

(2004) 01 PAT CK 0054

In the Patna High Court

Case No : CWJC Nos. 8582 of 2001 and 10744 of 2002

I.T.C. Limited and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 15-01-2004

Acts Referred:

Citation : (2004) 01 PAT CK 0054

Judgement

Nagendra Rai, J.—The points involved in both the writ applications are one and the same and as such they have been heard together and are being disposed of by a common judgment.

2. The petitioners In both the cases have challenged the validity of the amended provision of Rule 45(b) of the Bihar Sales Tax Rules, 1983 (hereinafter referred to as the Rules) as amended by the Notification No. SO 43, dated 1st February, 2000.

3. The petitioner No. 1 in CWJC No. 8582 of 2001 is a Public Limited Company and is engaged in manufacturing cigarettes etc. One of its cigarette factories is located at Munger in the State of Bihar. It is registered as a dealer under the Bihar Finance Act (hereinafter referred to as the Act) and under the Central Sales Tax Act. The raw materials and other inputs for manufacture of cigarettes including packing materials are purchased outside the State of Bihar and brought in the factory at Munger in course of inter state trade and commerce or by way of stock transfers. The cigarettes and tobacco products are all exempted from the levy of sales tax. The paper, paper board and other inputs required for making shells and slides/hinge lid type packets in flattened form at the said factory at Munger are entirely consumed by the Company for packing of its various brands of cigarettes. The portion of the said shells and slides/hinge lids made at Munger factory are consumed for packing of cigarettes manufactured threat and substantial quantity thereof are transferred to other cigarette factories of the Company and that of its job workers all located outside the State of Bihar by way of stock transfer. The Company is not liable to pay sales tax on such

stock transfer. The Company however requires Form XXVIII B or exemption from use of such Form under Rule 42(7) of the Rules for inter State movement of the said packaging materials to and fro from its factory at Munger. The petitioner is liable to pay amount of sales tax only on sale of its waste products.

4. Up to the assessment year 1993-94, the petitioner--Company was assessed to sales tax only about Rs. eight lacs to ten lacs per annum. However, with regard to assessment years 1994-95, 1995-96 and 1996-97, the authorities made a wrong assessment raising huge demands. The petitioner's application for exemption regarding transport permit for movements of goods in terms of Rule 42(7) of the Rules was extended from time to time up to 31st May, 2001.

5. On 28.5.2001 the respondent--sales tax authorities passed an order that as the petitioner--Company had not paid the amount of tax including disputed tax and penalty for the aforesaid three assessment years and accordingly exemption under Rule 42(7) of the rules would stand withdrawn with effect from 1.6.2001. The result of the said order was that the movement of the goods to and fro from the Company was stopped with effect from 1.6.2001.

6. The petitioner filed a writ application before this Court being CWJC No. 7108 of 2001 challenging the said order. This Court taking note of the fact that the revision applications are pending before the Commercial Taxes Tribunal, Bihar did not interfere with the said order. Thereafter the petitioner filed a petition before the authorities concerned agreeing to pay disputed sales tax amount of the assessment years 1994-95 and 1995-96 and also the penalty amount in instalment for the said two assessment years as a condition for getting transport permit/ exemption and petitioner paid Rs. 3.15 crores under protest on 16.6.2001 towards the tax demand for the assessment years 1994-95 and 1995-96 and also paid one set of disputed penalty amount of Rs. 40 lakhs plus 40 lakhs for the said assessment years and also the entire amount of the disputed penalties imposed for the assessment year 1996-97. On 19.6.2001, the authorities granted exemption to the petitioner--Company under Rule 42(7) of the Rules up to 31.8.2001 subject to the company paying the amount of tax in instalment as stated in its petition filed before the authorities.

7. Again the petitioner-company made a request on 6.7.2001 for confirmation that the exemption granted under Rule 42(7) of the Rules will not be discontinued on the ground of outstanding demand relating to assessment year 1996-97. No response was received from the department and thereafter the present writ application was filed challenging the constitutional validity and legality of the amended Rule 45(b) of the Rules.

8. The petitioner filed an application for grant of interim relief in the said writ application and limited interim relief was granted on 11.7.2001 by this Court and thereafter the petitioner filed a SLP (Civil) No. 12634 of 2001 before the Apex Court and the Apex Court by order dated 10.8.2001 restrained the respondents from insisting upon the payment of disputed taxes and penalty as a condition for

extension of the petitioner's transport permit/exemption.

9. The case of the petitioner in CWJC No. 10744 of 2002 is that it is a public limited company and is engaged in manufacturing and selling tyres, tubes and flaps etc. in the State of Bihar and other States of the country. It is registered under the Act as well as under the Central Sales Tax Act. While making the assessment for the last six years, the claim of the company on account of sales made to Government Departments, Export sales and sales return have been disallowed by the Assessing Officer and confirmed by the Joint Commissioner of Commercial Taxes and it has challenged the order before the Commercial Taxes Tribunal. It has paid the entire admitted tax and 65% of the disputed tax. However, the Sales Tax Officers are not issuing Form XXVIII-B for non-payment of disputed tax resulting into stoppage of the business of the Company.

