(2003) 09 PAT CK 0129

In the Patna High Court

Case No : C.W.J.C. No. 11506 of 1999

Hamid Husain and Others APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 02-09-2003

Acts Referred:

Citation : (2003) 09 PAT CK 0129

Judgement

Nagendra Rai, J.—The petitioners have filed the present writ application for quashing the notification dated 10-2-1999 issued by the Excise Commissioner on behalf of the Member Board of Revenue fixing the price of the liquor including 25% sales tax charged on the price of wholesale liquor fixed earlier. A copy of the said notification has been annexed as Annexure 6 A to the writ application.

2. The point for consideration in this case is as to whether the safes tax under the provisions of the Bihar Finance Act shall be levied on the cost price of the liquor or on the wholesale price including excise duty and sacheting cost.

3. Admitted facts are that the petitioners are the retail vendors of the country liquor and they have been granted exclusive privilege as well as licence u/s 22 of the Bihar Excise Act for the years 1997-2000. Under the provision of the Act and the terms and conditions of the licence the retail vendors of country liquor are bound to lift the minimum guarantee quota of country liquor fixed with regard to their shops from the warehouse. Section 22A of the Bihar Excise Act confers power on the State Government to fix the cost price of country liquor includes the price of the spirit, transportation charges Warehouse maintenance charges, taxes, if any, and other charges such as bottling, packing etc. and dividend. The said power to exercised on behalf of the State Government by the Member, Board of Revenue. The retail vendor on the payment of fixed price of the country liquor obtains country liquor from the warehouse for the purpose of sale. Earlier sales tax was not imposed on the country liquor etc. The State Government by notification dated 21-5-1997 (Annexure 3) to the writ application) imposed sales tax at the rate of 25% on the country liquor at the first point of sale. The said

notification was challenged before the Court by persons dealing in liquor but the said challenge was rejected by this Court. After issuance of the aforesaid notification the Commissioner with the approval of the Member, Board of Revenue vide order dated 11-2-1999 (Annexure 6-A) revised the wholesale price of the country liquor and included 25% excise duty in the total price of the country liquor. The said notification was given retrospective effect, i.e. with effect from 21-5-1997. Thus, according to the notification the retail dealers were liable to pay 25% of the sales tax on the wholesale price of the country liquor at the first point of sale to the manufacturer cum wholesale dealer of the country liquor. The petitioners challenged the aforesaid notification before the Member, Board of Revenue on the ground that the sales tax should be realised only on the cost price of the liquor and excise duty etc. should not be included, The Member, Board of Revenue rejected the same vide order dated 11-8-1999, vide Annexure 6 to the writ application and thereafter the present writ application has been filed.

4. The learned Counsel appearing for the petitioners submitted that according to definitions of gross turnover, sale and sale price under the Bihar Finance Act consideration for sale of country liquor is the cost price and as such the sales tax is to be levied on the same and excise duty and sacheting cost do not form part of the consideration for sale and as such no tax should be levied with regard to the said amount. In support of his submission, he relied upon a judgment of a Division Bench of this Court in the case of Ramjee Prasad Sahu and Ors. v. The Union of India and Ors., reported in 1993 (2) PUR 555 where a Division Bench of this Court while dealing with the provision of Section 206C of the Income Tax Act held that income tax is to be charged which will be collected by a seller from the retail vendors only on the amount paid as cost price to the seller and no tax is to be paid or collected on amount deposited by the retail vendor by way of excise duty directly to the State Government in terms of the provisions contained under the Bihar Excise Act.

5. Learned Counsel appearing for the State, on the other hand, submitted that in terms of the provisions contained under the Bihar Excise Act as well as under the Bihar Finance Act, excise duty and sacheting charges form part of the consideration for sale and sales tax is payable on the wholesale price including the aforesaid amount. He further submitted that the cost of sacheting is also included in the cost price of the sale and excise duty is charged on the goods and the event for charging the excise duty in on the production or manufacture and the primary and exclusive obligation to pay the excise duty is of the manufacturer and producer and even if the payment is made by any other person under the terms of the agreement the same will amount to meeting of the obligation of the manufacturer or the producer. If the payment is made by any other person not directly to the seller but to the Government the payment is made on behalf of the manufacturer or producer to the Government agency and the same would form part of the consideration money for sale of the country liquor. In support of his submission he relied upon judgments of the apex Court in the case of Mc Dowell & Company Limited v. Commercial Tax Officer, reported

in AIR 1986 Supreme Court 649, and in the case of Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, .

