
(2019) 03 PAT CK 0045

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 24431 Of 2018

M/S Tata Project Ltd

APPELLANT

Vs

State Of Bihar Through Commissioner And Ors

RESPONDENT

Date of Decision : 05-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Value Added Tax Act, 2005 — Section 24, 24(1)(A), 24(3), 24(12), 25, 26, 26(1), 26(2), 26(3), 31, 31(2), 33, 39, 54

Bihar Value Added Tax Rules, 2005 — Rule 21, 21(2), 22, 25, 25(1), 25(2), 62

Citation : (2019) 4 PLJR 1255

Hon'ble Judges : Jyoti Saran, J;Arvind Srivastava, J

Bench : Division Bench

Advocate : Y.V. Giri, Anurag Saurav, Vikash Kumar

Final Decision : Allowed

Judgement

The petitioner by filing this writ petition under Article 226 of the Constitution of India prays for issuance of a writ in the nature of certiorari for

quashing the order dated 26.11.2018 passed by the Joint Commissioner, Commercial Taxes, Patliputra Circle, Patna whereby an assessment order has

been passed for the financial year 2017-18 and consequent where to a demand notice bearing Memo No.120478656052966 has been issued

whereunder a demand of Rs.7,97,42,283/- has been raised. Copies of the assessment order and the demand notice are impugned at Annexures 8 and

8/1 respectively to the writ petition.

Two interlocutory applications bearing I.A. No.9486 of 2018 and I.A. No.9487 of 2018 have also been filed seeking additional prayers for issuance of

Form C-II as well for addition of parties.

The petitioner is a public limited company incorporated under the Companies Act, 1956 and having its registered office at New Delhi and at

Secunderabad in the State of Andhra Pradesh with its regional office situated at 203, Shanti Complex, S.P. Verma Road, Patna.

The petitioner obtained registration under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as the "VAT Act"), the Central Sales

Tax Act, 1956 (hereinafter referred to as the "CST Act") and the Bihar Tax on the Entry of Goods Into Local Areas for Consumption, Use of

Sale Therein Act, 1993 (hereinafter referred to as the "Entry Tax Act") bearing TIN Nos.10050748029, 10050643204 and 10050742183

respectively.

The petitioner claims to have filed his quarterly as well as annual returns including the audit reports within the time stipulated for the financial years

2009-10, 2010-11, 2011-12, 2012- 13, 2013-14 and 2014-15 and also deposited the amount of tax as found admissible.

The issue in hand relates to the financial year 2017-18. According to the petitioner, it furnished its quarterly return for the period April to June, 2017 in

time and in prescribed format, as per the "VAT Act" vide Form RT-V. The petitioner submitted his annual return under Form RT-III along with

the VAT report in terms of section 54 of the "VAT Act". It is not in dispute that for the financial year 2017-18 there was only one quarterly

return filed for the period April to June, 2017 because with effect from 01.07.2017 the Goods and Services Taxes Act (Central and State) came into

force. Up to this stage there is no dispute.

The pleadings on record confirm that an audit report was submitted by the Senior Audit Officer along with the Assistant Audit Officer in the office of

the Principal Accountant General (Audit), Bihar, Patna according where to, the excess amount claimed by the petitioner towards Input Tax Credit to

the tune of Rs.5,59,47,935/- was detected and on which the petitioner was held liable to penalty under section 31(2) of the "VAT Act". A copy

of the report is at Annexure 5 to the writ petition. It is enclosing the audit report that a notice was issued by the Joint Commissioner, State Tax,

Patliputra Circle, Patna on 06.10.2018 to the petitioner in reference to an earlier notice issued in this regard seeking his response. According to the

respondents, the petitioner did not respond to the notice by filing any

explanation to the objection and as such an assessment order in exercise of powers vested under sections 33 and 39 of the "VAT Act" was passed creating a liability of Rs.7,97,42,283/- on the petitioner which is followed by a demand notice and it is feeling aggrieved by these orders that the petitioner is before this Court.

Mr. Y.V. Giri, learned senior counsel has appeared for the petitioner with due assistance from Mr. Anurag Saurav, the advocate on record.

