

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7436 of 2015

Unitech Wireless (Tamilnadu) Pvt. Limited (formerly known as Unitech Wireless (East) Pvt. Limited), a Company incorporated under the Companies Act, 1956 having its registered office at Basement 6, Community Centre, Saket, New Delhi-110017 and Circle office at NH-30, Patna-Fatuha Highway, Sabalpur (near Tedhiphul), P.O.+ P.S. Didarganj, Patna-800009 through its authorized signatory, Nihar Ranjan Mishra, son of Shri Niranjana Mishra, resident of Jaikriti Pearl Court, East Boring Canal Road, P.O. Boring Road, P.S. Budha Colony, District-Patna.

.... Petitioner/s

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, having its office at Vikas Bhawan, Bailey Road, Patna.
2. Deputy Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondent/s

with

Civil Writ Jurisdiction Case No.7534 of 2015

Unitech Wireless (Tamilnadu) Pvt. Limited (formerly known as Unitech Wireless (East) Pvt. Limited), a Company incorporated under the Companies Act, 1956 having its registered office at Basement 6, Community Centre, Saket, New Delhi-110017 and Circle office at NH-30, Patna-Fatuha Highway, Sabalpur (near Tedhiphul), P.O.+P.S. Didarganj, Patna-800009 through its authorized signatory, Nihar Ranjan Mishra, son of Shri Niranjana Mishra, resident of Jaikriti Pearl Court, East Boring Canal Road, P.O. Boring Road, P.S. Budha Colony, District-Patna.

.... Petitioner/s

Versus

1. State of Bihar through Commissioner of Commercial Taxes, having its office at Vikas Bhawan, Bailey Road, Patna.
2. Deputy Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondent/s

with

Civil Writ Jurisdiction Case No.7522 of 2015

Unitech Wireless (Tamilnadu) Pvt. Limited (formerly known as Unitech Wireless (East) Pvt. Limited), a Company incorporated under the Companies Act, 1956 having its registered office at Basement 6, Community Centre, Saket, New Delhi-110017 and Circle office at NH-30, Patna-Fatuha Highway, Sabalpur (near Tedhiphul), P.O.+P.S. Didarganj, Patna-800009 through its authorized signatory, Nihar Ranjan Mishra, son of Shri Niranjana Mishra, resident of Jaikriti Pearl Court, East Boring Canal

Road, P.O. Boring Road, P.S. Budha Colony, District-Patna.

.... Petitioner/s

Versus

1. State of Bihar through Commissioner of Commercial Taxes, having its office at Vikas Bhawan, Bailey Road, Patna.
2. Deputy Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondent/s

with

Civil Writ Jurisdiction Case No.7521 of 2015

Unitech Wireless (Tamilnadu) Pvt. Limited (formerly known as Unitech Wireless (East) Pvt. Limited), a Company incorporated under the Companies Act, 1956 having its registered office at Basement 6, Community Centre, Saket, New Delhi-110017 and Circle office at NH-30, Patna-Fatuha Highway, Sabalpur (near Tedhiphul), P.O.+P.S. Didarganj, Patna-800009 through its authorized signatory, Nihar Ranjan Mishra, son of Shri Niranjana Mishra, resident of Jaikriti Pearl Court, East Boring Canal Road, P.O. Boring Road, P.S. Budha Colony, District-Patna.

.... Petitioner/s

Versus

1. State of Bihar through Commissioner of Commercial Taxes, having its office at Vikas Bhawan, Bailey Road, Patna.
2. Deputy Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondent/s

Appearance :

(In CWJC No.7436 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mr. P.K. Mishra
Mrs. Manju Jha
For the Respondent/s : Mr. Lalit Kishore (Paag)
Mr. Vikash Kumar, A.C. to PAAG

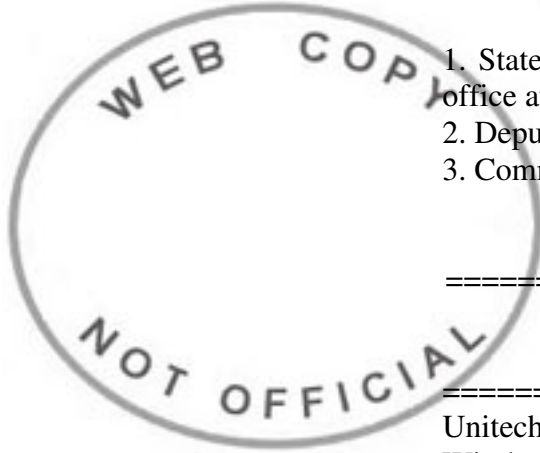
(In CWJC No.7534 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mr. P.K. Mishra
Mrs. Manju Jha
For the Respondent/s : Mr. Lalit Kishore, PAAG
Mr. Vikash Kumar, A.C. to PAAG