6. Before adverting to the submissions advanced at the bar it will be appropriate and apt to refer to the relevant provisions of the Bihar Excise Act and the Bihar Finance Act having a bearing on the question in controversy.

7. Excise duty has been defined u/s 2 (6) (a) of the Bihar Excise Act which means any such excise duty as has been mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution of India. The said entry 51 of List II inter alia provides for imposition of excise duty on the alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics manufactured or produced in the State. Section 22 of the Excise Act confers power on the State Government to grant exclusive privilege of manufacture and sale of country liquor. It provides further that the grantee of any privilege had to obtain licence from the Collector or the Excise Commissioner as the case may be. Section 27 of the Bihar Excise Act empowers the State Government to impose excise duty on import, export, transport and manufacture of excisable articles.

8. Rules 55 to 59 under the Bihar Excise Act contain provision with regard to supply of spirit to the retail vendors and payment of excise duty. According to the said Rules, the payment of duty is to be made in the treasury or sub-treasury before transport and spirit pass is supplied to the retail vendor.

9. It is not in dispute that the retail vendors on payment of wholesale price including excise duty obtain the country liquor from the warehouse to sell the same in the respective shops.

10. The turn over has been defined u/s 2 (j) of the Bihar Finance Act, according to which, aggregate of sale prices received and receivable by a dealer is the gross turn over. Sale has been defined u/s 2 (t), according to which transfer of property in goods for cash or deferred payment or other valuable consideration is a sale and sale price is defined u/s 2 (u) which means the amount payable to a dealer as valuable consideration in respect of the sale or supply of goods.

11. On conjoint reading of the aforesaid provisions it is clear that to attract the tax under the provisions of the Bihar Finance Act there (sic) which transfer of property is to be made for a valuable consideration and aggregate of sale prices, i.e. amount payable to a dealer as a valuable consideration received or receivable in respect of a sale of goods is gross turn over.

12. The question is as to whether the excise duty and sacheting charges are also to be treated as part of the consideration for sale of the liquor. If it is part of consideration for sale then the same is to be included in the gross turn over for the purpose of levying tax under the provisions of the Bihar Finance Act.

13. The taxing event in the case of excise duty is upon the goods manufactured or produced and as such exclusive liability is of the producer and manufacturer to pay the Excise duty. The collection may be deferred to a later stage on account

of convenience, administrative ground or other grounds. Thus, even if the excise duty is paid in terms of the agreement or otherwise by any other person, such as retail vendor, it is really a payment on behalf of the manufacturer. The retailer pays the same in terms of the provisions of the Excise Act because the law says so. In terms of the provisions of the Act the retailer has to pay the cost or price which includes the sacheting price and the excise duty before the takes delivery of the liquor from the warehouse. Thus, the total amount charged from him is a consideration for the sale of the liquor and is included within the definition of the turn over as stated above. The fact that the payment of excise duty is not made directly to the manufacturer or wholesaler and is paid in Government Treasury does not mean that the same does not constitute a part of gross turn over.

14. In the case of M/s. Mc Doweli & Company Ltd. (supra), the decision for consideration was whether the excise duty under the provisions of the Andhra Pradesh General Sales Tax Act deposited with the State exchequer in respect of Indian Liquor by buyer before removing the same from the distillery could be said to form part of taxable turn over of the appellant-distillery. The relevant Rules provided that no liquor or spirit is to be manufactured or removed or stored unless excise duty provided therein is paid by the holder of the distillery licence. The apex Court after taking into consideration the definition of the turn over under the A.P. Sales Tax Act which is similar to the definition of gross turn over under the Bihar Fiance Act held that excise duty is includible in the turnover of the manufacturer. It was held in paragraphs 35 and 40 of the judgment as follows:

(35) "The definition of "turnover" clearly indicates that the total amount charged as the consideration for the sale is to be taken into account for determining the turnover. Where a bill of sale is issued (and obviously the bill has to state the total amount charged as consideration), the total amount set out therein is to be taken into account. Excise duty though paid by the purchaser to meet the liability of the manufacturer, is a part of the consideration for the sale and is includible in the turnover of the manufacturer. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer.

(40) The fact that excise duty does not go into the common till of the manufacturer (assessee) and it does not become a part of the circulating capital is not the decisive test for determining whether such duty would constitute turnover."

