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HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 15798 of 2022

(In the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

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M/S. JINDAL INDIA THERMAL POWER LIMITED	…	***Petitioner***

Mr. Surya Prasad Mishra, Senior Advocate
with M/s. Rudra Prasad Kar, Asit Kumar Dash
and Abhishek Dash, Advocates for the petitioner

-versus-

THE COMMISSIONER OF COMMERCIAL TAXES & GOODS AND SERVICE TAX & OTHERS	…	***Opposite Parties***

Mr. Sunil Mishra,
Additional Standing Counsel
(CT&GST Organisation)
for opposite parties

Date of Hearing and Order : 02.08.2022

CORAM:

MR. JUSTICE JASWANT SINGH

AND

MR. JUSTICE MURAHARI SRI RAMAN

ORDER

This matter is taken up by virtual/physical mode.

2. Assailing the Order of assessment dated 31.03.2022 passed by the Sales Tax Officer, Angul Circle, Angul, ("Assessing Authority" for short) in exercise of powers conferred under Section 10 of the Odisha Entry Tax Act, 1999 (for brevity referred to as "OET Act"), raising a demand to the tune of Rs.83,06,37,489/- comprising tax of Rs.27,68,79,163/- and penalty of Rs.55,37,58,326/- pertaining to the tax periods from 01.04.2013 to 30.09.2015, the Petitioner has approached this Court by invoking provisions of Article 226 of the Constitution of India, *inter alia,* contending that:

(a) The assessment order vide Annexure-19 pursuant to notice dated 13.01.2022 in Form-E 32 for the tax periods from 1.4.2013 to 30.09.2015 is not tenable inasmuch as the assessment for the year 2013-14 is barred by limitation as envisaged in Section 10(1) of the said Act; and

(b) On account of misconception and misunderstanding of Accounting Standard the assessing authority construed addition of Rs.6019,11,90,908/- shown in the balance sheet against Note-11 (Tangible Assets) for the year 2014-15 as if the entry of goods have been effected during said period.

3. The fact submitted by the petitioner and not disputed by the opponent reveals that by Order dated 08.01.2018 the audit assessment under Section 9C of the OET Act was passed by Joint Commissioner of Sales Tax, Angul Range, Angul pursuant to Audit Visit Report by raising a demand of Rs.9,03,81,036/- pertaining to the tax periods covering 01.04.2013 to 30.09.2015. The self-same person in the capacity of Additional Commissioner of Sales Tax of Angul Range has sought to invoke power under Section 10 contemplating reassessment for the said tax periods by issue of Notice dated 04.12.2018 on the ground that unaccounted for purchases of tangible assets, plant and machinery, to the tune of Rs.6019,11,90,908/- shown as addition during the year 2014-15 escaped assessment while completing assessment under Section 9C. The said authority *vide* communication dated 30.04.2019 intimated that the notice issued for reassessment under Section 10 being issued due to inadvertence has been withdrawn. On account of this fact, this Court disposed of W.P.(C) No. 5047 of 2019 wherein said notice was under challenge. On 22.06.2019, the Deputy Commissioner of CT&GST, Angul Circle, Angul issued Notice under Section 10 with respect to tax periods from 01.04.2013 to 30.09.2015; but on 06.11.2019 an Office Order has been passed by the said authority indicating that said notice issued inadvertently has been withdrawn. Another notice dated 26.11.2019 for the aforesaid tax periods contemplating reassessment under Section 10 was issued by the Joint Commissioner of Sales Tax, Angul Range, Angul which again was stated to be withdrawn *vide* Office Order dated 05.12.2019. The Deputy Commissioner of CT&GST, Angul Circle who issued notice dated 22.06.2019 again invoked power under Section 10 and issued fresh notice dated 17.02.2020 for reassessment under Section 10 with respect to aforesaid period citing the same reason as was shown earlier. However, *vide* communication dated 16.12.2021 it was stated that said notice dated 17.02.2020 has been withdrawn.

