
(2002) 04 PAT CK 0052

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3768 of 2002

S.C.I. India Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Citation : (2002) 04 PAT CK 0052

Judgement

Sachidanand Jha, J.—The dispute in this case relates to claim for exemption from sales tax on sale of finished product, namely, Extra Neutral Alcohol manufactured by the petitioner-company in terms of the Industrial Policy Resolution (IPR).

2. The Government of Bihar declared a new Industrial Policy in the year 1995 modifying the 1993 policy, with the avowed object of attracting investment in new industries and motivating the existing units to make further investment by way of expansion and/or diversification in order to accelerate the pace of economic growth. The policy contemplates giving different kinds of incentives, one of the incentives being by way of exemption from sales tax on the purchase of raw materials and sale of finished goods. Clause 16.1 provides that the new units will be allowed the facility of either "set-off or "exemption", at their choice, on purchase of raw materials within the State for a period of ten or eight years, depending on the situation of the unit in the particular district, from the date of commencement of production of the unit. However, units opting for deferment of sales tax on sale of finished goods in terms of Clause 16.2 would be eligible for "set-off only on purchase of raw materials. Clause 16.2 provides that the new units in sales tax on purchases will also have the option to choose deferment or exemption of sales tax--both Bihar sales tax and Central sales tax--on sale of finished goods for a period of ten years or eight years depending on the location of the units in the particular district from the date of production. Clause 16.3 with which we are concerned in this case, provides for similar benefits to units going in for expansion or diversification within the eligibility period, i.e., September, 1995 to August, 2000. The dispute herein revolves round the interpretation of Clause 16.3, besides some other allied provisions and therefore,

I will come back to this clause again later in this judgment.

3. The petitioner, which is a company incorporated under the Indian Companies Act, 1956 having its registered office at Bhagalpur is engaged in the production of rectified spirit in its factory at Rajoun in Banka district. The case of the petitioner is that acting upon the assurance held out in the said IPR and intending to avail of the benefits provided thereunder it decided to diversify its activity and thus set up a plant for manufacturing Extra Neutral Alcohol. On January 29, 1996 it informed the Director, Technical Development, Department of Industries and the Commissioner of Commercial Taxes about its diversification plan sending them copies of the project report. The proposal was approved by the Director, Technical Development vide letter No. 271 dated September 27, 1996. The petitioner had also informed the Government of India, Ministry of Industry about the diversification plant which was duly acknowledged on October 23, 1996. The petitioner was granted "No objection" certificate by the Bihar State Pollution Control Board on December 14, 1996. Prior to diversification it had made investments to the extent of Rs. 260.45 lakhs in fixed capital productive assets. The investment of Rs. 137.92 lakhs, being more than 50 per cent of the amount of undepreciated value of the initial fixed capital investments prior to diversification, the unit is eligible for the sales tax exemption on sale of Extra Neutral Alcohol in terms of Clause 16.3 of the industrial policy. The petitioner thus applied for exemption certificate before the Deputy Commissioner of Commercial Taxes, Bhagalpur Circle, on August 23, 1987, in terms of Notification S.O. No. 479 dated December 22, 1995 issued by the Government of Bihar in the Commercial Taxes Department u/s 7(3)(b) of the Bihar Finance Act, 1981.

4. It is relevant to mention here that under the Bihar Finance Act sales tax is payable on the taxable turnover after deducting therefrom, among other things, the sale price on sales exempted u/s 7 of the Act. Section 7 provides for exemption from sales tax on certain types of sales or purchases of goods. Subsection (3) thereof empowers the State Government by notification and subject to such conditions or restriction as may be imposed, to exempt from sales tax (or purchase tax), inter alia, sales of particular goods or class or description of goods, vide Clause (b). It is under this clause, that S.O. No. 479, Government to carry out the objects of the Industrial Policy because, without such notification any sale of goods cannot be exempted from sales tax.

5. On receipt of the above said application for exemption certificate on August 23, 1997 the claim was processed by the Commercial Taxes Officer with reference to certificate of the Industries Department contained in its letter No. 6488 dated November 7, 1998, copy whereof has been enclosed as annexure 3 to the writ petition. The Commercial Taxes Officer vide his order dated July 18, 2000 came to the conclusion that both in terms of the additional investments in fixed capital assets and in terms of the production capacity as a result of diversification, the petitioner's unit was eligible for exemption and thus submitted a favourable note. The Joint Commissioner of Commercial Taxes

however, vide his order dated August 29, 2000 came to a different conclusion. He took the view that investment in fixed capital assets of Rs. 137.92 lakhs was less than 50 per cent of the capital investment of Rs. 494.89 lakhs made earlier and therefore the unit did not fulfil the requisite condition in para 12(Ka) of S.O. No. 479 dated December 22, 1995 and thus it was not eligible for exemption of sales tax. He accordingly directed assessment of the sales tax on sale of the goods from the date of commencement of production. On September 2, 2000 the Deputy Commissioner of Commercial Taxes ordered for issuance of show cause notice against imposition of penalty u/s 16(9) of the Bihar Finance Act, 1981. In the meantime, the petitioner seems to have obtained a fresh certificate from the Industries Department on September 29, 2000 under letter No. 3103 with respect to quantum of investment in fixed capital assets which was produced before the Deputy Commissioner at the time of hearing of the show cause in the matter of proposed imposition of penalty on October 14, 2000. The Deputy Commissioner directed the petitioner to obtain clarifications from the Industries Department and meanwhile stayed further proceedings pursuant to notice u/s 16(9) of the Act. The petitioner approached the Industries Department for further report in respect of the investments made in the unit. The Industries Department got inspection made by a team of officers comprising of Deputy Director (Tech.), General Manager, District Industries Centre, Bhagalpur, and Technical Officer, Department of Industries, on December 14, 2000. On December 18, 2000 the inspection team submitted its report which was sent to the Deputy Commissioner of Commercial Taxes by the Joint Director by letter No. 3785 on December 22, 2000, vide letter No. 378 giving reference to the modified certificate sent by department's letter No. 3766 dated December 21, 2001 and enclosing a copy thereof. In the opinion of the Industries Department, the investment of 183.29 lakhs in setting up of the effluent treatment plant was not directly related to the production, and being unproductive machinery, they may be excluded from the category of fixed capital assets.

6. It may be stated here that the amount of Rs. 494.89 lakhs taken into account by the Joint Commissioner of Commercial Taxes in his order dated August 29, 2000 (supra) as fixed capital investments comprises of 5.16 lakhs on land, 51.15 lakhs on building, 255.29 lakhs on plant and machinery and 183.29 lakhs on other assets. If the last item which relates to setting up of effluent treatment plant is excluded, as recommended by the Industries Department, the additional investments to the tune of Rs. 179.17 lakhs comprising of 41.25 lakhs on building and 137.92 lakhs on plant and machineries will exceed 50 per cent of the fixed capital investment and thus the petitioner will qualify for exemption in terms of the Industrial Policy as well as the exemption Notification S.O. No. 479 dated December 22, 1995.

7. To complete the narration of events, on receipt of the above said letter of the Joint Director, Industries, dated December 22, 2000, on December 23, 2000 the Deputy Commissioner of Commercial Taxes directed the matter to be put up before the Joint Commissioner, Commercial Taxes (Administration) for fresh

consideration. Vide his order dated May 16, 2001 the Joint Commissioner took the view that the Deputy Commissioner had merely forwarded the file without expressing any opinion or giving finding and therefore it was not possible for him to give his approval or issue any direction.

The file was sent to the Circle In-charge. On October 29, 2001 the Assistant Commissioner of Commercial Taxes, i.e., the Circle In-charge observed that the then Joint Commissioner, Commercial Taxes (Administration), did not approve the application of the petitioner for exemption, vide his order dated August 29, 2000 but without taking any permission or order from the department, i.e., the Commercial Taxes Department the petitioner had got the fixed capital investment reassessed by the industries department, and it should be examined as to on whose direction the fresh assessment had been made. Secondly, the petitioner had also not challenged the earlier order of the Joint Commissioner dated August 29, 2000 by way of revision or appeal. The Assistant Commissioner/Circle In-charge thus expressed the view that it will not be proper to reconsider the exemption petition. Since, it appears, the Assistant Commissioner had drawn adverse inference against the petitioner not filing any appeal or revision against the earlier order of the Joint commissioner, the petitioner preferred to challenge the said order of the Assistant Commissioner dated October 29, 2001 before the Joint Commissioner (Appeal) by way of revision u/s 46(3) of the Bihar Finance Act, 1981 which was registered as Miscellaneous Case No. 89/2001-2002. The Joint Commissioner (Appeal) vide his order dated January 15, 2002 took the view that u/s 46(2) of the Act revision lies to the Joint Commissioner against orders passed by officers up to the rank of Deputy Commissioner and though the petitioner had preferred the revision against the order of the Assistant Commissioner dated October 29, 2001, it was clear that exemption petition of the petitioner stood rejected by the Joint Commissioner (Administration) and as such the revision was not maintainable and accordingly summarily dismissed the petition.

8. In the above background of facts the petitioner has approached this Court for quashing the order of the Assistant Commissioner of Commercial Taxes, Bhagalpur-cum-Circle In-charge dated October 29, 2001 and the order of the Joint Commissioner, Commercial Taxes (Appeal), dated January 15, 2002. The petitioner also seeks consequential direction upon the respondents to consider its exemption petition in the light of the report of the industries department and upon favourable consideration, issue the exemption certificate.

9. Shri Ram Balak Mahto, learned Counsel for the petitioner, submitted that the petitioner is eligible for exemption from sales tax in terms of the Industrial Policy Resolution, 1995 and S.O. No. 479 dated December 22, 1995 and in any view, as its claim has not been considered on merit in the light of the revised report of the industries department, a direction may be issued to the Joint Commissioner to consider the matter afresh.

10. At this stage the relevant provisions may be noticed as follows. Clause 16.3

of the IPR concerning the sales tax exemption with respect to the units undertaking expansion/diversification which is the basis of the claim of the petitioner, runs as follows :

Such units should be given identical treatment as new units for their expanded/diversified capacity and incremental production both in purchase of raw materials and for sales tax on finished goods. All such incentives will be admissible to such units which are covered by the definition of expansion/diversification as given in the annexure.

The term "incremental production" has been defined to mean :

the incremental production shall mean the excess of actual production over 2/3 of the originally installed capacity or the highest production in 3 years immediately preceding the year in which such expansion/diversification commenced, whichever of the two is higher.

The term "expansion/modernisation/diversification" has been defined to mean :

Expansion/modernisation/diversification of an existing industrial unit would mean additional fixed capital investment in plant and machinery of 50 per cent or more of the undepreciated value of fixed capital investment in the existing unit leading to incremental production capacity which would not be less than 50 per cent of the initial installed capacity.

The term "fixed capital investment" has been defined to mean :

the fixed capital investment means investment made in land, building and plant and machinery and productive assets of permanent nature.

The IPR further provides that in order to qualify for the sales tax incentives a unit undertaking expansion/modernisation/diversification should send prior intimation to the General Manager, District Industries Centre or the Managing Director, Industrial Area Development Authorities and Deputy Commissioner, Commercial Taxes, as the case may be, in respect of small-scale industry or the Director of Industries/Director, Technical Development and Commissioner, Commercial Taxes in case of medium and large industries before undertaking expansion/modernisation/diversification programme. Such intimation should be accompanied by detailed expansion/modernisation/diversification proposal giving the specific period of proposed additional investment.

11. In the instant case it would appear that there is no dispute about the petitioner's investment in land, building and plant and machineries comprising the fixed capital assets both prior to diversification and subsequent to diversification as under :

Item	Earlier	After	Total	Land	5.16 lakhs		5.16 lakhs	Building	51.15 lakhs
	41.25 lakhs	92.40 lakhs	Plant and	255.29 lakhs	137.92 lakhs	393.21 lakhs			
	machinery	Total	311.60	179.17					

The dispute is with respect to investment made in setting up or installation of effluent treatment plant prior to the diversification to the tune of Rs. 183.29 lakhs. In the opinion of the industries department, as the concerned machineries of the effluent treatment plant are not directly related to the production and are unproductive machineries they should not be included in the category of the capital investment. Further, the petitioner had made investment of 112.74 lakhs for setting boiler, cooling tower, PHE in the process of diversification which amount should be included as additional investment in fixed capital assets, and thus investment made by the petitioner in the process of diversification is more than 50 per cent of the capital investment made earlier and hence it is eligible for exemption.

12. Shri R.K. Dutta, learned Standing Counsel appearing for the Revenue pointed out that the addition of boiler, cooling tower, PHE was made during the year 1999-2000, i.e., after the unit had already commenced its production of Extra Neutral Alcohol on July 19, 1997 and hence any investment on such addition cannot be taken into account. On behalf of the petitioner it was submitted that though these investments were made in 1999-2000 it was part of diversification programme and the delay in installation of boiler, etc., was on account of belated sanction of loan by the State Bank of India.

