

(2019) 07 PAT CK 0335

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8782 Of 2019

Sanyog Construction Private Limited

APPELLANT

Vs

State Of Bihar Through The Commissioner State Taxes And
Ors

RESPONDENT

Date of Decision : 23-07-2019

Acts Referred:

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

Bihar Value Added Tax Act, 2005 — Section 24, 26(1), 26(3), 31, 31(2), 33, 39, 47, 74

Citation : (2019) 07 PAT CK 0335

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

Bench : Division Bench

Advocate : Chiranjiva Ranjan, Vikash Kumar, Ranjan Ghoshrave

Final Decision : Allowed

Judgement

Heard Mr. Chiranjiva Ranjan, learned counsel for the petitioner and Mr. Vikash Kumar, S.C.11.

With the consent of the parties the matter has been heard with the view to final disposal at the stage of admission itself.

This writ petition was initially filed praying for a writ in the nature of mandamus commanding the respondents to release the bank account of the petitioner which had since been attached under the order of the respondent No.3, Commercial Tax Officer, Patna North Circle, Patna in purported exercise of powers vested in him under Section 47 of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the Act') and the Rules framed thereunder. A copy of the notice issued under Section 47 is impugned at Annexure-4. The petitioner complains that the copy of the notice was not served on him.

The petitioner has also filed an interlocutory application bearing I.A. No.1 of 2019 to question the reassessment order dated 19.05.2015 passed by the Commercial Taxes Officer in purported exercise of jurisdiction under Section

31(2) of 'the Act' as well as the consequential demand raised thereunder, copies of which are impugned at Annexures- 2/1 and 2/2 respectively to the writ petition. The interlocutory application and the prayer of the petitioner to question the assessment orders has been allowed by us vide order passed on 19.07.2019.

The third prayer made in this writ petition is for a direction to the Commissioner, Commercial Taxes to decide the revision filed by the petitioner to question the exercise by the Commercial Taxes Officer under Section 74 of 'the Act', copy of which is at Annexure-3 to the writ petition.

A preliminary objection was raised by Mr. Vikash Kumar, S.C.11 on grounds that since the matter is pending in revision before the commissioner, the petitioner may raise all issues as raised herein before the Commissioner itself in the pending revision application.

Mr. Chiranjiva Ranjan, learned counsel for the petitioner while not disputing the objection on its merits, has relied upon a decision of this Court rendered in the case of M/S Tata Project Ltd. versus the State of Bihar since reported in 2019(4) BLJ 387 to submit that since the issue which the petitioner intends to canvas already stands settled by this Court, a relegation of the petitioner to the jurisdiction of the Commissioner would be a formality. It is submitted that since the issue raised herein would invite an opinion as to whether the case is covered by the judgment in M/S Tata Project Ltd. (supra), this matter be considered by this Court itself especially where the petitioner questions the very lack of jurisdiction in the Assessing authority in reopening of the assessment.

Brief facts leading to the present writ petition is that the return filed by the petitioner under RT -III in terms of Section 24 of 'the Act' was within time and since it was not put to scrutiny, it became a case of deemed assessment under Section 26(1) of 'the Act'. It is not in dispute that no departmental audit objection was raised on the returns filed in terms of Section 26(3) of 'the Act' for reopening of the proceedings.

The situation continued as thus when an audit objection was raised by the Accountant General through letter dated 03.11.2014 raising objections on the input tax credit claim raised by the petitioner in his return filed under RT-III. The Deputy Commissioner while issuing notice to the petitioner under Section 33 of 'the Act' initiated proceedings thereunder which has culminated in an order dated 19.05.2015 (Annexure 2/1), passed by the Commercial Tax Officer who assumed jurisdiction of the matter in the meanwhile and finding infirmity in the input tax credit so claimed by the petitioner that while rejecting the said claim, a tax liability of Rs. 4,73,854/- was raised and along side a penalty 3 times thereof to the tune of Rs. 14,21,562/- was imposed, to raise a demand of Rs. 18,95,116/- as manifest from demand notice at Annexure 2/2.