3.1. While the matter stood thus, the Sales Tax Officer, Angul Circle, Angul issued yet another notice dated 13.01.2022 contemplating reassessment under Section 10 of the OET Act for the same tax periods from 01.04.2013 to 30.09.2015 on the same ground alleging unaccounted for purchase of plant and machinery to the tune of Rs.5786,14,12,516/-. The said notice culminated in passing of assessment order dated 31.03.2022 under Section 10 by the Sales Tax Officer, Angul Circle, Angul by raising a demand to the tune of Rs.83,06,37,489/-.

4. It is contended by Sri Surya Prasad Mishra, Senior Advocate assisted by Sri Rudra Prasad Kar, Advocate and Sri Asit Kumar Dash, Advocate that the assessing authority was not within his jurisdiction to assess the petitioner in respect of tax periods from 01.04.2013 to 31.03.2014.

4.1. It is next contended that the turnover alleged to have been escaped assessment is misconceived in view of the fact that the purchase of plant and machinery has been made since 2009-10 and the said purchase of assets shown to have been capitalized in the Balance Sheet for the year 2014-15 are as per requirement of Accounting Standard. Amplifying such contention it has been explained that the capitalization of pre-operative expenses in the year plant got operational is in accordance with the provisions of the Companies Act, 2013 and in compliance of requirement of Accounting Standards being AS-10 (fixed assets) and AS-16 (borrowing costs) issued by the Institute of Chartered Accountants of India. It is submitted that the petitioner-company incurred capital work-in-progress expenses and project development cost during the period from the financial year 2009-10 to financial year 2013-14 towards construction/installation of the thermal power plant.

4.2. It is further elaborated that the power plant project normally takes several years in conceptualizing, designing, erection, installation and commissioning. The petitioner has incurred capital work-in-progress of Rs.5472,56,81,731/- during the periods from 2009-10 till 2013-14 towards construction of 2X600MW Thermal Power Plant. It is, therefore, urged that the assessing authority having not taken into consideration such vital fact, heavy demand raised by way of reassessment after audit assessment order under Section 9C being confirmed by the Additional Commissioner of Sales Tax (Appeals), Central Zone, Cuttack, now pending before the Odisha Sales Tax Tribunal in Second Appeal No.54(ET) of 2021, is tainted with arbitrariness and irrationality.

4.3. It is further submitted that the Assessing Authority could have been more circumspect while undertaking reassessment proceeding under Section 10 of the OET Act. On earlier occasion the Deputy Commissioner of CT&GST, Angul Circle, Angul issued notice requiring the petitioner-company to deposit outstanding entry tax along with interest to the tune of Rs.36,41,13,766/- for the tax periods from 01.04.2010 to 30.04.2017, which was subject-matter of W.P.(C) No.13515 of 2019. This Court, considering the undertaking of the petitioner that it would discharge its tax liability in 36 instalments starting from 01.09.2019, while allowing it do so, observed as follows:

> *"5. Considering the facts and submissions made, the prayer made on behalf of the petitioner-Company is allowed. The petitioner-Company is directed to pay the outstanding Odisha Entry Tax dues pertaining to the period 01.04.2010 to 30.04.2017 amounting to Rs.36,41,13,766/- crores in 36 (thirty six) monthly installments starting from 1st September, 2019. The amount, if any, already paid by the petitioner-Company towards outstanding Odisha Entry Tax dues for the aforesaid period, shall be adjusted in the aforesaid installments. However, the petitioner-Company will pay 12% interest per annum on the outstanding Odisha Entry Tax dues i.e. Rs.36,41,13,766/- crores while completing the installments. Any failure in payment of two consecutive installments shall amount to contempt and it will be open for the opposite parties-revenue to initiate appropriate contempt proceeding against the petitioner-Company.*
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> *6. However, we make it clear that the interest on the aforesaid amount for the period from 1st April, 2010 to 30th April, 2017 will be subject to order to be passed in W.P.(C) No.21007 of 2017 and batch of cases pending before this Court.*
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> *7. With the aforesaid order, this writ petition stands disposed of."*

Therefore, it is contended that the petitioner-company has been scrupulously adhering to such arrangement as allowed by this Court. The reassessment proceeding, therefore, in respect of the tax periods from 01.04.2013 to 30.09.2015 is not permissible.

