

(2009) 07 JH CK 0124

In the Jharkhand High Court

Case No : Writ Petition (T) No. 54 of 2009

Techno Electric and Engineering Co. Ltd.

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 31-07-2009

Acts Referred:

Bihar Finance Act, 1981 — Section 14, 46, 47, 9
Bihar Sales Tax Act, 1947 — Section 14A
Bihar Sales Tax Rules, 1949 — Rule 39, 39(2)
Bihar Sales Tax Rules, 1959 — Rule 32, 32(1), 32(2)
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Article 137
Sales Tax Act, 1947 — Section 24(5), 3

Citation : (2009) 25 VST 645

Hon'ble Judges : M.Y. Eqbal, J;Jaya Roy, J

Bench : Division Bench

Advocate : Rahul Saboo, for the Appellant; R. Krishna, Senior Standing CounselI, for the Respondent

Judgement

M.Y. Eqbal, J.—By this writ petition, the petitioner has prayed for quashing the order as contained in letter dated 11.11.2008 issued by the Joint Commissioner Commercial Taxes, Hazaribagh Sub Division, whereby he has accorded sanction to the Commissioner, Commercial Taxes, Ramgarh Circle, Ramgarh for reviewing the assessment order of the petitioner for the years 2002-03, 2003-04 and 2004-05 u/s 47 of the Bihar Finance Act, 1981. The petitioner has also challenged the notices issued by the Assessing Commissioner, Commercial Taxes, Ramgarh Circle, Ramgarh for reviewing the assessment order of the petitioner for the years 2003-04 and 2004-05.

2. The facts of the case lie in a narrow compass:

The petitioner is a limited company registered u/s 14 of the Finance Act, 1981 in Hazaribagh circle and is engaged in the execution of work contracts, which includes erection, testing and commissioning of electrical equipment and other

civil contracts. The petitioner was awarded works contracts for erection, testing and commissioning including civil work at Ramgarh Substation. The petitioner said to have carried the entire work and filed returns and deposited total tax amount. According to the petitioner, the assessment order for the financial year 2002-03 was passed on 17.12.2004 and demand notice of excess payment was issued on 4.1.2005. Similarly, assessment order 2003-04 was passed on 7.3.2005 and notice of excess payment was issued on 1.4.2005. For the assessment year 2004-05, assessment order was passed on 30.11.2005 and notice of excess payment was issued on 30.11.2005. The petitioner accordingly applied on 27.6.2005 for refund of the excess amount of tax for the financial years 2002-03 and 2003-04. The petitioner also applied on 18.12.2005 and 15.5.2008 for refund of the excess amount of tax for the financial years 2004-05 and 2005-06 respectively. When the refund applications were not processed and order of refund of excess amount of tax was not made in favour of the petitioner, a writ petition was filed being W.P.T. No. 4858 of 2008 seeking direction for refund of the excess amount of taxes. In the meantime, according to the respondents, the Joint Commissioner Commercial Taxes by order dated 11.11.2008 accorded sanction for reviewing of the assessment order u/s 47 of the Finance Act, 1981 read with Rule 32 of the Bihar Sales Tax Rule for the aforementioned financial years. Consequently, notices were issued for reviewing of the assessment order by the authority on 12.11.2008. These notices are impugned in the instant writ petition.

3. Mr. Rahul Saboo, learned Counsel appearing for the petitioner, assailed the impugned orders and notices as being illegal, wholly without jurisdiction and are mala fide. According to the learned Counsel, no sanction can be accorded for review of the assessment order after 12 months from the date of the order of assessment. Learned Counsel referred Section 47 of the Finance Act (herein after referred as "the Act") and Rule 32 of the Bihar Sales Tax Rules (herein after referred as "Rules").

4. Mr. R. Krishna, learned Counsel appearing for the State, on the other hand, submitted that no limitation of 12 months is provided if the decision is taken by the Commissioner including the Joint Commissioner, Commercial Taxes according sanction for review of the assessment order. Learned Counsel put heavy reliance on Sub-rule (2) of Rule 32 of the said Rules.

5. The only question, therefore, that falls for consideration is as to whether the limitation of 12 months will apply in a case where review proceeding is initiated on the basis of sanction accorded by the Commissioner under the said Rules.

6. For better appreciation, Section 47 of the Act is quoted herein below:

47. Reviews. - Subject to such rules as may be made by the State Government under this part any authority appointed u/s 9 or the Tribunal may review any order passed by it, if such review is, in the opinion of the said authority or Tribunal, as the case may be, necessary on account of a mistake which is

apparent from the record:

Provided that no such review, if it has the effect of enhancing the tax or penalty or both, or of reducing a refund shall be made unless the said authority or the Tribunal, as the case may be, has given the dealer, or the person concerned a reasonable opportunity of being heard.

7. From bare perusal of the aforesaid provision, it is clear that the authority appointed u/s 9 of the Act or the Tribunal may review any order passed by it, if there appears mistake in the assessment order, which is apparent from the record.

8. Rule 32 of the Rules reads as under:

32. Review. - (1) When any authority appointed u/s 9 review u/s 47 any order passed under the Act is shall record reasons for doing so.