The petitioner questioning the exercise filed a revision application under Section 74 of 'the Act' before the Commissioner together with the stay application which never got heard rather led to the attachment of the bank account of the

petitioner and it is at this stage that complaining of inaction on the part of the Commissioner in hearing the revision application and questioning the attachment of the bank account that the petitioner approached this Court through this writ petition when the parties have been heard.

According to Mr. Chiranjiva Ranjan, learned counsel for the petitioner, the matter is squarely covered by the judgment of this Court passed in the case of M/S Tata Project Ltd.(supra) because being a case of deemed assessment neither the Accountant General had jurisdiction to reopen proceedings and even if the Accountant General, being oblivious of the legal position, raised such objection then an obligation was cast on the Assessing authority i.e the Deputy Commissioner Commercial Taxes, at the relevant time, to first satisfy himself on the audit objection in terms of the duty cast on him under Rule 25 of 'the Rules' before he proceeded to issue notice to the petitioner under Section 33 of 'the Act'.

Learned counsel in reference to the judgment of M/S Tata Project Ltd.(supra) has submitted that just as it happened in the said case, so in the present case as well, a mechanical discharge has been done by the Assessing authority on the audit objection raised by the Accountant General which has culminated in the orders impugned.

Having noted the objection raised by Mr. Vikash Kumar, SC 11 on the pending revision application, we were almost persuaded to remit the matter to the Commissioner for its disposal but on appreciating that the contest required an interpretation whether, the case of the petitioner is covered by the opinion of this Court rendered in the case of M/S Tata Project Ltd.(supra), we have allowed the parties to contest the matter before this Court.

Mr. Vikash Kumar, S.C.11 has made a serious attempt to distinguish the present case from the issue that came up for consideration in the case of M/S Tata Project Ltd. (supra) by submitting that even if the audit objection would not have lawful sanction in a case of deemed assessment nonetheless it would constitute an information and would be sufficient to clothe the Assessment authority for exercising jurisdiction under Section 31 of 'the Act' because the legislature while laying down the various options under the provision for reopening of an assessment, has also authorised the Assessing officer to hold such exercise in matters not so covered, by using the term 'otherwise' which finds mention in Section 31 of 'the Act'.

In short, the submission of Mr. Vikash Kumar is that even if the objection of the Accountant General has not proceeded in the manner prescribed under Section 33 of 'the Act' it definitely constituted an information for the Assessing authority to proceed under Section 31 of 'the Act'. For the purpose, learned counsel relied upon judgment of the Supreme Court reported in 2017(13)SCC780 (Larsen and Toubro Ltd. versus State of Jharkhand & Ors.) more particularly paragraphs 26,31 and 32.

We have heard learned counsel for the parties and we have perused the records

and having given anxious consideration to the lawful submissions, we are absolutely firm in our view that the present case is another addition to the multiple cases of exercise dehors the statutory prescriptions and the reasons for our view are as follows:

(a) Being undisputedly a case of deemed assessment, the Accountant General had no jurisdiction to raise objection under Section 33 of 'the Act' as held by us in the judgment rendered in the case of M/S Tata Projects Ltd.(supra) more particularly paragraphs 36,41,43 which runs under:

"36.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 'VAT Act' completely oblivious of the fact that while it is under the statutory prescriptions of section 33 that the power was being exercised by the 'CAG', section 31(2) of the 'VAT Act' 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 'VAT Act' and not on the basis of audit objection by the 'CAG' under section 33 of the 'VAT Act'.

..... 41.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 'VAT Act' while imposing penalty, he seeks refuge under section 31(2) of the 'VAT Act' which is not available to a proceeding initiated on an audit objection made by the 'CAG' under section 33.

.....

