

(2008) 03 PAT CK 0025

In the Patna High Court

Case No : CWJC Nos. 4556 and 4599 of 2008

United Spirits Limited

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

Citation : (2008) 03 PAT CK 0025

Judgement

1. Heard both the parties.

The Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred as the said Act) came into effect in the year 1993. The validity of the said Act was upheld by the Hon"ble Supreme Court in the case of State of Bihar v. Bihar Chamber of Commerce, reported in : [1996]2SCR184 . By the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein (Amendment) Act, 2001, which came into operation on and from 11th July, 2001, the said act was amended. Subsequent thereto by the Bihar Tax on Entry of Goods into Local Areas for consumption, Use or Sale Therein (Amendment) Act, 2003, which came into operation on and from 22nd August, 2003, the said Act was further amended. These two amendments were challenged. The challenge so thrown failed before this Court on the ratio of the Judgment of the Hon"ble Supreme Court rendered in the case of State of Bihar v. Bihar Chamber of Commerce (supra). The challenge was thereupon taken before the Hon"ble Supreme Court. When the same was pending consideration, the Hon"ble Supreme Court by a Judgment rendered in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, declared that the law laid down in the State of Bihar v. Bihar Chamber of Commerce (supra) is not good law. Subsequent thereto, the Hon"ble Supreme Court by its Judgment rendered in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, directed, amongst others, the parties whose challenge to the said amending Acts were then pending before the Hon"ble Supreme Court to place before this Court the relevant datas in the writ petitions concerned with a direction upon this Court to deal with the basic issue as to whether the levy imposed by those

amendments was compensatory in nature with a further direction that the Judgment so to be rendered by this Court should be placed on record of the Hon''ble Supreme Court. In terms of the said direction of the Hon''ble Supreme Court, this Court considered, amongst others, the said two amendments and declared them to be not compensatory in nature. The Judgment so rendered by this Court has been placed before the Hon''ble Supreme Court and the Hon''ble Supreme Court is in seisin of the matter along with other connected matters. We are told that the Hon''ble Supreme Court is likely to take up the matter in question and all other connected matters sometimes in the months of May, 2008.

2. In the original Act, the charging Section contained in Section 3 thereof provided, to the extent we are concerned, as follows:

There shall be levied and collected a tax on entry of scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding 5 per centum of the import value of such goods as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed.

The charging section therefore, provided:

(a) Tax shall be levied on entry of scheduled goods into a local area for consumption, use or sale therein; (b) At such rate not exceeding 5 per centum of the import value of such goods; (c) As may be specified by the State Government in a notification published in an official gazette; and (d) Subject to such conditions as may be prescribed.

The Act defined the words "Prescribed" and "Scheduled goods" as under:

Prescribed means prescribed by the Rules made under this Act.

Schedule goods means goods specified in the Schedule to this Act.

3. Section 9 of the Act authorized the State Government to make Rules for carrying out the purposes of the Act. On 17th May, 1993, the State Government made the Bihar Tax on Entry of Goods into Local Areas Rules, 1993 and thereby made the prescriptions. The Act contained a Schedule which in turn contained six specific items of goods.

4. In terms of the Act, therefore, entry tax on those six specific items of goods became levyable upon their entry into a local area for consumption, use or sale at such rate as was to be notified by the State Government, but which rate was not to exceed 5% subject to the conditions as had been prescribed in the Rules. The Rules did not prescribe anything pertaining to the rates to be specified by the State Government.

5. By a notification dated 27th February, 1993, the State Government prescribed the rate of tax to be levied in respect of those six specified goods. By the 2001 amendment, amongst others, the Schedule to the Act was altered by increasing the number of specified goods from 6 to 18. On 25th July, 2001 by a notification,

the State Government specified the rate of tax to be levied in respect of those 18 Scheduled goods. The rate of tax so specified did not exceed 5% of the import value of those goods.

6. By the 2003 amendment, the charging Section, namely, Section 3 of the Act, was amended and thereby the words "5 per centum" were replaced by the words "20 per centum" and accordingly, the State Government acquired the right to specify rate of tax up to 20 per centum. By the said amendment, the Schedule of goods was also enlarged and thereby 24 species of goods had been included in the Schedule of goods to the Act. Soon thereafter, by a notification dated 22nd August, 2003, the earlier notification dated 25th July, 2001 was amended and thereby new rate of tax was specified in relation to the goods, which were then included in the Schedule of goods to the Act. The rate of tax so specified exceeded 5% but not 20% of the import value of those goods.

7. Petitioner in these writ petitions do not deal with Scheduled goods, which were in the Act originally. It, however, deals in goods which were brought into the Schedule of goods by the 2001 and 2003 amendments. In these writ petitions, we are not concerned with levy of tax or demand upon the petitioner of tax for the period prior to 29th August, 2006. We are concerned with the demand of tax for entry of goods belonging to the petitioner on and from 29th August, 2006.

8. As aforesaid the principal reason for this Court to hold that the 2001 and 2003 amendments are invalid as it found that the levy sought to be introduced thereby was not compensatory in nature. While dealing with the subject, this Court took note of the fact that on 29th August, 2006, the said Act was further amended by the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein (amendment) Act, 2006, whereby and under the charging section of the Act was altered. The altered section to the extent we are concerned is as follows:

There shall be levied and collected a tax on entry of scheduled goods into a local area for consumption, use or sale therein for the purpose of development of trade, commerce and industry in the State, at such rate, not exceeding 20 per centum of the import value of such goods, as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed.

This Court, while expressing its opinion that the 2001 and 2003 amendments are invalid, opined that the 2006 amendment is valid.

9. The aforementioned Judgment of this Court was rendered on 9th January, 2007 whereupon on 10th April, 2007 Bihar Entry of Goods into Local Areas for Consumption, Use or Sale Therein (Amendment and Validation) Act, 2007 was made, which came into effect on and from 29th August, 2006. By the said Amending and Validation Act, the Schedule of goods to the said Act was amended and thereby many species of goods were reintroduced in the Schedule of goods to the said Act.

There is no dispute that the petitioner deals in with the goods, which were reintroduced in the Schedule of goods to the said Act by the said Amending and Validation Act.

10. The entire case of the petitioner is based upon interpretation of Section 2 of the said Amending and Validation Act. The same is reproduced hereunder as follows:

2. (1) The amendment made in Schedule to the said Act shall be deemed to be, for all purposes, as validly and effectively in force with effect from 29.8.2006.

(2) Any assessment, collection, adjustment, reduction or consumption made or any other action taken or anything done or purported to have been taken or done under the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 and notifications issued and rules made thereunder shall be deemed to be and to have always been, for all purposes, as validly and effectively, assessed, collected, adjusted, reduced, computed or taken or done as if the said Act as amended by this Act had been in force at all material times and accordingly, notwithstanding anything contained in any judgment, decree or order of any court or tribunal or other authority:

(a) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the refund of any amount received or realized by way of such tax;

(b) no court, tribunal or other authority shall enforce any decree or order directing the refund of any amount received or realized by way of such tax;

(c) recoveries shall be made in accordance with the Schedule of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993, of all amounts which could have been collected as tax under the said Act by reason of amendment made in the Schedule to the said Act by this Act but which had not been collected.

(3) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this amendment in the Schedule had not come into force.

11. It is the contention of the petitioner that once, it has been declared by this Court that the 2001 and 2003 amendments are invalid, with them the notifications issued by the State Government specifying the rate of tax in 2001 and 2003 met their natural death. The petitioner contends that in the absence of the 2001 and 2003 amendments, the goods dealt with by the petitioner are not Scheduled goods and accordingly, no levy of tax can be made in respect of goods dealt with by the petitioner. It is the contention of the petitioner that with effect from 29th August, 2006, i.e. from the date the 2006 amendment Act came into force, the goods dealt with by the petitioner became part of the Schedule of goods on which tax is levyable, but the fact remains that in relation to the goods dealt with by the petitioner since then, no notification has been issued by the

State Government specifying the tax payable on the goods dealt with by the petitioner and accordingly, tax can not be levied on the petitioner.

12. The learned Counsel appearing on behalf of the State submitted that the Judgment of this Court holding that the 2001 and 2003 amendments are invalid is in fact an opinion expressed by this Court on remand made by the Hon''ble Supreme Court for the purpose of ascertaining whether the levy imposed thereby was compensatory in nature or not and that opinion has not yet reached its finality since the Supreme Court has not yet pronounced its views thereon and the matter is still pending consideration before the Hon''ble Supreme Court. The learned Counsel further submitted that assuming the 2001 and 2003 amendments have been declared as invalid but no such pronouncement has been made in so far as the notifications of 2001 and 2003 are concerned and accordingly, they remain intact. The learned Counsel submitted that the Amending and Validation Act validated those notifications too and as such it cannot be contended that the State Government has not specified the rate of tax payable.

13. In reply, the learned Counsel for the petitioner contended that Sub-sections (1) and (2) of Section 2 of the Amending and Validation Act cannot be read disjointly. Those should be read conjointly. It was submitted that the intention of the amendment was to introduce the amendments with effect from 29th August, 2006 and accordingly, anything done with effect from 29th August, 2006 had been validated by Sub-section (2) of Section 2 of the Amending and Validation Act. It was contended that notifications issued prior to 29th August, 2006 in relation to the goods brought within the Schedule of goods by the Amending and Validation Act were not intended to be validated and the same cannot be read into Sub-section (2) of Section 2 of the Act. The learned Counsel for the State submitted validation of notifications as contained in Sub-section (2) of Section 2 of the Amending and Validation Act is without any limitation and accordingly, it has no connection with the amendment which has been dealt with in Sub-section (1) of Section 2 of the Amending and Validation Act.

14. Considering the above submissions, we have been persuaded by the learned Counsel for the State to hold that as of now it cannot be said that there has been a final adjudication that the 2001 and 2003 amendments are invalid. However, at the same time there is a pronouncement by this Court, which is binding on us, that the said amendments are invalid. Therefore until such time, the Hon''ble Supreme Court pronounces otherwise it would be inappropriate on our part to hold that despite such pronouncement by this Court the State is entitle to levy tax on the basis of the 2001 and 2003 amendments.

15. Power to specify levy of tax by publication of notification was granted by the Original Act, which has not been declared invalid. However, the same remained confined in respect of six specified goods and was limited up to 5% of the import value of such goods. By the 2001 Amending Act, the power to specify levy of tax increased from 6 to 18 specified goods. By the 2003 Amending Act, the power to

specify levy of tax became available in respect of 24 species of goods and at the same time, the limit of imposing tax stood increased from 5% to 20% of the import value of such goods. The Amending Acts of 2001 and 2003, as aforesaid, have been declared by this Court as invalid on the ground that they are not compensatory in nature and accordingly, not within the competence of the State legislature. By reason of such declaration, although the notifications published after coming into force of the 2001 and 2003 Amending Acts have not died their natural death, as was contended by the learned Counsel for the petitioner, but certainly they became dormant. Life in those notifications, no doubt could be infused by a Validation Act, but only after the 2006 Amending Act came into force, i.e. from 29th August, 2006, inasmuch as the said Amending Act has been upheld by this Court as valid. The question is whether the same has been done by the Amending and Validation Act, 2007 and in particular, by Sub-section (2) of Section 2 thereof.

16. If we accept the contention of the learned Counsel for the State that validation of actions accorded by Sub-section (2) of Section 2 of the Amending and Validation Act is without limit, then the logical conclusion would be that all actions of past have been validated and accordingly, all assessments, collections, adjustments, reductions or consumptions made or any other action taken or anything done or purported to have been done prior to 29th August, 2006 i.e. prior to coming into force of the 2006 Amending Act, on the basis of the 2001 and 2003 Amending Acts have also been validated. When the pronouncement is that the 2001 and 2003 Amending Acts are beyond the competence of the State legislature, the same could not be validated by the State legislature. The logical conclusion would, therefore, be that assessments, collections, adjustments, reductions or consumptions made after 29th August, 2006 i.e. when the 2006 Amending Act came into force, were validated. In such circumstances, if we have to hold that the notifications issued prior to 29th August, 2006 were validate by Sub-section (2) of Section 2 of the Amending and Validation Act with effect from 29th August, 2006, then we would be required to supply words in Sub-section (2) of Section 2 of the Amending and Validation Act, a fiscal statute, which we cannot do.

17. There being admittedly no notification fixing tax liability in respect of the goods reintroduced by the Amending and Validation Act, the one and the only logical conclusion would be that there is no scope of levying tax upon persons dealing with the goods brought in the Schedule of goods with effect from 29th August, 2006.

18. However, at the same time, being alive of the situation that even now there is a possibility of the Hon''ble Supreme Court declaring the 2001 and 2003 amendments as valid amendments, we would dispose of these writ petitions by directing the parties to maintain status quo as of today until the Judgment of the Hon''ble Supreme Court in relation to the validity of the 2001 and 2003 amendments is rendered. In the event, it is held by the Hon''ble Supreme Court

that the said amendments are invalid, the State would be precluded from recovering any tax from the petitioner on the demands being the subject matter of challenge in these writ petitions. Accordingly, the writ petitions are disposed of. On the oral prayer of the learned Counsel for the State, we are inclined to grant certificate under Article 132(1) of the Constitution.