(2) Save with the previous sanction of the Commissioner or an authority specifically authorized by him in this behalf no authority appointed u/s 9, other than the Commissioner, shall review any such order except before the expiry of twelve months from the date of passing of the order which is sought to be reviewed.

(3) Save with the previous sanction of the Commissioner or an authority specifically authorized by him in this behalf, no authority appointed u/s 9, other than the Commissioner, shall review any order which has been passed by any of its predecessors in office.

9. Sub-rule (1) of Rule 32 aforesaid provides that when an authority exercises power of review u/s 47, he shall record reasons for doing so. Sub-rule (2) of Rule 32 consists of two parts. The first part confers power to the authority appointed u/s 9 to review any such order, but before the expiry of 12 months from the date of passing of the order, which is sought to be reviewed. The second part makes an exception whereby the Commissioner or any authority specifically authorized with the previous sanction of the Commissioner may review such order but in that case the limitation of 12 months will not apply.

10. A similar question, with regard to limitation, was raised before the Supreme Court in the case of Indian Copper Corporation Limited Vs. State of Bihar and Others, In that case, a similar provision under the old Bihar Sales Tax Act was considered. The fact of that case was that the assessee Indian Copper Corporation Ltd. (in short Corporation) was incorporated in England and carried on business and trade in India at Ghatsila in the district of Singhbhum in the State of Bihar. It was registered as a dealer under the Bihar Sales Tax Act, 1947. The Corporation used to deposit tax in advance with the Sales Tax Authority. In the year 1950-51 the Superintendent of Sales Tax assessed the tax at Rs. 5,88,833/-. The corporation appealed to the Deputy Commissioner, Sales Tax claiming exemption in respect of goods dispatched outside Bihar. The Deputy Commissioner remanded the case with the direction to re-examine the matter.

The Corporation then moved the Board of Revenue in Revision against the order of the Deputy Commissioner. The Board of Revenue let the remand stand but with a different direction. In this way the case was remanded to the Sales Tax Officer for passing an order afresh. After remand the Superintendent of Sales Tax passed order holding the Corporation entitled to a refund of certain amount. On the same day the authority issued a notice to the Corporation for forfeiture of the amount refundable to it u/s 14A of the Act of 1947. In the meantime the Corporation applied for refund. The Corporation also moved the Patna High Court for quashing the proceeding for forfeiture of the amount. The Patna High Court in terms of judgment dated 25.9.1956 quashed the proceeding. As the amount was not refunded the Corporation filed another application under Articles 226 and 227 of the Constitution of India seeking refund of the amount. Meanwhile the Commissioner of Commercial Taxes applied to the Superintendent of Sales Tax for review of the order of assessment dated 11.2.1956. The application was made on 11th August, 1957. The corporation raised objection that the officer has no power to review the order of 11th February, 1956 i.e. after 12 months from the date of the order. The Assistant Commissioner of Sales Tax overruled that objection. The Corporation then moved the High Court and after being unsuccessful moved to Supreme Court. One of the contentions raised before the Supreme Court was that review could only be made with the prior sanction of the Commissioner and that too within 12 months of making of the order.

11. Under the Old Sales Tax Act, 1947, the power of review was conferred u/s 24(5) of the Act, which reads:

24(5) Subject to such rules as may be prescribed, any order passed under this Act or the rules made thereunder by any person appointed u/s 3 may be reviewed by the person passing it or by his successor-in-office.

12. Rule 39 of the Old Bihar Sales Tax Rules, 1949 provides as under:

39. Review. - (1) When the Commissioner or any other officer reviews any order under Sub-section (5) of Section 24, he shall record his reasons in writing for doing so.

(2) Save with the previous sanction of the Commissioner an order not passed by the Commissioner shall not be reviewed more than twelve months after the passing of the order which is sought to be reviewed.

(3) No officer below the rank of Commissioner shall review any order which has been passed by any of his predecessors-in-office except with the previous sanction of the Commissioner.

13. The Supreme Court, interpreting the aforesaid provisions, have held as under:

The only question is whether the time limit under Sub-rule (2) of Rule 39 for review has expired and the contention is that this time marks out the commencement of the proceedings. In our opinion, Sub-rule (2) cannot be read in this way. It says that an order not passed by the Commissioner shall not be

reviewed more than 12 months after the passing of the order which is sought to be reviewed save with the previous sanction of the Commissioner. The emphasis is no doubt on the passage of time but the rule indicates that within the period specified the sanction of the Commissioner is not necessary. Even after the passage of time action can be taken but with the previous sanction of the Commissioner. This limit of time does not apply to orders passed by the Commissioner himself. A sanction is thus needed after the expiry of twelve months, but sanction is not necessary within that period. If proceedings are commenced within twelve months and also concluded within twelve months, there is no need for sanction. If they are commenced within twelve months but actual review takes place after twelve months, sanction must be obtained before reviewing the earlier order. It is thus obvious that this is not a limit of time for the commencement of the proceedings but to the making of the order for review. The Commissioner can review his own order without the limit of time and it is for the Commissioner, after the expiry of twelve months, to determine whether review should or should not take place in other cases. The free power is curtailed by the passage of a year in respect of not the initiation but of the making of the order of review. In the present case, as the Commissioner has himself moved for review, the requirements of Sub-rule (2) as also of Sub-rule (3) are fully satisfied and express consent is also available if the order is required to be reviewed.

