

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.22765 of 2018

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Molson Coors Cobra India Pvt. Ltd., a registered company incorporated under the Companies Act, 1956 having its registered office at 1002, 10th Floor, DLF Tower, District Centre Jasola, New Delhi- 110 025 through its Constituted Attorney Mr. Ashok Kumar Dubey, Son of Mr. A.N Dubey, aged about 45 years, resident of 570/16, Virat Nagar, V.I.P. Road Alambagh, Lucknow, U.P.

... .. Petitioner

Versus

1. The State Of Bihar through the Principal Secretary, Department of Commercial Taxes, Govt. of Bihar, Patna
2. The Commissioner, Commercial Taxes, Bihar, Patna.
3. The Joint Commissioner of State Taxes, Danapur Circle, Danapur (Formerly Deputy Commissioner, Commercial Taxes, Danapur Circle, Danapur)
4. The Commercial Tax Officer, Danapur Circle, Danapur.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 23880 of 2018

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4. The Commercial Tax Officer, Danapur Circle, Danapur.

... .. Respondents

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Appearance :

(In Civil Writ Jurisdiction Case No. 22765 of 2018)

For the Petitioner/s : Mr. Satyabir Bharti, Adv.

Mr. Alok Chandra, Adv.

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

Mr. Bishwa Bibhuti Kumar Singh, AC to AG

(In Civil Writ Jurisdiction Case No. 23880 of 2018)

For the Petitioner/s : Mr. Satyabir Bharti, Adv.

Mr. Alok Chandra, Adv.

For the Respondent/s : Mr. Vikash Kumar, SC11

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE JUSTICE SMT. NILU AGRAWAL
ORAL JUDGMENT



(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date :05-02-2019

The petitioner in the two writ petitions, which have been heard analogous is the same, the issue raised is the same and the prayer made is also the same except for assessment period. For the sake of convenience the relief prayed in C.W.J.C.No. 22765/2018 is reproduced hereinbelow:

- “ i) Quashing the entire proceeding including the re-assessment order, dated 2.8.2018 (Annexure- 3/1, page-60) passed under section 33 of the Bihar Value Added Tax Act, 2005 with respect to the assessment year 2012-13 including the demand notice, dated 31.8.2018 (Annexure- 3/2, Page 64) by which the petitioner has been re-assessed for payment of total sum of Rs.75,85,890.00 including interest for the assessment year 2012-13;
- ii) Pending final hearing and disposal of the writ application, stay operation of the impugned order both dated 2.8.2018 and demand notice dated 31.8.2018 and restrain the respondents from taking any coercive action in pursuance to the aforesaid impugned order;
- iii) To pass such other order (s) as your Lordships may deem fit and proper in the facts and circumstances of the case.”

Identical prayer for quashing the re-assessment order dated 2.8.2018 passed in purported exercise of powers vested under section 33 of the Bihar Value Added Tax Act, 2005,



impugned at Annexure 3/1, in respect of the assessment year 2011-12 together with the demand notice dated 31.8.2018, impugned at Annexure 3/2, for a sum of Rs.90,72,831.00 which is inclusive of interest is questioned in C.W.J.C.No. 23880/2018 (hereinafter referred to as 'the second writ petition') which prayer also accompanies a prayer for interim relief.

Since the issue raised in the two writ petitions concerns the same writ petitioner and also raises identical issues arising from the provisions of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the Act') and the Rules framed thereunder that they have been heard analogous and with the consent of the parties are being disposed of at the stage of admission by this common judgment.

For the sake of convenience we would be referring to the pleadings and annexures as occurring in C.W.J.C.No. 22765/2018 unless clarified with specific reference to the second writ petition.

The facts leading to the orders impugned briefly stated is that the petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the business of manufacture and sale of beer. The petitioner had a wholly owned subsidiary company running in the name of M/s Iceberg Industries Limited having its



registered office at New Delhi which company merged with the petitioner company pursuant to a scheme of merger under sections 391 and 394 of the Companies Act, 1956. The petitioner is an assessee under 'the Act' and the Rules framed thereunder, the Bihar Tax Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 (hereinafter referred to as 'the Entry Tax Act') and the Rules framed thereunder as well as under the Central Sales Tax Act, 1956 (hereinafter referred to as 'the CST Act') and the Rules framed thereunder. While C.W.J.C.No. 22765/2018 relates to assessment/ re-assessment proceeding for the assessment year 2012-13, 'the second writ petition' raises similar issues in relation to the assessment year 2011-12.

