IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2540 of 2019

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M/s. ACC Limited a Company incorporated under the provisions of the Indian Companies Act, 1913, having its office at Samridhi Complex, S.P. Verma Road, P.S. Gandhi Maidan, District- Patna through its Deputy General Manager (Finance) Sri Jitendra Sharma, Male, age about 40 years Son of Sri Mohan Lal Sharma, Resident of R.P.S. More, P.O. and P.S. Danapur and District- Patna

... ... Petitioner/s

Versus

1. The State of Bihar through the Commissioner State Taxes-cum-Principal Secretary, Commercial Taxes Department, Bihar having its office at Vikash Bhawan, Bailey Road, Patna
2. The Assistant Commissioner State Taxes, Special Circle, Patna

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr.Ramesh Kumar Agrawal, Advocate

For the Respondent/s : Mr.Vikash Kumar, SC 11

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE PARTHA SARTHY)

Date : 18-11-2019

The petitioner has filed the instant application praying for quashing the ex parte order of assessment dated 12.01.2019 passed by the Assistant Commissioner State Tax, Special Circle, Patna under section 8(2) of the Bihar Tax on Entry of Goods in to Local Areas for Consumption, use or sale Therein Act, 1993 (hereinafter referred to as 'the BTEG Act, 1993) read with section 39(2) of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the BVAT Act') for the period 2015-2016 by which a sum of Rs. 13,32,32,322/- has been worked out as the dues payable by the petitioner under the head of entry tax and together with the interest on the said amount to the tune of Rs. 6,79,48,484/- the petitioner has been directed to make payment of a total sum of Rs. 20,11,80,806/- for the period 2015-16 as entry tax. The petitioner further prayed to restrain the respondents from taking steps for realization of the aforesaid amount of tax and interest mentioned in the impugned order of assessment and demand notice.

It is the case of the petitioner that the petitioner is a company engaged in the business of sale of cement having sale units across the country, one of which is located in S.P. Verma Road in the town of Patna. For the period 2010-11, the petitioner paid Rs. 14,18,09,180/- on 27.03.2014 and Rs. 1,88,56,180 on 27.02.2014 as entry tax. By order contained in memo no. 391 dated 31.03.2015 issued under the signature of the Joint Commissioner Commercial Taxes, Patna, order of refund of tax by adjustment under the Bihar Value Added Tax Ordinance, 2005 was issued with respect to the petitioner. It was ordered that for the year 2010-11 a refund of Rs.15,04,59,365/- was due under Rule 43/Rule 44 of the Bihar Value Added Tax Rules, 2005 and that the said refund was to be adjusted towards entry tax dues for the period 2014-15. It is the case of the petitioner that he utilized the said refund by taking adjustment against liability of entry tax for the months of April, May and June of 2015 and these facts were duly shown in Form ET-03 for the said months, which has been brought on record as Annexure 2 series to the application.

During pendency of the application a supplementary affidavit has been filed on behalf of the petitioner bringing on record an assessment order dated 22.06.2019 (Annexure 12 to the application) issued under the signature of the Assessing Officer on completion of the assessment proceeding for the period 2014-15 (entry tax). From perusal of the said order it would transpire that the petitioner was given the credit of a sum of Rs. 15,04,59,365/- by 'refund adjustment note'. Taking into consideration the payment of Rs. 93,28,36,157/- as against the entry tax dues of Rs. 77,95,15,176/-, a net sum of Rs. 15,33,20,981/- was found refundable to the petitioner and it was stated/ordered that the said amount was being forwarded for adjustment against the entry tax dues for the next year i.e. 2015-16.

It is the case of the petitioner that for the period 2015-16 the entry tax payable on the import of cement as per the annual return as well as the impugned assessment order was to the tune of Rs. 90,77,46,204.91. The petitioner had made actual payment for the said period to the tune of Rs. 77,45,12,940/-. Together with the refund of Rs. 15,04,59,365/- as mentioned in the order dated 31.03.2015 or the refund to the tune of Rs. 15,33,20,981/- as mentioned in the order dated 22.06.2019, a sum of more than Rs. 1.72 crores (approx) would be refundable to the petitioner after accounting of the entry tax dues and payments for the period 2015-16. It has been submitted by learned counsel for the petitioner that instead of taking the above facts into consideration and coming out with an order that refund is due for the period 2015-16 (entry tax) to the petitioner, the respondent authorities came out with an order dated 12.01.2019 (Annexure-6 to the application) stating that against the entry tax dues to the tune of Rs. 90,77,46,204.91 the petitioner had paid only a sum of Rs. 77,45,13,882/-. It has been ordered that thus he was liable to pay a further sum of Rs. 13,32,32,332/- and together with the interest at the rate 1.5 % to the tune of Rs. 6,79,48,484/-, the entry tax for the period 2015-16 payable by the petitioner was Rs. 20,11,80,806/-. Subsequent to the order of assessment dated 12.01.2019 (Annexure-6 to the writ application) the respondent authorities have also issued demand notice dated 12.01.2019 (Annexure-4 to the writ application) and reminder dated 28.01.2019 (Annexure-7 to the writ application). It is for the quashing of the order of assessment as contained in Annexure-6, the demand notice as contained in Annexure-4 and the reminder as contained in Annexure - 7 that the petitioners have preferred the instant application.

