IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.454 of 2021
In
Civil Writ Jurisdiction Case No.2726 of 2015

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1. The Secretary-cum- Commissioner of Commercial Taxes Government of Bihar, Vikash Bhawan, Bailey Road, Patna.
2. The Deputy Commissioner of Commercial Taxes, In-charge of North Circle, Patna.

... ... Appellant/s

Versus

1. M/S Gangotri Iron and Steel Co. Ltd. a Company duly registered under the Companies Act, 1956 having its registrant office at 307, Ashiana Towers, Exhibition Road, Patna through one of its Director Sanjiv Kumar Choudhary, Son of Late Shiv Bhagwan Choudhary, resident of 7th Floor, Kalaruka Niwas, South Gandhi Maidan, Police Station- Gandhi Maidan, District- Patna- 800001.
2. The State of Bihar through its Chief Secretary, Government of Bihar, Main Secretariat, Patna.
3. The Development Commissioners, Government of Bihar Main Secretariat, Patna.
4. The Industrial Development Commissioners, Government of Bihar Vikash Bhawan, Bailey Road, Patna.
5. The Director (Technical), Department of Industries, Government of Bihar Vikash Bhawan, Bailey Road, Patna.
6. The General Manager, District, Industry, Centre, Industrial Area, Patliputra Coloney, Patliputra, Patna.

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vikas Kumar, S.C. - 11
Mr. Rewti Kant Raman (A.C. To S.C -11)

For the Respondent/s : Mr. P. K. Shahi (AG)

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 06-08-2024

The issue agitated in the appeal is in a narrow compass, as to whether Industrial Incentive Policy, 2006 (hereinafter referred to as the 'Policy') provided for incentive by way of reimbursement of 80% of the Entry Tax (ET) and Central Sales Tax (CST) together with the Value Added Tax (VAT).

2. The learned Single Judge found the issue in favour of the assessee, the writ petitioner, on three grounds. First on the clarification to clause 2(6) of the Policy; providing for '*Subsidy/Incentive on Value Added Tax*', having stipulated that the incentive would not be payable on the amount imposed as penalty; as also the difference of amounts between tax assessed and accepted under the Central Sales Tax (CST)/Bihar Value Added Tax Act, 2005 (VAT Act) and Bihar Entry Tax Act (ET Act). This, according to the learned Single Judge, clearly indicates that the incentive would be payable on all the three taxes and

not on VAT alone. The next reasoning was that in Annexure-III to the Policy; which is the Pass Book to be maintained for the purpose of claiming incentives, there is provision for showing the amount of tax admitted under VAT, CST and ET enactments; which according to the learned Single Judge leaves nothing for speculation or determination or adjudication considering the plain meaning thereof that the incentive would be available also on the Entry Tax. The return was also looked into, which was in form RT – 3, which clearly depicted the amount deposited by the assessee, by way of Entry Tax, as forming an integral part of the amount of admitted VAT of the assessee, which makes both inseparable; the last of the grounds on which the incentive was find to be applicable to Entry Tax also. It was hence held that the eligibility to incentive, also encompass the Entry Tax paid, as per the Policy and the nominal heading of a provision or clause, cannot be merely relied upon to exclude something which is otherwise included. Looking at the Policy as a whole and the language employed, the inclusion of Entry Tax was held to be clear, unambiguous and unequivocal. Despite the heading which

speaks of subsidy and incentive to VAT alone, the substantive provision indicates otherwise; was the declaration. The learned Single Judge also relied on the principle of promissory estoppel insofar as the assessee having altered their position, by making investments as per the Policy; acting upon the promise of the State as projected in the Policy document.

3. The learned Advocate General, Shri P.K Shahi appearing for appellant-State took us through clause 2(vi) of the policy document to assert that the plain and simple language used therein would clearly indicate that the incentive was confined to VAT. The reference to CST and Entry Tax in the clarification cannot be interpreted in a manner, which would run contrary to the substantive clause which grants the incentive. The clarification only indicates that the difference of the tax assessed as CST, VAT and Entry Tax, exceeding the admitted/ accepted tax; would not be available for reimbursement as an incentive. The use of the words ‘accepted’ and ‘assessed’ are in the context of the VAT regime having brought in self-assessment by filing of returns as prescribed, which is the tax liability ‘accepted’ by

the assessee. Whereas the Assessing Authority under the VAT Act is empowered to carry out re-assessment, after scrutiny of the returns filed, which will be the tax 'assessed'. The learned Advocate General also relies on a Division Bench decision of this Court in ***Khichri Ram and Another v. State of Bihar and Others; (2009) 2 PLJR 265,*** to contend that if there is any ambiguity in the English version, the Hindi version, which is the original notification in the official language of the State, has to be looked at; which has be treated as the authentic Policy framed by the State. The learned Single Judge clearly erred in bringing Entry Tax also into the incentive umbrella created by the Policy, which cannot be permitted.

