
(2010) 02 PAT CK 0018
In the Patna High Court

Eureka Forbes Limited

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-02-2010

Acts Referred:

Citation : (2010) 02 PAT CK 0018

Judgement

Sudhir Kumar Katriar, J.—This writ petition seeks the following reliefs:

(a) To quash notice u/s 27 of Bihar Finance Act, 1981 (Annexure-4), for recovery of Sales Tax during pendency of review petition, pending disposal before Commercial Taxes Tribunal.

(b) To quash order passed by Commercial Taxes Tribunal dated 15.04.2004, which is contrary to law and as such wrong, illegal, and without jurisdiction.

(c) Direction to the Tribunal to dispose of the petitioner's review petition and also reference petition pending before it for more than three years.

2. A brief statement of facts essential for effective adjudication of the issues involved in this matter may be indicated. The petitioner is a public limited company engaged in marketing, distribution, and sales of a certain product known as Vacuum Cleaner. We are not concerned with its other items. The present writ petition is with respect to the assessment years 1990-91, 1991 -92, 1992-93, and 1993-94. It is evident that these periods were prior to the date of bifurcation of the erstwhile State of Bihar in terms of the Bihar Reorganisation Act, 2000. The petitioner had been submitting returns at various places in the undivided State of Bihar including Jamshedpur and Patna. It had submitted returns for the said four periods on the footing that it was liable to be taxed at the rate of 8% under the provisions of the Bihar Finance Act 1981 (hereinafter referred to as the "Act"). The learned Assessing Officer did not agree with the petitioner and instead assessed the petitioner Company to tax at the rate of 12%, treating the vacuum cleaner to be "electrical goods" within the meaning of Entry No. 81 of the Sales Tax Notification No. 1026/77-14541, dated 26.12.1977,

issued u/s 12 of the Act. In terms of the notification, tax was leviable at the rate of 11% up to 31.3.1982, and was raised to 12 % with effect from 1.4.1982. It is evident that the four periods in question are after 1.4.1982. The four appeals preferred by the petitioner for separate periods were dismissed. These were followed by revision applications before the Commercial Taxes Tribunal, Bihar, Patna, which have been dismissed by a common judgment dated 27.4.2004 (Annexure-3), passed in Revision Case Nos. PT-621/97, PT-334/98, PT-335/98 and PT-586/99 (Eureka Forbes Limited v. State of Bihar). Hence this joint writ petition for the four periods in question, whereby the petitioner challenges the validity of the impugned judgment by which the petitioner is sought to be taxed at the rate of 12% for the four periods in question, instead of 8 %.

3. The State Government issued Notification No. S.O. 134, dated 27.7.2000 (Annexure-6), which was published in the Bihar Gazette (Extraordinary), dated 27.7.2000, whereby a separate and distinct entry has been inserted as "Vacuum Cleaner" which shall be taxed at the rate of 12%. The concluding portion of the notification states that "this Notification shall come into force with effect from the date of the publication in the Official Gazette".

4. Before we proceed further, we would like to observe that the petitioner ought to have preferred four separate writ petitions. However, the matter has progressed and we are at the stage "For Hearing", and final disposal. We would, therefore, not like to defer its hearing on this ground, and proceed to dispose of the writ petition by a common judgment covering the four periods.

5. While assailing the validity of the impugned order, learned Counsel for the petitioner submits that the notification dated 27.7.2000 (Annexure-6), is prospective in nature and, therefore, wholly inapplicable to the facts and circumstances of the present case. The learned Additional Advocate General has not joined issues with the petitioner on this count and has indeed submitted that the notification on the very face of it is prospective in nature and, therefore, inapplicable to the facts and circumstances of the present case.

5.1) He next submits that the assessing authorities have, during the five years preceding the ones in question was taxed at the rate of 8% throughout the State of Bihar. There cannot, therefore, be any justification for departure for the periods in question. He further submits that the situation is accentuated by the fact that, for the four periods i.e. assessment years 1987-88 to 1990-91, the Jamshedpur Circle has taxed the petitioner at the rate of 12%, which was set aside by the Ranchi Bench of the Patna High Court in the case of Eureka Forbes Ltd. Vs. State of Bihar and Others

5.2) He submits in the same vein that consistency is the hallmark of justice-delivery system. Why should, therefore, be a departure for the four periods in question, and that too only by the Patna Circle? He relies on the following judgments:

(i) Division Bench judgment of Delhi High Court in Commissioner of Income Tax

Vs. A.R.J. Security Printers,

(ii) M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax,

(iii) Judgment dated 13.10.2009 of the present Bench in Misc. Appeal No. 145 of 2004 (Dr. Nrendra Prasad v. Commissioner of Income Tax-I, Patna and Anr.), and analogous appeals, reported in 2010 (1) B.B.C.J. 400.

