
(1996) 02 PAT CK 0026

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 283 of 1996 (R)

Bihar Alloy Steels Ltd. and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 29-02-1996

Acts Referred:

Citation : (1996) 02 PAT CK 0026

Final Decision : Allowed

Judgement

B.N. Agrawal, J.—This writ application has been filed for quashing orders dated 12.1.1996, issued by the Deputy Commissioner of Commercial Taxes, Hazaribagh, contained in annexures 4, 5 and 6, whereby purporting to act u/s 7A of the Bihar Electricity Duty Act, 1948 (hereinafter to be referred to as "the Act") bank accounts of the petitioner-company in three banks viz. United Commercial Bank, Ranchi, State Bank of India, Ranchi and Bank of India, Ranchi have been attached for payment of the amount of surcharge u/s 3A of the Act. Further prayer has been made for a declaration that the petitioners are not liable to pay amount of surcharge u/s 3A of the Act.

2. Short facts are that petitioner No. 1 is a company incorporated under the provisions of the Indian Companies Act having its registered office in the district of Hazaribagh and petitioner No. 2 is its Deputy Manager (Accounts). The petitioner-company is manufacturer of alloys, tool and special steel and it purchases electricity from Damodar Valley Corporation (hereinafter to be referred to as "DVC"), which is a licensee within the meaning of Section 2(d) of the Act for the purpose of its industry under an agreement executed between DVC being licensee and the petitioner-company as consumer. According to Clause 17 of the agreement, the petitioner-company, which was a consumer, was liable to pay electricity duty (hereinafter to be referred to as "duty") to the Government of Bihar on the electricity purchased by it from the DVC. The petitioner-company under ill advice applied for its registration as an assessee under the provisions of the Bihar Electricity Duty Rules, 1949 (hereinafter to be referred to as "the

Rules") and it was registered as an assessee. Later on, the petitioner-company having realised its mistake filed an application before the respondent-Deputy Commissioner, Commercial Taxes, for cancellation of the registration.

3. The petitioner-company received a notice issued by the respondent-Deputy Commissioner, Commercial Taxes, in relation to assessment years 1990 91 to 1994-95 fixing the date of hearing as 29.12.1995 for the purposes of imposing surcharge under the provisions of Section 3A of the Act. Pursuant to the said notice, the petitioner-company appeared before the authority concerned on the said date and filed a time petition. The petitioner-company's representative was made to understand that the case shall be adjourned to some other date. Subsequently, an objection was filed on behalf of the petitioner-company before the authority denying its liability to pay the amount of surcharge. Thereafter, the petitioner-company was intimated by the Branch Managers of United Commercial Bank, Ranchi, State Bank of India, Ranchi, and Bank of India, Ranchi, that they have received orders of attachment, issued by the respondent-Deputy Commissioner, Commercial Taxes, Hazaribagh, contained in Annexures 4, 5 and 6, respectively, stating therein that there is a liability on account of surcharge against the petitioner-company to the tune of Rs. 1,17,64,355.56 paise, therefore, the aforesaid banks were directed to deposit the said amount in the account of the respondent-Deputy Commissioner, Commercial Taxes, Hazaribagh, Pursuant to the said orders of attachments, the State Bank of India, Ranchi Branch, was compelled to issue a draft of Rs. 20,04,361.81 paise in favour of the respondent-Deputy Commissioner, Commercial Taxes, out of the account of the petitioner-company with the said bank and the same was made over to the respondent-Deputy Commissioner. This action of the respondent-Deputy Commissioner necessitated filing of the present writ application.

4. Learned Counsel appearing on behalf of the petitioners in support of the writ application contended that the petitioner-company is neither liable to pay duty nor surcharge under the provisions of the Act, as such, orders of attachment of its bank accounts in relation to three banks, referred to above, are illegal and liable to be quashed. Learned Counsel further contended that in any view of the matter, orders of attachment are per se invalid as neither any assessment was made nor demand notice was issued. It was also contended that orders of attachment show that the same have been issued u/s 27 of the Bihar Finance Act, 1981 for realisation of the amount of surcharge under the provisions of the Act; as such, the same are invalid. Learned Counsel appearing on behalf of the State, on the other hand, contended that the petitioner-company is liable to pay duty as well as surcharge under the provisions of the Act and no illegality was committed in issuance of orders of attachment, which have been issued after following the procedure prescribed under law.