(In CWJC No.7522 of 2015)

For the Petitioner/s : Mr. D.V.Pathy
Mr. P.K. Mishra
Mrs. Manju Jha
For the Respondent/s : Mr. Lalit Kishore- PAAG
Mr. Vikash Kumar, A.C. to PAAG

(In CWJC No.7521 of 2015)



For the Petitioner/s : Mr. D.V.Pathy
Mr. P.K. Mishra
Mrs. Manju Jha

For the Respondent/s : Mr. Lalit Kishore- PAAG
Mr. Vikash Kumar, A.C. to PAAG

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH
ORAL ORDER
(Per: **HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA**)

6 11-08-2015

Heard learned counsel for the petitioner and learned

Principal Additional Advocate General for the State.

A common issue arises in all the four writ applications with regard to re-assessment under Section 31 of the Bihar Value Added Tax Act, 2005 for the periods 2009-10, 2011-12, 2012-2013 & 2013-2014 and they have been accordingly heard together and are being disposed of by this common order.

The petitioner is a registered dealer both under the Bihar VAT Act and the Bihar Tax on Entry of Goods into Local Areas for Consumption Use or Sale Therein Act, 1993.

It is not in dispute that the petitioner had filed its returns from time to time and paid taxes on the basis of the said returns. With respect to the period 2012-2013, an audit objection was made by the office of the Accountant General (Audit), Bihar on 3.12.2014 stating that the petitioner had paid admitted Entry Tax of Rs.65,99,050 only against its liability of Rs. 1,31,22,392.74 and



had thus short paid its Entry Tax to the extent of Rs.65,23,342.74 and further there was a concealment of its purchase turnover to the extent of Rs.3,47,44,360/- for which Entry Tax and penalty would come to a total Rs.1,11,181.94. On the basis of the said audit objection, notices were issued to the petitioner not only with respect to the period 2012-13, for which the audit objection was recorded but also with regard to other three periods, namely, 2009-10, 2011-12 and 2013-14. The petitioner filed its reply giving the details with regard to the year 2013-14 on 25.2.2015 and with regard to the other financial years it was stated that it had Centralized finance and accounts department and was working on the same to retrieve data and other related documents and accordingly prayed to be granted a month's time to collect and furnish the information for the said subject matter. Thereafter, the petitioner was granted time fixing the date of hearing on 2.3.2015 and again on 12.3.2015. Upon the failure of the petitioner to produce necessary documents and evidences, the Assessing Officer proceeded with the matter and by the impugned orders imposed tax and penalty upon the petitioner for all the four periods in question.

Learned counsel for the petitioner submits that the Assessing Authority has not at all considered the difficulties of the



petitioner in producing the evidences and materials when despite audit objection only for one year, the notices were issued for as many as four years going back to the year 2009-10 and it was not at all possible for the petitioner in the short period available to have produced all the necessary evidences which had to be retrieved from the computer system of the petitioner.

It is urged by learned counsel that the Assessing Officer completely forgot that he was not making a current assessment under Section 25 of the Act, rather he had reopened old assessments without any objection with regard to three of the periods and thus he ought to have given ample time to the petitioner to produce the necessary documents which has not been done by him.

It is also submitted by learned counsel for the petitioner that under Section 31 of the Act and imposing penalty there must be concealment, omission or failure to disclose full and correct particulars and there is nothing in the impugned orders to show that there was any concealment, omission or failure to disclose full and correct particulars on the part of the petitioner so far as returns were concerned.

It is, at this stage, pointed out by learned counsel for the petitioner that in the annual return forms of ET Form-05 there was



no column of inter-State sale or stock transfer as is to be found in the corresponding forms of Central Sales Tax and thus whatever could be submitted, the petitioner had filed in terms of the statutory forms provided by the Department and fully disclosed therein and further the petitioner had been able to fully explain the figures that had been shown in the Form ET-05.

Learned counsel also submits that in the audit objection, there was no allegation that any stock transfer of the petitioner was after use nor there was any material on the record of the Assessing Officer to have raised any such issue and yet the onus was thrown upon the petitioner to show that the stock transfers had not been made after use by making wrong reliance upon the third proviso to sub-section (1) of Section 3 of the Bihar Entry Tax Act. It is submitted that all that the petitioner is required to show is that the goods that had been imported into a local area were not used for the purpose of consumption, use or sale, rather they were sent in the course of the inter-State transfer or stock transfer to the Branch of the petitioner itself. It is submitted that there is no requirement under the Entry Tax Act to further show that before such transfer was made there had not been any use of the goods. If at all any such plea is raised by the revenue then there must be some material in possession of the Assessing Officer to raise such plea

and only when such material is put to the assessee it would be for the assessee to meet the same.

