

WPST-92630-20.doc.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO.92630 OF 2020

Greatship (India) Ltd.,
a company incorporated under the
Companies Act, 1956 having its registered
office at Indiabulls Finance Centre,
Tower 3, 23rd Floor, Senapati Bapat Marg,
Elphinstone Road (West), Mumbai-400 013.

..Petitioner

Versus

1. State of Maharashtra through
the Secretary, Ministry of
Finance, Mantralaya,
Mumbai-400 021.

2. Commissioner of State
Tax Maharashtra State,
GST Bhavan, 8th Floor,
Mazgaon, Mumbai-400 010.

3. Assistant Commissioner of State
Nodal-4 [MUM-VAT-D-850],
GST Bhavan, Mazgaon,
Mumbai-400 010.

..Respondents

Mr. Rafiq Dada, Senior Advocate a/w Mr. Ranjan Mishra and Mr. Srinath
Nair i/ by Mr. Mihir P. Deshmukh, for the Petitioner.

Mr. V. A. Sonpal, Special Counsel a/w Ms. S. D. Vyas, "B" Panel
Advocate for the Respondents.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.**

**RESERVED ON : 19.01.2021
PRONOUNCED ON : 30.04.2021**

JUDGMENT AND ORDER (Per Ujjal Bhuyan, J.)

Heard Mr. Rafiq Dada, learned senior counsel for the petitioner
and Mr. V. A. Sonpal, learned counsel for the respondents.

BGP.

1 of 39

WPST-92630-20.doc.

2. By filing this petition under Articles 226/227 of the Constitution of India, petitioner seeks quashing of assessment orders dated 20.03.2020 passed by respondent No.3 as well as the consequential notices of demand dated 20.03.2020 under the Maharashtra Value Added Tax Act, 2002 as well as under the Central Sales Tax Act, 1956.

3. Case of the petitioner is that it is a company incorporated under the Companies Act, 1956 and is engaged in the business of providing specialized services to persons involved in exploration and production of oil and natural gas. The services include carrying of man and material between offshore rigs/installations and on shore using vessels of the petitioner and providing drilling services by using the vessels owned or chartered by the petitioner. Customers of the petitioner include public sector undertakings such as Oil and Natural Gas Corporation Ltd. (ONGC) as well as private entities such as Reliance Industries Ltd. etc. Petitioner has given details of the scope of work and the nature of services provided by it in the writ petition.

4. It is stated that being a service provider, petitioner had discharged service tax under the Finance Act, 1994 at the prevailing rate during the financial year 2015-16. Total service tax paid by the petitioner during the said year was Rs.208,98,43,288.00.

5. For the said financial year 2015-16, respondent No.3 issued notice of assessment dated 01.02.2018 calling upon the petitioner to produce relevant

BGP.

2 of 39

WPST-92630-20.doc.

documents and also to show cause as to why it should not be assessed under sub sections (2), (3) or (4) of section 23 of the Maharashtra Value Added Tax Act, 2002 ("MVAT Act" for short); besides as to why interest and penalty should not be imposed under the MVAT Act. Similar notice was issued for assessment under the Central Sales Tax Act, 1956.

5.1. Responding to the said notices of assessment dated 01.02.2018, petitioner submitted the required documents and also showed cause vide letter dated 03.05.2018.

6. Vide letter dated 22.11.2019, respondent No.3 again called upon the petitioner to submit documents pertaining to the said year cautioning that in the event those documents were not submitted, assessments would be made *ex-parte*. Thereafter petitioner approached respondent No.3 and submitted that the documents pertaining to the financial year 2015-16 were already submitted earlier vide letter dated 03.05.2018.

7. Thereafter there was a complete *hiatus* and no consequential steps were taken by respondent No.3. Be it stated that the limitation period for making assessment under section 23(2) of the MVAT Act for the financial year 2015-16 was five years expiring on 31.03.2020.

8. When just about two weeks were left before expiry of the limitation period, respondent No.3 on 13.03.2020 telephonically informed the

BGP.

3 of 39

WPST-92630-20.doc.

petitioner about personal hearing on 16.03.2020 and asking the petitioner to participate in such hearing. However, on 16.03.2020 respondent No.3 was not available in office and therefore no hearing took place. On 17.03.2020, 18.03.2020 and 19.03.2020 petitioner made multiple telephone calls to respondent No.3 for personal hearing but no such hearing materialized. Ultimately, petitioner vide letter dated 20.03.2020 submitted before respondent No.3 that for the financial year under consideration the relevant documents had already been submitted and sought for a personal hearing.

9. It is stated that without providing any opportunity of hearing and without considering the documents submitted, respondent No.3 passed the two impugned orders allegedly dated 20.03.2020 determining tax liability of the petitioner at Rs.76,30,03,372.00 along with interest and penalty under the MVAT Act and also determining tax liability of Rs.4,97,56,627.00 under the Central Sales Tax Act, 1956 (briefly "the CST Act" hereinafter) together with interest and penalty for the period 01.04.2015 to 31.03.2016.

10. It is stated that the impugned orders were digitally signed on 22.07.2020 and were served on the petitioner via email on 23.07.2020. Further, the order details were uploaded on the official website of MVAT only on

2. 08.2020 though the same could not be downloaded. In such circumstances, it is contended that the limitation for passing the assessment orders for the financial year 2015-16 having expired on 31.03.2020 and there being no provision for extension of the period of limitation, those were clearly barred by

BGP.

4 of 39

WPST-92630-20.doc.

limitation.

11. It is with the above grievance that the present writ petition came to be filed seeking the relief as indicated above.

12. This Court by the order dated 15.09.2020 had issued notice and passed an interim order to the effect that no coercive action should be taken by the respondents against the petitioner on the basis of the impugned assessment orders.

13. Thereafter petitioner filed an additional affidavit to bring on record certain subsequent developments and also made a prayer for amendment of the writ petition which was granted whereafter amendments were carried out.

14. In the additional affidavit petitioner has stated that it received copies of the impugned orders vide email dated 22.09.2020. Such order copies were shown as manually signed by the officer and having the date of

20.03.2020. Unlike the orders which were served upon the petitioner via email on 23.07.2020, the newly introduced order copies were accompanied by certain documents which encapsulated the reasoning underlying the impugned orders.