5.3) He next submits that the petitioner's item is "machinery" within the meaning of Entry No. 33, of the Government notification dated 26.12.1977, under the provisions of Section 11 of the Act. In other words, in his submission, the petitioner's case is covered by Entry No. 33 of the notification u/s Section 11, whereas, according to the Revenue, the case is covered by Entry No. 81 of the notification u/s 12. He wraps up his contentions by submitting that, in case of doubt or difficulty with respect to taxing statute, the Courts should lean in favour of the assessee. He relies on the judgment of the Supreme Court in The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.,

6. The learned Additional Advocate General submits that the present writ petition is an abuse of the process of the Court while the petitioner has preferred a review application, and his reference case with respect to the impugned judgment is also pending, and he has approached this Court in haste. The writ petition is, therefore, not only pre-mature, it is not maintainable. He relies on the following reported judgments of the Supreme Court:

(i) Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, paragraph 7;

(ii) Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, paragraph 11.

6.1) Learned Counsel for the respondents further submits that no doubt or difficulty arises in the present case. He has taken us through the provisions of the Act and the relevant circulars to persuade us to hold that one and only one view is possible, namely, the petitioner has to be taxed at the rate of 12%, and, therefore, the principles of law, and the judgments cited by learned Counsel for the petitioner, are inapplicable to the facts and circumstances of the present case. He relies on the judgment of a Division Bench of this Court in M/s SPIC PHI Seeds Ltd. Vs. The State of Bihar and Others, . He lastly submits that the petitioner's case is covered by Entry No. 81 of the notification u/s 12 and, therefore, cannot be treated to be an unspecified item within the meaning of Section 12 of the Act.

7. Learned Counsel for the petitioner has in reply submitted that this writ petition is maintainable. He also submits that the very justification for the State Government in issuing the aforesaid notification dated 27.7.2000 (Annexure-6), was to clear the doubt which had arisen in the minds of assesseees as well as the taxing authorities.

8. We have perused the materials on record and considered the submissions of learned Counsel for the parties. The learned Government Counsel has strenuously contended that this writ petition is not maintainable. On a perusal of paragraph 1 of the writ petition set out hereinabove, we are of the view that the dominant relief prayed for in the present proceeding is to set aside the order of the Tribunal. We are proceeding on the footing that a review application as well as reference application at the instance of the petitioner is pending before the Tribunal. Section 47 of the Act provides for a review application and is reproduced hereinbelow:

47. Reviews. - Subject to such rules as may be made by the State Government under this part any authority appointed u/s 9 or the Tribunal may review any order passed by it, if such review is, in the opinion of the said authority or Tribunal, as the case may be, necessary on account of a mistake which is apparent from the record:

Provided that no such review, if it has the effect of enhancing the tax or penalty or both, or of reducing a refund shall be made unless the said authority or the Tribunal, as the case may be, has given the dealer, or the person concerned a reasonable opportunity of being heard.

Apart from the general notion with respect to review jurisdiction, Section 47 itself makes it abundantly clear that it is a forum of extremely limited jurisdiction. Secondly, such objections were not raised by the respondents at the time the rule was issued in the presence of the respondents and it was admitted for final adjudication. It has remained pending for sufficiently long time. This Court on earlier occasions and today also spent considerable time over hearing of the case and it would not, therefore, be a wise exercise of discretion to dismiss it on the ground of maintainability. After all the net result would be adjudication of the order of the Tribunal. As would be evident from our discussion hereinafter, pure questions of law have arisen for determination in this case. Disputed questions of facts have not been raised. Indeed the facts are now already settled on account of three orders of the authorities under the Act. The contention on behalf of the respondents is hereby rejected.

