

(2019) 03 OHC CK 0006

In the Orissa High Court

Case No : Writ Petition (Civil) Nos.11126, 11127, 11128 Of 2008

SMC Power Generation Limited

APPELLANT

Vs

State Of Odisha & Others

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Orissa Value Added Tax Act, 2004 — Section 11, 11(10), 41, 41(3), 41(4), 42, 42(4), 42(6)
Code Of Civil Procedure, 1908 — Section 148
Income Tax Act, 1961 — Section 133(2), 139(2)
Arbitration Act, 1940 — Section 28

Citation : (2019) 2 ILR(CUT) 239

Hon'ble Judges : K. S. Jhaveri, CJ; K. R. Mohapatra, J

Bench : Division Bench

Advocate : N. Venkataraman, Satyajit Mohanty, R.R. Swain, A. Mohapatra, S. Pattnaik

Final Decision : Allowed

Judgement

K.S. JHAVERI, C.J

1. Since in all these writ petitions, the questions of law involved are similar, learned counsel for the petitioner requested to take up W.P.(C) No.11126

of 2008 as leading case. Learned counsel for the opposite parties have no objection to the same. As such, W.P.(C) No.11126 of 2008 is taken up as

leading case and the order to be passed herein, will govern the fate of other two writ petitions, i.e., 11127 and 11128 of 2008.

In W.P.(C) No.11126 of 2008, the petitioner has prayed for the following relief:

â??In the facts and circumstances stated above, it is humbly prayed that this Honâ??ble Court may graciously be pleased to issue Rule NISI in the nature of Writ of

Certiorari and/or any other appropriate Writ/Writs, call for the records and calling upon the Opp. Parties to show cause;

As to why the order of Assessment dtd.2.7.2008 passed by the Asst Commissioner of Sales Tax, Sambalpur Range, Sambalpur (vide Annexure-6) under Section 42(4)

of the Orissa Value Added Tax Act, 2004 for the period 1.4.2005 to 30.11.2006 imposing tax amounting to Rs.3,53,36,607.00 including penalty of Rs.2,35,57,738.00, shall

not be quashed;

And if the Opp. Parties fail to show cause or show insufficient cause, make the said Rule NISI absolute.

And pass such other order/orders as this Honâ??ble Court may deem fit and proper;

And allow the Writ Petition.

And for this act of kindness the Petitioner shall as in duty bound ever pray.â??

2. Learned counsel for the petitioner at the outset fairly submitted that he is not canvassing any other points raised, but he is restricting his argument

only on the point of extension of time, which ought to have been sought for within six months from the date of receipt of the Audit Visit Report. That

having not been done, the impugned order of assessment is barred by limitation. In order to appreciate the submission of learned counsel for the

petitioner, some facts as well as relevant dates need be considered.

3. Pursuant to an audit under the provisions of the OVAT Act, the Audit Visit Report (AVR) was submitted on 01.06.2007 under Section 41(4) of the

OVAT Act. The Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (Opposite Party No.3) received the Audit Visit Report on

05.07.2007. Accordingly, notice under Section 42 of the OVAT Act was issued by the Assessing Authority (Opposite Party No.3) on 04.10.2007

which was received by the petitioner on 10.10.2007 requiring him to appear on 13.11.2007. Thus, according to him, the period of limitation has expired

on 04.01.2008 or 09.04.2008, i.e., six months from the date of issuance of notice to the petitioner, but extension of further six months time was sought

for as it is reflected in the order dated 07.06.2008, which reads as under:

â??7.6.2008. Call for the record. The cross verification of statement and other documents are completed today. As such, the audit visit report is related to the

period(s) 1.4.05 to 30.11.2006. Thus, issue letter to the Commissioner of Commercial Taxes, Orissa, Cuttack accordingly seeking extension of further six months time

for completion of assessment U/s. 42(4) of the OVAT Act of the instant dealer-Company. Put up the record along with the permission order of the C.C.T.(O), Cuttack

for completion of assessment and issue of assessment order and demand notice to the dealer-Company.â??

However, extension of time was granted on 26.06.2008 as is revealed from the order dated 30.06.2008 passed by the Asst. Commissioner of Sales

Tax, which reads as under:

â??Record is put up to me today along with the order of extension of time for further six months for completion of assessment vide Head Office letter No. VII (REV)

06/08/10698/CT dated 26.6.2008. In this letter of the Head Office it is revealed that the C.C.T.(O), Cuttack has been pleased to extend a period of further six months

time for completion of assessment U/s.42(6) of the OVAT Act and fixed the date of completion of assessment on dated 04.7.2008. Hence, put up the record on 2.7.2008

for issue of assessment order and demand notice to the dealer-Company.â??

4. Learned counsel for the petitioner took us to the provisions of Sections 41 and 42 of the OVAT Act, which read as under:

â??41. Identification of tax payers for tax audit.-

(1) The Commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis of risk analysis or on the basis of any other

objective criteria, at such intervals or in such audit cycle, as may be prescribed.