14. Now the question that arises for consideration is as to whether if the limitation of twelve months as contemplated in Sub-rule (2) of Rule 39 does not apply in cases where review proceeding is initiated at the instance of Commissioner, Commercial Taxes according sanction after 12 months from the date of assessment order, then what should be the limitation within which such power is to be exercised by the Commissioner under the aforesaid rule. In other words, whether Sub-rule (2) of Rule 39 confers unrestricted and unlimited power to the Commissioner to accord sanction to the authority to initiate review proceeding.

15. A similar question with regard to revisional power of the Commissioner u/s 46 of the Bihar Finance Act was considered by a Division Bench of this Court in the case of Shivam Coke Industries and Rani Sati Coke Manufacturing Company Vs. State of Jharkhand and Others, the Court observed:

62. Suo Motu acts and power is to be exercised judicially i.e. ejusdem Generis. Therefore, the suo motu revisional power not to be arbitrary, fanciful and oppressive, it must be guided by meticulous analysis with legal tools and some time limit must exist. In absence of statutory time period for the exercise of the power, Article 137 of Limitation Act, 1963 will come into play and such suo motu revisional power be exercised within three years from the date of the order sought to be revised. The interpretation that a period of 90 days is prescribed to exercise power of revision if an application is made and no time limit is prescribed for taking action suo motu is in echo of what Mimamsakas pejoratively dismissed as "ardha Jarateeya Nyaya" (The argument that an egg can be partly

used for eating and partly for hatching). Its western counterpart is: "to have the cake and eat it too" as observed by Apex Court in the case of Union of India (UOI) and Another Vs. British India Corporation Ltd. and Others, .

63. This is the dictum of Law for fairness. If such power continues for indefinite period the scope of malafide, vengeance or vested interest is always there which can be eliminated by invoking Article 137 of Limitation Act. There must be some guidelines for exercising discretionary power to avoid discrimination. Since, in a fiscal law economic fabric is woven there should be a clear-cut provision to ensure reasonableness, fairness & justice. A socio-economic perspective must play upon the interpretative process. In order to ensure fair and just exercise of power there must be some reasonable time period within which such power is to be exercised. And the reasonable time is 3 years as prescribed under Article 137 of the Limitation Act as a residuary provision of Limitation Act, 1963.

16. Coming back to the instant case, as noticed above, the assessment order for the financial years 2002-03, 2003-04 and 2004-05 were passed on 17.12.2004, 7.3.2005 and 30.11.2005 respectively whereas the order according sanction by the Commissioner was passed on 11.11.2008 for initiation of review proceeding for all the financial years 2002-03, 2003-04 and 2004-05. Evidently, therefore, for the financial years 2002-03 and 2003-04 sanction was accorded after the expiry of three years. So far for the assessment year 2004-05 order according sanction was passed within three years.

17. Not only that for all the three financial years 2002-03, 2003-04 and 2004-05, notices of excess payment were served upon the assessee immediately after passing of the assessment order and in response to that, the petitioner-assessee submitted refund applications on 27.6.2005 for the financial year 2002-03 and 2003-04. Similar application for refund was submitted on 18.12.2005 for the financial year 2004-05. The respondents sat tight over the matter and did not pass order for refund of excess amount of tax to the petitioner. The petitioner was then compelled to file a writ petition being W.P.T. No. 4858 of 2008 in September, 2008 seeking a direction for refund of excess amount of tax paid by the petitioner. It was only after notice to the writ application was issued, the respondents before filing the counter affidavit obtained order of sanction on 11.11.2008 by the Commissioner for review of the assessment order of the aforementioned financial years. Prima facie, therefore, the action taken by the respondents are not only malafide, but suffers from biasness also.

18. After having considered the entire facts of the case and the law discussed herein above, in our considered opinion, the orders passed by the Commissioner for reviewing the assessment orders for the financial years 2002-03 and 2003-04 is barred by limitation and also mala fide and without jurisdiction. Hence, the impugned order of sanction and the notice issued for review of the assessment orders for the financial years 2002-03 and 2003-04 are quashed.

19. So far the assessment order for the financial year 2004-05 is concerned, it

appears that sanction was accorded by the Commissioner within three years from the date of assessment order and consequently review notice was issued to the assessee, we do not find any reason to interfere with the notices issued for review of the assessment order for the financial year 2004-05 which shall stand.

20. For the reasons aforesaid, this writ petition is allowed in part and the order of sanction accorded by the Commissioner and the notices for review of the assessment order for the financial years 2002-03 and 2003-04 are quashed. So far assessment order for the financial year 2004-05 is concerned, the writ petition is dismissed. Consequently, the petitioner shall appear before the Reviewing Authority and shall produce the documents required by the Authority who shall pass final order in accordance with law.