

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No.3969 of 2005

Order reserved on: 21-6-2017

Order delivered on: 7-7-2017

Steel Authority of India Ltd., Registered as Government Company under the Companies Act, with registered office at Lodhi Road, New Delhi and work at Bhilai Steel Plant, District Durg.

Represented by: Managing Director.

---- Petitioner

Versus

1. The Additional Commissioner, Commercial Tax, Raipur.
2. The Assistant Commissioner, Commercial Tax, Durg.
3. State of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
4. State of Madhya Pradesh, through the Secretary, Commercial Tax Department, Mantralaya, Bhopal.

---- Respondents

For Petitioner: Mr. M.C. Jain and Mr. Ashok Patil, Advocates.

For State of Chhattisgarh/Respondents No.1 to 3: -

Mr. Arun Sao, Deputy Advocate General and
Mr. Shashank Thakur, Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Impugning legality, validity and correctness of the order passed by the Additional Commissioner, Commercial Tax, Raipur, whereby and whereunder the said revisional authority has affirmed the order of the assessing authority relating to assessment of entry tax for the period from 1-4-1990 to 31-3-

1991 levying penalty under Section 17 (3) (b) (ii) of the M.P. General Sales Tax Act, 1958 (for short, 'the Act, 1958') and the Rules made thereunder read with Section 13 of the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (for short, 'the Act, 1976') and thereby affirmed the levy of penalty to the extent of ₹ 4,09,09,903/-.

2. Essential facts leading to passing of the impugned order are as under: -

2.1) The petitioner is a company incorporated and registered under the provisions of the Indian Companies Act, 1956. It is a Government company within the meaning of Section 617 of the Companies Act, 1956. It has an integrated steel plant at Bhilai where iron and steel are manufactured. For manufacture of iron and steel, various raw materials including iron ore, coking coal, lime stone etc., are used as raw materials. These goods are specified as raw materials in the registration certificate of the petitioner.

2.2) It is the case of the petitioner that in conformity with the policy to tax raw materials at a lower rate under the Sales Tax Act and also under the Act, 1976, general rate of entry tax on raw material was 7% under Section 4 of the said Act. The State Government could specify local area or areas and the goods for levy of entry tax at a rate not exceeding 10% by notification under Section 4A of the Act, 1976. The petitioner Company

purchased low silica lime stone as one of its raw materials for production of steel and they were paying entry tax regularly on it on the entry of low silica lime stone into the local area of Bhilai up to December, 1990. For the month of January, 1991, tax was due on 10-2-1991, but the M.P. High Court on 6-2-1991 delivered a judgment in the case of **Makers Development Service (Pvt.) Ltd. v. State Govt. of Madhya Pradesh and others**¹ declaring the levy of entry tax on lime stone as unconstitutional on the ground that entry tax on lime stone was a tax on royalty on mineral right and was beyond the legislative competence of the State Legislature while following the decision of Their Lordships of the Supreme Court in the matter of **The India Cement Ltd. etc. etc. v. State of Tamil Nadu**². Likewise, the cess on mineral was declared ultra vires by the M.P. High Court in the matter of A.C.C. Ltd. v. State of M.P.³ decided on 16-2-1991. Therefore, the petitioner Company in view of the decision in **Makers Development Service** (supra) discontinued payment of entry tax on lime stone from the month of January, 1991, though payment for the month of January, 1991 was due to be paid on 10-2-1991. Thereafter, the petitioner filed writ petition in the M.P. High Court in which interim order was granted in favour of the petitioner and attempt on the part of the State Government to get the interim order vacated remained

1 [1991] 24 VKN—289

2 [1991] 24 VKN 269 (SC) : AIR 1990 SC 85

3 [1991] 24 VKN—293

illusory but later-on, looking to the gravity and taking into account the long life of litigation, a settlement was arrived at and a memorandum of understanding (MOU) was reduced into writing on 11th/12th February, 1993 and thereafter, the entry tax liability for the 4th quarter of the year 1990-91 was paid in the year 1993-94 and withdrawn all its pending proceedings and tax liability for 1991-92 and 1992-93 was also paid. Pursuant to the memorandum of understanding, the State Government issued circular waiving levy of entry tax and penalty for the period from 1-4-1991 to 31-3-1994, but inadvertently, the period from 1-1-1991 to 31-3-1991 was left to be included and that has given rise to the present dispute.

