IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3291 of 2023

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Star Build Max Pvt. Limited, Balua Tal, Motihari, District East Champaran through its Proprietor Parvez Ahmad Khan, aged about 50 years, Gender-Male Son of Haseen Ahmad Khan, Resident of Balua Tal, Motihari, P.O.- Motihari, P.S.- Motihari Town, District- East Champaran.

... ... Petitioner/s

Versus

1. The Union of India through the Principal Chief Commissioner of Central Tax, Government of India, New Delhi.
2. The Principal Commissioner of Central Tax, Government of India, New Delhi.
3. The Commissioner Central Tax, Government of India, New Delhi.
4. The Additional Commissioner State Taxes (Appeal) Tirhut Division, Muzaffarpur.
5. The State of Bihar, through the Principal Chief Commissioner, State Tax, Bihar, Patna.
6. The Chief Commissioner, State Tax, Bihar, Patna.
7. The Deputy Commissioner, State Taxes, Motihari Tirhut, Bihar.
8. The Joint Commissioner, State Taxes, Motihari Tirhut, Bihar.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Ranjeet Kumar, Advocate
For the U.O.I.	:	Mr. Anshuman Singh, Sr. SC, CGST & CX
For the State	:	Mr. Vivek Prasad, G.P. 7

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 11-05-2023

Petitioner is concerned with the order passed in assessment under Section 73 of the Bihar Goods and Services Tax Act, 2017 (for brevity “the BGST Act”) and the specific contention raised is that there was no notice granted of thirty days which is a statutory requirement as per Section 73. The petitioner had filed an appeal which was also dismissed on merits. However, this contention was not raised before the Appellate Authority. Since, it is a question of insufficiency of notice, it ought to have been raised before the Assessing Officer itself. We are of the opinion that Section 160(2) of the BGST Act stands against the petitioner. We extract sub-section (2) of Section 160 hereunder:-

> "(2) The service of any notice, order or communication shall not be called in question, if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."

The petitioner having not raised the issue before the Assessing Officer who issued such notice and also having not raised it in appeal is estopped from raising it in the present writ petition.

Learned counsel for the petitioner submits that the assessment order was *ex parte* but, however, that does not preclude him from having raised the contention before the Appellate Authority. It was also *ex parte,* only because the assessee did not turn up for hearing. Sub-section (2) of Section 160 of the BGST Act specifically stands against the contention raised in the writ petition. We are not inclined to permit such contention to be raised herein.

Learned counsel for the petitioner then submits that the petitioner is desirous of availing statutory remedy of appeal against the impugned order before the ***Appellate Tribunal*** (hereinafter referred to as ***"Tribunal"***) under Section 112 of the Bihar Goods and Services Tax Act (hereinafter referred to as "B.G.S.T. Act").

However, due to non-constitution of the ***Tribunal***, the petitioner is deprived of his statutory remedy under Sub-Section (8) and Sub-Section (9) of Section 112 of the B.G.S.T. Act.

Under the circumstances, the petitioner is also prevented from availing the benefit of stay of recovery of balance amount of tax in terms of Section 112 (8) and (9) of the B.G.S.T Act upon deposit of the amounts as contemplated under Sub-section (8) of Section 112.

The respondent State authorities have acknowledged the fact of non-constitution of the ***Tribunal*** and come out with a notification bearing Order No. 09/2019-State

Tax, S. O. 399, dated 11.12.2019 for removal of difficulties, in exercise of powers under Section 172 of the B.G.S.T Act, which provides that period of limitation for the purpose of preferring an appeal before the ***Tribunal*** under Section 112 shall start only after the date on which the President, or the State President, as the case may be, of the ***Tribunal*** after its constitution under Section 109 of the B.G.S.T Act, enters office.

This Court is, therefore, inclined to dispose of the instant writ petition in the following terms:-

> (i) Subject to deposit of a sum equal to 20 percent of the remaining amount of tax in dispute, if not already deposited, in addition to the amount deposited earlier under Sub-Section (6) of Section 107 of the B.G.S.T. Act, the petitioner must be extended the statutory benefit of stay under Sub-Section (9) of Section 112 of the B.G.S.T. Act. The petitioner cannot be deprived of the benefit, due to non- constitution of the Tribunal by the respondents themselves. The recovery of balance amount, and any steps that may have been taken in this regard will thus be deemed to be stayed. It is not in dispute that similar relief has been granted by this Court in the case of *SAJ Food Products Pvt. Ltd. vs. The State of Bihar & Others* in *C.W.J.C. No. 15465 of 2022*.
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> (ii) The statutory relief of stay, on deposit of the statutory amount, however in the opinion of this Court, cannot be open ended. For balancing the equities, therefore, the Court is of the opinion that since order is being passed due to non-constitution of the Tribunal by the respondent-

Authorities, the petitioner would be required to present/file his appeal under Section 112 of the B.G.S.T. Act, once the Tribunal is constituted and made functional and the President or the State President may enter office. The appeal would be required to be filed observing the statutory requirements after coming into existence of the Tribunal, for facilitating consideration of the appeal.

(iii) In case the petitioner chooses not to avail the remedy of appeal by filing any appeal under Section 112 of the B.G.S.T. Act before the Tribunal within the period which may be specified upon constitution of the Tribunal, the respondent- Authorities would be at liberty to proceed further in the matter, in accordance with law.

With the above liberty, observation and directions, the writ petition stands disposed of.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

P.K.P./Anushka

AFR/NAFR	
CAV DATE	
Uploading Date	16.05.2023
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