4. Shri S. D. Sanjay, learned Senior Counsel appearing for the respondent seeks to defend the orders of the learned Single Judge. It is emphasised that the policy itself was brought in with the purpose of increasing productivity and enabling more investments in the State and promoting industrialisation. Considering the totality of the Policy, the provision has to be given a liberal interpretation and Entry Tax which is factored in the VAT, has also to be

given the incentive. The learned Senior Counsel would take us through the Policy to emphasise that even electricity duty and luxury tax were granted exemption, and it was the Government Officers who restricted the incentive to VAT and declined it for the Entry Tax component. Annexure –III of the Policy document as also the return filed is read out to further buttress the contention that Entry Tax is also covered under the incentive policy.

5. At the outset, we have to observe that the aspect of electricity duty and luxury tax having been brought under the Policy; does not necessarily result in Entry Tax also being enabled inclusion for grant of incentive. We should also, at the outset, record our reservation regarding the specific provision in the Policy being decided based on the Form appended to the Policy; which is the Pass Book to be maintained for the purpose of enabling the incentive under the Policy. The Pass Book has a specific purpose, which we would dilate upon a little later.

6. We have to first extract the specific clause under the Policy; being clause 2 (vi), which is as

hereunder :-

> ***Subsidy / Incentive on VAT:***
>
> *This facility will be available to Small/large/ medium industries. The industrial unit will get a passbook from the State Government in which the details of the tax paid under Bihar VAT would be entered and verified by the Commercial Taxes Department in the form prescribed in Appendix - III. The Director, Industries will be authorized to pay the incentive amount on the basis of the verification.*
>
> *The new Units will avail 80% reimbursement against the admitted VAT amount deposited in the account of the Government, for a period of ten years. The maximum Subsidy amount is payable 300% of the capital Invested.*
>
> ***Clarification:***
>
> *The incentive would not be payable on the amounts imposed as penalty and the difference of amount between tax assessed and accepted under the Central Sales Tax/Bihar Value Added Tax Act, 2005 and Bihar Entry Tax Act.*

7. The incentive facility is made available to Small/Large/Medium industries and based on the details of the tax paid under the Bihar VAT, as entered and verified in the Pass Book issued from the State Government as per Annexure-III, the Director Industries would be authorised to pay the incentive amounts, which is also stated to be 80% reimbursement against admitted VAT amount deposited in the account of the Government, for a period of 10 years, subject to the maximum subsidy being restricted to 300% of

the capital investment. We have to emphasise that the details in the Pass Book at Appendix – III, as per the substantive provision in the Policy document, is with respect to the ***tax paid*** under the Bihar VAT Act and the reimbursement is also against the ***VAT amount deposited in the account of the Government*** (emphasis supplied). The tax paid under the Bihar VAT Act which is deposited in the account of the Government is the tax paid into the treasury under the VAT Act.

8. Entry Tax is a charge levied under a different enactment, namely the Bihar tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993. which speaks of tax charged and levied on goods brought into the State from outside the State. The goods, on inter-State supply attracts the levy of tax on entry into the local areas of the State, and this is distinct and different from the VAT imposed on a subsequent sale of the same goods or the goods manufactured from the imported goods; which subsequent levy is enabled a set-off, to the extent of the Entry Tax paid. ***Jindal Stainless Steel Limited vs. State of Haryana (2017) 12 SCC 1,*** a Nine-Judge Constitution

Bench, by majority upheld the constitutional validity of the levy of Entry Tax, finding that the levy need only satisfy the mandate of being non- discriminatory as per Article 304 (a) of the Constitution of India. The theory of it being a compensatory tax was held to be not the justification; which theory, it was held was legally unsupportable and fit to be abandoned. To treat it as non-discriminatory the test was only to verify: (i) whether similar goods manufactured within the State are also subjected to the levy and (ii) there is no discrimination on that count between goods manufactured or produced within the State and those imported.

9. The charge of tax under Section 3(1) of the Entry Tax Act, levies tax on entry of scheduled goods into a local area for consumption, use or sale within the State at such rates as specified. The second proviso to Section 3(1) enables an importer, who imports goods notified under sub-section (1) to be exempted from such tax only on discharging the burden of proving that the goods were brought in for purposes other than consumption, use or sale within the State. Sub-Section (2) of Section 3 makes it

mandatory for every dealer liable to pay tax under the VAT Act or any other person; who imports scheduled goods into the local areas of State of Bihar whether on his own account or an account of his principal or takes delivery or is entitled to take delivery of such goods, to the tax liable also under the Entry Tax Act.