It is further submitted that the proceedings having been started on an audit objection under Section 33 of the Act and further the remaining three periods under Section 31 by relying on the said audit objection, it was not open to the Assessing Officer to have initiated the proceedings without recording his satisfaction on the basis of the facts and materials.

In support of his case, learned counsel for the petitioner relies upon a decision of the Supreme Court in the case of Income-Tax Officer, I Ward, Distt. VI, Calcutta and others vs. Lukhmani Mewal Das: 103 I.T.R. 437, the relevant paragraphs at page Nos.445 and 448 of which are quoted below:-

“The grounds or reasons which lead to the formation of the belief contemplated by section 147 (a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate



or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income-tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression “reason to believe” does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law. (See observations of this court in the cases of Calcutta Discount Co. Ltd. v. Income-tax Officer and S. Narayanappa v. Commissioner of Income-tax, while dealing with the corresponding provisions of the Indian Income-tax Act, 1922).



As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words “definite information” which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the

information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.”

On the basis of the aforesaid provisions, it is submitted by learned counsel for the petitioner that there was no lack of full and true disclosure by the petitioner and the notice itself under Section 31 of the Act issued to the petitioner relies upon the materials already disclosed by the petitioner in its return and thus there was no question of imposing penalty under sub-section (2) of Section 31 of the Bihar VAT Act read with Section 8 of the Entry Tax Act.

It is also submitted by learned counsel for the petitioner that all the goods of the petitioner were not re-usable goods except for a small amount of Rs.14,400. All were new materials which were sent out of the State.

Learned Principal Additional Advocate General, on the other hand, submits that the initiation of proceedings was on the basis of audit objection of the CAG with regard to the year 2012-13 and the matter would be squarely covered by the provisions of Section 33 of the VAT Act which provides that 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 raised in the manner prescribed.

It is further submitted that on the basis of the grounds and reasons mentioned in the audit objection which were found proper by the Department on considering the returns for the three other periods, it was found that the matter was required to be re-assessed and accordingly proceedings under Section 31 of the Act were initiated.

It is contended by learned Principal Additional Advocate General that Section 31 (1) of the Act contemplates two types of situation; one simpliciter where during any period any sale or purchase of goods liable to tax under this Act or the said Act, for any reason, has been under assessed or has escaped assessment, or has been assessed to tax at a lower rate, or any deduction therefrom has been made incorrectly, apart from the other situation being one of concealment, omission or failure on the part of the dealer to disclose full and correct particulars of such sale or purchase or input tax credit. It is submitted that in the two situations different considerations would arise and wherever a case of concealment, omission or failure to disclose full and correct particulars is found, in that case a penalty equal to three times of tax may be imposed under sub-section (2) of Section 31 of the

Act.

It is urged by learned counsel that the above interpretation of Section 31 of the Act is clear in the provisions of sub-section (1) which clearly mentions the said two situations, particularly when it is read with sub-section (2) of Section 31 of the Act where if the dealer has concealed, omitted or failed to disclose full and correct particulars of sale or purchase, it is liable to penalty.

It is also urged by learned Principal Additional Advocate General that the Statute should be read as a whole and no part should be considered as superfluous.

The further submission on behalf of the respondents is that under the third proviso to Section 3 (1) of the Entry Tax, the burden is upon the importer to prove that the imported goods were imported not for the purpose of consumption, use or sale but for purposes other than the same and thus upon failure to prove the same, the Assessing Officer has rightly held the same against the petitioner.

Learned counsel also submits that twice the petitioner had prayed for time but did not produce relevant documents and materials before the Assessing Officer and thus, the impugned orders should not be held to be bad on the said ground.



It is also submitted by learned Principal Additional Advocate General that the intention for non-consumption or use of the goods in question should be there at the time of import of goods itself. Mere subsequent stock transfer of the goods in question cannot be a good ground for not paying Entry Tax on the goods imported.

We have considered the submissions of learned counsels for the parties.

