

(2014) 03 PAT CK 0005

In the Patna High Court

Case No : CWJC Nos. 1271 and 1272 of 2014

Premier Irrigation Adriteck Private Limited

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-03-2014

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 10
Bihar Value Added Tax Act, 2005 — Section 14, 17(5), 19, 28, 5
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 360

Citation : (2014) 3 PLJR 81

Hon'ble Judges : S.P. Singh, J;I.A. Ansari, J

Bench : Division Bench

**Advocate : S.D. Sanjay and Alok Kumar Agrawal, Advocate for the Appellant;
Lalit Kishore and Piyush Lall, Advocate for the Respondent**

Judgement

Samarendra Pratap Singh, J.—M/s Premier Irrigation Adriteck Pvt. Limited, which is petitioner in both the writ applications, has challenged the order, dated 2.9.2013, passed by the Deputy Commissioner, Commercial Taxes, Patna Circle, respondent No. 2, levying entry tax, for the two periods, namely, 2009-10 and 2010-11, alongwith 100% penalty for each of the two periods. Prayer has also been made for a declaration that in absence of amendment made in Section 8 of Bihar Entry Tax Act, 1993, adopting the relevant provisions of Bihar VAT Act, 2005, the respondents cannot exercise any authority under Section 8 of Bihar Entry Tax Act, 1993, vis-a-vis the provisions of Bihar VAT Act, 2005. The plea of the petitioner is based on the premises that the relevant provisions of Bihar Finance Act, 1981, and the rules framed thereunder, with respect to assessment, reassessment and penalty, which have been made applicable to Bihar Entry Tax Act, 1993, stand repealed and replaced by Bihar VAT Act, 2005, and that the corresponding provisions, embodied under the 2005 Act with respect to assessment, penalty, etc., have not been incorporated or made applicable to Bihar Entry Tax Act, 1993. As such, according to the petitioners, the exercise of

power of reassessment by respondent No. 2 under Section 8 of the Entry Tax Act, 1993, read with Section 28 of the Bihar VAT Act, 2005 is without jurisdiction.

2. Before we take up the rival submissions for consideration, it would be necessary to notice the facts of the case in brief;

(i) The petitioner is a manufacturer of Sprinkler Set and Drip Irrigation Set having its office in different parts of the country with its factory, at Nagpur, in the State of Maharashtra. According to the petitioner, the Sprinkler Set consists of various essential parts and accessories, namely, HDPE Pipes, Bim Connecting Nipple, Bend, Tee, End Cap, ISC Sprinkler Nozzle and Riser Pipe, etc. All these items constitute a complete set of Sprinkler Irrigation System for agricultural use. A copy of brochure of Sprinkler Set is at Annexure-1 in both, C.W.J.C. Nos. 1271 and 1272 of 2014. Different models of Sprinkler System are transferred from petitioner's factory, situated at Nagpur and from other branches of the country, to Patna for sale in Bihar by way of "Stock Transfer", The Sprinkler Set is, then, sold to consumer, and VAT @ 4 per cent is charged on it after raising tax invoice.

(ii) The petitioner applied to the Commercial Tax Department for declaration in Form "F" to be submitted to the respective branches or the Head Office from where the relevant stocks had been received for favour of exemption of entry tax.

(iii) Initially, the Deputy Commissioner of Commercial Taxes, Patna Circle, refused to issue Form "F" observing that the petitioner is importing pipe, which is a "scheduled" item and is taxable upon its entry to State of Bihar under the provisions of the Bihar Entry Tax Act, 1993, and, thus, necessary registration under Bihar Entry Tax Act, 1993, was mandatory.

(iv) The petitioner registered its objections and the matter was entrusted, for enquiry, to Assistant Commissioner of Commercial Taxes (respondent No. 3). On enquiry, the Assistant Commissioner of Commercial Taxes, in his report, observed that the petitioner does not sell "pipes" which is a scheduled item and what the petitioner sells is Sprinkler/Drip Irrigation System, which is not a scheduled item under Bihar Entry Tax Act, 1993. The Deputy Commissioner of Commercial Taxes, (respondent No. 2), being satisfied that the petitioner had not been importing any scheduled commodity, opined that Bihar Entry Tax Act, 1993, was not applicable to the import of the item in dispute and, accordingly, directed for issuance of Form "F" in favour of the petitioner and Form "F" was, eventually, issued.

(v) Later on, the audit team of Accountant General Office raised an objection that the petitioner had imported HDPE Pipes, which is different from "Sprinkler Sets" valuing Rs. 12,67,340/-, in the year 2009-10, without any registration under Bihar Entry Tax Act, 1993, and, hence, recommended for levy of entry tax @ 4 per cent with 100 per cent penalty. Similarly, for the year 2010-2011, the audit team observed that the petitioner imported HDPE Pipes and fittings valuing Rs. 5,57,23,876/- and, as such, recommended for levy of entry tax @ 4 per cent

with equal amount of penalty, i.e. 100 per cent.

(vi) In view of the audit objections so raised, the respondents issued notice under Section 8 of the Entry Tax Act, 1993, to the petitioner separately, for each of the two periods, i.e., 2009-2010 and 2010-2011, to show cause as to why reassessment and appropriate penalty be not imposed. The petitioner filed its explanations and stated that the product imported was not HDPE Pipe and, as such, the articles did not fall within the "scheduled" item under Bihar Entry Tax Act, 1993, and, thus, no registration under the said Act was called for.

3. The Deputy Commissioner of Commercial Taxes, not being satisfied with the explanations offered by the petitioner, imposed entry tax @ 4 per cent on import value of Sprinkler Sets amounting to Rs. 12,67,240/- treating the said articles to be pipe under the schedule, which came to Rs. 50,694/- for the year 2009-10, with 100 per cent penalty of equal amount of Rs. 50,694/-, raising the total demand to a sum of Rs. 1,01,388/-. Similarly, he imposed entry tax amounting to Rs. 22,28,955/- at a rate of 4 per cent on a sum of Rs. 5,57,23,876/- with an equal amount of Rs. 22,28,955/- as penalty creating a total demand of Rs. 44,57,910/- for the period 2010-11.

