NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 70 OF 2017

- M/s Era Infra Engineering Ltd. Seepat Road, Bilaspur (C.G.) having its registered office at C-56/41, Sector 62, Noida 201305, through Vinod Bhatia, Senior Officer (Taxation), S/o Dharam Pal Bhatia, aged about 34 years, R/o Plot No. MM 108, Second Floor, Flat No.4, DLF Ankur Vihar, Loni Ghaziabad, Uttar Pradesh 201102

... Petitioner

versus

1. State of Chhattisgarh, through its Secretary, Finance and Planning Department (Commercial Tax Department), Mantralaya, Mahanadi Bhawan, Naya Raipur (C.G.)

2. Commissioner, Commercial Tax Department, Government of Chhattisgarh (Vanijya Kar Bhawan), South Civil Lines, Raipur (C.G.)

3. Additional Commissioner, Commercial Tax Department, Government of Chhattisgarh (Vanijya Kar Bhawan), South Civil Lines, Raipur (C.G.)

4. Regional Deputy Commissioner, Commercial Tax Department, Bilaspur, Region No.1, Bilaspur (C.G.)

... Respondents

For Petitioner	:	Mr. Anumeh Shrivastava, Advocate.
For Respondents	:	Mr. B. Gopa Kumar, Dy. Advocate General.

Hon'ble Shri Justice P.Sam Koshy

C A V ORDER

Reserved on : 29/08/2017

Delivered on : 25/10/2017

1. The present writ petition has been filed challenging the order passed by the Additional Commissioner, Commercial Tax, Raipur, vide Annexure P-1, dated 3.4.2017, passed in Revisional Order No. 04/BSP/2016(State) and also the order dated 22.12.2015 (Annexure P-6) passed by the Regional Deputy Commissioner, Commercial Tax, Bilaspur, in Order No. 08/Remand/2014(State).

2. The dispute pertains to the assessment year 2007-08. The allegation against the petitioner-firm as per the department is that they had a works contract with the railways department pertaining to railway signaling/communication cables. After the petitioner had submitted its return, the same was subjected to audit and in the course of audit, an objection was raised as to the tax paid on the cable purchased by the petitioner by executing a contract. As per the audit objection, the tax paid by the petitioner was of 4% whereas it should had been 12.5% and as such the petitioner is said to have concealed and evaded tax to the tune of 8.5%.

3. According to the learned counsel for the petitioner, the assessment made by the authorities is bad in law for the reason that the case against the petitioner can under no circumstances be held to be one under concealment of facts or is in any manner an evasion of tax. According to the counsel for the petitioner, the finding of the officer is only on the basis of change of opinion with no substantive or substantial material. According to the counsel for the petitioner, the department itself has not been able to prove its case since the department has not discharged its duties that of proving the fact that the cable used by the petitioner in the execution of the work contract would be taxed at 12.5%. According to the counsel for the petitioner, the burden of proof was upon the department to show that the said cable used by the petitioner would fall under Part IV of Schedule 2; rather it is a case where the product was one which would fall under Part II of Schedule 2 of the Value Added Tax Act, 2005, as is also certified by the Chartered Engineer. The counsel for the petitioner has relied upon the decision of the Madhya Pradesh High Court in the case of **Eisher Motors Ltd. and Anr.** v. **State of M.P. and Ors.**, **2005 (3) MPHT 399**, and further also has relied upon the decision of the Hon'ble Supreme Court in the case of **Haleema Zubair, Tropical Traders** v. **State of Kerala**, **2008 (16) SCC 504.**

4. Per contra, learned counsel for the State opposing the petition submits that it is a case which purely falls within four corners of Section 22(1) of the Value Added Tax Act, 2005, inasmuch as the case of the petitioner would fall under Section 21(1)(b) of the said Act as the assessment made by the petitioner was on a lower rate. Further, the State Counsel referred to the order passed by the revisional authority which had elaborately discussed while deciding the revision petition and submits that it is a case of under-assessment made by the petitioner so far as the product used by the petitioner and that this aspect could be detected only during the audit which was conducted. Therefore, since the finding is on the basis of audit report, it cannot be said to be a case of reopening of assessment on the basis of change of opinion; rather it is a case where the assessment initially made was on the basis of the information provided by the petitioner, thus, prayed for the rejection of the petition.

5. Having heard the contentions put forth on either side, the core issues which are required to be adjudicated upon by this Court in the present writ petition are the three grounds of challenge. Firstly, the ground of there being no new material available for the authorities for going in for reassessment. Second ground being that of the order of reassessment is only on a change of opinion by the auditors. And the last ground being that of the order passed by the revisional authority not being a reasoned order.

