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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.5129 of 2016

M/s. Sarala Project Works Pvt. Ltd. .... ***Petitioner***

Mr. Tushar Kanti Satpathy, Advocate

-versus-

Additional Commissioner of Sales Tax, Cuttack & Others .... ***Opposite Parties***

Mr. Susanta Kumar Pradhan, ASC

CORAM:
THE CHIEF JUSTICE
JUSTICE M. S. RAMAN

ORDER
22.12.2022

Order No.

Dr. S. Muralidhar, CJ.

05. 1. The short ground on which the impugned notice dated 11th January, 2016 issued by the Commissioner of Commercial Taxes, Odisha, Cuttack to the present Petitioner has been challenged, is that it is a violation of Section 79(4)(b) of the Odisha Value Added Tax Act, 2004 (OVAT Act).

2. The facts in brief are that the Petitioner is a registered dealer under the OVAT Act and engaged in undertaking works contracts. An audit visit report was submitted under Section 42 of the OVAT Act in respect of the Petitioner by the audit visit tam for the period

20th December, 2007 to 31st March, 2010. Thereafter, an assessment order was passed on 3rd February, 2011 allowing the Petitioner refund Rs.1.07 crores.

3. The first appeal was filed by the Petitioner under Section 77 of the OVAT Act was disposed of by the Joint Commissioner of Sales Tax, Balasore (JCST) on 30th May, 2012 allowing the TDS and other deduction and reducing the refund to Rs.1.2 crores. According to the Petitioner, no further challenge was raised by the Petitioner to the said order of the JCST.

4. Nearly four years later, the impugned notice dated 11th January, 2016 was issued by the Commissioner invoking the *suo motu* power of revision under Section 79 (1) of the OVAT Act for the said period on the ground that the deduction allowed by the JCST was erroneous and prejudicial to the interests of the Revenue.

5. Section 79 (4) (b) and Section 79 (5) of the OVAT Act read as under:

> *"79. **Revisional power of Commissioner.** –*
> *(4) The Commissioner shall not revise, under sub-section (1), any order, if-*
> *(a) xxxxxxxxx xxxxxxxx*
> *(b) The order has been made a subject matter of appeal under section 77 or 78"*
>
> *"(5) Notwithstanding anything contained in sub-section (4), the Commissioner may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (b) of sub-section (4) before the*

expiry of the period specified in clause (c) of the said sub-section."

6. The specific averment of the Petitioner that the very purpose of which notice under Section 79(4) of the OVAT Act was issued by the Commissioner was already the subject matter of the appeal before the JCST, and that the Department itself could have gone in appeal against the said order under Section 78 of the OVAT Act has remained uncontroverted. In terms of Section 79(4)(b) read with Section 79(5) of the OVAT Act there is a clear statutory bar to the Commissioner exercising *suo motu* revisional power in such circumstances.

7. In response to the notice issued in the present petition, a counter affidavit has been filed by the Department. *Inter alia*, it is stated that the Petitioner ought not have approached this Court at the stage of notice and it is only after an order passed pursuant to the impugned notice issued that the Petitioner has a remedy of challenge to such order.

8. It must be noted that at the outset that while issuing notice in the present petition on 18th May, 2016 this Court granted a stay of further proceeding pursuant to the impugned notice. That stay has continued since.

9. The present petition has been pending for over six years. In the circumstances, the Court sees no useful purpose being served in relegating the Petitioner at this stage to the Commissioner for an

order on the impugned show cause notice, particularly since it appears to have been issued in violation of Section 79(4)(b) read with Section 79(5) of the OVAT Act.

10.The counter affidavit fails to answer to the principal ground of challenge viz., that despite there being available to the Department the remedy of an appeal in terms of Section 78 of the OVAT Act, the Commissioner has chosen to exercise suo motu revisional power under Section 79 (1) of the OVAT Act. Further, there is no denial in the counter affidavit that there is statutory bar under Section 79 (4) (b) of the VSAT Act to the Commissioner exercising *suo-motu* revisional power since the issue was already the subject matter of an appeal.

11.The legal position being clear, this Court quashes the impugned notice dated 11th January, 2016 and all consequential proceedings. The result of this order is that the order passed by the JCST, Balasore will be given effect to forthwith in accordance with law.

12.The writ petition is disposed of in the above terms.

(Dr. S. Muralidhar)
Chief Justice

(M. S. Raman)
Judge

MRS/Laxmikant