

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.24482 of 2013

M/S Takshila Seas and Resort Pvt. Ltd., Sonagopalpur, Sampatchak, Patna Parsa
Road through its Director Sanjay Kumar Choudhary, S/o Sri Mahendra Choudhary
Resident of 102 C-Block, Nutan Tower, Colony More, Kankarbagh, Patna

.... Petitioner

Versus

1. State Of Bihar Through The Commissioner, Commercial Taxes, Vikas Bhawan,
Bailey Road, Patna
2. The Deputy Commissioner, Commercial Taxes, South Circle, Patna
3. The Commercial Tax Commissioner, South Circle, Patna
4. The Assistant Commissioner Of Commercial Taxes, South Circle, Patna

.... Respondents

Appearance :

For the Petitioner/s : Mr. Shashi Shekhar Kumar Prasad, Advocate

For the Respondent/s : Mr. Lalit kishore , PAAG

CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

CAV JUDGMENT

Date: 10-08-2016

Heard learned counsel for the petitioner and
learned counsel for the State.

The writ application has been filed for a
direction upon the respondents to allow the petitioner, who
claims to be part of the tourism industry under the Bihar
Tourism Policy, 2009 to avail of the privilege granted by Bihar
Government Gazette Notification No. 413 dated 10.08.2009 in
the form of exemption from the liability of paying
Entertainment Tax for seven years from the year of
commencement of its operations of Water Amusement Park and

not to impose any condition in the absence of any notified special order with respect to procedure for availing of the said privilege.

The petitioner is a private limited company registered under the Companies Act. It is the stand of the petitioner that the Government of Bihar through its aforesaid Gazette Notification dated 10.08.2009 invited different private companies for promotion of tourism in Bihar and of several privileges in that regard, which included the setting up of amusement parks apart from others. In the said notification the government exempted as a special incentive under the said policy, the entertainment centers to be exempted from entertainment tax for seven years from the commencement of commercial operation. Pursuant to the Bihar Tourism Policy 2009, the petitioner through its own investment started water amusement park in Sonagopalpur, Sampatchak, Patna - Gaya road, Bihar. For the said purpose it took all the necessary clearances for starting the amusement park, which project was approved by the State Investment Promotion Board (SIPB) on 28.09.2011 with the sole condition of getting 'No Objection Certificate' from the Urban Development Department, which condition was fulfilled by the petitioner. The SIPB is a Single



Window Clearance Mechanism of the State Government set up, as empowered to do so, under the Bihar Single Window Clearance Act, 2006. The petitioner made investment of Rs. 6,38,12,959.25/- out of which Rs. 4,01,00,000/- was in the form of Bank loan. The clearance was granted to it subject to issue of the No Objection Certificate as stated above, included all allotments, consents, approvals, permissions, registrations, enrolments, licences and the like by any competent authority/authorities in connection with the setting up of an industrial unit in the State of Bihar and included all such clearances required till the industrial undertaking started commercial production.

It is the stand of the petitioner that the Additional Commissioner, Commercial Taxes, Government of Bihar is one of the members of the Board of Directors of the SIPB which had approved the project of the petitioner. It is also the stand that after the Bihar Tourism Policy, 2009 was notified, a request was made by the Tourism Department to the Commercial Taxes Department by letter dated 22.9.2009 to issue a matching notification in terms of the said policy but no such notification was issued at any point of time. It is also the stand that during the stage of clearance of the project of the



petitioner by the SIPB, at no stage it was informed to get any further clearance from the Tourism Department or the Commercial Taxes Department with respect to the Entertainment tax. Accordingly, the petitioner did not get itself registered under the Bihar Entertainment Tax Act, 1945. It is also the stand that the petitioner made inquiries from the Commercial Taxes Department by letter dated 7.9.2012 before commencement of its operations with regard to its liability to obtain registration under the Bihar Entertainment Tax Act but no response came from the Department. In the said circumstances, the petitioner did not register itself with the Department under the said Act. It is also submitted that the Commercial Taxes Department has not notified any Rules or notification or prescribed procedure for availing the tax exemption by an amusement park pursuant to the Bihar Tourism Policy, 2009.

The further case of the petitioner is that the Managing Director of the petitioner was invited by the State Government and has been participating in all such conferences for development of tourism industry in the State of Bihar. Further, the Government of Bihar has also been taking advantage of the investment made by the petitioner by putting a

banner of the amusement park in India International Trade Fair at Delhi to attract tourists and investors in Bihar.

On 30.7.2013 the premises of the water park was inspected by a team of Officers of the Commercial Taxes Department, Patna South Circle and it was found that though it was in business since 16.2.2013 but had not applied for registration under the Bihar Entertainment Tax Act. The petitioner subsequently applied online for registration under the said Act on 28.8.2013.

Pursuant to the said inspection assessment orders under the said act were passed for the years 2012-13 and 2013-14, with respect to which one of the Directors of the Company without impleading the Company as petitioner, had filed CWJC No. 22276 and 22092 of 2013 which were dismissed in 31.10.2013 and 12.11.2013 respectively as not maintainable by an individual since the company is a juristic person which can sue and be sued and if the company is aggrieved by the order of assessment it has statutory remedy under the Act.

The stand of the State in the counter affidavit is that since the petitioner has not taken registration under the Entertainment Tax Act and willfully avoided the registration



and has filed the application for registration only after the inspection of the premises was made, hence, it is neither entitled to any exemption under the said Tourism Policy as the same did not permit the beneficiary not registered with the Commercial Taxes Department, since the exemptions in general are conditional in nature and can be given as fixed by the Department like the exemption is to be given to the dealer who are registered with the Department, etc. The plea is also taken that no such matching notification exists till date. Further, it being a statutory obligation for the dealer to get itself registered under the Act, hence, it cannot be granted any exemption. It is submitted that rightly the assessment had been made and penalty under Section 6(4) of the Bihar Entertainment Tax Act was levied for the period during which the petitioner was not registered under the Act.

It is also the stand taken in the counter affidavit that the writ application is not maintainable in the light of the previous orders of this Court in the two writ petitions filed by the petitioner especially with respect to the order of assessment and penalty dated 7.9.2013 for the financial years 2012-13 and 2013-14.

Learned counsel for the petitioner submits that



the action of the respondents is totally arbitrary, whimsical and illegal since, having framed the tourism policy and invited the petitioner and others to invest on the basis of said policy, it is not open to the respondents to turn around and deny the benefits under the said policy after a person has acted upon the promise made under the said policy and made substantial investments and the respondents are bound to comply with the terms of the Bihar Tourism Policy and grant the benefit applying the principles of Promissory Estoppel.

It is further submitted by learned counsel that the Bihar Tourism Policy has been framed after a policy decision has been taken by the Council of Ministers, Bihar which would be binding upon all the Departments and it is not open to any Department to deny any benefit granted under the said Policy on the ground that it had not issued any notification pursuant to the said Policy nor, according to learned counsel, it is open to the Department to lay down any further conditions apart from a procedure for obtaining the exemptions which cannot have the effect of denying the benefit granted under the Tourism Policy.

In support of its stand learned counsel for the petitioner relies upon a Division Bench decision of this Court in

the case of M/s. Suprabhat Steel Limited & Ors. Vs. The State of Bihar and Others: 1995 (2) PLJR 536 in paras 17, 18 and 19 of which it has been held as follows:

“17. If I am right in coming to the conclusion that the facility of sales tax exemption on the purchase of raw material was extended to old industrial units also fulfilling the condition laid down in the policy, the Notification of 4th April, 1994 imposing the condition that such old industrial units must not have taken advantage or benefit under any other industrial policy, appears to deprive the old industrial units of the benefits under the Industrial Incentive Policy of 1993. As has been urged on behalf of the petitioners, industrial units which had come into production earlier did take advantage of the benefits and facilities extended under the earlier policy of the Government. The Government was also aware of this fact and yet provided a limited facility by way of incentive to such old units also. It is not as if the Government was not competent to extend this limited facility to older industrial units, and if it was competent to do so, it has done so in clear words without imposing any condition. The petitioners are, therefore, right in contending that the notification of 4th April, 1994 in so far as it imposes a condition that the old industrial units should not have taken benefit



under any earlier industrial incentive policy of the Government is inconsistent with the policy decision. In exercise of authority vested in the Commercial Taxes Department under paragraph 10.5 of the Industrial Incentive Policy, 1993, the Commercial Taxes Department could not add or subtract to the incentive/benefits granted under the policy decision, but could only issue a separate order/notification for sales tax exemption with a view to give effect to the policy decision. The conditions which it could lay down by issuing such order or notification could be conditions which were essentially to be imposed with a view to keep a check on the persons availing of the benefits and to ensure that the facility was not being misused. They could require the industrial units to furnish such particulars about their purchases and production as was considered necessary, and for that purpose could have prescribed forms and declarations as was considered necessary with a view to give effect to the policy decision and to avoid misuse of facilities/benefits conferred thereby. Such conditions could not be imposed which in effect amended the policy decision itself by depriving industrial units of the benefits/facilities granted by the policy decision. The petitioners on the basis of the industrial Incentive Policy of 1993 have made purchases