A counter affidavit and a supplementary counter affidavit has been filed on behalf of the Assistant Commissioner, State Taxes, Special Circle, Patna i.e. the respondent no. 2 herein. It has been submitted on behalf of the respondent no. 2 that the petitioner who was involved in the import of scheduled goods under the BTEG Act, 1993 have admitted the entry tax liability upon the import of such goods. They being engaged in business of such goods within the State of Bihar, have also accepted the VAT liability under the BVAT Act, 2005. In the annual return filed in Form ET – 05 by the petitioner for the period from 01.04.2015 to 31.03.2016, the total amount of entry tax admitted as payable was Rs. 90,77,46,204.91. Further contention on behalf of the respondent no. 1 is that although the tax deposited is Rs. 77,45,13,882.00/- and is short by Rs. 13,32,32,322/-, amount of entry tax paid has wrongly been shown to be Rs. 92,49,72,305/-. Thus, a notice under section 39(2) (ii) of the BVAT Act, 2005 read with section 8 of the BTEG Act, 1993 was issued to the petitioner. The balance tax payable together with interest computed as per the provisions of section 24 (10) of the BVAT Act, 2005 read with section 8 of the BTEG Act, 1993 came to a total of Rs. 20,11,80,806/-. It has further been submitted that on the petitioner not responding to the notice issued and on having failed to produce any proof of payment or any stay order of a competent Court, a demand notice under section 47 (i) of the BVAT Act, 2005 read with section 8 of the BTEG Act, 1993 was issued to the bankers of the petitioner for payment of the dues amount of the petitioner under special mode of recovery. In compliance of the notice, the full amount of Rs. 20,11,80,806/- was paid by the bankers of the petitioner. On realization of the amount of demand, revocation of attachment of the bank account of the petitioner was issued by the office of the respondent no. 2. It has further been submitted on behalf of the respondent no. 2 that so far as the payment of Rs. 15,04,59,365/- made by the petitioner for the period 2010-11 is concerned, the same has already been refunded by a refund order for adjustment of the said amount in the financial year 2014-15.

Further case of the respondent no. 2 is that the petitioner has claimed refund by adjustment of excess amount of Rs. 15,05,50,986/- of the period 2010-11 against the liability for the period 2014-15. Acting on the refund application dated 24.03.2015, the refund payment order as contained in Annexure F to the counter affidavit was passed on 31.03.2015 and the same was credited to the account of the petitioner vide challan no. 297 dated 31.03.2015. The relevant part of Register VIII and the copy of the refund payment order dated 31.03.2015 were once again brought on record as Annexures-J and K to the supplementary counter affidavit. It has finally been prayed that the issue raised by the petitioner not being tenable, is fit to be rejected.

Heard Mr. Ramesh Kumar Agrawal, learned counsel for the petitioner and Mr. Vikash Kumar, learned Standing Counsel no. 11 for the respondents.

It has been contended by learned counsel for the petitioner that from order dated 31.03.2015 relating to the period 2010-11 issued under the BVAT Act, 2005 it would transpire that a sum of Rs. 15,04,59,365/- was refundable and the said refund was to be adjusted towards 2014-15 entry tax. It has further been contended that for the return of 2015-16 the last date would be December, 2016 and the due date would be 31.12.2017. The authority concerned had no jurisdiction of scrutiny on 12.01.2019 as has been done, as contained in

Annexure-6 to the application and the same is wrong, illegal and without jurisdiction. As a consequence, the demand notice dated 28.01.2019 as contained in Annexure-7 to the application is also bad . Further contention on behalf of the petitioner is that section 39 deals with payment and recovery of tax. Section 39(2)(ii) provides for payment of tax by the dealer according to the return filed by the dealer where full payment of such amount has not been made. It has been contended that from perusal of Form ET-05 for the relevant period 2016-17 the amount of tax paid as per the dealer being more than amount payable, no order could have been passed under section 39(2) (ii), as impugned herein.

