IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10819 of 2016

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East North Interconnection Company Ltd., a Company incorporated under the Companies Act 1956 having its registered office at F-1, Mira Corporate Suiet, Mathura Road, Ishwar Nagar, P.O.+P.S. New Friends Colony, New Delhi- 110065 and Branch Office at Chitragupta Nagar (Near Budha Dental College), P.O.+P.S. Kankarbagh, District- Patna through its Assistant Manager (Taxation), Rajeev Kumar Bharti, Son of Sri S.N. Roy, resident of B-68 (2nd Floor), Uttam Nagar, P.O.+P.S.- Uttam Nagar, New Delhi- 110059.

.... Petitioner/s

Versus

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

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 11064 of 2016

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East North Interconnection Company Ltd., a Company incorporated under the Companies Act 1956 having its registered office at F-1, Mira Corporate Suiet, Mathura Road, Ishwar Nagar, P.O.+P.S. New Friends Colony, New Delhi- 110065 and Branch Office at Chitragupta Nagar (Near Budha Dental College), P.O.+P.S. Kankarbagh, District- Patna through its Assistant Manager (Taxation), Rajeev Kumar Bharti, Son of Sri S.N. Roy, resident of B-68 (2nd Floor), Uttam Nagar, P.O.+P.S.- Uttam Nagar, New Delhi- 110059.

.... Petitioner/s

Versus

3. State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
4. Asstt. Commissioner of Commercial Taxes, Patliputra Circle, Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 11362 of 2016

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East North Interconnection Company Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at F-1, Mira Corporate Suiet, Mathura Road, Ishwar Nagar, P.O.+P.S.- New Friends Colony, New Delhi- 110065 and Branch Office at Chitragupta Nagar (Near Budha Dental College), P.O.+P.S.- Kankarbagh, District- Patna through its Assistant Manager (Taxation), Rajeev Kumar Bharti, Son of S.N. Roy, resident of B-68 (2nd Floor), Uttam Nagar, P.O.+P.S.- Uttam Nagar, New Delhi- 110059.

.... Petitioner/s

Versus

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

.... Respondent/s

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Appearance :
(In all the cases)

For the Petitioner	:	Mr. D.V. Pathy, Advocate Mrs. Manju Jha, Advocate
For the Respondents	:	Mr. Vikash Kumar, A.C. to P.A.A.G.

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

C. A. V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)

Date: 27-07-2016

This order shall dispose of aforesaid three writ petitions filed by the same Assessee.

2. CWJC No.10819 of 2016 is directed against an order passed by the Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna on 11th of May, 2016 under Section 31 of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the Act') imposing tax Rs.13,72,05,023.54, interest Rs.10,05,02,679.59 and penalty Rs.41,16,15,070.62 for the assessment year 2011-12.

3. CWJC No.11064 of 2016 is directed against an order passed by the Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna on 30th of March, 2016 under Section 31 of the Act imposing tax Rs.4,76,87,260.10, interest Rs.4,24,80,118.94 and penalty Rs.14,30,61,780.30 for the assessment year 2010-11.

4. In CWJC No.11362 of 2016, the challenge is to an order passed under Section 8 of the Bihar Tax on Entry of Goods into Local Areas for Consumption Use or Sale Therein Act, 1993 on 30th of

March, 2016 imposing entry tax Rs.2,77,45,314.96 for the assessment year 2011-12.

5. Learned counsel for the State at the outset raised a preliminary objection that the orders of assessment are appealable orders where the questions of law and fact can be raised and adjudicated upon, therefore, the writ petitions filed against the orders of assessment should not be entertained.

6. We have primarily heard learned counsel for the parties on such preliminary objection.

7. Learned counsel for the petitioner argued that the proceedings under Section 31 of the Act can be initiated only if there is credible material that sale and purchases of goods liable to tax has been under assessed or has escaped assessment, but since there is no such satisfaction recorded by the Assessing Officer, therefore, the proceedings initiated under Section 31 of the Act are not sustainable.

8. It is contended that the basis of initiation of proceedings is an audit objection and such audit objection cannot form basis of initiation of proceedings for re-assessment. He refers to four decisions of the Supreme Court in the case of <u>Income Tax Officer, Calcutta and Ors. Vs. Lakhmani Mewal Das, (1976) 3 SCC 757; Moriroku UT India (P) Ltd. Vs. State of U.P. and Ors. (2008) 4 SCC 548; Calcutta Discount Company Limited Versus Income Tax Officer, Companies District, I and Anr., AIR 1961 SC 372; M/s Indian &</u>

Eastern Newspaper Society, New Delhi; (1979) 4 SCC 248; and also a Division Bench judgment dated 11.08.2015 passed in CWJC No.7436 of 2015 and other connected matters (Unitech Wireless (Tamilnandu) Pvt. Limited Vs. The State of Bihar & Ors.)

9. Learned counsel for the petitioner further submitted that the order of assessment has been framed by the Assessing Authority without giving sufficient opportunity to the petitioner to produce evidence in respect of nature of transaction entered upon by the petitioner inasmuch as the petitioner has paid tax on the goods brought within the State, but in respect of goods consumed within the State, the petitioner has given contract to Bajaj Electricals Limited for erection of transmission lines and such transmissions lines are owned, operated and maintained by the petitioner, therefore, there is no transfer of property. The tax deposited by the petitioner which is available on the Web portal of the State is in respect of statutory deductions carried out on the work contracts given to Bajaj Electricals Limited and that such amount cannot be taken into consideration as such amount has been made basis of raising a huge demand against the petitioner.

