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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.109 of 2012

Bharat Petroleum Corporation Ltd. having its Office at 4&6, Currimbhoy Road, Ballard Estate, Mumbai, Maharastra, Ps & Po Fort Through Sidney Diago George S/o Mr. Diago John George, aged about 52 years, resident of Kumbharwada, Agashi Vihar, Taluka Vasai, Distt. Thane, Maharashtra-401301.

---- Petitioner

Versus

1. Commissioner Commercial Tax Vanijyik Kar Bhawan, Civil Lines, PS Civil Lines, Raipur, Distt Raipur, Chhattisgarh.
2. Additional Commissioner Of Commercial Tax Vanijyik Kar Bhawan, Civil Lines, Raipur, Distt Raipur, Chhattisgarh.
3. State of Chhattisgarh Through Secretary, Department of Commercial Tax Mantralaya, DKS Bhawan, PS Civil Lines, Raipur, Distt Raipur, Chhattisgarh.

---- Respondents

For Petitioner : Smt. Smriti Sharma, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy

ORDER

Delivered on 25/08/2017.

1. The petitioner seeks to impugn the notice of re-assessment dated 14.06.2010 (Annexure P/3), the subsequent order of re-assessment dated 12.08.2010 (Annexure P/4) and the revisional order dated 23.12.2011 (Annexure P/6) passed by the Additional Commissioner, Commercial Tax.

2. Challenge in the present writ petition is on two folds. Primarily the petitioner has challenged the entire initiation of assessment to be barred by limitation and the second challenge was that the Light Diesel Oil (in short LDO) and Furnace Oil (in short, FO) are two

distinct commodities and therefore the rate of tax applicable on both these products should be separately levied at separate rates.

3. The assessment year involved in the present dispute is 2001-02. At the relevant point of time i.e. in the year 2001-02 it was the Commercial Tax Act which was in force. The petitioner company is a Central Govt. undertaking and is engaged in sale and purchase of petroleum products across the country including the State of Chhattisgarh. The products which are sold by the petitioner are petroleum diesel, Light Diesel Oil, Bitumen and Furnace Oil etc. The petitioner company is registered with the Commercial Tax Department having TIN-22921302283. The assessment for the period 01.04.2001 to 31.03.2002 was done on 28.01.2005 and the tax assessed was of Rs.10,03,45,175/-. The rate of tax for LDO has been 12 percent as per Entry-25 of Part-III of Schedule-II of the Commercial Tax Act and FO under the residuary entry being Entry-39 of Part-IV of Schedule-II of the said Act was @ 8 percent. There was no specific entry of FO under the Schedule.

4. That, on 14.06.2010 the respondent issued a notice for re-assessment under Section 28 (1) of the Chhattisgarh Commercial Tax Act for assessment year, 2001-02. The petitioner filed detailed reply with preliminary objection demanding reasons as to why the said proceedings were initiated and also emphasizing the fact that under the Chhattisgarh Entry Tax Act, both LDO and FO have been treated as different products. However, the department vide its order dated 12.08.2010 passed an order of re-assessment against the

petitioner raising new tax, demanding approximately 1.9 Crores.

5. The petitioner immediately challenged the order of re-assessment by filing a revision, however, the revisional authority also in a mechanical manner relying upon the same reasons as has been shown by the assessing officer while passing the re-assessment order, rejected the revision petition leading to filing of present writ petition.
6. Counsel for the petitioner submitted that in the year, 2001-02, the law in force for tax was the Commercial Tax Act, however, in the year, 2006, the Chhattisgarh Value Added Tax Act, 2005 (for short, VAT Act) came into force and was made effective from 01.04.2006. It was further submitted that by virtue of coming into force of VAT Act, the earlier tax law i.e. Commercial Tax Act stood repealed. After coming into force of VAT Act, for all practical purposes, the law as it lays down under the VAT Act would be applicable even in respect of the assessment years for the period prior to coming into force of VAT Act
7. According to counsel for the petitioner, under Section 22 of the VAT Act, the order of re-assessment even for the assessment made under the Commercial Tax Act i.e. the repealed Act, the period of limitation prescribed for issuance of notice for re-assessment is within a period of three calendar years from the date of order of assessment and which in the instant case has not been abided with, as the notice (Annexure P/3) has been issued much after the period of three years prescribed under Section 22 of the VAT Act. Thus, the proceeding is barred by limitation.

