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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 11311 of 2019
AND
W.P.(C) No. 22064 of 2019

W.P.(C) No.11311 of 2019

M/s. Maharana Supply and Co., Kotsahi, Tangi	….	***Petitioner***
	-versus-	
State of Odisha and Others	…	***Opposite Parties***

AND

W.P.(C) No.22064 of 2019

M/s. Maharana Supply and Co., Kotsahi, Tangi	….	***Petitioner***
	-versus-	
Commissioner of Sales Tax and Another	…	***Opposite Parties***

Advocates, appeared in these cases:

For Petitioner(s)	:	Mr. R.P.Kar, Advocate
For Opposite Parties	:	Mr. S.K. Pradhan Addl. Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

Order No. **ORDER**
20.12.2022

Dr. S. Muralidhar, CJ.

09. 1. The challenge in W.P. (C) 11311 of 2019 is to an order dated 8th March, 2019 passed by the Commissioner of Sales Tax, Odisha

(CST) whereby the appeal filed by the present Petitioner-Assessee under Section 79 (7) of the Orissa Value Added Tax Act, 2004 (OVAT Act) against the suo-motu revision order dated 12th July, 2018 passed by the Addl. Commissioner of Sales Tax (Addl.CST), Cuttack-II Range, Cuttack under Section 79(1) of the OVAT Act raising demand of Rs.7,99,848/- for the tax period 1st April, 2014 to 30th September, 2015 was dismissed. The challenge in the companion W.P. (C) 22064 of 2019 is to the consequential demand raised by the Assessing Authority (AA).

2. This Court has heard the submissions of Mr. R.P. Kar, learned counsel appearing for the Petitioner and Mr. S.K. Pradhan, learned Addl. Standing Counsel for the Opposite Party-Department.

3. The facts in brief are that the Petitioner is a dealer registered under the OVAT Act, and deals in sale of sized wood, logs and waste of wood cuts. Pursuant to a tax audit conducted under Section 41 of the OVAT Act, the AA passed an assessment order under Section 42 of the OVAT Act on 3rd May, 2017 allowing certain deductions while computing the tax liability.

4. On 2nd May, 2018 the Joint Commissioner of Sales Tax, Cuttack-II Range, Cuttack (JCST), exercising suo motu revision power under Section 79(1) of the OVAT Act, issued a notice seeking to revise the aforementioned order of the AA. On 12th July, 2018 the Additional Commissioner of Sales Tax (Addl. CST), Cuttack-II Range, Cuttack passed an order under Section 79(1) of the OVAT

Act revising the original assessment order and raising an enhanced demand relating to the aforementioned tax periods.

5. Aggrieved by the above order of the Addl. CST, the Petitioner-Assessee filed an appeal before the CST under Section 79(7) of the OVAT Act. Along with the appeal the Petitioner filed two applications, one for stay and the other raising a preliminary issue as to the jurisdiction of the Addl. CST to pass an order in suo-motu revision.

6. By an order dated 6th December, 2018 the CST rejected the application for deciding the preliminary issue. Aggrieved by this order, the Petitioner filed W.P.(C) No.179 of 2019 in this Court. On 22nd January, 2019 the following order was passed by this Court in the said writ petition:

> "Heard learned counsel for the parties.
>
> By way of this writ petition, the petitioner has challenged the order passed by the Commissioner of Sales Tax, Odisha dated 06.12.2018, in Revision Case No.CU-29/V 2018-19, under Annexure-1, whereby the preliminary issue raised by the petitioner has been turned down.
>
> In our considered opinion, the point which has been raised by the petitioner prima facie appears to have force of law, but the same can be challenged along with other grounds after the Commissioner decides the appeal, if he feels aggrieved.
>
> We are not inclined to interfere with the impugned order at this stage.

> It is made clear that we have not expressed any opinion on the merits of the case.
>
> However, it is open for the Petitioner to challenge the jurisdiction of the Joint Commissioner of Sales Tax (Additional Commissioner of Sales Tax) even at the time of challenging the order of the Commissioner, if occasion arises.
>
> The original documents filed by the petitioner may be returned after substituting attested photocopies thereof.
>
> The writ petition is disposed of with the observation made above.
>
> All concerned Misc. Case/I.As, if any, are accordingly disposed of."

7. Pursuant to the above order, the Petitioner had on 2nd March, 2019 filed a petition before the CST seeking deferment of the proceedings. It is stated that on 8th March, 2018 adjournment was sought by the counsel for the Petitioner on the ground of ill-health. When this was also not agreed to by the CST, an additional ground of written note of submissions was filed by the Petitioner.

