(2000) 05 PAT CK 0057

In the Patna High Court

Case No : C.W.J.C. No''s. 4696, 4712, 4764 and 4765 of 1999

B.K. Jaiswal and Others — APPELLANT

Vs

State of Bihar and Others — RESPONDENT

Date of Decision : 04-05-2000

Acts Referred:
Income Tax Act, 1961 — Section 206C

Citation : (2000) 4 PLJR 463 : (2006) 143 STC 648

Hon'ble Judges : Ravi S. Dhavan, C.J;Aftab Alam, J

Bench : Division Bench

Advocate : K.N. Jain and Y.V. Giri, D.V. Pathy and Jyothi Saran, for the Appellant; S.A. Narain, Advocate-General and V.N. Sinha, Government Pleader IX, for the Respondent

Final Decision : Dismissed

Judgement

Ravi S. Dhavan, C.J. and Aftab Alam, J.—The four writ petitions in this batch, which are quite identical to each other, seem to have taken a curious course. The writ petitions were filed challenging a certain order issued by the Excise Commissioner, Government of Bihar and praying for certain reliefs. During the pendency of these cases, the order issued by the Excise Commissioner, which was the subject-matter of challenge, was recalled by the State Government but through interlocutory applications filed in each of the four writ petitions the petitioners redirected their challenge to another circular letter issued by the Commissioner-cum-Secretary, Commercial Taxes Department, Government of Bihar. The result was that at the time of hearing these writ petitions were sought to be argued for reliefs quite different from those prayed for in the writ petitions as those were originally filed.

2. In each of the four writ petitions the contents of paragraph 1 were identical wherein declarations were sought as follows :

(i) that no sales tax was payable on the subsequent sale of country liquor ;

(ii) that the notification dated February 10, 1999 issued by the Commissioner of Excise and Prohibition, Government of Bihar, by which the amount of excise duty was added to the cost price for fixing the wholesale price of country liquor was arbitrary, illegal and without jurisdiction ;

(iii) and alternatively, that the levy of sales tax was to be calculated with reference to sale price, excluding excise duty.

3. Similarly all the four writ petitions had a common prayer which is reproduced below :

It is, therefore, prayed that your Lordships may be graciously pleased to issue rule nisi calling upon the respondents to show cause as to why the notification issued by the Commissioner of Excise, Government of Bihar, as contained in annexure 1 be not set aside and quashed and for further declaration that no tax is payable by the petitioner on sale of country liquor including the sale of country liquor during the period May 21, 1997 to November 16, 1997 that is the period during which the operation of the Notification being S.O. No. 92 dated May 21, 1997 was stayed by this honourable Court

and/or

pass such other order(s), direction(s) as your Lordships may deem fit and proper.

4. At least one of the reliefs asked for in the prayer portion as quoted above was quite frivolous as would be evident from following facts and circumstances. The State Government issued Notification No. S.O. 92, dated May 21, 1997 imposing sales tax at 25 per cent on the sale of molasses and different forms of spirit, including potable spirit, country liquor and spiced country liquor. The notification which came into force from the date of its publication (May 21, 1997) provided that sales tax would be levied at the first point of sale in Bihar.

5. The imposition of sales tax on country liquor and the other forms of spirit was sought to be challenged before this Court in a batch of writ petitions, some of which were filed at the instance of persons who are petitioners in this batch of cases as well. In the earlier batch an interim order was passed by this Court staying the operation of the notification, dated May 21, 1997 imposing sales tax on country liquor. However, that batch of cases was eventually permitted to be withdrawn on a prayer made on behalf of the respective petitioners. While permitting withdrawal the court also vacated the interim order(s) passed earlier in those cases.

6. The second relief claimed in the prayer portion in this batch of cases relates to the period during which the operation of the notification, dated May 21, 1997 was stayed under an interim order passed by this Court. It is already stated above that the interim order of stay, rather than being confirmed, was eventually vacated. We are unable to see how the petitioners can derive any benefit from an interim order which was not confirmed but was vacated and we fail to appreciate how any exemption from payment of sales tax can be claimed for the period the

interim stay order was in operation.

7. It was for that reason that on the first date when these cases were taken up for hearing Mr. K.N. Jain, learned Senior Counsel appearing for the petitioners, frankly stated that he did not propose to make any submission in support of the second relief claimed in the prayer portion and that he would rather concentrate on assailing the order, dated February 10, 1999 issued by the Excise Commissioner, Bihar.

8. In that connection Mr. Jain submitted that the amount of sales tax leviable was legally required to be determined in an assessment proceeding held under the provisions of the Bihar Finance Act, 1981 in which the Excise Commissioner did not come in the picture at all and, therefore, the order issued by the Excise Commissioner purporting to quantify the sales tax leviable, in the guise of fixing the wholesale price of country liquor by adding the amount of excise duty to the cost price was wholly unwarranted, unauthorised and without jurisdiction. Learned counsel further submitted that the impugned order issued by the Excise Commissioner was bound to cause interference in the assessment proceeding that would be held against the petitioners under the provisions of the Bihar Finance Act and would come in their way to try to show and persuade the assessing authority that sales tax was leviable on the cost price of the country liquor, excluding the amount of excise duty.

