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Court : Patna

Decided On : Jul-22-2002

Judge : P.K. Deb, J.

Appeal No. : Civil Writ Jurisdiction Case No. 846 of 1991

Appellant : Rameshwar Prasad

Respondent : The State of Bihar and ors.

Disposition : Writ Petition Allowed

Judgement :

P.K. Deb, J.

1. This petition has been filed by the petitioner for quashing the order of assessment dated 18.10.1979 (Annexure-4) passed by the Assessment Sub-Committee of the Agricultural Produce Market Committed Shaikhpura, district Munghair, for the period from 1.4.1976 to 31.3.1979 imposing levy of market fee on tobacco, tobacco products, Zafrani Zarda, Tea leaves and Bidi leaves as well as penalty under the provisions of Bihar Agricultural Produce Marketing Act, 1960 and rules framed thereunder.

2. The petitioner was one of the partners of the Firm, namely, M/s Janta Tobacco Stores situated at Shaikhpura in the district of Munghair. The firm was holding a

licence issued under the provisions of the Marketing Act and such licence had been received by the firm on 22.4.1979 as required under the Rules. The firm was filing return regularly and paid market fee on assessment of the transactions of sale effected by the firm. The items/commodities dealt by the firm were all excisable goods as under the Central Excise Act. It was maintaining a register showing the entire stock position as well as sale and purchases of tobacco and tobacco products. On 24.7.1979 the Secretary of the respondent Market Committee visited the premises of the firm and seized all the books of accounts lying there and then issued a letter on 24.7.1979 directing the firm to purchase register with regard to sukha, khaini Bidi leaves and Kandi for the period from 1.4.1975 to 2.2.77 and sale-purchase register with regard to zarda and tea leaves for the period from 1.4.1975 to up to date. The petitioner appeared with all this books of accounts lying with him except those which have been seized by the Secretary and those which were the excise department. The Secretary had not called the petitioner nor his registers have been filled and as such, the petitioner had to leave the office of the Secretary but subsequently the firm received a notice dated 1.8.1979, as contained in Annexures-1 and 2 with a direction to produce all books of accounts mentioned in the notice on 3.8.1979 but that notice was received by the firm on 17.8.1979. On 20.8.1979 the firm filed an application that the Form E.B. 3 register is lying with the Excise Department and that ten box of tea leaves were purchased on 19.9.1978 under Bikray Lakha No. 13829 dated 19.9.1978 during the relevant period. Seizure was made regarding Zafrani Zarda which belonged to another firm. The notice for assessment at Form 'C', as mentioned in Annexure-3, had been done for the first time by the Secretary and accordingly the petitioner appeared on 24.9.1979 and filed a petition but no order was passed on his petition in his presence but subsequently the firm was served with a demand notice in which it was mentioned that a fee of Rs. 9831.67 paise has been determined against the firm and a further 100% penalty amounting to same Rs. 9831.67 paise has been levied against the firm. Then the petitioner applied for certified copy of the assessment order and from the assessment order it could appear that the firm has been subjected to fee penalty by adopting arbitrary and illegal manner. Such assessment order, as contained in Annexed-4, is under challenge. Various points have been raised regarding illegality of the

assessment order. Whether tobacco and tobacco products can be levied for market fee or not was the subject matter before the Apex Court. Once it was held by the Apex Court in the case of I.T.C. as reported in 1985 supplementary (1) SCC 145 that the State legislature is not competent for providing levy and collection of market fee on the sale of tobacco in the market area. But the same view as given had been considered in 2002 (1) Supreme Today 258, held that the law enunciated in the earlier case was not a correct one and it was held that State Legislature is competent to enact levying of market fee at the market area on tobacco and tobacco products itself. In that way, in the present writ petition challenge regarding the tobacco/tobacco products having been without jurisdiction of levying of market fee goes away. This writ petition was kept pending till the decision being arrived at by the Apex Court in the I.T.C. case, as mentioned above. When that judgment went against the I.T.C. vis-a-vis the present petitioner also, that point of levying of market fee on tobacco and tobacco products goes away.