8. In addition, counsel for the petitioner has also assailed the rate of tax applied for LDO as well as FO treating them to be one commodity. According to him, there is no specific entry for furnace oil made in Part-II or IV of Schedule-II of the Commercial Tax Act and that in the past, the said furnace oil has been treated to be one under the subsidiary entry being Entry-39 of Part-IV of Schedule-II of the Commercial Tax Act and which has not been properly taken note of by the authorities while making re-assessment.

9. Before deciding the second ground raised by the petitioner so far as the dispute in respect of LDO and FO, it would be relevant to deal with the issue of limitation first. For better appreciation of facts, it would be relevant to quote Section 28 of the Commercial Tax Act which provides for re-assessment of turnover escaping assessment as under:

> "28 ASSESSMENT OF TURNOVER ESCAPING ASSESSMENT
> (1) Where an assessment has been made under this Act or the Act repealed by this Act and if for any reason any sale or purchase of goods chargeable to tax under this Act or the Act repealed by this Act during any period, has been under assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom or a set off has been wrongly allowed, <u>the Commissioner may, at any time within five calendar years from the date of order of assessment after</u> giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years from the commencement of such proceedings the tax payable by such dealer and the Commissioner may, where the omission leading to such reassessment is attributable to the dealer, direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount."

10. The said Act stood repealed from the date the VAT Act came into force i.e. w.e.f. 01.04.2006. Section 22 of the VAT Act refers to the

repealed Act saves under the repealing provision under Section 72 of the Act which specifically holds that Chhattisgarh Commercial Tax Act, 1994 shall stand repealed from the date of coming into force of this Act. Corresponding provision of Section 28 of the Commercial Tax Act was Section 22 in the VAT Act . Under the Commercial Tax Act, the time limit within which the notice for re-assessment could be issued was within 5 calendar years from the date of order of assessment. The date of order of assessment in the present case is 28.01.2005. Thus, even under the old Act, the notice of re-assessment could be issued only by 28.01.2010. However, in the instant case, the notice of re-assessment has been issued on 14.06.2010 i.e. even beyond the prescribed period of limitation under the repealed Act.

11. At this juncture it would be more pertinent to refer Section 22 of the VAT Act. Sub-section-1 of Section 22 of the VAT Act which is relevant for adjudication of the dispute raised in this case reads as under:

> "22. (1) Where an assessment or reassessment of a dealer has been made under this Act or the Act repealed by this Act and for any reason any sale or purchase of goods liable to tax under this Act or the Act repealed by this Act during any period-
> (a) has been under assessed or has been escaped assessment; or
> (b) has been assessed at a lower rate; or
> (c) any wrong deduction has been made while making the assessment; or
> (d) a rebate or input tax has incorrectly been allowed while making the assessment; or
> (e) is rendered erroneous and prejudicial to the interest of revenue consequent to or in the light of any judgment or order of any court or Tribunal, which has become final,
>
> <u>the Commissioner may at any time within a period of three calendar years from the date of order of assessment,</u> (or from the date of judgment or order of any court or Tribunal) proceed in

> such manner as may be prescribed, to assess or re-assess, as the case may be the tax payable by such dealer after making such enquiry as he considers necessary and assess or re-assess to tax."