Reiterating the sequence of events he submits that while the period in question relates to the financial year 2017- 18 the actual dispute relates to the

first quarter of the said financial year i.e. from April to June, 2017. He submits that the petitioner in tune with the provisions underlying section 24(3)

of the "VAT Act" filed returns on 30.08.2018 for the financial year 2017-18. He submits that Comptroller and Auditor-General ("CAG")

for the sake of brevity) held its audit on 07.09.2018 raising objection in relation to Input Tax Credit and which has resulted in the order impugned.

Learned senior counsel in reference to the provisions of section 24(3) of the "VAT Act" submits that every registered dealer is required to

furnish his return for the financial year before the "due date" which term is explained as "31st day of December of the year following the

year to which such return relates". According to Mr. Giri, the audit could not have preceded the due date for even if the petitioner filed his returns

on 30.08.2018, the due date would fall in December, 2019 and no audit thus could take place prior to the said date.

He submits that despite such legal position, the petitioner received a notice together with the audit objection, a copy of which is enclosed at Annexure

5 series. The petitioner was asked to respond to the audit objection. According to Mr. Giri, the petitioner appeared and submitted before the

respondent no.3 i.e. the Assistant Commissioner, Commercial Taxes, Patliputra Circle, Patna that since the assessment for the period 2015-16 and

2016- 17 was underway, he would produce the records on its completion and some time may be given for production of C-II certificate etc.

It is argued that a second notice was issued on 26.10.2018 for filing reply and the petitioner again responded by producing the records for the earlier

period and undertook to produce the records for the financial year 2017-18 soon after the conclusion of the assessment proceeding of the financial

year 2015-16 and 2016-17. It is informed that petitioner though received the notice of hearing for the financial year 2015-16 and 2016-17 but no notice was issued for the financial year 2017-18 and on query the petitioner was surprised to gather knowledge of the impugned assessment order passed by the Joint Commissioner, Commercial Taxes, Patliputra Circle, Patna on 26.11.2018 together with the demand raised thereunder.

According to Mr. Giri, the assessment order and the consequential demand are unsustainable in law on following counts:

- (a) The order is ex-parte and without opportunity of hearing to the petitioner;
- (b) The audit report is de-hors the statutory provisions;
- (c) The assessment proceeding relying upon the audit report is contrary to the stipulations present in section 31 or section 33 of the "VAT Act";

and

- (d) Rule 25 of the Bihar Value Added Tax Rules, 2005 (hereinafter referred to as "the Rules") casts an obligation on the Assessing Authority to record satisfaction before he proceeds with the audit objection which is missing in the present case and thus the order is mechanical.

Mr. Vikash Kumar, learned Standing Counsel No.11 has appeared for the respondents to submit that section 24 of the "VAT Act" provides for

filing of returns and sub-section (1A) thereof obliges every registered dealer to file his return complete in all respect in each quarter before the due

date. He submits that sub- section (3) of section 24 provides for annual returns before the due date which in the case of Financial year 2017-18 would

be December, 2018 and not December, 2019 as argued by Mr. Giri as manifest from the language of the explanation to the term "due date"

attached to sub-section (3) of section 24. He submits that sub- section (12) of section 24 provides for grant of rebate for every correct returns.

Learned counsel next turns to section 25 of the "VAT Act" to submit that it relates to scrutiny of returns by the prescribed authority and rule

21(2) of "the Rules" allows the prescribed authority to carry a scrutiny before the expiry of the due date or the extended due date. He submits

that since there was some difficulties prevailing in relation to online filing of returns for the financial year 2017-18 that the due date was extended to

31.03.2019 and not as argued by Mr. Giri.

Learned counsel thus submits that the due date in the present case was

extended up to 31.03.2019 and since the returns were not put to scrutiny under section 25 of the "VAT Act" read with rule 21 of "the Rules", that it was a case of deemed assessment under section 26(1) of the "VAT Act" and whereupon the "CAG" had full jurisdiction to carry out audit on the basis of the returns so filed and to raise their objection which suffers no infirmity.

Learned counsel in reference to section 33 of the "VAT Act" submits that it relates to assessment on the basis of audit objection. He further submits that the term "assessment" cannot be given a restricted meaning to cover only cases where an order of assessment or re-assessment is passed by the Assessing Authority, rather it would cover cases of deemed assessment as well because if a return is not put to scrutiny by the due date or extended due date fixed for filing of return, the tax due shall be deemed to have been assessed and which would give jurisdiction to the "CAG" to hold its audit.

