

(1993) 09 PAT CK 0049

In the Patna High Court

Case No : C. W. J. C. NOS. 2251 OF 1991 (R), SEPTEMBER 24, 1993.

BHAGWAN SINGH AND OTHERS

APPELLANT

Vs

UNION OF INDIA AND OTHERS

RESPONDENT

Date of Decision : 24-09-1993

Acts Referred:

Citation : (1993) 09 PAT CK 0049

Judgement

In these applications the partitions have, inter alia, questioned the vires of section 44AC and 206C of the Income Tax Act, 1961.

It is admitted that the said question is pending before the Supreme Court of India in Transfer Petition No. 42 of 1984 : Bihar Excise Vendors Association v. Union of India and, as such, in these writ applications we are not deciding the said question. We further make it clear that this decision shall be governed by the ultimate decision which may be rendered by the Supreme Court of India in the aforementioned case. However, as the matter is now fully covered by several decisions of this court, we dispose of these writ applications to this stage.

These writ applications relate to the Districts of Hazaribagh, Ranchi, Giridih, Dhanbad, Bokaro, Aurangabad, Gaya and other places. Sections 44AC and 206C of the Income Tax Act read thus :

"Section 44AC. - Special provisions for computing profits and gains from the business of trading in certain goods. -(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee, being a person other than a public sector company (hereafter in this section referred to as "the buyer"), obtaining in any sale by way of auction, tender or any other mode, conducted by any other person or his agent (hereafter in this section referred to as the seller), -

(a) any goods in the nature of alcoholic liquor for human consumption (other than Indian made foreign liquor), a sum equal to forty per cent. of the amount paid or payable by the buyer as the purchase price in respect of such goods shall

be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head "Profits and gains of business or profession."

Provided that nothing contained in this clause shall apply to a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act....

(2) For the removal of doubts, it is hereby declared that the provisions of sub-section (1) shall not apply to a buyer (other than a buyer who obtains any goods from any seller which is a public sector company), in the further sale of any goods, obtained under or in pursuance of the sale under sub-section (1).

(3) In a case where the business carried on by the assessee does not consist exclusively of trading in goods to which this section applies and where separate accounts are not maintained or are not available, the amount of expenses attributable to such other business shall be an amount which bears to the total expenses of the business carried on by the assessee the same proportion as the turnover of such other business bears to the total turnover of the business carried on by the assessee.

Explanation. - For the purposes of this section, "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a central, State or provincial Act, or any Company, or firm, or co-operative society."

"206C(1). - Every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the table below, a sum equal to the percentage specified in the corresponding entry in column (3) of the said Table, of such amount as Income Tax :

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this sub-section shall not apply so long as the certificate is in force."

Section 44AC, however, has been deleted from the statute book and section 206C has been substituted by the Finance Act, 1992, which came into force with effect from April 1, 1992.

A Division Bench of this court of which one of us was member in Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others , upon taking into consideration various decisions of the Supreme Court of India held that in view of the said amendment, the assessee under the Income Tax Act which came within

the purview of the definition of seller as contained in section 206C may deduct the cost price. At this juncture, it is also relevant to mention that in State of Bihar and Another Vs. Commissioner of Income Tax and Others , a Division Bench of this court has held that the State of Bihar is also a "seller" within the meaning of the aforementioned provisions.

Thereafter, in Raghunath Prasad v. Union of India (C. W. J. C. No. 7817 of 1991) [1993] 2 BLJ 152 , (See Madan Mohan Gupta Vs. Union of India (UOI) and Others), this court followed the decision of Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others , and held as follows (at page 385 of 204 ITR) :

"So far as the first relief is concerned, Mr. Rastogi, learned counsel appearing on behalf of the Income Tax Department, has fairly conceded that in view of the definition of "seller" referred to above, if the status of the wholesaler for the purpose of the Income Tax Act is that of "individual" or "Hindu undivided family" or "association of persons" then such wholesaler cannot collect any amount as Income Tax u/s 206C of the Act.

Accordingly, in view of the assertions made by the petitioner in the writ application, the submission of the parties at the Bar and the relevant statutory provisions, we are of the opinion that if the status of the respondent wholesaler in respect of the transaction in question is that of individual for the purpose of Income Tax proceedings under the Act, then it will not be permissible on his part to collect any amount as Income Tax u/s 206C of the Act. Since the respondent wholesaler has not appeared to disclose his status, we are unable to record any finding in this regard. It will thus be open for the wholesaler to decide on his statutory obligation under the provisions in question and act accordingly. If the proceeds to act on a wrong assumption of his status, it will be open to the Department to take such action against him as may be permissible in law.