9. Mr. Jain further submitted that the order issued by the Excise Commissioner tantamounts to charging sales tax without any assessment proceedings by simply co-relating it to the wholesale price fixed by the Excise Commissioner by including the amount of excise duty payable on liquor.

10. The court was prima facie of the view that the submissions made by Mr. Jain were not unfounded and accordingly the matter was brought to the notice of the Advocate-General.

11. On February 14, 2000 when the cases were again taken up the following order was recorded :

Learned Advocate-General has made a submission to the effect that having gone through the matters he had advised the State Government that in matters of excise relating to the present case, on particular reference to the Government order dated 10th February, 1999 (annexure 1 to the writ petition), the aspect of sales tax being charged should be delinked and become the subject-matter of assessment proceedings in accordance with law and all the obligations upon the wholesaler/dealer to file returns and be subject to the assessment proceedings.

Learned Advocate-General prays that this matter may be taken up after ten days. In the circumstances, these cases are adjourned for ten days and may be listed on 24th February, 2000.

12. On the same day the petitioners in each of the four writ petitions filed interlocutory applications bringing on record a circular letter, dated December 24,

1999 issued by the Commissioner-cum-Secretary, Commercial Taxes Department.

13. On the next date when the cases were taken up for hearing, the Advocate-General true to his words produced before the court the order, dated February 23, 2000 issued by the Excise Commissioner, Government of Bihar, by which the earlier order, dated February 11, 1999 was recalled.

14. The recall of the order coming under challenge in these writ petitions should have fully redressed the petitioners'' grievances and one should have expected that that would be the end of the matter so far as these cases are concerned but that was not to be.

15. Mr. D.V. Pathy, learned Counsel, who from that stage appeared on behalf of the petitioners in place of Mr. Jain, insisted on challenging the circular letter dated December 24, 1999 issued by the Commissioner-cum-Secretary, Department of Commercial Taxes, which was brought on record along with interlocutory applications filed on February 14, 2000. According to Mr. Pathy the circular letter issued by the Commissioner, Commercial Taxes, also contained a similar instruction and advised that sales tax on country liquor was to be levied at 25 per cent of the wholesale price, which would be inclusive of excise duty payable on the liquor sold.

16. Mr. Y.V. Giri, learned Senior Counsel appearing in one of the cases in this batch being C.W.J.C. No. 4765 of 1999 also tried to take the same stand.

17. Both M/s D.V. Pathy and Mr. Giri sought to advance elaborate submissions contending that the amount of excise duty could not be taken as forming part of the wholesale price for levying sales tax. In support of their submission they placed reliance on some decisions of the Supreme Court and the High Courts including this Court. They relied upon a Supreme Court decision in what is commonly known as the first Mcdowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, . They also relied upon a Bench decision of this Court in Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others which was rendered in the context of section 206C of the Income Tax Act as it was in existence at that time. Counsel for the petitioners also relied on a decision of Kerala High Court in Madras Rubber Factory Limited v. State of Kerala [1989] 74 STC 56 and another decision of the Bombay High Court in Gujarat Export Corporation Limited v. State of Maharashtra [1990] 77 STC 110.

18. Mr. V.N. Sinha, learned Government Pleader IX appearing for the State, on the other hand, contended that the wholesale price of country liquor for the purpose of levy of sales tax could only be fixed after including the excise duty payable on the liquor sold. In support of his submission he relied upon a decision of the Supreme Court in what is commonly called as the second McDowell and Co. Ltd. Vs. Commercial Tax Officer, . He also relied upon another Supreme Court decision in Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, . Mr. Sinha also relied upon a Full Bench decision of the Kerala High Court in Hindustan Petroleum Corporation Limited v. State of Kerala

[1993] 89 STC 106.

19. It is only with a sense of fairness to the counsel for the parties that we have taken note of the submissions sought to be advanced before us. But we are of the considered opinion that it would not be permissible to go on changing and enlarging the scope of the writ petitions and to allow the petitioners to raise this question in these writ petitions. We are of the view that Mr. K.N. Jain who earlier appeared on behalf of the petitioners in these cases was quite right in his submission that the amount of sales tax leviable is legally required to be determined in an assessment proceeding under the Finance Act and it is in that proceeding that the question as to what constitutes the taxable turnover of the assessee can be determined having regard to the facts and circumstances of the case and the relevant provisions of law. No order passed in an assessment proceeding against any of the petitioners is brought on record and it is undeniable that none of the petitioners has yet gone in for an assessment proceeding for the period after the issuance of the notification, dated May 21, 1997. In these circumstances the question sought to be canvassed before this Court does not really arise in these writ petitions and the petitioners by trying to rake up that issue seem to wish that even before assessment proceedings are duly held, issues be prejudged on the basis of an academic debate on an abstract question. This is clearly impermissible and this Court is, therefore, not inclined to entertain the submissions made on behalf of the petitioners in connection with the circular letter issued by the Commissioner-cum-Secretary, Department of Commercial Taxes.

20. As noted above, one of the main reliefs originally claimed in the writ petition stands satisfied with the recall of the order dated February 11, 1999 issued by the Excise Commissioner. The other relief asked for was quite frivolous and Mr. Jain rightly did not press for it. Thus the cause of action for filing these writ petitions no longer subsists and these petitions have become infructuous. All these writ petitions are accordingly dismissed as such.