

(1999) 03 GAU CK 0027

In the Gauhati High Court

Case No : Writ Appeal No's. 473, 474, 475, 476, 477, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497 and 498 of 1996

Commissioner of Taxes

APPELLANT

Vs

B.R.P.L.

RESPONDENT

Date of Decision : 08-03-1999

Acts Referred:

Assam (Sales of Petroleum and Petroleum Products, including Motor Spirit and Lubricants) Taxation Act, 1955 — Section 11(3)

Citation : (1999) 1 GLT 224

Hon'ble Judges : P.G. Agarwal, J;N.C. Jain, J

Bench : Division Bench

Advocate : N.M. Lahiri and G.N. Sahewalla, for the Appellant; A.K. Saraf, for the Respondent

Judgement

P.G. Agarwal, J.—Bonaigaon Refinery & Petrochemicals Ltd., for short "BRPL" filed a batch of writ petitions, 24 in number being Civil Rule Nos. 407/94, 370/96, 359/94, 329, 364, 388, 360, 328,327,367,369,326,361,369,281,408, 368, 362, 358, 366, 365, 354, 355 and 357 of 1994.

2. Vide the above writ petitions the present Respondent BRPL challenged the assessment orders passed u/s 11(3) of the Assam (Sales of Petroleum & Petroleum Products including Motor Spirit and Lubricants) Taxes Act, 1955, for short "the Taxation Act" and Central Sales Tax, 1956. The assessment orders were initially challenged by BRPL by way of revision and as the order of revision passed by the Commissioner of Taxes was also the subject matter of challenge in the writ petitions, vide common judgment and order dated 8.3.96 the learned Single Judge allowed the relief claimed by the writ Petitioner in the above batch of writ petitions. Feeling aggrieved, the Commissioner of Taxes and Ors. Respondent in the writ petitions, have preferred the present batch of Writ Appeals being No. 473,474,475,476,477,480,481,482,483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493,494,495,496,497 and 498 of 1996.

3. The appeals were filed beyond time and after condonation of delay these were admitted. The facts of the case are more or less similar and as the appeals involve common question of law, these are being disposed of by this common judgment.

4. BRPL is a limited company (a Govt. of India Undertaking) engaged in crude oil refining and manufacturing of petroleum products. It is registered with the Appellants under the Taxation Act, 1955 and also under the Central Sales Tax Act. Under the directives of the Govt. of India, BRPL is bound to sell their products to Indian Oil Corporation at a rate to be fixed by the Oil Pricing Committee, for short "OPC So far as the sale of petrochemical products are concerned, the crux of the dispute between the parties we will have to understand the history of the pricing policy.

5. Way back in the year 1974, the Govt. of India constituted an Oil Pricing Committee, (OPC) to examine and recommend a pricing policy that would be practicable and feasible enough to meet the situation. Basing on the recommendation of the said committee, the Oil Co-ordination Committee fixed retention prices for each products for each refinery and also fixed up an ex-factory price. The relevant observation reads as under:

Retention prices have been fixed for each products for each refinery by the OCC, based on the crude throughout standard pattern of production, delivered cost of crude oil, refinery cost and the appropriate return on capital employed. Whereas the refinery is entitled to retain its appropriate retention price for each product, they recover on their sale to the Marketing Companies on the basis of ex-refinery price, fixed by the Government for each product. The difference between the ex-refinery price, recovered by the refineries from the marketing companies and the retention price, which the refineries are entitled to retain is calculated on the despatches from each refinery and adjusted in the E&F (Cost & Freight Account).

If the refinery has surplus realisation on account of variation in the standard production pattern, the same is also adjusted in C&F Accounts, such variation must be authorised or should be on account of specific Government directions.