On a consideration of the provisions of Section 31 of the Bihar VAT Act, we find that the same are broadly on the same lines as the provisions with regard to escaped assessment which have been dealt with by the Apex Court in the case of Likhmani Mewal Das (supra) under Section 147 of the Income Tax Act in which, as it then stood, there was provision for assessment or reassessment of Income-tax of escaped income both on the failure on the part of the assessee to make a return or to disclose full and correct particulars and material facts necessary for his assessment, as also in the case where there has been no omission or failure on the part of the assessee but the Income-tax Officer has information in his possession. Although the words used under Section 31 of the Bihar VAT Act are not the same, but the purport of Section 31 of the Act appears to be broadly on the same lines as that under



Section 147 of the Act, as it then stood. The matter before the Apex Court was one where notices had been issued under Section 147 (a) of the Income Tax Act which led to the observations as have been made by the Apex Court for the same. The said observations would clearly apply to the present matter also and it would be incumbent upon the Assessing Officer to come to a conclusion that there has been concealment, omission or failure to disclose full and correct particulars of sale or purchase or input tax credit on the part of the dealer.

Again considering the submissions of learned counsel for the petitioner on the basis of Form ET-05, if the Form itself does not provide for any particular information to be given therein then failure of the petitioner to provide the information because of the absence of any column in the statutory form itself cannot be considered to be a concealment, omission or failure to disclose correct and full particulars and in case proceedings are initiated under section 31 of the Act then all that the assessee would be required to show is to justify the figures mentioned in the relevant columns of the statutory forms on the basis of his books of accounts and other materials in the possession of the dealer.

It is an established principle that in the course of making re-assessment of tax on account of escaped turnover or



some such reason, it is open to the Officer to go beyond the notice issued so as to recover any tax which is found to be clearly due on the basis of the materials on the record but the same does not give any right to the Assessing Officer to raise issues as though he was conducting a fishing or roving enquiry in the matter. There was nothing in the audit objection with regard to the goods having been sent out of the State after use nor anything has been placed before us in the pleadings of the respondents to show that there was any material before the Assessing Officer to show that the goods had been transferred out of the State after use within the State.

In the said circumstances, in the proceedings under Section 31 of the Act, it was not open to the Assessing Officer to have proceeded in the manner as if he was making an initial assessment under Section 25 of the Act.

We, however, are of the view that there was no inherent lack of jurisdiction in the Assessing Officer to have proceeded in the matter not only with regard to the year 2012-13, for which the audit objection had been made but also for the other years if the reasons given in the audit objection were applicable to them also and thus initiation of proceedings under Section 31 of the Act for the other years cannot be held to be without jurisdiction. However,



having initiated the said proceedings and proceeded to impose penalty, as per the decision of the Apex Court in the case of Lukhmani Mewal Das (supra) he has to make assessment on the basis of the materials on the record and in case any penalty was to be levied it could only be on the basis of concealment, omission or failure to disclose full and correct particulars as provided under Section 31 (1) of the Act and not merely on account of something being discovered in the returns and other materials already filed before the Department.

We are also of the view that where reassessment for previous periods extending up to the period 2009-10 has been re-opened, considering that the facts and figures were available on the computer, they may not be easily accessible by the Branch Office and, moreover, other evidences may also have to be searched. If the petitioner had prayed for time for producing the same it ought to have been granted to the petitioner. Even if it is assumed that for the period 2009-10, there may have been pressure on the Assessing Officer with regard to limitation provided in the Act but for the same, it is not the petitioner who can be blamed, as it is the Department which is responsible for acting after such a long period of time.

We are also unable to persuade ourselves to accept the



contention of learned PAAG that the intention not to consume, sell or use must be there at the time of import of the goods. In the normal course of running of a business carried over a large area in different States or even different local areas, what is relevant is not any intention which would be difficult to fathom but the actual course of conduct of the party. If there has been no actual consumption, sale or use within the local area in the facts like the present matter, than there can be no levy of entry tax on such act of import of goods.

Thus, in the light of the aforesaid discussions, all the writ applications are allowed and the impugned orders are quashed. The matters are, however, remanded to the Assessing Officer to decide the same afresh in accordance with law and the principles laid down and observations made in this order.

It is made clear that no further notice of the proceedings shall be required to be issued and the petitioner shall appear before the Assessing Officer on 07.09.2015 at 11 A.M. along with all the necessary documents and evidences. It is further made clear that if exercise of power under Section 12 of the VAT Act is required to be made by the assessing officer in view of the inability of the petitioner to get the evidences from the earlier vendors of the petitioner, who may not be inclined to co-operate with the

petitioner on their own, then on such prayer being made,
appropriate orders would be passed by the Assessing Authority.



V.P.Sinha/-

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(Ramesh Kumar Datta, J)

(Sudhir Singh, J)