10. As stated above, the petitioners in both the cases have challenged the provision of Rule 45(b) of the Rules as amended by Notification No. S.O. 43 dated 1.2.2000. Their cases is that as they have disputed the amount of tax assessed the authorities cannot withhold the issuance of Form XXVIII-B or exemption under Rule 42(7) of the Rules for non-payment of the disputed dues. The amended provision of Rule 45 (b) requiring payment of disputed amount of tax as a condition for grant of declaration Form under XXVIII-B or exemption under Rule 42 (7) of the Rules are ultra vires of the Act and is violative of Article 301 and 304 of the Constitution of India. The amended provision of Rule 45(b) is also arbitrary, unreasonable and oppressive.

11. The stand of the State is that the original Rule 45(b) as well as the amended Rule 45(b) are all valid and not ultra vires of the Act. It is not violative of Article 301 of the Constitution of India nor arbitrary or violative of Article 14 of the Constitution. The aforesaid rule has been framed under Clause (ii) of Subsection (1) of Section 58 of the Act, to carry out the object of the Act. It is well settled that power to levy tax on sale of goods under Entry No. 54 of List II of the Seventh Schedule of the Constitution of India includes power to provide machinery for collection of tax and to curb evasion and Rule 45(b) has been framed to provide effective machinery for realisation of unstayed tax dues under the Act and as such it is valid one. The petitioners admittedly have not cleared the dues in terms of the demand notices issued u/s 25(2) of the Act and as such the authorities were justified in refusing to grant declaration Form being Form XXVIII-B/exemption.

12. Sri S. Ganesh, Senior Advocate appearing for the petitioners in CWJC No. 8582 of 2001 raised four points which are placed in seriatim.

(i) The amendment brought under Rule 45 (b) by notification No. S.O. 43 dated 1.2.2000 is ultra vires of Section 31(2-a) of the Act. Elaborating his submission he submitted that under the provision of Section 31(2a) of the Act the power to issue permits thereunder in Form XXVIII-A and XXVIII-B can be exercised for obtaining particulars and information and it cannot be used as a tool to stop the

movement of goods. The amended provision of Rule 45(b) stopped grant of the permit of movement of goods or exemption as it requires inter alia for payment of disputed dues also before grant of permit or declaration form or exemption. Section 31(2-a) of the Act does not authorise the authorities to exercise the power to grant of permit as a measure for recovery of taxes including disputed taxes.

It is to be stated that no grievance has been made with regard to refusal to grant permit for non-deposit of admitted dues under Clauses (a) and (b) or even under Clause (c) of Section 25(2) of the Act. His grievance is only with regard to disputed dues as per assessments as provided under Clause (c) of Section 25 (2) of the Act.

(ii) Rule 45(b) imposes restriction on the inter State movement of goods and thus violative of Article 301 of the Constitution. The same is not protected by Article 304 as it is a rule and not the legislative enactment. In the alternatively it was submitted that the rule cannot be protected by Article 304 of the Constitution as it is not reasonable and in public interest.

(iii) Rule 45(b) is also arbitrary, unreasonable and oppressive as the provision authorises the authorities to coerce the assessee to make payment even of the disputed dues before issue of transport permit/exemption.

(iv) Rule 45(b) of the Rules authorises the respondent authorities to impose restriction on issuance of permits and declaration forms in respect of inter State movement of goods and the same being legislation in respect of inter State transaction by the State which is unconstitutional and impermissible in law being beyond the legislative competence of the State under Entry No. 54 of List II of the Seventh Schedule of the Constitution of India.

13. The same submission has been adopted by Mr. L N Rastogi, the learned counsel appearing for the petitioner in CWJC No. 10744 of 2002.

14. Learned counsel appearing for the State on the other hand submitted that the said rule has been framed to check evasion of tax as such it facilities the trades and does not impede. It is not the means for recovery of the tax. It is regulatory in nature and it is not violative of Article 301 of the Constitution of India. It in no way interferes or impedes the inter State sale and the provision otherwise valid and within the legislative competence cannot be held to be invalid on the ground of hardship.

15. The parties also relied upon judgments in support of their submissions which will be referred to while dealing with the points in seriatim.

16. Before adverting to the submissions advanced at the bar it will be useful to refer to the relevant provisions of the Act and the Rules.