15. It is stated that the orders that were served upon the petitioner were digitally signed on 22.07.2020 bearing manual signature purportedly dated 20.03.2020. However those could not be downloaded from the portal of MVAT department till 04.10.2020. It is further stated that though the orders bore the

BGP.

5 of 39

WPST-92630-20.doc.

signature of the officer having the date of 20.03.2020, it is nothing but a reproduction of the order received by the petitioner on 23.07.2020. Clearly it is an attempt to circumvent the bar of limitation.

16. The orders emailed on 22.09.2020 appear to be a mere printout of the orders served on 23.07.2020 which have now been manually signed. Therefore, there exist no possibility that the orders served on 22.09.2020 were passed on or before 31.03.2020.

17. The above aspects have been incorporated in the writ petition by way of amendment.

18. Shri. Prasad Gajanan Joshi, Joint Commissioner of State Tax, Nodal Division-4 has filed affidavit in reply on behalf of respondent Nos.1, 2 and 3. Adverting to the impugned orders of assessment it is stated that petitioner was provided ample opportunities and the documents submitted by the petitioner were duly considered by the assessing authority. After considering all relevant aspects including balance-sheet and audit report, assessing authority passed reasoned orders on 20.03.2020 within the period of limitation. It is stated that the assessment orders were served upon the petitioner by scanning the order copies and sending it to the petitioner by email. As the scanned copies of the assessment orders were not properly readable or legible, assessing authority downloaded clear legible copies of the orders from the system, signed those digitally and thereafter emailed to the petitioner. Assessing

BGP.

6 of 39

WPST-92630-20.doc.

authority tried his best to provide legible copies of assessment orders to the petitioner. Passing of the orders, uploading of the same on the system, downloading those and serving those again upon the petitioner were done on different dates because of the critical covid-19 situation.

18.1. Respondents have explained that petitioner is under an erroneous impression that assessing authority had served two different assessment orders on two different occasions i.e. on 23.07.2020 and 22.09.2020. However, the assessment orders were the same which were already served on the petitioner on 23.07.2020 and which were passed on 20.03.2020. Explaining further, it is stated that the assessment orders were passed manually on 20.03.2020 which was well within the period of limitation. Thereafter those were uploaded on the SAP (System Applications and Products) system.

18.2. Asserting that the impugned assessment orders were passed well within the prescribed time limit as provided under the MVAT Act, those had to be passed as per best judgment as nobody had attended the office of respondent No.3 for final hearing. It is stated that the best judgment orders were passed on the basis of relevant legal provisions and decisions of the first appellate authority as well as of the Maharashtra Sales Tax Tribunal and judgments of the High Court.

18.3. It is submitted that if the petitioner is aggrieved by the orders of assessment, it should first exhaust the appellate remedy provided under the

BGP.

7 of 39

WPST-92630-20.doc.

MVAT Act. In fact against earlier assessment orders petitioner had filed appeals. In the instant case, without availing the statutory remedy of appeal petitioner has straightaway invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India. The writ petition should therefore be dismissed on the ground of non-availing of alternative remedy alone.

18.4. Clarifying the matter further, it is stated that the assessment orders were passed on 20.03.2020 after which an entry was made in the daily book of assessment as well as in the monthly summary in the office record. As the assessment orders were required to be served upon the petitioner, copies of the same were scanned but the scanned copies of the assessment orders were neither properly readable nor legible. Therefore, the assessing authority downloaded clear legible copies of the assessment orders, signed those digitally and emailed to the petitioner on 23.07.2020. The assessment orders were uploaded on the system on 14.07.2020 as per internal direction given.

18.5. Respondents have stated that on 20.03.2020 petitioner had submitted a letter for hearing, but since the office was closed due to covid-19 the letter was not received by the assessing officer till September, 2020. It is contended that such a letter did not mandate or compel the assessing authority to pass assessment orders without getting proper submission.

18.6. It is stated that petitioner had attended the office of respondent No.3 on 23.04.2018, 03.05.2018 and 31.05.2018 when the petitioner submitted

BGP.

8 of 39

WPST-92630-20.doc.

the documents. Thereafter no submissions were made by the petitioner. Later on a reminder was issued to the petitioner on 22.11.2019 followed by some phone calls for hearing, but petitioner failed to appear in the hearing. Hence, best judgment assessment orders were passed.

18.7. However, it is admitted by the respondents that though the assessment orders were passed on 20.03.2020, those could not be immediately served upon the petitioner due to limited staff availability and non-availability of postal services as well as closure of offices. As a result, assessing authority uploaded the assessment orders on the SAP system on 14.07.2020 which date of uploading gets automatically embossed on the assessment orders.

18.8. On merit, it is contended that the transactions/agreements entered into by the petitioner are in the nature of lease activity and not rendition of pure services which was the view taken in the earlier orders of assessment covering previous periods which have been upheld by the first appellate authority as well as by the Maharashtra Sales Tax Tribunal.

18.9. At another portion of the reply affidavit, it is stated that the assessment orders were uploaded on SAP system on 14.07.2020. Those were downloaded, digitally signed and attached in order to email to the petitioner. However, due to technical issues, the assessment orders were attached without content and emailed to the petitioner. The contents were immediately emailed when this issue came to notice. Petitioner was already aware of the facts and

BGP.

9 of 39

WPST-92630-20.doc.

circumstances present in the content because same facts and circumstances were already communicated in the previous assessment orders.

18.10. Thus, in the facts and circumstances of the case, respondents contend that petitioner should be relegated to the forum of alternative remedy provided under the MVAT Act and therefore the writ petition should be dismissed.

19. Petitioner has filed rejoinder affidavit. After summing up the averments made by the respondents, it is submitted that the facts and logical sequence of events would demonstrate considerable inconsistencies. Though the assessment orders were purported to be passed manually on 20.03.2020, according to the respondents themselves such version of the orders were not properly readable or legible, hence not served on the petitioner. On 14.07.2020, the assessment orders were uploaded on the SAP system and according to the respondents the system is such that the date of uploading gets embossed on the orders which cannot be changed. According to the respondents, on 22.07.2020 respondent No.3 downloaded the assessment orders from the SAP system, digitally signed those and then emailed to the petitioner on 23.07.2020. Interestingly, in this version of the orders the date 20.03.2020 is mentioned, though there is no mention of the date 14.07.2020 which according to the respondents automatically got embossed on the orders at the time of uploading. However, on 23.07.2020 the orders that were emailed were without any content. Rather no orders were visible on the MVAT portal. On 22.09.2020 another

BGP.

