

THE HIGH COURT OF JHARKHAND AT RANCHI**W.P.(T) No.3957 of 2022**

M/s. Shiv Jyoti Enterprises JV Binod Kumar Lal @ Shiv Jyoti Enterprises Petitioner

Versus

1. The State of Jharkhand.
2. The Commissioner, Commercial Taxes Department, having its office at Utpad Bhawan, Kanke Road, Ranchi.
3. The Deputy Commissioner of Commercial Tax, Urban Circle, Dhanbad.
4. Assistant Commissioner of Commercial Tax, Urban Circle, Dhanbad. Respondents

CORAM: HON'BLE MR. JUSTICE APARESH KUMAR SINGH
HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Petitioner : Mr. Sumeet Gadodia, Adv.
For the Res. State : Mr. Sachin Kumar, AAG-II

9/21.02.2023

The instant writ application has been preferred for the

following relief:-

- (i) *For quashing and setting aside the order dated 31st January, 2022 passed by Commercial Taxes Tribunal, Jharkhand in Review Case No. DN 7 of 2022 pertaining to the period 2015-16 (Annexure-13) whereby the review petition filed by the petitioner against the judgment and order dated 22nd November, 2021 passed in Revision Case No. DN 48 of 2021 has been dismissed.*
- (ii) *For quashing and setting aside the judgment and order dated 22nd November, 2021 passed in Revision Case No. DN 48 of 2021 (Annexure-11) wherein imposition of penalty under Section 40(2) of the Jharkhand Value Added Tax Act, 2005 (for short JVAT Act, 2005) by the Assessing Officer has been upheld.*
- (iii) *For issuance of an appropriate writ, order or direction to the respondent-authorities to refund an amount of Rs.17,35,000/- which has been realized by initiating recovery proceeding under Section 46(1) of the JVAT Act from the banker of the Petitioner-company.*

2. Brief fact of the case is that the petitioner is engaged in the business of works contract on behalf of various entities including Government Entities. For the period in dispute, Petitioner purchased pipes from outside the State of Jharkhand for an amount of Rs.1,55,69,332/- towards execution of works contract. The said interstate purchases were made through valid road permits duly generated from the official website of State of Jharkhand. Petitioner filed its original quarterly return and, inadvertently, reflected interstate purchases as 'Nil'.

On 09.01.2016 “Before assessment” proceeding under Section 40(2) of the JVAT Act was initiated against the Petitioner by Respondents on the sole ground that for the period in dispute, it filed quarterly returns by reflecting therein inter-state purchases as ‘Nil’, but, as per data available in the Department’s software, it was evident that petitioner utilized SUGAM-G for an amount of Rs.1,55,69,332/- for inter-state movement of goods. Accordingly, Petitioner was directed to file its reply by 01.02.2016.

On 01.02.2016, the petitioner filed its reply by stating, inter-alia, that inadvertently, the amount of inter-state purchases made during the period in dispute could not be reflected in its original quarterly return. Accordingly, to rectify the mistake, it prayed for one month’s time to file the revised quarterly return and on 21.02.2016, petitioner revised its quarterly return and disclosed the inter-state purchases of Rs.1,55,69,332/- which could not be reflected in original quarterly return.

3. Interestingly, on the very next date i.e., on 02.02.2016, the Respondent No. 4 passed an order under Section 40(2) of the JVAT Act and imposed penalty of Rs.25,68,940/- The calculation of penalty by the assessing officer is as under.

Total amount alleged concealed turnover by petitioner	Rs.1,55,69,332/-
(+) 10% profit and inward expenses	Rs.15,56,933.20/-
Total	Rs.1,71,26,265.20/-
5% Tax at Rs.1,71,26,265.20/-	Rs.8,56,313.26/-
Penalty under Section 40(2) of the JVAT Act being thrice the amount of tax of Rs.8,56,313.26/-	Rs.25,68,940/-

4. Being aggrieved by penalty order, petitioner filed Appeal before the Appellate Court and the Appellate Court vide its order dated 22.12.2017 dismissed the Appeal of the petitioner. Subsequently, petitioner also filed Revision Petition being Revision Case No. DN 10 of 2018 before the Commercial Taxes Tribunal and

the learned Tribunal remanded the matter back to the Appellate Court vide its order dated 21.12.2018.