4. The demands, for the two different periods, are under challenge in these two writ applications. To be specific, the demand of Rs. 1,01,388/-, for the period 2009-10, inclusive of penalty, is under challenge in C.W.J.C. No. 1271 of 2014; whereas the demand of Rs. 44,57,910/-, inclusive of penalty, for the period 2010-11, is under challenge in C.W.J.C. No. 1272 of 2014.

5. The impugned order has been assailed by the petitioner on the following grounds:--

(i) Section 8 of the Entry Tax Act, 1993, is not workable as the provisions of assessment, reassessment or enforcement of payment or imposition of penalty, made under Section 28 of the VAT Act, 2005, which has replaced Bihar Finance Act, 1981, has not been made applicable to the Entry Tax Act, 1993.

(ii) The Deputy Commissioner of Commercial Taxes, on the same facts and materials, could not have changed his earlier opinion as the audit report cannot constitute information under Bihar Finance Act, 1981, for purposes of reassessment.

(iii) The articles, imported by the petitioner from its factory, at Nagpur and other branches of the country, for the period, in question, is not a "scheduled" item and, therefore, not liable to entry tax under the schedule appended to the Entry Tax Act, 1993.

(iv) Even if the item is a "scheduled" item, no penalty could have been imposed as petitioner was under bona fide belief that the articles imported were either Sprinkler Set or accessories of Sprinkler Set and, thus, there was no willful or deliberate design to defraud the Department concerned.

(v) Even assuming that the item imported was a scheduled item liable to entry tax, the respondents, instead of coercing the petitioner in making payment of the entry tax, ought to have set off the entry tax amount against the amount of VAT already paid on sale of the said articles.

6. Mr. Lalit Kishore, learned Principal Additional Advocate General, submits that the writ application itself is not maintainable as the petitioner has an alternative remedy by way of statutory appeal under Section 72 of Bihar VAT Act, 2005. He next submits that most of the articles, imported by the petitioner from its factory at Nagpur and other branches, during the period 2009-10 and 2010-11, are not Sprinkler Sots or parts thereof, but "HDPE Pipes and fittings" which are enlisted as scheduled items under Bihar Entry Tax Act, 1993, and, as such, the petitioner is liable to pay entry tax on these items. Furthermore, as the petitioner had been dealing in schedule items, it ought to have registered itself under Bihar Entry Tax Act, 1993, but the petitioner, having not got registered under Bihar Entry Tax Act, 1993 has made itself liable to pay penalty.

7. Before we deal with the justifiability of the order passed, we deem it apposite to refer to the law relating to imposition of taxes on sale, purchase as well as entry of goods.

8. The Constitution of India confers power on the State to make laws with respect to imposition of tax on sale and purchase of goods as well as entry of goods in its local area for consumption, use or sale thereof. Entry 52 of List-II of 7th Schedule confers power on the State Legislature to make laws with respect to taxes on "entry of goods into local areas for consumption, use or sale therein". Entry 54 of List-II under 7th Schedule of Constitution confers power on the State to make laws with respect to taxes on "sales or purchase of goods" other than newspapers subject to provisions of Entry 92-A of List-I".

9. Both the State and the Centre have been further conferred power to make laws with respect to any of the matters enumerated in List-III of 7th Schedule referred to as "concurrent list" subject to the preferential right of the centre.

10. The earliest of the tax laws, on purchase and sale of goods, in State of Bihar, was Bihar Sales Tax Act, enacted in the year 1944, which had very limited application. The Bihar Sales Tax Act, 1944, was replaced by Bihar Sales Tax Act, 1947, which, too, covered a small range of articles. Bihar Sales Tax Act, 1947, did not envisage any tax on purchase of goods of commodity. It was only in the year 1959 that an exhaustive sales tax law, namely, Bihar Sales Tax Act, 1959, was enacted; but these two enactments lacked provisions with respect to raising of tax on purchase of goods or commodity. It was only in the year 1970 that a tax on purchase of goods and commodity came to be levied by incorporation of Section 3-A vide amendment to Section 3. The Bihar Sales Tax Act, 1959, in time to come, was repealed by Bihar Sales Tax Fourth Ordinance (209 of) 1976 followed by another Bihar Sales Tax Ordinance (257 of) 1977. The sales tax laws continued to be regulated through Ordinance till Bihar Finance Act, 1981, was

enacted. Part-I of Bihar Finance Act, 1981, dealt with levy of tax on sale and purchase of goods in Bihar. In the year 2005, Bihar Finance Act, 1981, too, came to be repealed and replaced by Bihar Value Added Tax Act, 2005.

11. However, no laws, with respect to tax, on entry of goods, under Entry 52 of List-II of 7th Schedule, was framed, in Bihar, for quite some time and it was only in 1993 that Bihar Tax on Entry of Goods into Local Area, Consumption, Use or Sale Therein Act, 1993 (in short, Bihar Entry Tax Act, 1993) was enacted and came into force on 2.8.1993.

12. Now that we have set, in brief, summary of the three relevant enactments, it would be necessary to notice some of the relevant features of these enactments. To begin with, we would refer to Bihar Entry Tax Act, 1993, and Bihar VAT Act, 2005, and would deal with provisions of Bihar Finance Act, 1981, a little later.

13. Section 2(c) of the Bihar Entry Tax Act, 1993, defined "entry of goods" as follows:--

"(a)2(c) "Entry of goods", with all its grammatical variations and cognate expressions, means, entry of goods;

(i) into a local area from any place outside such area,

(ii) into a local area from any place outside the State,

(iii) into a local area from any place outside the territory of India, for consumption, use or sale therein."

14. Section 2(d) defines "importer" to mean a dealer or any other person, who, in any capacity, effects, or causes to be affected, entry of any scheduled goods into a local area for consumption, use or sale therein.

15. Section 2(e) defines the term "Import Value" and Section 2(f) defines the term "Local Areas".

16. Section 3 contains charging provisions. Section 3(1) provides for levy and collection of taxes on entry of "scheduled goods" into a local area for consumption, use or sale therein.