10 of 39

WPST-92630-20.doc.

version of the orders were downloaded from the system, manually signed and emailed to the petitioner along with the content though not visible on the MVAT portal. Again in this version of the orders, the date 20.03.2020 finds place and not the date 14.07.2020. Finally on 17.11.2020 petitioner was able to download the orders from the MVAT portal but without content. Both versions of the orders bore the SAP system date of 14.07.2020 though the order under the MVAT was unsigned.

19.1. On this basis, it is contended that there is a clear attempt by respondent No.3 to circumvent the bar of limitation as the orders of assessment were not passed on 20.03.2020 or before 31.03.2020. It is further contended that the various versions of the assessment orders were not served upon i.e., emailed to the petitioner till 23.07.2020. On this basis itself a presumption can be drawn that the orders were passed after the lapse of limitation.

19.2. Petitioner has made detailed reference to circular No.4A/2020 dated 20.03.2020 to point out gross anomalies in the conduct of respondent No.3 which has completely vitiated the impugned orders. It is asserted that all versions of the assessment orders were not visible on the official portal of MVAT till 17.11.2020, though the orders under the MVAT Act and CST Act were purportedly dated 14.07.2020. Only the order under the CST Act bore the digital signature of 02.08.2020; the order under the MVAT Act remained unsigned. It is asserted that the orders were uploaded on the SAP system on 14.07.2020 but those were created with the file extension pdf only on

BGP.

11 of 39

WPST-92630-20.doc.

21.07.2020. On that basis, it is contended that to state as has been stated by respondent No.3 that the orders were uploaded on the SAP system on 14.07.2020 is glaring untrue deposition of fact.

19.3. On merit, petitioner has asserted that it has duly discharged service tax liability for the financial year 2015-16 amounting to Rs.208,98,43,288.00. No sale had taken place. MVAT Act provides for levy of tax on sales and not levy of tax on services which is within the sole jurisdiction of the central government and cannot be usurped by the state authorities. Therefore, no tax under the MVAT Act and under the CST Act are payable by the petitioner.

19.4. In so far alternative remedy is concerned, it is contended that while for previous years petitioner has filed appeal before the appellate authority, that would not estop the petitioner from assailing the present assessment orders in a writ proceeding since admittedly those are without jurisdiction being beyond limitation.

19.5. In the circumstances, petitioner submits that there is substantial merit in the writ petition which should therefore be allowed with cost.

20. Mr. Rafiq Dada, learned senior counsel for the petitioner has first taken us to the order of assessment passed by respondent No.3 under the MVAT Act. It is an order passed under section 23(2) of the MVAT Act which is nothing but a best judgment assessment. He submits that though this order is shown to

BGP.

12 of 39

WPST-92630-20.doc.

be dated 20.03.2020, it was in fact not so passed on that date. The order also is not signed by the assessing officer i.e. respondent No.3. Similar is the position in respect of the assessment under the CST Act. Referring to pages 91 and 92 of the paper-book and comparing the two orders of assessment, he submits that the orders of assessments were actually signed digitally on 14.07.2020, beyond the limitation period of 31.03.2020. In this connection, he has referred to the averments made in paragraphs 4.10 and 4.14 of the writ petition and submits that the impugned orders were digitally signed on 14.07.2020 whereafter those were emailed to the petitioner on 23.07.2020 but without any content.

20.1. Mr. Rafiq Dada has also extensively referred to the internal circular dated 20.03.2020 issued by the office of the Commissioner of State Tax, Maharashtra in respect of assessment proceedings under the MVAT Act and CST Act which were getting barred by limitation by 31.03.2020 on the basis of which the assessment orders were purportedly passed on 20.03.2020. He submits therefrom that if an assessment order was passed manually, all related functions would have to be carried out manually too. Such assessment orders should be sealed, dated, stamped and signed by the issuing authority before delivering it to the assessee, but the stamps and seals should not be carried home by the officers. As to service of assessment orders and demand notices, the assessing authorities were called upon to follow the provisions of law diligently. Mr. Rafiq Dada has particularly referred to clause 3(11) of the said internal circular and submits that not only the date of passing of order manually has to be recorded, the date of service of the order on the dealer should also be

BGP.

13 of 39

WPST-92630-20.doc.

mentioned. Such orders should not be served electronically but delivered manually. On the above basis, he submits that the orders of assessment emailed to the petitioner on 23.07.2020 could not have been passed on or before 31.03.2020 and hence are without jurisdiction being beyond limitation.

20.2. Referring to the reply affidavit of the respondents, learned senior counsel submits that on going through the averments made therein, it is evident that the assessment orders were not passed on 20.03.2020 as asserted by respondent No.3 but was subsequently ante-dated. Respondent No.3 himself has admitted that the scanned copies of the assessment orders were not properly readable or legible; therefore, he claimed to have downloaded clear legible copies of the orders passed in the month of March, 2020, signed those digitally and emailed to the petitioner, further stating that assessing authority tried his best to provide legible copies of the assessment orders to the petitioner. From this itself, it is evident that respondent No.3 is trying to make out a case of having passed the assessment orders on 20.03.2020 which in fact he had not. When admittedly the orders of assessment were passed manually, there was no question of having scanned copies of such orders. Again question of those orders being not properly readable or legible did not arise. Question of digitally signing the same also did not arise as those were required to be served manually.

20.3. Mr. Rafique Dada has also referred to the rejoinder affidavit filed by the petitioner, more particularly to the sequence of events brought out by the petitioner to contend that no assessment orders were passed on 20.03.2020.

BGP.

14 of 39

WPST-92630-20.doc.

Signature of respondent No.3 was affixed subsequently. He also submits that respondent No.3 was not present in office on 20.03.2020 and was presumably working from home. As per information gathered by the petitioner, ten assessment orders similar to the one in respect of the petitioner were passed by respondent No.3 on 20.03.2020 based on the internal circular issued on the same date, which is humanly impossible. Further in terms of the internal circular dated 20.03.2020 respondent No.3 could not have stamped and sealed the orders on 20.03.2020 as he was not authorized to carry the stamp and seal home.