5. Now the first question, which falls for consideration, is as to whether the petitioner-company is liable to payment of duty to the State of Bihar. For appreciating this point, it would be useful to quote provisions of Sections 2(b) to

2(b), 3, 3A and 4 of the Act, which read thus:

2(b) "consumer" means any person who is supplied with energy by a licensee, but does not include either a licensee or the "distributing licensee" as described in Clause I(a) of Clause IX of the Schedule to the Indian Electricity Act, 1910), or a person who obtained sanction u/s 28 of the said Act.

(c) "energy" means electrical energy when generated, transmitted, supplied or used for any purpose except the transmission of a message.

(d) "licensee" means any person, including a company or a local authority licensed under part II of the Indian Electricity Act, 1910 (IX of 1910) to supply energy, or any person including a company or a local authority who has obtained sanction u/s 28 of the Act to engage in the business of supplying energy and includes the Bihar Electricity Board constituted u/s 5 of the Electricity (Supply) Act, 1948 (54 of 1948)."

"3. Incidence of duty.- (1) Subject to the provisions of Sub-section (2), there shall be levied and paid to the State Govt. on the units of energy consumed or sold, excluding losses of energy in the transmission and transformation, a duty at the rate or rates specified in the Schedule.

(2) No duty shall be leviable on units of energy-

(a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government;

(b) consumed in the construction, maintenance, or operation of any railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway;

(c) consumed by the licensee in the construction, maintenance and operation of his electrical undertaking;

(d) consumed by or sold by any class of persons exempted from payment of duty u/s 9;

(e) consumed by the Damodar Valley Corporation for the generation, transmission or distribution of electricity by that Corporation;

(f) consumed for any purpose which the State Government may, by notification, in this behalf declare to be a public purpose and such exemptions may be subject to such conditions and exemptions, if any, as may be mentioned in the said notification.

(3) when a licensee holds more than one license, duty shall be payable separately in respect of each licence.

3A. Surcharge.- (1) Subject to the provision of Clauses (a), (b) and (e) of Sub-section (2) of Section 3. every licensee or every other person who is liable to pay

duty u/s 4 shall pay, in addition to the duty payable under Sub-section (1) of Section 3, surcharge at the rate of two paise per unit of energy consumed or sold;

(2) Notwithstanding anything to the contrary contained in this Act, no licensee or other person who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge as such from the consumer;

(3) All provisions of this Act and the Rules framed there under, relating to the payment, assessment, recovery and refund of the duty shall also apply to the payment, assessment, recovery and refund of the surcharge."

4. Payment of duty.- (1) Every licensee shall pay every month to the State Government at the time and in the manner prescribed the proper duty payable u/s 3 on the units of energy consumed by him or sold by him to the consumer.

(2) Every licensee may recover from the consumer the amount which falls to be paid by the licensee as duty in respect of the energy sold to the consumer.

(3) The licensee may, for the purpose of Sub-section 2, exercise the power conferred on a licensee by Sub-section (1) of Section 24 of the Indian Electricity Act, 1910 (9 of 1910) for the recovery of any charge or sum due in respect of energy supplied by him.

(4) Every person including any department of the State Government other than a licensee, who generates energy for his own use or for the use of his employees, or partly for such use and partly for sale, shall pay every month at the time and in the manner prescribed the proper duty payable u/s 3, on the units of energy consumed by him or his employees or sold by him.

(4a) Every person other than a licensee who obtains, for sale or partly for his own use and partly for sale, bulk supply of energy generated by a licensee or other person shall pay every month to the State Government at the time and in the manner prescribed, the duty payable u/s 3 on the units of energy so obtained and sold or partly sold and partly consumed by him.

(5) The licensee or other person who is liable to pay duty under this Act shall, subject to the prescribed conditions, be entitled to a rebate of such percentage as may be prescribed on the amount of duty paid by him within the prescribed time.