17. Section 3(2) provides that the tax, leviable under this Act, shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981, or any other person, who brings the scheduled goods into the local area.

18. The second proviso to Section 3(2), which would be relevant in the context, is quoted hereinbelow alongwith substantive provisions thereof:--

"3(2) The tax leviable under this Act shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981 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:

Provided no tax shall be leviable in respect of entry of such scheduled goods effected by a person other than the dealer if, the value of such goods does not exceed 25 thousands in a year:

Provided further that where an importer of a scheduled goods liable to pay tax under the Act, incurs tax liability, at the rate specified under Section 14 of the Bihar Value Added Tax Act, 2005 (Act 27 of 2005), by virtue of sale of imported scheduled goods or sale of goods manufactured by consuming such imported scheduled goods, his tax liability under the Bihar Value Added Act, 2005 (Act 27 of 2005) shall stand reduced to the extent of tax paid under the Act."

19. Section 5 mandates that every dealer dealing in "scheduled goods" shall get himself registered under the Act in such manner and within such period as may be prescribed.

20. Section 7 deals with offences and penalties, which provides that whoever fraudulently evades payment of any tax, payable under the Act, or willfully acts in contravention of any of the provisions of this Act or Rules made thereunder, shall, in addition to the penalty, which may be imposed upon him, be punishable with simple imprisonment for a term, which may extend to one year, or fine, which shall not be less than one thousand rupees.

21. Section 8 relates to applicability of the provisions of Bihar Finance Act, 1981, and the rules made thereunder with respect to power to assess, reassess, collect and enforce payment of tax and penalty payable by a dealer under the Bihar Finance Act, 1981, and, for the said purpose, shall exercise all or any of the powers assigned to them under the said Act or Rules. Section 9 confers power on the State Government to make rules, whereunder the State Government has framed Bihar Tax on Entry of Goods into Local Area Rules, 1993.

22. The Bihar Finance Act, 1981, has been repealed by Bihar Value Added Tax Act, 2005. However, Section 94, which is a saving clause, saves any local proceeding or any right or privilege accrued under the Bihar Finance Act, 1981. Section 28 of the VAT Act, 2005, relates to assessment of tax of dealers evading registration and provides for penalty. Chapter-XII of the Bihar VAT Act, 2005, embodying Section 72 to Section 76, provides for appeal, revision and review. Second 93 bestows, on the State Government, the power to make rules, whereunder Bihar Value Added Rules, 2005, has been framed.

23. In view of the submissions of the parties, the following issues arise for consideration of this Court:--

(i) Whether a writ application is maintainable if an alternative remedy is provided under the enactment?

(ii) Whether the provisions of Section 8 of the Bihar Entry Tax Act, 1993, with respect to assessment, is workable?

(iii) Whether mere change of opinion, on same set of facts and materials, would

constitute "information" for the purpose of reassessment?

(iv) Whether the article, in dispute, was scheduled item under Bihar Entry Tax Act, 1993?

(v) Whether the entry tax, subsequently levied on the item, would be reduced to the extent of tax paid under the Bihar VAT Act, 2005?

(vi) Whether the respondents have adequate power to impose civil penalty or penalty simplicitor if the dealer has not got himself registered under the Bihar Entry Tax Act, 1993, and failed to pay entry tax on import of scheduled item?

(vii) Whether the penalty, imposed by respondent No. 2, is sustainable in the eyes of law?

24. Issue No. 1: Whether the writ application is maintainable if an alternative remedy is provided under the enactment?

25. The issue in hand is no more *res integra* and stands authoritatively settled by a catena of decisions of the Supreme Court. It is well established age old legal dictum that where statute provides an alternative remedy for adjudication of questions arising under an enactment, the statutory remedy should be, ordinarily, availed of and recourse to invoking writ jurisdiction under Articles 226 and 227 of the Constitution of India would, generally, be not permitted. Reference, in this regard, can be made to the decision in case of *Wolverhampton New Water Works Co. vs. Hawkesfor*, [(1858)6 CBNS 336], approved by the House of Lords, in *Neville vs. London Express Newspaper Ltd.* (1919 AC 368), and reaffirmed by Privy Council, in *Attorney General of Trinidad and Tobago vs. Gordon Grnt. & Co.* (1935 AC 532) and AIR 1940 105 (Privy Council).

26. The Supreme Court, in *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, , observed that the power of the High Court, under Article 226 of the Constitution of India, is couched in widest terms and the exercise thereof is not subject to restrictions. Nonetheless, resort to the said jurisdiction is, ordinarily, not intended if an alternative remedy of relief is provided in a Statute. Ordinarily, the Court would not entertain a petition for a writ under Article 226 of the Constitution of India, wherein equally efficacious remedy has been provided in the Statute.

27. The Supreme Court, in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, , has held that the power to issue a prerogative writ, under Article 226 of the Constitution of India, is plenary in nature and is not limited by any other provisions of the Constitution; rather, it is the self-imposed restriction. However, in a given case, the Court has discretion to entertain or not to entertain a writ petition. The restriction imposed on itself by the Court, not to entertain a writ, in the facts of a given case, is a self-imposed restriction.

28. En *Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others*, , the

Supreme Court has observed that where there is complete lack of jurisdiction, on the part of the official authorities to take action, or there has been contravention of a fundamental right or there has been violation of natural justice or where a tribunal has acted under the provision of a law, which is ultra vires, alternative remedy would not bar exercise of writ jurisdiction.

29. In *K. Venkatachalam Vs. A Swamickan and Another*, , the Supreme Court observed that unless and until there is a clear jurisdiction of bar under Article 226 of the Constitution of India, a writ application could be entertained, despite availability of an alternative remedy.

30. In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , the Supreme Court has held that a writ application will be maintainable, despite the provisions of alternative remedy, in the following eventualities:--

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is a failure of the principles of natural justice; or

(iii) where the orders or the proceedings are wholly without jurisdiction or the vires of an enactment is challenged.

31. It is well established from conspectus of decisions of the Apex Court that the power, under Article 226 of the Constitution, is of very wide amplitude and the restriction, imposed by Courts, is one of self-imposed restrictions. Recourse to writ jurisdiction would not, ordinarily, be permitted if the exercise of such power is barred under an enactment. Alternative remedies, under a Statute, would not bar jurisdiction of Courts to entertain writ applications, under Article 226 or 227 of the Constitution of India, if vires of an enactment is challenged or where the order impugned is wholly without jurisdiction. The plea of the petitioner is founded on the aforesaid premises and, as such, we hold that the writ application is maintainable.

32. The issue of maintainability of writ application is, thus, answered in affirmative.

33. Issue No. (ii): Whether the provisions of Section 8 of the Bihar Entry Tax Act, 1993, with respect to assessment, is workable?

34. The petitioner contends that in absence of amendment in Section 8 of Bihar Entry Tax Act, 1993, adopting the provisions of Bihar VAT Act, 2005, the respondents cannot exercise any authority, under Section 8 of Bihar Entry Tax Act, 1993, read with provisions of Bihar VAT Act, 2005, particularly, in respect of assessment and enforcement of payment of tax and penalty by a dealer.

35. In order to appreciate the submissions made by learned counsel for the petitioner, it would be necessary to correctly appreciate the relevant provisions of the Bihar Entry Tax Act, 1993, Bihar VAT Act, 2005 and Bihar Finance Act, 1981.

36. Section 8 of Bihar Entry Tax Act, 1993, provides for applicability of Bihar

Finance Act, 1981, and the rules made thereunder with respect to assessment reassessment, enforcement of payment of tax and penalty by a dealer under Bihar Finance Act, 1981. Section 8 is quoted hereinbelow for easy reference:--

"8. Applicability of the provisions of the Bihar Finance Act, 1981 (Bihar Act 5, 1981) and Rules made thereunder.--Subject to other provisions of this Act and the Rules framed thereunder the authority empowered to assess, reassess, collect and enforce payment of tax and penalty payable by a dealer under the Bihar Finance Act, 1981 (Bihar Act 5, 1981) shall assess, reassess, collect and enforce payment of tax and penalty payable under this Act and for this purpose they may exercise all or any of the Ed.--sic--A line is missing here:--"powers assigned to them under the said Act and Rules made thereunder for the time being in force". including the provisions relating to returns, assessment, reassessment, escaped assessment, recovery of tax, special mode of recovery, maintenance of accounts, inspection, search and seizure liability in representative character, refund, appeal, revision and reviews, statement of cases to the High Court, compounding of offences and other miscellaneous matter and the provisions of the said Act shall mutatis mutandis apply accordingly."

37. The Bihar Finance Act, 1981, has been repealed by Bihar VAT Act, 2005. The Bihar Entry Tax Act, 1993, has incorporated quite a few provisions of Bihar Finance Act, 1981. We, thus, find that Section 8 of Bihar Entry Tax Act, 1993, has made applicable the relevant provisions of Bihar Finance Act, 1981, with respect to assessment, reassessment, payment of tax, penalty, provisions of appeal, revision and review, etc., and has not altered the same, although Bihar Finance Act, 1981, has been repealed by Bihar VAT Act, 2005.

38. Learned counsel for the petitioner does not dispute and cannot dispute that the provisions of assessment or reassessment, enforcement of payment of tax and penalty, as provided under the Bihar Finance Act, 1981, have been made applicable to Bihar Entry Tax Act, 1993. The relevant provisions of assessment, payment of tax and penalty under Bihar Finance Act, 1981, stand made under Section 17 thereof. Section 17(5), being relevant in the context, is quoted hereinbelow:--

"17(5). If upon information which has come into his possession, the prescribed authority is satisfied that reasonable grounds exist to believe that any dealer has been liable to pay tax under this part in respect of any period, and has nevertheless wilfully failed to apply for a registration certificate, or having so applied failed to furnish any particulars or information required for the purposes of Section 14, the prescribed authority shall, after giving the dealer a reasonable opportunity of being heard, assess to the best of its judgment, the amount of tax if any due from the dealer in respect of such period and all subsequent periods; and the prescribed authority shall direct that the dealer shall pay, by way of penalty, in addition to the amount of tax so assessed, a sum of fifty rupees for everyday of the period during which the dealer failed to apply for registration or

failed to furnish any particulars or information required for purposes of Section 14 or an amount equal to the amount of tax assessed. whichever is less."

(Emphasis is supplied)

39. It would be worth noting that Section 17(5) of Bihar Finance Act, 1981, which dealt with assessment and penalty, as regards levying of quantum of punishment, is *pari materia* with Section 28 of the VAT Act, 2005. Section 28 of Bihar VAT Act, 2005, makes corresponding provisions with regard to assessment and penalty with minor differences. Section 28 of the Bihar VAT Act, 2005, is quoted hereinbelow for easy reference.

"28. Assessment of tax of dealers evading registration.--(1) If upon information which has come into his possession, the prescribed authority is satisfied that reasonable grounds exist to believe that any dealer has been liable to pay tax under this Act in respect of any period, and has nevertheless willfully failed to apply for grant of certificate of registration, or, having so applied, failed to furnish any particulars or information required for the purposes of Section 19, the prescribed authority shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of its judgment, the amount of tax due, if any, from the dealer in respect of such period and all subsequent periods; and the prescribed authority may, direct that the dealer shall pay, by way of penalty. in addition to the amount of tax so assessed, a sum of one hundred rupees for everyday of the period during which the dealer failed to apply for registration or failed to furnish any particulars or information required for the purposes of Section 19 or an amount equal to the amount of tax assessed, whichever is higher."

(Emphasis is added)

40. The contention of the petitioner is that Section 8 of Bihar Entry Tax Act, 1993, has adopted the provisions of Bihar Finance Act, 1981, with respect to assessment, enforcement of payment of tax and penalty, which, now, stands repealed by Bihar VAT Act, 2005, and as the provisions of assessment and penalty provided, under Section 28 of the Bihar VAT Act, 2005, have not been incorporated or made applicable by making an amendment, Section 8 would be rendered unworkable for the purposes of making assessment or enforcing the payment of tax and penalty.

41. We are unable to subscribe to the submissions made by the petitioner. It is well settled that if the provisions of one statute are incorporated by reference in a second statute and the earlier statute is repealed, the second statute would continue to remain in force with the incorporated provisions, because the repealed statute would be treated as being in force as part of the subsequent statute. Reference can be made, in this respect, to the decision in *Narottamdas Vs. State of Madhya Pradesh*, . The 5th edition of Craies' "Statute Law" states that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does, not affect the second statute.

42. Section 10 of the Bihar & Orissa General Clauses Act, 1917, which is more or less similar to Section 8 of the General Clauses Act, 1897, read as follows:--

"10. Construction of references to repealed enactments.-- Where any Bihar and Orissa Act repeals and re-enacts, with or without modification, any provision of a former enactment, references in any other enactment or in any instrument to the provision so repealed, shall, unless a different intention appears, be references to the provision so re-enacted."

43. It would, thus, appear from a bare perusal of Section 10 of Bihar and Orissa General Clauses Act, 1917, that if a subsequent enactment refers to a provision of former repealed enactment and the new enactment does not convey any different intention, the references to the provisions of earlier enactment would be akin to making to the provisions of the new enactment. For instance, by force of Section 8 of General Clauses Act, the old Criminal Procedure Code having been repealed by the new Code of 1973, the reference to the provisions of Section 562 (of old Code) in Section 19 of Probation of Offenders Act 1958, has to be construed as reference to the provisions of re-enacted Section 360 of Code of 1973. If, the provisions of one Statute are incorporated in another, then, any subsequent amendment, in the former Statute, or even total repeal of the earlier Statute, would not effect (sic--affect?) the provisions incorporated in the later statute. Reference can be made, in this respect, to the case of Mahindra and Mahindra Ltd. Vs. Union of India (UOI) and Another, , too, particularly, paragraph 8 of the decision. Furthermore, repeal of an enactment would not mean repeal of provisions incorporated in subsequent enactment. This view was affirmed in case of Ram Sarup Vs. Munshi and Others, .

44. In backdrop of aforesaid discussions, we hold that the relevant provisions of assessment under Section 17 of the Bihar Finance Act, 1981, which have been incorporated Section 8 of Bihar Entry Tax Act, 1993, would not become non-applicable merely because former Act (i.e., Bihar Finance Act, 1981) is repealed by a subsequent Act, namely, Bihar VAT Act, 2005.

45. Issue No. (iii): Whether mere change of opinion, on same set of facts and materials, would constitute "information" for the purposes of reassessment?

46. The petitioner's case is that the impugned order of demand notice, vide process No. 2495 dated 2.9.2013, for the period 2009-10, and demand notice of even date, vide process No. 2496 for the period 2010-11, are not sustainable in law inasmuch as the prescribed authority had earlier, on the same facts and materials, opined that the articles imported were not scheduled items under Bihar Entry Tax Act, 1993, and, thus, not liable to assessment for having not paid entry tax on its entry into the State of Bihar. The petitioner adds that earlier, the respondents, on the same facts and materials, having opined that the goods, in question, were not scheduled goods under Bihar Entry Tax Act, 1993, directed issuance of Form "F" and Form "F" was accordingly issued, but merely on the basis of audit objections, the prescribed authority has changed its opinion to hold

that the articles imported were scheduled items and, thus, liable to payment of entry tax thereon. This change of opinion, on the same set of facts, is not permissible, when the opinion of the prescribed authority is not based on any independent application of mind but merely based on audit objection and, hence, not sustainable in law and impugned notices need to be set aside. The petitioner, in support of its submissions, has relied upon a Full Bench decision of this Court in case of *Bhimraj Madanlal Vs. State of Bihar and Another*, . The Full Bench, in paragraph 19, concluded as follows:--

"19. To finally conclude.--(i) The answer to the question posed at the very outset is rendered in the negative and it is held that "information" envisaged by Section 18(1) of the Act for purposes of reassessment need not necessarily spring from a source external or extraneous to the original record.

(ii) That having second thoughts or a mere change of opinion by the prescribed authority on the same set of facts and materials on the record would not constitute "information" under Section 18(1) of the Act for the purposes of reassessment.

(iii) xx xx xx"

47. We have heard learned Counsel for the parties on the issue. There is no dispute with respect to the proposition of law laid down by the Full Bench in *Bhimraj Madanlal* (supra). The ratio, laid down by the Full Bench, would bind us in our adjudication if the prescribed authority, on the same set of facts and materials on record, has changed its earlier opinion for the purposes of reassessment, but what is noticeable is that the Full Bench has also observed that information, envisaged by Section 18(1) of Bihar Sales Tax Act, 1959, for purposes of reassessment, need not necessarily spring from a source external or extraneous to the original record. It can be, thus, inferred that materials available on record, which had escaped attention or consideration, can constitute information within the meaning of Section 18(1) of the Bihar Sales Tax Act, 1959.

48. The issue would be whether it was merely, on the basis of audit objection and same set of facts and materials, that the prescribed authority has revised its earlier opinion with respect to assessment. It appears from the impugned order that pursuant to audit objection, the petitioner was issued notice to which it filed its show cause. The bill/invoice was, again, examined, whereupon it transpired that the imported articles were "HDPE Pipes and fittings" which are schedule items under Bihar Entry Tax Act, 1993, and, therefore, liable to payment of entry tax.

49. Even assuming that the respondent No. 2, on the same facts and material, could not have revised its earlier opinion that items were not scheduled item, the fact remains that the proceeding cannot come to a close. The department is not divested of its right to file an appeal against the order of Deputy Commissioner before the Joint Commissioner or for that matter, the Commissioner of Commercial Taxes, under its suo moto power of revision, too, can examine the

entire matter. The petitioner also could have preferred appeal against the impugned demand raised by respondent No. 2 and the matter could have been examined at the level of appellate forum. The petitioner has chosen to move this Court against the order of respondent No. 2 and has raised various issues; as such, we have proceeded to examine the entire matter and issues including the correctness of the impugned orders made by respondent No. 2.

