

V.GOPALA GOWDA, CJ & S.C.PARIJA, J.

W.P.(C) NO.15722 OF 2006 (Decided on 28.07.2010)

M/S. EPARI SADASIV & SONS

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Petitioner.

. Vrs.

ASST. COMMISSIONER OF

SALES TAX & ORS.

.....

Opp. Parties.

ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO. 4 OF 2004) – SEC.41 (1) & (2) r/w Rule 51 of the OVAT Rules, 2005.

For Petitioner - M/s. M.V.S.R.Pathi, N.Paikray, B.K.Mishra,

P.K.Hazra, K.K.Sahoo, S.P.Bhuyan & S.Dash

For Opp.Parties - Mr. T.K.Satpathy Addl. Standing Counsel

S.C. PARIJA, J. The petitioner, who is a registered dealer, has filed this writ petition challenging the jurisdiction of the Asst. Commissioner of Commercial Tax, Intelligence Range, Cuttack-opposite party no.2, in conducting tax audit and issuance of Audit Visit Report, especially when the said authority-opposite party no.2 has not been delegated with the power by the Commissioner of Sales Tax, Orissa, to exercise and discharge the power and duties in relation to Rule 41 of the Orissa Value Added Tax Rules, 2005 (OVAT Rules for short), under notification dated 1.12.2005, as per Annexure-5 to the writ petition. The petitioner also assails the submission of the Audit Visit Report in Form E-27 for the purpose of making audit assessment under the provisions of Orissa Value Added Act, 2004 (OVAT Act for short), when the same was required to be submitted in Form VAT-303.

2. The main contention of the learned counsel for the petitioner was that the Commissioner for Sales Tax, Orissa, having issued notification dated 1.12.2005 (Annexure-5), delegating to the Assistant Commissioner's of Sales Tax (excluding Intelligence Ranges) to exercise all the powers and duties of the Commissioner specified in Section 41(1) and (2) of the OVAT Act and powers specified in Rule 41 of the OVAT Rules, the audit conducted by the Assistant Commissioner of Commercial Tax, Intelligence Range, Cuttack, and the Audit Visit Report (Annexure-1) submitted by him pursuant to such audit, is wholly illegal and without jurisdiction. The further plea of the learned counsel for the petitioner was that the Audit Visit Report submitted by the Assistant Commissioner of Commercial Tax, Intelligence Range, Cuttack-opposite party no.2 in Form E-27 for the purpose of making audit assessment under the provisions of OVAT Act and the subsequent order of assessment dated 7.12.2006 (Annexure-6) passed on the basis of such report are also improper and illegal, as the proper form prescribed for the same is Form VAT-303.

3. In the counter affidavit filed on behalf of opposite parties, it has been stated that as per the notification issued by the Commissioner of Sales Tax, Orissa, dated 1.12.2005 (Annexure-5), the

Commissioner has delegated the powers to select dealers for the purpose of taking up tax audit during a particular period to the Assistant Commissioner of Sales Tax appointed under Section 3(2) of the OVAT Act, excluding the Intelligence Ranges. However, this power is only for selection of dealers in respect of whom tax audit is to be conducted. Therefore there is no bar in conducting tax audit by the audit team duly constituted under Rule 43 of the OVAT Rules. In the said counter affidavit, it has been further stated that the inspection of the business transactions effected by the petitioner's firm was taken up simultaneously under both the OVAT Act and Orissa Entry Tax Act and the Rules framed thereunder and accordingly a common report had been prepared in Form E-27, which is substantially the same as Form VAT-303. In order to avoid duplication and for convenience in recording the observation made during the course of audit, the Audit Visit Report has been submitted in Form E-27, which is in substantial compliance of the statutory provisions as well as the principles of natural justice and no prejudice can be said to have been caused to the petitioner on that score.

4. On a perusal of the notification dated 1.12.2005 (Annexure-5) issued by the Commissioner of Sales Tax, Orissa, Cuttack, it is seen that the powers and duties of the Commissioner under Section 41(1) and (2) of the OVAT Act and all powers specified in Rule 41 of the OVAT Rules has been delegated to the Assistant Commissioner of Sales Tax exercising jurisdiction over a circle (s), a Large Tax Payer Unit (s) or a Range (excluding Intelligence Range), with effect from the date of issue of notification.

5. Section 41(1) and (2) of the OVAT Act reads as under :

“41. Identification of tax payers for tax audit-

(1) The Commissioner may select such individual dealers or class of dealers for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, at such intervals or in such audit cycle, as may be prescribed.