20.4. Even the assessment orders emailed to the petitioner on

23.07.2020 could be downloaded much later. Orders emailed to the petitioner were bereft of any reasons and were non-speaking ones. Mr. Rafiq Dada has relied upon a decision of the Supreme Court in **State of A. P. Vs. M. Ramaishtaiyah, (1994) 93 STC 406** to highlight his submission that orders of assessment were not made on the date those were purported to have been made.

He has also placed reliance on a decision of the Supreme Court in **Assistant**

Commissioner Vs. Amara Raja Batteries Limited, (2009) 8 SCC 209

to contend that in a situation such as the present one, filing of appeal by the petitioner to the appellate authority would be an idle formality.

20.5. He therefore submits that the impugned orders being passed beyond the limitation date of 31.03.2020 are without jurisdiction and *non est* in the eye of law. Those should accordingly be set aside and quashed.

BGP.

15 of 39

WPST-92630-20.doc.

21. On the other hand, learned special counsel Mr. V. A. Sonpal has elaborately referred to the averments made in the reply affidavit of the respondents. Referring to paragraph 13 of the said reply affidavit, he submits that the assessment orders were passed within time on 20.03.2020 as per provisions of section 23(2) of the MVAT Act and section 9(2) of the CST Act. After passing of the orders entries were made in the daily book of assessment and also in the monthly summary. The assessment orders were subsequently served upon the petitioner after scanning the order copies and sending to the petitioner. As the scanned copies of assessment orders were not properly readable or legible, the assessing authority downloaded clear legible copies of the orders from the system, signed those digitally and emailed those to the petitioner on 23.07.2020. From this, he contends that assessing authority tried his level best to provide proper legible copies of the assessment orders to the petitioner. The manual assessment orders were passed well within the prescribed period and then uploaded on SAP system. The date of uploading automatically gets embossed on the assessment order. The assessment orders were uploaded on the system on 14.07.2020.

21.1. Mr. V. A. Sonpal has submitted a compilation of documents and submits therefrom that the difficulties arose because of the pandemic and the related restrictions imposed by the government including functioning of government offices with minimal strength.

21.2. Referring to rule 87 of the Maharashtra Value Added Tax Rules,

BGP.

16 of 39

WPST-92630-20.doc.

2005 (briefly “the MVAT Rules” hereinafter), he submits that orders and notices under the MVAT Act can be served by any of the methods mentioned therein including by sending a scanned copy or electronically generated and digitally signed copy of the order or notice by email. This has exactly been done in the instant case which was accepted by the petitioner. He has also referred to section 91 of the Evidence Act, 1872 to contend that no evidence is required to be given in proof of a document except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible.

21.3. Reverting back to the orders of assessment, he has taken us to sub sections (2) and (2A) of section 23 of the MVAT Act and submits that respondent No.3 had considered all the documents and materials which were on record before passing the orders of assessment.

21.4. Mr. V. A. Sonpal has also tried to distinguish the judgments relied upon by Mr. Rafiq Dada in **M. Ramaishtaiyah** (*supra*) and **Amara Raja Batteries Limited** (*supra*) by contending that those would not be attracted to the facts and circumstances of the case.

21.5 While explaining the internal circular dated 20.03.2020, Mr. V. A. Sonpal has also placed reliance on a previous internal circular of the department dated 29.05.2018, more particularly to clauses 2.7 and 6.1 thereof.

21.6. His final submission is that petitioner has got adequate and

BGP.

17 of 39

WPST-92630-20.doc.

efficacious alternative remedy under the MVAT Act and therefore this Court may not entertain the writ petition which should accordingly be dismissed. Mr. Sonpal has also produced the record in original.

22. Mr. Rafiq Dada in his reply submissions contended that the short point to be considered in the writ petition is whether an order of assessment is to be communicated or kept in the file. Referring to page 116 of the paper-book and paragraph 30 of the reply affidavit, he submits that there are clear discrepancies between the order of assessment at page 85 of the paper-book and at page 116 of the paper-book; one without signature of respondent No.3 and the other having the signature. Thus the two cannot be one and the same order. The orders of assessment were in fact signed on 14.07.2020 as has been clearly brought out by the petitioner in the rejoinder affidavit.

23. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record as produced by Mr. Sonpal.

24. From the rival pleadings and the submissions made in support thereof, the following issues arise for consideration of the Court :-

- I) Whether the orders of the assessment were passed or signed by respondent No.3 on 20.03.2020 as asserted by respondent No.3 or on any date prior to 31.03.2020 ?

BGP.

18 of 39

WPST-92630-20.doc.

- II) Whether an order of assessment is required to be communicated or kept on the file ?

25. To answer the above questions, it would be apposite to first dilate on the relevant legal provisions. Chapter V of the MVAT Act comprising sections 20 to 28A deals with returns and assessment etc. Section 23 provides for assessment. As per sub section (1), where a registered dealer fails to file a return in respect of any period by the prescribed date, the Commissioner may assess the dealer in respect of the said period to the best of his judgment without serving a notice for assessment and without affording an opportunity of being heard. However, as per the first proviso, such an assessment order can be cancelled and the dealer may be assessed afresh, if he submits the return after the assessment order is passed.

25.1. Sub section (2) deals with a situation where a return is filed by a registered dealer in respect of any period by the prescribed date and if the Commissioner considers it necessary or expedient to ensure that the return is correct and complete, he may make a fresh assessment but only after issuing notice to the dealer. As per the first proviso, if the registered dealer fails to comply with the terms of any such notice the Commissioner shall make assessment to the best of his judgment. However, in terms of the second proviso, the limitation for making such assessment is four years from the end of the year containing the period to which the return relates. Sub section (2) being relevant is extracted hereunder :-

BGP.

19 of 39

WPST-92630-20.doc.

“(2) Where the return in respect of any period is filed by a registered dealer by the prescribed date and if the Commissioner considers it necessary or expedient to ensure that return is correct and complete, and he thinks it necessary to require the presence of the dealer or the production of further documents, he shall serve on such dealer, a notice requiring him on a date and at a place specified therein, either to attend and produce or cause to be produced all documents on which such dealer relies in support of his return, or to produce such documents or evidence as is specified in the notice.