3. Now submission has been made itemwise on factual aspect as to how far levying of market fee on each item was legal or otherwise. Admittedly, levying of tax was made in respect of the period from 1.4.1976 to 31.3.1979. In respect of bidi leaves, the same has been included within the Schedule of the Bihar Agricultural Produce Market Act on 12.2.1972 but it was published in the official Gazette on 15.5.1980 and until and unless gazette notification is there the same item cannot be levied of tax. It may come up for levying of tax only after 15.6.1980, and notification to that effect under Sections 3/4 of the Act had been made admittedly in the year 1980. So before such notification is made, bidi leaves cannot be construed to be coming within the purview of the Act for the purpose of levying tax. In this respect a Division Bench judgment of this Court has been referred to 1983 BUR 571 Bhawani Pd. Sri Bihariji Mills Ltd. and Ors. v. State of Bihar. On interpretation of Section 4 of the Act it is clear that till a notification is being made the same cannot be within the purview of levying of tax. In that way, the tax levied for the period, as already mentioned above, did not attract bidi leaves and hence, assessment of tax in respect of Bidi leaves goes away of the period as mentioned above.

4. In respect of Zafrani Zarda, it is a manufactured item of tobacco and manufactured item of tobacco has been included within the Schedule by amendment of 1982 and before 1982 there is no scope of levying tax on Zafrani Zarda. In this respect reference may be made to 1985 PLJR 531 M/s Prabhat Zarda Factory v. State of Bihar. Till 1982 Zafrani Zarda remains out side the scope of levying tax. This has been elaborately contained by the writ petitioner in paragraph-30 of the writ petition itself.

5. In respect of tea leaves, the same has been added in the Schedule of the Act by a notification dated 21.1.1976 and by further notification on 24.12.1979 under Section 4 of the Act tea leaves were notified for the respondent Market Committee and hence, before 24.12.1976 there was no scope of levying market fee. Moreover, the tax has been levied on the basic of transactions on tea leaves on 24.7.1979 and in that way, levying can be done for the period 1979-80 and not for the previous year.

6. In respect of khaini, from he records it could be found that the petitioner had purchased 608 kilograms between the period from 15.5.1979 to 16.6.1979 from Sarili Tobacco Stores, Gaya, and 244 kilograms from M/s Lakhan Lal Co., Gaya during the period from 3.5.1979 to 15.5.1979.

7. It is the submission that there is no scope of levying tax for the previous years when there is nothing on record that any purchase was made earlier to that as mentioned above. In this respect reference has been made to 32 Sales Tax Cases page-466. That was a case between Laxmi Stores and State of Bihar wherein under the Bihar Sales Tax Act, 1959 it has been held that assessing authority can assess for the period for which transaction is found within that period. There is no scope of any prosecution under the general law or under the provisions of the Act that any person is dishonest for one year must be deemed to have been dishonest for previous years also. In that way, there is no scope of assessment of tax for the period for which it has been done for Zafrani Zarda, Tea leaves and Khaini, Similarly, it is the case of tobacco dust. One transaction could be found of the dated 28.7.1978 in respect of tobacco dust for which assessment has been made for the period from 1.4.1976 to 31.3.1979, at beat assessment can be made for the

period from 1978-79. Moreover, it is submitted and it is clear from the assessment itself that ten times escalated price has been taken for the purpose of assessment and over and above it 100% penalty has been imposed. It is true that imposing of penalty is a discretionary power of the assessment authority but it must be commensurate to the position and circumstances of each and every individual case. There cannot be any hard and fast rule regarding imposing of penalty. In the present case, it appears that some of the items on which assessment has been made are out side the scope of assessment. Moreover, according to the petitioner, although registers were taken by the petitioner to the office of the Market Committee but the same had not been looked into and some registers were lying with the sales tax authority which also had not been verified but assessment has been made on presumptive basis and on such presumptive basis there cannot be imposing of 100% penalty.

8. Be it what it may, the assessment made by the order dated 18.10.1979, as contained in Annexure-4, and the further order dated 5.12.1980, as contained in Annexure-5, affirming the assessment, as contained in Annexed-4, by the Managing Director and also the notice issued, as contained in Annexure-6, dated 28.12.1990 by the Secretary of the Market Committee for deposit of the amount cannot be sustained in law and, as such, quashed. The matter is sent back to the respondent Nos. 2 and 3 for fresh assessment for the period, as mentioned above, in the light of the observation made in the foregoing paragraphs of this judgment. Such assessment should be made after giving a reasonable opportunity of hearing to the petitioner within a period of two months next from the date of receipt, of a copy of this judgment or either being produced by either of the parties.

The writ petition is thus allowed with the direction as mentioned above.