

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

HEARD ON: 05.05.2025
DELIVERED ON: 05.05.2025

CORAM:
THE HON'BLE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

W.P.T.T. 9 of 2025
Hindustan Construction Co. Limited
Vs.
The State of West Bengal & Ors.

Appearance:-

Mr. Bharat Raichandani,
Mr. Victor Chatterjee,

.....For the Petitioner.

Mr. A. Roy, Ld. G.P.
Mr. T.M. Siddiqui, Ld. A.G.P.
Mr. T. Chakraborty,
Mr. S. Sanyal

.....For the State.

(Judgment of the Court was delivered by T.S. SIVAGNANAM, C.J.)

1. This writ petition has been filed challenging the order passed by the West Bengal Taxation Tribunal dated 3rd October, 2024 in R.N. - No.960 of 2018. The said application was filed under Section 8 of the West Bengal Taxation Tribunal Act, 1987 challenging an assessment order dated 27th June, 2018 for the period 2015-2016 under the provisions of the West Bengal Value Added Tax Act, 2003 (hereinafter referred to as "the Act"). Primarily two sets of grounds were raised, one with regard to the constitutional validity of the amendment made to Section 84 of the Act read with Rule 138(2)(b) (ia) of the VAT Rules, 2005 as being unconstitutional, unreasonable and arbitrary. The second set of grounds was on the merits of the matter questioning the addition of 40% to the Contractual Transfer Price (CTP) and making an assessment on the same and levying tax.
2. On the first aspect, the learned Tribunal was right in holding that the validity of the amended Section 84 has been upheld by the Division Bench

of this Court and, therefore, the writ petitioner cannot canvass such a ground.

3. With regard to the other issue, the learned Tribunal held that the writ petitioner has to avail the statutory appellate remedy and it appears that the learned advocate appearing for the writ petitioner had agreed to exhaust such remedy.
4. The petitioner has challenged the order passed by the learned Tribunal on the ground that there was absolutely no basis for adding 40% of the total contractual transfer price declared by the petitioner and such addition was wholly unjust and improper without taking note of the specific submission made by the assessee during the course of assessment proceedings as well as before the Tribunal.
5. In other words, the petitioner, while accepting the fact that the amended Section 84 has been upheld, sought to canvass the other grounds, which touched upon the merits of the assessment. However, what could be seen from the order passed by the learned Tribunal is that the learned advocate, who had then appeared for the petitioner had agreed to move before the appellate authority and this has been recorded so in the impugned order passed by the learned Tribunal. However, it appears that the petitioner has not given any written concession seeking to go before the appellate authority and it appears to be a submission made by the then learned advocate, who appeared for the writ petitioner, which has been recorded by the Tribunal. Even assuming a concession is given, unless the same is unequivocal, the same will not bind the party.
6. Be that as it may, we find that the assessment order dated 27th June, 2018 is undoubtedly a high-pitched assessment. In more than one place, the

Assessing Officer used the expression “best of judgment”. This, obviously could not have been a best of judgment assessment since a draft assessment order dated 11th June, 2018 was drawn, the petitioner was granted opportunity to place his submission, which was placed and the submissions have been recorded in the assessment order dated 27th June, 2018 and if that be so, the Assessing Officer is required to reject the submission and then take a decision on the merits based on the Profit & Loss account and other documents and credentials of the assessment could not have been on best of judgment basis.

7. Having steered clear of this issue, we find that in the assessment order, after setting out the stand taken by the writ petitioner in their written submission dated 19th June, 2018, the Assessing Officer has pointed out that the petitioner/dealer has deviated from the practise, which they had followed in the earlier years without any explanation if a dealer is undoubtedly entitled to resort to tax planning, but not tax avoidance.
8. That apart, each assessment year is an individual unit and there can be no fetters or bar put on an assessee/dealer, to resort to any provision of the Act so that the amount of tax payable on a particular transaction is assessed appropriately.
9. The Assessing Officer also states that the dealer has not provided certificate from auditor on operations in West Bengal. However, before the Tribunal as well as before this Court, the writ petitioner has raised the following grounds.

“II. For that the respondent no. 1 arbitrarily and illegally added 40% to the contractual transfer price declared by the petitioner. Your petitioner separately maintains books of account in respect of business carried on by the petitioner in each state all over India.

Your petitioner prepares consolidated Profit & Loss Account for all over India and there is no separate profit & Loss Account for State. Your petitioner however maintains VAT audit report in respect of the works executed for each state. Accordingly in the works executed in West Bengal separate VAT audit report is maintained by the petitioner and the said report is duly certified by the Chartered Accountant of the petitioner. The said VAT Audit report was duly produced along with consolidated Profit & Loss Account before the respondent no. 1 at the time of assessment but the respondent no. 1 insisted for separate profit and loss account in respect of West Bengal. VAT audit report prepared for West Bengal would give the total picture of the works executed in West Bengal. Respondent no.1 on the mere fact that profit and loss account was not produced for the State of West Bengal added 40% to the contractual transfer price. Since the VAT audit report produced before the respondent no. 1 which gives entire picture of the works executed in West Bengal the respondent no.1 should not have added 40% to the total contractual transfer price declared by the petitioner. The said addition of 40% to the contractual transfer price is wholly unjust and improper in the eye of law.

III. *For that the respondent no. 1 has wrongly, illegally added an amount of Rs. 11.99 crore with the contractual transfer price on the ground of price variation of materials. At the time of entering into the contract the petitioner gives the total price of the contract on the basis of price of the materials prevalent at that point of time. During the course of works contract the price of the materials obviously increased and there is a separate clause in the agreement that if there is any price variation, the same would be included in the invoices raised by the contractor. In the present case also during the course of execution of works contract the price of the materials increased and the petitioner charged increased price in the bills raised by the petitioner. Therefore, the price variation which occurred is already included in the bills raised by the petitioner and the contractual transfer price was declared on the basis of the said increased in the price of the materials. The respondent no. 1 without appreciating the records of the case of the petitioner and without appreciating the contentions of the petitioner again added a sum of Rs. 11.99 Crores with the contractual transfer price and such addition is nothing but double taxation on the petitioner. If the increased price is already included in the bills and*

shown as contractual transfer price such increased price cannot be again included in the contractual transfer price. Therefore, addition made by the respondent no.1 to the extent of Rs. 11.99 crores should be declared invalid in law.”

10. The above aspect of the matter has to be gone into since it is the specific case of the petitioner/dealer that in respect of the works executed in West Bengal, separate VAT audit report is maintained by the petitioner and the said report is duly certified by the Chartered Accountant of the petitioner and that VAT audit report was duly produced alongwith the consolidated Profit & Loss account before the authority at the time of assessment, but the Assessing Officer insisted for separate Profit and Loss account in respect of West Bengal.
11. It is the further submission that VAT audit report prepared for West Bengal would give the total picture of the works executed in West Bengal and the mere fact that the Profit & Loss account was not produced for the State of West Bengal adding 40% to the Contractual Transfer Price (CTP) was unjustified.
12. Other factual explanation has also been given by the petitioner/dealer. As pointed out above, if this be the factual position and the contentions advanced by the petitioner/dealer, the same are required to be gone into by the Assessing Officer and the assessment should be completed on merits and not on “best of judgment” basis.
13. One more aspect, which is conspicuously missing in the assessment order is to the basis of addition of 40%. No explanation is forthcoming, as could be seen from the assessment order. Therefore, we are of the view that the matter should be re-examined by the Assessing Officer after affording an opportunity to the petitioner to produce documents and particulars and

after affording an opportunity of personal hearing to the authorised representative either virtually or in person, the fresh assessment order be passed on merits and in accordance with law.

14. Under normal circumstances, we would have set aside the assessment order in its entirety, but, however, considering the fact that the Assessing Officer has made certain observations in the assessment order dated 27th June, 2018 on which the petitioner/dealer had no opportunity to put forth the case, those observations shall be treated as a show-cause notice and the petitioner is directed to submit his reply alongwith supportive documents within a period of three weeks from the date of receipt of server copy of this order, after which an opportunity of personal hearing shall be afforded to the authorised representative of the writ petitioner/dealer either virtually or in person and a fresh assessment order be passed on merits and in accordance with law.
15. It is made clear that this order has been passed considering the peculiar facts and circumstances of the case and not to be treated as a precedent.
16. With the aforesaid observations/directions writ petition stands disposed of.
17. No costs.
18. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(CHAITALI CHATTERJEE (DAS), J.)