

(2002) 02 PAT CK 0055

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10276 of 2000

Jai Ram Das and Co.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-02-2002

Acts Referred:

Citation : (2002) 02 PAT CK 0055

Judgement

Nagendra Rai, J.—The writ petitioner, who is engaged in the business of dealings in general mercantile goods including cigarette at Begusarai, has filed the present writ application challenging the assessment order passed by the Deputy Commissioner of Commercial Taxes, Begusarai, for assessment years 1993-94, 1994-95 and 1995-96 u/s 17(5) of the Bihar Finance Act, 1981 (hereinafter referred to as "the Act") read with Section 8 of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred to as "the BET Act"). The total tax liability has been determined as Rs. 5,55,865.86 paise and the penalty imposed thereon as Rs. 1,37,300.90 paise. The assessing authority has not accepted the claim of the petitioner for exemption from payment of entry tax under the BET Act on the ground that he is second buyer and not an importer as defined under the BET Act on account of non-filing the form ET-IX as prescribed under Rule 6 of the Bihar Tax on Entry of Goods into Local Areas Rules, 1993 (hereinafter referred to as "the Rules").

2. The facts necessary for disposal of the present case are like this. The State Government enacted BET Act for the purpose of collection of tax on entry of goods into local areas for consumption, use or sale. Section 3 of the BET Act is the charging section according to which a tax on entry of scheduled goods into a local area for consumption, use or sale therein shall be levied and collected at a rate not exceeding 5 percentum of the import value of such goods as may be specified by the State Government in the notification subject to such other conditions as may be prescribed. The State Government is also empowered under the said provision to provide rates for different scheduled goods for different local areas. Sub-section (2) of Section 3 provides that the tax leviable

under the BET Act shall be paid by every dealer liable to pay tax under the Bihar Finance Act or any other person who brings or causes to be brought into the local areas such scheduled goods whether on his own account or on account of his principal or takes delivery or is entitled to take delivery of such goods on such entry. Other provisions of the said section are not relevant for the present case.

3. Section 5 of the BET Act requires every dealer in scheduled goods to get himself registered under this Act. Section 6 of the BET Act empowers the State Government to exempt from payment of tax any class of dealers, persons or importers. Section 7 deals with offences and penalty. Section 8 of the BET Act says that the provisions of the Bihar Finance Act will apply subject to the provisions of this Act with regard to assessment, collection and enforcement of payment of tax and penalty. Section 9 empowers the State Government to make rules for carrying out the purposes of the BET Act. In pursuance of power u/s 9 of the BET Act, the State Government has framed Rules. Rule 6 is relevant for the present case which requires production of documents or evidence by a dealer who claims exemption from levy of the tax under the Act. According to the said Rules, a dealer, who claims exemption on the ground that the tax has been paid at the first point of entry into a local area, is required to substantiate his claim before the assessing officer by producing purchase bills, invoices, cash memo and other documents to its satisfaction and a true and complete declaration in form ET-IX received from the selling dealer. The said rule further provides that the registered dealer who makes the first sale of the goods imported from any other local area or from outside the State has to pay the tax by virtue of his being the first importing dealer and shall issue the aforesaid form to the purchasing dealer in addition to cash memo or bill or invoice. Any other dealer making second or subsequent sale of such scheduled goods which has suffered the levy of tax and on which entry tax has been paid at the stage of first entry into local area are also required to issue to the purchasing dealer a declaration in form ET-IX as prescribed in Clause (a). The Rule 6 runs as follows :

"6. Evidence in support of claim for exemption from levy of tax.--(1) A dealer who claims that any part of his turnover relating to import of scheduled goods is not liable to tax on the ground that tax was paid at the first point of entry into a local area as notified by State Government under Sub-section (1) of Section 3 of the Ordinance, he shall substantiate such claim before the assessing officer by producing purchase bill, invoices or cash memos and other documentary evidences to the satisfaction of the said authority and a true and complete declaration in form ET-IX received from the selling dealer :

Provided that one form of declaration shall not be valid for more than one transaction of sale unless all the transactions are of the same year and for less than one lac of rupees.