6. There is no dispute at the Bar that the entire price maxim is governed by the Oil Coordination Committee, for short the "OCC. There is also no dispute that the retention prices is in respect of the refinery product of BRPL is on higher side and as the ex-refinery price at which the goods are sold to its marketing agent, I.O.C. by BRPL, is low. The difference between the retention price is received by the BRPL from the oil pool. According to BRPL the amount was received by the writ Petitioner from the pool account administered by OCC is not a part of sale price and is in the nature of subsidy and/or compensation and the same cannot by any stretch of imagination be termed as a sale price. On the other hand, according to Appellants a part of the sale price of the refinery products is realised by the BRPL from IOC and another part is realised through OCC. In other words, according to the Appellants BRPL is required to raise bills on ex-refinery price to

the IOC and to claim the difference between the ex-refinery price and retention price from the OCC to make the sale deed complete. BRPL thus get their retention price as fixed by OCC and the amount received from two sources is a part of the sale price and BRPL is liable to pay taxation on both the amounts, i.e. the amount received from the IOC against the bills raised by them and also on the amount received from OCC. There is no controversy or dispute that BRPL is paying the tax on the amount of the bill raised to IOC.

7. In the impugned judgment the learned single Judge has dealt in detail the definition of "sale", "sale price" and "turn over" as defined under the Taxation Act, 1955 and the Central Sales Tax Act. As per the agreement between the BRPL and IOC, the former is required to sale the refinery products at the price to be fixed by the Govt. of India. BRPL is thus not entitled to realise any amount excess of the price fixed from IOC even if the later is willing to pay. The learned Counsel for the BRPL had referred to the following decision before the learned Single Judge:

- (1) Hindustan Sugar Mills Ltd. v. State of Rajasthan Vol. 43 STC 13 (SC) ;
- (2) Remco Cement Distribution Co. (P) Ltd. v. State of Tamil Nadu Vol. 88 STC 151 (S.C.) ;
- (3) Central Wines Vs. Special Commercial Tax Officer, Intelligence, Hyderabad-I, Secunderabad,
- (4) State of Andhra Pradesh v. Ranka Cables (P) Ltd. Vol. 78 STC 11;
- (5) Fertilizer Corporation of India Ltd. v. Commercial Tax Officer, Hyderabad Vol. 83 STC 129 ;
- (6) Coromandel Fertilisers Ltd. Vs. The Commercial Tax Officer (OFA), Punjagutta Division, Hyderabad.,
- (7) Madras Fertilisers Limited Vs. Asst. Commissioner (Assessment), Agrl. Income Tax and Sales Tax Dept. and Another,
- (8) Nataraj Organics Ltd. v. Asstt. Commissioner, (Assessment) Special Circle-II, Madras Fertilisers Limited Vs. Asst. Commissioner (Assessment), Agrl. Income Tax and Sales Tax Dept. and Another,

8. The learned Counsel for the BRPL has placed reliance on the above decisions before us. In the impugned judgment the learned Single Judge after discussing the above referred decision was of the opinion that the amount received by the BRPL from the pool account do not form part of the sale price turnover and as such BRPL is not liable to pay taxes on the above amount. The decision of the Hon"ble Andhra Pradesh High Court in Central Wines (supra) and Remco Cables (supra) were followed by the Hon"ble Kamataka High Court, Kerala High Court and Allahabad High Court. The learned Single Judge also relied on the above decisions. The first submission of the learned Counsel for the Appellant before us is that for the period 1982-83 to 1987-88 the BRPL received a sum of Rs. 166

Crores and odd from the OCC and in their balance sheet they have shown the receipt of the above amount under the heading "Sale of goods Purchased" and as such the gross sales in respect of the goods were thus the combination of the amount received as sale price from the IOC and from OCC, being the difference between the ex-refinery price and retention price. Appellants have filed the annual report of BRPL for the year 1988-89 and for the year 1992-93. The learned Counsel for the Respondent Dr. A.K. Saraf, on the other hand, submitted that the heading or receipt shown in the balance sheet is of no consequence and the court had accepted the true meaning after examining in nature of the transaction. The learned Counsel has relied on the observation of the Apex Court in the case of Travancore Sugars and Chemicals Ltd. Vs. Commissioner of Income Tax, Kerala, , wherein the Apex Court observed:

The name which the parties may give to the transaction which is a source of receipt and characterisation of the receipt by them are of little consequence.