17. The Act has been primarily enacted to consolidate and amend the law relating to levy of tax on the sale and purchase of goods in Bihar. Section 3 is a

charging section. Section 31 as substituted by Bihar Finance Act, 1984 contains a provision with regard to furnishing of information by clearing and forwarding agents and seizure of goods carrier etc. Section 31 (2a) provides for carrying a declaration by a person transporting the goods in such form as may be prescribed by the Commissioner supported by a cash memo or bill or challan. However, the section empowers the Commissioner to exempt any person or dealer or class of registered dealers from the requirement of this sub-section. It also empowers the Commissioner to provide a form of declaration or adopt a form of declaration or permit prescribed for Sections 34 and 35. The sub-section reads as follows :

"(2a) A person transporting goods shall carry a declaration in such form as may be prescribed by the Commissioner supported by a cash memo or bill in case the movement is as a result of sale or a challan in case the movement is otherwise than as a result of sale in respect of goods which is being transported on a goods carrier, vehicle or a vessel or is otherwise in transit or in transit storage and shall produce such cash memo or bill or challan as the case may be, along with the aforesaid form of declaration on demand before the prescribed authority :

Provided that the Commissioner, by notification in this respect, may prescribe a form of declaration or adopt a form of declaration or permit prescribed for the purpose of Sections 34 and 35 of this part and, he may also prescribe in the said notification the manner in which such declaration or permit shall be utilised for verification and assessment of tax payable under this part :--

Provided further that the Commissioner may exempt any person or dealer or class of registered dealers from the requirement of this sub-section."

Under the aforesaid provision, the following notifications have been issued.

December, 28, 1985

S.O. 1432--In exercise of the powers conferred by Sub-section (2-a) of Section 31 of the Bihar Finance Act, 1981 (Bihar Act 5 of 1981) Part I, the Commissioner adopts Forms XXVIII-A and XXVIII-B as the declaration for the purpose of the aforesaid sub-section which a person shall carry in respect of goods being transported for the purposes of verification and assessment of tax payable and prescribes the following manners in which such permit shall be utilised for verification and assessment of tax payable under Part I of the said Act :

(i) A person transporting goods, exceeding the quantity notified u/s 35, on a goods carrier or a vessel shall carry Forms XXVIII-A or XXVIII-B duly filled up in respect of goods being brought into the State or being sent out of the State :

(ii) In case a form is found blank, or not containing all the particulars, it shall be deemed to be a violation of the provisions of Sub-section (2-a) of Section 31 of the said Act,

(iii) The prescribed authority, after verification of the consignment, shall make

appropriate endorsement in respect of the result of verification on both the copies/counterfoils of Forms XXVII-A or XXVIII-B, as the case may be, and retain one copy of original counterfoil and return the other copy or duplicate counterfoil to the person transporting the goods :

(iv) The copy of the original counterfoil retained by the inspecting authority shall be forwarded for verification and for assessment of tax to the circle in which the dealer is registered or has his place of business;

(v) The concerned dealer shall preserve the other copy or duplicate counterfoil of Forms XXVIII-A or XXVIII-B, as the case may be, for production before the assessing authority or for inspection at any time before or after the assessment.

2. This notification shall come into force with effect from January 1, 1986."

18. Section 34 empowers the State Government for establishment of check posts with a view to prevent evasion of tax which runs as follows :

"34. Establishment of check-posts.--(1) The State Government may, by notification, set up and erect, in such manner as may be prescribed, check-posts and barriers at any place in the State with a view to preventing evasion of tax payable under this part.

(2) Every person transporting such goods as the State Government may, by notification specify, shall, at any check-post or barrier, referred to in Sub-section (1) and before crossing such check-post or barrier file before such authority or officer as may be authorised by the State Government in this behalf a correct and complete declaration in such form and in such manner as may be prescribed.

(3) The authority or officer authorised by the State Government under Sub-section (2) may for the purpose of satisfying himself that the provisions of Sub-section (2) are not being contravened, and subject to such restrictions as may be prescribed, intercept, detain and search any road vehicle or river-craft which may be suspected of being used for contravening such provisions."

19. Section 35 imposes restriction on movement of goods with a view to ensure that there is no evasion of tax which runs as follows :

"35. Restriction on movement--(1) No person shall transport from any railway station, steamer station, airport, post-office or any other place, whether of similar nature or otherwise, notified in this behalf by the State Government, any consignment of such goods, exceeding such quantity, as may be specified in the notification, except in accordance with such conditions as may be prescribed and such conditions shall be made with a view to ensuring that there is no evasion of tax payable under this part.

Explanation.--Any consignment of goods, specified in a notification under Sub-section (1) brought within a radius of two hundred yards of a place, other than a railway station, steamer station, airport, or post office, notified under Sub-section (1) and meant for transport across or beyond such place shall be deemed

to be transported from such a place.

(2) Any authority or officer who may be authorised by the State Government in this behalf may, for the purpose of verifying whether any goods are being transported in contravention of the provisions of Sub-section (1) and subject to such restrictions as may be prescribed intercept, detain and search any road vehicle or river craft or any load carried by persons, and the person transporting goods or for the time being in charge of goods shall render all possible assistance to such authority or officer in carrying out the search.

(3) (a) The authority referred to in Sub-section (2) may seize any goods notified under Sub-section (1), which, he suspects, are being transported in contravention of the provisions of Sub-section (1) together with any container or material for the packing of such goods :

Provided that a list of all the goods seized under this sub-section shall be prepared by such officer and be signed by the officer, the dealer or the person in charge of goods and not less than two witnesses.

