner) on June 13, 2011 on the ground that the second respondent had passed the said orders without jurisdiction. Section 37 provides that notwithstanding anything contained in section 21, where an assessment is made in respect of a dealer in pursuance or in consequence of or to give effect to a direction contained in an order u/s 33, such assessment shall be made within three years from the date of receipt of such order by the prescribed authority. The fact that the Appellate Deputy Commissioner in his order dated June 13, 2011 allowed the appeals without going into the merits and after allowing the appeal (on the ground that the second respondent did not have jurisdiction) directed the CTO, Gandhinagar (second respondent) to make necessary correspondence with the Deputy Commissioner concerned for taking appropriate steps indicates that the Appellate Deputy Commissioner clearly intended that assessment of the petitioner should be done afresh in the manner permitted by law by the competent authority. It was not a case of the appeal being allowed simpliciter. It was a case of impugned order being set aside leaving it open to the competent assessing authority to make assessment as per law Therefore, in our opinion, section 37 alone would apply to the present situation as the impugned assessment is a consequence of an order passed u/s 33 in appeal. So section 21 is not attracted as contended by the petitioner.

27. Since the first respondent was issued a separate authorization for regular assessment by the Deputy Commissioner (CT), Secunderabad on August 6, 2012 and pursuant to the said authorization, the first respondent issued show-cause notices dated August 17, 2012 and passed the impugned orders of assessment on October 17, 2012, which is within three years from June 13, 2011 (date of passing of orders by the Appellate Deputy Commissioner), we are of the view that the orders of the first respondent are within the time permitted by section

37 of the Act. Therefore the impugned orders of assessment cannot be challenged on the said ground.

28. We therefore hold that the first respondent had the jurisdiction to pass the impugned orders of assessment dated October 17, 2012 for the assessment years 2006-07 and 2007-08 and the said orders are not barred by limitation.

29. However, on the merits we do not propose to express any opinion. It is open to the petitioner to challenge the impugned assessment orders dated October 17, 2012 for the assessment years 2006-07 and 2007-08 by way of appeal before the competent appellate authority under the Act. Subject to the above observations, both the writ petitions are dismissed. No costs.

