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HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 7315 OF 2009

1. Ganpati Solvex Private Limited, a company incorporated under the provisions of the Companies Act, 1956, through director Kanhaiya Daga, Lakholi Road, Rajnandgaon (C.G.)
2. Kanhaiya Daga, S/o Late K.N. Daga, aged about 39 years, Lakholi Road, Rajnandgaon (C.G.)

… Petitioners

Versus

1. Commercial Tax Officer, Rajnandgaon (C.G.)
2. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, D.K.S. Mantralaya Bhavan, Raipur (C.G.)

… Respondents

WRIT PETITION (T) NO. 7486 OF 2009

1. Ganpati Solvex Private Limited, a company incorporated under the provisions of the Companies Act, 1956, through director Kanhaiya Daga, Lakholi Road, Rajnandgaon (C.G.)
2. Kanhaiya Daga, S/o Late K.N. Daga, aged about 39 years, Lakholi Road, Rajnandgaon (C.G.)

… Petitioners

Versus

1. Commercial Tax Officer, Rajnandgaon (C.G.)
2. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, D.K.S. Mantralaya Bhavan, Raipur (C.G.)

… Respondents

For Petitioners	:	Mr. Siddharth Dubey, Advocate.
For Respondents	:	Mr. D.R. Minj, Dy. Govt. Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

04/08/2017

1. Since the factual matrix in these two writ petitions is identical in nature, except for the assessment year being different, that is, 2007-08 in Writ Petition (T) No. 7315/2009 and 2008-09 in Writ Petition (T) No. 7486/2009, this Court is proceeding to decide the two writ petitions by this common order.

2. Challenge in the present writ petitions is to the notice dated 28.10.2009 (Annexure P-5) and the consequential revenue recovery proceeding drawn on 27.11.2009 (Annexure P-6). Annexure P-5 is a notice seeking demand of advance tax of the State, Central and Entry Tax for the aforesaid assessment years.

3. Contention of the learned Counsel for the Petitioners is that the said issuance of notice for advance tax is bad in law, for the reason that it is in total contravention to the provisions of Section 26 of the Chhattisgarh Value Added Tax Act, 2005 (hereinafter referred to as 'the Act of 2005'). According to the learned Counsel for the Petitioners, it is not a case where the Petitioners have failed to deposit the return which is one of the most essential ingredient. Further necessary ingredient is that apart from there being a failure in furnishing the return, the assessee should also fail to pay the tax payable, which is not the case so far as the Petitioners are concerned as they have timely deposited their return showing nil return for the assessment years on account of there being an exemption in their favour for the relevant period. Learned Counsel for the Petitioners further submits that the State Government in their reply filed to the writ petition itself have admitted the submission of the returns by the Petitioners in paragraph 8 of their reply. Thus, it stands proved that it is not a case where the Petitioners have failed to furnish their return during the said period. According to the learned Counsel for the Petitioners, the remedy which was available with the department was for initiation of appropriate assessment proceeding for the said period and only after determination of the tax payable could they have issued appropriate notices for deposit of unpaid tax if any. He thus prayed for quashment of Annexure P-5 and consequential order Annexure P-6.

4. Learned Counsel for the Petitioners relies upon the decision passed by the Madhya Pradesh High Court in the case of *Fabworth (India) Pvt. Ltd. and Another* v. *Commercial Tax Officer, Raipur and 3 others*, 2000 (3) VKN 516. Likewise, he has also relied upon the case of *Itarsi Oils and Flours Ltd., Raipur* v. *Asstt. Commissioner of Commercial Tax, Raipur*, 2000 (3) VKN 59, and lastly he has relied upon the recent decision of the

Division Bench of the Madhya Pradesh High Court in the case of *M/s Birla Corporation Ltd.* v. *The State of Madhya Pradesh & Another,* decided on 27.3.2014 in Writ Petition No. 20674 of 2013.

5. Learned Counsel for the State however opposing the writ petitions submits that it is a case where the exemption granted to the Petitioners has already been withdrawn and further the authorities found that there was a default on the part of the Petitioners in furnishing their return at the first instance and also in filling the tax payable during the relevant period and thus notices were issued in accordance with the provisions of Section 26 of the Act of 2005, which cannot be faulted with and the petitions deserve to be rejected accordingly. He further submits that it is a case where the withdrawal of exemption part is still under challenge before this Court and unless the said issue of exemption is decided, it would be difficult also for initiating appropriate assessment proceeding against the Petitioners. Learned Counsel for the State further submits that considering the judgment in the case of *Fabworth (India) Ltd.* referred to by the learned Counsel for the Petitioners, undisputedly there is a clear non-compliance of the statutory provisions so far as advance tax is concerned by the Petitioners and therefore the judgments relied upon by the Petitioners may not come to their rescue.

6. Having heard the rival contentions put forth on either side and on perusal of the record, what stands admitted from the reply of the State Government is that the Petitioners had submitted their return showing nil return, which establishes the fact that the returns had been submitted. Thus, the requirement under Section 26 of the Act of 2005 regarding failure to furnish any return is not available against the present Petitioners. Likewise, what is also not disputed from the facts which have been enumerated before this Court is that the exemption was withdrawn only on

26.10.2009 and the notices for demand of advance tax were issued on the very second day i.e. on 28.10.2009. From this itself it clearly reflects that the return of the Petitioners must have been filed much before the date of exemption being withdrawn by the respondent authorities. If that be so, it appears to be a case where the necessary ingredient required for initiating a proceeding under Section 26 of the Act of 2005 was not available for the department at the time of issuance of Annexure P-5.