13. Even if the investment of 112.74 lakhs on boiler, cooling tower, PHE is excluded, the investment of 179.17 lakhs--undisputedly made prior to July 19, 1997 in the process of diversification--would be more than 50 per cent of the investment of 311.60 lakhs provided if the investment on setting up of the effluent treatment plant is excluded. I am not sure as to whether or not the machineries of the effluent treatment plant should be included in the list of investment on plant and machineries as constituting fixed capital investment on the ground that they are unproductive machineries and not related to the production directly as held by the industries department. This is a technical matter into which this Court would not like to go. The court would however, like to observe that while considering the claim of exemption the competent authority is required to consider broadly two things--(a) that the additional fixed capital investment (on land, building and plant and machineries) is 50 per cent or more of the undepreciated value of the capital investment of the existing unit and (b) that the additional fixed capital investment results in incremental production capacity of not less than 50 per cent of the initial installed capacity. As seen above, "incremental production" means the excess of actual production over 2/3 of the originally installed capacity or the highest production in three years immediately preceding the year in which the expansion/diversification commenced--whichever of the two is higher.

14. In the instant case, undisputedly, as per the installed production capacity, the unit was producing 6,600 KL of ethyl alcohol, i.e., rectified spirit while as the result of diversification, i.e., the additional fixed capital investment, the unit has been producing 6,000 KL of Extra Neutral Alcohol, i.e., more than the required

quantum of incremental production. If the additional fixed capital investment resulted in sufficient incremental production, it should be treated as a strong index of the genuineness of the claim. The object underlying the condition that there should be 50 per cent or more additional fixed capital investment appears to be that only such units which make substantial investments and contribute to the required incremental production of scheduled commodities should be allowed the benefit of tax exemption. The Industrial Policy is designed to give benefit to industrial units and therefore a positive approach is required to be adopted. Any attempt to find loopholes and reject the claim on technical ground, in my opinion, may be counter-productive and subversive of the objects. The Supreme Court in *State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others*, has observed that the power u/s 7(3) of the Bihar Finance Act, 1981 in the matter of exemption from sales tax to industrial units desirous of availing the incentives under the Industrial Policy Resolution should not be exercised in a manner that they are denied the benefit which is otherwise available to such unit under the Industrial Policy. Notification u/s 7 of the Bihar Finance Act, 1981, is issued to carry out the objects of the Industrial Policy and in that view of the matter, any notification issued by the Government in exercise of powers u/s 7 of the Bihar Finance Act, 1981, found to be repugnant to the Industrial Policy must be held to be bad to that extent.

15. It is also to be kept in mind that as per the definition of the "fixed capital investment" only such investments made in land, building or plant and machinery can be taken into account which may be "productive assets of permanent nature". I am not sure if the machineries of the effluent treatment plant can be called "productive assets". Nonetheless the opinion of the Industries Department describing that it is "unproductive and not directly related to the production" deserves due weight and consideration. Unfortunately, the claim of the petitioner has not been considered on merits by the competent authority, i.e., the Joint Commissioner of Commercial Taxes (Administration). Perhaps, the petitioner should have approached the Joint Commissioner of Commercial Taxes (Administration) rather than the Joint Commissioner (Appeal). But if it did so apparently under legal advice, it should be given an opportunity to have its case considered by the competent authority. It is true that the Joint Commissioner (Administration) had earlier rejected the claim of the petitioner on August 29, 2000 but that was on the basis of earlier report/certificate of the Industries Department. It is futile to go into the question, as pointed out by the Assistant Commissioner of Commercial Taxes in his letter dated October 29, 2001, as to the circumstances in which fresh inspection was made by a team of officers of the Industries Department. Perhaps, that was in the light of the order dated October 14, 2000 referred to above. Be that as it may, there being a fresh report by an agency which cannot be regarded as extraneous inasmuch as it is the Industries Department which provides necessary inputs on the basis of which the Commercial Taxes Department has to take the decision, I am of the view that the matter deserves fresh consideration.

16. The petitioner may file representation before the concerned authority, i.e., the Joint Commissioner of Commercial Taxes (Administration), Bhagalpur, for the purpose. He (the Joint Commissioner) is directed to take a fresh decision in the matter keeping in view the observations made in this order. Meanwhile, the orders of the Joint Commissioner, Commercial Taxes (Administration), dated August 29, 2000 and the Joint Commissioner, Commercial Taxes (Appeal), dated January 15, 2002 are set aside.

17. In the result, this writ petition is allowed with the observations and directions mentioned above. No order as to costs.

Tarkeshwar Prasad Singh, J.

18. I agree.