It is the case of the petitioner that it filed its return quarterly and annual returns together with the tax audit report within due date as prescribed under section 24(3) of 'the Act' i.e. before 31st day of December of the year following the year to which such return relates. It is urged that by the order dated 26.3.2016 the petitioner was assessed to payment of tax to the tune of Rs.1,32,10,275.00 (excess) under 'the Act'; for a sum of Rs.26,74,799.00 under 'the CST Act' and to the tune of Rs.67,60,347.00 under 'the Entry Tax Act' for the assessment year



2012-13. A copy of the assessment orders is enclosed at Annexures 1 series to the writ petition.

It is the case of the petitioner that despite the assessment made by the Assessing Officer on the basis of returns so filed, it is taking note of objection raised by the Comptroller and Auditor General (hereinafter referred to as 'the CAG') vide IR No. 130/2014-15 regarding deduction wrongly availed as well as liability towards purchase tax, that a notice was issued on 3.11.2017 bearing process No. 2217 putting the petitioner on show cause as to why he be not reassessed. A copy of the notice dated 3.11.2017 together with undated 'CAG' report is enclosed at Annexures 2 and 2/1 respectively. A proceeding was initiated on the audit objection of 'the CAG', the order sheet of which is enclosed at Annexure 3. It is the case of the petitioner that the Assessing Officer simply proceeding on the audit objection made by 'the CAG' has reassessed the liability of the petitioner under 'the Act' for the assessment year 2012-13 on 2.8.2018 and which is followed by a demand notice dated 31.8.2018 impugned at Annexures 3/1 and 3/2 to the writ petition. Feeling aggrieved he is before this Court.

Identical sequence of events follow in the second writ petition and on an identical 'CAG' objection impugned at



Annexure 2/1 to the said writ petition which again is undated, that after issuing a notice on 3.11.2017 vide process No. 2214 a formal proceeding was drawn to make reassessment for the assessment year 2011-12 on identical objections relating to wrongly availing deductions; liability towards stock transfer and liability to pay purchase tax. The proceeding so initiated vide Annexure 3 has resulted in the reassessment order dated 2.8.2018 impugned at Annexure 3/1 to 'the second writ petition' and which is followed by a demand notice dated 31.8.2018 impugned at Annexure 3/2. According to the petitioner, identical facts accompany the two writ petitions save and except that they relate to the assessment years 2012-13 and 2011-12 respectively.

Mr. Satyabir Bharti, learned counsel has appeared for the petitioner in the two writ petitions while State is represented by Mr. Vikash Kumar, learned SC-11.

Mr. Satyabir Bharti, learned counsel for the petitioner, while taking this Court through the sequence of events, has invited our attention to the audit objection of 'the CAG' enclosed at Annexure 2/1 to the respective writ petition to submit that while the opening line of the audit objection clearly records that scrutiny/ assessment has not yet been finalized, which means that the scrutiny and/or assessment for the period in question was yet to



take place, the audit objection at the footnote records “**after these were pointed out in audit, the DCCT (In-charge) stated that the matter will be examined. Result thereof may be intimated to audit.**”

Mr. Bharti in reference to the copy of the audit objection submits that though it does not bear any date, but since the audit objection records that the scrutiny/ assessment has not been finalized, it means that the audit took place prior to assessment proceedings and which is confirmed by the footnote present at Annexure 2/1 of C.W.J.C.No. 23880/2018 which records the assurance of the Assessing Officer of looking into the matter. According to the learned counsel, the assessment proceedings have taken place for each of the two assessment years thereafter and the Assessing Authority has taken care of the objections.

According to Mr. Bharti, if the audit objection has already been taken care of, at the time of assessment, there was no occasion for the Assessing Authority to again issue notice on 3.11.2017 enclosing the audit objection which was recorded prior to scrutiny/ assessment and which would deemed to have been noticed and acted upon while passing the assessment orders for the assessment years in question enclosed at Annexures 1 series to the respective writ petition.



The second issue raised by Mr. Bharti is that even if it is presumed that the audit objection was raised post-assessment i.e. after the assessment orders were passed, even then, in absence of any satisfaction shown by the Assessing Authority as to its lawfulness, as mandated under section 33 of 'the Act' read alongside Rule 25 framed thereunder which casts an obligation on the assessing authority to be satisfied on the lawfulness of such objection before proceeding thereon and which essential discharge according to Mr. Bharti is missing in the present case, the orders put to challenge are unsustainable.