6. From preamble of the Act, it would appear that the Act was enacted for levy of duty on the sales and consumption of electrical energy in the State of Bihar. The expression "consumer" has been defined to mean any person who is supplied with energy by a licensee or sanction holder. "Licensee" has been defined to mean a person who has been granted licence under part II of the Indian Electricity Act, 1910 to supply energy or a person who has obtained sanction u/s 28 of the Act to engage in the business of supplying energy and includes Bihar Electricity Board. Section 3 of the Act lays down that duty shall be levied and

paid to the State Government on the unit of energy consumed and sold at the rate or rates specified in the Schedule appended to the Act. Section 4 fixes liability upon different persons to make payment of duty to the State Government in the prescribed manner. It appears that in Section 4 of the Original Act, liability to pay duty was only upon the licensee. In 1953 amendments were made in the said Act by Bihar Act 9 of 1953 and Sub-sections (4) and (4a) were incorporated in Section 4. By Bihar Finance Act, 1985 (Act 5 of 1981) Section 3A was inserted in the Act under which a licensee alone was obliged to pay surcharge. In 1990 by Bihar Act 2 of 1990 the expressions "or every other person who is liable to pay duty u/s 4" were inserted in Sub-section (1) of Section 3A and the expressions "or other person" were incorporated in Sub-section (2) of Section 3A.

7. u/s 4(1) every licensee is required to pay every month the duty Payment u/s 3 to the State Government at the time and in the manner described on the units of energy consumed by him or sold by him to the consumer. Sub-Section (2) lays down that every licensee may recover from the consumer the amount which falls to be paid by the licensee as duty in respect of energy sold to the consumer. Sub-Section (3) prescribes the mode of recovery of duty by the licensee from the consumer. Under Sub-section (4) of Section 4 every person other than a licensee who generates energy for his own use or for the use of his employees or partly for such use and partly for sale is liable to pay duty payable u/s 3 on the units of energy consumed or sold. Under Sub-section (4a) every person other than the licensee, who obtains, for sale or partly for his own use and partly for sale, bulk supply of energy generated by licensee or other person shall pay every month to the State Government at the time and in the prescribed manner the duty payable u/s 3 on the units of energy so obtained and sold or partly sold and partly consumed by him.

8. On behalf of the State, it has been submitted that the petitioner company is liable to pay duty u/s 3 of the Act. As stated above, Section 3 lays down incidence of duty on the units of energy consumed or sold. It further lays down that duty shall be levied at such rate as specified in the Schedule appended to the Act, but it is completely silent on the question as to who shall pay duty to the State Government. Section 4 specifies the persons, who are liable to pay duty to the State Government. So far the petitioner-company is concerned, undisputedly, it being not a licensee is not required to pay duty to the State Government under Sub-section (1) of Section 4. The other two Sub-sections under which various persons are required to pay duty are Sub-sections (4) and (4a) of this section. According to stand of the State, the petitioner-company is liable to pay duty to the State Government under Sub-section (4) of Section 4 as it is said that it was generating energy for its own use and for the use of its employees. In relation to this stand of the State taken in the counter affidavit, it was stated on behalf of the petitioner-company in affidavit under reply that for captive use the petitioner-company produces a negligible quantity of electricity. Which is neither used for consumption nor for sale. This stand of the petitioner-company in the affidavit

under reply is supported by the various returns filed by it before the authorities, which have been enclosed as Annexures "A" series to the counter affidavit filed on behalf of the respondents, upon which reliance has been placed on behalf of the State in support of the fact that the petitioner-company was generating electrical energy. From the returns aforesaid, it would appear that the petitioner company was generating electricity in very negligible quantity, which would go to show that the same was for captive use only and was not meant either for consumption or for sale. As for example, from the returns filed in the month of January 1987, it would appear that in that very month units generated by the petitioner-company were 1330, whereas the units purchased in bulk from DVC were 87,4,000. This being the position, it cannot be said that the petitioner-company was generating energy either for its own use or for the use of its employees or for sale, therefore, it is not possible to hold that it is liable to pay duty to the State Government as required under Sub-section (4) of Section 4 of the Act.