(b) The provisions of Sub-section (5) of Section 33 of this part shall, mutatis mutandis, apply in matters relating to such seizure, penalty, security, release and confiscation of goods."

20. Section 58 of the Act empowers the State Government to make rules with regard to matters mentioned therein. The relevant part of the said section is as follows;

"58. Power to make rules.--(1) The State Government may, subject to the condition of previous publication, make rules.

(i) all matters expressly required or allowed by this part to be prescribed and generally for carrying out the purposes of this part and regulating the procedure to be followed, forms to be adopted and fees to be paid in connection with proceedings under this part and all other matters ancillary or incidental thereto.

(ii) any other matter for which there is no provision or no sufficient provision in this part and for which provision is, in the opinion of the State Government, necessary for giving effect to the purposes of this part.

(2) In making any rules the State Government may direct that for a breach thereof, the prescribed authority may in the prescribed manner, impose a penalty not exceeding one thousand rupees and when the breach is a continuing one, a penalty not exceeding twenty-five rupees per day during the continuance of the offence."

21. In exercise of power under the said provision, the Governor of Bihar has framed Rules on 2nd January, 1984. Rule 42 contains a detailed provision with regard to restriction on movement of goods. It requires that for movement of goods permit has to be granted in Form XXVIII A in case of unregistered dealer and Form XXIII B in case of registered dealer. Rule 42 (7) provides that public

sector undertaking or a public limited company or such private limited company or firms whose annual gross turnover exceeds rupees one crore and is a registered dealer on its application being made, may be exempted from the use of permits in Form XXVIII B for movement of consignment of goods by the order of the Commissioner.

22. Rule 45 of the Rules prior to its amendment by Notification No. S.O. 43 dated 1st February, 2000 was as follows :

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

(a) if for reasons to be recorded in

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

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

(b) if the applicant for Forms IX, IXC 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 day 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 challan 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."

23. By the Notification No. S.O. 43 dated 1st February, 2000, the respondent No. 1 the State of Bihar in exercise of power u/s 56 (1) of the Act amended Rule 45 (b) of the Rules in following manner.

"In the said Rules in Clause (b) of Rule 45 after the words," have already expired" the following words shall be added;

"or has failed to make payment of any amount of tax by the date specified in the notice issued under Sub-section (2) of Section 25 or in the like manner has failed to make payment of tax by the date extended under first proviso of Sub-section (2) of Section 25 or has defaulted in payment of instalment."

24. Section 25 contains a provision with regard to payment of recovery of tax. Section 25 of the Act runs as follows :

"25. Payment and recovery of tax.--(1) The tax payable under this part shall be paid in the manner hereinafter provided.

(2) The amount of--(a) tax estimated in advance under Sub-section (10) of Section 3, or

(b) tax due according to the return filed by a dealer where full payment of such amount has not been made, or

(c) tax assessed or re-assessed under Sections 17 or 18 or 19 in pursuance of or as a result of an order on appeal, revision, reference or review, less the sum, if any, already paid by the dealer, or

(d) penalty, if any, imposed under any of the provisions of this part, shall be paid by the dealer or the person concerned into a Government Treasury, or in such other manner as may be prescribed by such date as may be specified in a notice issued by the prescribed authority for this purpose and the date to be so specified shall, ordinarily, be not less than forty five days from the date of service of such notice :

Provided that the prescribed authority may, in respect of any particular dealer or person, and for reason to be recorded in writing, extend the date of such payment, or allow such dealer to pay the tax due and the penalty, if any by instalments;

Provided further that where the prescribed authority considers it expedient in the interest of State revenue, it may, for the reasons to be recorded in writing, require any dealer, or person to make payment forthwith."

The points raised by the petitioners shall be discussed in seriatim.

Point No. (i)

25. The Act has been enacted to make a provision for the levy of tax on the sale and purchase of goods in Bihar. The State legislature is competent to enact laws which are ancillary or incidental to any provision relating to the aforesaid purposes. Any provision either under the Act or the Rules which made for the purpose of prevention of evasion of tax liability on intra State sale or purchase would be within the power of the State legislature. The State or its authorities has no power to make any law with regard to inter state sale or commerce or in the course of export. Section 31 (2a) requires a person to carry a declaration form being prescribed by the Commissioner for transportation of goods unless the same exempted by the Commissioner as provided under the proviso. The very purpose of carrying a declaration is for the purpose of verification and assessment of tax payable as well as to prevent evasion of tax. By the notification as stated above, the forms prescribed under Sections 34 and 35 have been adopted. The aforesaid notification adopting forms was challenged in this