15. Again in the case of Mohan Breweries & Distilleries Ltd., (supra) the question for consideration before the apex Court was whether the excise duty on potable liquor manufactured by the appellants, paid by the purchasers, is includible in the taxable turnover of the appellants for the purpose of levy of tax under the Tamil Nadu General Sales Tax Act. Section 18A of the Tamil Nadu Prohibition Act, 1937 imposes excise duty on liquor on import, export, transportation etc. and Rule 22 of the Manufacture Rules provided the payment of excise duty by the persons who removes the goods from a manufactory on the stock of Indian Made

Foreign Spirits. Dealing with the aforesaid matter, the apex Court held that the liability to pay the excise duty is of the manufacturer or producer and the collection may be deferred to a later stage on administrative or other grounds and Rule 22 provides for a convenient method of its collection. Though the payment is made by a person other than the manufacturer the payment is made in discharge of the obligation of the manufacturer. The payment of sale price to the manufacturer and payment of excise duty into the Treasury on behalf of the manufacturer does not exclude the excise duty from the consideration for sale. In this connection the element of excise duty does includes the turn over of the manufacturer just as much as it would ordinarily do. The definition of the turnover under the provisions of the Sales Tax is wide enough to cover the excise duty. In this connection, it is relevant to refer to para 11 of the judgment which runs as follows:

As we look at it, the primary obligation to pay excise duty on the IMFL is of the manufacturer thereof. Rule 22 only provides for a convenient method for its collection. When the excise duty is collected from a party removing the IMFL from the factory of its production, other than the manufacturer, the payment of excise duty that party makes is in discharge of the obligation of the manufacturer. That party does not, as it would ordinarily do, pay the excise duty component along with the sale price of the IMFL it purchases to the manufacturer; it pays the sale price to the manufacturer and it pays the excise duty into the Treasury for and on behalf of the manufacturer. In effect, therefore, the element of excise duty does enter into the turnover of the manufacturer just as much as it would ordinarily do. The definition of "turnover" in Section 2 (r) of the Sales Tax Act, referring as it does not "the aggregate amount for which goods are bought or sold" and "whether for cash or... other valuable consideration", is wide enough to cover such excise duty. That the excise duty does not physically enter the manufacturer''s till is, as held, in the second Mc Dowell case, not the decisive test for determining whether or not it would be a part of the manufacturers turnover."

16. Thus, the settled law is that the excise duty is one of the components of sale price and the consideration money for sale of the liquor and the fact that it is paid by a person other than the manufacturer does not make any differences as the payment is made on behalf of the manufacturer. The fact that it is also not paid directly to the manufacturer or the Seller, on the other hand, it is paid in the Government Treasury in terms of the relevant Rules also does not exclude the same being the part of the consideration money for the sale price of the liquor. According to the definition of the turn over under the Bihar Finance Act, excise duty which is paid by the retailer on behalf of the manufacturer is also included in the price of the liquor and as such it is liable to payment of sales tax under the provisions of the Bihar Finance Act. So far the cost of sacheting is concerned, that is included in the cost price of the liquor as is evident from Section 22 A of the Bihar Exise Act and as such that is also includible as a component of the consideration for sale of the liquor.

17. So far the decision of the Division Bench of this Court in the case of Ramjee Prasad Sahu (supra) relied upon by the petitioners is concerned that does not held the case of the petitioners. In that case the question for consideration was as to whether income tax u/s 206C of the Income Tax Act is to be paid by the retail vendor only on the amount paid as cost price or it also includes the price. Mc Dowell''s case (supra) was also referred to in the said case and that was distinguished on the ground that under the provisions of the Bihar- Excise Act, the obligation to pay the excise duty is on the retail vendor and as such the case is covered by earlier Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, . It was also held in that case as it appears from paragraph 52 of the judgment that excise duty payable by the retailer is not the excise duty which is payable by the manufacturer or contractors etc. The view taken in that case, if I may say with respect, ignored the fact that excise duty is payable by a manufacturer or producer and not by others. The payment by retail vendors is not the payment of excise duty on their behalf but it is a payment made by them for and on behalf of the manufacturer, therefore, it is included as a part of consideration for sale of the liquor as held in the case of Mc Dowell (supra) and Mohan Breweries & Distilleries Ltd. (supra). It may also be appreciated that without payment of Excise duty the liquor cannot be moved, therefore, if excise duty is to be paid then it would be one component of sale price.

18. Thus, the sales tax is to be levied not only on the cost price but also on the excise duty and sacheting cost. The wholesale price of the liquor includes not only the cost price but excise duty and sacheting cost. In that view of the matter, the impugned notification does not suffer from any legal infirmity.

19. In the result, there is no merit in this application and the same is dismissed.

R.S. Garg, J.

20. I agree.