(1994) 05 PAT CK 0007

In the Patna High Court

Case No : C.W.J.C. No. 5197 of 1992

Ashirvad Enterprises APPELLANT

Vs

The State of Bihar and Another RESPONDENT

Date of Decision : 18-05-1994

Acts Referred:
Bihar Finance Act, 1981 — Section 13, 13(b), 22

Citation : (1994) 2 BLJR 1248 : (1994) 2 PLJR 522

Hon'ble Judges : K.S. Paripoornan, C.J;Naresh Kumar Sinha, J

Bench : Division Bench

Judgement

K.S. Paripoornan, C.J.—The petitioner firm is a small scale industrial unit. It is a registered dealer under the Bihar Finance Act, 1981, and under the Central Sales Tax Act, 1956. In this writ application, the petitioner assails Annexure "5", an order passed by the second respondent-Deputy Commissioner of Commercial Taxes, Special Circle, Patna, dated 9-6-1991. By the said order, the second respondent has declined the prayer of the petitioner for the issue of Form XXVIII-B under Rule 45 of the Bihar Sales Tax Rules, 1983. The ground of rejection was that the dealer has not deposited the admitted tax on or after 1-9-1991, by wrongly pleading the facility of set-off afforded by S. O. No. 123 dated 5-3-1990.

2. The petitioner-firm is engaged in manufacturing P. V. C. Pipes and fittings, H. D. P. E. Pipes and fittings and L. D. P. E. pipes and fittings. It is stated that the petitioner was availing the benefit of S. O. No. 787, dated 10-9-1986, which was an incentive afforded to the small scale industrial units by the State Government. The notification provided for facility of set-off of the tax paid on the purchase of raw materials used for the manufacture of goods with the sales tax payable by the dealer on sales of such manufactured goods and after such set-off to pay only such amount of sales tax which is in excess of the amount paid by the dealer on the purchase of raw materials. This was in force till 31-8-1991. Even before the expiry of the said notification, the State Government promulgated a fresh Notification No. S.O. 123 dated 5-3-1990, in exercise of the powers vested

in it u/s 22 of the Bihar Finance Act, 1981. The said notification dated 5-3-1990 is Annexure T. The benefit of the said notification was afforded to existing and newly established small and/or medium scale industrial units in the State. The units were allowed to set-off the amount of sales tax paid by them on purchase of raw materials directly required for sale of manufactured goads within the State, with the amount of sales tax payable by such dealer on the sale of such manufactured goods, subject to the condition that such dealer did not purchase the raw materials at concessional rate u/s 13 of the Act. The petitioner had applied for and was granted a certificate of registration u/s 13 of the Act. The certificate is granted by the prescribed authority not only for purchase of raw materials at concessional rate of tax but also for sale to Government department and purchase of plant and machineries and packing materials by a dealer engaged or intended to engage in manufacture of goods for sale. By Notification No. S.O. 125 dated 5-3-1990, the facility of set-off sales tax was extended for goods sold in the course of inter-State trade or commerce. The said notification is Annexure ''3''. The petitioner was availing the facility of set-off so allowed. It is stated that respondent No. 2 began to create difficulties from March, 1992, and insisted that the petitioner should first deposit the entire amount of sales tax collected by it on sales of manufactured goods and file, details of his claim for set-off in respect of the amount of tax paid on purchases and the set-off will be allowed only in the succeeding months. This direction is illegal. However, the petitioner deposited the entire amount of sales-tax in March, 1992. Subsequently, the second respondent raised objection to the very eligibility of the petitioner to set-off the tax and wanted the petitioner to file a clarification. Under Rule 45 of the rules, the petitioner has to apply for the grant of road permit, "Form XXVIII-B" before the second respondent. It is after verifying the details the Form is issued. When an application was so made, the second respondent, by order dated 9-6-1992, rejected the same (Annexure 5). The main ground, on which the application of the petitioner was rejected, is that the petitioner is registered u/s 13 (b) of the Act and is entitled to the facility of purchasing raw materials at concessional rate of tax and go the petitioner was not ''entitled to the facility of set-off under Notification No. S.O. 123. This has resulted in the entire business of the petitioner coming to a grinding halt. The petitioner is not able to despatch any manufactured goods to its buyers without the road permits. The petitioner has received many orders. The rejection of the road permits, for the reasons stated by the second respondent, is illegal. The proceeding to that effect evidenced by Annexure ''5'' is invalid. The registration u/s 13 by itself does not disentitle the petitioner of the facility of set-off. On these grounds, the petitioner prays for quashing Annexure-5 order and for the issue of a writ of mandamus, directing the second respondent to issue sufficient From XXVIII-B to the petitioner to enable it to despatch the goods manufactured by it. It is the petitioner''s case that during the relevant time though it had a certificate u/s 13 of the Act, it was subsequently surrendered, and it never purchased any raw material at the concessional rate by using the certificate u/s 13 of the Act after April, 1991(see rejoinder affidavit of 134-94).