On the date specified in the notice, or as soon as may be thereafter, the Commissioner shall, after considering all the documents or evidence which may be produced, assess the amount of tax due from the dealer:

Provided that, if a registered dealer fails to comply with the terms of any notice issued under this sub-section, the Commissioner shall assess, to the best of his judgement the amount of tax due from him:

Provided further that, no order of assessment under this sub-section shall be made after the expiry of four years from the end of the year containing the period to which the return relates.

Provided also that, in respect of the period commencing on or after the 1st April 2008 and ending on or before the 31st March 2009, an order of assessment under this sub-section may be made on or before the 30th June 2013.”

25.2. Sub section (2A) deals with assessment by the Commissioner if he

BGP.

20 of 39

WPST-92630-20.doc.

satisfied that the returns furnished are correct and complete though as per the proviso such an order of assessment has to be made within four years failing which the returns shall be deemed to have been accepted.

25.3. Sub section (3) of section 23 provides that where a registered dealer has not filed the return in respect of any period by the prescribed date, then the Commissioner may serve on the dealer a notice requiring him to attend on a date and at a place specified therein and after giving the dealer a reasonable opportunity being heard, proceed to assess to the best of his judgment, the amount of tax due from him. As per the proviso, no such order of assessment shall be made after expiry of five years from the end of the year containing the said period. Thus, sub section (3) of section 23 provides for a situation where the Commissioner may pass an order of assessment to the best of his judgment in a case where a registered dealer has not filed the return but the limitation period for passing of such an order is five years from the end of the year containing the said period.

26. Section 26 of the MVAT Act deals with appeals. As per sub section (4), such an appeal is required to be filed within sixty days from the date of communication of the order appealed against.

27. Payment of tax, etc. is dealt with in section 32 of the MVAT Act. As per clause (b) of sub section (4) of section 32, the amount of tax, interest and penalty that becomes due as per any order passed under the MVAT Act shall be

BGP.

21 of 39

WPST-92630-20.doc.

paid by the person concerned into the government treasury within thirty days from the date of service of notice though as per the first proviso such payment can be allowed on installments.

28. While rule 21 of the MVAT Rules provides for form of notice for assessment, rule 25 deals with an order imposing a penalty or levy of interest in respect of any period which may be incorporated in the order of assessment relating to that period. As per rule 26, a certified copy of an order of assessment shall be furnished to the assessee free of charge alongwith the notice issued in accordance with sub section (4) of section 32 as alluded to hereinabove.

29. Proceeding to rule 87 of the MVAT Rules, we find that the said provision lays down the procedure whereby orders and notices issued under the MVAT Act or under the MVAT Rules can be served. Orders and notices can be served by hand delivery, by post, by facsimile message, by sending a scanned copy or electronically generated and digitally signed copy of the order or notice by e-mail or by courier service. As per sub rule (2), if the order or notice is served by hand, then the signature of the person to whom the copy is so delivered or tendered is required to be obtained as an acknowledgment of service. Sub rule (4) clarifies that where an order or notice is made electronically and addressed to the dealer by email which is provided by the department to the dealer, then such order or notice shall be deemed to be served on the addressee.

BGP.

22 of 39

WPST-92630-20.doc.

30. In so far the CST Act is concerned, provision for passing assessment order is found in sub section (2) of section 6A and in sub section (2) of section 9 whereby and whereunder state tax authorities can assess, re-assess etc. a dealer on behalf of the Government of India. Provision of appeal is in section 18A. As per sub section (2) of section 18A, the appeal has to be preferred within sixty days from the date on which the assessment order is communicated to the aggrieved person.

31. Internal circular No.13A of 2018 dated 29.05.2018 has been issued by the office of the Commissioner of Sales Tax, Maharashtra State laying down certain guidelines regarding best judgment assessment. Referring to section 23 of the MVAT Act, it says that best judgment assessments are inevitable in certain circumstances as specified in section 23 of the MVAT Act. Clause 2 of the said circular deals with service of notice. As per clause 2.7, at least one reminder should be given to the dealer before an *ex-parte* show-cause notice is issued to the dealer and as per clause 2.8, *ex-parte* show-cause notice should be accompanied by working of tax liability to the best of the judgment of the assessing officer. The quantum of disallowances and reasons for the same should be mentioned appropriately in the said working. While clause 4.1 says that ordinarily adjournments should not be granted for a period of more than ten days, clause 6.1 highlights or provides for procedural safeguards while passing *ex-parte* best judgment assessment orders. It says that where the dealer or his representative has not appeared or no record has been produced, in such cases, the assessing officer should take the administrative approval of the immediate

BGP.

23 of 39

WPST-92630-20.doc.

supervisory authority while issuing the *ex-parte* best judgment detailed working show cause notice. Further, if *ex-parte* best judgment assessment order is required to be passed, administrative approval should be obtained again before the order of assessment is made.

31.1. Thus, from clause 6.1 it is evident that when it comes to *ex-parte* best judgment assessment, administrative approval of the immediate supervisory authority is required to be taken at two stages. Firstly at the stage of issuing show-cause notice which should include the working of tax liability together with quantum of disallowances and the reasons for the same; secondly, at the time of passing the best judgment assessment order *ex-parte*, again administrative approval is required to be obtained from the immediate supervisory authority.

32. Office of the Commissioner of State Tax, Maharashtra State issued internal circular No.4A of 2020 dated 20.03.2020 on the subject of passing of assessment orders manually outside the SAP system in cases which were getting barred by limitation on 31.03.2020. This internal circular was necessitated because of covid-19 pandemic and the lockdown restrictions imposed by the Government of Maharashtra. It is stated that as per instructions of the Government of Maharashtra, attendance of employees in State Government departments should not be more than 50% of the usual attendance on any given date till 31.03.2020. As per clause I, all the officers were instructed to pass the assessment orders on the SAP system. Where it was not so possible, then the

BGP.

