IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10373 of 2023

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Ascend Telecom Infrastructure Pvt. Ltd. 202, 2nd floor, Kousaiya Apartment, Fraser Road, Patna, Bihar - 800001 through its authorised representative namely Sanjay Kumar male, aged about 54 years son of Shri Shiv Chandra Mishra resident of Flat No. 203, Majestic Heritage, Near Alpna Market, New Patliputra Colony, Patliputra, Patna, Bihar-800013.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary cum Commissioner, Department of State Taxes, Government of Bihar, Patna.
2. Joint Commissioner of State Tax, Patna West Circle, Patna, Bihar.
3. Assistant Commissioner of State Tax, Patna West Circle, Patna, Bihar.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Alok Kumar Jha, Advocate
Mr. Saket Tiwary, Advocate

For the Respondent/s : Mr. Vikash Kumar (Sc11)

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 25-01-2024

We had in two instances found excessive action on the part of Departmental Officers in expediting recovery of tax assessed, frustrating the remedy of appeal before the Goods and Sales Tax Appellate Tribunal, as constituted under the BGST Act, which in effect has not been constituted till date.

2. We had dealt with the matter in C.W.J.C. No. 5407 of 2021 titled as ***Sita Pandey v. The State of Bihar and Others***, from which we extract paragraphs 11 to 15:-

> 11. As far as the statutory provision not requiring a notice to the assessee, we need only refer to the Constitution Bench decision of the Hon'ble Supreme Court in ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others; AIR 1978 Supreme Court 851*** from which we extract hereunder Paragraphs 75 and 76:-
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>> *"75. Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.*
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>> *76. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequatur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation."*
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> *[underlining by us for emphasis]*
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> 12. The aforesaid declaration of law made with

respect to a decision cancelling a poll, applies across the board to every judicial and *quasi-judicial* order and action taken. The principles of natural justice stand embedded in every coercive action taken by a statutory authority, even within the four corners of the law; when it could, in the normal circumstances cause prejudice to the person against whom such proceedings are levelled. The recording of reasons as coming forth in the provision to Section 78 are not to be recorded surreptitiously and kept in the files, but to be informed to the assessee and a time specified within three months for the payment to be made. In fact, on a reading of the proviso we are of the definite opinion that there is a requirement of notice, if not prior to the recording of reasons; at least intimation of the reasons which motivates the proper officer to recover the amounts due, considering such recovery to be expedient in the interest of revenue with clear specification of the period; less than a period of three months, within which the amounts are to be paid.

13. Section 78 provides that a person against whom an order is passed shall satisfy the amounts payable within a period of three months and the proviso empowers the Assessing Officer to seek satisfaction of such dues even during a period lesser than three months. The provision is worded so:-

> *"**78. Initiation of recovery proceedings.**- Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:*
>
> *Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within <u>such period less than a period of three months as may be specified by him."</u>*

[underlining by us for emphasis]

Hence, when reasons are recorded in writing, there is a duty on the Assessing Officer to specify the time within which the amounts are to be paid which intimation has to go to the assessee.

14. In this context, we also have to notice that the Appellate Tribunal under Section 109 of the CGST Act has not yet been constituted. We would not rely at all on the equitable directions issued by this Court in various petitions staying recovery on payment of twenty per cent of the balance tax due as provided under Section 112(8). However, it is very evident that even the Central Government and the State Government was conscious of the fact of the Tribunal having not yet been constituted. Two notifications, one of the Central Government and the other of the State Government, are produced as Annexure 8 and 9 along with the writ petition. Both these notifications invoke the power conferred respectively under Section 172 of the CGST and BGST Act. For removal of difficulties, presumably for reason of the non-constitution of the Tribunal, the three months limitation period stipulated under sub-section (1) of Section 112 of both the enactments are extended to the latter of the following dates; (i) of communication of order or (ii) the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under Section 109, enters office. It is also stipulated that the six month period provided under Section 112(3) shall also stand extended by the very same period from the aforesaid dates; whichever date falls later. Hence, there could not have been a recovery surreptitiously, by issuing notices to the banks and coercing them to pay the amounts, that too the entire due amounts, including the tax, interest and penalty.

15. The Legislature had, in the event of an appeal filed to the Tribunal, only intended twenty percent of the tax dues alone to be paid; on which payment the entire demand was liable to be stayed till the disposal of the appeal. However, admitted tax; interest, fine and penalty also have to be satisfied.

> Hence even if coercive action could have been taken the tax officer should have confined it to the twenty percent of the total amounts assessed, in addition to the ten percent paid at the first appellate stage and any admitted tax, if remaining unpaid. The tax officer had definitely erred, that too egregiously, to the extent of his action being termed high-handed, in surreptitiously making the recovery of the entire amounts due as tax, interest and penalty, even contrary to the legislative mandate. As we found, the reasons stated are unconvincing and clearly untenable and the approaching closure of the financial year end can only be a motivation to enhance the individual targets assigned by the higher authorities.

3. Again another matter of similar nature came up before us in C.W.J.C. No.777 of 2023 titled as ***National Insurance Co. Ltd. v. The State of Bihar and Others.*** In both the writ petitions, despite 20% of the amounts due having been paid up, recovery was effected against the statutory provisions which provided a stay of such recovery, if an appeal has been filed before the Tribunal; which Tribunal has not yet been constituted. We found a definite over reach on the part of the Tax Officers and relied on ***R.S. Joshi, Sales Tax, Gujarat and Others v. Ajit Mills Ltd. and Another*** reported in ***(1977) 4 SCC 98***, wherein the Hon'ble Supreme Court deprecated "*a tendency for valiant tax executives clothed with judicial powers to remember their former capacity at the expense of the latter*"(sic). We also imposed a cost of Rs.5000/- on the Officers, who peremptorily carried out the recovery from the bank account of the assessee.

4. In this case, we find the very same arbitrariness having been exercised by another Officer; according to us to a larger extent.

5. The assessment order dated 05.02.2021 is produced as Annexure-3. A first appeal was filed as Annexure-5 after remitting 10% of the tax amounts due, which appeal was disposed of by Annexure-7 on 16.06.2023. Soon thereafter, a notice for recovery was issued as per Annexure-8 dated 26.06.2023 to the Branch Managers of various banks seeking payment of a sum of Rs. 1,07,04,546/-. On 30.06.2023, the assessee shot off an e-mail to the Assistant Commissioner of State Tax, as is produced at Annexure-9. The assessee expressed its desire to file an appeal before the Appellate Tribunal and also specifically brought to the notice of the Officer, Section 112 of the BGST Act wherein a pre-deposit of 20% of the disputed tax amount was also provided. The Appellate Tribunal having not been constituted; it was requested that the recovery by way of attachment of bank accounts of the assessee would be in violation of the provisions of the GST Act. A decision of the High Court was proffered along with the e-mail, which directed payment of 20%, pending constitution of the Appellate Tribunal and stay of recovery in the meanwhile. A circular of the Central Board of Indirect Taxes and Customs dated 18.03.2023 was also annexed with the communication.

6. We, further, notice that the State Government had brought out S.O. 399, dated 11th December, 2019 titled as 'Removal of Difficulty Order No.9/19-State Tax' produced at Annexure-12 series, specifically extending the period of filing of an appeal to the Tribunal from the 3 months provided in the statute, from the date of order, to 6 months from the date of communication of order or the date on which the President or the State President, as the case maybe, of the Appellate Tribunal after its constitution under Section 109, enters office; whichever is later. The notice herein was issued on 26.06.2023 in flagrant violation of the circular issued and the statutory provisions.

7. More disturbing is the fact that the assessee deposited 20% on 04.07.2023 and on 05.07.2023, the Bank transferred the amounts demanded as per Annexure-8 to the Department. As is evident from Annexure-7 produced along with I.A No.1 of 2023, the Bank had informed that they had subsequently received a letter from the Department returning the demand draft of Rs.1,07,04,546/- and directing payment of only Rs.85,61,192/- reckoning the 20% payment made. We find the above actions to be quite contrary to the statutory provisions and in disobedience of the circulars issued by the State Government.

8. We also extract paragraphs 17 & 18 from C.W.J.C. No.5407 of 2023 hereunder:-

> 17. We cannot but find a definite overreach by the tax authority, the officer who issued Annexure-3 order, to surreptitiously recover the amounts due as per the assessment order passed, from the bank accounts of the assessee, without proper intimation being given to the assessee or a time specified for the assessee to satisfy the demands; even if the action was motivated by expediency and in the interest of the Revenue, which we have found is not discernible from the reasons recorded in the instant case. The reasons stated by the officer were kept hidden within the folds of the files; at the risk of repetition, were also not convincing. The close of the assessment year and one or two days of bank holidays, we are not convinced are sufficient reasons to forfeit the amounts kept in the account of a running business. The State and its revenues would not collapse if the said amounts were not recovered but there is every chance of a business folding up without liquid funds being available to it, especially a running concern with liabilities to its employees, its other creditors and so on and so forth.
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> 18. The actions of the Tax Authorities, under the taxing statute should be tempered with good conscience and judicious reasoning, which in the instant case was in complete derogation of the established principles of rule of law; reigning supreme

> even when there is a compulsory extraction of money for the larger good and welfare, which a levy of tax always is. The tax authority should also act as a facilitator of business and economy and not merely as an extortionist, always looking to have the pound of flesh, to satisfy his hierarchical superiors to push his/her personal agendas. We have no doubt that the action complained of, was high handed and arbitrary.

9. We, hence, direct the Assessing Officer to immediately return the amount of Rs.85,61,192/- to the respondent. It is made clear that there shall be no recovery conducted till the constitution of the Tribunal and the appeal period expires; and in the event of an appeal proffered till it is disposed off.

10. If eventually the appeal is allowed in favor of the assessee, then the amounts now refunded or to the extent the claim is allowed in the appeal, shall carry interest at the rate provided under the BGST Act, from the date of its debit from the account of the assessee and the payment back as directed hereinabove. If the appeal of the assessee goes against it, then necessarily the assessee shall be liable to interest only from the date of the re-payment by the Department and to the extent the assessee is mulcted with the liability. There shall be no interest levied by the Department for the period in which it had the benefit of the 80% amounts.

11. We, especially noticing the callous manner in which the recovery was carried out, after instructions were issued by the State not to do so, the Officer is imposed with a cost of Rs. 5,000/- to be paid from his pocket to the assessee.

(K. Vinod Chandran, CJ)

(Rajiv Roy, J)

sharun/-

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