Learned counsel in support of his submission has relied upon a judgment of the Supreme Court reported in AIR 1988 SC 191 (M/s J.K. Cotton Spinning & Weaving Mills Ltd. vs. Union of India) and a judgment reported in (1995) 1 SCC 537 (Harish Tandon vs. Addl. District Magistrate, Allahabad).

We have heard learned counsel for the parties and we have perused the records. The facts are not in dispute rather are admitted. It is not in dispute that the returns filed by the petitioner whether quarterly for the period April to June, 2017 or the annual returns filed under section 24(1A) and (3) respectively were never put to scrutiny under section 25 of the "VAT Act" until the due date fixed for filing such returns i.e. 31.12.2018 as extended to 31.03.2019 vide notification bearing Memo No.7221 dated 27.12.2018. In other words, the returns so filed by the petitioner became final and the tax due in respect of the financial year 2017-18 would be held deemed assessed.

The issue which falls for our consideration is whether this assessment of tax for the financial year 2017-18 by deeming fiction as per section 26 of the "VAT Act" invites an audit objection by the "CAG" and even if it does whether the Assessing Authority has proceeded for re-assessment in the manner prescribed.

Section 26(1) of the "VAT Act" provides for deemed assessment on expiry of the due date or the extended due date in respect of dealers who have furnished returns for the financial year in question. The petitioner undisputedly had filed returns within time and thus he shall be deemed to have been assessed as per the legislative intent.

Section 26(2) of the "VAT Act" opens with a non- obstante clause and vests jurisdiction in the Commissioner to select any registered dealer for detailed audit of his business as may be deemed fit by the Commissioner and which audit is to be conducted in the manner prescribed under rule 22 of the "Rules" and has to be completed within 36 months from the due date.

Section 31 of the "VAT Act" deals with assessment/ reassessment of escaped turnover and inter alia provides that where the prescribed authority is satisfied either on the basis of the audit conducted under sub-section 26(3) or otherwise that reasonable ground exists to believe that a dealer has been under assessed or has escaped assessment or has been assessed at lower rate or any deduction therefrom has been wrongly made or any input tax credit incorrectly made that he shall, in the manner prescribed and after serving notice on the dealer, proceed to assess or reassess as the case may be, the tax payable by such dealer, within 4 years from the expiry of the year during which the original order of assessment or re-assessment was passed.

The stipulations which we have discussed above relate to assessment/re-assessment of an escaped turnover detected on the basis of a departmental audit conducted under the orders of the Commissioner. However, the issue in hand is not founded on a departmental audit rather it is on the audit objection by the "CAG" and which situation is catered by section 33 of the "VAT Act" and reads under:

"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."

The manner prescribed for holding re-assessment by the prescribed authority in the light of the objection by the CAG is provided under rule 25

of the Rules which reads under:

25. Assessment on audit objections.- (1) If any irregularity relating either to fact or law committed in the course of any proceedings is pointed

out by the Comptroller and Auditor- General, the authority specified in rule 62 shall, upon being satisfied about the lawfulness of such objection and

after giving the dealer an opportunity of being heard, proceed to reassess the tax due from the dealer.

(2) If the specified authority is not satisfied about the lawfulness of the objection, he shall communicate his views to the Commissioner with a copy of

the original order and the audit objection, a copy of which shall also be forwarded to the Comptroller and Auditor-General.

(3) The commissioner or any other officer especially empowered by him in this behalf, after the receipt of the communication mentioned in sub-rule

(2) and after applying his mind to the questions involved shall pass appropriate order in this regard:

Provided that no such order shall be passed without serving upon the dealer concerned a notice requiring him to file, within one month of the date of

the service of notice, a reply to the objection raised by the Comptroller and Auditor-General.

Chapter VI of the VAT Act amongst others, provides for an elaborate scheme of assessment/re-assessment on the basis of:

(a) Scrutiny;

(b) audit objection made on a departmental order issued by the Commissioner; and

(c) scheme underlying section 33 of the VAT Act which rests on an audit objection by the Comptroller and Auditor-General.

