

(2019) 10 JH CK 0016

In the Jharkhand High Court

Case No : Writ Petition (T) No. 5516 Of 2017

M/S. Bihar Sponge Iron Ltd

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 23-10-2019

Acts Referred:

Jharkhand Value Added Tax Act, 2005 — Section 29(1), 29(2), 40(2), 40(2)(a), 70(5)(a), 70(5)(b)
Salt Cess Act, 1953 — Section 11A
Jharkhand Value Added Tax Rules, 2006 — Rule 14(1), 38(6), 38(2)(i), 38(2)(r), 57, 58, 58(1)

Citation : (2019) 10 JH CK 0016

Hon'ble Judges : H.C. Mishra, J;Deepak Roshan, J

Bench : Division Bench

Advocate : M.S. Mittal, Rahul Lamba, Varsha Ramsisaria, Naveen Kumar, Zaid Imam, Atanu Banerjee, Ashwini Bhushan

Final Decision : Disposed Of

Judgement

1. The instant application has been preferred by the petitioner-company for the following reliefs:-

(a) For quashing of the Order dated 17.05.2017 (Annexure-9) passed by the Commercial Taxes Tribunal so far it pertains to Revision Case No. 128 of 2016 which has been dismissed by the Tribunal although for the same inspection and via common Judgment Revision Case No. 129 of 2016 has been allowed;

(b) For quashing the Appellate Order dated 03.06.2013 (Annexure-8) by which the petitioner's appeal against the penalty order has been dismissed and the order of penalty under Section 70(5)(b) of Jharkhand Value Added Tax Act, 2005 has been confirmed;

(c) For quashing the Order dated 26.05.2010 (Annexure-6) by which the assessing authority has imposed penalty of Rs. 58,78,944/- under Section 70(5)(b) of Jharkhand Value Added Tax Act 2005 on the Petitioner;

(d) And also for quashing the demand notice dated 26.05.2010 (Annexure-7) raised pursuant to the aforesaid orders.

2. The facts of the case lie in a short compass. A team of officers of the Commercial Taxes Department made an inspection of the petitioner's factory on 13.05.2010 and prepared an inspection report in which, besides other allegations at page-4 of the inspection report, it was stated that the entries in the books of account of the goods purchased in the year 2010-11 namely the raw materials, iron ores, coal and dolomite have not been made and consequently the goods were seized under the provisions of Section 70(5)(a) of the JVAT Act 2005. Proceeding was also initiated under Section 40(2) of the JVAT Act 2005, but in the present case, the petitioner is not concerned with that proceeding in as much as the proceeding under section 40(2) was held to be bad in law by the Tribunal in the same impugned order and the levy of penalty under section 40(2) was also set aside.

A show-cause notice was issued to the petitioner subsequent to the said inspection on the same day i.e. on 13.05.2010 alleging imposition of penalty under Section 40 (2) and Section 70 (5) (b) of the JVAT Act, 2005. Pursuant to the show-cause notice, the petitioner appeared and filed its show-cause reply on 17.05.2010 (Annexure-5) and it was stated that the entries in the books of accounts were not made because the statutory audit was going on and the records were with the auditor and the person who was looking after accounting was on leave due to his father's death.

By way of Annexure-5 series, petitioner has annexed the concerned documents regarding purchase of coal and other materials which were filed along with the show cause reply. All these documents were also annexed in revision petition before the Tribunal by way of Annexure-4 Series. The authorities passed an order of penalty vide order dated 26.05.2010 levying a penalty of Rs. 58,78,944.00/-. Pursuant to the said order of penalty, a notice of demand was also issued for a sum of Rs. 58,78,944/-.