6. As regards the ground of availability of new material is concerned, what is reflected from the proceeding is that the petitioner showing the product to be an industrial cable paid the tax at the rate of 4%, whereas during the course of audit it was detected that the product used by the petitioner was an ordinary cable and was not an industrial cable and therefore the tax payable would have been at the rate of 12.5% rather than 4%. Based on the audit report, the Regional Deputy Commissioner had taken cognizance and reopened the case and passed an order on 28.3.2014 (Annexure P-3). Against the said order, the petitioner preferred a revision petition under Section 49(1) of the Value Added Tax Act, 2005 before the Additional Commissioner (Commercial Tax). The revisional authority vide its order dated 29.11.2014 had set aside the order of the assessing officer, dated 28.3.2014, and remanded the matter back for a fresh adjudication. The assessing authority on the matter being remanded back to it, reconsidered the facts and circumstances of the case and passed a fresh order dated 22.12.2015 holding the product used by the petitioner to be one which would fall under Part 4 of Schedule 2 and made an assessment of Rs. 1,24,26,323/- and issued a demand notice in this regard. The said order dated 22.12.2015 was again subjected to challenge in a revision petition before the Additional Commissioner (Commercial Tax) and the revisional authority has confirmed the order of the assessing authority vide impugned order dated 3.4.2017.

7. Now whether there was any new material brought before the authorities or not, if we look into the proceedings drawn it would reveal that the sole stand taken by the petitioner all along was that the product used was an industrial cable and for which they relied upon a certificate issued by a Chartered Engineer who has certified that the cable used by the petitioner for the execution of the contract that they had with the railways department to be an industrial cable. Once when the audit objection was specific to the effect that the cable used by the petitioner not being an industrial cable but an ordinary cable, what was required for the petitioner was to have produced before the authorities sufficient material/evidence to convince that the product used by them was in fact an industrial cable and not an ordinary cable as was objected by the audit team. However, if we peruse the records, the petitioner has not produced any material to show as to what sort of a cable was used by them for the execution of the works contract and what was the actual specification of the cable used. The report of the Chartered Engineer also does not disclose much specification and only certifies the purchase of the cable by the petitioner. There is no evidence to the effect that the said cable was in fact used in the railways department, neither is there any evidence from any of the officers of the railways department. The petitioner has also failed to produce any evidence before the concerned authority to prove the actual nature of work and the cables used for the said work, with which it could be determined by the authorities that the cable used was industrial cable and not ordinary cable.

8. The aforesaid facts would also help in considering the second ground so far as reopening of the case on the ground of change of opinion. If we read audit objection as also the finding of the revisional authorities, what is reflected is that it is not a case of change of opinion but is a case where certain discrepancies were found during the course of the audit and the matter on discrepancy was sent back to the concerned authority where it was the responsibility of the petitioner to have proved its case to show that the objection pointed out by the audit team was baseless, which the petitioner has not availed rather were banking only upon the certificate of the Chartered Engineer without producing material facts so far as the works executed by the petitioner. Thus, it cannot be held that the reopening was on change of opinion.

9. As regards the ground of the order of the revisional authority not being a reasoned order, this Court is not inclined to accept it, for the reason that the perusal of the order of the revisional authority would clearly reveal that the revisional authority has taken into consideration each of the grounds which they had raised in their revision petition and has discussed and decided those issues. In view of the same, this Court is of the opinion that the order under challenge is a well reasoned and speaking order and that no strong case has been made out by the petitioner to interfere with the impugned order.

10. As regards the afore-quoted judgments which have been cited by the petitioner are concerned, the facts of those cases are entirely different than the facts of the present case. The cases referred to by the petitioner pertain to evasion of tax or concealment of taxable turnover etc. Whereas, the present is a case which would be one which could be said to be a case of the assessment being made at a lower rate and which could be detected only in the course of audit and therefore the orders passed by the authorities concerned cannot be said to be either erroneous or bad in law. The petitioner could have easily, when the matter was initially remitted by the revisional authority vide order dated 29.11.2011, produced material sufficient to establish that the cable used by them was not ordinary cable. The petitioner could have also produced sufficient proof either from the railways department where they had executed the work or by producing sufficient material to show as to the nature of work and the cable used. Only because the railways being an industrial establishment by itself would not simply mean any cable used by a contractor in the execution of a contract would fall within the ambit of an industrial cable.

11. The writ petition thus being devoid of merits deserves to be and is accordingly dismissed.

Sd/-

(P. Sam Koshy)
JUDGE

/sharad/