10. Learned counsel for the petitioner further argued that penalty has been imposed in exercise of the powers conferred under sub-section (2)(b) of Section 31 of the Act, but such penalty cannot be imposed unless the Assessee is given reasonable opportunity of being heard. The petitioner was not given any show cause notice of

imposition of penalty, therefore, imposition of penalty contravenes the statutory provisions.

11. On the other hand, learned counsel for the State pointed out that the judgments of the Supreme Court referred to by the learned counsel for the petitioner are in respect of Income-tax Act and that the provisions of the Income-tax Act are different than the provisions of the Act in question. Section 31 contemplates if the prescribed authority' is satisfied as against expression, "for reasons to believe" used in the Income-tax Act in the judgments referred to by the petitioner. It is, thus, contended that the satisfaction contemplated by Section 31 of the Act is wide which includes subjective satisfaction as against reasons to believe which are primarily based upon objective criteria. Therefore, the judgments referred to by the petitioner are not applicable to the facts of the present cases.

12. It is also argued that in the impugned order it is mentioned that the notice was served upon the petitioner and, in fact, on one day, its counsel appeared, but has not produced any evidence as is sought to be raised in the present writ applications.

13. It is contended that the evidence of the petitioner is a question of fact which should not be examined by this Court in exercise of writ jurisdiction which should appropriately be raised and decided by the authorities under the Act.

14. Before considering the arguments raised by the

learned counsel for the parties, Section 31 of the Act needs to be extracted. It reads as under:

> "31. Assessment or Re-assessment of Tax of escaped turnover.- (1) If the prescribed authority is satisfied, either on the basis of audit conducted under sub-section (3) of section 26 or otherwise, that reasonable grounds exist to believe that, in respect of any assessment under this Act or under the Bihar Finance Act, 1981, (Bihar 5 of 1981) as it stood before its repeal by section 94, during any period, any sale or purchases 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 there from has been wrongly made, or an input tax credit has incorrectly been claimed; the prescribed authority shall, in such manner as may be prescribed and after serving on the dealer a notice in the form and in the manner prescribed, proceed to assess or re-assess, as the case may be, the tax payable by such dealer within four years from the expiry of the year during which the original order of assessment or re-assessment was passed, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice under this sub-section was a notice under section 27:
>
> Provided that the amount of tax shall be assessed or re-assessed after allowing such deductions as were allowable during the said period and at rates at which it would have been assessed had the turnover not escaped assessment.
>
> (2) (a) The prescribed authority shall, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, direct that the dealer shall, besides the amount of interest payable under sub-section (10) of section 24, pay by way of penalty a sum equal to three times the amount of tax which is or may be assessed on the turnover of sale or purchase which escaped assessment.
>
> (b) the penalty imposed under clause (a) shall be in addition to the amount of tax, which is or may be assessed on the turnover of

sale or purchase which escaped assessment.

(c) No order shall be passed under this sub-section without giving the dealer a reasonable opportunity of being heard.

(3) Any assessment or re-assessment made and any penalty imposed under this section shall be without prejudice to any action, which is or may be taken under section 81."

15. The Division Bench of this Court in Unitech Wireless (Tamilnadu) Pvt. Limited's case (supra) has held that there was no inherent lack of jurisdiction in the Assessing Authority to have proceeded in the matter for which audit objection has been made, but also for the other years if the reasons given in the audit objections were applicable to them. The Court found that the provisions of Section 31 of the Act are broadly on the same lines as provisions with regard to escaped assessment under the Income Tax Laws. The Supreme Court judgments referred to by the petitioner pertains to Income-tax Act and cannot be examined to the provisions of the Act with full force. But we need not examine such issue at this stage.

16. The argument of learned counsel for the petitioner is based upon assertions which were not raised before the Assessing Officer. The petitioner has not taken stand before the Assessing Officer that the tax deposited by it as shown in the Web Portal of the Tax Department is in respect of goods entrusted to Bajaj Electricals Limited in execution of the works contract for and on behalf of the petitioner. It is not the case of the petitioner before the Assessing Officer that there was no transfer of property in the goods entrusted to Bajaj Electricals

Limited. In the absence of such stand before the Assessing Officer, the petitioner cannot be permitted to raise such questions of fact in a writ petition when such questions of fact can be raised by the petitioner in an appeal against the order of assessment.

17. However, it appears that no notice was served upon the petitioner before the imposition of penalty; therefore, the penalty imposed may not be sustainable. But such fact can be raised in an appeal to be availed by the petitioner. We find that satisfaction has been recorded by the Assessing Officer that there is concealment of income. Whether such finding is correct or not can again be raised by the petitioner in an appeal. Therefore, we do not wish to examine the writ petitions on merits. The petitioner is relegated to the remedy of appeal provided under the Statute.

18. Consequently, the writ petitions are dismissed.

(Hemant Gupta, J.)

Ahsanuddin Amanullah, J. I agree.

(Ahsanuddin Amanullah, J.)

Sunil

AFR/NAFR	
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