IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3696 of 2023

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M/s. Singh Caterers and Vendors, a partnership firm having its office at Kunwar House, Rajendra Nagar, Road No. 11, Patna through one of its partners namely Rakesh Singh, Aged about 47 years, Male, Son of Kunwar Ranbir Singh, Resident of Kunwar House, Plot No. 3Y, Road No. 11, Rajendra Nagar, P.S. Rajendra Nagar, Dist. Patna.

... ... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Finance, Government of India, New Delhi.
2. The State of Bihar through the Principal Secretary-cum- Commissioner, Department of State Taxes, Government of Bihar, Patna.
3. The Principal Secretary-cum- Commissioner, Department of State Taxes, Government of Bihar, Patna.
4. The Additional Commissioner of State Tax (Audit), East Division, Patna.
5. The Joint Commissioner State Tax, Kadamkuan Circle, Patna.
6. The Deputy Commissioner of State Taxes, Kadamkuan Circle, Patna.
7. The Assistant Commissioner of State Taxes, Kadamkuan Circle, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Mohit Agarwal, Advocate

For the Respondent/s : Mr. Vivek Prasad, GP-7

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 09-05-2023

The writ petitioner is an assessee under the Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as Act). The petitioner is aggrieved with the audit report issued under section 65(6) and the non-consideration of the rectification application, the petitioner has made, under Section 161 of the Act.

The learned counsel for the petitioner argues that the order passed on audit report is amenable to the rectification under section 161 and without the same being considered, the show-cause notice issued by the Assessing Officer at Annexure-5 cannot be proceeded with.

The learned Government Pleader submits that the audit report was finalized after hearing the petitioner and there is no question of any rectification being made under section 161, especially since the aspects raised in the rectification application as seen at Annexure-4 are not matters which could be said to be an error on the face of the record. What the petitioner attempts by the rectification application is a review of the said order. Further it is also submitted that, in any event, the report of audit is not final and the Assessing Officer will have to take a call regarding the defects pointed out in the audit report for which purpose the show-cause notice is issued. Every contention raised by the petitioner could be looked into by the Assessing Officer is the argument in defense.

We have looked at Section 65 which speaks of an audit by the tax authorities. Any registered person can be subjected to audit under section 65 and the same has to be conducted at the place of business of the registered person or in their office. There is a requirement for issuance of notice of not less than fifteen working days prior to the conduct of the audit and the audit initiated shall be completed within a period of three months, an extension being possible only on the orders of the Commissioner. In the course of the audit, the authorized officer can require the registered person to provide the necessary facility to verify the books of account or other documents, to furnish such information as he may require and also render assistance for completion of audit.

Under sub-section (6) of section 65 on conclusion of audit, within thirty days, the registered person should be informed about the findings, his rights and obligations and the reasons for such findings. If the audit carried out under sub-section (1) of section 65 results in detection of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized, the Proper Officer may initiate action under section 73 or section 74. Section 73 speaks of determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts. On there being allegations of fraud, willful misstatment or suppression of facts, the proceedings have to be initiated under section 74 for the very same defects pointed out.

Sections 73 and 74 both require the Proper Officer to serve notice on the person chargeable with tax and require him to show-cause as to why he should not be directed to pay the tax amounts specified in the notice along with interest and penalty leviable. Under section 73(2) the notice period is specified as three months while under sub-section (2) of section 74 there is a requirement of at least six months. From the limits specified in sub-section (10) under both the provisions, it is three years for issuance of an order under sub-section (9), under section 73 and five years insofar as an order under sub-section (9) of section 74.

The provisions under both sections 73 and 74 provide for an elaborate procedure for the Proper Officer to proceed against the assessee, who is alleged to have given rise to any of the defects pointed out, which are almost in *pari materia.* Hence, despite an audit report which enables the Proper Officer to proceed either under section 73 or 74, it is for the Proper Officer to come to the conclusion as to whether there is any defect as pointed out under section 65 or in the notice specified under section 73 and section 74, so as to decide as to the further tax liability of the assessee.

It is in this background that the show-cause notice impugned herein has to be examined. Annexure-1 is the audit report issued under section 65(6) after the audit was carried out in the petitioner's premises. The discrepancies noticed for the assessment years 2017-18 have been detailed in Annexure-1A.

Pursuant to the audit report dated 22.12.2022, Annexure-2 dated 23.12.2022, a notice seeking clarification on the discrepancies found during audit was also issued. In Annexure-2 there was a specific direction to pay the amounts mentioned as above or in case of disagreement to furnish the explanation along with supporting documents.

The report was finalized as per Annexure-3, which specifically indicates that the representative of the tax payer appeared on different dates of hearing with books of accounts and other documents. Detailed analysis of the summary returns was also done with reference to the books of accounts and the relevant documents. The observations are found in page-2 of Annexure-3A, wherein it has been specifically noticed that the *"Jurisdictional officer may verify and ascertain actual turnover in accordance with the provisions of BGST Act, 2017 along with supporting documents"*. Hence the observation in an audit report is not the final decision and we also notice some discrepancies having been dropped on examination of the explanation.

Annexure-4 is the rectification application filed under section 161, which as argued by the learned Government Pleader does not fall under the description of errors apparent on the face of record. By the rectification application the assessee/petitioner requires the Audit Officer under section 65 to re-examine the report; which is not a permissible exercise under section 161.

Lastly, we have to notice Annexure-5, show-cause notice. The show-cause notice indicates that the assessee made a specific request, to wait for disposal of the rectification application. The Assessing Officer rightly found that there is no error apparent on the face of the record, which could be rectified under section 161 and that in any event, section 73 proceedings have been initiated based on the final audit report. The Assessing Officer also alertly notes that if any submission is made by the tax payer that would be taken on record. The Proper Officer being the Assessing Officer has looked at the audit report and has recorded his satisfaction in the show-cause notice on items raised in the audit report and it also enables the assessee to raise objections against the same.

We are of the opinion that there is no reason why the writ petition should be entertained specifically when the rectification application, on which basis the proceedings under section 73 is sought to be kept in abeyance, cannot be invoked fruitfully by the petitioner. If the Assessing Officer has not completed the proceedings, the petitioner would be entitled to file his objections and seek for consideration of the same before the Assessing Officer.

The writ petition would stand dismissed but with the above reservation.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

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AFR/NAFR	AFR
CAV DATE	
Uploading Date	17.05.2023.
Transmission Date	