Court by Hari Prasad Debuka and others (CWJC Nos. 990 and 991 of 1986 (R) on the ground as being ultra vires of the Articles 301 and 304 of the Constitution of India. The High Court quashed the same on the ground that same puts unwarranted restriction on the inter state trade and commerce. This Court relied upon the decision of the Apex Court in the case of Hans Raj Bagrecha Vs. State of Bihar and Others, held that the said notification imposed unwarranted restrictions on the inter state trade and commerce and quashed the same. The State of Bihar challenged the said judgment before the Apex Court in the case of State of Bihar and Others Vs. Harihar Prasad Debuka and Others, and the Apex Court set aside the judgment of this Court and upheld the notification. It held that the notification only prescribed the declaration forms to be carried on a goods carrier or vessel for transporting goods through the State of Bihar. It does not prohibit transportation of the goods and a declaration may also serve the public purpose by finding out unauthorised trade or business to which freedom of trade, commerce and intercourse would not apply. It will not affect the freedom of movement of goods carried, on the other hand it would facilitate transportation across and throughout the State of Bihar by showing the permit wherever required and thus instead of hindering it will promote the free movement of goods. The insistence on a permit in respect of goods entering the State in course of inter state trade could also be necessary to distinguish the goods that would be transported across the territory of the State and those which would reach the consumption point within the State. The impugned notification has to be held to be a measure in exercise of a power incidental to the levy of sales tax and the same is reasonable measure adopted by the State Legislature to prevent evasion and facilitate assessment of sales tax. In this connection, it is relevant to quote paragraphs 19 and 24 of the judgment which runs as follows :

"The Notification only prescribed the declaration Forms to be carried on a goods carrier or vessel for transporting goods through the State of Bihar. It does not prohibit transportation of the goods. Before the High Court it was not disputed that the Notification and the Forms were applicable in respect of goods being brought into the State and being sent out of the State in excess of the quantity notified u/s 35 of the Act on every goods carrier or vessel. Thus it would be applicable to the transport of all goods carried intrastate in Bihar, and inter state to and through the State of Bihar. Further Clause (ii) of the Notification states that if the prescribed Form is found blank or does not contain all the required particulars it would be deemed to be a violation of the provisions of Sub-section (2-a) of Section 31 of the Act entailing penalties for the infraction thereof. Counsel for the State submits that Form XXVIII-A (Permit) is meant for those who are not registered as dealers and it has to be obtained from office, while Form XXVIII-B (Permit) can be filled up by the registered dealer himself. It is further submitted that the particulars are to be furnished by the persons and this would not affect the freedom of movement of the goods carried, and that it would facilitate transportation across and throughout the State of Bihar by

showing the permit wherever required and thus, instead of hindering, it will promote free movement of the goods. We find no reason to disbelieve these statements. We are of the view that the permits will indirectly help assessment by ascertaining whether tax would be payable or not. The permit would enable the carrier to cross the State territory by producing it if and when needed and thus would promote rather than impede inter state trade. A declaration may also serve the public purpose by finding out unauthorised trade or business to which freedom of trade, commerce and intercourse would not apply. Thus, the impugned Notification has to be held to be a measure in exercise of a power incidental to the levy of sales tax and it could not be said to have been a colourable exercise of power to impede, restrict or barricade inter state trade in respect of which Bihar State legislature has no power to legislate. It is, to our mind, clearly distinguishable from the facts in Bagrecha case. The commonness between the two is in insistence of despatch certificate in Bagrecha and a permit in the instant case. But there the similarity ends. While there was an ex facie purpose disclosed in the Bagrecha prohibitory Notification, in the instant case the Notification ex facie shows the purpose, namely, to prevent evasion and facilitate assessment of sales tax. The insistence on a permit in respect of goods entering the State in course of inter state trade could also be necessary to distinguish the goods that would be transported across the territory of the State and those which would reach the consumption point within the State, and to ascertain whether tax would be payable in the latter category. We are, therefore, of the view that the ratio decidendi of the Bagrecha case would not be applicable to the facts of the instant case. We are also of the view that the facts in *Sodhi Transport Co. v. State of U.P.*, would be nearer to the facts of the instant case. In this case Section 28 of the Uttar Pradesh Sales Tax Act, 1948 authorised the State Government to establish check posts and barriers with a view to preventing evasion of tax or other dues payable under the Act in respect of sale of goods in the State. Section 28-B, added by the UP. Act 1 of 1973, makes provision for the procedure to be followed by persons who intend to transport goods from outside the State by road through the State to destinations outside the State. It provides that when a vehicle coming from any place outside the State and bound for any other place outside the State passes through the State, the driver or the other person in charge of such vehicle shall obtain in the prescribed manner a transit pass from the officer in charge of the first check post or barrier after his entry into the State and deliver it to the officer in charge of the check post or barrier before exit from the State. If he fails to do so it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in charge of the vehicle. Rule 87 of the Uttar Pradesh Sales Tax Rules, 1948, inserted by the U.P. Sales Tax (First Amendment) Rules, 1977 provides that a person who wishes to obtain a transit pass shall make an application in the prescribed form to the officer in charge of the check post concerned. It also provides for the issue of private pass in triplicate and for inspection of the documents, consignments and goods to ensure that the statements are true."