9. Further question, which arises, is as to whether the petitioner-company is liable to pay duty under Sub-section (4a) of Section 4 of the act. Undisputedly, the petitioner-company is obtaining bulk supply of energy generated by DVC, which is a licensee. It has been stated on behalf of the State that out of energy obtained by the petitioner-company from DVC substantial part of it is being utilized by the petitioner-company for its own use and the rest is being used in making supply to its employees on payment of electrical charge at the rate of twenty-five paise per unit after giving certain amount of electricity free of charge and this activity of the petitioner-company, according to the State, amounts to sale of energy to its employees. According to the petitioner-company; electricity is supplied by it to its employees up to certain quantity free of charge and thereafter, they are required to pay electrical maintenance charges at the rate of twenty-five paise per unit. The position as admitted by the State in its supplementary counter affidavit is that the petitioner-company circulated letter dated 25.3.1987, contained in Annexure J, informing all its employees that certain amount of energy has been provided free of cost to its employees and beyond that, twenty-five paise per unit will be chargeable as electrical maintenance charge and the employees will be liable to pay charges for different types of quarters. In the same letter, it has been mentioned that for A-type quarters, there will be free supply of electricity up to 125 units for lighting and up to 375 units for power plug and thereafter, it will be charged at the rate of twenty-five paise per unit. Similarly, in the case of B-type quarters, the limit is 72 units and 300 units for lighting and power plug, respectively, and beyond that it is charged at the rate of twenty-five paise per unit as maintenance charge and likewise for other types of quarters also different limits were fixed for free supply and thereafter maintenance charge has to be paid at the same rate as stated above. It was directed in that letter that the employees should exercise care so that power consumption is minimised. This clearly indicates that the supply of electricity is by way of service and not sale.

10. The respondents have relied on another document, contained in Annexure "K" issued by the-Deputy General Manager of the petitioner-company, stating therein as follows:

We provide facility of electricity to our employees and also maintain the time etc. In this connection, we replace various worn out/damaged electrical items like plugs, sockets, damaged wires, switches, bulb-holders, chokes, and starters for the tube-lights. We also maintain the fans provided in the houses and for all these, wherever electrical maintenance charges @ 25 paise per unit from the employees after considering certain number of units as free.

This document does not support stand of the State rather proves that the change of twenty-five paise per unit is not the price of the electricity; as a matter of fact, it is by way of maintenance charge for the services rendered. Here, the amount charged is very meagre and negligible, inasmuch as the electricity purchased by the petitioner-company costs Rs. 1.40 paise per unit has not been raised to Rs. 1.80 paise per unit, but the maintenance charge is still twenty-five paise per unit. This fact is also supported by the chart for the month of January 1996 department-wise showing recovery of electric maintenance charge from the employees. The said charts have been relied upon by the State and annexed as Annexures F, G and H to its supplementary counter affidavit and specifically it has been mentioned therein that deductions have been made from the salary of the employees towards electrical maintenance charges.

11. Thus, on the basis of the aforesaid facts, it has been submitted on behalf of the petitioners that dominant object of supplying electricity by the petitioner-company to its employees is by way of rendering services as a measure as such, the said activity cannot constitute "sale" within the meaning of the aforesaid Sub-section (4a). Reference in this connection may be made to a decision of the Supreme Court in the case of *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, . In that case the Court was considering the question if service of meals to casual visitors in restaurant located in a hotel in which lodging and means are provided to residents is sale and taxable as such under the provisions of Bengal Finance (Sales Tax) Act, 1941. It was laid down that the supply of meals was essential in the nature of service provided and could not be treated as a section of sale. The Court observed thus:

It has already been noticed that in regard to hotels this Court has in *Associated Hotels of India Ltd.* AIR 1972 SC 11310 (supra) adopted the concept of the English law that there is no sale when food and drinks are supplied to guests resident in the hotels. The court pointed out that the supply of meals was essentially in the nature of a service provided to them and could not be identified as a transaction of sale. The court declined to accept the proposition that the Revenue was entitled to split the transaction into two parts, one of service and the other of sale of food stuffs. If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of restaurant. No reason has been shown to us for preferring any other. The classical legal view brings that

a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need...

