
(2016) 08 PAT CK 0089

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 18989 of 2015

M/s Lumbini Beverages Pvt. Ltd.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 16-08-2016

Acts Referred:

Bihar Finance Act, 1981 — Section 7(3)(b)

Bihar Value Added Tax Act, 2005 — Section 57, Section 96(3)(b)

Citation : (2016) 4 PLJR 994

Hon'ble Judges : Mr. Hemant Gupta and Mr. Ahsanuddin Amanullah, JJ.

Bench : Division Bench

Advocate : Mr. Suraj Samdarshi, Advocate, for the Petitioner; Mr. Vikash Kumar, S.C. 11, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Hemant Gupta, J. - The challenge in the present writ application is to an order dated 13th of September, 2013 passed by the Commercial Taxes Officer, Hajipur Circle, Hajipur, whereby request of the petitioner for waiver of interest to the extent of Rs. 1,70,28,937/- stands declined.

2. The said request for waiver of interest was made in view of the fact that the petitioner, a Private Limited Company, is engaged in production of non-alcoholic beverages. The petitioner was granted certificate by the Director, Technical Development, Bihar, Patna on 22nd of July, 1998 that the petitioner has commenced its commercial production on 14th of April, 1998 so as to make the petitioner eligible for the grant of Sales Tax exemptions under the Industrial Policy, 1995. Such policy was framed by the State wherein, certain initiatives were promised to the intending entrepreneurs to provide exemption to the units coming into production within the policy period i.e. from 1st of September, 1995 to 31st of August, 2000, which was further extended for pipeline industries from 1st of April, 2000 to 27th of June, 2003. Since the petitioner satisfied the requirement of exemption from Sales Tax, the same was granted for 10 years i.e.

from 14th of April, 1998 to 13th of April, 2008 with a ceiling of 150 per cent of the fixed capital investment. Consequent to the exemption granted, the goods produced by the petitioner were treated to be exempted from payment of Sales Tax in terms of Section 7(3)(b) of the Bihar Finance Act, 1981.

3. During the period when the exemption from payment of taxes was being availed by the petitioner, the Bihar Value Added Tax Act, 2005 (hereinafter referred to as "VAT Act") came into force on 1st of April, 2005. In terms of Section 96(3)(b) of the VAT Act, the unit enjoying the benefit of exemption from payment of tax under the Bihar Finance Act, 1981 were allowed to opt for deferment of its tax liability in the manner and extent provided.

4. The petitioner challenged such provision before this Court in C.W.J.C. No. 5613 of 2005, which is pending consideration. The State Government took a decision on 14th of September, 2009 for giving exemption to the units which could not avail full exemption due to enforcement of VAT Act with effect from 1st of April, 2005. The amount of exemption was to be borne by the Department of Industries, Government of Bihar.

5. On 18th of March, 2010 a decision was taken under the Chairmanship of the Chief Secretary, Bihar when a direction was issued to the Department of Industries for obtaining necessary Government order for reimbursement of Rs. 18.75 crores to 22 such units including the unit of the petitioner. The Director of Industries thereafter issued a disbursement order on 31st of December, 2012 in favour of the units including the petitioner which were granted exemption from tax under the Bihar Industrial Policy, 1995 but could not avail full amount of exemption. The Commissioner, Commercial Taxes directed the respective Circle Incharge of Commercial Taxes Department to ensure that the VAT is paid along with the interest before disbursement of grant is started by the State Government.

6. The petitioner submitted representation for the payment of the amount deducted towards interest on delayed payment of deferred amount of VAT. Such representation remained unsuccessful. It is thereafter the petitioner invoked the writ jurisdiction of this Court.

7. In the counter affidavit, the stand is that once the VAT Act came into force with effect from 1st of April, 2005, the exemption granted under the Bihar Finance Act, 1981 and the notification issued there under became redundant. The remaining period of exemption was provided to be optional for deferment. Any delay in payment of deferred amount of tax was to carry interest over it in terms of Rule 57 of the Bihar Value Added Tax Rules, 2005 (hereinafter referred to as "the VAT Rules"). It is averred that petitioner did not opt for deferment of his VAT liability by applying in Statutory Form A-XII to his Circle Incharge in terms of the provisions contained in Section 96(3)(b) of the VAT Act read with Rule 57 of the VAT Rules for the period commencing from 1st of April, 2005 to 13th of April, 2008. Since the petitioner has failed to opt for deferment of his

VAT, he is bound in law to deposit the monthly admitted VAT amount and also interest at the rate of 1.5% per month for delay in payment of monthly admitted VAT amount. The total VAT amount, which was not deposited from 1st of April, 2005 to 13th of April, 2008 is Rs. 10,77,80,886.26/-. It is also pointed out that had the petitioner opted for deferment of his VAT liability, it was essential for the petitioner to deposit the admitted VAT amount in five equal instalments payable by 31st March every year commencing after the expiry of the year 2008-09. It is further stated that there cannot be estoppel against the provisions of law. Therefore, the petitioner has not opted for deferment of tax in terms of Section 96 of the VAT Act, the liability to pay interest arises. It is pointed out that total amount of statutory interest which was deposited by the petitioner for delayed payment of instalments of deferred amount of VAT was Rs. 1,70,28,937/-.

8. The petitioner has filed rejoinder controverting the stand of the State in the counter affidavit.

9. We have heard learned counsel for the parties at length.

10. It is admitted fact that the petitioner was granted exemption from payment of tax for a period of 10 years i.e. from 14th of April, 1998 to 13th of April, 2008 but due to enactment of the VAT Act with effect from 1st of April, 2005, the provision of exemption came to an end. Section 96 of the VAT Act contains transitory provisions which reads as under:-

"96 (3) Where -

(a) any dealer has been granted the facility of deferment of tax payable under section 23A of the Bihar Finance Act, 1981, (Bihar Act 5 of 1981) as it stood before its repeal by section 94, and who has, on the commencement of this Act, not availed of the full entitlement, he shall be allowed to continue to defer the tax payable under this Act, in the manner and to the extent prescribed;

(b) any dealer has been granted the facility of exemption from payment of tax under clause (b) of sub-section (3) of section 7 of the Bihar Finance Act, 1981 (Bihar Act 5 of 1981) as it stood before its repeal by section 94, and who has, on the commencement of this Act, not availed of the full entitlement, he shall be allowed to opt for deferment of his tax liability under this Act, in the manner and to the extent prescribed."

11. The prescribed procedure for availing the deferment is contained in the VAT Rules. The relevant Rule is 57 which reads as under:-

"57. Deferment. - (1) Such industrial units as are availing the benefit of exemption from payment of tax on the scale of their finished products granted under clause (b) of subsection (3) of section 7 of the earlier law and who have not availed of their full entitlement shall be allowed to opt for deferment of their liability to pay tax in terms of section 96 of the Act. Such deferment shall be equivalent to his unavailed entitlement.

(2) No dealer eligible for deferment under sub-rule (1) shall be allowed to defer his tax liability under the Act unless he applies, to the concerned Circle Incharge, for the same in form A-XII

(3) Upon receipt of such application the concerned Circle Incharge shall issue the dealer a certificate in form C-VIII.

(4)(a) The amount of tax deferred under sub-rule (1) shall be paid in 5 equal installments payable by 31st March every year commencing after the expiry of the year during which the unavailed entitlement terminated.

(b) Where after expiry of the period of deferment the deferred tax is not paid within the time specified in clause (a), interest at the rate of one and half percentum per month or part thereof shall be payable on such amount of default till the date of its payment without prejudice to any action that maybe taken for recovery under the Act.

Explanation - For the purpose of this rule, the expression "unavailed entitlement" shall mean the remaining period or the remaining monetary ceiling, whichever may be applicable, of exemption to which such unit would have been entitled on the appointed date."

12. The petitioner did challenge the provisions in Section 96 of the VAT Act before this Court. But the said writ application is pending and there is no interim protection granted to the petitioner. Therefore, the petitioner is bound by the provisions of the VAT Act and the rules framed there under.

13. In terms of the statutory provisions, the petitioner could opt for deferment of tax in terms of Section 96(3)(b) of the VAT Act which he failed to do soon after the VAT Act came into force. In absence of the option for deferment, the liability of the petitioner was to pay VAT in terms of Section 24 of the VAT Act. The failure to pay tax attracts interest in terms of sub-section (10) of Section 24 of the Act i.e. 1.5% per month of the amount due from the date, the tax becomes due to the date of its payment. On the other hand, option of the petitioner for deferred payment of tax in terms of Section 96(3)(b) of the VAT Act was exercised far too late only on 14.03.2013, and that too when it found no other option to avail the grant from the State Government. Therefore, such option results into delayed payment of the deferred amount of tax, which would attract interest at the rate of 1.5% per month or part thereof. Therefore, in either situation, after the commencement of the VAT Act, the liability of the petitioner was to deposit the amount of tax either by way of a regular assessment or in case of deferment by deposit of the deferred amount of tax.

14. The petitioner has failed to deposit the amount of tax after the enactment of the VAT Act with effect from 1st of April, 2005. Since the liability is statutory, therefore, it is presumed that the petitioner has collected tax from its consumers as a manufacturer of non-alcoholic beverages. It is not the stand of the petitioner that the burden of amount of interest paid by it was not passed on to

the consumers. The petitioner cannot claim that the interest would not be payable as the same is payable in either situation for non-filing of return or for not filing the deferred tax returns. There was no immunity to pay the tax amount and consequently the interest. Once the interest has been deposited, the burden of the said interest must have passed on to the consumers.

15. Therefore, the petitioner would not be entitled to its refund as it will be a case of undue enrichment as laid down by the Supreme Court in the case *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536. Therefore, the interest for not paying tax in terms of Section 24 of the VAT Act or seeking deferment in terms of Section 96(3)(b) of the VAT Act is a statutory interest and cannot be claimed by the petitioner once there is no assertion that the burden has not been passed on to the consumers.

16. Thus, we do not find any merit in the writ petition. The same is dismissed.