Thus, as would be evident from Form ET-05 filed by the petitioner for the period from 01.04.2015 to 31.03.2016 which has been brought on record as Annexure-A to the counter affidavit on behalf of the respondent no. 2, from perusal of Part C thereof it would be evident that as against total amount of entry tax admitted by the petitioner as payable which is to the tune of Rs. 90,77,46,204.91 the amount of entry tax paid according to the petitioner was much more i.e. to the tune of Rs. 92,41,72,305/-. Thus, it was submitted that for the relevant period i.e. 2015-16 the amount of entry tax paid by the petitioner being much higher than total amount of entry tax admitted as payable, the amount recovered by the respondents from the petitioner's bankers is illegal, the assessment order is fit to be quashed and the authorities be directed to refund the amount.

It has further been contended by learned counsel for the petitioner that the respondent authorities have issued assessment order dated 22.06.2019 for the period 2014-15 (ET) under the signature of the Deputy Commissioner, State Taxes, Special Circle, Patna from perusal of which it would transpire that after adjustment of the sum of Rs. 15,04,59,365/- which was found refundable for the period 2010-11, a net sum of Rs. 15,33,20,981/- had been found refundable for the period 2014-15 and this amount would be refunded by way of adjustment for the next year/period i.e. 2015-16. Thus, it has been submitted by learned counsel for the petitioner that even as per the order of the respondent authorities a sum of Rs. 15.33 crores (approx) was found refundable for the period 2014-15 and as per the said order dated 22.06.2019 (Annexure 12) itself, the same was to be refunded by adjustment for the period 2015-16. Thus, it has been submitted that the impugned order of assessment dated 12.01.2019 (Annexure 6) is illegal and unsustainable and as such the said assessment order as also the demand notices dated 12.01.2019 and 28.01.2019 as contained in Annexures - 4 and 7 to the application is also fit to be quashed.

It is the contention of the learned counsel for the respondents that the order as contained in Annexure-1 to the application bearing memo no. 391 dated 31.03.2015 related to the period 2010-11 and the refund reflected therein is to be adjusted towards 2014-15 (ET). It has been submitted that the matter in issue related to three financial years i.e. 2010-11, 2014-15 and 2015-16. For the period 2010-11 a sum of Rs. 15.04 crores (approx) has been found to be refundable to the petitioner. It has been submitted that an application for refund under section 68 of the Bihar VAT Act, 2005 has to be made in Form A-(VIII) and in the said form a categorical statement has to be made as to the manner in which the refund is preferred and that if the refund is preferred by way of adjustment, the period against which the adjustment is prayed for, has to be mentioned.

Learned counsel referring to Annexure-2 to the supplementary counter affidavit on behalf of the respondent no. 2 stated that from perusal of a copy of Form A (VIII) submitted by the petitioner it would transpire that with respect to the refund for the period 2010-11 the petitioner had made an application praying for refund by adjustment as against the entry tax for the period 2014-15. This application is dated 24.03.2015. It has been submitted that against the application dated 24.03.2015 in Form A (VIII), the refundable amount of Rs. 15,04,59,365/- has been credited to the petitioner’s account on 31.03.2015 vide Challan no. 297 dated 31.03.2015. It has further been submitted that Form ET-05 for the period 2014-15 was filed on 13.01.2016 (Annexure-8 to the petitioner’s reply to the counter affidavit of respondent no. 2).

It has finally been submitted that the contention of the petitioner that he had adjusted the amount of Rs. 15.04 crores (approx) refundable for the period 2010-11 from the entry tax payable for the months of April, May and June, 2015 (as contained in Annexure-2 series to the application) is fit to be rejected for the reason that the said refund had been adjusted as per the petitioner’s application towards 2014-15 (ET) and the petitioner could not claim benefit of the said amount for the second time by adjustment.

Having heard learned counsel for the parties and having gone through the records of the case, it transpires that the issue in the present application relates to entry tax for the period 2010-11, 2014-15 and 2015-16. The order under challenge is the order of assessment dated 12.01.2019 (Annexure-6 to the application) whereby for the period 2015-16, entry tax to the tune of Rs. 13,32,32,322/- together with interest to the tune of Rs. 6,79,48,484/- being a total demand of Rs. 20,11,80,806/- has been raised against the petitioner. The consequential demand notices have also been challenged. With respect to the order of refund of tax for the period 2010-11, there appears to be no dispute in so far as a sum of Rs. 15,04,59,365/- has been found refundable for the said period to the petitioner. It is also not disputed that the refund was to be adjusted towards 2014-15 (ET) dues. The said order dated 31.03.2015 with respect to the period 2010-11 is contained in Annexure-1 to the application.