(2)(a) Every registered dealer who makes first sale of the scheduled goods imported from any other local area or outside the State and by virtue of being the first importing dealer has paid tax thereon, shall issue to the purchasing

dealer in addition to a cash memo or bill or invoice, a true and complete declaration in form ET-IX. The declaration shall be signed by the dealer or his declared manager.

(b) Any other dealer making second or subsequent sale of such scheduled goods which has suffered the levy of tax and on which entry tax has been paid at the stage of first entry into a local area, shall issue to the purchasing dealer a declaration in form ET-IX as prescribed in Clause (a).

(3) The dealer shall maintain serially and chronologically a complete account in a register containing all particulars required to be mentioned in the form and of all the forms issued."

4. The State Government issued notification dated February 25, 1993 (annexure 4) specifying the rates at which and the conditions subject to which the tax on entry of scheduled goods shall be levied and paid on entry in any local areas of the State of Bihar from any other local areas or outside the State of Bihar in exercise of powers under Sub-section (1) of Section 3 of the BET Act. Paragraph 3 of the notification clearly stated that the scheduled goods shall be subject to entry tax only at the first point of entry in local areas and at the subsequent entry in any other local areas the scheduled goods shall not be subject to tax under the Ordinance provided the subsequent importing dealer produces before the assessing officer the original copy of the cash memos or bill or challan of the dealer from whom he purchased or received the goods supported by a declaration in the form and manner prescribed as stated above a declaration in form ET-IX.

5. The petitioner claims that he deals in general mercantile goods including cigarette. The cigarette is admittedly one of the scheduled goods under the BET Act. The petitioner applied for registration u/s 5 of the BET Act, but no registration has been granted. In the meantime, the authorities took steps for assessment u/s 17(5) of the Bihar Finance Act, 1981 read with Section 8 of the BET Act for the three assessment years, namely, 1993-94, 1994-95 and 1995-96 and imposed tax and penalty on the ground that the petitioner has not filed the form ET-IX to claim exemption from payment of tax on the ground of he being the subsequent importer or dealer.

6. The learned counsel appearing for the petitioner has neither challenged the vires of the BET Act nor Rules framed thereunder. His only challenge is that requirement of filing form ET-IX as provided under Rule 6 of the Rules for claiming exemption on the ground of being a subsequent dealer or importer is directory and not a mandatory provision and for non-filing of the same the claim of exemption cannot be rejected and the assessing authority on the basis of other materials produced by the dealer should decide the question of exemption. He referred to several decisions which will be referred to at appropriate stage.

7. The learned counsel appearing for the State on the other hand submitted that under the provisions of the Act scheduled goods have to suffer entry tax only at

the first point of entry into local areas. In other words, the registered dealer who makes the first sale of the scheduled goods has to pay tax. Any person claiming to be the subsequent dealer or importer and thus entitled to exemption from payment of entry tax is obliged to give evidence in support of the said claim. The registered importing dealer while making the sale at the first point is also required to issue a declaration in form ET-IX to the subsequent dealer and the subsequent dealer has to file the aforesaid form before the assessing authority as a proof of evidence for claiming exemption apart from the other document. The said provisions have been made to carry out the provisions of the Act to prevent fraud and collusion in attempt to evade tax and to facilitate administrative efficiency. The said provision is mandatory and not directory. If the said provision is interpreted to be directory then that will create a lot of confusion and uncertainty in the assessment matter. The dealer may produce different types of evidence which may be accepted or rejected and in case of rejection it will give rise to unavoidable litigation. The State Government with a view to avoid the same has provided under the Rules a recognised mode of proof of the fact of payment of entry tax by the first dealer.

8. The only point that falls for consideration is as to whether the provisions of Rule 6 of the Rules which requires the subsequent dealer to produce evidence by producing purchase bill, invoices or cash memos and other documentary evidences and a true and complete declaration in form ET-IX received from the selling dealer for claiming exemption from levy of tax is mandatory or directory one.

9. The object of the Act as noticed above is to levy entry tax on the scheduled goods only at the first point of entry and thus liability to pay entry tax is on the first importing dealer-cum-seller. The subsequent seller and importers are not liable to pay tax with regard to entry of the scheduled goods under the provisions of the Act. This is evident from the provisions of Section 3(1) of the BET Act read with notification dated 25th February, 1993. The State Government is empowered to frame rule u/s 9 of the BET Act to carry out the purpose of this Act. To achieve that Rules have been framed and Rule 6 as quoted above contains a procedure of proving the factum of payment of entry tax by the first dealer for the purpose of claiming exemption by the subsequent dealer. According to the said provision, a dealer claiming exemption has to prove his claim before the assessing authority by producing bill, invoices or cash memos or other documentary evidences to the satisfaction of the said authorities with a true and complete declaration in form ET-IX received from the selling dealer. The selling dealer is also required by the said Rules to issue the aforesaid form to the purchasing dealer in addition to the cash memo or bill or invoice. This requirement and mode of proof has been provided to prevent fraud and to facilitate administrative efficiency. The main object of the Rules is to find out that the entry tax has been paid at the first entry and no subsequent dealer is required to pay the tax in such a case. If the fact of payment of tax at the first entry is proved then the subsequent purchasing dealer would not be required to

pay the tax and it would avoid double taxation.

10. According to learned counsel for the petitioner as the rule itself provides for filing other evidences also including bills or invoices or cash memos, the requirement of form may be held to be directory because the assessing authority may feel satisfied on the basis of other materials also, with regard to claim of exemption. In this connection, he relied upon a judgment of the Supreme Court in the case of the State of Orissa v. M.A. Tulloch and Co. Ltd. reported in [1964] 15 STC 641. In that case, the subject for consideration was the provisions of Section 5(2)(a)(ii) of the Orissa Sales Tax Act, 1947 and the Rule 27(2) of the Orissa Sales Tax Rules, 1947 framed thereunder. According to provision of Section 5(2)(a)(ii), a selling dealer is entitled to a deduction in respect of sales to a registered dealer of goods, if the goods are specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa. Rule 27(2), inter alia, provided that a dealer who wishes to deduct from his gross turnover amount of a sale on the ground that he is entitled to deduction under Sub-clause (ii) of Clause (a) of Subsection (2) of Section 5 of the Act then apart from filing cash receipt or bill, etc., he would also be required to file a declaration in writing supplied by the purchasing dealer or by his authorised person in writing by such dealer that the goods in question are specified in the purchasing dealer's certificate of registration as being required for resale by him or in the execution of any contract. Dealing with the aforesaid provision, the apex Court held that Rule 27(2) must be reconciled with the section and the said provision has to be held directory but the same should be substantially complied with. In this connection it is relevant to quote the relevant paragraph of the said decision of the apex Court :

"In our opinion, Rule 27(2) must be reconciled with the section and the rule can be reconciled by treating it as directory. But the rule must be substantially complied with in every case. It is for the Sales Tax Officer to be satisfied that, in fact, the certificate of registration of the buying dealer contains the requisite statement, and if he has any doubts about it, the selling dealer must satisfy his doubts. But if he is satisfied from other facts on the record, it is not necessary that the selling dealer should produce a declaration in the form required in Rule 27(2), before being entitled to a deduction."

11. The case of State of Orissa Vs. M.A. Tulloch and Co., was considered by the Supreme Court in the case of Kedarnath Jute manufacturing Co. Ltd. v. Commercial Tax Officer [1965] 16 STC 607. There similar provision under the Bengal Finance (Sales Tax) Act, 1941 was under consideration. Section 5(2)(a)(ii) of the said Act provided exemption from taxable turnover to all sales to a registered dealer of goods of the class or classes specified in the certificate of registration of dealer as being intended for the purposes mentioned therein. But the said exemption was subject to a proviso. According to which a declaration form duly filled up and signed by the registered dealer to whom the goods were sold and containing the prescribed particulars on a prescribed form obtainable

from the prescribed authority has to be furnished in the prescribed manner by the dealer who sells the goods. Rule 27A framed under the said Act provided that a dealer who wishes to claim the said exemption shall produce such a declaration in writing signed by the purchasing dealer. The apex Court held that it gives exemption to the dealer as covered by the aforesaid provision and also prevent fraud and collusion in an attempt to evade tax. It was held as follows :

"There is an understandable reason for the stringency of the provisions. The object of Section 5(2)(a)(ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will well nigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the twofold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provisions of the said clause seek to avoid."

12. With regard to decision in the case of the State of Orissa v. M.A. Tulloch and Co. Ltd. [1964] 15 STC 641, the apex Court held that the mandatory requirement under the rule for filing of a declaration form in writing by the purchasing dealer by a dealer claiming exemption was inconsistent with the provisions of Section 5(2)(a)(ii) of the Act and in that situation to avoid that conflict, the apex Court held that the rule was directory.

13. In the case of Commissioner of Sales Tax Vs. Prabhudayal Prem Narain, the question as to whether the provision for furnishing the declaration form prescribed under Rule 12-B of the U.P. Sales Tax Rules, 1948 by the dealer claiming exemption u/s 3-D of the U.P. Sales Tax Act, 1948 on sales to registered dealers in U.P. is mandatory or not was considered by the apex Court and relying upon the judgment of Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, held that the provision is mandatory and the assessee is entitled to exemption only on furnishing declaration form and in absence of filing of declaration form, the assessee is not entitled to exemption.

14. Thus it has been settled by the Supreme Court that requirement of furnishing a declaration form for claiming exemption under the provisions of the Sales Tax Act by a dealer is mandatory as it helps the dealer to claim exemption, prevents fraud and collusion in an attempt to evade tax and facilitates the administrative efficiency.

15. The learned counsel appearing for the petitioner relied upon a judgment of

the West Bengal Taxation Tribunal reported in [1990] 76 STC 14 (Tata IISCO Dealers' Association v. Commissioner of Commercial Taxes). In that case constitutional validity of Sub-clause (vd) of Section 5(2)(a) of the Bengal Finance (Sales Tax) Act was challenged before the High Court of Calcutta which was transferred to the Tribunal. Prior to introduction of Sub-clause (vd) of Section 5(2)(a), the tax on the sale of iron and steel was levied on the last point of sale. By the said amendment, the point of taxation was changed to the first point of sale and subsequent sale was not subjected to any tax. It provided that the dealer at the second or subsequent points of sale if is able to prove to the satisfaction of the Commissioner of Commercial Taxes that the concerned iron and steel were purchased by him in the same form from a registered dealer provided that a declaration in form XXIVC obtainable in the prescribed manner and duly signed by the selling registered dealer is furnished. In that case Kedarnath Jute Manufacturing Co. Ltd. [1965] 16 STC 607 was also referred to but that was distinguished on the ground that single point taxation which was compulsory u/s 15(a) of the CST Act was not under consideration in Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, . The Supreme Court held that the aforesaid provision was invalid as violative of Article 14 of the Constitution. However, it considered Sub-clause (vd) of Section 5(2)(a) and relevant rules and held the same to be directory. The State of West Bengal did not file an appeal against the aforesaid judgment. However, one of the petitioners, namely, Calcutta Iron Merchants' Association filed appeal before the Supreme Court which is reported in [1997] 107 STC 556 (Calcutta Iron Merchants' Association v. Commissioner of Commercial Taxes) which has also been relied upon by the learned counsel for the petitioner. The apex Court did not go into the question of correctness of the finding of the Tribunal that the aforesaid provision was invalid for the reason that the State has not preferred any appeal. It considered the other question with regard to grievance made by the appellants before the apex Court relating to subsequent part of the judgment holding the provision with regard to production of a declaration by the seller to be directory and not mandatory and directing that the words "and furnishes" be read as "or furnishes". The apex Court held that if the sub-clause is to be read in terms of the direction of the Tribunal, the same does not make any sense and distorted from a grammatical point of view. On that ground that direction of the Tribunal was set aside. Thus in that case, the question as to whether the aforesaid provision was mandatory or directory was not at all considered by the apex Court.