8. On the issue of jurisdiction, three contentions were raised by the Petitioner. One was that in terms of Section 5 of the OVAT Act read with Rule 5(2) of the OVAT Rules for delegation of the powers of the CST to the Addl. CST, which was done by virtue of the notification dated 5th June, 2018, the mandatory prior approval of the Government was not obtained and, therefore, such delegation of power was bad in law. The second ground was that the said notification itself had not been gazetted. Thirdly, it was submitted

that even assuming that the delegation was valid, since the original assessment order under Section 42 of the OVAT Act was passed by the Sales Tax Officer (STO) as an AA, the revisional power could not have exercised by the Addl. CST against such an order.

9. As regards the first contention, the CST while rejecting the plea of the present Petitioner referred to an earlier approval of the Government granted on 30th April, 2009. It was further observed that at the time when the suo motu revisional order was passed, the notification of delegation had not yet been published and, therefore, the Addl. CST who passed a suo motu revisional power was still acting as a JCST.

10. This Court would like to first consider the correctness of the above conclusion of the CST vis-à-vis the issue of prior approval of the Government. Section 5 of the OVAT Act reads as under:

> ***"5. Delegation of the Commissioner's powers and functions.—***
>
> Subject to such restrictions and conditions as may be prescribed, the Commissioner may, by order in writing, delegate any of his powers and functions under this Act or the rules to any person appointed under sub-section (2) of Section 3, and any order passed by any such person in exercise of the powers so delegated shall be deemed to be an order passed by that person."

11. The above provision has to be read with Rule 5(2) of the OVAT Rules, which reads as under:

> "5(2) The Commissioner shall not delegate to any Officer, appointed under sub-section (2) of Section 3, to assist him, the powers under sub-section (1) of Section 79, without the prior approval of the Government."

12. In terms of Rule 5(2) of the OVAT Rules, the CST cannot delegate to an officer appointed under Section 3(2) of the OVAT Act, which includes the Addl. CST and the JCST, the powers of CST under Section 79(1) of the OVAT Act "without the prior approval of the Government". The mandatory nature of the requirement of prior approval is evident from the fact that all the delegation notifications including the one dated 15th May, 2009 specifically mentioned the prior approval obtained from the Government. However, when one peruses the notification dated 5th June, 2018 in terms of which the CST delegated his power under Section 79(1) of the OVAT Act to the Addl. CST, reference is made only the earlier approval obtained on 30th April, 2009. That approval was not for delegation of the powers of the CST to the Addl. CST but delegation of the powers of the CST to the JCST. Consequently, that earlier approval of the 30th April, 2009 was not sufficient to justify the further delegation of powers to the Addl. CST more than 9 years later on 5th June, 2018. Clearly, therefore, the notification dated 5th June, 2018 was contrary to Section 5 of the OVAT Act read with Rule 5(2) of the OVAT Rules.

13. This Court is, therefore, unable to agree with the conclusion reached by the CST in the impugned order in the above regard. Further, there is no answer to the contention raised by the Petitioner-Assessee that the said notification dated 5th June, 2018

was in fact never gazetted. In reply to an application filed by the Petitioner under the RTI Act on this specific aspect, the reply received from the Department was that although the notification had been sent to the Director, Printing, Stationery and Publication "a copy of the gazette has not yet been transmitted by the Director, Printing, Stationery and Publication."

14. The observation of the CST in the impugned order that the Addl. CST, at the time when the suo motu revision order was passed on 6th December 2018, was still exercising the powers of the JCST is also not factually correct. The notification promoting the JCST as Addl. CST and posting him on promotion was issued on 2nd May, 2018 itself. Therefore, at the time when the impugned suo motu revisional power was passed by the Addl. CST he was functioning as Addl. CST and not as JCST. Even in terms of the notification dated 5th June, 2018 the Addl. CST could have exercised the suo motu revisional power only if the order under revision was passed by the JCST or Dy. CST. Admittedly, in the present case, it is the STO who has passed the assessment order under Section 42 of the OVAT Act which was sought to be revised by the Addl. CST. Therefore, even in terms of the notification dated 5th June, 2018 the Addl. CST lacked the jurisdiction to revise the order of the STO.

15. For all of the aforementioned reasons, the Court is of the view that the suo motu revisional power passed by the Addl. CST on 6th December, 2018 was entirely without jurisdiction and beyond the powers of the Addl. CST. Consequently, the suo motu revisional

order, and the impugned order of the CST affirming it in the appeal, are hereby set aside.

16. Since the suo motu revision order has itself been set aside by this Court, the consequential demand raised by the AA by order dated 17th September, 2019 which has been challenged in the companion W.P.(C) No.22064 of 2019 is also hereby quashed.

17. Both the writ petitions are accordingly allowed. No order as to costs.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S.K. Jena/Secy.