2.3) It was further pleaded that the petitioner filed returns for the quarter ending on 31-12-1990 and 31-3-1991 and only on the basis of decision of the M.P. High Court, entry tax was not paid. An explanation was offered for not paying the tax along with returns that persuaded respondent No.2 to demand tax on these goods and notices were served on 4-3-1991 and 30-7-1991 for demand of entry tax. Respondent No.2 initiated the assessment proceedings for the relevant year i.e. 1990-91 by issuing notice of assessment and the case was fixed for hearing on 23-3-1999 and in which sufficient cause was shown for not clearing the tax liability on account of the judgment of the M.P. High Court in **Makers Development Service** (supra), as there is an order of stay in their favour and tax was subsequently deposited based

on the condition of MOU between the Government of Madhya Pradesh and Bhilai Steel Plant.

- 2.4) It is the further case of the petitioner that despite showing sufficient cause under Section 17 (3) (b) (ii) of the Act, 1958, penalty to the extent of ₹ 4,09,09,903/- was imposed holding that Section 17 (3) (b) is automatic and mandatory though the petitioner had sufficient cause for not paying balance of tax that was assessed, whereas the admitted tax as per the return had already been paid and the returns filed are late only by three days. Misconstruing and misunderstanding the provisions of the Act, 1958, the impugned order imposing penalty has been passed. On revision being filed, the revisional authority also did not properly consider the petitioner's plea that they are not liable for payment of penalty and passed the impugned order leading to impugned challenge by way of this writ petition.
3. The writ petition as framed and filed has been opposed by the State of Chhattisgarh/respondents No.1 to 3 averring that penalty has rightly been imposed as only interest and liability has been exempted pursuant to the MOU from 1-4-1991 to 31-3-1994 and sufficient cause has been shown while imposing penalty and no fault can be found in it.
4. Mr. M.C. Jain, learned counsel appearing for the petitioner, would submit that imposing of penalty in exercise of power under Section 17 (3) (b) (ii) of the Act, 1958 read with Section 13 of the

Act, 1976 for late deposit of tax is absolutely illegal and bad in law. He would further submit that the assessing authority was required to record a finding that tax was not deposited without sufficient cause and the dealer has failed to show sufficient cause to comply with the requirements of notice under Section 17 (1) of the Act, 1958, as Section 17 (3) is a penal provision and unless there is a finding of failure to make payment in time or failure to submit return in time without sufficient cause, no penalty under Section 17 (3) could have been imposed. He would further submit that sufficient cause was shown that was neither considered nor finding was recorded while passing the impugned order levying penalty. The revisional authority on revision even did not pay any heed to the star submission raised by the present petitioner leading to passing of the impugned order, therefore, the impugned order deserves to be set aside.

5. On the other hand, Mr. Arun Sao, learned Deputy Advocate General and Mr. Shashank Thakur, learned Government Advocate appearing on behalf of the State of Chhattisgarh/ respondents No.1 to 3, would support the impugned order and submit that the petitioner's submission has been considered in its proper perspective by the assessing authority and it has been upheld by the revisional authority and, therefore, in exercise of supervisory jurisdiction under Article 227 of the Constitution of India, no interference is warranted by this Court, as neither there is perversity nor illegality in the impugned order and as such, the

writ petition deserves to be dismissed.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
7. Section 17 of the Act, 1958 deals with returns to be filed by the dealer. Under Section 17 (1) every dealer is required to furnish returns in such form and in such manner for such period by such dates and to such authority, as may be prescribed. Consequence of non-furnishing returns as enumerated in Section 17 (1) is provided in Section 17 (3) (b) which reads as under: -

“17. RETURNS

(3) If—

(a) a dealer fails without sufficient cause to comply with the requirements of a notice issued under sub-section (1); or

(b) a registered dealer fails without sufficient cause to pay the amount of tax in the manner prescribed under sub-section (2) of section 22 or to furnish his return under sub-section (1) or revised return under sub-section (2) for any period in the manner and by the date prescribed thereunder or while furnishing the return fails to furnish along with the return, the proof of payment as required by sub-section (1-A); or

(c) a registered dealer fails to furnish return,

the commissioner may, after giving such dealer a reasonable opportunity of being heard, direct him to pay, by way of penalty—

(i) in the case referred to in clause (a), in addition to any tax payable by him a sum not exceeding fifty rupees for each occasion of default, subject to a maximum of five hundred rupees in each case;

(ii) in the cases referred to in clause (b), in addition to the amount of tax, if any, payable by him a sum equal to one percent of the tax for every month or part thereof for the first six months and 1.5 percent for the next six months of the first year during which the default continued and thereafter 2 percent of the tax for every month or part thereof during which the default continued but not exceeding in aggregate 25 percent of the tax which may be assessed on him under section 18 and where no tax is payable, a sum not exceeding Five hundred rupees; and

*** *** ***"

8. At this stage, it would also be appropriate to notice Section 22 of the Act, 1958 which deals with payment and recovery of tax and other dues under the Act. Section 22 (1), (2) and (3) of the Act, 1958 reads as follows: -

"22. PAYMENT AND RECOVERY OF TAX AND OTHER DUES UNDER THE ACT

(1) The tax payable for each year shall be paid in the manner hereinafter provided at such intervals may be prescribed.