A plain reading of the scheme present under section 25, section 31 and section 33 read alongside rules 21, 22 and 25 respectively is reflective of the

circumstances and conditions precedent to such exercise. While the assessment/re-assessment under section 31 is founded on an audit held by the

department under section 26(3) on the orders of the Commissioner even on deemed assessment, there is no such reference in section 33 that similar

powers can be exercised by the CAG to hold audit in cases of deemed

assessment.

In circumstances thus, where the pre-requisites to an exercise of assessment/re-assessment based on an audit objection of the department and by the

â??CAGâ?? are so distinctly delineated, it would be reading in between the provisions to extend the overriding power vested in the Commissioner of

the department to hold audit even in case of deemed assessment, in the â??CAGâ?? even though the Legislative intent present in section 33 is silent

on such conferment.

In fact with the legislative intent so clear, it is difficult to accept the arguments advanced by Mr. Vikash Kumar, learned Standing Counsel No.11 to

justify audit conducted by the â??CAGâ?? under section 33 in reference to section 26(1) of the â??VAT Actâ??.

We are fortified in our opinion by the language present in rule 25 of â??the Rulesâ?? which prescribes the procedure to be followed on an objection

raised by the â??CAGâ?? and requires the Assessing Authority to consider and be satisfied on the lawfulness of the objection before he proceeds to

re-assess the tax but in case he is not satisfied by the objection so made by the â??CAGâ??, then sub-rule (2) of rule 25 obliges him to record his

views and forward the same to the Commissioner along with a copy of his original order and the audit objection.

On the other hand, a plain reading of the provisions of section 31 read with rule 22 of â??the Rulesâ?? manifests that where the tax of an assessee is

deemed assessed and the Commissioner is of the opinion that an audit is required in the interest of revenue, he shall proceed to take action in terms of

rule 22 of â??the Rulesâ?? and where such a process has been initiated and the Circle Incharge is satisfied that the dealer has not disclosed his tax

liability or concealed any part thereof for reduction of tax payable by the dealer, he shall proceed to initiate proceeding under section 31 of the

â??VAT Actâ??.

The detail procedure prescribed under rule 22 of â??the Rulesâ?? for proceeding on a departmental audit objection under the orders of the

Commissioner under section 26(3) leading to assessment under section 31 of the â??VAT Actâ?? is clearly distinct to the procedure based on a audit

objection by the â??CAGâ?? for even though the legislature has empowered the Commissioner to hold audit on deemed assessment and initiate an

exercise for the purpose of assessment under section 31, no such privilege is given to the â??CAGâ?? to exercise jurisdiction on a deemed assessment.

Much stress has been given by Mr. Vikash Kumar to the term â??assessmentâ?? present at section 33 to include cases of deemed assessment as

well but in our opinion where the legislature has consciously not included a situation of â??deemed assessmentâ?? in section 33 even while conferring

overriding powers on the Commissioner to hold audit in cases of deemed assessment, any interpretation by us, on the lines as advanced by Mr. Vikash

Kumar would amount to supplying â??casusâ?? and we refrain from doing so.

It is unfortunate that the â??VAT Actâ?? was enforced in the year 2005 and despite such long lapse of time, the statutory authorities acting

thereunder, yet are oblivious of their limitations.

The legal proposition in this regard is too well settled for any confusion and that is:

(a) A taxing statute has to be strictly construed as per the language used, without additions or subtractions; and

(b) where the law itself provides for the manner and the circumstances in which the statutory authority can exercise jurisdiction then neither can the

statutory authority acting thereunder, enlarge the scope of its exercise nor can he travel beyond the statutory provisions to draw power from other

prescriptions available in the enactment simply because it caters to a similar situation.

The complete non-application of mind with which the issue has been handled is manifest from the audit report itself available at Annexure 5 which

after recording the alleged excess Input Tax Credit claimed by the petitioner relegates him to a proceeding under section 31(2) of the â??VAT

Actâ?? completely oblivious of the fact that while it is under the statutory prescriptions of section 33 that the power was being exercised by the

â??CAGâ??, section 31(2) of the â??VAT Actâ?? is a penalty exercise in circumstances where an assessment/re-assessment is conducted on the

basis of an audit conducted under the orders of the Commissioner under section 26(3) of the â??VAT Actâ?? and not on the basis of audit objection

by the â??CAGâ?? under section 33 of the â??VAT Actâ??.

