A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.2971 of 2009

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

M/s Delhi Foot Wear,
Shiv Bazar, Cuttack

..... Petitioner

-Versus-

Sales Tax Officer, Vigilance, Cuttack
& others ..... Opposite Parties

For petitioner : M/s. P.K.Jena & S.C. Sahoo

For Opp. Parties : Mr.R.P.Kar, Standing Counsel
[For O.P.-Revenue]

P R E S E N T:

THE HONOURABLE MR. JUSTICE I.MAHANTY
AND
THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA

Date of Judgment: 25.09.2014

B.N. Mahapatra, J. This writ petition has been filed with a prayer for quashing the order of assessment dated 12.01.2007 passed by the Sales Tax Officer, Cuttack-1 Range, Cuttack under Annexure-1 on the ground that the said order is barred by limitation and has been passed without complying with the statutory requirement of Section 42(2) of the OVAT Act.

2. Petitioner's case in a nutshell is that it is a proprietorship concern dealing with Foot Wear on wholesale basis. It is a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act'). The Sales Tax Officer, Vigilance, Cuttack Division, Cuttack conducted audit investigation at the business premises of the petitioner for the tax period from 01.04.2005 to 31.07.2006 on 12.07.2006. Audit visit report dated 21.07.2006 was submitted before the opposite party No.3-Assistant Commissioner of Sales Tax, Cuttack-1 Range, Cuttack vide letter No.317 dated 22.07.2006 for completion of assessment under Section 42 of the OVAT Act. Basing upon such report, a proceeding under Section 42 of the OVAT Act was initiated by opposite party No.2-Sales Tax Officer, Cuttack I Range, Cuttack by issuing notice in Form VAT 306 dated 30.12.2006 enclosing the audit visit report for the tax period from 01.04.2005 to 31.07.2006 fixing the date to 12.01.2007. Thereafter, opposite party No.2-STO passed the assessment order on 12.01.2007 under Section 42 of the OVAT Act for the tax period from 01.04.2005 to 31.07.2006 and the said order was issued vide Memo No.8041 dated 31.12.2008, which was received by the petitioner on 03.01.2009. Hence, the present writ petition.

3. Mr.P.K. Jena, learned counsel for the petitioner submitted that the impugned order of assessment passed under Annexure-1 is not sustainable in law as the said order of assessment has been antedated and that the notice was issued to produce the books of account to make the

audit assessment without allowing the statutory period of 30 days as provided under Section 42(2) of the OVAT Act. It was submitted that if the statute requires to do a thing in a particular manner, the authority is to follow the same. In support of his contention that the assessment order was passed beyond the period of limitation, Mr. Jena relied upon the judgment of the Hon'ble Supreme Court and the Andhra Pradesh High Court.

4. Mr. Kar, learned Standing Counsel for Commercial Taxes Department supported the order of assessment to be valid and legal.

5. On the rival contentions of the parties, the following questions fall for consideration by this Court:-

(i) Whether the order of assessment has been antedated and passed beyond the period of limitation?

(ii) Whether notice dated 30.12.2006 issued in Form VAT-306 for production of books of account and documents for assessment of the tax without complying with the mandate of sub-section (2) of Section 42 of the OVAT Act by not allowing the minimum period of 30 days for production of books of account and documents vitiates the assessment proceeding?

(iii) What order?

6. Question No.(i) is whether the order of assessment has been antedated and passed beyond the period of limitation.

To deal with this question, the following facts may be relevant.

The Audit Visit Report was submitted on 22.07.2006 before the Assessing Officer; the last date for completion of audit assessment under Section 42 was expiring on 21.01.2007 and the order of assessment is dated 12.01.2007. Allegation of petitioner is that the order of assessment has been antedated. In support of his contention, it was vehemently argued that the order of assessment was issued vide Memo No.8041 dated 31.12.2008 which was received by the petitioner on 03.01.2009. Thus, there is inordinate delay of 24 months approximately in issuing the order of assessment. When this Court called upon Mr. Kar, learned Standing Counsel for the opposite party-Department to explain the delay of 24 months between the purported date on which the impugned assessment order was passed and the date on which it was issued and served on the petitioner, Mr. Kar failed to satisfy this Court the cause of delay.

7. At this juncture, it would be appropriate to rely on some of the judicial pronouncements, which are referred to hereunder.

The Hon'ble Supreme Court in the case of ***State of Andhra Pradesh Vs. M.Ramakishtaiah & Co.*** [1994] 93 STC 406 (SC) held as follows:

> "We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10 ½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper examination, it

> would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It would have been made after the expiry of the prescribed four years' period. The civil appeal is accordingly dismissed."