(2) Before any registered dealer furnishes any return required by sub-section (1) of section 17, he shall pay into a Government treasury in the prescribed manner the full amount of tax due from him under this Act according to such return.

(3) If a revised return submitted by a registered dealer in accordance with sub-section (2) of section 17 shows a greater amount of tax to be due than was shown in the original return, he shall pay the difference into a Government treasury."

9. A focused glance of Section 17 (3) (b) of the Act, 1958 would show that if a registered dealer fails without sufficient cause to pay the amount of tax in the manner prescribed under sub-section (2) of Section 22 or fails to furnish his return under sub-

section (1) or revised return under sub-section (2) for any period in the manner and by the date prescribed thereunder, the Commissioner may, after giving such dealer a reasonable opportunity of being heard, impose a penalty provided under Section 17 (3) (c) (ii), a sum equal to one percent of the tax for every month or part thereof. Therefore, the condition precedent for levy of penalty is that dealer must have failed without sufficient cause to comply with the provisions of Section 22 (2) or Section 17 (1) or Section 17 (2) of the Act, 1958 and further that a reasonable opportunity of hearing has to be granted to the dealer before imposing penalty.

10. The word “reasonable opportunity” used in Article 311 of the Constitution of India has been defined by Their Lordships of the Supreme Court in the matter of **Khem Chand v. Union of India and others**⁴ and it has been held as under: -

“(19) To summarise: the reasonable opportunity envisaged by the provision under consideration includes:

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and

4 AIR 1958 SC 300

after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant. ...”

11. Yet again, in a Constitution Bench decision of the Supreme Court in the matter of **Fazal Bhai Dhala v. The Custodian-General, Evacuee Property, New Delhi and another**⁵, Their Lordships of the Supreme Court while considering the scope and ambit of phrase 'reasonable opportunity of being heard' employed in the first proviso to Section 26 (1) of the Administration of Evacuee Property Act, 1950, held as under: -

“(7) ... What the law requires is that the person concerned should be given a reasonable opportunity of being heard before any order prejudicial to him is made in revision. If this reasonable opportunity of being heard cannot be given without the service of the notice the omission to serve the notice would be fatal; where however proper hearing can be given without service of notice, it does not matter at all, and all that has to be seen is whether even though no notice was given a reasonable opportunity of being heard was given.”

12. Section 17 (3) (b) (ii) of the Act, 1958 is a penal provision. In the matter of **Maya Devi v. Raj Kumari Batra**⁶, the Supreme Court has held that where an authority is vested with discretionary powers, discretion has to be exercised by application of mind and by recording reasons to promote fairness, transparency and equity.

13. It is settled law that an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal

5 AIR 1961 SC 1397

6 (2010) 9 SCC 486

proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained of was a technical or venial breach, flew from a bona fide though mistaken belief. (See **Karnataka Rare Earth & anr. v. Senior Geologist, Department of Mines & Geology**⁷, **Bharjaty Steel Industries v. Commissioner, Sales Tax, UP**⁸ and **M/s. Hindustan Steel Ltd. v State of Orissa**⁹.)

14. The penal provision as contained in Section 17 (3) (b) of the Act, 1958 has been considered by a Division Bench of the M.P. High Court in the matter of **Commissioner of Sales Tax, M.P. v. M/s Eastern Air Products (P) Ltd., Bhopal**¹⁰ in which Their Lordships have held that if assessee has not been given opportunity to show cause for the defaults committed by the dealer, penalty is not justified and it has been held as under: -

“4. ... It will be clear from the aforesaid provisions that if a registered dealer fails without sufficient cause to furnish a return under sub-section (1) of section 17 for any period in a manner and by the date prescribed thereunder or while furnishing a return fails to furnish proof of payment as required by sub-section (1-A) of section 17, the Commissioner

