

(2021) 12 PAT CK 0068

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8562 Of 2021

McNally Bharat Engineering Co. Ltd

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 06-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Bihar Value Added Tax Rules, 2005 — Rule 45, 46, 46(3), 46(4)

Bihar Value Added Tax Act, 2005 — Section 33, 39, 72, 72(2), 73, 93(2)(zzt)

Citation : (2021) 12 PAT CK 0068

Hon'ble Judges : Sanjay Karol, CJ; S. Kumar, J

Bench : Division Bench

Advocate : Gautam Kumar Kejriwal, Atal Bhiari Pandey, Alok Kumar Jha, Harshit Gupta, Vikash Kumar SC-11

Final Decision : Disposed Of

Judgement

1. We have heard learned counsel for the parties.

2. The sole issue which arises for consideration is as to whether the appeal preferred by an Assessee under Section 72 of the Bihar Value Added Tax Act 2005 (hereinafter referred to as the Act) can be heard and decided on merits without the petitioner complying with the order passed for deposit of an amount under the provisions of Rule 46 of the Bihar Value Added Tax Rules 2005 (hereinafter referred to as the Rules).

3. Petitioner has prayed for the following relief(s).

"1. That the present writ application has been filed for quashing of part of the order dated 22.02.2021 passed by the Additional Commissioner of State Taxes [Appeals] Central Division Patna [hereinafter referred to as the appellate authority for short'] in Appeal Case Number ST/SL-1/2020-2021 whereby onerous condition of payment of Rs. 27,15,208/- being 40% of the disputed tax along with additional sum of Rs. 1,35,38,175/- being 30% of penalty and interest

has been demanded from the petitioner for the financial year 2014-2015 against grant of interim order of stay of the rest amount in demand which is in teeth of the law laid down by this honourable court in the matter of CWJC number 6124 of 2019 (Samsung India Electronics Private Limited Versus The State of Bihar And Others) and for a direction upon the respondent appellate authority to decide the appeal on merits within a time frame and for grant of any other relief or reliefs to which the petitioner is found entitled in the facts and circumstances of this case."

4. Sri Vikash Kumar, learned Standing Counsel 11, appearing for the respondents, clarifies that perhaps the present petition has become infructuous with time.

5. On the other hand, Sri Gautam Kumar Kejriwal, learned counsel for the petitioner, prays that to obviate any error in future and also for future guidance of the officers, the issue be decided.

6. He further submits that it is the settled practice of the appellate authority not to hear the appeal unless and until the order passed under Rule 46 is complied with, notwithstanding the fact that the assessee is in compliance of the mandatory provisions of Sub-Section (2) of Section 72 of the Act.

7. It is apt to reproduce provisions of the Act and Rules having a bearing on the issue.

Provisions of the Act

"33. Assessment of tax based on audit objections.- Where an objection has been made by the Comptroller and Auditor-General of India in respect of an assessment or re-assessment made or scrutiny of any return filed under this Act, the prescribed authority shall proceed to re-assess the dealer with respect to whose assessment or re-assessment or scrutiny, as the case may be, the objection has been made in the manner prescribed:

Provided that no order under this section shall be passed without giving the dealer an opportunity of being heard."

"72. Appeal to Deputy Commissioner and Joint Commissioner.-(1) Subject to such rules as may be made by the State Government under this Act, any dealer, objecting to an order of assessment or an order levying interest or penalty passed by the prescribed authority against him, or an order under section 25 or a person, objecting to an order of penalty passed against him or an order under section 47, may appeal to the Joint Commissioner, or, the Deputy Commissioner specially authorised in this behalf.

(2) No appeal under sub-section (1) shall be admitted unless the dealer objecting to an order of assessment has paid twenty-five per cent. of the tax assessed or full amount of admitted tax, whichever is higher.

(3) Every appeal under this section shall be filed, in such form and the manner,

as may be prescribed, within forty-five days of the receipt of the notice of demand but where the appellate authority is satisfied that the appellant had sufficient reason for not preferring the appeal within time, it may condone the delay.

(4) The appellate authority while disposing of an appeal against an order, other than an order under section 47, may-

(a) (i) confirm, annul, reduce, enhance or otherwise modify such order; or

(ii) set aside the order directing the authority below to make fresh order after further enquiry on specific points as directed; and

(b) in other cases, pass such order as it may, for reasons to be recorded in writing, deem fit.

(5) No order under this section shall be passed without giving reasonable opportunity of hearing to the appellant as also the authority whose order has been appealed against."

"93. Power to make rules.-(1) The State Government may, subject to the condition of previous publication, by notification, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

Xx xxx

(zzt) the form and manner of filing an appeal under section 72;"

Provisions of the Rules

"46. Disposal of appeal or application for revision. -

(1) If a memorandum of appeal or an application for revision does not comply with all the requirements of rule 45, the appellate or revisional authority may reject it summarily:

Provided that no appeal or application for revision shall be summarily rejected under this sub-rule unless the appellant or applicant has been given a reasonable opportunity to amend the memorandum or application so as to bring it into conformity with all the requirements of rule 45.

(2) An appeal or application for revision may be summarily rejected on other reasonable grounds after giving the appellant or applicant a reasonable opportunity of being heard.

(3) The Appellate Authority or revisional authority, as the case may be, shall ordinarily within thirty days of the presentation of the appeal or revision, either admit or reject it after proper examination of the impugned order and/or the record relating to such order:

Provided that no order rejecting the appeal or the revision, as the case be, shall be passed without giving the appellant or

(4) (i) If an appellant intends to pray for stay of recovery of the disputed amount of tax, penalty or interest arising out of an order appealed against, he shall make a stay petition containing, inter-alia, substance of facts leading to the exact amount of tax, penalty or interest sought to be stayed and the exact amount of tax, penalty or interest disputed, payment of tax before and after the said order and reasons in brief for seeking stay, and stay petition shall be presented along with the memorandum of appeal under rule 45.

(ii) Where a stay petition has been presented by an appellant along with the memorandum of appeal or along with application for revision before the appellate authority or the revisional authority, as the case may be, and such appeal or revision has been entertained, he shall, after giving such appellant a reasonable opportunity of being heard, dispose of such stay petition within one month from the date of presentation of such petition.

(iii) The appellate or the revisional authority, as the case may be, may, in his discretion, by an order in writing, stay realisation of the amount of tax or interest, part or whole, as the case may be, in dispute, on such terms and conditions as he may deem fit and proper in the facts and circumstances of the case.

(iv) If the realisation of the amount of tax, penalty or interest is stayed by the appellate authority subject to payment of such amount of tax penalty or interest, or furnishing security for securing the payment of the amount of tax, penalty or interest in dispute, as the case may be, specified in the order referred to in clause (i), the appellant shall pay such amount of tax, penalty or interest, or furnish such security, by the date specified in such order.

(v) Where an appellant fails to pay any amount of tax or interest in dispute which he is required to pay according to the order referred to in sub-clause (iv) by the date specified therein or such other date as may be allowed by the appellate authority, such order staying realization of the amount of tax, or interest, as the case may be, shall stand automatically vacated after the expiry of the date specified in the order or such other date as may be allowed by the appellate authority.

(4) Where an application for appeal or revision is admitted for hearing on merit the appellate or revisional authority shall, after giving the parties concerned a reasonable opportunity of being heard, fix a date for passing the final order on the appeal or application for revision as the case may be, if the order is not passed on the date of hearing."

(Emphasis supplied)

8. Section 33 of the Act enables and empowers the assessing officer to pass an appropriate order about the assessment/re-assessment with the transactions

subject matter of the Act. An appeal against such orders to the Deputy Commissioner/Joint Commissioner under Chapter XII of the Act. Section 72(2) stipulates a mandatory condition of pre-deposit of 20% of the tax assessed or full amount of admitted tax, whichever is higher for the purpose of admission of an appeal. Every appeal has to be heard and decided per conditions stipulated under Sub-Section (4) and Sub-Section (5) thereof. An appeal against an order passed by the authority under Section 72 would further lie to a Tribunal constituted under Section 73 of the Act.

9. Section 93(2)(ztt) empowers the government to frame rules to prescribe the form and manner of filing an appeal under Section 72. In consonance of such power, the State Government has notified the Bihar Value Added Tax Rules 2005, as amended from time to time. Rules 45 and 46 specifically deal with the issue of the form, i.e. memorandum of appeal and application for revision and the hearing thereof. By virtue of clauses (3) and (4) of Rule 46, the assessee has a right to file an application seeking a stay of the operation of the notice of demand, be it concerning tax or the component of penalty or interest. Under the said clause, the authority is fully empowered to pass an appropriate order, issuing directions for a stay of such demand on such terms as deemed just, proper and appropriate.

10. We notice that there is no embargo either under Section 72 or in the Rules, i.e. Rules 45 and 46, for the appellate authority to hear the appeal on merits, subject, of course, to the assessee complying with the pre-requisite condition of deposit of 20% of the amount assessed by the Assessing Officer.

11. The hearing of the appeal on merits and passing of the order, staying the operation of the impugned demand, are two separate things.

12. In our considered view, if a party were not to comply with the conditions laid down in the order passed under Rule 46, it would be to their peril, not precluding the revenue from taking steps for recovery of the impugned demand in the exercise of its power under Section 39 of the Act, which is an independent Section and not subjected to the provisions of either Section 72 or Rules 45 and 46.