12. Under Section 22 of the VAT Act, the time limit prescribed for issuance of notice for re-assessment is three calendar years from the date of order of assessment. As has been mentioned earlier that the order of assessment in the present case for the assessment year 2001-02 was 28.01.2005 and under the new law i.e. VAT Act, the notice for re-assessment could have been issued within three years from the date of order of assessment i.e. by 28.01.2008. For argument sake even if we take three years from coming into force of the new law, the notice could have been issued only by 28.01.2009 as VAT Act came into force w.e.f. 01.04.2006 and the notice for re-assessment as mentioned earlier was 14.06.2010 which again is much beyond the prescribed period under Section 22 of the VAT Act for issuance of notice of re-assessment.

13. At this juncture, it would be relevant to refer decision of this court in Writ Petition (T) No.7700 of 2010 (M/s Budhia Auto T.P. Nagar Korba Vs. Assistant Commissioner, Commercial Tax & Anr.) decided on 18.01.2013 where under somewhat similar circumstances, this court dealing with the issue of the repealing of the Commercial Tax Act has held as under:

> "6. Under the new Act, the appeal, revision or other proceeding arising under the repealed Act but preferred or initiated after the commencement of this Act, have also been saved to the extent that the same shall be heard and decided by the authority competent to entertain any appeal, revision or any other proceedings in accordance with the provisions of this Act. However, the re-assessment of the earlier assessment has not been saved under the repealing provisions under Section 72 of

> the Act. Thus, any re-assessment proceeding initiated after the new Act came into force cannot be saved. Thus, the assessment initiated under the old provisions but VAT Tax came into force stand quashed."

14. The State counsel opposes the petition on the ground that the issue of limitation has not been raised by the petitioner before the revisional authority or before the Assessing Officer during the course of re-assessment proceeding and therefore, the petitioner cannot take the ground of limitation now at this stage. So far as issue of dispute pertaining to LDO and FO, it is submitted by the counsel for the State that the said issue stands decided by the judgment of this court in Writ Petition (T) No.08 of 2012, dated 12.06.2012 (Hindustan Petroleum Corporation Ltd. Vs. Deputy Commissioner, Commercial Tax & Ors). He further relied upon the decision of the Karnataka High Court in case of MRF Ltd. Vs. Commissioner of Commercial Tax, Bangalore, 2011(18) STJ-204 (Kar) dealing with issue of interpretation of entries. However, the State counsel could not advance any argument so far as issue of limitation is concerned except for the fact that the said issue was not raised before the authorities below.

15. Indisputably, the law is by now well settled that legal issues and legal grounds particularly touching the issue pertaining to competency of authority, jurisdiction of authority, bar of statutes being all legal grounds can be raised at any point of time and limitation also being a jurisdictional issue could therefore be raised by the petitioner before the High Court while assailing the order of competent authority.

16. This view of the court stands fortified by the decision of the Supreme

Court in case of State of Punjab & Others Vs. Bhatinda District Co-operative Milk Producers Union Ltd., 2007 (11) SCC 363.

17. In view of the aforesaid decisions of the Supreme Court upholding the maintainability of the writ petition, if we read the two provisions i.e. Section 28 of the repealed Act and Section 22 of the VAT Act, both specifically stipulate the period of limitation for initiating re-assessment proceeding on an escaped assessment. Thus, this court has no hesitation in reaching to the conclusion that under both the laws the notice of re-assessment issued by the respondents were beyond the period of prescribed limit. No plausible explanation has been furnished by the State Govt. justifying the delay part. Neither does the Act empower the authorities under any circumstances to proceed for re-assessment beyond the limitation period prescribed under Section 22 of the VAT Act.

18. Thus, the notice of re-assessment dated 14.06.2010 (Annexure P/3), the subsequent order of re-assessment dated 12.08.2010 (Annexure P/4) and the revisional order dated 23.12.2011 (Annexure P/6) being in contravention of Section 22 of the VAT Act, the same being not sustainable deserve to be and are hereby quashed.

19. The petition is allowed.

Sd/-
(P. Sam Koshy)
Judge

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