7 (2004) 2 SCC 783

8 (2008) 11 SCC 617

9 1969(2) SCC 627

10 2006(3) M.P.L.J. 184

may, after giving him a reasonable opportunity of being heard, direct him to pay by way of penalty the amount stipulated in clause (ii) of section 17(3). It is thus clear that where sufficient cause is shown by the registered dealer for not filing the return within the prescribed date or for not furnishing along with the return proof of payment of tax due, such penalty cannot be imposed. In fact, the requirement in the provision for giving a reasonable opportunity of being heard is for the purposes of enabling the dealer to establish before the Commissioner that he had sufficient cause for not filing return by the date prescribed or for not furnishing along with the return proof of payment as required by sub-section (1-A) of section 17 of the Act. The word “may” in the provision further makes it clear that the Commissioner may or may not impose penalty under section 17(3) of the Act in any particular case. In other words, where sufficient cause is shown by the registered dealer by the date prescribed for not furnishing the return or for not furnishing proof of payment along with the return as required sub-section (1-A) of section 17 of the Act, the Commissioner in exercise of such discretion will not impose a penalty on such dealer.”

15. Thereafter, it has further been held by Their Lordships constituting the Division Bench that the Commissioner may initiate penalty proceedings by asking the assessee to show cause as to why penalty will not be imposed for the default. But while passing the order of penalty, he has to record a finding either that no cause was shown by the dealer or that the cause shown by the dealer was not sufficient.

16. Thus, taking note of the statutory provisions and principles governing imposition of penalty and the nature of penalty i.e. penal provision, the authority imposing penalty has to exercise that jurisdiction in consonance with the aforesaid provisions of law and the principles of law laid down by Their Lordships of the

Supreme Court and the M.P. High Court.

17. This would bring me to the next question, whether the assessing authority is justified in imposing penalty after giving a reasonable opportunity of being heard as contemplated under Section 17 (3) (b) of the Act, 1958.
18. It is the case of the petitioner that on account of decision of the M.P. High Court in **Makers Development Service** (supra) declaring the levy of entry tax on lime stone as unconstitutional and beyond the legislative competence of the State Government, decided on 6-2-1991, payment of entry tax from January, 1991 onwards was deferred by the petitioner, but ultimately, when the matter was settled and MOU was entered into, all other dues were paid by the petitioner Company and even interest and penalty were waived for the period from 1-4-1991 to 31-3-1994, which constitutes sufficient cause within the meaning of Section 17 (3) (b) of the Act, 1958.
19. The assessing authority in its order dated 22-10-2001 has noted the case of the petitioner only to the extent that it relies upon the notification dated 22-3-1994, but it omits to consider other pleas that on account of the decision in **Makers Development Service** (supra), tax liability was not cleared and as soon as the matter was settled by MOU, all petitions were withdrawn and tax liability was cleared by making payment of an amount to the extent of ₹ 47 crores which is only on account of taking plea that they are

not liable to pay entry tax pursuant to the decision of the High Court, they did not make payment, but when the settlement was arrived at all the tax liability was cleared. It appears that the assessing authority after assessing tax liability simply proceeded to levy penalty in exercise of power conferred under Section 17 (3) (b) (ii) of the Act, 1958 and has not considered the reason assigned by the petitioner Company whether it constitutes sufficient cause or not. Apart from the fact that there is nothing on record to show that after assessing tax and before imposing penal liability, reasonable opportunity of hearing was afforded to the petitioner. This shows that no reasonable opportunity of being heard to oppose the levy of tax as contemplated by Section 17 (3) (b) of the Act, 1958, was afforded to the petitioner. Specific ground was raised before the revisional authority that no show cause notice was issued before levy of penalty and thus, imposition of penalty is not justified, but the revisional authority also cursorily and casually noted the submissions, but did not consider the plea raised by the petitioner and simply stated that no satisfactory explanation has been offered. It is neither considered in detail nor the plea of the petitioner has been answered that no reasonable opportunity of showing cause was afforded to him before imposing penalty and though partly reduced the penalty to the extent of ₹ 73,37,768/- so made by the assessing authority. Thus, the assessing authority has neither given reasonable opportunity of hearing before imposing

penalty and even not recorded that failure to pay the tax within the stipulated time is without sufficient cause. The revisional authority has also perpetuated the illegality.

20. As a fallout and consequence of above-stated analysis, the order of the assessing authority duly upheld by the revisional authority to the extent of imposing penalty, is hereby quashed. However, the respondent authorities are at liberty to proceed in accordance with law for imposition of penalty after affording reasonable opportunity of hearing and this order will not debar the respondents to proceed afresh.

21. The writ petition is allowed to the extent indicated herein-above.

No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge