
(2003) 04 PAT CK 0122

In the Patna High Court

Case No : C.W.J.C. Nos. 8092, 8127 and 8128 of 2002

Reckitt Benckiser (India) Limited

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 16-04-2003

Acts Referred:

Citation : (2003) 04 PAT CK 0122

Judgement

1. This order is in relation to C.W.J.C. No. 8092 of 2002 [Reckitt Benckiser (India) Ltd. v. State of Bihar], C.W.J.C. No. 8127 of 2002 (Godrej Saralee Ltd. v. State of Bihar) and C.W.J.C. No. 8128 of 2002 (Godrej Saralee Ltd. v. State of Bihar).

2. The disputes in nutshell are that whether the assessing g officer is entitled to make assessment u/s 20(I)(a) of the Bihar Finance Act and would be justified in imposing penalty for alleged breach of clause (a) of sub-section (1) of section 20 without recording a final finding that the petitioners of each case in fact concealed any sales or purchases or any particulars thereof with a view to reduce the amount of tax payable by him. The facts in nutshell are that each of the petitioner is dealing in coils, cakes, mats and other such items which are used as mosquito repellants. Each of the petitioner is registered dealer and is subject to assessment under the provisions of the Bihar Finance Act, 1981. Each of the petitioner has furnished its return and paid the tax on the sales G and purchases as shown in the return. It is not in dispute before us that the tax has been paid on the turnover shown in the return. In C.W.J.C. No. 8092 of 2002 (Reckitt Benckiser Ltd. v. State of Bihar) annexure 5 series are the orders under challenge which are in relation to the assessment year 2000-2001 and assessment year H 2001-2002, writ application C.W.J.C. No. 8127 of 2002 and 8128 of 2002 have been filed by M/s. Godrej Saralee Ltd., being aggrieved by the orders passed by the authority for the assessment year 2000-01 and 2001-02 respectively. Impugned orders have been annexed at annexure 9 in each of the writ application.

3. It is not in dispute before us that show cause notices were issued to each of the petitioner, they had filed their show cause and after affording an opportunity of hearing to each of them the final orders were passed against their interest. In C.W.J.C. No. 8092 of 2002 (Reckitt Benckiser Ltd. v. State of Bihar) the assessing officer observed that the said writ applicant did not pay the tax in accordance with law and instead of paying 8 per cent tax had been paid 4 per cent only, it accordingly fixed the tax liability and directed imposition of the penalty u/s 20(l) (a) of the Bihar Finance Act. Similarly in C.W.J.C. No. 8127 of 2002 and 8128 of 2002 (Godrej Saralee Ltd. v. State of Bihar) the learned assessing officer observing that each of the petitioner-dealer did not pay the tax in accordance with law and paid only 4 per cent instead of 8 per cent and thereby filed a wrong return. In each of the case the learned assessing officer observed that each of the dealer/petitioner paid less tax and thereby caused loss of revenue to the State. In accordance with the provisions of the Act after finding them guilty it had imposed the penalty as provided u/s 20(l)(a) of the Bihar Finance Act ("the Act" for short).

4. Learned counsel for the petitioners submitted that application of section 20(1) (a) of the Act by the assessing officer at this stage is absolutely misconceived. It is submitted by them that section 20(l)(a) applies to the escaped turnover which is detected before the assessment. It is submitted by them that the assessment is to be completed in accordance with section 17 of the Act but before passing a final order u/s 17 of the Act if the prescribed authority in the course of any proceedings or otherwise is satisfied that any registered dealer has concealed any sales or purchases or any particulars thereof with a view to reduce the amount of tax payable by him then the authority may impose penalty. It is submitted by them that a perusal of the orders would show that the petitioners did not conceal any sales or purchases or any particulars thereof. According to them if the assessing officer found that the petitioner had paid less tax applying a wrong provision of law then in cases like present where the turnover relating to sales and purchases are accepted to be correct and final then section 20(l)(a) cannot be applied.

5. Learned counsel for the State on the other hand vehemently argued that section 20(l)(a) must be construed to mean that if proper tax is not paid then it must amount to concealment of sales or purchases or any particulars thereof. According to the learned counsel non-payment of the proper tax would amount to concealment of the particulars and therefore the department is justified in applying the provisions of section 20(l)(a) of the Act.

6. It was also submitted before the court that the products in which the petitioners are dealing are in fact insecticide/pesticide which will attract only 4 per cent tax and the department is absolutely unjustified in observing that the product is not insecticide or pesticide. To counter this learned counsel for the State placing reliance upon the judgment of the Supreme Court in the matter of Bombay Chemical Pvt. Ltd. Vs. Collector of Central Excise, Bombay I, Bombay,

submitted that every disinfectant cannot be treated to be insecticide or pesticide and as in the present matters the petitioners are dealing in mosquito repellent which in fact are disinfectant, the department is justified in observing that the sale would attract 8 per cent tax.