9. We pass on to the most important question which arises for determination of the dispute in the present writ petition. We would first of all notice of the provisions of Sections 11 and 12 of the Act and are reproduced hereinbelow:

11. Point or points in the series of sales at which the sales tax shall be levied. - (1) the sale tax on goods shall be levied only at that point or points in the series of sales as may be specified by the State Government by a notification published in the Official Gazette.

(2) Where by a notification published under Sub-section (1), the State Government specifies in respect of any goods, class or description of goods that the sales tax shall be levied at the first point of sale in Bihar either by an importer, or a manufacturer or a wholeseller, subsequent sale of the same goods

shall not be levied to tax, if the dealer making the subsequent sale produces before the prescribed authority u/s 17 the original copy of cash memo, or invoice or bill issued to him and files true and complete declaration in the form and in the manner prescribed.

(3) Where by a notification published under Sub-section (1) the State Government specifies in respect of any goods, class or description of goods that the sales tax shall be levied at more than one point or on all the points, the amount of sales tax paid at each preceding stage of sale shall be adjusted against the amount of tax payable at each subsequent stage of sale in the prescribed manner.

(4) Where no specification is made in respect of any goods, class or description of goods under Sub-section (1), the sales tax shall be levied at the point of sale by a registered dealer to a person other than a registered dealer. Each preceding sale by a registered dealer to another registered dealer in whose registration certificate such goods or class or description of goods are specified as being required for re-sale by him shall not be levied to tax, if the selling dealer produces a declaration from the buying dealer in the prescribed form and manner to the authority prescribed u/s 17.

12. Rate of tax. - (1) The sales tax or purchase tax payable by a dealer u/s 3 or 4 shall be levied at the rate of eight percentum of his taxable turnover:

Provided that the State Government may, from time to time, by notification and subject to such conditions and restrictions as it may impose, fix higher rate not exceeding twenty five percentum or any lower rate not below two percentum in respect of such class or dealers or such goods, or class or description of goods, or such sales category or description of sales as may be specified in the notifications.

1["Provided further that where goods are sold or purchased together with the container or packing materials, the rate of tax on the price or value or such containers or packing materials shall be the same as is applicable to the goods so contained or packed, whether the price of the containers or packing materials are charged separately or not"]

(2) Notwithstanding anything contained in this part the levy of the tax payable by a dealer under this part on sale or purchases of declared goods made by him inside Bihar shall be subject to the restrictions and conditions contained in Section 15 of the Central Sales Tax Act, 1956 (LXXIV of 1956)."

It is evident that Section 11 is headed "Point or points in the series of sales at which the sales tax shall be levied". This question with respect to Section 11 was considered by the Tribunal, but no issue thereunder has been raised before us. The aforesaid notification u/s 11 prescribes the point at which the products mentioned therein shall be taxed. It is in that context that we must reproduce Entry 33 of Section 11 notification:

33. All machineries and machines including agricultural machineries and machines, spare parts and accessories thereof worked by electricity, steam, diesel or petrol and other agricultural machineries and implements and spare parts thereof worked by human and animal power excluding those exempted u/s 6 of the Bihar Sales Tax Ordinance, 1977.

The question whether or not the product in question has to be taxed at the first point, or a later point, does not arise for our determination and, therefore, Entry 33 of the notification u/s 11 is not relevant for adjudication of the issue in hand.

10. It is evident on a plain reading of Section 12 of the Act that all products shall be taxed at the rate of eight percentum of the taxable turnover of the assessee, excepting products which have been decided by the State Government to be taxed at different rate(s) and for which separate notification(s) has been issued in terms of the proviso to Section 12(1) of the Act. The aforesaid notification u/s 12 is evidently issued in terms of the proviso to Section 12(1) of the Act. On a perusal of the different entries therein, we are of the view that the product in question is covered by Entry 81 and is reproduced hereinbelow for the facility of quick reference:

81. Electrical goods, instruments, apparatus and appliances including electric fans and lighting bulbs, electric earthenware and porcelain and all other accessories excluding electric motor, dry cell batteries, torch, torch bulbs, exhaust fans, air circulators, and spare parts and accessories, electric heaters of all varieties.