5. At this stage, it is pertinent to mention that on 25.03.2019, during the pendency of remand appellate proceeding, original assessment order under Section 35(6) of the JVAT Act was passed against the petitioner, wherein GTO of Rs.5,41,73,159/- was determined by Respondent No. 3. The turnover disclosed in revised return was not disputed and the revised return was accepted.

On 21.01.2020, petitioner challenged the said assessment order before the Commissioner of Commercial Taxes in Revision Case C.C. (S) No. 767 of 2019. The matter was remanded to the assessing officer.

Thereafter, on 17.03.2020, pursuant to remand order passed by the Commissioner Court, a revised assessment order was passed and revised GTO of Rs.6,17,61,159/- was duly accepted by the assessing officer. A tax liability of Rs.24,70,658/- was determined against the petitioner. Against the total turnover of Rs.6,17,61,159/-, VAT @ 4% amounting to Rs.24,70,446/- was already realized by Respondent being amount deducted from the bills of Petitioner in advance. In this regard, Form JVAT-400 being Certificate of Tax Recovery at Source was also issued to the Petitioner and after adjusting the said amount, a demand notice of Rs.212/- was issued to the petitioner by Respondent No. 3.

6. During the remand penalty proceeding, Petitioner brought to the notice of learned Appellate Court the fact that error which crept in while filing original quarterly return has been subsequently rectified by the Petitioner by filing revised returns and regular assessment proceedings have also been done and returns have been accepted. However, despite the said fact, on 28.11.2020, the Appellate Court dismissed the Appeal of the Petitioner and imposition of penalty by the assessing officer was affirmed by the said appellate authority.

On 22.11.2021, being aggrieved by the appellate order, petitioner filed a Revision Petition 22.11.2021 being Revision

Petition No. DN 48 of 2021 before the Commercial Taxes Tribunal, Jharkhand at Ranchi. However, the learned Tribunal dismissed the Revision Petition and upheld the imposition of penalty under Section 40(2) of the JVAT Act. Thereafter, Petitioner filed a Review Petition being DN 7 of 2022 before the Tribunal. Though, the petitioner also filed review application but on 31.01.2022, the same has also been dismissed by the Tribunal.

On 20.12.2019, during the course of revisional proceeding, an amount of Rs.17,35,000/- has also been realized by the Revenue and balance amount of Rs.8,33,940/- has been put on hold by initiating recovering proceeding under Section 46(1) of the JVAT Act by the Respondent-authorities.

7. Mr. Sumeet Gadodia, learned counsel for the petitioner submits that admittedly, petitioner has made inter-State purchases for an amount of Rs.1,55,69,332/- on the strength of Form SUGAM-G and inadvertently, the said purchases could not be reflected in the quarterly return for the quarter ending September, 2015. However, subsequently, petitioner revised its return on 21.02.2016.

Learned counsel contended that as per provision of Section 29(1) and (3) of the JVAT Act, 2005 read with Rule 14(1) and (7) of the JVAT Rules, petitioner was required to revise its return till 25th January, 2016. Thus, at best, any proceeding under the provisions of JVAT Act could have been initiated after expiry of such period. However, in the case of petitioner, the proceeding under Section 40(2) of the JVAT Act was initiated on 09.01.2016 by fixing the date of hearing on 11.01.2016 i.e., prior to expiry of the period of revising its return. However, inadvertently, the notice under Section 40(1) of the JVAT Act was served to Petitioner and by correcting the said error, on 27.01.2016 revised notice under Section 40(2) of the JVAT Act was issued to Petitioner. The said fact is itself evident from the penalty order dated 02.02.2016 at Annexure-1.