7. Further, what is also required to be looked into is the fact that the contention of the State as regards the deliberate non-compliance of the submission of return by the Petitioners is concerned, the same cannot be accepted in the light of the averment made in para 8 of their reply which states that the Petitioners have submitted their returns. Now, if at all, if there is any dispute so far as the payment of tax is concerned, the same stands disputed on account of the fact that the Petitioners state that they have got the exemption which was only withdrawn on 26.10.2009 and the return having been filed earlier. If the State intends to dispute the said fact they should have initiated appropriate assessment proceeding first and then should have issued the notices for demand of tax payable if any.

8. At this juncture, it would be trite to refer to the decision rendered in the case of **Fabworth (India) Pvt. Ltd. and Another** v. **Commercial Tax Officer, Raipur and 3 others**, 2000 (3) VKN 516, wherein the Madhya Pradesh High Court in para 6 has held as under:

> **"6.** In the present case, there is no dispute that the registered dealer (petitioner No.1) had duly filed the return and there is also no dispute that as per returns filed, liability of entry tax had been shown as nil. Since the requirement of sub-section (2) of section 32 is for deposit of the full amount of tax payable according to the return and since as per the returns filed by the petitioners, the tax payable was shown as nil, it is also not a case where there was failure to pay the tax payable in accordance with the return under the provisions of sub-section (2) of section 32 of the Act. Thus, neither of the two conditions was in existence to enable the taxing officer to invoke the power under the

> provisions of section 33(1) and to raise any demand of tax in advance of assessment as per other provisions contained in section 33. A similar question had arisen before this Court in WP 982 of 1999; *M/s Itarsi Oil and Flours Ltd., Ganjpara, Raipur and Another Vs. Assistant Commissioner of Commercial Tax, Raipur, Circle II and two others* (decided on 1-9-99) and the contention was repealled by S.P. Khare, J. in the observations contained in paragraphs 6 and 7 of the judgment which reads as extracted below:
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> > "(6) A careful reading of sections 26, 27, 32 and 33 goes to show that the registered dealer is bound to deposit the sales tax in advance in respect of those items for which there is no dispute or objection. In case there is any dispute between the dealer and the authorities regarding any item on which the tax is payable or the dealer claims any exemption which is not admissible according to the taxing authorities, this dispute has to be decided by an order of assessment after hearing the dealer. The two provisos to - section 27 lay down that the assessment can take place at any time. It is, however, necessary that there has to be an assessment and thereafter the demand notice and revenue recovery certificate can be issued for payment of the tax. Then there is provision of an appeal u/S. 61 of the Act by any dealer aggrieved by an order of assessment. Therefore, the disputed questions of fact and law are required to be decided by the taxing authorities by an assessment order and that order has necessarily to be a reasoned one. In disputed cases the procedure of issuing the demand notice and revenue recovery certificate cannot be adopted without the assessment order. That was also the scheme under the provisions of the MP Gen. Sales Tax Act, 1958."

9. The said judgment of the Madhya Pradesh High Court was based upon the earlier decision of the same High Court made in the case of **Itarsi Oils and Flours Ltd., Raipur** v. **Asstt. Commissioner of Commercial Tax, Raipur**, 2000 (3) VKN 59.

10. Recently, again a Division Bench of the Madhya Pradesh High Court in the case of **M/s Birla Corporation Ltd.** v. **The State of Madhya Pradesh & Another**, decided on 27.3.2014 in Writ Petition No. 20674 of 2013, had the occasion for dealing with a similar situation. The Division Bench of the Madhya Pradesh referring to the decision of *Itarsi Oils and Flours Ltd.* (supra) and *Fabworth (India) Pvt. Ltd.* (supra) and other cases, held that:

> **"**Having heard learned counsel for the parties and on consideration of the facts and circumstances of the case, it is clear that in the cases **Itarsi Oils and Flours Ltd., Raipur Vs. Asstt. Commissioner of Commercial Tax, Raipur [2000] 33 VKN 59, Fabworth (India) Ltd. and another Vs. Commercial Tax Officer, Raipur and 3 others [2000] 33 VKN 516, Sanghi Brothers (Indore) Pvt. Ltd., Indore Vs Asstt. Commissioner, Commercial Tax, Indore & others (2005) 6 STJ 333 (MP) and Kailash Raghuvanshi & another Vs. State of Madhya Pradesh & others, (2005) 6 STJ 336 (MP)** the principle with regard to recovery of advance tax has been dealt with and it has been held in all the aforesaid cases that when the dealer has disputed his liability to pay the tax and when returns are being filed, no order can be passed in the matter of demanding advance tax before the assessment. It is for the revenue in such cases to complete the process of assessment and computation of tax and on the basis of the assessment order, a notice of demand can be issued for payment of tax. It is held that without assessment of the tax and computation process, issuing show-cause notice and recovery of tax by coercive method is unsustainable.
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> Keeping in view the above, the impugned action is quashed and respondents are directed to proceed in the matter with regard to the assessment and recovery of tax after following the law laid down in the aforesaid cases as indicated hereinabove in accordance with law.**"**

11. Taking into consideration the judicial pronouncements referred to in the preceding paragraphs and when compared to the facts of the present case, this Court has no hesitation in reaching to the conclusion that the notice (Annexure P-5) issued by the State Government was uncalled for at this stage, for the reason that when the State Government itself has admitted in their reply of the returns having been submitted by the Petitioners, the provisions of Section 26 of the Act of 2005 could not have been invoked by the State. The remedy available for them was, to have gone for proper assessment, determination and then for issuance of appropriate notice.

12. Thus, for the foregoing reasons, the writ petitions are allowed. The impugned Annexure P-5 deserves to be and is accordingly set aside. As a consequence, the consequential RRC notice (Annexure P-6) also deserves to be and is accordingly quashed, leaving open the remedy available to the State for initiating appropriate assessment proceeding in accordance with law, if they so desire.

Sd/-
(P. Sam Koshy)
Judge

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