7. Before entering into the rival submissions raised by the parties it would be useful to quote the judgment of this Court in the matter of Pro Agro Seeds Co. Ltd. Vs. State of Bihar and Others though the question was little different in the said matter but the judgment could still provide a proper guide- line to us. In the said matter the attack was on the directions issued by the Commissioner, Commercial Taxes. It was argued in the said matter that if a person pays the tax which is due according to the g return filed by him then the penalty may not be imposed. In the said matter in paragraph 10 this Court observed that once the dealer pays tax due according to the information furnished in the return then he cannot be penalised subsequently after the assessment proceedings are finalised and the amount of the tax is determined. This Court also observed that the Commissioner, Commercial Taxes, would not be empowered to issue a direction to the authority exercising quasi- judicial functions. This Court allowed the writ application and quashed the impugned notices.

8. At this stage we are also allured to refer to certain observations made by the Supreme Court in the case of J.K. Synthetics Ltd. v. Commercial Taxes Officer [1994] 94 STC 422. The apex Court observed that the expression "Tax payable" in section 11B of the Rajasthan Act can only mean the full amount of tax which becomes due under sub-sections (2) and (2A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. The apex Court further observed that it would be a different matter if the return is not approved by the authority because in such a case the authority would be entitled to take exception and may disapprove the return. The apex Court also observed that asking the assessee to predict the final assessment and pay the tax on that basis would in fact be asking the assessee to do the near impossible.

9. It would be useful to refer to section 20 of the Act which reads as under :

"20. Escaped turnover detected before assessment.-(1) If the prescribed authority in the course of any proceeding (or otherwise) under this Part is satisfied that any registered dealer or a dealer to whom grant of registration certificate has been refused under the third proviso to sub-section (2) of section 14-

(a) has concealed any sales or purchases or any particulars thereof, with a view to reduce the amount of tax payable by him under this Part, or

(b) has furnished incorrect statement of his turnover or incorrect particulars of his sales or purchases in the return furnished under sub-section (1) of section 16 or otherwise, the prescribed authority shall, after giving such a dealer an opportunity of being heard in the manner prescribed, by an order in writing

direct that he shall in addition to any tax which is or may be assessed u/s 17, pay by way of penalty, in a case falling in clause (a), a sum not exceeding three times but not less than an amount equal to the amount of tax and in a case falling in clause (b), a sum not exceeding two times but not less than an amount equal to the amount of tax on the suppressed turnover or on concealed or incorrect particulars.

(2) The penalty under sub-section (1) may be imposed before completion of assessment, and for determining the amount of penalty, the prescribed authority may quantify the amount of tax provisionally in the prescribed manner.

(3) Any penalty imposed under sub-section (1) shall be without any prejudice to any action which is or may be taken u/s 49."

10. Section 20(l)(a) authorises the prescribed authority in the course of any proceeding or otherwise that after recording its satisfaction that a registered dealer or a dealer to whom grant of registration certificate has been refused under the third proviso of sub-section (2) of section 14 has concealed any sales or purchases or any particulars thereof, with a view to reduce the amount of tax payable by him, the prescribed authority after giving such a dealer an opportunity of being heard by an order in writing direct that the dealer shall in addition to any tax which is or may be assessed u/s 17, pay by way of penalty a particular sum.

11. It would clearly appear from the above referred passage that section 20(l)(a) would apply to a case where the dealer has concealed any sales or purchases or any particulars thereof with a view to reduce the amount of tax payable by him. For application of section 20(l)(a), the department must show or prove that the dealer concealed any sales or purchases or any particulars thereof. That would not be the end of the matter because beyond this the department has to prove further that the concealment was with a view to reduce the amount of tax payable by him. Both the facts, i.e., there was a concealment and that the concealment was with a view to reduce the amount of tax must co-exist. In the present matters the assessing officer while exercising his jurisdiction u/s 20(l)(a) has not recorded a single finding that the dealer concealed any sales or purchases or any particulars thereof. He also did not record a finding that the concealment was with a view to reduce the amount of tax payable by the dealer.

12. The finding in each of the case is that instead of paying 8 per cent tax each of the dealer had paid only 4 per cent tax. The assessing officer did not dispute the figures of sales and purchases as provided in the return, in fact he did not record that the figures relating to sales or purchases or any particulars thereof were concocted, manufactured or were provided in the return with an intention of concealment. In absence of a finding like that clause (a) of sub-section (1) of section 20 would not apply.

