

(2019) 07 PAT CK 0334

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8478 Of 2019

Kalika Cooling System Through

APPELLANT

Vs

State Of Bihar Through The Commissioner And Ors

RESPONDENT

Date of Decision : 18-07-2019

Acts Referred:

Bihar Value Added Tax Rules, 2005 — Rule 22, 22(8), 22(8)(c)
Bihar Value Added Tax Act, 2005 — Section 24, 26(1), 26(3), 27, 31, 31(1), 33, 47, 74
Bihar Finance Act, 1981 — Section 94

Citation : (2019) 07 PAT CK 0334

Hon'ble Judges : Jyoti Saran, J; Partha Sarthy, J

Bench : Division Bench

Advocate : Chiranjiva Ranjan, Vikash Kumar

Final Decision : Allowed

Judgement

Heard Mr. Chiranjiva Ranjan, learned counsel appearing for the petitioner and Mr. Vikash Kumar, learned Standing Counsel No. 11 for the State.

Re: I.A. No.1 of 2019

This interlocutory application is filed to question the assessment proceedings itself held by the assessing authority in purported exercise of power vested in him under Section 31 of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the Act') and the Rules framed thereunder, inter alia, on grounds that it was barred by limitation and thus, void ab initio. Mr. Chiranjiva Ranjan, learned counsel for the petitioner while admitting to the position that a revision application bearing C.C.(s) 404 of 2018-19 under Section 74 of 'the Act' is pending disposal before the respondent no. 2, would submit that where action complained itself is void, the petitioner may not be relegated and the matter be disposed of accordingly.

In the nature of the issue that was raised that we permit the petitioner to question the proceedings in the present writ petition itself as it requires an

interpretation of the statutory provisions and thus having heard learned counsel for the parties, we are persuaded to allow the petitioner to question the assessment proceedings itself in the present writ petition. Consequentially, I.A. No. 1 of 2019 filed in the present writ petition is allowed.

Re: CWJC 8478 of 2019

As we have observed above, the writ petition was initially filed, seeking a direction in the nature of mandamus to release the bank account of the petitioner from attachment under Section 47 of 'the Act'. The petitioner also prayed for a direction to the Commissioner of Commercial Taxes, Bihar the respondent no. 2 to decide the revision application which remains pending before him. It is because during the course of consideration of such prayer of the petitioner an issue arose on the very validity of the assessment proceedings that the petitioner seeking leave has filed the interlocutory application to question the proceedings itself and which has since been allowed by us as recorded above. We thus have proceeded to consider the validity of assessment proceeding itself on its exercise under Section 31 of 'the Act' read alongside Rule 22 of 'the Rules' framed thereunder and Section 27 of 'the Act'.

The matter in contest relates to assessment year 2012-13 ending on 31.03.2013. The petitioner filed his returns on 31.08.2013 disclosing particulars in terms of the provision underlying Section 24 of 'the Act'. Since no scrutiny or assessment was carried out before the 'due date' within the meaning of the explanation attached to Section 24 of 'the Act' i.e. by 31.12.2013 relatable to the financial year 2012-13, that in terms of the provisions underlying Section 26(1) of 'the Act' the returns were deemed assessed. A departmental audit followed under Section 26(3) of 'the Act' on the returns filed by the petitioner in the light of order no. 14 dated 10.03.2015 when notice was issued to the petitioner to co-operate. The petitioner responded to the notice and participated in the audit as manifest from the order recorded on 28.04.2016 in the file relating to the proceedings in question produced by Mr. Vikash Kumar, learned SC-11. Since the provision of Section 26(3) of 'the Act' gives liberty to the department to hold internal audit within 36 months of the due date of the year to which the return relates, we find no infirmity in the audit so held and which was completed on 25.05.2016 as manifest from the report of the Deputy Commissioner, Commercial Taxes (Audit), East Division, Patna also present in the file. The report was approved by the Joint Commissioner, Audit who recommended for action thereon vide order dated 28.05.2016 and consequentially, a proceeding under Section 31(1) of 'the Act' was drawn on 23.10.2017 when notice was issued to the petitioner through Memo No. 3463 dated 23.10.2017 as also confirmed from the order sheet in the file.