"24. The High Court has taken the view that an importer has to send the form in advance to the consignor so that it could be filled up to accompany the goods and that would amount to a blockade placed on the free movement of goods in interstate commerce. It should, however, be noted that the Notification has been issued and the Forms have been adopted by the State of Bihar and would be enforced in that State. There is nothing to indicate that the carrier would be penalised for not having filled up Forms XXVIII-A or XXVIII-B, as the case may be, while the goods were being carried through other States. They are to be filled up only when the carrier is within the territory of the State of Bihar. There is no provision to the effect that those who had not filled up the appropriate Form at the earlier stages of the transit would not be allowed to fill up within the State. The particulars required are not such as would be impossible or difficult for the carrier to furnish. There is no prohibition on transportation of the goods themselves. We are accordingly of the view that there is no direct and immediate restriction of interstate trade, commerce or intercourse as a result of the requirement to fill up and carry the Forms. In other words, the continuity of the transport will not be obstructed or interrupted. Stoppage of the transporting vehicle for the purpose of obtaining and filling in the appropriate Form would, in our opinion, not amount to interruption but only a stoppage. A mere stoppage of the movement of the vehicle will not have any direct or immediate effect on the trade. The checking of documents or the filling in and submission of Forms and returns, detour to a public weighbridge and the like may be an inconvenience, and unless they are shown to be unreasonable and not in public interest the Court may apply the maxim "*de minimis non curat lex*." A stoppage of the vehicle for roadside repair, for taking petrol, for allowing the driver to take rest or his meals would not naturally amount to interruptions of trade, commerce and intercourse. Public interest also will not allow transit regulations and allied measures to be violated, thwarted or evaded through the channel of interstate trade, commerce and intercourse, unless of course the measures are shown to be unreasonable. In this view of the matter this case would squarely be covered by the decision in *Sodhi Transport Co.* We accordingly hold the Notification and adoption of the Forms to have been validly made in exercise of powers incidental to the power of levying sales tax, and that they are reasonable and in public interest and not ultra vires the Articles 301 and 304 of the Constitution of India."

26. Thus, insistence of carrying a form for transporting the goods has been held to be regulatory measure having been made to carry out the purposes of the Act, The said form has been adopted u/s 31 (2a) of the Act, vires of which has not been challenged by the petitioner. Rule 45 of the Rules requires refusal of grant of declaration form, permit etc. on the ground of non-fulfilment of conditions including Rule 45 (b) which after amendment provides for deposit of tax as per return or as per assessment or re-assessment. The said provision cannot be said to be ultra vires of Section 31 (2a) of the Act, on the other hand, the same is with a view to achieve the purpose or object as envisaged u/s 31 (2a) of the Act. In other words, the provision of Rule 45 (b) of the Rules in no way is beyond the

power as provided u/s 31 (2a) of the Act as the very purpose of carrying a declaration form along with other documents is for the purpose of verification and assessment of tax as well as to prevent evasion of tax. The said purpose is achieved by the provision contained under Rule 45(b) of the Rules and accordingly, the submission advanced on behalf of the petitioner is devoid of any substance.

Point No. (ii)

27. Part XIII of the Constitution of India contains a provision with regard to trade, commerce and intercourse within the territory of India. Article 301 provides that subject to the other provisions of this Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. However, the said provision is subject to restrictions contained under Articles 302 to 305. It is not necessary to refer to the other Articles of the said Part except Article 304 which empowers the State legislature to put restriction on trade, commerce and intercourse among the States. Article 304(a) empowers the State of taxing goods imported from other States provided no discrimination is made in favour of similar goods produced within the State. Article 304(b) empowers the State legislature to put reasonable restriction on the freedom of trade, commerce or intercourse with or within that State which is required in the public interest. The Bill or amendment for the purposes of Clause (b) shall not be introduced or moved in the Legislature of a State without the previous sanction of the President.

28. Law is well settled that tax laws are not outside the purview of Part XIII of the Constitution of India but only such taxes which directly and immediately impede or restrict the free flow of trade attracts the provision of Article 301 of the Constitution of India. However, if the taxes remotely restricts the same, then the same do not fall within the purview of Article 301. It is also equally well settled that regulatory measures promote trade facilities and compensatory measures imposing taxes for use of tax facilities do not amount to infringement of freedom guaranteed under Article 301 of the Constitution of India. Learned counsel appearing for the petitioner in support of his submission relied upon the decisions of the Supreme Court in two cases, namely, in the case of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and in the case of *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and submitted that amended provision of Rule 45(b) of the Rules infringes Article 301 of the Constitution of India as it puts restriction on the movement of goods as it requires the payment of disputed dues before grant of permit or declaration form or exemption certificate. In *Atiabari Tea Co. Ltd. (supra)*, the appellants had challenged the provisions of the Assam Taxation (on Goods Carried by Roads or Inland Waterways) Act, (Assam Act XIII of 1954) which was passed by the Assam Legislature to provide for the levy of taxes on certain goods carried by road or inland water-ways in the State of Assam. The appellants were the tea growers in West Bengal or in Assam and they carried tea to the market in

Calcutta for the purpose of marketing. The substantial portion of the same was transported by road or inland water-ways and as such liability arose under the Act for payment of tax. Dealing with the said matter, the Apex Court held that taxation is not excluded from the operation of Article 301 of the Constitution of India but held that the restrictions on freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow of movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. It was further held in paragraph 52 of the judgment that "Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade."

29. Thereafter, the provision of the aforesaid Act was considered and it was found that the very purpose and object of the Act was to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State and accordingly the same was held to be infringing the freedom of trade and commerce under Article 301 of the Constitution.

30. Article 301 of the Constitution of India was again considered by seven judges of the Supreme Court in Automobile Transport (Rajasthan) Ltd. case (supra). There the judgment given in Atiabari Tea Co. Ltd.'s case (supra) was considered and explained and the bench agreed with the view taken in Atiabari Tea Co. Ltd.'s case that the restriction in Part XIII of the Constitution applies to the taxation law also and relevant Articles in Part XIII do not apply only to legislation in respect of entries relating to trade and commerce only but they held that the regulatory measures which do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them. The challenge in the same case was made to the provisions of the Rajasthan Motor

Vehicles Taxation Act. It was held that the taxes imposed under the Act are compensatory taxes which do not hinder the freedom of trade, commerce and intercourse assured by Article 301 of the Constitution of India and upheld the provision of the Act.

31. The question for consideration in this case is whether in view of the settled law, the amended provision of Rule 45(b) of the Rules can be held to be putting an impediment or restriction on the movement of trade, commerce and intercourse.

32. Section 31(2a) requires a person to carry a declaration in such form as may be prescribed by the Commissioner supported by a cash memo or bill or challan. The Commissioner may either prescribe a form of declaration or adopt a form of declaration or permit prescribed for the purpose of Sections 34 and 35 of the Act which shall be utilised for verification and assessment of tax payable under the Act. The Forms XVIII A and XVIII B have been adopted by the notification dated 28.12.1985.

33. Unamended Rule of 45(b) of the Rules empowers the authority to reject the application for permit and declaration form in Form XXVIII B on the ground that if the applicant for the Form XXVIII B at the time of making application defaulted in furnishing any return or revised return together with receipted challan showing payment of tax due from him according to such return or revised return for the furnishing of which the prescribed date or dates, or the extended date or dates, if any, have already expired provided the form may be issued subsequently if the aforesaid deficiencies are removed.

34. Learned counsel for the petitioner has not challenged the unamended provision of Rule 45(b) as according to him, the rejection of application to grant permit and declaration form under Form XVIII B on non-payment of admitted dues or other grounds as mentioned therein are regulatory provisions and the same has been made in the exercise of power incidental to the power of levy of sales tax. His grievance as stated above is only with regard to that amended provision which requires even payment of disputed amount as a condition precedent for grant of forms etc. The said provision has also been made in exercise of power incidental to the power of levy of sales tax. If the tax liability has been determined by the authority, the insistence for payment of the same before grant of permit with a view to prevent evasion of tax cannot be said to be a restriction or impediment in the movement of trade, commerce and intercourse and accordingly, the amended provision cannot be struck down on the ground of being violative of Article 301 of the Constitution of India as the amended provision does not contravene Article 301 of the Constitution of India. In view of the aforesaid conclusion it is not necessary to consider as to whether the amended provision is saved by Article 304(b) of the Constitution of India nor there is any occasion to consider the judgment relied upon by the learned counsel for the petitioner in the case of State of Mysore Vs. H. Sanjeeviah, , wherein it has been held by the Supreme Court that Article 304 of the

Constitution of India is applicable only to laws which has been passed by the legislature of the State and not the provisions made by the executive Government in exercise of delegated authority.

Point No. (iii)

35. Under the provisions of the Act elaborate provision has been made for recovery of the tax. Section 25 (2) contains a provision with regard to payment and recovery of tax. So far Clauses (a) and (b) of Sub-section (2) of Section 25 of the Act are concerned they provided for payment of estimated tax in advance and non-payment of tax which is due according to return. The petitioner has no grievance so far fulfilment of Clauses (a) and (b) of Section (2) of the Act are concerned. As a matter of fact, the unamended provision has already contained a provision for payment of tax according to return or revised return for grant of declaration form. The grievance is only with regard to Clause (c) of Sub-section (2) of Section 25 of the Act which provides for payment of tax assessed or re-assessed under Sections 17 or 18 or 19 in pursuance of or as a result of an order on appeal, revision, reference or review, less the sum, if any, already paid by the dealer. In other words, it contains a provision with regard to payment of tax, assessed or re-assessed under the different mode of assessment by the original authority or the appellate or the revisional authority. According to the petitioner, even if the tax is exorbitantly assessed and disputed by the applicant, he has to pay the same, otherwise the application for declaration form will be refused or exemption will be refused. As such according to the petitioner, the amended provision so far as it relates to Section 25(2) (c) of the Act is arbitrary, oppressive and unreasonable as it amounts to coercing the assessee to make payment even if the dues is disputed and the said provision is not for the purpose of verification and assessment of tax or preventing for evasion of the tax, on the other hand, the same is for the purpose of collection of the tax for which specific provision has been made under the Act. In support of the aforesaid submission, learned counsel appearing for the petitioner relied upon a judgment of the Supreme Court in the case of M/s. Dabur India Ltd. and Others Vs. State of Uttar Pradesh and others, , wherein it has been held that citizen cannot be coerced to make payment of dues which according to him is not legally payable. In the aforesaid case, in paragraph 30 it was held as follows.