50. Issue No. (iv): Whether the articles, in dispute, was scheduled item under Bihar Entry Tax Act, 1993?

51. The petitioner has all along taken the stand that the item imported is "Sprinkler Set? which is not a "scheduled" item and as such, the order of assessment, levying entry tax, is wholly without jurisdiction. The submissions of the petitioner necessitate a deeper look into the matter for the purpose of determining if the goods imported are covered under the "schedule" appended to Bihar Entry Tax Act, 1993.

52. The respondents have contended that the items, which were imported, on which the impugned demand have been raised for the period 2009-10 and 2010-11, are scheduled items and as such, the petitioner was required to register itself under Section 5 of Bihar Entry tax Act, 1993, and to have paid entry tax on these items.

53. According to the respondents, the petitioner, in fact, has been importing, in disguise of Sprinkler Sets, HDPE Pipes and fittings, which are all scheduled items, vide SI. No. 12 of the Schedule appended to the said Act. On the other hand, the petitioner referred to the schedule, particularly, item No. 12, appended to the Entry Tax Act, 1993, to show that the Sprinkler Set does not come within the scheduled item and, as such, the requirement for registration, under Entry Tax Act, 1993, and/or payment of any entry tax is unnecessary and demand for registration is uncalled for. As the dispute revolves around item No. 12 of the Schedule to Bihar Entry Tax Act, 1993, the same is quoted hereinbelow:--

"12. Steel pipes, plastic and PVC pipes including plastic celluloid, Bakelite, goods made of similar substance (excluding moulded suitcase made of plastic and similar substance such VIP, Aristocrat, Safari and similar articles and vanity cases), plastic sheets and fabrics and articles made of such sheets and fabrics, PVC, HDPE, granules and other raw materials."

54. There is no dispute that Sprinkler Set is not a scheduled item under the schedule appended to the Act under consideration. Even the State does not dispute this fact. However, the State, with reference to the delivery notes and invoices of the items imported by the petitioner from its Nagpur factory and other branches, has tried to convey that what were being imported, were not Sprinkler Set alone, but HDPE Pipes, too, in its various forms, which fall within the ambit of scheduled item.

55. On the other hand, the contention of the petitioner is that it has been

importing Sprinkler Irrigation System, which consists of various essential parts and accessories, like HDPE Pipes, Bim Connecting Nipple, Bend, Tee, End Cap, ISC Sprinkler Nozzle and Riser Pipe.

56. We find from perusal of the delivery note and invoices, as well as from material descriptions and item codes of the articles, that only some of the items actually refer to Sprinkler Sets; whereas others relate to HDPE Pipes. For the sake of convenience, the relevant extract of tax invoice, appearing on page 43 of C.W.J.C. No. 1271 of 2014, is quoted herein below:--

57. It appears that only Sl. No. 7 of Tax Invoice relates to Sprinkler Model-110 ST bearing item Code S110ST732018, its quantity, rate and total value. Similarly, the material description, item code, quantity, rate and value of other items have also been separately mentioned. For instance, Sl. No. 1 relates to 75 mm SL HDPE 2.5 Kgs Pipe (6 mts.). It appears that 1144 pieces of this item has been imported @ Rs. 420/- per piece, which values Rs. 4,80,480/- in total. Similarly, the quantity, rate and value of other items, which, in material description, stand shown as HDPE Pipe, has also been separately mentioned. The value of Sprinkler Model, mentioned in the Tax Invoice, comes to Rs. 98,000/-. The value of Sl. No. 1, which is a form of HDPE Pipe alone, comes to Rs. 4,80,480/-.

58. It is not in dispute that HDPE Pipes is a scheduled item. HDPE Pipes, by no stretch of imagination, can be held to constitute a Sprinkler Set and we agree with the submission of the learned Principal Additional Advocate General that Sprinkler Set and HDPE Pipes are two different items. Whereas Sprinkler Set is not a scheduled item under Bihar Entry Tax Act, 1993, HDPE Pipes is a scheduled item liable to assessment of entry tax and a person or a dealer, importing the same, has to necessarily get itself registered under the provisions of Bihar Entry Tax Act, 1993.

59. The plea of the petitioner that the items mentioned have been disjointed for the purposes of convenience of transfer is difficult to accept, because of the specific quantity and different rates mentioned with respect to different items.

60. Thus, the petitioner would not be entitled to the benefit of exemption from entry tax on articles, other than Sprinkler Sets, mentioned in the invoice. The petitioner would be liable to pay entry tax on items, which would not constitute Sprinkler Sets. The plea of the petitioner that all the items imported were Sprinkler sets is only partially accepted.

61. Issue No. (v): Whether the entry tax subsequently levied on the taxable item under Bihar Entry Tax Act, 1993, can be reduced to the extent of tax paid under Bihar VAT Act, 2005?

62. It is true that the second proviso to sub-section (2) of Section 3 states that where an importer has already paid entry tax on the scheduled goods, then, in such case, further taxable liability, by virtue of sale of imported scheduled goods or sale of goods manufactured by consuming such scheduled goods, shall under

Bihar VAT Act, 2005, stand reduced to the extent of tax already paid under the Bihar Entry Tax Act, 1993.

63. The contention of the State is that the taxable liability gets reduced to the extent of entry tax paid on the scheduled goods and not vice versa inasmuch as the Bihar Entry Tax Act, 1993, does not state that the entry tax, found payable, is to be adjusted against the VAT paid. It is difficult for us to accept this conclusion, for, it is too wide a proposition to be accepted as a general rule.