The petitioner perhaps did not participate in the re- assessment despite notice and which got concluded vide order dated 31.03.2018, a copy of which is enclosed at Annexure-1 to the writ petition with the demand notice at Annexure-1/2. It is raising various grounds to question the order of re-

assessment that the petitioner approach the Commissioner under Section 74 of 'the Act' vide application at Annexure-2 and which remains pending. It is when the account of the petitioner was attached through Memo No. 451 dated 24.01.2019 through notice issued under Section 47 of 'the Act' impugned at Annexure-3 and since the revision of the petitioner was not being heard by the Commissioner nor the stay application being entertained that he approached this Court and for the reasons that we have recorded above, we have allowed him to question the re-assessment proceeding including the attachment order on its validity.

Mr. Chiranjiva Ranjan has questioned the reopening of the proceedings under Section 31 and its culmination in the order of reassessment dated 31.03.2018 as well as the consequential demand notice also dated 31.03.2018 on grounds that it is an exercise without jurisdiction, inasmuch as according to the petitioner it is hopelessly barred by limitation as well as on grounds that the pre-requisites to such exercise is not satisfied. The argument has been contested by Mr. Vikash Kumar, learned SC-11 on grounds that the assessment is within the limitation prescribed under 'the Act'.

We have already recorded that the audit was held within the limitation prescribed and thus the two issues which fall for consideration is :-

- (a) Whether the time limit prescribed under Section 31 of 'the Act' has been followed in the present case, and;
- (b) Whether the exercise under Section 31 of 'the Act' alongside Rule 22 of 'the Rules' is in tune with the stipulations.

While Mr. Chiranjiva Ranjan, learned counsel appearing for the petitioner has reiterated the position as we have already noted above to question the proceedings on limitation, Mr. Vikash Kumar, learned SC-11 has taken us through the provisions of Section 31 of 'the Act' to submit that the period prescribed thereunder requires the assessing authority to initiate action for re- assessment but the outer limit to conclude such proceeding so initiated is provided under Section 27 and which allows the assessing authority to complete the proceeding within a period of two years of such initiation.

Placing reliance on the order dated 23.10.2017 of the assessing authority as present in the order-sheet, he submits that a notice under Section 31 of 'the Act' was issued on 23.10.2017 and which confirms that the proceeding initiated was within a period of four years from the due date which in the present case would be 31.12.2013 and expiring only on 31.12.2017 i.e four years from the due date within the meaning of Section 24 of 'the Act'.

Proceeding herefrom it is the submission of Mr. Vikash Kumar that a notice issued for reopening of the assessment under Section 31(1) of 'the Act' inter alia on grounds of concealment, omission or failure to disclose full and correct particulars of sale or purchase or input tax credit, has been treated to be a notice

under Section 27 of 'the Act' and a plain reading of the 3rd proviso attached to Section 27 would confirm that the outer limit provided for conclusion of proceeding on reopening of such assessment, is two years from the date of initiation.

According to Mr. Vikash Kumar while the limit for initiation of a proceeding under Section 31(1) is provided in the said Section, the culmination of such proceedings can be found in the 3rd proviso to Section 27 of 'the Act' because a default of the kind noted in Section 31 which leads to reopening of an assessment, has been treated equivalent to a default of non-filing of return.

We are in complete agreement with the submission of Mr. Vikash Kumar, learned SC-11 for a conjoint reading of Section 31 and Section 27 would confirm that while liberty has been granted to the assessing authority to proceed in the matter of re-assessment based on a departmental audit made under Section 26(3) of 'the Act', with 4 years of the 'due date', the outer limit for conclusion of such obligation is found in the 3rd proviso attached to Section 27 and the reason is because the omission or failure or non-disclosure has been treated equivalent to a non-filing of the return as manifest from the legislative intent. Having observed thus, we find no infirmity in so far as the issue of limitation raised by Mr. Ranjan is concerned and we hold the proceedings to be within time.

In our opinion the problem for the State does not end here and we say so because even though the departmental audit has been done within the limitation prescribed under Section 26(3) and even the initiation under Section 31(1) of 'the Act' and its culmination has taken place within the period stipulated as held by us but while doing so the assessing authority has failed on his obligation as cast upon him under Section 31(1) of 'the Act' read alongside Rule 22(8)(c) of 'the Rules' framed thereunder, whereby the legislature has cast an obligation on the assessing authority to not only record its opinion on the correctness of the audit objection but also to record satisfaction thereon before he proceeds to issue a notice thereunder.

It is in compliance of our order dated 11.07.2019 that the records have been produced and we have gone through the orders passed in the proceedings.

In our considered opinion, the assessing authority has completely failed on his discharge and which is confirmed from the order dated 23.10.2017 whereby proceeding has been mechanically initiated by the assessing authority on a simple consideration of the departmental audit objection and on receipt of the report. For the sake of convenience we reproduce the relevant extracts of Section 31 as well as Rule 22(8)(c) of 'the Rules' which are self eloquent of discharge expected of an assessing authority: based upon a departmental audit.