3. The respondents have filed a detailed counter-affidavit dt. 7-7-1992. Supplementary counters are also filed. It is stated that Form XXVIII-B was withheld on the ground that the petitioner has submitted a return, it has defaulted in making payment of admitted tax from the month of September, 1991 to May, 1992. It is further stated that the petitioner is not entitled to claim the facility of set-off either on the basis of provisions of Notification No. S.O. 787 dated 10-9-1986 or Notification No. S.O. 123 dated 5-3-1990. Since the petitioner is a registered dealer u/s 13(1)(b) of the Bihar Finance Act and enjoys the facility of purchasing raw materials at concessional rate, it is not entitled to the benefit of S.O. 123 dated 5-3-1990.

4. In the rejoinder-affidavit filed by the petitioner, dated 13-1-1994, it has denied the averments made by the Revenue. In paragraph 5 thereof, it is stressed that what is prohibited by Notification No. S.O. 123 is the ''actual Luuhabc'' of raw material at concessional rate by a dealer on the strength of his registration u/s 13(l)(b). The petitioner has stated that the Revenue has not cited a single case where the petitioner has made even a single purchase of raw material at concessional rate since April, 1991. The forms prescribed for purchasing raw material at concessional rate on the strength of the registration u/s 13(1)(b) (Form IX) were never used by the petitioner from April, 1991, It has surrendered all the unused Form No. IX (12 in number). The petitioner has not purchased raw materials at the concessional rate and so there is no basis for holding that there has been a contravention of the conditions of S.O. 123.

5. We heard counsel. S. O. No. 123 dated 5-3-1990 is as follows:

The 5th March, 1990

S.O. 123-In exercise of the powers conferred by Section 22 of the Bihar Finance Act, 1981 (Bihar Act No. 5 of 1981) Part I, the Governor of Bihar on being satisfied that it is necessary to do so in the interest of the industrial growth is pleased to permit the registered dealers, who are running the existing and new industrial units in small and medium sectors to adjust the amount of Bihar Sales Tax paid on purchase of direct raw materials in the State of Bihar and used in manufacture of goods for sale in the State of Bihar against the Bihar Sales Tax payable for a period of five years from 1st January, 1990 to 31st December, 1994 on the following conditions:

1(a) The Industrial units availing of the facility of the special rate of tax on purchase of raw materials u/s 13 of the Bihar Finance Act, 1981 shall not be eligible for the above set-off facility ;

(b) This facility shall be limited to the corresponding conversion of the direct raw materials into finished product and Bihar Sales Tax payable on the sale of the said finished product within the same financial year,

...

3. This notification shall remain valid till 31st December, 1994.

By order of the Governor of Bihar. N.K. SINGH Commissioner of Commercial Taxes and Special Secretary to Govt. of Bihar, Patna.

Rule 45 of the Bihar Sales Tax Rules, 1983 is to the following effect:

45. Powers to reject applications for permit and declaration form-Notwithstanding anything contained in these rules-

(a) if for reasons to be recorded in writing-

(i) the prescribed authority is not satisfied that the applicant for Forms IX, IX C and XXVIII-B made bona fide use of such forms previously issued to him or that he bona fidely requires such Forms applied for, he may reject the application ;

(ii) the prescribed authority is not satisfied that the applicant bona fidely requires such Forms in such numbers as he has applied for, he may issue Forms in such lesser numbers as, in his opinion, would satisfy the reasonable requirement of the applicant;

(b) if the applicant for Forms IX, IX-C and XXVIII-B has at the time of making the application defaulted in furnishing any return or revised return, together with the receipted challan, showing payment of the tax, due from him according, to such return or revised return for the furnishing of which the prescribed date or dates, or the extended dale or dates, if any, have already expired, the prescribed authority shall withhold the issue of such Forms to him until such time as he; furnishes-

(i) any other return or revised return, together with receipted challans showing payment of such return or revised return, together with such receipted challlan or challans. and

(ii) any other return or revised return, together with receipted challan or challans showing payment of the tax due according to such return or returns, for the extended date or dates, if any, may have expired after the date of application.

6. In this case, in Annexure-3 order passed by the second respondent dated 9-6-1992, it is stated thus: (True translation supplied by the party):

...by Notification No. 153, dated 5-3-1990 issued by the Government of Bihar, the dealer has the right to set-off the sales tax paid on the purchase of raw material in Bihar with the sales tax payable on the sale of manufactured goods. According to Notification No. 123, dated 5-3-1990 any registered dealer who is engaged in industrial production from before and has opened new industry (Small and Medium Scale), the facility of set-off will be available to him from 1-1-1990 till 31-12-1994. There is a condition in this that those industrial units who pay tax at special rate on purchase of raw material u/s 13 of the Bihar Finance Act, 1981, they will not get the facility of set-off under this notification. The dealer is registered u/s 13(1)(?) of Bihar Finance Act, 1981, in this circle and the facility of purchasing raw material at concession is available to him. Under such circumstances the facility of set-off of the sales tax paid by him on purchase of raw material with the sales tax payable on sale of goods manufactured by him will not be available to him under Notification No. S.O, 123, dated 5-3-1990.