(2) After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such individual dealers or class of dealers be conducted in accordance with the audit programme approved by him :

Provided that the Commissioner may direct tax audit in respect of any individual dealer or class of dealers on out of turn basis or for more than once in an audit cycle to prevent evasion of tax and ensure proper tax compliance.”

6. Rule 41 of the OVAT Rules provides as follows :

“41. Selection of dealers for tax audit-

(1) The Commissioner shall, under the provision of Section 41, select by the 31st of January or by any date before the close of every year, commencing from the appointed day, not less than twenty per cent of registered dealers for audit during the following year, by random selection with or without the use of computers :

Provided that for the year commencing with the appointed day, the selection of dealers for audit under this sub-rule shall be made by the 30th of September of that year.

(2) The Commissioner, where considers it necessary to safeguard the interest of revenue or where any enquiry is required to be conducted on any specific issue or issues relating to any dealer, or class or classes of dealers, on being referred by an Officer appointed under sub-section (2) of Section 3, may direct audit to be taken up.

(3) The Commissioner may, on the basis of apparent revenue risk of the individual dealers, make selection of dealers for special or investigation audit. The revenue risk may be determined on objective analysis of the risk parameters or on receipt of intelligence or information, regarding evasion of tax.

(4) For the control of large tax payers, the Commissioner may, plan audit checks across the totality of the business of such dealers, within an audit cycle of two years.”

7. The notification (Annexure-5) and the schedule appended thereto shows that the delegations have been made in respect of powers and duties enumerated in Section 41(1) and (2) of the OVAT Act and Rule 41 of the OVAT Rules. The Commissioner of Sales Tax has delegated his powers and duties to be exercised by the authority stated therein in respect of the said provisions relating to selection of dealers for tax audit, after identification of such dealers and for issuing direction for conducting tax audit in respect of such dealers, in accordance with the tax audit programme approved by the said authority. Rule 41 of the OVAT Rules lays down the modalities for selection of dealers for tax audit. Further Rule 43 thereof provides that such tax audit shall be undertaken by a team constituted for the purpose and such team may consist one or more Assistant Commissioner, Sales Tax Officer and Assistant Sales Tax Officer, as the Commissioner may deem fit.

8. A combined reading of the aforesaid statutory provisions make its abundantly clear that the Commissioner of Sales Tax has delegated his powers and duties with regard to selection of dealers for tax audit on random basis and issue of direction for conducting tax audit in respect of such dealers, in accordance with the approved audit programme. The said notification excludes the Intelligence Ranges from exercising such powers to select the dealers for tax audit. But once the concerned Assistant Commissioner of Sales Tax has selected the dealer for tax audit, the Intelligence Range is not prohibited from conducting such tax audit. Such provisions have been incorporated in the statute to check evasion of tax, causing loss of State revenue. Moreover, as the Assistant Commissioner of Sales Tax, Puri Range-opposite party no.1, who has conducted the assessment pursuant to the Audit Visit Report being not an authority exercising jurisdiction of the Intelligence Range, the impugned order of assessment passed on the basis of such report cannot be faulted.

9. Coming to the plea of the petitioner with regard to issue of Audit Visit Report in Form E-27 instead of Form VAT-303 for the purpose of making audit assessment under the provisions of the OVAT Act, it is seen that the Assessing Officer-opposite party no.1 had issued a notice of assessment as a result of audit, enclosing a copy of the Audit Visit Report, to which the petitioner has submitted its show-cause/reply, (Annexure-4), explaining the irregularities mentioned in the said report. No plea of improper service of notice has been taken therein. Moreover, the Form VAT-303 and Form E-27 being substantially similar, which provides for indicating the details of the audit made, the copy of which has been supplied to the petitioner, there is substantial compliance of the statutory provisions, inasmuch as, the petitioner cannot complain of any violation of principles of natural justice.

10. For the reasons detailed above, we do not find any impropriety or illegality in the action of the opposite parties in carrying out the tax audit of the petitioner’s firm and the subsequent order of assessment passed on the basis of such audit report, so as to warrant any interference. However, as the petitioner has moved this Court against the order of assessment, we permit the petitioner to avail the statutory remedy of appeal, which if filed within four weeks’ hence, shall be considered on its merit and disposed of in accordance with law.

The writ petition being devoid of merit, the same is accordingly dismissed.

Writ petitioner dismissed.