"Sec.31. Assessment or re-assessment of tax of escaped turnover- (1) if the prescribed authority is satisfied, either on the basis of audit conducted under sub-section (3) of Section 26 or otherwise, that reasonable ground exist to believe that, in respect of any assessment under this Act or under the Bihar Finance Act,

1981, (Bihar 5 of 1981) as it stood before its repeal by Section 94, during any period, any sale or purchases of goods liable to tax under this Act or the said Act, for any reason, has been under-assessed or has escaped assessment, or has been assessed to tax at a lower rate, or any deduction therefrom has been wrongly made, or an input tax credit has incorrectly been claimed, the prescribed authority shall, in such manner as may be prescribed and after serving on the dealer a notice in the form and in the manner prescribed, proceed to assess or re-assess, as the case may be, the tax payable by such dealer within four years from the expiry of the year during which the original order of assessment or re-assessment was passed, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice under this sub-section was a notice under Section 27:

Provided that the amount of tax shall be assessed or re-assessed after allowing such deductions as were allowable during the said period and at the rates at which it would have been assessed had the turnover not escaped assessment.

... ..

Rule 22. Audit and Re-assessment of Tax.-

... .. (8)(a) A copy of the final audit report, drawn up by the audit team in terms of the provisions of sub-rule

(7) shall be forwarded by the Joint Commissioner, Incharge of the Audit to the concerned Circle Incharge within two months of the preparation of the final audit report.

(b) The concerned Circle Incharge shall allot the file to any officer posted under him.

(c) if, after considering the final report, the officer to whom the file has been allotted is of the opinion that the dealer had not disclosed his correct tax liability or had concealed or omitted any fact or, as the case may be, presented any fact in such a manner, that has led to any reduction in the tax payable by the dealer, he shall proceed to initiate proceedings under Section 31 of the Act:

Provided no re-assessment under Section 31 shall be made unless the dealer is served with a notice in Form N-V."

(Emphasis supplied by us).

The extract of the provisions relevant for consideration reproduced above are a confirmation of the responsibility cast on the assessing authority regarding formation of 'opinion' as well as of recording 'satisfaction' on the default warranting re-opening of assessment.

Though Mr. Vikash Kumar, learned SC-11 has tried to justify the action but the records fail the justification because there is complete absence of either 'opinion'

expressed by the assessing authority or any 'satisfaction' drawn as mandated under Section 31(1) and Rule 22(8) of 'the Rules' which is an essential prerequisite to be satisfied before he proceeds to initiate any such proceeding to reopen the assessment.

The issue of re-opening of assessment resting on the audit objection by the Comptroller & Audit General under Section 33 of 'the Act' was a subject matter of a judgment rendered by this Court reported in 2019 (3) BLJ 414 (Molson Coors Cobra India Pvt. Ltd. v. the State of Bihar & ors.), to conclude that a reopening of assessment based on audit objection is not a mechanical exercise because a concluded exercise under 'the Act' in respect of a dealer, is sought to be questioned by the audit and thus before the assessing authority proceeds to act thereupon, he has to record his satisfaction as to the objection recorded and whether it warrants any further action. Unfortunately despite such issues having been settled by Courts in catena of judgments, the statutory authorities discharging obligation under 'the Act', remain oblivious of their obligation as well as the duty cast under the Statute.

Though Mr. Chiranjiva Ranjan advocates for putting a quietus to the matter on lapse but since the initiation is within the time frame and indulgence is invited on account of procedural irregularity in the proceeding, we are persuaded to remit the matter to the assessing authority, who shall consider the audit objection and proceed in the matter in accordance with law bearing in mind the legal position settled, within a maximum period of three months from the date of receipt/production of a copy of this judgment.

In result, the assessment order dated 31.03.2018 together with the demand notice of the same date, impugned at Annexures 1 and 1/2 to the writ petition, along with the attachment notice dated 24.1.2019, impugned at Annexure 3, are quashed and set aside.

In view of the conclusion that we have drawn above, the revision application filed by the petitioner under Section 74 of 'the Act' bearing C.C.(s) 404 of 2018-19 pending before the Commissioner is rendered infructuous and is accordingly disposed of.

The writ petition is allowed with the directions above. Let the record so produced by Mr. Vikash Kumar. learned SC-11 be returned for its transmission to the department.