5. Mr. Sunil Mishra, learned Additional Standing Counsel for the CT&GST Organisation upon instruction submitted that the contention as to capitalization is in accordance with the provisions of the Companies Act, 2013 and in compliance of requirement of Accounting Standards being AS-10 (fixed assets) and AS-16 (borrowing costs) issued by the Institute of Chartered Accountants of India was never put forth by the petitioner-company before the Assessing Authority. He further submitted that even if this Court holds the assessment pertaining to 2013-14 has been hit by limitation period stipulated under Section 10 of the OET Act, it would have no impact on the determination of liability inasmuch as no part of turnover pertaining to 2013-14 has been taken into consideration in the impugned reassessment.

6. With regard to initiation of proceeding by issue of notice for reassessment for the tax periods from 01.04.2013 to 31.03.2014 it is pertinent to take note of sub-section (1) of Section 10 of the OET Act which reads as follows:

"10. Reassessment in certain cases.—

(1) Where for any reason all or any of the Scheduled goods brought by a dealer has escaped assessment of tax, or where value of all or any of the scheduled goods has been under-assessed, or any deduction has been allowed wrongly, the assessing authority, on the basis of information in his possession, may, ***within a period of seven years from the end of the year to which the tax period relates,*** *serve a notice on the dealer in such form and in such manner as may be prescribed and after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity of being heard, proceed to assess the dealer accordingly."*

[Emphasis supplied]

6.1. The term "year" and "tax period" has been defined in the OET Act. Section 2(p) defines "year" to mean "the financial year" and Section 2(oo) lays down that "tax period" means such period for which return is required to be furnished by or under this Act".

Section 7 of the said Act specifies that every registered dealer and every dealer who is liable to get himself registered under the OET Act is required to furnish every month a return within stipulated date as prescribed under Rule 10 of the Odisha Entry Tax Rules, 1999.

6.2. Conjoint reading of Section 10(1), Section 2(p) and Section 2(oo) of the Act read with Rule 10 of the said Rules makes it clear that for the tax periods commencing from 01.04.2013 to 31.03.2014, the end of the year to which they relate would be 31.03.2014. Thus, the notice for reassessment under Section 10 being issued on 13.01.2022, it is manifest that the proceeding in respect of the year 2013-14 was not initiated within the time-frame envisaged under sub-section (1) of Section 10. It is clearly stipulated in said sub-section that the notice in Form E32 prescribed under Rule 15D(1) was required to be served on the petitioner within a period of seven years from the end of the year to which the tax periods from 01.04.2013 to 31.03.2014 relate. In other words, on 31.03.2021 seven year lapsed from the end of the "year" in respect of the tax periods from 01.04.2013 to 31.03.2014. Therefore, on the date of issue of notice in Form E32, *i.e.*, 13.01.2022, the Assessing Authority was not competent to exercise power under Section 10 of the OET Act. Thus, it is held that the assessment for the tax periods from 01.04.2013 to 31.03.2014 is barred by limitation as provided under Section 10(1) of the OET Act.

7. As regards the contention of the petitioner through its counsel that the subject-goods, *i.e.*, plant and machinery, which were brought from outside into the local area during the period from 2009-10 till 2014-15 and subsequently capitalized in the year 2014-15, had already suffered entry tax, the same is subject to factual adjudication by the competent authority.

7.1. Refuting the said contention of the counsel for the petitioner, Mr. Sunil Mishra, learned Additional Standing Counsel (CT&GST Organisation) furnished a copy of instruction dated 22.07.2022 under the signature of the Assessing Authority wherein the following has been stated:

*"As regard point No.-2, I am to say that the contention now taken never raised before me at the time of adjudicating the case. In every occasion the person appearing on behalf of the dealer-company has challenged the jurisdiction of the assessing authority and objected that there is no material with the revenue which proves that there is no escapement of turnover. ****

But as per the audited balance sheet in column No.-11 it has been categorically mentioned addition of plant and machinery was of Rs.6019,11,90,908/-. In bifurcation figures submitted by the CA in Point No.-11, it has been clearly mention the purchase of plant and machinery from local and inter-State source but the dealer-company never explained/produced any books of accounts in support of such claim."