Further, it is also not in dispute that the said revised return has duly been accepted by the respondent-authorities in the original

assessment proceeding of the petitioner. Thus, on one hand, by accepting return and turnover of petitioner, the respondents have determined tax liability in the original assessment proceeding and on the other hand respondents have disputed the revised quarterly return and levied penalty under Section 40(2) of the JVAT Act. Thus, levy of penalty under Section 40(2) of the JVAT Act is not justified. **It is a settled proposition of law that revision of return can be allowed even after expiry of time period prescribed and time period prescribed for revision of returns is directory and not mandatory.**

In this context, Petitioner is placing reliance upon the following judgments:

- (i) Commercial Tax Officer Vs. C.R. Varghese reported in MANU/KE/1248/2018. [Relevant Para 1, 2, 4, 8, 9, 12, 13, 15, 16]
- (ii) Super Plast Poly Products India Pvt. Ltd. Vs. State of Kerala reported in (2018) SCC OnLine Ker 23311 [Relevant Para 7 to 10]
- (iii) Always Sugar Agency Vs. Assistant Commissioner (Assmnt) and Others reported in MANU/KE/1886/2017 [Relevant Para 1, 2 and 5]
- (iv) Aar Kay Agro Spring Industries Vs. State of Madhya Pradesh and Others reported in (2011) SCC OnLine MP 2389.
- (v) Ingram Micro India Pvt. Ltd. Vs. Commissioner, Department of Trade and Taxes and Others reported in MANU/DE/0256/2016 (Relevant para 2, 3, 10, 12, 17, 19]

8. Learned counsel for the petitioner further contended that the purchases were made on the strength of Form SUGAM-G (Annexure-1 Series), and, therefore, no occasion arises for suppression of any purchases with an intent to evade the payment of tax otherwise. As a matter of fact, the petitioner would not have utilized SUGAM-G for the purchases of goods in question. Admittedly, the present dispute did not pertain to filing of incorrect return with intention to suppress or conceal purchases; rather the dispute pertains to filing of revised return belatedly. Thus, the imposition of penalty under Section 40(2) of the JVAT Act upon petitioner is not sustainable in the eye of law and if the justification of the Respondents in this regard is accepted then the provision of Section 30 more particularly; sub-section 4 would be rendered otiose.

Apart from the above, Respondents have failed to establish

mens-rea and in absence of *mens-rea*, penalty could not be imposed to Petitioner. Petitioner is placing reliance upon the judgment passed in the case of *Commissioner of Sales Tax, U.P. V. Sanjeev Fabrics* reported in (2010) 9 SCC 630.

Learned counsel lastly submits that since the purchased goods have been utilized in execution of works contract which has already suffered tax and further sale transaction has not been disputed in the impugned order; thus, under the aforesaid facts and circumstances, the imposition of penalty under Section 40(2) of the JVAT Act is liable to set aside by this Court and the amount of alleged penalty of Rs.17,35,000/- already realized from the bank accounts of Petitioner is fit to be refunded to the Petitioner.

9. Learned counsel for the respondents submits that penalty order dated 02.02.2016 was passed stating therein that the quarterly return for the period 01.04.2015 to 30.09.2015 showed inter-state purchase 'Nil', but from the software available with the department it appeared that the petitioner had purchased goods worth Rs.1,55,69,332/- which was evidenced by the Form JVAT G also known as SUGAM-G. He further submits that entire proceeding under Section 40(2) of the JVAT Act, 2005 was initiated after lapse of the statutory period of 3 months calculating from end of the tax period i.e., from 30.09.2015. Therefore, there has been admitted default in filing the quarterly returns showing it to be 'Nil' when admittedly as per SUGAM-G there was purchase transaction worth more than Rs.1.5 crores.

He further submits that under Sub-rule 7, if there is any incorrect information contained in the quarterly return, the same can be rectified within period of 3 months from the end of the respective tax period within reasons to be given and such returns shall be termed to be revised returns. Annual return is to be filed in Form JVAT 204. Thus, filing of quarterly returns is the mandate of law and the same can be revised within period of 3 months from the end of the tax period. In this case the returns are related to the period 1st April, 2005 to 30th September, 2015 and notice by the department was issued

after a lapse of 3 months which is the statutory period for revising the return.

He lastly submits that the Hon'ble Apex Court has held that legislative intent is not required to be explored if the plain reading of the statute does not create any ambiguity. Proceeding under section 40(2) and proceeding under Section 35, 36 of the JVAT Act, 2005 are not overlapping proceeding; rather they are mutually exclusive proceedings. Even in the facts of the present case while passing the regular order of the assessment which has been passed in the month of March, 2020, no penalty was imposed for incorrect filing of quarterly returns as admittedly separate proceeding was there for which appeal was pending and then the order impugned was passed.

10. Having heard learned counsel for the parties and after going through the documents available on record and the averments made in the respective affidavits, it transpires that the primary dispute involved in the instant writ application pertains to imposition of penalty under Section 40(2) of the JVAT Act on the alleged ground of concealment of purchases for an amount of Rs.1,55,69,332/- made by the Petitioner despite the fact that the said amount was duly reflected in its revised return. The petitioner has annexed the entire order-sheet pertaining to penalty proceeding for the period in dispute to demonstrate that order was passed without granting sufficient opportunity to the Petitioner.

Admittedly, for the quarter ending September, 2015, the last date for filing of revised return was up-to January, 2016. However, before assessment proceeding was initiated on 09.01.2016 i.e., before the expiry of period of revising of return in dispute which would be itself evident from the penalty order dated 02.02.2016 at Annexure-1. Further, the Petitioner, for the purchases in dispute has utilized Form SUGAM-G and, thus, no occasion arose for suppression of any turnover with intent to evade payment of tax. In the entire Counter Affidavit no *mens-rea* has been alleged by Respondent-authorities. Thus, it appears that the contention of the petitioner that at best

penalty under Section 30(4)(d) of the JVAT Act could have been imposed upon petitioner is correct. This specific plea of Petitioner is uncontroverted by Respondent-authorities.

For brevity both Section 40(2) and section 30(4) of the JVAT Act is extracted herein below for proper appreciation of the lis:-

"40. Turnover escaping Assessment —

.....

(2) If the prescribed authority in the course of any proceeding or upon any information, which has come into his possession before assessment or otherwise, under this Act, and is satisfied that any registered dealer or a dealer to whom the registration certificate has been suspended under sub-section (7) of Section 25 –

(a) has concealed any sales or purchases or any particulars thereof, with a view to reduce the amount of tax payable by him under this Act, or

(b) has furnished incorrect statement of his turnover or incorrect particulars of his sales or purchases in the return furnished under sub-section (1) of Section 29; or otherwise,

the prescribed authority shall, after giving such a dealer an opportunity of being heard, by an order in writing direct that he shall, in addition to any tax payable which is or may be assessed under Section 35 or 36 or 38, pay [by way of penalty a sum equal to thrice the amount of tax on the concealed turnover or on concealed or incorrect particulars of suppression or concealment or for furnishing incorrect particulars; on the amount of tax payable under the Act or on the suppressed turnover or on concealed turnover or for furnishing incorrect particulars.

The interest shall be payable before the completion of the assessment and for determining the amount of interest payable, the prescribed authority shall quantify the amount of tax payable provisionally under this Act."

"30. Return Defaults —

.....

.....

(4) If a registered dealer or any other dealer required to furnish return under sub-section (1) and sub-section (2) of Section 29; without any sufficient cause.

(a) fails to comply with the requirements of the notice issued under sub-Section (2) of Section 29; or

(b) fails to furnish any return by the prescribed date as required under [sub-Section (1) or sub-Section (2) of Section 29; or

(c) being required to furnish revised return, fails to furnish the revised return by the date prescribed under sub-Section (3) of Section 29;

(d) the prescribed authority shall, after giving such a dealer an opportunity of being heard in the manner prescribed, impose a penalty of the rate not exceeding rupees fifty for every day of such default for any month or any tax period, subject to a maximum of rupees twenty five-thousand in a year.

Explanation – Return for this purpose shall mean and include the Monthly Abstract. Return for any tax period, Revised Return(s) as well as the Annual Return.]"

11. There is no dispute with respect to the fact that before assessment proceeding under Section 40(2) of the JVAT Act and regular assessment proceeding under Section 35 of the JVAT Act are mutually exclusive to each other. However, acceptance of GTO and revised quarterly return in the original assessment proceeding could not be totally brushed aside when the sole issue revolves around revision of return by the Petitioner-company.

It is also not in dispute that the alleged revised return has duly been accepted by the Respondent-authorities in the original assessment proceeding of the Petitioner. Thus, on one hand, by accepting return and turnover of Petitioner, the Respondents have determined tax liability in the original assessment proceeding and on the other hand Respondents have disputed the revised quarterly return and levied penalty under Section 40(2) of the JVAT Act.

Further, revision of return can be allowed even after expiry of time period prescribed and time period prescribed for revision of returns is directory and not mandatory. In this regard, reference may be made to the section 30 (4) (d) of the JVAT Act itself where the legislature has specifically mentioned that if a registered dealer or any other dealer required to furnish return under sub-section (1) and sub-section (2) of Section 29; without any sufficient cause; the prescribed authority shall, after giving such a dealer an opportunity of being heard in the manner prescribed, impose a penalty of the rate not exceeding rupees fifty for every day of such default for any month or any tax period, subject to a maximum of rupees twenty five-thousand in a year.

12. It further transpires from records that the purchases were made on the strength of Form SUGAM-G (Annexure-1 Series), and, therefore, no occasion arises for suppression of any purchases with an intent to evade the payment of tax otherwise. As a matter of fact, Petitioner would not have utilized SUGAM-G for the purchases of goods in question.

Admittedly, the present dispute did not pertain to filing of

incorrect return with intention to suppress or conceal purchases; rather the dispute pertains to filing of revised return belatedly. Thus, the imposition of penalty under Section 40(2) of the JVAT Act upon Petitioner is not sustainable in the eye of law and if the justification of the Respondents in this regard is accepted then the provision of Section 30 more particularly; sub-section 4 would be rendered otiose.

In the given facts and circumstances and in view of specific provision enshrined u/s 30(4) (d) of the Act, it is apparent that there is no deliberate act of evasion of tax which would be warranting imposition of penalty on the petitioner given the language used in Section 40(2) containing the penal provision. In fact it cannot be said to be an act of deliberately filing incorrect returns as the revised return has been duly accepted by the Assessing Officer. Reference in this regard may be made the judgment passed in the case of *Commissioner of Sales Tax, U.P. V. Sanjeev Fabrics* reported in (2010) 9 SCC 630 wherein the Hon'ble Apex Court has laid down the law at para-24, 25 & 30 as under:-

24. Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.

25. Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gainsaying that a penal provision has to be strictly construed on its own language.

30. To put it succinctly, in examining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors:

- (i) the object and scheme of the statute;*
- (ii) the language of the section; and*
- (iii) the nature of penalty.*

13 Having regards to the discussion made hereinabove, this court holds that the penalty imposed by the revenue u/s 40(2) of the JVAT Act is not sustainable in the facts and circumstances of this case rather; penalty under Section 30(4)(d) of the JVAT Act could have been imposed upon Petitioner.

Consequently, the order dated 31st January, 2022 passed by Commercial Taxes Tribunal, Jharkhand in Review Case No. DN 7 of 2022 pertaining to the period 2015-16 (Annexure-13) and order dated 22nd November, 2021 passed in Revision Case No. DN 48 of 2021 (Annexure-11) are hereby quashed and set aside. Further, the amount of alleged penalty of Rs.17,35,000/- already realized from the bank accounts of Petitioner is to be refunded to the Petitioner after deducting Rs.25000/- taking resort of Section 30 (4) of the JVAT Act which prescribes maximum penalty of Rs.25000/-.

14. As a result, the instant writ application is allowed on contest. Pending I.A., if any, is also disposed of.

(Aparesh Kumar Singh, J.)

(Deepak Roshan, J.)

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