We may further make it clear that this order is being passed keeping in view the amendments made by reason of the Finance Act. 1992, in terms whereof section 44AC has since been deleted and section 206C has been substituted with effect from April 1, 1992."

In Haroon Rashid Vs. Union of India and others, , a Division Bench of this court had refused to grant stay of realisation of the amount.

In Sheo Shankar Pd. and Others Vs. The Union of India and Others,

, this court again, upon taking into consideration the amended provision of section. 206C of the said Act, held thus :

"So far as the first ground is concerned, the very description of the name of the wholeseller shows that it is a private limited company incorporated under the provisions of the Companies Act, 1956, and it has been wrongly stated in some of the writ applications that it is an individual. A company, as it would appear from the definition of the "seller" set out above, is very much covered by that expression. Therefore, the first ground at the very outset fails.

So far as the second ground is concerned, it is also without any substance. It is so because the wholeseller purchases the spirit from the manufacturer/distiller of strength, which cannot be used as alcoholic liquor for human consumption. The spirit so purchased by the wholeseller is then carried to the warehouse and its strength is reduced as prescribed by the Board pursuant to the statutory directions to make it fit for human consumption. Only thereafter it is known as country spirit and supplied to the retail vendors like the petitioners. Therefore, as in common parlance as well as for statutory purpose, the commodities which are purchased and subsequently sold, after subjecting them to certain processing and reducing its strength, are two different commodities. In this view of the matter, it will be fallacious to say that the petitioners are second buyers of the country spirit purchased by them. Thus, the second ground also fails.

So far as the last ground is concerned, on a detailed consideration of the provisions of the Income Tax Act, 1961, and the Bihar Excise Act, 1915, and the rules made thereunder, in the case of Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others

(C. W. J. C. No. 7278 of 1992 and analogous cases) which have been disposed of today by this Bench, it has been held that deduction u/s 206C of the Act can be made only with reference to the cost price of the country spirit and not with respect to the excise duty paid thereon."

Yet recently, in Rajendra Roy Vs. Union of India (UOI) and Another, this court held thus :

"The obligation on the seller to collect Income Tax at source had been provided u/s 206C of the Act read with section 44AC thereof. The Finance Act, 1992, has deleted section 44AC and sub-section (1) to section 206C has been substituted by a new sub-section.

The present set of cases are governed by the provisions as they existed till 31st March, 1992. After a thorough consideration of the then provisions, this court in the case of State of Bihar and Another Vs. Commissioner of Income Tax and Others

(C. W. J. C. No. 2429 of 1992 disposed of on 15th May 1992) has held that with respect to the supplies of country liquor to the retail vendors, the State of Bihar will be deemed to be the seller for the purposes of the impugned provisions and keeping in view the statutory definition of "purchase price" given u/s 44AC, which was to govern section 206C as well, the excise duty payable in respect of the said sale would also be deemed to be a part of the purchase price for the limited purpose of those provisions."

Yet recently in Jaishree Traders Vs. The Union of India and others, this court held as follows :

"Section 44AC and 206C were inserted in the Act by the Finance Act, 1988. u/s

44AC, the Legislature had devised a notion of presumptive income, i.e., income deemed to accrue by conclusive presumption of law for determining the Income Tax liability of persons dealing in alcoholic liquor and timber. u/s 206C, a provision was made for collection of Income Tax at source by the seller of the said commodities from the buyers with reference to the presumptive income postulated u/s 44AC. The said provision was challenged in this court and in the Supreme Court on various constitutional grounds.

Keeping in view the wide ranging litigation on the aforesaid issue, the Supreme Court directed that the High Courts will not consider the constitutional validity of the said provision and the matter will be finally determined by the apex court but till then for interim orders, the dealers may approach the respective High Courts. The question of validity of the said provision is still pending consideration before the Supreme Court. In the meantime, by the Finance Act, 1992, section 44AC has been deleted from the statute book and section 206C has been substituted, making it self-contained. The effect of this amendment is that the concept of presumptive income for the purpose of computing Income Tax has been given a go-by. Now, section 206C as it stands is merely a mode of collecting Income Tax at source, which is subject to final determination of income of the payee and the amounts collected are subject to adjustment and refund on final assessment of Income Tax under the provisions of the Act. Even earlier in respect of the provisions of sections 44AC and 206C, a Bench of this court, to which one of us, G. C. Bharuka J., was a party, has refused to grant any interim relief by way of staying collection of Income Tax for the reasons detailed therein in C. W. J. C. No. 5685 of 1991 (Haroon Rashid v. Union of India) disposed of on 5-9-91."

All these cases, therefore, would be governed by the aforementioned judgments.

However, Mr. S. B. Gadodia, appearing on behalf of the petitioners. raised two contentions in relation to the wholesale dealers of the Ranchi and Giridih districts. So far as Ranchi district is concerned, it is admitted that one Anil Kumar Sahu is an individual. He had taken a licence in his own name, but admittedly, he has constituted a firm which carries on the business. The firm is the assessee. Mr. Gadodia, therefore, submits that in view of the provisions of sections 20, 22, 23 and 42 of the Bihar and Orissa Excise Act and rule 34 of the Rules, a licensee is precluded from transferring his right nor can spirit be supplied to a person other than the licensee. Learned counsel, therefore, contends that despite the fact that the firm is an assessee before the Income Tax authorities, the licensee being an individual, he would not come within the purview of the definition of seller and this case would also be squarely covered by the decision of this court in Raghunath Prasads case [1993] 2 BLJ 152.

It was further submitted that in some cases, applications for amendment of the writ applications have been filed questioning the vires of section 206C as amended by the Bihar Finance Act, 1992. So far as the applications filed for amendment of the writ petition are concerned, in our opinion, the same should not be allowed and the petitioners should be given an opportunity to question the

same by filing separate writ applications. The only question, therefore, which arises for consideration is as to whether the person although he is a licensee under the Bihar and Orissa Excise Act, can get his business carried out by a firm of which he himself is a partner. In our opinion, the submission of Mr. Gadodia cannot be accepted.

It is now well known that where the statute defines a particular word, the same should, unless the context otherwise requires, be construed in the same manner and be given the same meaning. In view of the fact that section 206C of the Income Tax Act does not exclude a firm from the purview thereof, the question of excluding it therefrom would not arise only because the licence has been obtained in the name of a single individual.

In Commissioner of Income Tax Vs. Prakash Ram Gupta,

, it has been held as follows :

"It is contended by learned counsel for the Commissioner of Income Tax that the formation of the partnership in question amounted to a transfer of the privilege given to Sri Prakash Ram Gupta u/s 22 of the Excise Act, that is to say, the excise licence, and, secondly, the business of the two shops mentioned in the partnership deed having been transferred by Sri Prakash Ram Gupta to the firm, there has been a contravention of section 23 of the Excise Act. The first question raised by learned counsel is fully answered by the Supreme Court decision of Umacharan Shaw and Bros. Vs. Commissioner of Income Tax, West Bengal,

. The following observations of their Lordships at page 276 may be noted :

Though the Tribunal stated that it had not proceeded on the ground that the partnership was illegal being against the Bengal Excise Act, 1911, the argument was referred to as supporting the conclusion that the firm was not genuine. Section 42(1) (a) of the Bengal Excise Act reads :

"42. (1) Subject to such restrictions as the State Government may prescribe, the authority who granted any licence, permit or pass under this Act may cancel or suspend it. . .

(a) if it is transferred or sublet by the holder thereof without the permission of the said authority."

There was no evidence that the excise licences were transferred or sublet.

If the mere formation of a partnership in which the licensee is a partner amounts to a transfer or sub-lease of the licence, their Lordships of the Supreme Court would not have stated that there was no evidence that the excise licences were transferred or sublet. Therefore, the real question in these two cases for consideration is whether Sri Prakash Ram Gupta had sub-let or assigned the licence obtained by him to the firm."

The Bench, after considering a large number of decisions cited at the Bar, held as

follows (at page 372) :

"Learned counsel for the Commissioner of Income Tax has relied upon a decision of the Madras High Court in *D. Mohideen Sahib and Co., Excise Contractors Vs. Commissioner of Income Tax*,

, which was based on an earlier Full Bench decision of the same High Court in the case of *Velu Padayachi Vs. Sivasooriam Pillai*,

. Sri A. K. Sen, appearing for the firm has argued that the principle followed by the learned judges of the Madras High Court is obliterated by the decision of their Lordships of the Supreme Court in *Umacharan Shaw and Bros. Vs. Commissioner of Income Tax, West Bengal*,

. In *D. Mohideen Sahib and Co., Excise Contractors Vs. Commissioner of Income Tax*,

, the learned judges of the Madras High Court referred to the Full Bench decision and stated that the Full Bench decision of that court held that a partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted to only one or some of the partners was void ab initio, because such a partnership arrangement involved a transfer of the licence or was a breach of the Abkari Act punishable under that Act, because the unlicensed partner, by himself, or through his agent, the other partner, sells without a licence. The argument of Sri Sen is based on the decision of their Lordships of the Supreme Court. Challenging the correctness of the decisions of the Madras High Court cannot be said to be without force and Sri Sen has drawn our attention to a decision of the Andhra Pradesh High Court in the case of *Chandaji Sukhraj and Company Vs. Lal and Co. (Tobacco Trading Company) and Others*,

, where the Full Bench decision of the Madras high Court was not accepted as correct. Sri Sen has also relied upon a decision of the Bombay High Court in the case of *Champsey Dossa v. Gordhandas Kessowji* AIR 1917 Bom 250, affirmed by the Privy Council in AIR 1921 PC 137, and the decision of this court in the case of *CIT v. K. C. S. Reddy* [1969] 38 ITR 560, for contending that section 23 of the Excise Act has not been contravened by the partnership deed entered into by Sri Gupta and Sri Ram. In my opinion the contentions raised by Sri Sen are valid."

Nothing has been brought to our notice to show that a licensee was prohibited from entering into a partnership.

In *Jer and Co. Vs. Commissioner of Income Tax, U.P.*,

, the Supreme Court of India held in the following terms (at page 548) :

"The Commissioner and the High Court proceeded on the footing that the licence was governed by rule 322 which prohibited the holder of the licence from entering into a partnership with another person. But the licence, it is clear from the record, was in Form FLII issued under the U. P. Excise Manual. The licence does not prohibit the holder from entering into partnership by the holder of the

licence : it merely provides that the licence shall not be sublet or transferred. Since there is no prohibition against entry by the holder of the licence into a partnership the question whether the partnership was illegal does not arise. The firm was entitled on that account to registration. It is somewhat unfortunate that the attention of the Commissioner and the High Court was not invited to the form in which the licence was issued by the excise authorities. They proceeded to decide the case on the footing that rule 322 of the Excise Manual applied. But that rule has no application here.

On that view, it is unnecessary to consider the other questions argued at the Bar, whether the partnership related to sharing of profits of the business in liquor carried on by the two partners and that it was not a partnership relating to the licence."

It is also not the contention of the petitioner that the firm is not registered in terms of section 185 of the Income Tax Act.

It is, therefore, clear that when section 206C refers to a firm, it must be held as referring to a firm within the meaning of the provisions of the said Act whether the same has been legally or illegally constituted. Once a firm is registered under the Income Tax Act, it is bound to comply with the provisions thereof. Thus, in our opinion,, a firm being assessed as a firm having been registered u/s 185 of the Income Tax Act, would come within the purview of section 206C of the Act. Further, if the assessee is being assessed as a firm under the Income Tax Act, 1961, it is estopped and precluded from contending that the constitution of the firm was in violation of the provisions of the Bihar and Orissa Excise Act and/or the rules framed thereunder. In our considered opinion, the licensee himself being a party to the constitution of the firm and having taking advantage under the Income Tax Act, shall not be permitted to turn round and contend that the constitution of the firm was illegal. In any view of the matter, the petitioners directly are not concerned with the said question.

In this view of the matter, in our opinion, in relation to such places where licence(s) have been granted to an individual but the business is being carried on by the firm, the firm would be a "seller" within the meaning of section 206C of the Income Tax Act. However, we make it clear that in cases where the return has already been filed and taxes have already been paid, no further action is required to be taken in the matter. It is also made clear that in the event any seller is held to be liable for payment of a huge amount, it will be open to the individual assesseees to approach the prescribed authorities therefore by taking appropriate steps in this regard as may be permissible in law. In some of the matters, a Bench of this court, of which one of us (N. Roy J.) was a member, directed that the same should be listed after disposal of the matter pending before the Supreme Court of India but in view of the fact that a large number of cases had been disposed of both at Patna and at Ranchi, we are disposing of the said applications also and in that view of the matter such orders passed in the concerned writ petitions would be deemed to have been recalled.

For the reasons aforementioned, it is clear that all these writ applications are governed by the decisions aforementioned. These writ applications are, therefore, disposed of with the aforesaid directions and subject to the final decision of the Supreme Court of India.