16. Learned counsel for the petitioner also relied upon a division Bench judgment of this Court passed in Food Corporation of India, Patna Vs. The Commissioner of Commercial Taxes, Bihar, Patna, dealing with the provisions of the Bihar Sales Tax Act. In that case matter related to levy of special sales tax. The notification provided that the subsequent purchaser to claim exemption from payment of special sales tax has to produce before the assessing authority purchase orders, if any, the original copy of the cash memoranda or bills issued to him by the

dealer from whom he purchased the goods and a true declaration in writing in form IX-C appended to the Bihar Sales Tax Rules, 1959 from such dealer or his manager, declared u/s 10 of the Bihar Sales Tax Act, 1959. Dealing with the aforesaid provision, the division Bench held that as the condition for filing declaration form was wholly immaterial for determining the point of levy and as such the provisions are directory because such a reading will not in any way adversely affect the interest of the revenue. On the other hand notification will make the provision under the notification consistent with Section 5A of the Act which contains a provision with regard to point in the series of sales at which the special sales tax shall be levied. In my view, the observations made by the division Bench are not relevant for deciding the present controversy. This apart the said observations are contrary to the law declared by the apex Court in the case of Kedarnath Jute Manufacturing Co. Ltd. [1965] 16 STC 607 and Prabhudayal Prem Narain [1988] 71 STC 1.

17. In the case of Phool Chand Gupta Vs. State of Andhra Pradesh, , the question for consideration before the apex Court was whether the requirement of furnishing form C in terms of Rule 12(3)(ii) of the Central Sales Tax (Andhra Pradesh) Rules, 1957, for claiming exemption was ultra vires of the Act and the Rules and also as to whether it was mandatory or directory. The apex Court held that Section 13(3) confers wide powers on the State Government to make Rules to carry out the purpose of the Act provided the said rules are not inconsistent with the Act and the Rules framed by the Central Government in exercise of power conferred by Sub-section (1) of Section 13. It was further held that requirement of filing form C for claiming the benefit of exemption u/s 6(2) did not run counter to the provisions of the Act or the Central Government, on the other hand the same was within the rule-making power of the State Government and to carry out the purposes of the Act. It was further held that the provision was mandatory and not directory. It is for the State Government to select a mode of proof and once it has selected production of a specific document as a mode of proof for the purpose of claiming exemption, the same cannot be held to be impermissible in law. If the provision is held to be directory it will create lot of uncertainty. If other document is produced and rejected that will lead to further litigation. In this connection, it is relevant to quote paragraph 13 (page 609 of 104 STC) of the judgment :

"If the provision in Rule 12(3)(ii) of the State Rules is held to be directory, substantial compliance would suffice. That would permit the dealer to adopt any other mode of proof. It would be for the authorities to accept it as sufficient or to reject it. If the authorities reject it as insufficient, it would lead to avoidable litigation. It was, therefore, open to the State Government to accept the recognised mode as the exclusive mode of proof to avoid disputes on the sufficiency or otherwise of the proof and also to make the process of granting exemption easy and uniform. Such a rule must be held to be within the scope and ambit of Section 13(3) read with Section 13(4) of the Act and not inconsistent with the Act or the Central Rules."

18. Coming to the instant case, Rule 6 of the Rules contains a provision with regard to evidence which is to be produced by a dealer who wants exemption from payment of tax under the Act on the ground that the tax has already been paid at the first point by the first importing dealer. Apart from other documents, he is required to file complete declaration in form ET-IX received from the selling dealer. The said rule has been framed to carry out the object of the Act and as such the requirement of filing a document including declaration form is neither inconsistent nor contrary to the provisions of the Act and as such this case is not similar to the case of State of Orissa Vs. M.A. Tulloch and Co., The said provision has been made with a view to see that the object of the Act is achieved, i.e., the tax has been paid by the first importing dealer and there is no evasion of entry tax and exemption is given only to subsequent dealers. This also prevents a fraud and collusion in an attempt to evade tax and to facilitate administrative efficiency because filing of a particular form ET-IX by all the dealers will not lead to uncertainty or unnecessary harassment. If this provision is held to be directory then dealer will be free to provide different modes of proof which may or may not be accepted by the assessing authority giving rise to numerous litigation. It will also affect the administrative efficiency.

19. Thus, the requirement of declaration form ET-IX is held to be mandatory and not directory as submitted by learned counsel for the petitioner.

20. Accordingly, there is no merit in this writ application and the same is dismissed. However, it will be open to the petitioner to challenge the assessment order on other grounds before the appellate authority, if so advised.

R.S. Garg, J.

21. I agree.