of raw materials in the State of Bihar with a view to avail of such facility. Counsel for the petitioners explained that otherwise it could have been beneficial for such industrial units to make purchases outside the State of Bihar so as to avoid the incidence of local taxes. The petitioners have also asserted, which is not denied by the State, that they have purchased more raw materials with a view to increase their production and take advantage of the incentives announced by the Government. They have also made heavy investment on the basis of the promise held in the Industrial Incentive Policy, 1993, that they shall be given the facility of sales tax exemption on the purchase of raw material. Having done all these, they cannot be deprived of the facility which they were promised under the Industrial Incentive Policy, 1993 and that too by the issuance of notification which is inconsistent with the policy decision, and seeks to modify the same without authority of law. In exercise of his power under the Bihar Finance Act, the Commissioner should have issued appropriate notification granting exemption in the matter of payment of sales tax consistent with the Industrial Incentive Policy decision of 1993, which bound the State.

18. The learned Advocate General did not urge



that the principle of estoppel does not apply in the instant case, and in my view, rightly. The impugned notification has been issued with a view to give effect to the policy announced. It does not proceed on the basis that old industrial units which came into production before 1.4.1993 are not entitled to any benefit under the scheme. On the contrary, it concedes that such old industrial units are entitled to the facility of exemption of sales tax on purchase of raw material, provided they have not taken benefit under any earlier incentive policy. The challenge is on the ground that if the notification is intended to give effect to the policy decision announced by the State, it is not permissible to the Commissioner of Sales Tax to make a further classification by imposing a condition not warranted by the policy. If the policy intended to give a benefit or facility, to a class of industries, he could not impose a further condition so as to create another class of industries out of the industries to whom the benefit or facility was intended, as that would be arbitrary and unreasonable.

19. In these circumstances, these writ petitions are allowed. The Notification bearing S.O. No. 95 dated 4.4.94 (Annexure-3) is quashed to the extent that it imposes a condition that the facility



of sales tax exemption on purchase of raw material will be available only to old industrial units whose investment on plant and machinery did not exceed Rs. 15.00 crores on 1.4.1993, and who had not availed of any facility/benefit under the earlier incentive policy. It is further declared that the petitioners are entitled to the facility of sales tax exemption on the purchase of raw material under paragraph 10.4(i)(b) of the Industrial Incentive Policy, 1993.”

Learned counsel further relies upon the decision of the Supreme Court affirming the decision of the High Court in the State of Bihar & Ors. Vs. M/s Suprabhat Steel Limited and others: 1999 (1) PLJR SC 1, in para 7 of which it has been laid down as follows:

“7. Coming to the second question, namely the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notification entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive Policy itself. The Industrial Incentive Policy is issued by the State



Government after such Policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objective and the decisions taken in the Industrial Policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power under Section 7 of the Bihar Finance Act, it is found to be repugnant to the Industrial Policy declared in a government Resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4th of April, 1994 has been examined by the High Court and has been found rightly to be contrary to the Industrial Incentive Policy, more particularly the Policy engrafted in Clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of Clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may override the incentive policy itself. In our considered opinion the expression “such



conditions and restrictions as it may impose” in sub-section (3) of Section 7 of the Bihar Finance Act will not authorize the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4th of April, 1994.”

It is further submitted by learned counsel that the project of the petitioner has been approved by the SIPB, Single Window System which is statutory in nature and if at all anything more was required to be done by the petitioner like getting registration under the Bihar Entertainment Tax Act or applying for any further approvals or making any other applications for the grant of benefits, it was the duty of the SIPB to have informed the petitioner about it in terms of the statutory provisions and the benefits cannot be denied to the petitioner for the reason that it has not obtained registration under the Bihar Entertainment Tax Act.

It is further submitted by learned counsel for the petitioner that the Tourism Department itself recognized that the petitioner is promoting tourism which is evident from the

pleading and documents brought on the record in the writ petition.

It is also submitted by learned counsel that the orders passed by this Court in the earlier writ petitions filed by one of its Directors cannot bind the petitioner which was not a party to these proceedings and there was clearly nothing against the petitioner in the order itself, after holding that the said writ petition would not be maintainable at the behest of an individual without impleading the company which had the right to sue and be sued.

Learned counsel for the State, on the other hand, submits that the grant of exemption under the Bihar Tourism Policy is not automatic and for the same the petitioner was required to get itself registered with the Department under the Bihar Entertainment Tax Act and show that it was promoting tourism so as to entitle it to grant of said exemption, which factual aspect has to be considered by the respondents. It is further submitted that the petitioner, in any case, is not entitled to any benefit for the purpose for the years for which assessment has been made under the Bihar Entertainment Tax Act, that is, for the years 2012-13 and 2013-14 for which assessment have been made and if at all the petitioner is entitled

for the exemption, it would only be from the financial year subsequent to its application for registration and the petitioner is bound to accept the liability for at least two years. Reliance in this regard is made to various provisions of the Bihar Entertainment Tax Act by learned counsel for the State.