The petitioner filed an appeal which was dismissed vide order dated 03.06.2013 without considering any of the issues raised by the petitioner. Being aggrieved by the penalty order under Section 70 (5) (b) and the appellate order, the petitioner filed a revision petition before the Commercial Taxes Tribunal which was registered as JR-128 of 2016. It is pertinent to note that penalty under Section 40(2) was also passed and appeal was also dismissed and accordingly the petitioner had filed another revision petition being JR - 129 of 2016. Both the cases namely JR-128/2016 which is in relation to the orders passed under Section 70(5)(b) and JR-129/2016, which dealt with the orders passed under Section 40(2) of the JVAT Act were heard together by the Commercial Taxes Tribunal and the learned Tribunal proceeded to pass a common impugned judgement. So far as Revision Case No. JR-129/2016 is concerned which dealt with penalty under Section 40(2) of the JVAT Act is concerned, the learned Tribunal after considering various judgments of the Jharkhand High Court as well

as of the Hon'ble Supreme Court of India hold that findings of the appellate authorities cannot be sustained and ultimately the order of penalty under Section 40 (2) was set aside. However, the learned Tribunal sustained the order of penalty passed under Section 70 (5) (b) of the JVAT Act 2005, which has been challenged by the petitioner in the instant writ application.

3. The learned senior counsel for the petitioner submits that from perusal of the first part and last part of the show-cause notice dated 13.05.10, the following things are evident:

(a) No reasons at all has been assigned for issuance of notice under Section 70(5) (b);

(b) No satisfaction of the authorities has been recorded for imposition of penalty under Section 70 (5) (b);

(c) No gist of accusations has been given in the said notice as required under Rule 58 of the JVAT Rules, 2006.

4. In this context, learned senior counsel referred to Rule 58 (1) of the JVAT Rules, 2006, which is quoted herein below:

"58. Opportunity of Hearing- (1) The authority referred to in Rule 57 shall, in the matter of a proceeding Section 28, under sub-sections (3) and (4) of Section 30, sub-sections (4) and (6) of Section 37 [Sub-Section (6) of Section 43] sub-section (6) of Section 44 , sub-section (5) of Section 45, sub-sections (1)(b) and (2) of Section 47 " sub-section (3) of Section 63, sub-section (5) of Section 70, subsections (5) , (8) of Section 72 and sub-section (3) of Section 73 serve or cause to be served upon the person proceeded against a notice which shall contained a gist of the accusations, a date of hearing which shall in no case be more than fifteen days from the date of issue of notice [In Form JVAT 302] and the time of hearing."

5. He further submits that from bare perusal of the show cause notice, it is evident that no gist of accusations in regards to penalty under Section 70 (5) (b) of the Act has been given in terms of Rule 58(1) of the JVAT Rule 2006. The first point on which the petitioner wants to assail the entire proceedings is that the initiation of the proceedings, pursuant to the show cause notice, are bad in law and as such the entire consequential proceedings are bad in law and liable to be set aside. Learned senior counsel for the petitioner has referred the judgment of the Hon'ble Apex Court in the Case of Metal Forgings & Another Vs. Union of India & Others reported in (2003) 2 SCC 36 at paragraph-12 which is quoted as under:

"12. It is an admitted fact that a show-cause notice as required in law has not been issued by the Revenue. The first contention of the Revenue in this regard is that since the necessary information required to be given in the show-cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in

law. We do think that we cannot accede to this argument of the learned counsel for the Revenue. Herein we may also notice that the learned technical member of the Tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show-cause notices by the Appellate Authority are inadequate to be treated as show-cause notices contemplated under Rule 10 of the Rules or Section 11-A of the Act. Even the judicial member in his order has taken almost a similar view by holding that letters either in the form of a suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note as show-cause notices for the recovery of demand, and we are in agreement with the said findings of the two members of the Tribunal. This is because of the fact that issuance of a show-cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection to such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 year as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show-cause notice. For this reason, the above argument of the Revenue must fail."

6. Placing reliance on the above judgment, the learned senior counsel further submits that show-cause notice as required under law has not been issued by the revenue. Other documents cannot be construed as show cause notice by the authority. Any other documents in the form of suggestion or demand notice cannot be construed as a show cause notice. Issuance of show cause notice in a particular format is mandatory requirement of law. It would be futile that every communication or order could be considered as a show cause notice.

7. Learned senior counsel submits that on the above observations of the Hon'ble Supreme Court, this writ petition is liable to be allowed and the entire proceeding for penalty under Section 70 (5) (b) of the of the JVAT Act 2005, is liable to be set aside.

8. The learned senior counsel further submits that from perusal of the order of penalty it is evident that in the first para itself it has been stated that entries in respect of raw materials were not made in the books of accounts (and that was the cause of proceedings). In the last few lines, it has been stated that from 10th April to 10th May, the photocopies of the purchased invoices in 14 pages have been submitted but the same was overlooked by the authority and an order of penalty was passed.

9. He further submits that supplementary affidavit filed before the Commercial Taxes Tribunal and also annexed in the Writ petition as Annexure-10, the petitioner has quoted extensively the relevant provisions of law. Rule 14(1) dealt with the filing of return, which is quoted herein below :

"11. That Rule 14(1) Returns deals with the returns which prescribed that the return has to be filed in Form JVAT-200 and it shall be filed in Circle where the dealer is registered under the Act within 25 days after the end of the tax period. Rule 14(1) is quoted here-in-below:-

"Rule 14(1) Returns - (1) A return to be filed by a registered VAT dealer under sub-section (1) of Section 29, and a dealer to whom a notice under sub-section (2) of Section 29 of the Act, has been issued to file the return, shall be in Form JVAT 200 and it shall be filed in a circle, where such dealer is registered under the Act, within twenty five days after the end of the tax period. The return shall be true, complete and in duplicate and one copy of the return shall be retained by such dealer".

10. On the basis of the above Rule, the learned senior counsel submits that a return for a particular month has to be filed by the 25th of the next month. The petitioner had filed the returns by the scheduled date i.e. on 25.05.2010 for the month of April 2010. The return has been annexed in the writ application. This return was filed on 25.05.2010 which included all the documents, the details of all the purchases of raw materials (both within the State and outside State), the relevant accounts and the details of all sales (both within the State and outside State). However, the assessing officer and later on the appellate authority as well as the Tribunal totally ignored the returns filed by the petitioner. The learned senior counsel further referred Section 70(5)(b) of the JVAT Act, which is quoted herein below:

"70 (5) (b) The Prescribed Authority shall, in a case where the dealer or the person in-charge of goods as mentioned in Clause (a) fails to produce any evidence or fails to satisfy the said authority regarding the proper accounting of goods, impose a penalty, after allowing an opportunity of hearing in the prescribed manner to the dealer or such person, which shall be equal to three times the amount of tax calculated on the value of such goods and the goods shall be released as soon as the penalty is paid."

11. He further submits that the penalty could be charged only if assessee fails to produce any evidence. In the instant case even before date on 25.05.2010 itself, the petitioner had filed all documents in relation to sales and purchases of goods and had filed complete returns including total sales and purchases (both within the State and outside State) but all these documents were not taken into consideration and order of penalty was passed.

12. Per contra, Mr. Atanu Banerjee, learned counsel for the respondent-State submits that the inspection report should be treated to be as gist of accusation required under the show cause notice and the inspection report should be deemed to be sufficient to enable the petitioner to file its reply and since the gist of the accusations are given in the inspection report and the necessary information required to be given in the show cause notice was made available to the petitioner in the form of inspection report, as such, issuance of the show

cause notice in a specified manner was not required in law. He has further submitted that the inspection report should be treated to be part of show cause notice contemplated under Rule 58 of the JVAT Rules. The counsel for the State further submits that the judgment cited by the petitioner in Metal Forgings (Supra) is not applicable in the instant case in as much as, the facts of that case is entirely different with facts of this case and as such, the ratio cannot be made applicable in the facts of this case.

13. It was then submitted by the counsel for the State that the impugned order passed by the learned Tribunal is justified and irrespective of the fact that Section 40 (2) (a) speaks both of sales as well as purchase, but the two proceedings namely Section 40(2) and Section 70(5)(b) are totally different. It has further been submitted by learned counsel for the State that merely because of the reason that for the same inspection, the proceedings under Section 40(2) has been dropped would not mean that the proceedings under Section 70(5)(b) is also bad in law. In order to buttress his argument, the learned counsel for the State relied upon the judgment of Guljag Industries Vs. Commercial Taxes Officer, in (2007) 7 SCC 269 and submitted that for the purpose of levying penalty no mens-rea is required. The learned counsel for the State further submits that original documents were not placed before the Tribunal as stated in page-14 of the impugned order. By refuting the contention of the petitioner in respect of the assessment order passed by the same authority, wherein it was stated that nothing wrong was found for the said assessment year, learned counsel submits that the assessment order has got nothing to do with the proceedings under Section 70(5)(b).

14. Having heard learned counsels for the parties and perusing the materials available on record, it appears that the learned Tribunal has dismissed the revision application holding as under:

"(i) In the result the order dated 24.12.2010 of learned DCCT and the appellate order dated 3.6.2013 of learned JCCT (Appeal) as u/s 40 (2) JVAT are hereby set aside. The matter is remanded to the learned DCCT or his successor to pass a fresh order after hearing the parties and after making required enquiry. In so far as the order dated 26.5.2010 of learned DCCT and appellate order dated 3.6.2013 of learned JCCT (Appeal) as passed u/s 70(5)(b) are concerned, they are affirmed.

(ii) Accordingly the revision petition bearing no. JR 128 of 2013 is dismissed while revision petition no. JR 129 of 2013 is allowed subject to above direction ".

15. Learned Tribunal then proceeded to discuss the case in relation to the proceedings under Section 70(5)(b) of the JVAT Act. The Tribunal quoted and relied on the Rule namely 38 (2) (i) & 38 (2)(r) which are being reproduce herein below:

" Rule 38. Records to be maintained for VAT-

(1) Every VAT dealer shall keep and maintain a true and correct account of his business transactions preferably in English, Hindi or any other languages, which can be readable to the Prescribed Authorities.

(2) The following records in particular shall be maintained:

(a) A VAT monthly account specifying total input Tax (including Entry Tax and net Input Tax payable shall be maintained in Form JVAT 500.

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) Cash records maintained by retailers namely cash books, petty cash vouchers, and other account records including copy receipts or cash register machine rolls detailing the daily takings.

(j)

(k)

(l)

(m)

(n)

(o)

(p)

(q)

(r) Stock records showing stock receipts and deliveries and any manufacturing records.

(s)

(t)

(u)

(3)

(4)

(5)

(6) Every dealer, being a manufacturer shall, in addition to the accounts and register require to be maintained under the rule, shall also maintain month wise, separate accounts in respect of -

(i) Quality of stocks, receipts, issue and closing stocks of different inputs received;

(ii) Quantity of opening stock, production, sales or dispatches and closing stock of different finished goods "

16. From bare reading of the above Rule, it is evident that Rule 38(2) (i) deals with retailers and not with manufacturers which the petitioner in this case is and though the said rule deals with daily takings. Rule 38(2)(r) deals with stock records, but no period is mentioned therein particularly daily maintenance of accounts. Rule 38(6) deals with manufacturers which speak of maintaining month wise accounts.

17. The Tribunal dealt with the fact that on 24.05.2010, the monthly abstract purchases 'April-2010' has been mentioned and also recorded the petitioner's contention that legislature has not used any explanation like daily entry of transaction.

18. The Tribunal has committed a blunder in as much as instead of the word "retailer" used the word "dealer". This is a mistake of fact committed by the Tribunal and its findings on the incorrect provision of law which is not applicable in the case of the petitioner.

19. The Tribunal has further erred in holding that no documents in relation to purchases has been filed and has further stated that even before the Tribunal not a single bill of purchase of goods as seized by the inspecting team has been produced to show the bona-fide transactions. However, from the materials available on record it transpires that all these documents were part of the revision petition as Annexure-4 of the paper book before the Tribunal and these documents are also annexed with the Writ petition. Moreover, all these documents were also annexed in the return which was filed before the Tribunal by way of supplementary affidavit.

20. The learned Tribunal has further erred in holding that the monthly abstract submitted by the petitioner on 25.05.2010 does not have any details so far as inter State purchase are concerned. The Tribunal has totally erred on this issue as it would be evident from the returns filed by the petitioner.

21. The learned Tribunal has further erred in holding that the petitioner has annexed only Form JVAT 501 which deals with intra State sales transaction, but the Tribunal fails to recognise that petitioner has also annexed Form JVAT-500 which deals with the inter State transactions.

22. Further, the Tribunal has misdirected itself in holding that the original of the documents were not produced either before the authorities or before the

Tribunal. As a matter of fact, the Tribunal has gone beyond the scope of the issue. Penalty has not been imposed because of non-production of original documents, but penalty has been imposed because of entries having not made in the books of accounts. The Tribunal has totally failed to consider the facts as well as relevant provisions of law and has consequently proceeded to pass an order which is totally erroneous.

23. At this juncture it would be pertinent to mention that the petitioner had filed a supplementary affidavit on 04.09.2019 in which it had annexed the regular assessment order for the year 2010-11. The said assessment order is annexed as Annexure-12 to the supplementary affidavit from which it is evident from first four lines at page no. 5 that no fault was found during the course of assessment where the accounts of the petitioner were checked and the concerned returns filed were also found to be as per books of accounts were accepted.

24. Relevant portion of the said assessment order dated 12.03.2014 is quoted herein below:

लेखा पुस्तकों की जाँच के क्रम में भी किसी प्रकार की अनियमितता नहीं पाया गया। फलतः उपरोक्त तथ्यों के आधार पर तथा किसी प्रतिकूल साक्ष्य के अभाव में व्यवसायी द्वारा प्रस्तुत लेखा पुस्तकों को स्वीकार किया जाता है तथा सकल विक्रय राशि रु 189, 77, 79.099=54 (कर सहित) निर्धारित किया जाता है।

25. From the above, it is evident that there are no discrepancies in accounts maintained by the petitioner and accounts were accepted by the authorities and this aspect would be an important factor in holding that earlier proceedings under Section 70 (5) (b) were bad in law.

26. It would be evident from the facts and documents available on records that the allegation is not that the original documents were not and are unaccounted goods, rather the allegation is that the entries on daily basis was not made in the books of accounts.

27. The revenue have also made their submissions and tried to justify the impugned orders on the grounds that it was not necessary to give details, gist of accusations in the notice to show cause and by not giving such notice, it would not render the proceedings to be void. Further, a detailed reasoning has been given in the inspection report and consequently the short comings in the show cause notice have been explained in the inspection report itself. Counsel for the State in respect of the Assessment Order passed by the same authority, wherein it was stated that nothing wrong was found for the said assessment year, has submitted that the Assessment Order has got nothing to do with the proceedings under Section 70(5)(b).

28. The contention of the State is not worth consideration as the law regarding issuance of show cause notice is very clear. Not only in the case of Metals Forgings (supra) but in various cases decided by the Hon'ble Supreme Court it has been held that notice has to be given in the required format. Rule 58 of the JVAT Rules is very clear that authority shall cause to be served upon the person

proceeded against a notice which shall contain a gist of the accusations. The Hon'ble Apex Court has held in unequivocal term that necessary information has to be given in the show cause notice. The Hon'ble Supreme Court stated that law requires that the notice to be issued under specific provision of law and not as a correspondence or part of an Order.