8. Following the aforementioned decision of the Hon'ble Supreme Court (supra), the High Court of Andhra Pradesh in the case of ***Sanka Agencies Vs. Commissioner of Commercial Taxes, Hyderabad***, [2005] 142 STC 496 held as under:

> "We have seen the record. Record also shows that while the impugned order bears the date May 17, 1996, the order was sent to the appellant by dispatching it only on November 1, 1996. There is no explanation in the record nor any explanation has been given by the respondent, as no counter is filed. Therefore, there is a strong apprehension that in order to give an impression that the impugned order was passed within the period of limitation; the order bears the date May 17, 1996, whereas it has been passed much after that. In this connection, the learned Counsel for the appellants has placed reliance on a judgment of the Hon'ble Supreme Court in State of *Andhra Pradesh Vs. M.Ramakishtaiah & Co.* [1994] 93 STC 406, wherein under similar circumstances, the Supreme Court held that in the absence of any explanation, whatsoever, for delayed service on the petitioner, of the order, the court should presume that the order was not made on the date it was purported to have been made."

9. In the instant case, there is no explanation for inordinate delay of 24 months caused in issuing the assessment order to the petitioner. Therefore, we have no hesitation to hold that the order of assessment under Annexure-1 was not made on the date it was purported to have been made. In order to bring the assessment within the period of limitation, the order of

assessment bears the date 12.01.2007, whereas it has been passed much after that.

10. So far as question No.(ii) is concerned, it is necessary to extract sub-sections (1) and (2) of Section 42 of the OVAT Act.

> "**42.Audit assessment**.—(1) Where the tax audit conducted under Sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.
>
> (2) where a notice is issued to a dealer under Sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents."
>
> *(underlined for emphasis)*

11. As per sub-section (1) of Section 42 of the OVAT Act, where the tax audit conducted under Section 41 of the OVAT Act results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority serves on such dealer a notice in the form and manner prescribed along with a copy of

the Audit Visit Report, requiring him to appear in person and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

12. Sub-section (2) of Section 42 provides that where a notice is issued to a dealer under sub-section (1) he shall be allowed time for a period not less than thirty days for production of relevant books of account. The use of the expressions "shall" and "not less than thirty days" make it amply clear that the Assessing Officer is bound to allow minimum thirty days time for production of books of account and documents. On a plain reading of sub-section (2), it further reveals that discretion is vested on the Assessing Officer to allow time more than thirty days for production of books of account, but he has no jurisdiction to allow less than thirty days' time for production of books of account.

13. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not

permissible. [*See Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615, Gujarat Urja Vikas Nigam Ltd. –v- Essar Power Ltd., (2008) 4 SCC 755)].*

14. If the notice issued is invalid for any reason, then the proceeding initiated in pursuance of such notice would be illegal and invalid. Section 42 (2) of the OVAT ACT is a mandatory provision not with regard to any procedural law, but with regard to a substantive right. Any infirmity or invalidity in the notice under Section 42(2) of the OVAT Act goes to the root of jurisdiction of the Assessing Authority. Issue of notice under Section 42(2) of the OVAT Act is a condition precedent to the validity of any assessment under Section 42 of the OVAT Act. Therefore, if the notice issued for assessment is invalid, the assessment would be bad in law. Hence, the notice for assessment of tax without allowing the minimum period of 30 days for production of the books of account and documents is invalid in law and consequentially, the order of assessment and demand notice passed/issued are not sustainable in law.

15. In the instant case, notice for assessment of tax basing on the audit visit report was issued in Form VAT-306 dated 30.12.2006 requiring the petitioner to appear in person or through his authorized agent before the Assessing Officer on 12.01.2007 and produce or cause to be produced the books of account and documents for the period from 01.04.2005 to

31.07.2006. Thus, notice in Form VAT-306 shows that minimum time as provided under sub-section (2) of Section 42 of the OVAT Act has not been granted to the petitioner. Thus, it is a clear case of violation/infraction of mandatory provisions of Section 42(2) of the OVAT Act. Therefore, the notice for assessment of tax in pursuance of audit visit report is invalid.

16. In view of the above, order of assessment passed in pursuance of notice in Form VAT-306 issued in violation of requirement of Section 42(2) of the OVAT Act is bad in law.

17. For the reasons stated above, we quash the impugned order of assessment dated 12.01.2007 passed under Annexure-1 and consequential demand notice for the period from 01.04.2005 to 31.07.2006.

18. In the result, the writ petition is allowed, but in the circumstances without any order as to costs.

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B.N. Mahapatra, J.

I.Mahanty, J. *I agree.*

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I.Mahanty, J.

Orissa High Court, Cuttack
The 25th September, 2014/bks/skj/ss