As per the above mentioned order dated 31.03.2015, as also the contents of the counter affidavit read with supplementary counter affidavit filed on behalf of the respondent no. 2, the total amount of refund to the tune of Rs. 15,04,59,365/- of the petitioner for the period 2010-11 was credited to the account of the petitioner vide challan no. 297 dated 31.03.2015 and the said amount is also reflected in Register VIII, relevant part of which has been brought on record as Annexure-H to the supplementary counter affidavit of respondent no. 2.

The respondent authorities, thereafter instead of proceeding to pass assessment order for the period 2014-15 (ET), passed the assessment order for the period 2015-16 (ET) first. While the assessment order for the period 2014-15 (ET) has been passed on 22.06.2019, an order under section 39 (2) of the BVAT Act for the period 2015-16 has been passed on 12.01.2019 (Annexure-6) itself taking into consideration the amount of entry tax accepted by the petitioner in their returns and the amount of entry tax actually paid by the petitioner for the relevant period.

As per order under section 39(2) of the BVAT Act, 2005 for the period 2015-16, while the petitioner has been found liable to pay further a sum of Rs. 13.32 crores (approx), in the assessment order dated 22.06.2019 for the period 2014-15. It has been found that a sum of Rs. 15.33 crores (approx) is refundable to the petitioner and it has further ordered that the same would be refunded by way of adjustment against the tax for the next year i.e. 2015-16. Thus, if the respondent authorities has passed the assessment order for the period 2014-15 prior to passing of order under section 39(2) for the period 2015-16, there would not have been any tax liability of the petitioner for the period 2015-16 which was calculated to the tune of Rs.

13.32 crores (approx) and which comes to Rs. 20.11 crores (approx) after adding of interest.

Further submission on behalf of the respondent State is that so far as the order impugned dated 12.01.2019 is concerned, no assessment or reassessment has been done, instead the same was an order passed taking into consideration the amount of entry tax accepted by the petitioner in their return and the amount of entry tax actually paid by the petitioner for the relevant period. It may be stated here that the return filed by the petitioner as contained in Form ET-05 for the period 2015-16 has been brought on record as Annexure-A to the counter affidavit of respondent no. 2. From perusal of para C to the said Form it would appear that as against the total amount of entry tax admitted as payable to the tune of Rs. 90.77 crores (approx), the amount of entry tax paid is higher being Rs. 92.49 crores (approx). To this it is submitted by the learned counsel for the State that although the petitioner had shown the amount of entry tax paid as Rs. 92.49 crores (approx), but in fact the total payment for the period 01.04.2015 to 31.03.2016, details of which has been brought on record as Annexure-B to the counter affidavit of respondent no. 2, would show that the petitioner had paid a sum of Rs. 77,45,13,882/- only. Here itself it may be pointed out that the difference of the amount of entry tax paid by the petitioner for the period 2015-16 and the amount of payment accepted by the respondents from their online Register VIII comes to Rs. 15.04 crores (approx). This amount has to match with the amount credited by the respondent authorities in the account of the petitioner for ET 2014-15, the relevant part of which has been brought on record as Annexure-H to their counter affidavit. Thus, from the facts stated and the documents referred to hereinabove the respondent no. 2 cannot be permitted to blow hot and cold at the same time. On one hand he states that the refund of Rs. 15,04,59,365/- for the financial year 2014-15 was credited to the account of the petitioner vide challan no. 297 dated 31.03.2015 and also in the assessment order for the period 2014-15 a sum of Rs. 15,33,20,981/- is found refundable to the petitioner and it has been stated that the same would be refunded by adjustment for the period 2015-16 but in the order impugned dated 12.01.2019 for the period 2015-16, a further sum of Rs. 13,32,32,322/- is found payable and together with interest of Rs. 6,79,48,484, a total sum of Rs. 20,11,80,806/- has been found payable by the petitioner. Either the respondent authorities should have proceeded to accept the Form ET-05 submitted by the petitioner for the period 2015-16 according to which a sum of Rs. 1.72 crores in excess by way of tax had already been paid or in the alternate they should have passed orders for the period 2014-15 prior to passing of the impugned order for the period 2015-16, on which, no tax would have been found payable by the petitioner.

In view of the above facts and circumstances of the case, I do not find that the order of assessment dated 12.01. 2019 passed by the respondent Assistant Commissioner, State Tax Special Circle, Patna contained in Annexure-6 to the application is sustainable in law and in the result, the same is set aside. Consequentially the orders of demand notice dated 12.01.2019 and 28.01.2019 as contained in Annexures-4 and 7 to the application are also quashed.

Writ application stands allowed with liberty to the respondents to pass fresh orders in accordance with law in view of the observations made in this order.

(Partha Sarthy, J)

I agree
Shivaji Pandey, J :

(Shivaji Pandey, J)

Prakash/-

AFR/NAFR	NAFR
CAV DATE	01-10-2019
Uploading Date	19-11-2019
Transmission Date	