The same view was reiterated by the Apex Court in the case of Commissioner of Income Tax, West Bengal I Vs. India Discount Co. Ltd., when the Apex Court observed: "It is well settled that a receipt which in law cannot be regarded as income cannot become so merely because the ACC erroneously credited it to the profit and loss account. (See Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., Thus from the Annual Report of the BRPL it cannot be inferred or held that the amount received by BRPL from OCC is a part of sale price.

9. Under the Sale of Goods Act the right to the property passes to the purchaser the moment the purchaser purchases the consideration therein. In the instant case the moment the IOC makes the payment of the refinery products against the bills drawn against them they become owner of the same and their sale transaction is not dependant on whether OCC pays the difference to BRPL or not. It is not a case of receipt of consideration from more than one quarter source.

10. Learned counsel for the Appellant strenuously argued that the retention price of the refinery is the actual price which has been received by the BRPL for the goods sold by them and as such they are liable to pay taxes on the said retention prices. According to the Appellants the retention price is nothing but the cost price as well as the profit of the unit and as the Respondent is entitled to retain/receipt the entire retention price the difference received by BRPL from OCC should be termed as a part of sale price and not a subsidy.

11. In this connection it may be useful to reproduce recommendation No. 39A of the Oil Price Committee which reads as follows:

The refineries should be compensated through an adjustment in the Pool Account for any shortfall in realisation due to variation from the standard production pattern on account of a specific directive from the Government. Similarly the refinery should credit any surplus to the Pool Account if the production pattern given by the Government has a favourable effect on realisation. However, any

deterioration in the production pattern on account of plant deficiency, operational defects or other factors should not be compensated from the pool.

12. From the above it is seen that if the retention price of refinery is less than the ex-refinery price/sale price to IOC in that case the difference between the retention price and the sale price cannot be retained by BRPL and they are bound to remit the same to the oil pool/OCC. To illustrate, suppose, the retention price of light diesel in respect of BRPL is Rs. 1,000/- per KL, whereas the sale price or ex-refinery price is Rs. 1,500/per KL under the Taxation Act and the Central Sales Tax Act, BRPL is required to pay taxes on Rs. 1,500/- but they are not allowed to retain this sum of Rs. 1,500/-. They can retain @ Rs. 1,000/- per KL only and the balance amount they will have to credit/remit to OCC.

13. In view of the above a query was raised to the learned Counsel for the Appellant where BRPL is entitled to pay their taxes @ Rs. 1,000/- only and/or the tax realised on the excess of Rs. 1,000/- is refundable to BRPL. The learned Counsel in their wisdom declined to commit, lest the State of Assam may be affected adversely. In spite of the silence the reply to the above query is a definite "No". The dealer is bound to pay the taxes on the sale price and although he is not entitled to retain the entire sale price, he cannot claim concession or refund in respect of the tax due. This goes to show that the amount received by the BRPL from the oil pool account is nothing but a compensation/subsidy given by the government in order to have a uniform price structure throughout the country. Likewise the amount paid by the manufacturer being the surplus of their retention price is their contribution to the pool account and they are not entitled to any rebate on the same.

14. Learned counsel for the Appellant has made another feeble attempt to rope in the amount given by OCC in the tax net on the ground that the difference in amount is paid by the OCC against the quantity of all the goods mentioned in each bill. Taking into consideration of the quantity of the goods against each bill is primarily for the purpose of calculation of the total subsidy or compensation required to be paid by the OCC. This is a more oblique manner of calculation. Under the guidelines the refinery is entitled to compensation or subsidy on the quantum of goods sold and not on the quantum of their production and as such the bills are the only source to find out the total quantity of goods sold by BRPL. We find no force in this plea.

15. In view of our foregoing discussion, we are of the view that the amount received by BRPL from OCC being the difference of the retention price and refinery price is in the nature of subsidy or compensation and these are not liable for taxation either under the Taxation Act or the Central Sales Tax Act. We find no merit in these appeals and the appeals are accordingly dismissed. Considering the facts and circumstances of the case the parties shall bear their own costs.