Learned counsel in support has referred to the proceedings initiated on the basis of audit objection, a copy of which is enclosed at Annexure 3 to the writ petition, to submit that it is simply taking note of the audit objection that the notice was directed to be issued to the petitioner on 7.11.2017 initiating proceedings under section 33 of 'the Act'.

In support of his submission that an order of reassessment on an audit objection, has to precede by recording of satisfaction by the assessing authority on the lawfulness of the objection of the CAG, learned counsel has relied upon the following judgments:

(i) (1976)3 SCC 757 (**the Income Tax Officer v. Lakhmani Mewal Das**) Paras- 7, 8 & 12



(ii) (2010)2 SCC 723 (**CIT v. Kelvinator of India Ltd.**)

Paras- 5, 6 & 7

(iii) (1979)4 SCC 248 (**M/s Indian and Eastern**

Newspapers Society v. CIT) Paras- 13 & 14

(iv) (2000)117 STC 346 Pat. (**Bihar Plastic Industries**

Ltd. vs. State of Bihar) Paras- 15 & 17

(v) (2015)17 SCC 324 (**State of U.P. v. Aryaverth**

Chawal Udyog) Paras- 20 to 24, 28, 29 & 30

The third issue raised by Mr. Bharti is that a proceeding under section 33 of 'the Act' can only be initiated where an objection is made by 'the CAG' in respect of an assessment or reassessment or scrutiny of any return. In reference to the audit report at Annexure 2/1 to the respective writ petition he submits that the very disclosure by 'the CAG' that neither the scrutiny nor the assessment had been finalized, by itself renders the audit objection unsustainable for initiation of any proceeding under section 33 of 'the Act'. According to Mr. Bharti, the prerequisite for initiating proceeding under section 33 of 'the Act' are missing in the case. According to the learned counsel, the submissions above would indicate that the order of reassessment is a result of change in opinion on the same set of materials by the Assessing Officer which has been held impermissible in the judgments rendered on the issue. Learned counsel in support has referred to the following judgments:



(i) (1979)4 SCC 248 (**M/s Indian and Eastern Newspapers Society v. CIT**) **Para-14**

(ii) (1975)4 SCC 375 (**Gemini Leather Stores v. the Income Tax Officer**) **Para-3**

(iii) (2015)17 SCC 324 (**State of UP v. Aryaverth Chawal Udyog**) **Paras- 29 & 30.**

Opposing the arguments of Mr. Bharti, Mr. Vikash Kumar, learned SC-11, has submitted that the writ petition is not maintainable as the petitioner has statutory remedy of appeal to question the reassessment order where he is free to raise all issues as raised in the two writ petitions. In reference to the audit objection he submits that since it was pointed out by the CAG that the petitioner had incorrectly availed deductions under the CST sale; on purchase tax payable and on stock transfer that being satisfied the Assessing Authority has proceeded within the jurisdiction vested in him under section 33 of 'the Act' for reassessment of the liability after due notice and opportunity of representation to the petitioner. According to Mr. Vikash Kumar, taking note of the stipulations present in Section 33 of 'the Act' read alongside Rule 25 of the Rules, a notice of hearing was given to the petitioner and who has participated in the proceedings without any objection. According to Mr. Vikash Kumar, once the petitioner participated in the reassessment proceeding, in case the results has gone otherwise than to the satisfaction of the petitioner,



if at all he is aggrieved then the proper course of remedy would be by way of appeal and not through a writ petition. According to Mr. Vikash Kumar, the moment the Assessing Officer proceeds on the audit objection, it would signify a satisfaction even if not recorded in words. In reference to the counter affidavit filed in the proceedings he submits that due opportunity of hearing was given to the petitioner and his representative who participated in the proceedings as manifest from the order sheet and in which proceeding the objections so made by the CAG was proved leading to the order of assessment. In sum and substance the argument of Mr. Vikash Kumar has been that:

(a) In view of alternative remedy available to the petitioner under 'the Act' the writ is not maintainable as there is no error in jurisdiction.

(b) Reassessment order was passed after due opportunity of hearing to the petitioner who participated in the proceedings and having done so, he cannot raise questions on its validity.

(c) The satisfaction on the lawfulness of the objection needs to be recorded at the stage of passing of reassessment order and since the objection has been found to be correct during the course of reassessment proceeding, it satisfies the requirement.