12. In the case of *Woodlands Hotel (P) Ltd. v. The State of Karnataka* (1995) 97 S.T.C. 251 question had arisen before a Division Bench of Karnataka High Court as to whether the activity of the employee in supplying food to its workmen and deducting the same from their wages would constitute sale and it was laid down that such an activity would not come within the ambit of sale, and, therefore, the employer was not liable to payment of sales tax under the Karnataka Sales Tax Act. The court laid down the law, which reads thus:

Thus as long as there is no relationship of seller and buyer, but only that of a master and the servant and if as an incident of relationship of master and servant, any food is supplied and deductions are made out from the wages of the servants towards food supplied, the same must be treated as a part of wages and not as a separate contract of sale of food...If wages are reduced by any particular figure, that figure cannot be taken to be equivalent to the value of the food provided to the employee to attract levy under the Karnataka Sales Tax Act, 1957.

13. Likewise, a Division Bench of the Madhya Pradesh High Court in the case of *Commissioner of Sales Tax, M.P. v. Hukumchand Mills Ltd.* (1988) 68 S.T.C. 378 was considering the question whether food-stuffs and other items served in canteen of a factory sold on non-profit basis at approved prices would constitute sale and it was laid down that as dominant object of running canteen was rendering services to its employees as a welfare measure, the said activity would not constitute sale. The Court observed thus:

The aforesaid provisions contained in Section 46 read with the rules referred to above, leave no room for doubt that the dominant object of running the canteen is rendering service as a welfare measure under the Factories Act and the Rules. Consequently, the substance of the transaction in canteen sales, evidenced by its dominant object, is not sale of food, but rendering of services as a welfare activity as enjoined by the Factory Act and the State Rules. The fixation of price of food articles supplied by the canteen on non-profit basis as required under Rule 80 of the M.P. Factories Rules is in conformity with the dominant object of service and welfare and excludes the intention of sale of food as business activity.

14. Before Bombay High Court in the case of *Commissioner of Sales Tax v. Cutchi Dasha Oswal Mahjan Grah Udyog Committee* (1975) 36 S.T.C. 1 question was raised as to whether activity of a trust, which was founded to ameliorate living condition of poor and destitute women of a community of engaging certain women for preparing eatables and sale of the same at profit, which is utilised for given relief to more woman, would amount to business for the purpose of incurring liability to be registered as a dealer under the Bombay Sales Tax Act. The Court held that for such an activity a person cannot be obliged to get himself

registered as a dealer and laid down as follows:

In the case before us also, we are of the view that the eatables were not got prepared and sold by the respondent not with the intention of carrying on business in the preparation and sale of these eatables, but in the carrying out of the main object of the trust, viz., to give employment to the destitute women of the community for whose benefit the trust was founded and, hence, the respondent cannot be regarded as a dealer within the meaning of the said term in Section 2(11) of the said Act in connection with this activity.

15. The Supreme Court in the case of *The Joint Commercial Tax Officer, Harbour Division, II-Madras Vs. The Young Men's Indian Association (Regd.), Madras and Others*, was considering a case where certain members' clubs of Madras State challenged the proceeding relating to their assessment to sales tax under the Madras General Sales Tax Act for supplying food, snacks, beverages and other articles to their members or guests. The articles necessary for the aforesaid purpose were purchased by the clubs out of the club-funds, which consisted of members' subscription. No profit was made by the club in providing those amenities. The Supreme Court held that those clubs could not be regarded as a dealer within the meaning of Section 2(g) read with Explanation No. 1 of the Act, nor was any sale involved in the aforesaid activity of the club within the meaning of Section 2(n) read with Explanation No. 1 of the Act. The levy of sales tax on such supply was therefore held to be illegal. The Court observed thus:

As no transaction of sale was involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparation by each one of the clubs to its members.

16. The Supreme Court in the case of *Bhopal Sugar Industries Ltd., Madhya Pradesh and Another Vs. D.B. Dube, Sales Tax Officer, Bhopal Region, Bhopal and Another*, held that the words "sale of goods under Entry 48, List II, in Schedule VII of the Government of India Act, 1935 have the same meaning as in the Indian Sale of Goods Act, 1930 and, therefore, any transaction of sale of goods, which is liable to be taxed, there must be concurrence of four elements viz. (i) the parties competent to contract; (ii) mutual assent; (iii) a thing, the absolute or general property in which is transferred from one seller to the buyer and (iv) a price in money paid or promised. A transaction which does not conform to the traditional concept of sale cannot be regarded as one in respect of which the State Legislature is competent to enact an Act imposing liability for payment of tax. The Court laid down thus:

Consumption by an owner of goods in which he deals is therefore not a sale within the sale of the Goods Act and, therefore, it is not a "sale of goods" within the meaning of Entry 54, List II, Schedule VII of the Constitution of India. The legislative power for levying tax on sale of goods being restricted to enacting legislation for levying tax on transactions which conforms to the definition of sale of goods within the meaning of sale of Goods Act, 1930, the extended definition

which included consumption by a retail dealer himself of motor spirit or lubricants sold to him for "retail sale" is beyond the competence of the State Legislature. But the Clause in the definition in Section 2(i) "and includes the consumption by a retail dealer himself or on his behalf of a motor-spirit or lubricants sold to him for retail sale" which is ultravires the State Legislature, because of lack of competence under Entry 54, List II, Schedule VII of the Constitution is severable, from the rest of definition and that clause alone must be declared to be invalid.

17. A Division Bench of Madras High Court in the case of Deputy Commissioner (C.T.) Vs. South India Textile Research Association, was considering the question whether purchase of goods for day-to-day research activity and sale of its resultant products can be said to be in the nature of trade or commerce so as to entail liability for payment of sales tax under the provisions of Tamil Nadu General Sales Tax Act. The Court answered the question in negative and observed thus:

Where an organisation is constituted solely and exclusively for the purpose of carrying on its research and the sale of resulting products by that organisation cannot be said to be in the nature of trade or commerce so as to bring it within the definition of the term "business" contained in Section 2(d) of the Act.

Thus, from a conspectus of the aforesaid decisions, I am of the view that in the present case, dominant object of supplying the electricity to the employees was for rendering services as welfare measure and there was no relationship of seller and buyer between the petitioner-company and its employees, but relationship between them was that of master and servant and if as an incident of relationship master and servant any electricity is supplied to the employees of the petitioner-company to some extent free of charges and thereafter maintenance charge of electricity at the rate of twenty-five paise per unit from the wages of the employees is deducted, the said activity must be treated as part of wages and cannot come within the sweep of sale. Therefore, I have no hesitation in holding that the petitioner-company cannot come within the mischief of Sub-section (4a) of Section 4 of the Act.

18. Merely because the DVC as a licensee is entitled to recover from the petitioner-company, which is a consumer, the amount of duty in respect of electrical energy sold to the consumer according to the provision of Sub-Section (2) of Section 4 of the Act, it cannot be said that the petitioner-company is liable to pay duty to the State Government. The said Sub-section shows that the licensee alone is entitled to recover the amount of duty on the quantum of energy sold to the consumer and the petitioner-company is liable to pay the same to the licensee alone and not to the State Government. If there is an agreement between the petitioner-company and DVC to pay the amount of duty to the State on the energy purchased by the petitioner-company from it, the same is internal arrangement between them and on the basis of same, no liability can be fastened on the petitioner-company to pay duty to the State

Government. On the basis of that agreement, if the petitioner-company pays duty, it will be treated that it is paying duty to the State Government on behalf of DVC at its agent and not in its individual capacity. Since under law, the petitioner-company is not obliged to pay duty directly to the State, an application filed by it for registration as an assessee under the provisions of the Rules and consequent registration thereof cannot fasten liability upon it to pay electricity duty to the State Government.

19. It appears that in relation to Bihar Sales Tax Act, 1959 and Bihar Finance Act, 1981, though the provisions are not identical, but to some extent similar, the Supreme Court had occasion to consider this question in the case of Ashoka Marketing Ltd. Vs. State of Bihar and Another, . That was a case under Bihar Sales Tax Act, 1959, in which it was laid down that liability to pay sales tax is upon the dealer and not upon the purchaser though a dealer may be entitled to recover the same from the purchaser. The Court observed thus:

In either case the liability to pay tax under the Act lies upon the dealer : he does not collect any tax from and on behalf of the Government. The dealer may recover from the purchaser the tax payable by him as part of the price, but on that account, the purchaser is not the person liable to pay tax on the sale to the State.