The dealer has not deposited the admitted tax on or after 1-9-1991 on the ground of the facility of set-off. Under such circumstances his application for issue of Form XXVUI-B under Rule 45 of the Bihar Sales Tax Rules, 1983 is rejected.

Do not issue Form XXVIII-B.

7. The second respondent, in Annexure-5 order has proceeded on the basis that since the petitioner has got a "facility to pay tax" at the concessional rate u/s 13 of the Bihar Finance Act, the facility of set-off will not be available under S. O. No. 123 dated 5-3-1990. Earlier, it has understood the condition in the notification, as one where the benefit will not be available to a person who pays tax at concessional rate. But in the conclusion, he has stated that the petitioner has the "facility to pay tax", at the concessional rate. Annexure 5 proceeds on inconsistent premises and on that ground itself seems to be perverse. That apart, the question is whether the interpretation placed on S. O. No. 123 dated 5-34990 is correct and whether Annexure 5 is valid. It is common ground that Clauses (a) (i) and (ii) of Rule 45 are inapplicable in this case. The only plea of the Revenue is that the dealer has not paid the tax due from it as per the revised return. The question is whether the dealer is disentitled to the benefit of S. O. 123 dated 5-3-90, and cannot avail the benefit thereof and as a sequal thereto, it cannot be said to have paid the tax admittedly due from it as per the return, enabling the authority to invoke Rule 45 (b) of the Rules And withhold the issue of Forms No. XXVIII-B.

8. I am of the view, that in view of the fact that the dealer has surrendered all the unused Forms No. IX and has not purchased raw materials at the concessional rate from April, 1991, which is borne out by paragraph 5 of the rejoinder affidavit dated 13-1-1994, the petitioner has not availed of the facility of special rate of tax on purchase of raw material u/s 13 of the Bihar Finance Act. Prima facie, it is entitled to the benefit of S. O. No. 123 dated 5-3-1990. The reason stated in Annexure 5 is that the dealer is registered u/s 13 of the Bihar Finance Act and "the facility of purchasing raw material" at concessional rate is available to it. It is not enough. The facility should have been availed of. There is no such case that it has been so availed of after April, 1991. In Annexure 5, the second respondent has only stated that the dealer has the facility u/s 13(1)(b) of the Bihar Finance Act to purchase raw material at the concessional rate. There is no material to show that the industrial unit has availed of and is availing the facility after April, 1991 so as to disentitle the petitioner-firm from getting the benefit of S. O. No. 123 dated 5-3-1990. The sole reason given in Annexure-5 for holding that the petitioner is not entitled to the benefit of set off of the sales tax paid by it on purchase of raw material with the sales tax payable on sale of goods manufactured by it under notification No. S. O. 123 dated 5-3-1990 is thus untenable and is plainly an error of law in construing the notification.

9. In C.W.J.C. No. 1444 of 1989, the question that arise for consideration was whether in a case where the petitioner has not shown inter-State sale in his returns and has not paid tax on the sale, the liability to tax was not admitted and no deposit of the amount made, the authority could withhold the issue of forms in exercise of the powers under Rule 45(b). In delivering the judgment dated 16-2-1990, a Bench of this Court held as follows:

...It is not a case where the petitioner admitted his liability in the return but did not deposit the amount. Respondent No. 4 while disposing of the application filed by the petitioner was not passing an order of assessment. While passing an order of assessment, the assessing authority may not accept the return filed by the dealer and may hold that the dealer was liable to deposit further sales tax. But while exercising the power under Rule 45(6), the prescribed authority cannot go into these questions,

8. In this case respondent No. 4 could not have exercised the power under 45(b) of the Rules. Rule 45(b) corresponds to Rule 3l-C(b) of the Bihar Sales Tax Rules, 1959. That rule came up for consideration before a bench of this Court in Mehta Kamnath v. State of Bihar and Ors. 1930 Sales Tax Cases 477. In that case also, the application for issuing forms was refused on the ground that as the petitioner had purchased onion from Nasik and sent the same to Siliguri, he was liable to pay purchase tax under the Bihar Sales Tax Act, 1959 on the said transaction. It was held that the petitioner in that case had filed a return and the prescribed authority under that rule had no jurisdiction to make any enquiry with regard to the correctness or otherwise of the return filed. The same is the position here. The petitioner must succeed in this application.

The observations in the said case have much relevance herein.

10. I hold that Annexure 5 is illegal and infirm. It is quashed or annulled. The 2nd respondent is directed to consider the matter afresh in accordance with law. In order to enable the petitioner to carry on its business, respondent No. 2 shall supply Form No. XXVIII-B under Rule 45 of the Bihar Sales Tax Rules, 1983 till the final disposal of the matter afresh. By way of interim order, a similar direction has been given by this Court on 9-12-1992. It is only proper to continue the said direction till the final disposal of the matter by the second respondent in accordance with law. Final orders shall be passed within two months from today.

Naresh Kumar Sinha, J.

11. I agree.