13. We notice that if the petitioner failed to comply with the order granting stay, sub-rule (4) of Rule 46 provides the same to vacate. The default clause is evidently clear, but it does not circumscribe the power of the appellate authority to hear the appeal on merits in terms of and on such conditions as are stipulated under Section 72 of the Act.

14. We further notice that the appellate authority, as per the present Rules, about which fact none have a dispute, under sub-rule (3) of Rule 46 is ordinarily within 30 days of its presentation under an obligation to either admit or reject the appeal. It appears that the authorities are either not aware of such provisions or are not complying with the same, for, as we find from the instant case, no such action was taken in terms thereof.

15. The attending facts show that the assessee had assailed the order of assessment and demand dated 16th of December 2020 and 26th of December 2020, respectively. He also deposited 20% of the demand, the subject matter of challenge in the appeal. He had also preferred an application seeking stay of the order of assessment as also the demand. While passing order in such an application, the appellate authority directed the petitioner to deposit 40% of the tax amount and 30% of the amount computed as penalty and interest. The impugned order dated 22nd of December 2021 (Annexure-3) records the petitioner to have already complied with the condition of pre-deposit of 20% of the impugned demand.

16. Petitioner, undisputedly, failed to comply with the said order. In fact, he had no intent to comply with the same, and had requested the appellate authority to hear the appeal on merits. Finding the authority not to be in favour with the petitioner's request, the instant petition was preferred on the 26th of March, 2021. We are informed that the authority started hearing the appeal after filing the instant petition.

17. Only when the petitioner approached this Court, the authority, perhaps realizing its mistake, took appropriate action envisaged under the law.

18. Under these circumstances, we agree with Sri Gautam Kumar Kejriwal, learned counsel appearing for the petitioner, that the practice adopted by the Tribunal, not to hear the appeals until compliance of orders granting an interim stay is unwarranted in law.

19. The Hon'ble Apex Court in *Shyam Kishore and Ors. Vs. Municipal Corporation of Delhi and Anr*, (1993) 1 SCC 22 in paragraph nos. 39 and 45 whereof, held as under:-

"39. The question whether the imposition of a condition which makes a right of appeal illusory can be valid may need careful consideration in an appropriate case. In *Wire Netting Stores v. Regional Provident Fund Commissioner*', a decision of the Delhi High Court (to which one of us was a party), the lack of a provision conferring an effective right of appeal against determination of damages under the Employees' Provident Fund Act was held violative of the provisions of the Constitution. That decision is the subject matter of an appeal which is still pending in this Court. It is fortunately not necessary, for the purposes of the present case, to enter into that area in view of the construction which we propose to place on Section 170(b). We shall now turn to that question."

"45. If the provision is interpreted in the manner above suggested one can steer clear of all problems of constitutional validity. The contention on behalf of the Corporation to read the provision rigidly and seek to soften the rigour by reference to the availability of recourse to the High Courts by way of a petition under Articles 226 and 227 in certain situations and the departmental instructions referred to earlier does not appear to be a satisfactory solution. The

departmental instructions may not always be followed and the resort to Articles 226 and 227 should be discouraged when there is an alternative remedy. A more satisfactory solution is available on the terms of the statute itself. The construction of the section approved by as above vests in the appellate authority a power to deal with the appeal otherwise than by way of final disposal even if the disputed tax is not paid. It enables the authority to exercise a Judicial discretion to allow the payment of the disputed tax even after the appeal is filed but, no doubt, before the appeal is taken up for actual hearing. The interpretation will greatly ameliorate the genuine grievances of, and hardships faced by, the assessee in the payment of the tax as determined. Though an assessee may not be able to acquire an absolute stay of the recovery of the tax until the dispute is resolved, he will certainly be able to get breathing time to pay up the same where his case deserves it. If this interpretation is placed on the provision, no question of unconstitutionality can at all arise."

20. Non-compliance with the statutory provisions by the appellate authority defeats the object and purpose of the enactment and puts the assessee to undue harassment. As such, we dispose of the present petition under the following terms:-

(a) In all cases, the appellate authority envisaged under Section 72 of the Act shall, ordinarily within 30 days as stipulated under sub-rule (3) of Rule 46, either admit or reject the appeal.

(b) This they shall positively do, without insisting on the compliance of their order passed under sub-rule (4) of Rule 46, more so, given the provision stipulated therein making such order of grant of stay to be automatically vacated, in the event of failure of the assessee to comply within the specified period.

(c) We see no reason as to why the appeals are kept pending for a number of years. In any event, all appeals must be decided within a period of six months from the date of presentation.

(d) This alone would result in economic growth in Bihar and instill confidence in the mind of litigants. The Principal Secretary-cum- Commissioner, Department of State Taxes, Government of Bihar shall take all steps in having this order implemented in letter and spirit.

21. The petition stands disposed of in the aforesaid terms.

22. Interlocutory Application(s), if any, also stands disposed of.