24 of 39

WPST-92630-20.doc.

assessment orders should be passed manually outside the SAP system. If an order is passed manually, all post assessment functions would have to be carried out manually too. It was made abundantly clear that the instructions contained in the said circular were applicable only to those assessments which were getting barred by limitation on 31.03.2020. Since the procedure for manual issuance of assessment orders as contained in clause III are important, those are extracted hereunder :-

“(III) Procedure for Manual Issuance of Assessment Orders:

Following instructions must be followed scrupulously by all the assessing authorities in the State.

1. Wherever an officer is in a position to pass the said order using SAP system simultaneously complying with all the instructions regarding attendance in office, then invariably the order should be passed through the SAP system.
2. The orders which are passed manually must be in Form 303 under MVAT Act and in Form VIIB under CST Act. Formats of the orders are attached to this circular. The attached forms are in word format and can be edited to enter the details pertaining to the case.
3. The assessment orders so issued must be sealed, dated, stamped and signed by the issuing authority before delivering it to the assessee but the stamps and seals must not be carried home by the officers. They can get the orders and demand notices stamped on the day they attend the office.
4. Regarding the service of the said orders and demand notices, officers shall follow the provisions of law diligently.
5. No order should be served on the dealer without taking

BGP.

25 of 39

WPST-92630-20.doc.

entry into the DBA.

6. The DBA entries of the orders passed manually should be marked as 'Manual' in the DBA itself. This entry should contain date of passing of order and date of service of order.

7. The list of all the orders which are passed manually should be submitted with the KKPI for the month of March 2020.

8. Data entry of all the orders which are passed manually is required to be taken in the system database. There is no provision of data entry in the system hence the manually passed orders should be uploaded into the SAP Assessment Module by 11th of May 2020. Concerned joint commissioners, on or before 15th May 2020, shall certify that all the manually issued orders have been entered into the system. Utmost care should be taken while entering the date into the system so as to ensure that the figures in the manually served order and the data entered into system do not have any discrepancies.

9. While uploading the manually passed orders in the system, the officers shall enter the original dates of notices passed manually.

10. While completing the hearing activity, the officer shall attach the scanned copy of the orders passed manually into the system.

11. While entering the content of the assessment order, officer shall, invariably write "This order was passed manually on .././2020 and served on the dealer on .././2020 as per the instructions of Internal Circular 04A of 2020 dated 20/03/2020". These orders will not be served electronically to the dealers as the speaking orders will already have been delivered to them manually, the content of the original assessment order need not be written here once again. So the content of all such orders will have only the above sentence and nothing else.

BGP.

26 of 39

WPST-92630-20.doc.

12. The officers will take all the actions such as approving the orders, digitally signing them, order service confirmation of such orders (**served manually**) once they are entered into the system.

13. If a manually passed order is entered into the system, the officer, without exception, shall refrain from taking the printouts of the system order as it will not be a proper assessment order but just a document created for the purpose of data entry into the system.

14. This electronic uploading of the order will be for the purpose of updating the database and for the post assessment actions such as recovery, rectification, appeal and payment against order only and **the date of manual service of the said orders will be considered for all the legal matters involved therein.**

32.1. Thus, from a careful analysis of the procedure laid down for manual issuance of assessment orders as contained in clause (III) of the internal circular No.4A of 2020 dated 20.03.2020, we find that particular format is laid down for passing of assessment orders manually. Those must be sealed, dated, stamped and signed before delivering to the assessee, but the stamps and seals should not be carried home. The assessment orders and the demand notices can be stamped on the day the assessing officer attends office. Service of assessment orders and demand notices must be in accordance with the provisions of law and must be followed diligently. While entering the contents of assessment order the assessing officer shall invariably write that the order was passed manually mentioning the date and that it was served on the dealer on the particular date. As per instructions contained in the internal circular No.4A of 2020 dated 20.03.2020, it is specifically stated that assessment orders passed

BGP.

27 of 39

WPST-92630-20.doc.

manually shall not be served electronically to the dealers as the speaking orders have to be delivered to the dealers manually. Printout of assessment orders passed manually and entered into the system should not be taken out as it would not be a proper assessment order but just a document created for the purpose of data entry. Further the date of manual service of the assessment orders will be considered for all legal matters involved in such assessment.

32.2. Take away from the above is that assessment order passed manually has to be served manually in which event signature of the person to whom the order is so served has to be obtained as acknowledgment of service and the date of such manual service will be considered for all legal consequences. Such signature or endorsement has to be on the original order or on a separate slip.

33. Having analyzed the above, we may now examine the original record of assessment as produced by Mr. Sonpal. As per the order-sheet, we find that the proceeding is for the assessment year 2015-16. Notice was issued to the petitioner by the Assistant Commissioner i.e. respondent No.3 on 1. 02.2018. On 23.04.2018, one Mr. Mahesh Jadhav appeared on behalf of the assessee (petitioner) informing that documents would be produced on 3. 05.2018. On 03.05.2018, Mr. Swapnil Ghatkar, Legal Manager of the petitioner appeared and submitted sales register etc.. He was asked to produce contract agreement etc. Thereafter Mr. Mahesh Jadhav appeared on 31.05.2018 and submitted a letter along with details such as rigs and vessel wise revenue,

BGP.

28 of 39

WPST-92630-20.doc.

details of other income etc.. He was asked to produce contract agreement copies and books of accounts on 29.06.2018. On 22.11.2019 reminder was issued to the dealer (petitioner). Then in the next entry i.e., entry dated 20.03.2020 the first line is written in different ink whereas the remaining portion of the note was by another pen. Though this by itself cannot lead to any definite conclusion, it nonetheless creates a doubt regarding the recording of the note on 20.03.2020. As it is we find that the dates given by respondent No.3 were very long and certainly more than ten days which was insisted upon in clause 4.1 of the internal circular dated 29.05.2018. Be that as it may, a reading of the note dated 20.03.2020 would go to show that the dealer (petitioner) had not attended several phone calls made to the dealer and his representative. As the case was getting time barred in the month of March 2020, respondent No.3 had no other option but to pass the assessment orders on the basis of submissions made by the dealer earlier. Respondent No.3 noted that the dealer was a reseller in sale of fixed assets mainly engaged in providing vessels and rigs on hire charge basis. As per audit report, dealer had not paid taxes on the transaction on hiring charges on account of hiring of vessels and rigs. Therefore, by considering the order of the first appellate authority for the period 2008-09 and the statement submitted by the dealer regarding revenue details of hiring of vessels and rigs for the period 2015-16 he passed the assessment orders on the basis of available record produced earlier under section 23(2) of the MVAT Act and section 9(2) of the CST Act read with section 23(2) of the MVAT Act. It was recorded that assessment orders were passed and demand notices issued.

