Super Construction Vs. Asst. Commissioner, Sales Tax and anr.

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Court : Orissa

Decided On : Jul-23-2008

Reported in : 106(2008)CLT851; 2008(II)OLR363; (2008)18VST387(Orissa)

Judge : B.S. Chauhan, C.J. and; B.N. Mahapatra, J.

Appellant : Super Construction

Respondent : Asst. Commissioner, Sales Tax and anr.

Judgement :

B.N. Mahapatra, J.

1. In the present writ petition, the petitioner assails the order dated 29.12.1997 (Annexure-1) passed by the Assistant Commissioner, Sales Tax (Opposite party No. 1) (hereinafter called 'ACST') as highly prejudicial, fully arbitrary or in contravention to the scheme of the Orissa Sales Tax Act, 1947 (hereinafter called as, 'the OST Act'). Even though in the order passed under Annexure-1 the ACST turned down various claims of the petitioner the learned Counsel for the petitioner, at the time of hearing of the writ petition confined his argument only to one of the grievances, i.e. the opposite parties are not justified in refusing to return the books of account taken from the petitioner in course of inspection to the place of business of the petitioner on 19.10.1995 in spite of repeated requests and for retaining the same without following procedure of law.

2. The petitioner's case is that it carries on business in purchase and sale of Mosaic Chips, White Piaster Paris, Colour Oxide, Oxalic Acids and Wax Polish etc. on wholesale as well as on retail basis, at his business premises functioning at 51, Bhagawanpur, Industrial Estate, Patrapada, Bhubaneswar. It is registered under the OST Act and Central Sales Tax Act, 1956 (hereinafter called 'CST Act'). For the purpose of its business, the petitioner maintains regular books of account like purchase register, sale register, stock register etc. On 19.10.1995 the Sales Tax Officer Investigation Unit, Bhubaneswar visited the petitioner's place of business and carried with him books of account, documents, register etc. relating to the year 1994-95. The petitioner made application before the Sales Tax Officer Investigation Unit, Bhubaneswar on 30.3.1996 for return of the seized books of account, documents and registers, but the same were not returned to him. On the basis of the seized books of account assessment for the year 1994-95 was completed against which the petitioner filed First Appeal before the Assistant Commissioner of Sales Tax (hereinafter called as 'ACST'). On 20.10.1997 the petitioner also prayed to the learned ACST for return of the books of account which were seized from the petitioner. The learned ACST turned down the petitioner's request on the ground that those documents have become part of the assessment record and those cannot be parted with. This action of the ACST has been seriously challenged by the learned Counsel on the ground that it is violative of the provisions contained in Subsection (3) of Section 16 of the OST Act read with Rule 46 of the OST Rules. Relying on these provisions, he submitted that the STO cannot retain the seized books of account for a period exceeding six months unless the ACST in-charge of that Range authorizes retention of those books of account by recording the reason of retention of those documents. According to the petitioner, unless the books of account/documents are returned to him, he would be deprived of rebutting the charges raised against him on the basis of which assessment for the year 1994-95 has been made.

3. Per contra, the learned Counsel appearing on behalf of Revenue submits that in view of the provisions contained in Rule 35 of the OST Rules the books of account seized from the petitioner form part of the assessment record and those cannot be returned to the petitioner unless all the proceedings relating to that year are completed and therefore the opposite parties are justified in retaining the same

and refusing to return those to the petitioner.

4. In view of rival contentions of respective parties the question which falls for consideration by this Court is whether on the facts and circumstances of the case, the opposite parties are justified in retaining the books of account seized from the petitioner on 19.10.1995 till date without following the procedure contained in Section 16(3) of OST Act read with Rule 46 of OST Rules on the ground that they form part of the assessment record.

In order to deal with the above question, it is necessary to know what is contained in Sub-section (3) of Section 16 of the OST Act and Rules 46 & 35 of the OST Rules. These provisions are quoted below.

Section 16(3) If the Commissioner has reason to suspect that any dealer is attempting to evade the payment of any tax due from him under this Act, he may, for reasons to be recorded in writing, seize such accounts, registers or documents of the dealer as may be necessary, and shall grant a receipt for the same, and shall retain the same only for so long as may be necessary for examination thereof or for a prosecution.

Rule 46 If the Commissioner seizes any books of account, registers or documents under Section 16, he shall not retain them for more than 21 days without recording in writing his reason for doing so:

Provided that where an officer below the rank of Assistant Commissioner of Sales Tax in charge of a Range constituted under Sub-rule (5) of Rule 3 seizes any books, registers or documents of any dealer by virtue of power of the Commissioner under Section 16 delegated to him, he shall not retain them or cause them to be retained for a period exceeding six months unless the Assistant Commissioner of Sales Tax in charge of the Range having jurisdiction over the local area in which place of business of the dealer is situated, has for reasons to be recorded in writing authorizes the retention of the books, registers or documents so seized for a longer period.

Provided further that such longer period shall not be more than six months at a time.

Rule 35 Assessment case record (1) All the papers relevant to the making of any assessment in respect of any particular dealer shall be kept together and shall form an assessment case record.

(2) Assessment case records shall be preserved for 12 years.

5. Section 16(3) of the OST Act empowers the Commissioner to seize the books of account of the dealer provided the Commissioner has reason to suspect that any dealer is attempting to evade the tax due from him only after recording the reason in writing. Rule 46 of OST Rules provides that if the Commissioner seizes any books of account, registers or documents under Section 16 he shall not retain them for more than 21 days without recording any reason in writing for his doing so. Where an Officer below the rank of ACST in-charge of Range seizes any books of account, registers and documents of any dealer by virtue of the power of the Commissioner under Section 16 delegated to him, lie cannot retain those books of account for a period exceeding six months unless the ACST in-charge of that Range authorizes retention of books of account, register and documents by recording his reason. Further, the retention of seized books of account for a longer period shall not be more than six months at a time. Rule 35 provides that all the papers relevant for making an assessment in respect of any particular dealer shall be kept together and shall form a part of assessment record and assessment case record shall be preserved for 12 years.