I have considered the submissions of learned counsels for the parties and the materials brought on the record and find sufficient force in the submissions of learned counsel for the petitioner.

In view of the decision of the Division Bench of this Court affirmed by the Supreme Court in the case of Suprabhat Steel (supra), it is evident that any such policy decision of the State Government taken by its Council of Ministers, whether an Industrial Policy or a Tourism Policy, would override any notification or even individual notifications to the contrary issued by the Department of the State Government which is contrary to the said policy decision. This aspect of the matter has been clearly considered by this Court and by the Apex Court in Surfboat Steel case (supra). It has been clearly held that the Department can only act in furtherance of the benefits and incentives granted under the said policy decision and it is not open to them to do anything which

is contrary to the same and where the notifications are issued by the individual Department contrary to the said policy decision duly notified in the official gazette, the said notification would have to give way to the policy decision.

It has also been clearly laid down that no further condition or stipulation can be laid down by any individual Department so as to defeat the clear benefit granted under the said Industrial policy, etc. and the function of the Department by issuing notification is only to lay down the procedure, form, etc, to be followed for the grant of benefit of exemption under the said policies.

In the case of M/s. Suprabhat Steel Limited (supra), the Commercial Taxes Department had issued notifications which was contrary to the benefit granted under the Industrial Incentive Policy, 1993 and this Court had struck down the notification of the Commercial Taxes Department to that extent, which was upheld by the Supreme Court.

In the present matter the Commercial Taxes Department has again failed to take any follow up action by issuing any notification in furtherance of the Bihar Tourism Policy, 2009 which was issued for promotion of tourism by the State Government and had granted exemption from payment of

entertainment tax for seven years in furtherance of the said aim.

This Court fails to understand as to how the benefit under the said policy can be denied merely on the ground that the petitioner had not applied for registration under the Bihar Entertainment Tax Act. Nothing has been brought on the record on behalf of the State to show that any such condition was imposed either in the Tourism Policy or in any notification issued pursuant thereto by the State Government either in the Tourism Department or the Commercial Taxes Department. As a matter of fact, the Entertainment Tax Department has not shown any grace to respond to the letter sent by the petitioner in this regard. Thus it is not open to the respondents to take a plea that since the petitioner is not registered with the Department, hence, the benefit of the Entertainment Tax exemption is not available to the petitioner, in the absence of any such condition in the Tourism policy or in any notification pursuant to the same.

This Court, however, is in agreement with the submission of learned counsel for the State that the factual aspect of the matter as to whether the petitioner is entitled to the benefit of exemption on the basis of the materials to be provided by it, have to be taken by the respondents. However,



once it is found that the petitioner is entitled to the said exemption under the Bihar Tourism Policy, 2009, the benefit of the same flow automatically to the petitioner from the commencement of the commercial operation for a period of seven years. The same would be in view of the provisions of the Bihar Tourism Policy, 2009 and by the operation of the doctrine of promissory estoppel, it is not open to the respondents to deny the benefit to the petitioner for any period on the ground that it had not taken registration under the Bihar Entertainment Tax Act. Any assessment of tax or penalty made to the contrary is in the teeth of the Bihar Tourism Policy, 2009. When such plea of exemption was taken by the petitioner before the authorities such assessment cannot stand and would not at all occupy any higher position than a notification of the Department contrary to the policy of the State Government, which notification was quashed by this Court and affirmed by the Supreme Court in the case of Suprabhat Steel. (supra).

It is therefore, directed that the petitioner shall file a fresh representation within a period of four weeks from today along with all relevant documents before the competent authority of the State Government, which according to this Court, is the Secretary, Tourism Department, for deciding the

question as to whether the petitioner comes under the purview of Bihar Tourism Policy, 2009 which shall be disposed of by him or such other person as may be designated by the State Government for deciding the said question. The said competent authority shall decide the said question within a period of two months from filing of the said representation along with a copy of this order. In case the decision is in favour of the petitioner then the petitioner shall be entitled to the exemption in terms of the Tourism Policy as held above.

The writ application is, accordingly, allowed subject to the aforesaid observations and directions.

(Ramesh Kumar Datta, J)

S.Pandey/-

AFR/NAFR	
CAV DATE	05.08.2016
Uploading Date	11.08.2016
Transmission Date	