43.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 'CAG' to record their audit objection at Annexure 5 is in tune with the statutory prescriptions because the provision underlying the 'VAT Act' does not vest jurisdiction in the 'CAG' 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 'VAT Act' completely unmindful of the obligation cast on him under rule 25(1) and (2) of 'the Rules'."

(b) Be it a case of reopening of an assessment under Section 33 of 'the Act' read along side Rule 25 of 'the Rules' framed thereunder or an exercise under Section 31 read along side Rule 22A, in each of the cases there is an obligation cast by

the legislature on the Assessing authority to draw a satisfaction on the audit objection before he proceeds to issue notice for reopening of assessment which essential discharge is absolutely lacking in the present case for the Deputy Commissioner has mechanically issued notice to the petitioner on receipt of the audit objection.

(c) The argument of Mr. Vikash Kumar in relying upon the judgment rendered by the Supreme Court in the case of Larsen and Toubro Ltd. (supra) cannot be applied to the case in hand for the reason that whereas the Supreme Court was examining the stipulations present in the Bihar Finance Act, 1981 to record opinion in the case of Larsen & Toubro (supra), the present proceeding arises under the 'VAT' Act and the provisions in consideration are absolutely distinct.

There cannot be any contest on the opinion expressed by the Supreme Court that an audit objection would constitute an information to reopen proceedings on interpretation of the stipulation present in the Bihar Finance Act, 1981 because definitely an audit objection would constitute an information to lay a foundation for such reopening but the exercise has to be within the channel so prescribed.

Be it noted that while the Bihar Finance Act did not stipulate separate decision making process for reopening of assessment based on department audit and on audit by the Accountant General, but such separate proceeding is found in Section 31 and 33 of the 'VAT' Act read alongside the corresponding rules framed for giving effect to such exercise.

The reliance by Mr. Vikash Kumar to the judgment of the Supreme Court in the case of Larsen and Toubro (supra), would in no manner, alter the situation. There is absolutely no dispute on the legal position settled for every audit objection would constitute an information for reopening of an assessment. The legal position advanced by Mr. Vikash Kumar to that extent cannot be disputed. The problem is that even if such audit objection is treated as an information, there are separate channel of statutory discharge provided under the 'VAT' Act where the information so disclosed by the Comptroller and Auditor General under Section 33 and by the departmental audit under Section 26(3) of 'the Act'.

We have already reproduced paragraph 43 of the judgment rendered in the case of M/s Tata Project Ltd. (supra) to hold that an audit objection by the Accountant General on the basis of deemed assessment, is illegal and is without lawful sanction. In other words, any such audit objection is a void document and if that be so then neither it can constitute an 'information' for drawing a lawful proceeding under Section 33 nor can be relied upon to exercise jurisdiction under Section 31, which is exclusively reliant on the preconditions present which are other than an audit objection by the Accountant General.

In our opinion where the legislature has provided a separate exercise under section 31, which includes a reopening on basis of a departmental audit objection under Section 26(3), the statutory authorities cannot be permitted to proceed on a borrowed 'information' from Section 33, for reassessment or for assessment

under Section 31 of 'the Act'. We are satisfied to record that an objection raised by the Accountant General has to be tested within the parameters of Section 33 read alongside Rule 25 but it cannot be used as a tool to justify an action under Section 31 and which exercise is void. If the legislature has so clearly demarcated the exercise so based on departmental audit under Section 31 while providing a separate exercise under Section 33 resting on an audit objection by the Accountant General, neither of the two exercise can overlap each other for providing a validity to an otherwise illegal action.

For the reasons so discussed, we find entire exercise void ab initio because if the foundation for the reopening has been rendered illegal, the consequential actions has to follow suit.

In result, the entire proceedings including the assessment order at Annexure-2, the demand notice at Annexure 2/1 and the attachment under Section 47 are quashed and set aside. The writ petition is allowed.

In view of our order above, the revision application which is pending before the Commissioner is rendered infructuous and stands disposed of.

The writ petition is allowed with the direction aforesaid.