6. In this context, it shall be useful to refer to some of the decisions of Hon'ble Apex Court and other High Courts.

The Hon'ble Supreme Court while dealing with seizure and retention of documents under the Income Tax Act, 1961 in the case of Commissioner of Income-Tax, West Bengal III and Ors. v. Oriental Rubber Works reported in : [1984]145ITR477(SC) held that two conditions must be fulfilled before an extended retention of books or documents seized in a search conducted under Section 132 becomes permissible in law : (a) Reasons in writing must be recorded by the authorized officer or the ITO concerned seeking the Commissioner's approval; and (b) the Commissioner's approval for such extended retention must be obtained. If either of these conditions is not fulfilled such extended retention will become unlawful and the person from whose custody such books or documents have been seized or to whom they belong acquires a right to their return forthwith.

7. The Hon'ble Supreme Court in the case of Commissioner of Income-Tax, U.P. and Ors. v. Jawahar Lal Rastogi reported in : [1970]78ITR486(SC) held that retention of books of account seized in course of search and seizure beyond 180 days without recording reasons and obtaining approval from the Commissioner of Income Tax is without authority of law and contrary to the terms of Section 138 as amended by the Income Tax (Amendment) Act, 1965.

8. The High Court of Punjab and Haryana in the case of Kundan Lal v. The State of Haryana and Ors. reported in (1988) 71 STC 394 held that the retention of the books beyond the period of 60 days without the approval of the Commissioner as required under Section 36(3) of the Act, was illegal. The said approval was obtained 10 days after the order of best judgment assessment was passed. The petitioner was justified in contending that he had been denied opportunity to have the books. The order of best judgment assessment was invalid.

9. The High Court of Rajasthan in the case of Maruti Mills (P) Ltd. v. Union of India and Ors. reported in (2001) 350 ITR 348, while considering the scope of Section 133A vis-a-vis seizure of books of account and other documents held that the proviso attached to Sub-section (3) of Section 131 empowers impounding the books of accounts and other document only after recording the reasons and the said impounded books of accounts or other documents cannot be retained for a period of more than fifteen days unless there is prior sanction by the authority mentioned therein.

10. The Allahabad High Court of in the case of Krishna Kumar Sharma v. Commissioner of Income-Tax reported in : [1991]192ITR57(All) held that there was no evidence of an order passed under Section 132(8) of the Income Tax Act, 1961. Hence, the books of account seized from the petitioner's premises in February, 1986, had to be returned to him.

11. The Allahabad High Court in another decision in the case of Variety General Stores v. Income-Tax Officer and Ors. reported in : [1993]202ITR660(All) directed the Revenue to return the books of account to the assesses on the basis of the petition filed by the assesses in February 1992 for return of the same which was seized in January 1986 and the Commissioner had permitted the Income Tax Officer to retain the books of account only till 31st December 1990.

12. The Madhya Pradesh High Court in the case of Sampatlal and Sons v. Commissioner of Income-Tax, Jabalpur and Ors. reported in : [1984]150ITR191(MP) held that in a case where 180 days has expired from the date of seizure and no steps were taken to obtain the approval of the Commissioner during that period but the approval was granted only after the filing of petition by the petitioner after two years from the date of seizure such an approval could not validate the retention of books of account and other documents seized from the petitioner which have become invalid after expiry of 180 days.

13. The provisions contained in Rule 35 of the OST Rules cannot override the provisions contained in Section 16(3) of the OST Act read with Rule 46 of the OST Rules which specifically deal with seizure of the documents and their retention by the Revenue. It must be read with Section 16(3) of the OST Act and Rule 46 of OST Rules. Thus Sales Tax authorities cannot retain the books of account without following the procedure laid down in Section 16(3) of the OST Act read with Rule 46 of the OST Rules. It is the well settled position of law that what cannot be done 'per directum is not permissible to be done per obliquum', meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of 'quando allquid prohibetur, prohibetur et omne per quod devenitur ad illud.'

14. In the case at hand, Revenue fails to satisfy that the conditions stipulated in Section 16(3) read with Rule 46 have been complied with. The conditions laid down in Rule 46 are admittedly not fulfilled. The extended retention of books of account is unlawful and the concerned person from whose custody such books of account and documents were taken acquires a right to get return of the same. Even though Section 16(3) and Rule 46 do not provide for communication of the

recorded reason of Commissioner and ACST's authorization and recording of reason for retention of seized documents beyond the prescribed period to the person from whose custody the documents were seized, in our view, it should be communicated to the concerned person since the concerned person is bound to be materially prejudiced because of seizure and retention of his books of account. In the present case, nothing regarding retention of books of account has been communicated to the petitioner till date even though books of account have been retained from 29.12.1997.

15. Admittedly, the books of account of the petitioner were seized by the STO Vigilance on 19.10.1995, but those books of account have not so far been returned to it even though more than 12 years have passed. The Revenue also could not satisfy the Court that the books of account seized on 19.10.1995 have been retained by them following the due procedure of law. In the circumstances, the books of account seized from the petitioner's premises on 19.10.1995 shall be returned to the petitioner within a period of 30 days from the date of production of certified copy of this order by the petitioner. If the Sales Tax authorities think that the books of account or any portions thereof are relevant for their purpose, they are entitled to take photocopy of the such documents or portions of such books of account and return them thereafter.

16 The writ petition is disposed of with the above direction.

B.S. Chauhan, C.J.

17. I agree.