The illegalities in the proceeding do not stop here rather are perpetuated by the

mechanical discharge by the Assessing Authority who has blindly proceeded on the audit objection without recording any satisfaction as to its lawfulness as per the mandate of rule 25(1) of "the Rules".

Rule 25 of "the Rules" has been reproduced by us above and provides for the procedure for holding assessment/ reassessment on an audit

objection by the "CAG". A plain reading of the provisions would manifest that a discharge by the prescribed authority on receipt of an audit

objection by the "CAG" is not mechanical, rather he is to draw satisfaction on its lawfulness and it is only after he records his assent or dissent

thereon that he can proceed thereafter. The two situations stand discussed in sub-rules (1) and (2) respectively and in case the prescribed authority is

satisfied to the lawfulness of the audit objection then after giving opportunity to the dealer under sub-section (3) that he shall proceed to hold

assessment in the manner provided under rule 24 of "the Rules". However in case he is not satisfied with the audit objection then after

recording reasons he shall communicate his views to the Commissioner together with the copy of the original order and the audit objection recorded by

the "CAG".

A plain reading of the notice forwarding the audit objection impugned at Annexure 5 would reflect that no such satisfaction is recorded by the

prescribed authority on the audit objection rather it is by simply enclosing a copy of the audit report of the "CAG" that the petitioner has been

asked to give his response.

The issue as regarding the manner of discharge by the prescribed authority under rule 25 of "the Rules" was a subject matter of writ petition

arising from CWJC No.22765 of 2018 (Molson Coors Cobra India Pvt. Ltd. vs. The State of Bihar) and CWJC No.23380 of 2018 (Molson Coors

Cobra India Pvt. Ltd. vs. The State of Bihar) and this Court having examined the statutory provisions which also finds discussed hereinabove has

struck down a similar audit objection by the "CAG" which was followed by an identical mechanical discharge by the Assessing Officer.

As already noted, a cursory glance of the assessment order passed under section 33 read with section 39 of the "VAT Act" impugned at

Annexure 8 would again confirm a complete non-application of mind by the prescribed authority who appears to be thoroughly confused on his

statutory discharge for even when he opens up with an exercise of power drawn from section 33 of the â??VAT Actâ?? while imposing penalty, he

seeks refuge under section 31(2) of the â??VAT Actâ?? which is not available to a proceeding initiated on an audit objection made by the

â??CAGâ?? under section 33.

Mr. Giri has also raised an issue that the order was passed ex-parte but considering that the petitioner did respond to the notice vide Annexure 5 and

kept taking time on the pretext of pending assessment for the financial years 2015-16 and 2016-17, it is not a case of ex-parte assessment rather a

case of the petitioner failing to respond to the notice. To that extent we do not subscribe with the arguments advanced by Mr. Giri.

Having heard learned counsel for the parties and for the reasons and discussions that we have held above, we are persuaded to hold that neither the

discharge by the â??CAGâ?? to record their audit objection at Annexure 5 is in tune with the statutory prescriptions because the provision underlying

the â??VAT Actâ?? does not vest jurisdiction in the â??CAGâ?? to hold audit on the basis of deemed assessment and thus the audit report is held

illegal and without statutory support and consequentially the assessment proceeding based thereon are rendered illegal because not only the prescribed

authority has proceeded on an illegal audit objection rather he has also failed to record his satisfaction as to the lawfulness of the audit objection and

has mechanically proceeded to draw the proceeding under section 33 of the â??VAT Actâ?? completely unmindful of the obligation cast on him

under rule 25(1) and (2) of â??the Rulesâ??.

The entire proceeding thus culminating in the assessment order and the demand notice impugned at Annexure 8 and 8/1 respectively are outcome of

an infracted proceeding not only on statutory violation but also on the manner of discharge.

Accordingly the entire proceeding culminating in the assessment order impugned at Annexure 8 together with the demand notice impugned at

Annexure 8/1 are quashed and set aside.

In so far as the interlocutory applications are concerned, in our opinion in the nature of relief claimed in the writ petition, the relief sought to be

incorporated through interlocutory applications cannot be permitted to be espoused in the present proceeding for they raise separate cause of action

and if so advised, the petitioner can take recourse to independent proceeding for such cause.

The writ petition is allowed.