"Before we part with this case, two aspects have to be adverted to one was regarding the allegation of the petitioner that in order to compel the petitioners to pay which the petitioners contended that they were not liable, the licence was not being renewed for a period and the petitioners were constantly kept under threat of closing down business in order to coerce them to make the payment. This is unfortunate. "We would not like to hear from a litigant in this country that the Government is coercing citizens of this country to make payment which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this

country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra legal steps or monoeuvre. Therefore, we direct that the right of renewal of the petitioner of licence must be judged and attended to in accordance with law and the occasion not utilised to coerce the petitioners to a course of action not warranted by law and procedure."

36. The Apex Court held that if the money is due to the Government, the Government should take steps to recover under the provisions of the Act and should not take extra legal steps. It cannot force the citizen to make payment which he is not legally obliged to make.

37. The question is whether insistence in payment of disputed tax for grant of permit can be held to be a reasonable one. At this stage it is made clear that as per amendment in the Rule 45(b) of the Rules, the requirement is for payment of tax in terms of notice issued u/s 25(2) of the Act. It does not speak of payment of penalty. Tax has been defined under the Act and it does not include penalty, even otherwise under Rule 45, as such for non-payment of penalty in terms of notice issued u/s 25(2) (d) of the Act, declaration form/exemption cannot be refused. The Act being a taxing statute it must be interpreted as it reads and no addition can be made on the ground of legislative intendment.

38. Insistence on payment of admitted dues for grant of declaration form can be justified on the ground that the authorities may refuse the same as the very object to deposit the admitted dues is to prevent evasion of tax, but the same cannot be said to be reasonable in the case of disputed amount. When the order of assessment or re-assessment is passed and the assessee does not admit the amount of tax and challenges the same by filing the revision or appeal, then asking him to deposit the said amount before grant of declaration form or exemption will be unreasonable or arbitrary and the same will be oppressive also as that will amount to coercing a person to pay the tax which is not legally payable by him according to his stand. Even if the words used under the aforesaid clause are to meet the tax evasion its meaning is to be restricted to avoid arbitrary, unjust results.

39. In my view, the insistence for payment of disputed amount cannot be justified in law and accordingly the authorities cannot refuse to grant declaration form/permit/exemption for non-payment of disputed dues. In cases an order of assessment or re-assessment has been passed and that amount is admitted by the applicant assessee, then without payment of the same, the authority may refuse to grant declaration form/exemption. If the same is disputed by filing appeal/revision etc. and in case interim order is passed by the authority, then in that case the assessee has to pay the amount as per interim order for obtaining declaration form/permit etc. But in a case where the demand is disputed by adopting lawful means (Appeal etc.) then in that case asking the assessee to deposit the disputed amount for grant of declaration form etc. will be unjust unreasonable and a device to recover the disputed tax by adopting extra legal

steps. In my view, the provision of Rule 45(b) cannot be declared ultra vires but the same has to be read down to maintain its validity and accordingly, restricted meaning has to be given as stated above and it has to be held that for non-deposit of admitted tax as provided u/s 25(2) (a) (b) (c) of the Act the prayer for grant of declaration form can be rejected and exemption can be refused, but when the assessee disputes the amount of tax assessed, then the application for grant of declaration form or prayer for exemption cannot be rejected on the ground of non-deposit of disputed tax as indicated above.

Point No. (iv)

40. So far point No. (iv) is concerned, the Apex Court has already held in the case of State of Bihar and Ors. v. Harihar Prasad Debuka and Ors. (Supra) that permit or declaration form will promote free movement of the goods not only intra State but inter State also. Insistence on a permit in respect of goods entering the State in course of interstate trade could also be necessary to distinguish the goods that would be transported across the territory of the State and those which would reach the consumption point within the State and to ascertain whether tax would be payable in the latter category.

41. Thus the provision of Rule 45(b) of the Rules cannot be held to be beyond the legislative competence of the State under Entry No. 54 of List II of the Seventh Schedule of the Constitution of India.

42. Accordingly, the point Nos. (i) (ii) and (iv) are rejected and point No. (iii) is allowed to the extent mentioned above.

43. The writ application is partly allowed as indicated above and the case of the writ petitioner for grant of exemption or declaration form shall be considered accordingly.

Ashok Kumar Verma, J.

44. I agree. Appeal allowed.