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THE HIGH COURT OF ORISSA : CUTTACK

W.P.(C) No.22697 of 2014

In the matter of an application under Articles 226 & 227 of the Constitution of India.

M/s. Veena House Petitioner

-Versus-

Sales Tax Officer,
Assessment Unit,
Nayagarh and others Opp. Parties

For Petitioner : M/s. Jagabandhu Sahoo, Sr. Adv.
A.Mohapatra, D.Panda,
B.K.Nayak, S.C.Mohanty.

For Opp. Parties : Mr.R.P.Kar (Standing Counsel)

P R E S E N T :

THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY
&
THE HON'BLE MR. JUSTICE B.N.MAHAPATRA

Date of Order : 30.03.2015

I.Mahanty, J. The present writ application has been filed by the petitioner-company seeking direction to Opposite Party No.1 (Sales Tax Officer, Assessment Unit, Nayagarh) to refund the amount due to the petitioner for the period from 1.4.2005 to 31.1.2006 pursuant to order dated 2.5.2009 passed by the learned Sales Tax Tribunal in S.A. No.30 (VAT) of

2006-07 along with interest within a stipulated time as may be directed by this Court.

2. Mr. J.Sahoo, learned Senior Advocate appearing for the petitioner submits that the assessment order under the OVAT Act (hereinafter referred to as the 'Act') for the period from 1.4.2005 to 31.01.2006 had been challenged by the petitioners before the Orissa Sales Tax Tribunal in S.A. No.30 (VAT) of 2006-07. The said Second Appeal filed by the petitioner came to be allowed vide order dated 02.05.2009 with a direction to the appropriate Assessment Authority to complete re-assessment after service of proper notice on the petitioner-dealer and giving a reasonable opportunity of being heard. He further submits that in spite of such order being passed by the Tribunal, no notice was issued by the Assessing Officer which in terms of Section 49 of the Act has become barred by limitation and consequently, the prayer for refund of the amount has been made in the writ application.

3. After notice in the present writ application came to be issued, a letter came to be issued by the Asst. Commissioner (O.P.2) dated 13.02.2015 calling upon the petitioner to appear before his office for producing Books of Accounts etc. for the purpose of assessment under Section 43 of the Act. This notice was brought on record by way of an amendment sought for by the petitioner during pendency of the writ application.

4. The petitioner places reliance on Section 49 of the OVAT Act, 2004 which is quoted hereinbelow:

“49(1) Where any order passed by the assessing authority in respect of a dealer for any period is found to be erroneous or prejudicial to the interest of revenue consequent to, or in the light of, any judgment or order of any Court or Tribunal, which has become final and binding, then, notwithstanding anything contained in this Act, the assessing authority may proceed to reassess the tax payable by the dealer in accordance with such judgment or order, at any time within a period of three years from the date of the judgment or order.

(2) Where any Court or Tribunal pass an order in appeal or revision to the effect that any tax assessed under this Act or the Central Sales Tax Act, 1956 (74 of 1956) should have been assessed under the provision of a law other than that under which it was assessed, then, in consequence of such order or to give effect to the finding or direction contained in such order, the turnover or any part thereof as relates to such assessment may be assessed or reassessed as the case may be, to tax at any time within five years from the date of such order, notwithstanding the applicability of any period of limitation to such assessment or reassessment under this Act.”

5. Mr. Sahoo, learned Senior Advocate for the petitioner submits that Section 49(2) of the Act as noted hereinabove clearly indicates that while the consequence of order in Appeal or Second Appeal, re-assessment is required to be made “within five years from the date of such order”. The order of Sales Tax Tribunal in Second Appeal having been passed on 2.5.2009, the period of five years came to be lapse on 1.5.2014 and this writ application came to be filed by the petitioner thereafter on 20.11.2014. Consequently, by operation of limitation prescribed under Section 49(2) of the Act, the opposite party have no authority to withhold any money due to the petitioner and consequently, the prayer of the petitioner to grant refund along with the interest under Section 59 of the Act ought to be allowed.

6. Mr.Kar, learned Standing Counsel for the Commercial Tax Department submits that the Sales Tax Tribunal in its order dated 2.5.2009, appended as Annexure-1 to the writ application, did not adjudicate the matter on merits and instead, came to a conclusion that the Sales Tax Officer (Opposite Party No.1) not being “the Assessing Authority of the Range” as required under Rule 34(12) of the OVAT Rules (pre-amendment) had no jurisdiction to assess the dealer under Section 43(1) of the OVAT Act. Consequently, he submits that this was not adjudication by the Tribunal on merits of the case but only a judgment of the Tribunal based on the lack of inherent jurisdiction of the Officer who had passed the assessment order under Section 43(1) of the Act. He also drew our attention to the fact that Rule 33(4) of the OVAT Rule has undergone in the amendment thereafter and post amendment, the Opposite Party No.1 is competent to make assessment under Section 43(1) of the Act but, he fairly admits that at the relevant time when the order of assessment was passed, Opposite Party No.1 lack necessary jurisdiction/competence.

Learned Standing Counsel further submits that the subsequent notice issued by the Asst. Commissioner of Commercial Taxes under Annexure-4 dated 13.2.2015 was in purported compliance of the direction issued by the Sales Tax Tribunal.

7. Having heard the learned counsel for the respective parties and in particular, having taken note of Section 49(2) of the Act as has been extracted hereinabove, clearly, the order of the Tribunal having

been passed on 2.5.2009 in terms of the extended period of limitation granted under the said provision, the period of limitation expired on 1.5.2013. Consequently, any notice for assessment under Section 43 of the Act made thereafter cannot save the power or authority for assessment, once, it becomes barred by the law of limitation. We are, therefore, of the considered view that the writ application ought to be allowed and the notice under Annexure-4 having been issued beyond the period of limitation and that too, not in statutory Form 307, is non-est in the eyes of law. We order accordingly and direct refund of any amount that may be due to the petitioner along with the statutory interest as may be applicable in terms of Section 59 of the Act within a period of three months from today.

8. Free Copy of this order be handed over to the learned Standing Counsel for the Commercial Tax Department. Urgent certified copy of this order be granted on proper application.

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I.Mahanty, J.

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B.N.Mahapatra, J.

ORISSA HIGH COURT; CUTTACK
 30th March, 2015/ RKS.

True copy attached

[Signature] Court Master