10. The second proviso to Section 3(2) read as under:-

> *"Provided further that where an importer of 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 Tax Act, 2005 (Act 27 of 2005) shall stand reduced to the extent of tax paid under the Act:"*

11. The second proviso to sub-section (2) provides that on payment of Entry Tax by an importer of scheduled goods, who is also liable to pay tax under the VAT Act, the VAT liability would stand reduced to the extent of tax paid under the Entry Tax Act. The said provision enables a set-off as against VAT liability incurred on the imported goods, in the same form or in any altered form; when sold within the State, attracting the liability to

tax under the VAT Act.

12. Viewed in this perspective, the Policy has to be interpreted. The petitioner has set up an Iron and Steel Company within the State and the petitioner sources goods from outside the State and on its import pays Entry Tax on entry into the State. The petitioner manufactures the goods or sells the goods imported, which attracts the VAT liability; against which eligibility there is a set-off provided for the Entry Tax paid. We once again emphasise that the charge and levy of Entry Tax and VAT are under two different statues and the statute levying Entry Tax makes a provision for set-off, of the Entry Tax paid; when the goods on which the Entry Tax has been levied, in the same form or in any other form, is subjected to a subsequent transaction, attracting VAT liability. Hence, when the VAT liability is attracted, after the set-off, the assessee is liable to pay into the coffers of the State, only the balance VAT component; which is the tax paid under the Bihar VAT Act and deposited in the account of the Government. This is the out-put tax payable by the assessee, which alone would be granted the 80% reimbursement as per the

Subsidy/Incentive on VAT, brought in by the Policy of 2006.

13. In ***Indian Oil Corporation Limited v. State of Bihar and Others; (2018) 1 SCC 242***, the Hon'ble Supreme Court dealt with the set-off of Entry Tax when the imported goods did not suffer further liability to tax (VAT) within the State of Bihar, at the hands of the importer itself. The assessee imported crude oil from outside the State and manufactured high speed oil, petrol etc., in its refinery within the State, which was sold *interalia* to other Oil Marketing Companies (OMCs) who in turn sold it to retailers or through their own petroleum outlets to end consumers, which sales were affected by the importer too. The sale to OMCs did not suffer tax by virtue of a notification issued under Bihar Finance Act, 2005, shifting the point of levy of tax to the point of the sale to retailers and end consumers. The assessee therein satisfy the first condition, of being a registered dealer under the Bihar VAT Act and the second, of being an importer of goods. But it did not satisfy the third condition, as it had no liability to pay VAT on its sale to OMCs, and also the fourth condition,

since the sale on which there was a levy under the VAT Act was by another OMC.

14. The Hon'ble Supreme Court held so in paragraph 13, which is extracted hereunder:-

> ***"13.*** *Since the set-off in question depends upon the interpretation of Section 3(2) of the Entry Tax Act, it is necessary to state, at the outset, that the following conditions need to be satisfied for claim of set-off under the said provision:*
>
> *(i) First and foremost, under Section 3(2) itself, the tax leviable by way of entry tax can only be paid by every dealer liable to pay tax under the VAT Act;*
>
> *(ii) The set-off can only be granted if the assessee is an importer of scheduled goods, who is liable to pay tax under the VAT Act;*
>
> *(iii) The assessee must incur tax liability at the rates specified under Section 14 of the VAT Act;*
>
> *(iv) This must only be by virtue of the sale of imported scheduled goods; and*
>
> *(v) "His" tax liability under the VAT Act will then stand reduced to the extent of tax paid under the Act."*

15. The set-off hence is applicable only when there is further sale made, when the goods suffer the VAT liability. It was never intended by the Policy that the Entry Tax paid by an investor would be entitled to the subsidy; (i) whether the importer is entitled to set-off as against the VAT

liability or (ii) when the importer suffers no further liability under the VAT Act; the latter of which cannot definitely be claimed. To make the later point very clear, an illustration would be apposite, insofar as, the investor, registered under the VAT Act, purchasing air conditioners from outside the State; to be fitted in its factory. It would be liable to Entry Tax on its entry into the State, but it suffers no liability under the VAT Act, which would dis-entitle any set-off, and there is also no question of any incentive by way of 80% reimbursement of such Entry Tax paid.

