

V.GOPALA GOWDA, CJ & B.N.MAHAPATRA, J.

W.P.(C) NO.22588 OF 2010 (Decided on 20.01.2011)

M/S. PRAKASH STORE

.....Petitioner.

.Vrs.

**COMMISSIONER OF SALES TAX,
ORISSA, & ORS.**

.....Opp.Parties.

**ORISSA V. A.T ACT, 2004 (ACT NO. 4 OF 2005) – S.41
r/w Rule 41 of the Orissa VAT Rules.**

For Petitioner - Tusar Kanti Satapathy

For Respondents -

The petitioner who is a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, "the Act") is before this Court seeking issuance of writ of certiorary to declare that Section 4 (1) of the OVACT Act and Rule 41 (1) of the Orissa Value Added Tax Rules, 2004 (for short, "the Rules") are illegal, invalid and ultra vires the Constitution of India.

2. The ground of attack for the said relief sought for by the petitioner is that the Taxing authorities are conducting frequent audits without describing the audit cycle in the Rules. Rule 41 is relevant for the purpose. Repeated conduct of audit amounts to harassment to the petitioner. The arbitrary power conferred on the assessing officer is violative of Article 14 of the Constitution. It is further contended that on the basis of such repeated audits conducted by the Department are in excess of the conferment of the power under Section 41 and Rule 41 of the Act and Rules. There is abuse of power conferred upon the Commissioner and the subordinate officers to whom power is delegated for the purpose of audit to prevent evasion of tax. It is further contended that as per Section 41 read with Rule 41 conducting audit without notice with regard to date place etc. is arbitrary on the part of the Commissioner and the subordinate officers to whom power is delegated to conduct audit in the premises of a dealer. Therefore, the same is arbitrary and violative of Articles 14 and 19 of the Constitution and the same is liable to be struck down.

3. Learned Standing Counsel for the Revenue submits that power under section 41 and Rule 41 of the Act and Rules respectively are vested in the Revenue authorities for the purpose of facilitating the Commissioner and his subordinate officers to conduct audit with a view to see that the escapement of tax is brought to assessment in the interest of public. Section 41 of the Act envisages the Commissioner may select such individual dealers or class of dealer for tax audit on random basis or on the basis of risk analysis or on the basis of any other objective criteria, as such intervals or in such audit cycle, as may be prescribed. Therefore, it is strongly submitted by Mr Kar that the said provisions of the OVAT Act being not violative of Article 14 of the Constitution, the writ petition is not maintainable. On the other hand, if the reliefs as sought for by the petitioner are granted, power of the Commissioner will not be there, which will leave adverse impact on the Revenue. Mr. Kar further submits that if there is any arbitrary

action on the part of the Revenue authorities in conducting audit with a view to harass the dealer, the same can be brought to the notice of the Commissioner. Moreover, the Audit Report is the clear subject matter of challenge, which can be scrutinized by the competent authority. Therefore, he submits that writ petition is liable to be dismissed.

4. We have carefully examined the pleadings advanced by the petitioner with a view as to whether it is required to strike down the provisions contained in Section 41 and Rule 41 of the Act and Rules. The said point is answered against the petitioner-dealer for the following reasons. It is worthwhile to extract the provisions prescribed under Section 41 and Rule 41 of the Act and Rules, which read as under :

“Section 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 the 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.

(3) Tax audit shall ordinarily be conducted in the prescribe manner in the business premises or office or godown or warehouse or any other place, where the business is normally carried on by the dealer or stock in trade or books of account of the business are kept or lodged temporarily or otherwise.

(4) After completion of tax audit of any dealer under Sub-section (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to be called “Audit Visit Report”, to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sale, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purpose.”

Rule 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 coming with the appointed day, the selection of dealer 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.”

5. The aforesaid provisions of the Act and Rules enable the Commissioner to select such individual dealers or class of dealer for tax audit on random basis. If reliable information is received by the Commissioner that there is tax evasion and he feels that he is required to conduct tax audit in respect of the said dealer or class of dealer, he is required to do so. The said provision cannot be said to be a fault with a view to the ongoing events of tax evasion in the country. The aforesaid enactment has brought in with a view to prevent the evasion of tax. The aforesaid Act and Rules have been enacted by the State Legislature in exercise of statutory power.

6. We have carefully read the provision of the Rules which prescribes for audit cycle. Sub-rule (1) of Rule 41 is distinct and different and, in those circumstances, the Commissioner is otherwise at liberty to conduct such audit to plug evasion of sales tax.

7. In view of the reasons stated above, it cannot be said that the aforesaid provisions of the OVAT Act and Rules are unconstitutional. Therefore, the argument advanced by the petitioner fails. The argument advanced by the learned Standing Counsel for Revenue is well founded and the same is accepted. If there are frequent tax audits and arbitrary action by the subordinate officers with a view to harass the individual dealers or class or dealer, the same should be brought to the notice of the Commissioner.

6. In view of the contention raised by the learned Standing Counsel for Revenue, Annexure-1 is liable to be quashed.

7. In the fact and circumstances of the case, we direct to conduct assessment proceeding by issuing fresh notice of hearing. The assessment notice may be issued by the officer who has not conducted the tax audit.

8. All other factual aspects are open for the petitioner-dealer to reflect in the reply to the show cause, which shall be considered by the assessing authority.

Free copy of this order be supplied to the learned Standing Counsel.

Writ petition disposed of.