There is no other entry in this notification which competes with Entry 81 for its application in the present case. Therefore, we are of the view that there is no doubt or difficulty in concluding that the petitioner's product is covered by Entry 81 of the notification u/s 12. In other words, there is no rival entry which calls for determination in the present case. The position would have been different had any doubt or difficulty arisen about the applicability of any other entry, in the absence of which there is no doubt or difficulty in our minds that Entry 81 of the notification u/s 12 is attracted. Entry 33 of the notification u/s 11, on which heavy reliance has been placed by learned Counsel for the petitioner, is indeed a misleading argument. The scope of Section 11, as indicated hereinabove, is very different and not relevant in the present context. As noticed hereinabove, the notification u/s 12 states that taxation at the rate of twelve percentum on the assessee's turnover shall be applied with effect from 1.4.1982. The four periods in question are obviously covered by this entry.

11. In that view of the matter, the various principles of law relied on by the learned Counsel for the parties and the various judgments cited in support of their respective contentions do not arise for our consideration.

12. We must deal with another aspect of the matter canvassed on behalf of the petitioner. Learned Counsel for the petitioner has strenuously contended that, in the petitioner's case for the same product in Jamshedpur Circle of the undivided State of Bihar though for the period 1987-88 to 1990-91, the authorities had

initially taxed the petitioner at the rate of eight percentum. The same was reopened and taxed at 12 percentum which was set aside by a Division Bench of this Court in *Eureka Forbes Ltd. v. State of Bihar and Ors.* (supra). We must, therefore, closely examine the judgment. That was undoubtedly a case with respect to the same product in the undivided State of Bihar. It appears to us on a perusal of the judgment that the petitioner was initially taxed at the rate of eight percentum of its turnover. In view of an audit report to the effect that the petitioner ought to have been taxed at the rate of 12 percentum, the assessment proceedings were reopened and taxed at the rate of 12 percentum. This Court allowed the writ petition on two grounds, namely, an audit report can at best be another opinion which cannot, in the scheme of the Act, be the basis to reopen a concluded assessment proceeding. The same cannot be treated to be a source of information within the meaning of Section 19(1) of the Act. There must be fresh materials justifying reopening of assessment proceeding. The relevant portion of the judgment is reproduced hereinbelow:

From the aforesaid finding of the Full Bench of this Court and division Bench of this Court; and that of the honourable Supreme Court I can come to a definite conclusion and hold:

- (i) A mere change of opinion and/or second thought by any authority on the same set of facts and materials on record would not constitute "information" u/s 19(1) of the Bihar Finance Act, 1981;
- (ii) There must be some material and/or Facts on the record which had not been taken into account at the time of original assessment, to make reassessment in terms with Section 19(1) of the Bihar Finance Act, 1981; and
- (iii) "Audit report" cannot constitute "an information", as enumerated u/s 19(1) of the Bihar Finance Act, 1981, for the purpose of reopening of assessment.

16. In this case it is an admitted fact that the sole document of reopening of assessment by the respondents is the audit report. Further the audit party merely gave its opinion as to whether the vacuum cleaner is a "machinery" and/or "electrical goods". For the said reason I hold that there is no information and/or new material that was available before the respondents to reopen the matter relating to the assessment for the period in question and further the audit report is mere a change and/or second opinion. The impugned notices as contained in annexure 1 series, the orders of reassessment as contained in annexure 2 series being based solely on the audit report are completely illegal. Accordingly they are set aside. The revisional orders as contained in annexure 3 series having confirmed the illegal orders of reassessment, they are also set aside.

13. It is evident that the reported judgment dealt with a fundamentally different situation. It dealt with the issue whether or not the basis on which the concluded assessment proceeding was reopened, was a sound basis for the purpose. It did not deal with the questions whether or not the product in question is covered by one entry or the other. The primary issue in the reported judgment was as to

what constitutes source of information within the meaning of Section 19(1) of the Act, whether or not audit report constitutes fresh material, and whether or not there have been fresh materials justifying reopening of assessment proceedings. The same, therefore, stood on a different footing altogether. As is evident for the foregoing discussion, the primary question for consideration in the present case is whether or not Vacuum Cleaner is an unspecified item within the meaning of Section 12(1) of the Act, or is covered by Entry 33 of the notification u/s 11, or is covered by Entry 81 of the notification u/s 12.

14. In the result, we find ourselves in full agreement with the conclusion arrived at by the learned Tribunal, though on different grounds. The writ petition is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.