16. As far as the investor, who brings goods into the State for consumption or sale, when the goods, in the same form or in the manufactured form, suffers VAT liability within the State, the investor/importer by virtue of the second proviso to Section 3(2) of the ET Act, is entitled to a set-off, of the Entry Tax paid on import. The second proviso to Section 3(2) of the ET Act is declared to be a mere concession as to set-off, on the conditions specified being fulfilled and not a charging section or a measure to plug evasion in ***Indian Oil Corporation Ltd.*** *(supra)*. It has also been categorically held that Entry Tax and VAT are two

separate taxes, under the two enactments; one of which, the ET Act, permits set-off of VAT on the four conditions being fulfilled.

17. In this context, we would also refer to ***CCE v. National Tobacco Company of India Ltd (1972) 2 SCC 560 .*** wherein the Hon'ble Supreme Court distinguished the terms 'levy' and 'assessment'. The equation of levy and assessment by the High Court was found fault with, while holding that, *'... although the connotation of the term 'levy' seems wider than that of 'assessment', which it includes, yet, it does not seems to us to extend to 'collection'. Article 265 of the Constitution of India makes a distinction between 'levy' and 'collection' (sic-para 19).* ***Somaiya Organics (India) Ltd. v. State of U.P.; (2001) 5 SCC 519*** also held that in a taxing statute, the words 'levy' and 'collect' are not synonymous terms; while 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realisation of the tax which is levied or imposed. It is this physical realisation of VAT alone that is permitted incentive/subsidy under the Policy of 2006

18. In ***CCE v. Vazir Sultan Tobacco Company***

Ltd. (1996) 3 SCC 434, the question arose as to whether special excise duty imposed would apply to the goods manufactured prior to such imposition; at the time of removal of goods, since the duty stood deferred to the stage of removal. The Hon'ble Supreme Court held that '*the idea of collection at the stage of removal is devised for the sake of convenience. It is not as if the levy is at the stage of removal; it is only the collection done at the stage of removal.' (sic-para 5)*. The aforesaid decisions were followed in ***Peekay Re-Rolling Mills (P) Ltd. v. Assistant Commissioner; (2007) 4 SCC 30,*** wherein it was held that 'collection' and 'levy' are distinct and 'collection' is not an essential facet of 'levy'. Though, collection may sometimes be indicative of a lawful levy of tax, it does not logically follow that absence of collection means an absence of liability. Here, under the Policy of 2006 the liability under the VAT Act is the levy made, but the amount payable, which is enabled incentive/subsidy, is after setting-off the Entry Tax paid.

19. We once again look at the specific words employed in clause 2(vi) of the Policy of 2006, which is the

details of the tax paid under the VAT Act being entered in a Pass Book, which is verified by the Commercial Taxes Department for the purpose of 80% reimbursement against the admitted VAT amount deposited in the account of the Government. We have to emphasise; it is not the levy or the liability to tax that has been granted the incentive/subsidy. It is the tax paid into the coffers of the Government as VAT that is given the subsidy, by way of 80% reimbursement. The set-off made of the amounts paid under the Entry Tax Act reduces the VAT liability, but the incentive only enables the output tax paid into the coffers of the Government to be granted 80% reimbursement as an incentive/subsidy. The levy as has been found in the afore cited decisions does not necessarily mean that there is payability.

20. As far as the clarification is concerned, it has to be kept in mind that on assessment, the Central Sales Tax levied on an inter-State transaction, if dis-allowed in assessment, the dis-allowance would be treated as an intra-State transaction with liability to VAT. Likewise, in the dis-allowance of the set-off claimed as Entry Tax from the VAT, on the ground that some of the imported goods had not

suffered VAT; there would be a dis-allowance of Entry Tax claimed, leading to an addition of the VAT liability. These additions, would be as distinguished from the returns filed by the assessee on self-assessment; which would be the assessed amount. These additions made, of the dis-allowance, would be dis-entitled to subsidy since the difference of amounts, between tax assessed and accepted under the different enactments, would not qualify for subsidy. The clarification and the requirement in the Pass Book to show the CST and Entry Tax paid along with VAT paid is only to ensure that 80% of reimbursement of the VAT paid, is enabled to only the VAT component as declared in the returns, on self-assessment and not the additions made when re-assessment is carried out. The clarification and the Pass Book at Annexure-III is inconsequential in deciding the Policy. We also have looked at the returns, which definitely has to indicate Entry Tax for the purpose of set-off from the VAT liability and that does not make it a component of the VAT paid.

21. On the above reasoning, we find the Policy of 2006 to have enabled Incentive/Subsidy only on the VAT

paid into the coffers of the State and not to either CST or Entry Tax. We set aside the judgement of the learned Single Judge and allow the appeal of the State.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree

(Partha Sarthy, J)

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