64. Hence, liability of entry tax has to be tested on the facts of each given case. For instance, if the omission to have got registered under Bihar Entry Tax Act, 1993, was bona fide, the tax, levied under Bihar Entry Tax Act, 1993, can be reduced to the extent of VAT paid. However, if the registration was evaded with an oblique motive to avoid payment of entry tax, the tax liability, incurred under Bihar Entry Tax Act, 1993, may not be reduced to the extent of VAT paid. The defaulter dealer, as such, can be asked to pay entry tax first and, then, claim refund of the entry tax paid to the extent of the VAT amount already paid.

65. With regard to the above, one may gainfully refer to a Division Bench decision of this Court, in *United Breweries Ltd. Vs. State of Bihar and Others*, , wherein the Division Bench, at paragraph Nos. 4 and 6, observed and laid down, as under:--

"4. On 7.3.2003 the petitioner-Company applied for renewal of the licence under the aforesaid Form 19-C after payment of renewal fees. The petitioner-Company was asked to file Sales Tax Clearance Certificate from the place where it is registered as a dealer. The petitioner-Company made an application before the Deputy Commissioner of Commercial Taxes, East Circle, Patna City, Patna, respondent No. 6 for grant of Sales Tax Clearance Certificate but the same has not been granted on the ground that there is dues under the Act against the petitioner-Company for the financial years 1999-2000, 2001-2002 and 2002-2003.

6. Under the provisions of the Act the importer is liable to pay tax on the scheduled goods and if he is also liable to pay tax under the Finance Act by virtue of sale of such scheduled goods then the tax under the Finance Act shall stand reduced to the extent of the tax paid under the Act. In other words, if the entry tax under the Act has been paid then liability to pay sales tax under the Bihar Finance Act shall stand reduced to the extent of the tax paid under the Act provided the goods is taxable both under the Finance Act and the Act."

66. Thus, we are of the view that in an appropriate case, wherein the omission to pay the entry tax is bona fide, the VAT paid can be adjusted against liability of entry, tax, which may have been subsequently found leviable. If the petitioner has paid more tax under Bihar VAT Act, 2005, the excess amount payable would be liable to be refunded to the petitioner within two months.

67. We have already held that some of the items, imported by the petitioner, fell

under SI. No. 12 of the Schedule appended to the Bihar Entry Tax Act, 1993, and the petitioner was required to have got itself registered under Section 5 of the Bihar Entry Tax Act, 1993. It appears that as the petitioner had not registered itself under the Bihar Entry Tax Act, 1993, it was treated by the prescribed authority as an assessee, who had avoided payment of entry tax on some of the goods imported, and 100 per cent penalty, under Section 28 of Bihar VAT Act, 2005, equal to the amount of entry tax leviable for the two years, namely, 2009-210 and 2010-2011, has been imposed by the impugned demand. We would, now, proceed to examine whether imposition of penalty was justifiable and in accordance with the provisions of law.

68. issue No. (vi): Whether the respondents have adequate power to impose civil penalty or penalty simpliciter if a dealer has not got himself registered under Bihar Entry Tax Act, 1993, and failed to pay entry tax on import of scheduled/fern?

69. The petitioner contends that there is no provision of penalty other than one contained in Section 7 of Bihar Entry Tax Act, 1993. However, Section 7 provides for "offences and penalties" and not penalty simpliciter. The provisions of offences and penalties also finds place in Section 49 of Bihar Finance Act, 1981, as well as under Section 81 of Bihar VAT Act, 2005, which is with reference to only criminal liability and has got nothing to do with the substantive provision of civil penalty.

70. We agree with the submission of Mr. S.D. Sanjay, learned Senior Counsel, that Section 7 of Bihar Entry Tax Act, 1993 has provided for "offences and penalties", which is a criminal penalty and which can be exercised only by courts and not by authority of the Commercial Tax Department. Section 7 of Bihar Entry Tax Act, 1993, is reproduced below:--

"7. Offences and Penalties.--(1) Any person who fraudulently evades payment of any tax payable under this Act or willfully acts in contravention of any of the provisions of this Act or Rules made thereunder shall, in addition to the penalty which may be imposed upon him, be punishable with a simple imprisonment for a term which may extend to one year or fine which shall not be less than one thousand rupees but may extend to five thousand rupees or both and when the offence is a continuing one, with a daily fine not exceeding one hundred rupees during the period of the continuance of the offence.

(2) No Court shall take cognizance of any offence punishable under this Act, except with the previous sanction of Commissioner of Commercial Taxes.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) shall be cognizable and bailable.

(4) Subject to the other provisions of the Act all the provisions of relating to offences and penalties of the Bihar Finance Act, 1981 (Act 5, 1981) relating to assessment, reassessment, collection and enforcement of payment of tax

required to be collected shall apply mutatis mutandis in relation to any process connected with such assessment, reassessment, collection or enforcement of payment of tax under this Act is if the tax under the Act is payable under this Act."

71. It is evident that Section 7 of Bihar Entry Tax Act, 1993, starts with the heading "Offences and Penalties". Section 7(1) states that any person, who fraudulently evades payment of any tax payable under this Act or wilfully acts in contravention of any of the provisions, in addition to penalty may also be saddled with punishment by imposing on him simple imprisonment, which may extend to one year or fine. Sub-section (2) of Section 7 does not leave any doubt as to the authority, which can impose such penalty. Section 7(2), in clear terms, states that it would be the Court alone, which would be competent to take cognizance, of course, with the previous sanction of Commissioner of Commercial Taxes.

72. Thus, we hold that Section 7 deals with offences and penalties, which are criminal penalty imposable by a Court after taking cognizance of the offence committed. In the instant case, the penalty imposed is a civil penalty or penalty simpliciter as it has been imposed by the authority of Commercial Tax Department.

73. However, we do not agree with the submission made on behalf of the petitioner that Bihar Entry Tax Act, 1993, does not contain any provision for imposing civil penalty in a case, wherein there has been evasion of payment of entry tax.

74. We have already noted that the provisions of Section 17(5) of Bihar Finance Act, 1981, relating to assessment and penalty, have been made applicable by Section 8 of Bihar Entry Tax Act, 1993, and are, more or less, akin to Section 28 of Bihar VAT Act, 2005. Thus, there can not be any difficulty in holding that the authorities concerned are vested with power to impose penalty in the case of willful contravention of the provisions of the Bihar Entry Tax Act, 1993.

75. The petitioner strenuously argued that the demand notice have been issued under Section 8 read with Section 28 of Bihar VAT Act, 2005, and there is no mention that the action has been taken under the Bihar Finance Act, 1981, and, hence, no penalty can be imposed. The submission of the petitioner is only noted to be rejected. Once the authorities have mentioned that action are being taken under Section 8 of the Bihar Entry Tax Act, 1993, which has incorporated the provisions of assessment under Bihar Finance Act, 1981, it would be deemed that the action has been taken under the provisions of the assessment embodied in Section 17 of Bihar Finance Act, 1981. The submission of the petitioner would also fail for two reasons. Mere labelling of a wrong section, namely, Section 28 of the Bihar VAT Act, 2005, would not go to the root of the issue and it cannot be disputed that the authority did have jurisdiction to make assessment under the relevant provisions of Bihar Finance Act, 1981, which have been specifically incorporated in Section 8 of the Bihar Entry Tax Act, 1993.

76. Furthermore, we have already noticed that the provisions of assessment under Section 17(5) of Bihar Finance Act, 1981, are substantially *pari materia* with Section 28 of Bihar VAT Act, 2005.

77. Thus, in view of application of Section 10 of the Bihar and Orissa General Clauses Act, Section 28 of Bihar VAT Act, 2005, would be applicable to the extent that it is *pari materia* with Section 17(5) of the Bihar Finance Act, 1981.

78. The matter would have been different if Section 8 would not have incorporated or referred to the provisions of the Bihar Finance Act, 1981, in matter of assessment and imposition of penalty. In such circumstances, neither the power of assessment under Section 28 of the Bihar VAT Act, 2005, nor Section 17 of the Bihar Finance Act, 1981, could have been invoked by the authorities rendering Section 8 of the Bihar Entry Tax Act, 2008, unworkable, which is not the situation here.

79. In terms of Section 8 of the General Clauses Act, if the Bihar Finance Act, 1981, is repealed by Bihar VAT Act, 2005, the reference to old provisions under the Bihar Finance Act, 1981, have to be construed as reference to new Act i.e. Bihar VAT Act, 2005. Thus, we hold that the authorities are vested with the power to impose penalty simpliciter under the Entry Tax Act, 1993.

80. Issue No. (vii): Whether the penalty, imposed by respondent No. 2, is sustainable in the eyes of law?

81. We have already held that the respondents have the power to impose penalty under Section 8 of Bihar Entry Tax Act, 1993, read with Section 17(5) of Bihar Finance Act, 1981, inasmuch as the provisions of assessment and imposition of penalty have been duly incorporated in Bihar Entry Tax Act, 1993. However, as per mandate of Section 17(5) or even Section 28 of Bihar VAT Act, 2005, a penalty can be imposed if the prescribed authority is satisfied that reasonable grounds exist to believe that any dealer has been liable to pay tax with respect of any period and has wilfully failed to apply for registration certificate or, having so applied, failed to furnish any particulars or information required for the purposes of registration.

82. It would, thus, appear that three conditions must exist before the authority imposes penalty, namely, (i) if the prescribed authority is satisfied that a dealer was liable under the Bihar Entry Tax Act, 1993, to pay entry tax; (ii) he wilfully failed to apply for grant of certificate of registration; and/or, (iii) having so applied for such certificate, failed to furnish the required information and particulars.

83. It is not in dispute that the petitioner had not paid entry tax and had also not applied for grant of certificate of registration under Section 5 of the Bihar Entry Tax Act, 1993. The most important feature of the penalty provision is that the prescribed authority must be satisfied that the default by the dealer was wilful. The word "wilful" has not been defined in the Bihar Entry Tax Act, 1993, and, as

such, the term willful must be attributed its common and dictionary meaning keeping in view the context in which the term has been used. The word "willful" has been defined in Black's Law Dictionary as under:--

"Willful--Voluntary and intentional, but not necessarily malicious. The word "willful" or "wilfully" when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."

84. It clearly transpires that if an act is done voluntarily or intentionally and not with any evil intent, it would not be malicious in its application. In light of the aforesaid common meaning of the term "wilfully", we would, now, examine whether the petitioner "wilfully" did not get itself registered with an evil intent or with ulterior motive.

85. In the present case, we find that the petitioner, right from the beginning, disputed that the items would come within the Schedule of the Entry Tax Act, 1993, and the petitioner, therefore, not be liable to pay entry tax. Consequently, the stand of the petitioner has been that it is not required to get itself registered under Section 5 of the Bihar Entry Tax Act, 1993. Even the authorities had, initially, accepted the contention of the petitioner that the items imported are Sprinkler Set and would not come under Bihar Entry Tax Act, 1993. No wonder, therefore, that even Deputy Commissioner of Commercial Taxes had directed to issue Form "F" which was, eventually, issued to the petitioner.

86. Thus, when the authorities themselves, namely, the Assistant Commissioner of Commercial Tax and Deputy Commissioner of Commercial Tax, Patna Circle, were of the view that items imported were Sprinkler Sets and also not fall within the ambit of the schedule items under Bihar Entry Tax Act, 1993, there is no adequate materials before us to come to the conclusion that the petitioner had avoided registration under Section 5 of Bihar Entry Tax Act, 1993, and willfully did not pay the entry tax. The petitioner, at best, can be held to be negligent; but its act was not actuated by any ulterior motive to avoid payment of entry tax as well as registration under Section 5 of the Bihar Entry Tax Act, 1993.

87 Thus, the order, imposing penalty, is not sustainable in law and is, accordingly, set aside. The respondents would, thus, undertake an exercise to separate the value of Sprinkler Sets imported during the period, in question, from that of other items, which fall under item No. 12 of the Schedule and would assess entry tax accordingly. For the reasons aforementioned, these writ application stands disposed of in terms of the directions given above.

I.A. Ansari, J.

I agree.