Mr. Bharti, learned counsel for the petitioner, in reply has made reference to the statement made by the respondents in paragraph 6 of the counter affidavit to submit that the respondents themselves accept to an implied satisfaction on the audit objection even when the law prescribes a recording of such satisfaction. As regarding participation in the reassessment proceeding he submits in reference to the judgment of the Supreme Court reported in (2012)4 SCC 307 (Kanwar Singh Saini v. High Court of Delhi) Paras 22 & 23 that a mere participation in a proceeding does not confer jurisdiction on a forum and thus, simply because the petitioner has participated in the reassessment proceeding it would not validate the illegality in the proceedings.

We have heard learned counsel for the parties and have perused the records and in the nature of the arguments that has been advanced before us, we are of the opinion that the following issues falls for consideration on the inter-party contest which we have also noted in our order dated 22.1.2019 and runs under:

“(a) Whether in absence of any order on scrutiny or assessment or re-assessment, the audit objection raised simply in consideration of the returns filed by the petitioner, has lawful sanction in view of the stipulation present under Section 33 of the Act?



(b) Whether the audit objection, at Annexure 2/1 to the respective writ petition, is in tune with the provision of Section 33 of the Bihar Value Added Taxation Act, 2005, (hereinafter referred to as, 'the Act')?

(c) Whether even if the audit objection is found in tune with the provisions of the Act, in view of the provisions underlying under section 33 read with Rule 24 and 25 of the Act, the assessing authority was obliged to record his satisfaction about the lawfulness of the audit objection before he proceeded to issue notice under section 33 of the Act to the petitioner for re-assessment?

(d) Whether the participation of the petitioner in the re-assessment proceedings, would amount to waiver and as well, substantial compliance of the obligation cast under the provisions by the assessing authority?

(e) Whether in the circumstances, where audit objection records that no scrutiny or assessment/ re-assessment had taken place, the assurance given by the assessing authority recorded in the audit objection that the issues would be taken care-of, would mean that the assessment orders passed by the assessment authority thereafter was taking note of the objection so present in the audit note



and in such circumstance the re-assessment order in absence of any fresh audit objection will have no sanction in law?

Mr. Vikash Kumar is correct on his objection of alternative remedy because in case the issue raised by the petitioner in the two writ petitions requires an examination on merits of the assessment order, certainly we would refrain from expressing any opinion thereon in view of the appellate remedy so available to the petitioner under 'the Act'. The issues that we have taken note of, strikes at the root of the matter and it is only if the arguments of Mr. Bharti draws the issue in favour of the petitioner that there can be any interference with the orders impugned in the two writ petitions at this stage. We say so, because in case the very initiation of assessment proceeding lacks foundation and/or, the exercise is de hors the statutory provisions underlying section 33 of 'the Act' read alongside Rule 25 of the Rules framed thereunder, the reassessment orders impugned in the two writ petitions would have to go and the participation of the petitioner in the proceedings would not be sufficient to dilute the consequences.

Section 33 of 'the Act', inter alia, provides that "where an objection has been made by the Comptroller and Auditor General of India in respect of an assessment or reassessment made



or scrutiny of any return filed under ‘the Act’, the prescribed authority shall proceed to reassess the dealer with respect to those assessment or reassessment or scrutiny, as the case may be,”

Rule 25(1) of the Rules framed thereunder, inter alia, provides that “if any irregularity relating either to fact or law committed in course of any proceedings is pointed out by the Comptroller and Auditor General, the authorities specified in Rule 62 shall, upon being satisfied about the lawfulness of such objection and after giving the dealer an opportunity of being heard, proceed to reassess the tax due from the dealer. Once the assessing authority records satisfaction on the lawfulness of the audit objection then hearing has to proceed in the manner set out in Rule 24. It further provides that if the prescribed authority is not satisfied by the audit objection, it shall record its views and forward the same to the Commissioner alongwith a copy of the original order and the copy of audit objection.

There is no dispute that reassessment orders impugned at Annexure 3/1 to the respective writ petition have been passed with due opportunity of hearing to the petitioner but then we have already expressed ourselves that we shall not be entering into the merits/ demerits of the assessment order rather it is the legality/ illegality of the decision making process culminating in the



reassessment order at Annexure 3/1 which is a subject matter of consideration herein. We straightway direct ourselves to the audit objection enclosed at Annexure 2/1, the opening words whereof clearly indicate that scrutiny/ assessment has yet not been finalized. Now Section 33 of 'the Act' has certain essential prerequisites to be satisfied before the CAG records his objection and it is where an assessment or reassessment has been made or scrutiny of any return has been filed under 'the Act', that the CAG can proceed to audit the same. In other words, the CAG is empowered to raise his objections on the assessment of tax only in case, an assessment or reassessment has been made or scrutiny of any return has been filed and in no other circumstance. In the present case where the CAG has itself accepted that neither assessment nor scrutiny has been finalized, in our opinion, the CAG had neither any business to record any objection nor the assessing authority was obliged to proceed thereon.