20. In the case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, the validity of Section 5(1) of the Bihar Finance Act, 1981, which provides for levy of surcharge on every dealer and Section 5(3) of the said Act, which prohibits a dealer from collecting the amount of surcharge payable by him from the purchaser was challenged and the Court while upholding constitutional validity of the said statute observed that the sales tax, according to the accepted notion, is intended to be passed on the buyer and the provision authorising collection of sales tax by the seller from the purchaser is usual feature of the Sales Tax Legislation. The Court laid down thus:

Merely because a dealer falling within the class defined under Sub-section (1) of Section 5 of the Act is prevented from collecting the surcharge recovered from him, does not affect the competence of the State Legislature to make a provision like Sub-section (3) Section 5 of the Act, nor does it become a tax on his income. It is, no doubt, true that sales tax is, according to the accepted notion intended to be passed on to the buyer and provision authorising and regulating the collection of sales tax by the seller from the purchaser are usual features of the sales tax legislation. But it is not an essential characteristic of the sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the legislature to impose a tax on sales conditional on its making a provision for seller to collect the tax from the purchaser. Whether a law should be enacted imposing sales tax or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer is a matter of police and does not affect the competence of the Legislature.

In view of foregoing discussions, I have no difficulty in holding that the petitioner-company is not liable to pay duty under the provisions of the Act to the State Government but the DVC is entitled to recover duty from the petitioner-company in respect of energy sold to it even by enforcing Clause 17 of the agreement requiring the petitioner-company to deposit duty with the State Government on the amount of energy sold to it and in that event, the petitioner-company shall be depositing duty as a representative of DVC.

21. The next question, which has to be considered, is as to whether the petitioner-company is liable to pay surcharge as required u/s 3A of the Act. According to Section 3A every licensee or every other person, who is liable to pay duty u/s 4 of the Act, is liable to pay surcharge at the rate of two paise per unit of energy consumed or sold and the surcharge payable shall be unit of energy consumed or sold and the surcharge payable shall be in addition to the duty payable under Sub-section (1) Section 3. The petitioner-company is undisputedly not a licensee and as laid down above, it does not come within the expression "every other person" as enumerated in-Section 4 and consequently not liable to pay duty u/s 4 of the Act. Therefore, it does not come within the mischief of Sub-section (1) of Section 3A of the Act and is, accordingly, not liable to pay surcharge to the State Government. That apart, Sub-section (2) of Section 3A lays down that neither any licensee nor any other person, who is liable to pay surcharge, shall be entitled to collect the amount of surcharge from the consumer. From the aforesaid facts, it becomes plain that the petitioner-company is a consumer within the meaning of Section 2(b) of the Act, therefore, DVC, which is a licensee, is not entitled to collect the amount of surcharge from it on the quantum of energy sold in its favour in view of the legislative command upon the licensee or other person, who have been injuncted to recover the amount of surcharge from the consumer.

Thus, I hold that the petitioner-company is not liable to pay surcharge under the provisions of the Act and consequently, the proceeding taken against it by the authorities of the Commercial Taxes Department; Government of Bihar, for realisation of surcharge and orders of attachment of its bank accounts, contained in Annexures 4, 5 and 6, are liable to be quashed and the amount of Rs. 20,04,361.81 paise recovered by them from the banker of the petitioner-company is liable to be refunded to it. Since the first two questions have been decided in favour of the petitioner-company. I do not find it necessary to deal with the other questions raised in this case by learned Counsel appearing on behalf of the petitioners; as such, I refrain myself from deciding the same.

22. For the foregoing reasons, the writ application is allowed, proceeding taken by the officers of the Commercial Taxes Department, Government of Bihar, of recovery of the amount of surcharge under the provisions of the Act from the petitioner-company and orders of attachment, contained in Annexures 4, 5 and 6, are hereby quashed. Respondents-State of Bihar and its officers are directed to refund aforesaid sum of Rs. 20,04,361.81 paise to the petitioner-company

within a period of three months from today. In the circumstances of the case. I direct that the parties shall bear their own costs.

Ashish N. Trivedi, J.

23. I agree.