13. In each of the case the assessing officer did not say that there was any concealment or the concealment was with a view to reduce the amount of tax

payable by the dealer. The finding in fact is that less tax has been paid than what was required to be paid. " The question that the product would attract 4 per cent tax or 8 per cent tax would be a question to be decided on merits while assessing the dealer u/s 17 of the Act and not at this stage applying the provisions of section 20(l)(a). While assessing a dealer finally u/s 17 of the Act the assessing officer after giving proper opportunity of hearing to the assessee may record a finding that the tax was paid in accordance with law or not. Non-payment of proper tax certainly would not fall within the domain of section 20(l)(a). It would apply to the cases where a dealer purposefully conceals the sales or purchases or any particulars thereof with a view to reduce the amount of tax payable by the said dealer or where such dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales or purchases in the return furnished under sub-section (1) of section 16 or otherwise.

14. Concealment in fact is a positive act because a person does something so that the reality does not come out. In the present matter undisputedly the return filed by each of the petitioner projects and depicts correct figures of sales and purchases. This we are observing because at this stage the department has not stated before us that the figures relating to turnover shown in the returns are incorrect. This observation, however, is for the purposes of these writ applications only. If there is no concealment then it cannot be argued that the act was with a view to reduce the amount of tax by the dealer.

15. The submissions of the learned counsel for the State that clause (a) of section 20(1) of the Act is wide enough to cover even a case of payment of less tax than what is required. A great emphasis is made on the words, "or any particulars thereof. In our opinion the interpretation put forth by the learned counsel for the State is misconceived. The rule of interpretation simply suggest that the words should be known, understood and interpreted by keeping in mind the company which they keep. The language of clause (a) says that " the dealer had concealed any sales or purchases or any particulars thereof (emphasis, Here italicised supplied). The simple question for consideration is that the words "any particulars thereof are in relation to the sales or purchases referred in clause (a) or are of general application and can be read in conjunction with the phrase "with the view to reduce the amount of tax payable by the dealer". Learned counsel for the State submits that the words "any particulars thereof must be read in conjunction with "the intention to reduce the amount of tax payable by the dealer". We are unable to concede to this argument. The language of clause (a) is plain and simple, it simply says that clause would apply a dealer who has concealed any sales and purchases or any particulars thereof. Putting of a "comma" after the words "particulars thereof would make the first phrase independent because the comma in the present clause (a) has not been used as a conjunctive. The words "any particulars thereof are in fact relating to and are subsidiary of the sales or purchases. If full details of the sales or purchases are not given or any particulars of sales and purchases if are not given then clause (a) would apply and not otherwise. The department is required to prove that with

a view to reduce the amount of tax payable by the dealer he had concealed the sales or purchases or particulars of sales and/or purchases.

16. Though great amount of argument was advanced by both the sides on the question that the particular item is or is not insecticide/pesticide and each side persuaded us to decide the matter on merits but at this stage it would not be fair on our part to enter into that controversy because the final assessment is yet to be made by the assessing officer. We are of the considered opinion that if we make any observation on the merits of the matter that the items under dispute are or not insecticides/pesticides then no scope would be left for the assessing officer to decide the matter in accordance with law. Whether the products in dispute are insecticide/pesticide or not will have to be decided by the assessing officer while passing final assessment orders.

17. For the reasons stated above we are of the considered opinion that present was not a stage where an action u/s 20(l)(a) of the Act could be taken. Section 20(l)(a) is to be applied to an exigency or a situation where the assessing officer forms an opinion that there is a concealment of sales or purchases or particulars thereof with a view to reduce the amount of tax payable by the dealer. At this stage the assessing officer cannot record a finding that the product in dispute would fall in a particular entry or not and what would be the tax payable. If that is allowed to be done then nothing would be left to be decided at the time of final assessment.

18. The orders contained in annexure 5 series in C.W.J.C. No. 8092 of 2002 and annexure 9 in each of the Writ Application No. 8127 of 2002 and 8128 of 2002 are hereby quashed. The assessing officer is hereby directed to proceed with the final assessment in accordance with law. He is hereby also directed to complete the __, assessment proceedings within a period of three months from today. It is also observed that the assessing officer shall not be influenced by the earlier directions issued by the Commissioner wherein he has classified the product in dispute falling within general category and not under the specified category.

19. It is, however, made clear that this Court is not making any observations on the merits of the matter. The assessing officer shall be free to apply his judicial mind and take an independent decision.

He shall also be free to decide that the product in dispute would fall under the residuary entry or under a particular entry and what should be the tax liability of the petitioners. He shall also be free to record his own satisfaction that the petitioners paid the tax in accordance with law or not and if not whether they are liable to penalty or not because we have disposed of the writ application only on a legal issue that provisions of section 20(l)(a) cannot be applied at this stage to either of the assessee of these writ applications.