The statement recorded at the footnote of the audit objection enclosed in the second writ petition at Annexure 2/1 reads that "after these were pointed out in audit the DCCT (In-charge) stated that the matter will be examined. Result thereof may be intimated to audit". Meaning thereby, that even when the scrutiny/ assessment was yet to take place but certain objections



came to the mind of the CAG which was impressed upon the DCCT (In-charge) i.e. the Assessing Officer who assured the CAG of looking into the objections. The sequence go to confirm that the assessment order at Annexures 1 series was passed thereafter and as Mr. Bharti canvasses the assessing authority would be understood to have taken note of the objections made by the CAG.

The third and most important aspect of the matter which persuades us to accept the persuasive argument of Mr. Bharti is the mechanical manner in which the assessing authority has proceeded to issue notice to the petitioner in purported exercise of powers vested in him under section 33 of 'the Act' which casts an obligation on him to proceed in the manner prescribed. A plain reading of the order sheet in the reassessment proceedings enclosed at Annexure 3 to the respective writ petition would show that it is simply taking note of the audit objection that the assessing authority has proceeded to issue notice to the petitioner without bothering to record his satisfaction as to its lawfulness. Rule 25 of the Rules is very explicit when it requires the authority specified in Rule 62 to proceed to reassess the tax due from the dealer only upon being satisfied with the lawfulness of such objection. While the legal position is well settled in this regard and the judgments



relied upon by Mr. Bharti are in confirmation of the legal position, that the assessing authority has admitted at paragraph 6 of the counter affidavit that it is after getting impliedly satisfied with the facts stated in the audit objection that the notice was issued to the petitioner, the mechanical discharge is confirmed. The legal position regarding reopening of the assessment is long well settled but the case in hand is a confirmation of the fact that the taxing authorities are not willing to change despite the legal position being reiterated time and again by the Courts that there cannot be a reassessment on mere change of opinion on the self same set of facts. When the statute mandates a satisfaction to be recorded by the assessing authority as to the lawfulness and correctness of the audit objection, it has a purpose behind it because an exercise towards assessment is already completed. Simply because the law empowers the CAG to raise audit objection and consequently gives jurisdiction to the assessing authority to reopen an assessment, it does not mean that on every audit objection the assessing authority is to mechanically proceed in the matter without applying his mind on its lawfulness and without drawing a satisfaction as to the correctness thereof.

The taxing authorities are creatures of Statute and are bound by the provisions framed thereunder and thus, where the



law prescribes a mode and manner of discharge of an obligation, these authorities cannot proceed in ignorance of the same and/ or in mechanical obedience of the objection raised by the CAG, on an implied satisfaction. There is nothing implied when it comes to adjudication on inter-party rights and where the situation deals with matter like reopening of an assessment etc., the issue demands more care and caution before a decision is taken on the same.

The discussions above are sufficient indication that the entire decision making process leading to reassessment orders dated 2.8.2018 and the demand notice dated 31.8.2018 for the assessment orders 2012-13 and 2011-12 respectively as impugned at Annexures 3/1 and 3/2 to the respective writ petition, are clothed with illegality for neither the audit objection in absence of assessment or reassessment or scrutiny had a legal sanction and even if such lapse is ignored and waived for a moment, then the failure of the prescribed authority to record his satisfaction as to the lawfulness and correctness of the audit objection before he proceeded to mechanically issue notice to the petitioner, is held de hors the statutory obligation, rendering the entire proceedings culminating in reassessment order(s) and the demand notice(s) bad in law.



Mr. Bharti is absolutely correct when he submits that where the proceeding itself is contrary to the statutory prescriptions, a participation by the petitioner in the same, would not provide it with lawful sanction.

The issues taken note by us are answered accordingly.

For the reasons and discussions above, the entire reassessment proceedings founded on the audit note impugned at Annexure 2/1 of the respective writ petitions, for the assessment years 2012-13 and 2011-12 respectively culminating in the order of reassessment dated 2.8.2018 and the demand notice dated 31.8.2018 impugned at Annexures 3/1 and 3/2 to the respective writ petition, cannot be upheld and are accordingly quashed and set aside.

The writ petitions are allowed.

(Jyoti Saran, J)

(Nilu Agrawal, J)

Surendra/-

AFR/NAFR	AFR
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