7.2. It has been brought to the notice of this Court by the senior counsel for the petitioner-company that such a statement by the Assessing Authority is fallacious in view of written submission dated 03.03.2022 (Annexure-12 of the writ petition) furnished to the Assessing Authority by the company, wherein it has been stated thus:

"1. That the figure of addition of Rs.6019,11,90,908/- shown in Schedule-11 of balance sheet for F.Y. 2014-15 includes

work in progress of previous year starting from 2009-10 onwards. Therefore, this figure does not relate to the purchases during F.Y. 2014-15 only and therefore not relevant for entry tax purposes.

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*5. The figure of plant and machinery capitalized in the books of accounts also includes the following items which were incurred from FY 2009-10 onwards. ****

*The capitalization of pre-operative expenses in the year of plant got operational is in accordance with the provision of Companies Act, 2013 and in compliance with Accounting Standards issued by Institute of Chartered Accountants of India (ICAI), and referred to in Section 133 of the Companies Act, 2013, read with Rule 7 of the Companies (Accounts) Rules, 2014. ****

Thus, the purchases made in the FY 2014-15 along with work in progress expenses of previous years were capitalized in the FY 2014-15."

7.3. Glance at Assessment Order dated 31.03.2022 reveals the following:

*"On 03.03.2022 under the signature of the authorized signatory, the dealer-company has filed a petition which are kept in record. ****

*I have gone through the record vis-à-vis the submission made by the dealer-company and the CA report original filed and now filed. ***"*

7.4. From the aforesaid statements, it is glaring on face of record that the instruction provided to the Additional Standing Counsel by the Assessing Authority pursuant to direction of this Court *vide* Order dated 11.07.2022 is incorrect.

7.5. On the issue of sufferance of entry tax on the value of goods it is noteworthy to notice provisions of sub-section (2) of Section 3 of the OET Act which is extracted herein below for ready reference:

> *"**3. Levy of tax.—***
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> *(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:*
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> *Provided that no tax shall be levied under this Act on the entry of scheduled goods into a local area, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.*
>
> *Explanation.—*
>
> *Where the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area."*

7.6. It transpires from the aforesaid provision that *onus* lies on the assessee to satisfy the Assessing Authority by adducing evidence to the effect that subject-goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under the OET Act.

7.7. In the above premises, this Court is of the considered opinion that as the explanation of the petitioner-company has not been given due consideration by the Assessing Authority. As has already been held that the assessment in respect of the tax periods from 01.04.2013 to 31.03.2014 out of the impugned tax periods from 01.04.2013 to 30.09.2015 undertaken for assessment under Section 10 is time-barred, and the assessment is required to be set aside for fresh consideration pertaining to rest of the periods, *i.e.,* from 01.04.2014 to 30.09.2015, the Assessing Authority is also required to consider the submissions furnished to him by the petitioner on different dates with reference to evidence available on record and/or to be produced by the petitioner-company.

8. In the aforesaid premises, it is held that the impugned reassessment order dated 31.03.2022 passed under Section 10 of the OET Act is unsustainable being barred by limitation so far as it relates to the tax periods from 01.04.2013 to 31.03.2014. However, so far as assessment for the tax periods from 01.04.2014 to 30.09.2015 is concerned, the same is liable to be set aside and remanded to the Assessing Authority-Sales Tax Officer, Angul Circle, Angul. Consequently, the writ petition stands allowed.

9. The assessment order dated 31.03.2022 is hereby set aside and the matter relating to the tax periods 01.04.2014 to 30.09.2015 is remanded to the Sales Tax Officer for proceeding with the matter afresh. For this purpose, the petitioner is directed to participate in the proceeding by producing books of account related to aforesaid tax periods and at liberty to furnish evidence to justify its claim that the alleged unaccounted for purchases of goods have already suffered entry tax. The Assessing Authority shall pass appropriate order after verification of the authenticity of claim made by the petitioner by taking into account the explanation submitted and documents produced/caused to be produced. The petitioner shall appear before the Sales Tax Officer, Angul Circle, Angul on 26th of August, 2022 for necessary instructions. No unnecessary adjournments shall be granted to or availed by the petitioner. Endeavor shall be made by the Assessing Authority to conclude the entire assessment proceeding within two months from the date of appearance of the petitioner as directed.

9.1. With the aforesaid observation and direction the writ petition stands disposed of.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE

AKS High Court of Orissa, Cuttack
August 02, 2022