BGP.

29 of 39

WPST-92630-20.doc.

33.1. From the above what is discernible is that according to respondent No.3 the dealer and his representative did not respond to the phone calls made and did not attend the office of respondent No.3. As the assessments were getting time barred in the month of March 2020, he passed the assessment orders considering the order of the first appellate authority for the period 2008-09 and submissions of the dealer made earlier. Though not explicitly stated, what transpires from the note is that two assessment orders were passed, one under section 23(2) of the MVAT Act and the other under section 9(2) of the CST Act read with 23(2) of the MVAT Act. Though it is stated that assessment orders were passed, there is no mention as on what page of the record those have been kept or tagged. Pagination or page number of such assessment orders in the record are conspicuously missing. At one part of the record a hand written working of MVAT and CST Act comprising three pages are available but without any signature or initials and without any date.

33.2. Though the order of assessment under MVAT Act in form 303 as typed is found in the record, again there is no pagination. It is an order passed under section 23(2) of the MVAT Act for the assessment period 01.04.2015 to 31.03.2016. In the 4th page of the said assessment order, it is written that it was an assessment order under section 23 of the MVAT Act and that responding to notice Mr. Mahesh Jadhav and Mr. Swapnil Ghatkar had attended and submitted relevant documents; assessment was made as per available record under section 23(2) of the MVAT Act with separate sheet attached. It was stated that the order was passed manually and served upon the dealer as per internal circular No.4A

BGP.

30 of 39

WPST-92630-20.doc.

of 2020. The date of the order was shown as 20.03.2020 with signature of respondent No.3, the same date as the internal circular No.4A of 2020. The order is also seen stamped and sealed. Similar is the position in respect of the order of assessment under the CST Act. However, in the assessment order in form 303 filled up by hand, there is significant difference in the last paragraph of the order as the words "this order was passed manually and served to dealer as per internal circular No.4A of 2020" is missing. The separate sheet stated to be attached with the order of assessment is not found attached with such order. Running into 21 pages it is kept in the record file separately unnumbered. This order content running into 21 pages is also dated 20.03.2020 i.e., the same date on which the internal circular No.4A of 2020 was issued.

34. From the above, at least one thing is certain and that is that the assessment orders were stated to have been passed manually on 20.03.2020 under section 23(2) of the MVAT Act and under section 9(2) of the CST Act read with section 23(2) of the MVAT Act for the assessment period 01.04.2015 to 31.03.2016. We have already extracted and discussed about the provisions contained in sub section (2) of section 23 of the MVAT Act as well as section 9(2) of the CST Act. Since the order under section 9(2) of the CST Act is passed by the state tax authority under the state sales tax law, in this case section 23(2) of the MVAT Act, the same therefore assumes significance. As per sub section (2) of section 23 if the dealer does not appear on the date specified in the notice as also does not comply with the terms of the notice, the Commissioner shall assess the dealer to the best of his judgment. The limitation for passing of

BGP.

31 of 39

WPST-92630-20.doc.

such assessment order is four years from the end of the year containing the period to which the return relates. Since the assessment period is 01.04.2015 to 31.03.2016, the four year limitation period would expire on 31.03.2020. Therefore, if the assessment order was required to be passed under section 23(2) of the MVAT Act for the aforesaid assessment period, it had to be passed on or before 31.03.2020.

35. We have further noted that once an assessment order is passed as above, under section 32(4) of the MVAT Act the concerned person is liable to pay the tax, interest and penalty into the government treasury within thirty days from the date of service of notice issued by the Commissioner.

36. Further, rule 26 mandates that an assessee is entitled to a certified copy of an order of assessment free of charge along with the notice issued in accordance with section 32(4). Though under rule 87(1), assessment orders and demand notices can be served by different methods including by hand delivery and by sending a scanned copy or electronically generated and digitally signed copy by email, in the case of personal service (hand delivery), the officer or person serving an assessment order or notice shall require the signature of the person to whom those are delivered as acknowledgment of service which must be endorsed on the original order or notice or on a separate slip.

37. At this stage, we may straightaway observe that there is no mention of the date when the assessment orders and the corresponding demand

BGP.

32 of 39

WPST-92630-20.doc.

notices were manually served upon the petitioner and therefore there is no endorsement to that effect either on the body of the assessment orders found in the record or on any separate endorsement sheet though it is clearly stated that the assessment orders were passed manually and served upon the dealer as per internal circular No.4A of 2020 which mandates that assessment order passed manually has to be served manually in the prescribed manner.

38. Coming to the internal circular No.13A of 2018 dated 29.05.2018, we find that as per clauses 2.7 and 2.8, before passing an *ex-parte* assessment order, an *ex-parte* show-cause notice is required to be issued to the dealer which should be accompanied by the working tax liability alongwith the quantum of disallowances and the reasons for the same. Such a show-cause notice is conspicuous by its absence in the record prior to the date of the note dated 20.03.2020. Clause 6.1 of the said circular further mandates taking of two administrative approvals by the assessing officer from his immediate supervisory authority; one while issuing the show-cause notice for *ex-parte* best judgment assessment and the second before passing of the *ex-parte* best judgment assessment order. No such administrative approvals are discernible in the record.

39. Coming to the internal circular No.4A of 2020 dated 20.03.2020, it is indeed surprising to note that respondent No.3 had professed to pass the assessment orders in terms of the said internal circular on the very same day of its issuance i.e. 20.03.2020. Not only the assessment orders in the prescribed

BGP.

33 of 39

WPST-92630-20.doc.

formats were alleged issued manually, separate order content running into 21 pages was stated to have been passed also on the same day i.e. 20.03.2020 in terms of the said circular which does not at all appear to be practically feasible. Though petitioner has alleged that respondent No.3 had passed ten similar such assessment orders to highlight the impossibility of the situation, we need not go that far as what is staring us in the face itself appears to be highly improbable.