In the instant case, notice was issued to the Writ petitioner, but no reason, whatsoever, in relation to penalty under Section 70 (5) (b), worth name was given so as to enable the petitioner to file its show cause. In other words, the notice was not in terms of Rule 58 and contention of the State that gist of allegation was provided in the inspection report cannot be taken into consideration and as such on the first point itself that is non issuance of proper show cause notice in terms of Rule 58 of the JVAT Rules 2006 would render the entire proceedings under Section 70 (5) (b) void ab initio.

29. The learned Tribunal has further erred in not taking the issue in the light of the prevailing law. The Tribunal though quoted the portions of JVAT Rules in the Impugned Judgment wherein it had specifically quoted 38(2)(i) wherein the word 'retailer' have been used but at page 7 at para (xii) of the Impugned Order, instead of the word 'retailer' the word 'dealer' has been used and as such this is a grave error because the Tribunal has proceeded and has based its findings upon incorrect provisions of law which are not applicable to the Petitioner.

30. It is apparent that the Tribunal has also gone way beyond the penalty order under Section 70 (5) (b) of the JVAT Act, wherein the only allegation was that entries have not been made into books of accounts but it was never alleged in the penalty order or show cause notice that originals of the documents of purchase were to be produced, the allegation also was not that these are unaccounted goods, rather the only allegation was that entries on daily basis was not made in the books of accounts but the Tribunal in the Impugned Order has repeatedly observed that original documents were not produced. It is rather surprising that the authorities as well as Tribunal totally ignored the VAT Returns filed by the Petitioner for the month of April, 2010, which was filed on 25.05.2010. The Tribunal records the returns which were filed in time but has erroneously stated at para (ix) and (x) of the Impugned Order that the return does not have any column for Inter State purchase details whereas the Petitioner shown all those details. It is evident that the Tribunal has missed out all these details and has consequently given an erroneous finding. The returns for April 2010 were annexed with the Supplementary Affidavit before the Commercial Taxes Tribunal which is at Annexure-10 in the Writ petition. From perusal of the returns, it is evident that all the details of sales and purchases both within the State as well as Inter State transactions have been provided. The authorities below as well as the Tribunal failed to consider the return which was filed by the Petitioner to find out if at all there was any evasion of tax.

31. Further, in the scheme of value added tax a dealer can avail input tax credit on the tax paid by him at the time of purchase of raw materials. In this case,

coal has been purchased from Central Coalfields Ltd and the invoices have been annexed for which there is no reason to disbelieve the authenticity of the same nor the Respondents have any occasion to make such contention nor they have ever raised this.

32. The Counsel for the State also argued that in terms of the Act and Rules it is mandatory for the petitioner to maintain a daily accounts and entry should be made daily in the books of accounts. We are not in agreement with the contention of the revenue in as much as the provisions of Rule 38(2)(i) is very clear that the same is for the 'retailer' who have to maintain a daily account in their books of accounts. The Petitioner in the instant case is a manufacturer; accordingly, the said rule is not applicable to the Petitioner. Further Rule 38(2)(r), which is applicable on the Petitioner, does not prescribe for maintaining such records on daily basis whereas Rule 38(6) which relates with the manufacturers speaks about maintenance of books of accounts month-wise. Thus this contention of the State is liable to be rejected. The Tribunal has also held the same erroneously using the word 'dealer' instead of the word 'retailer' and as such Order of the Tribunal based on this score also is liable to be set aside.

33. In view of the aforesaid discussions and judicial pronouncements, the impugned orders are liable to be set-aside in as much as the Show Cause Notice itself is not in accordance with the JVAT Act & Rules as held by the Hon'ble Apex Court in the case of Metal Forgings & Another Vs. Union of India & Others reported in (2003) 2 SCC 36 (supra). In the result, the instant Writ petition is allowed and Impugned Order of penalty, Appellate Order as well as the Order of Commercial Taxes Tribunal so far it relates to imposition of penalty under Section 70(5)(b) is set aside. Consequently, the demands made by the revenue are also set aside and it is further directed that if any amount is paid towards the Impugned Judgment, the same be refunded within a period of two months with statutory interest, if any.