(2) After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such

individual dealers or class of dealers be conducted in accordance with the audit programme approved by him:

Provided that the Commissioner may direct tax audit in respect of any individual dealer or class of dealers on out of turn basis or for more than once in an audit cycle

to prevent evasion of tax and ensure proper tax compliance.

(3) Tax audit shall ordinarily be conducted in the prescribed manner in the business premises or office or godown or warehouse or any other place, where the

business is normally carried on by the dealer or stock in trade or books of account of the business are kept or lodged temporarily or otherwise.

(4) After completion of tax audit of any dealer under sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion

of the audit, submit the audit report, to be called "Audit Visit Report", to the assessing authority in the prescribed form along with the statements recorded and

documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any,

relevant for the purpose of investigation, assessment or such other purposes.

42. Audit assessment

(1) Where the tax audit conducted under sub-section (3) of section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may,

notwithstanding the fact that the dealer may have been assessed under section 39 or section 40, serve on such dealer a notice in the form and manner prescribed

along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and

produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of

any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(2) Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of

account and documents.

(3) If the dealer fails to appear or cause appearance, or fails to produce or cause production of the books of account and documents as required under sub-section

(1) , the assessing authority may proceed to complete the assessment to the best of his judgment basing on the materials available in the Audit Visit Report and such

other materials as may be available, and after causing such enquiry as he deems necessary.

(4) Where the dealer to whom a notice is issued under sub-section (1), produces the books of account and other documents, the assessing authority may, after

examining all the materials as available with him in the record and those produced by the dealer and after causing such other enquiry as he deems necessary, assess

the tax due from that dealer accordingly.

(5) Without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed

under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six

months from the date of receipt of the Audit Visit Report :

Provided that if, for any reason, the assessment is not completed within the time specified in this sub-section, the Commissioner may, on the merit of each such case,

allow such further time not exceeding six months for completion of the assessment proceeding.

(7) No order of assessment shall be made under sub-section (3) or sub-section (4) after the expiry of one year from the date of receipt of the Audit Visit Report.â??

5. Learned counsel for the petitioner further contended that the issue is squarely covered by the ratio in the case of State of Punjab and Ors.-v-

Shreyans Indus Ltd. and Ors; reported in (2016) 4 SCC 769, wherein the Honâ??ble Supreme Court at paragraphs-8, 9 and 24 has observed as follows:

â??8. As the submissions of the parties on either side would be better understood once the relevant statutory provision is noted, it would be apposite to reproduce

the provisions of Section 11 of the Act, which are as follows:

Â â??11. Assessment of tax.â?"(1) If the assessing authority is satisfied without

requiring the presence of dealer or the production by him of any evidence that the

returns furnished in respect of any period are correct and complete, he shall pass an order of assessment on the basis of such returns within a period of three years from the last date prescribed for furnishing the last return in respect of such period.

(2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished

in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at place specified

therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(3) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall, after hearing such evidence as the dealer may produce, and such

other evidence as the assessing authority may require on specified points, [pass an order of assessment within a period of three years from the last date prescribed

for furnishing the last return in respect of any period.]

(4) If a dealer having furnished returns in respect of a period, fails to comply with the terms of notice issued under sub-section (2), the assessing authority shall,

within a period of three years from the 1st date prescribed for furnishing the last return in respect of such period, pass an order of assessment to the best of his judgment.

(5) If a dealer does not furnish returns in respect of any period by the last date prescribed the assessing authority shall within a period of five years from the last date

prescribed for furnishing the return in respect of such period and after giving the dealer a reasonable opportunity of being heard, pass an order of assessment to the

best of his judgment.

(6) If upon information which has come into his possession, the assessing authority is satisfied that any dealer has been liable to pay tax under this Act in respect of

any period but has failed to apply for registration, the assessing authority shall, within five years after the expiry of such period, after giving the dealer a reasonable

opportunity of being heard, proceed to assess, to the best of his judgment the amount of tax, if any, due from the dealer in respect of such period and all subsequent

periods and in case where such dealer has wilfully failed to apply for registration, the assessing authority may direct that the dealer shall pay by way of penalty, in

addition to the amount so assessed, a sum not exceeding one-and-a-half times that amount.

(7) The amount of any tax, penalty or interest payable under this Act shall be paid by the dealer in the manner prescribed, by such date as may be specified in the

notice issued by the assessing authority for the purpose and the date so specified shall not be less than fifteen days and not more than thirty days from the date of service of such notice:

Provided that the assessing authority may, with the prior approval of the Assistant Excise and Taxation Commissioner, in charge of the district extend the date of

such payment or allow payment by instalments against an adequate security or bank guarantee.

(8) If the tax assessed under this Act or any instalment thereof is not paid by any dealer within the time specified thereof in the notice of assessment or in the order

permitting payment in instalments, the Commissioner or any other person appointed to assist him under sub-section (1) of Section 3 may, after giving such dealer an

opportunity of being heard, impose on him a penalty not exceeding in amount the sum due from him.

(9) Any assessment made under this section shall be without prejudice to any penalty imposed under this Act.

(10) The Commissioner, may for reasons to be recorded in writing, extend the period of three years, for passing the order of assessment for such further period as

he may deem fit.

(11) Where the proceedings of the assessment are stayed by an order of any court, the period for which such stay remains in force, shall not count towards

computing the period of three years specified under this section for passing the order of assessment.

(12) The assessing authority may, on his own motion, review any assessment order passed by him and such review shall be completed within a period of one year

from the date of order under review.â??

Â (emphasis supplied)

9. A mere reading of the aforesaid provision would reflect that wherever return is filed by the assessee, assessment is to be made within a period of three years from

the last date prescribed for furnishing the return in respect of such period. On the other hand, in those cases where return is not filed or any dealer, who is liable to

pay the tax under the Act, does not get himself registered therein, the period of assessment prescribed is five years. We are not concerned with the alternate situation

as in the instant appeals not only the assesseees are registered dealers, they had also filed their returns regularly within the prescribed period and, therefore,

assessments were to be completed within a period of three years from the last date prescribed for furnishing the returns, which is the normal period prescribed. At the

same time, sub-section (10) of Section

11 gives power to the Commissioner to extend a period of three years. Interestingly, there is no upper limit prescribed for which the period can be extended, meaning

thereby such an extension can be given, theoretically, for any length of time. This discretion is, however, controlled by obligating the Commissioner to give his

reasons for extension, and such reasons are to be recorded in writing. Obviously, the purpose of giving reasons in writing is to ensure that the power to extend the

period of limitation is exercised for valid reasons based on material considerations and that power is not abused by exercising it without any application of mind, or

mala fide or on irrelevant considerations or for extraneous purposes. Such an order of extension of time, naturally, is open to judicial review, albeit within the confines

of law on the basis of which such judicial review is permissible.

xxx xxx xxx xxx

24. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said

that extension of time for assessment has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against

being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment

when the assessment has already become time-barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the

Commissioner is permitted to grant the extension even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a

power at any time even much after the last date of assessment. In the instant appeals itself, when the last dates of assessment were 30-4-2004, 30-4-2005, 30-4-2006

and 30-4-2007, orders extending the time under Section 11(10) of the Act were passed on 17-8-2007, 17-8-2007, 17-8-2007 and 25-5-2007 respectively. Thus, for

Assessment Year 2000-2001, order of extension is passed more than three years after the last date and for Assessment Year 2001-2002, it is more than two years after

the last date. Such a situation cannot be countenanced as rightly held by the High Court. When the last date of assessment in respect of these assessment years

expired, it vested a valuable right in the assessee which cannot be lightly taken away. As a consequence, sub-section (11) of Section 10 has to be interpreted in the

manner which is equitable to both the parties. Therefore, the only way to interpret the same is that by holding that power to extend the time is to be exercised before

the normal period of assessment expires. On the aforesaid interpretation, other arguments of Mr Ganguli lose all significance. Argument of the learned Senior Counsel

for the appellants based on Section 148 CPC would be of no consequence. This section categorically states that power to enlarge the period can be exercised

even

when period originally fixed has expired. Likewise, reliance upon Section 139(2) of the Income Tax Act is misconceived. That provision is made for the benefit of the

assessee which empowers the assessing officer to grant an extension of time for filing of the return of income and, therefore, obviously will have no bearing on the issue at hand. Moreover, this Court in Ajanta Electricals case [CIT v. Ajanta Electricals, (1995) 4 SCC 182] , which is relied upon by the learned counsel for the

appellant, held that the time can be extended even after the time allowed originally has expired on the interpretation of the words "it has not been possible"

occurring in Section 133(2) of the Act. The Court, thus, opined that the aforesaid expression would mean that the time can be extended even after original time

prescribed in the said provision has expired. Same is our answer to the argument of Mr Ganguli predicated on Section 28 of the Arbitration Act, 1940 as that provision

was in altogether different context."

6. Taking into consideration the provision under sub-section (6) of Section 42 of the OVAT Act including the proviso, it can be safely said that the

notice period had already expired when the extension for time to complete the assessment was sought for. The same was done much after six months

of expiry of the period of limitation in January, 2008 but the extension is sought for in June, 2008.

7. In that view of the matter and in view of the observations made by the Hon'ble Supreme Court in the case of Shreyans Indus Ltd. and Ors

(supra), we are of the considered opinion that the notice is without jurisdiction. These writ petitions deserve to be allowed and the same are allowed.

No other contention is canvassed in view of the fact that the petitioner has succeeded on the first point in the present case.