39.1. Clause (III) of the internal circular dated 20.03.2020 lays down the procedure for manual issuance of assessment orders. Petitioner's assertion that respondent No.3 worked from home on 20.03.2020 has not been denied by respondent No.3. Rather that has been acknowledged by respondent No.3 in the reply affidavit (paragraph 16) wherein he stated that petitioner's letter dated 20.03.2020 was not received till September 2020 since the office was closed due to covid 19. As per clause III (3), the stamps and seals could not be carried home by the officer though the assessment orders passed manually must be sealed, dated, stamped and signed by the issuing authority before delivering those to the assessee. The assessment orders and demand notices could be stamped on the day the assessing officer attended office. So when were the assessment orders stamped and sealed in office since admittedly those could not be taken home by respondent No.3 on 20.03.2020. That apart, the delivery of assessment orders and service of demand notices to the assessee becomes crucial which must be as per the provisions of law. The assessment order must contain not only the date of the order when it was passed manually but the date on which the dealer was served with the assessment order. As noticed above,

BGP.

34 of 39

WPST-92630-20.doc.

the date of service of the assessment orders and the demand notices on the petitioner are missing but most importantly the said internal circular clearly mandates that assessment orders passed manually should not be served electronically to the dealers as those would have to be delivered to them manually which date will be considered for all legal purposes. Further, there is clear prohibition upon the assessing officer that if an assessment order is passed manually and subsequently entered into the system, printout of the same should not taken out as it would not be considered to be a proper assessment order but just a document created for the purpose of data entry.

40. Let us now see as to how respondent No.3 has tried to explain the above obvious anomalous situation in his reply affidavit. Though he has asserted that the assessment orders were passed on 20.03.2020 manually, he has also stated that those were served upon the petitioner by email by scanning the order copies. As we have already noticed above, this is specifically prohibited by the internal circular No.4A of 2020 dated 20.03.2020. Respondent No.3 has tried to explain that as the scanned copies of the assessment orders were not properly readable or legible, he had downloaded a clear legible copy of those orders, signed those digitally and emailed to the petitioner. When the orders were passed manually and were required to be served upon the petitioner manually, there was no question of scanning copies of the assessment orders which were found to be not readable and legible. According to respondent No.3, he had served the petitioner scanned copies of the assessment orders on 23.07.2020. Since the assessment orders were uploaded on the system on

BGP.

35 of 39

WPST-92630-20.doc.

14.07.2020, emailed copies of the assessment orders carried the date

14.07.2020.

40.1. Falsity of the above narrative is quite apparent. Firstly, respondent No.3 was prohibited from serving the petitioner copies of the assessment orders and demand notices by email, since the assessment orders were passed manually. Secondly, uploading of the assessment orders on the system on 14.07.2020 which date is embossed on the emailed copies of the assessment orders can lead to the only rational inference that those were passed on 14.07.2020. Even those emailed copies of the assessment orders were not accompanied by the contents of assessment which is admitted by respondent No.3 in paragraph 30 of the reply affidavit. However, he has tried to justify this by saying that because of some technical issues, the assessment orders were emailed without content and that petitioner was already aware of the contents because of similar nature of assessment orders passed for previous periods. Such a bizarre explanation is no explanation at all and only goes to show the improbability what respondent No.3 is trying to prove.

41. From the above, the only logical and rational inference that one can draw is that the impugned orders of assessment could not have been passed manually on 20.03.2020 or on any date prior to 31.03.2020.

42. In **M. Ramaishtaiyah** (*supra*), it was found that the revisional assessment order was passed on 06.01.1973 but was served upon the assessee on

BGP.

36 of 39

WPST-92630-20.doc.

21.11.1973. There was no explanation as to why the said order was served upon the assessee so belatedly. In the facts and circumstances of that case, Supreme Court presumed that the order was not made on the date it purports to have been made. It could have been made after expiry of the prescribed four years period. Be it stated that in that case the Deputy Commissioner sought to revise the original assessment order and the limitation for such revision was four years.

43. **In Raja Harish Chandra Raj Singh Vs. Deputy Land Acquisition Officer, AIR 1961 SC 1500**, Supreme Court was examining effectiveness of an award passed under the Land Acquisition Act, 1894. After referring to certain decisions of the Madras High Court, Supreme Court took the view that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against such order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. In the context of an award passed under the Land Acquisition Act, 1894, it was held that if an award is pronounced without notice of the date of pronouncement and the aggrieved party is not present, the award can be said to be made when it is communicated to the party later. So the knowledge of the party affected by the award either actual or constructive is an essential requirement of fairplay and natural justice. Therefore the expression "the date of the award" would mean the date when the award is actually communicated to the party either actually or constructively.

44. This position has been reiterated by the Supreme Court in

BGP.

37 of 39

WPST-92630-20.doc.

Assistant Transport Commissioner Vs. Nand Singh, (1979) 4 SCC 19, wherein, it has been held that an order has to be made known either directly or constructively to the party affected by the order in order to enable him to prefer an appeal. Mere writing of an order and keeping the same in file would be no order in the eye of law. The order must be communicated either directly or constructively.

45. Thus, having regard to the discussions made above, we have no hesitation in coming to the conclusion that the impugned orders of assessment could not have been passed on 20.03.2020 or before 31.03.2020. Those were passed beyond the limitation period of 31.03.2020 and thus are *non est* in the eye of law. In such a case, question of petitioner not availing the alternative remedy of appeal does not arise. That apart, as has been pointed out in **Amara Raja Batteries Limited** (*supra*), when the appellate authorities have already taken a view in the matter on merit filing of appeal would be an idle formality but more importantly when it is a question of jurisdiction or lack of jurisdiction, an aggrieved assessee cannot be denied relief under Article 226 of the Constitution of India only on the ground of alternative remedy.

46. Consequently and in the light of the above, the impugned orders of assessment allegedly dated 20.03.2020 and the related notices of demand also allegedly dated 20.03.2020 are hereby set aside and quashed.

BGP.

38 of 39

WPST-92630-20.doc.

47. Writ petition is accordingly allowed. However, there shall be no order as to cost.

48. Record produced by Mr. Sonpal shall be returned forthwith.

MILIND N. JADHAV, J

UJJAL BHUYAN, J



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE