

(2003) 05 MP CK 0079

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 1569, 2865 and 3448 of 1999, 5525 and 5526 of 2000, 1875 and 1876 of 2001

Hindustan Lever Ltd. and Another

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 08-05-2003

Acts Referred:

Citation : (2005) 139 STC 179

Hon'ble Judges : Dipak Misra, J;A.K.Shrivastava, J

Bench : Division Bench

Advocate : T.R. Andhyarujina and Ravinder Narain, Kishore Shrivastava, Sajan Narain, Prem Francis, for the Appellant; Ajay Kumar Mishra, Deputy Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.—In this batch of writ petitions, the prayer being similar and the grievance put forth being common, they were heard analogously and disposed of by this common order. For the sake of clarity and convenience, we are inclined to advert to the facts in writ Petition. No. 1569 of 1999, slightly in detail. Thereafter, we shall briefly state the necessary facts of other writ petitions which are requisite for the disposal, to meet the conception of completeness.

2. At the outset we must state that what was a colossal complaint when the petitioner visited this Court in invocation of its jurisdiction under article 226 of the Constitution of India has watered down, if we are permitted to say so like a melted glacier inasmuch as the initial challenge to the constitutional validity of sections 61(4)(c), 69(2) and 69(3) of the Madhya Pradesh Commercial Tax Act, 1994 (for brevity "the Act") the core one, is no more required to be dealt with by us, in view of the subsequent developments that occurred during the pendency of this writ petition. The factual score as frescoed is that when notice was issued by the assessing officer initiating the proceedings for imposition of penalty on the backdrop that the assessee/company had not collected the tax on toilet soaps at

15 per cent but collected at 6 per cent, though toilet soaps according to the assessing officer were covered under the entry No. 7, Part III of Schedule II inasmuch as the entry postulates toilet articles including tooth paste, tooth powder, perfumed hair oils, face powder, talcum powder, combs, brushes, razors and razor blades, the assessee thought it condign to invoke the extraordinary remedy as it harboured the feeling that the preferring of appeal was not efficacious and in a way onerous that apart the assessee thought without assailing the validity of the provisions relating to imposition of penalty the challenge to the proceeding would be a sisyphian endeavour.

3. The grievance was that the assessee had felt that on earlier occasions, under the Madhya Pradesh General Sales Tax Act, 1958 there was classification from time to time. The toilet soaps could be taxed differently and amendments had been brought into existence at the later stage creating the distinction in respect of toilet soaps with the other items. In view of the factual backdrop, the assessee was under the bona fide belief that toilet soaps could be taxed under the residual entry No. 1 of Part VII which stipulates about all other goods not included in Schedule I or any other Part of the Schedule. After the show cause notice was issued, a demand was made which was five times of tax which was not paid by the assessee. At that juncture the assessee felt that the appeal which is provided for challenging the penalty was not an efficacious remedy inasmuch as 50 per cent of the penalty due has to be deposited before preferring the appeal and that apart no discretion was left with the appellate authority for reduction of penalty inasmuch as heavy onus is cast on the assessee to show that there was no fraud and gross negligence though under the accepted jurisprudence, the department has to record a finding that there was fraudulent maladroitness by the assessee or there was gross negligence. In that backdrop the writ petitioners challenged the provision as unconstitutional.

4. Now to the subsequent events. After the assessing officer the regular assessment order, directing the assessee to deposit the differential sum, the assessee preferred an appeal before the appellate authority. As required 10 per cent of the demanded sum was paid at the time of preferring of appeal. On May 9, 2001, the Government of Madhya Pradesh in the department of Commercial Taxes Department issued Notification No. A-3-69-97-ST-V(45), which reads as under :

-----				"Class of Period
Extent of Restrictions and goods exemption conditions subject to which exemption is granted	(1)	(2)	(3)	(4)
-----				Toilet soap,
(i) From 1-4-1995 Partly so as The exemption shall washing to 31-3-1997 to reduce be available if the tax soap and the rate of has been recovered washing tax under from the consumers detergent. Section 9 to at the rates specified 6 per cent in column (3)." (ii) From 1-4-1997 Partly so as to 31-12-1999 to reduce the rate of tax under Section 9 to 8 per cent				

After the notification came into force, the matter went up to the Board of Revenue which set aside the order of assessment as well as the order passed by the appellate authority and directed that the assessee would be entitled to refund of the amount subject to satisfactorily meeting the condition enshrined in column No. (4) of the aforesaid notification. The condition is that the assessee has not recovered from the consumers at the rate specified in column No. (3). The items have been brought on record. For some years, the assessing officer has been satisfied that the assessee has recovered at the rate of 6 per cent from the consumer and not at the rate specified in the Schedule and accordingly refund has been directed.

5. Mr. Ajay Kumar Mishra, learned Deputy Advocate-General has placed before us the Notification No. A-3-69-97-ST-V(33) dated 30th April, 2003 which amended the Notification dated May 9, 2001 and column No. (4) for the word "consumers" the word "purchasers" has been substituted. He has fairly stated that if the assessee has not collected the tax at the higher rate from its own dealers, he would be entitled to refund.

6. Mr. T.R. Andhyarujina, learned Senior Counsel has advanced twofold contentions, namely, that this Court while admitting the writ petition in respect of various orders passed against the assessee, had directed that differential amount to be deposited as a condition precedent for grant of stay of the penalty proceedings and therefore the differential amount has not been directed to be refunded by the Board of Revenue solely on the base that the deposit was made by the company as per order passed by this Court and in view of the subsequent change, this Court should direct refund of the aforesaid amount subject to satisfaction of the conditions and restrictions imposed under Notification dated May 9, 2001 and secondly, the demand made in pursuance of the penalty proceedings should be quashed for the assessment year 1995 which is the subject-matter of this writ petition. To clarify the position, this Court by order dated April 25, 1999 has directed a sum of Rs. 6,30,00,000 (rupees six crores and thirty lakhs only) to be deposited as the differential tax.

7. Considering the factual scenario in entirety we have no hesitation to hold that the aforesaid amount shall be refunded to the assessee, upon verifying that he had collected the tax at 6 per cent from the purchasers. Once the assessment order has been set aside, the question which appears is whether the penalty proceedings be allowed to continue. We have perused the language employed u/s 69 of the Act. We may refer to the said provision, which reads as under :

"Section 69 : Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances.-(1) If the Commissioner or the appellate or revisional authority, in the course of any proceedings under this Act is satisfied that a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his

sales or purchases, as the case may be, in his return or returns for any year or part thereof or has furnished a false return or returns for such period, the Commissioner or the appellate or the revisional authority as the case may be, may initiate proceeding separately for imposition of penalty under this section.

(2) The proceeding under Sub-section (1) shall be initiated by the Commissioner or the appellate or revisional authority as the case may be, by issue of a notice in the prescribed form for giving the dealer an opportunity of being heard. On hearing the dealer, the Commissioner or the appellate or the revisional authority as the case may be, shall pass an order not later than one calendar year from the date of initiation, of such proceeding or within such further time as allowed by the State Government, directing the dealer that he shall in addition to the tax payable by him pay by way of penalty a sum which shall not be less than three times but shall not exceed five times of the amount of tax evaded.

(3) If the total tax shown as payable according to the return or returns and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed u/s 27 such dealer shall be deemed to have concealed his turnover or aggregate of his purchase prices or to have furnished false particulars of his sales or purchases in his return or returns or to have furnished a false return or returns for the purpose of Sub-section (1) unless he proves to the satisfaction of the Commissioner or the appellate or the revisional authority, as the case may be, that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part."

8. If the provision is read in proper perspective for true import, in our considered opinion, unless there is some sort of gross negligence or fraud, the penalty proceedings may not be attracted. In any case, we may state here that as we are neither interpreting the provision nor dealing with the constitutional validity, we need not delve deep into that. In the case at hand when there is no tax liability beyond 6 per cent and the rate of tax has been determined by retrospective amendment, and relying on the same, the Tribunal has set aside the assessment order, the question of imposing any kind of penalty would be absolutely illogical, unreasonable and irrational. The inevitable conclusion that we are inclined to reach is that the penalty proceedings initiated by the assessing officer are to be quashed and accordingly, we so direct.

9. As far as the Writ Petition No. 3448 of 1999 is concerned, the penalty proceeding was initiated and demand was made. When the petitioner approached this Court, the full amount was stayed in this case and refund has been directed. Hence in this writ petition we only quash the penalty proceedings and the notice of demand.

10. In the Writ Petition No. 5525 of 2000, this Court while staying the demand pertaining to penalty had directed stay of the recovery of the penalty on condition that the petitioner would deposit the differential tax amounting to Rs.

7,14,48,090. We have been apprised at the bar that the said amount has already been deposited. As the assessment order has become extinct, the said amount shall be refunded to the assessee.

11. In Writ Petition No. 2865 of 1999, wherein the petitioner assailed the penalty proceeding, this Court stayed the recovery of the penalty and directed the assessee to deposit Rs. 4,29,187 by way of differential tax and the same has been deposited. Needless to emphasise, the penalty proceeding and the demands are to be quashed and amount has to be refunded.

12. In Writ Petition No. 5526 of 2000, while directing stay of the penalty proceeding and the payment arising therefrom, this Court directed payment of differential tax of Rs. 4,51,087 and the same has been deposited. As the Tribunal has already set aside the order of assessment, the aforesaid amount is to be refunded to the assessee. The penalty proceeding and the payment ensuing therefrom are hereby quashed.

13. The learned Senior Counsel made a prayer that a direction be issued to the department to pay the differential sum in all cases within a stipulated period.

14. Mr. Ajay Kumar Mishra, learned Deputy Advocate-General, submitted that the amount be adjusted towards the future dues.

15. Mr. Ravinder Narain assisting the learned Senior Counsel after obtaining instructions from the assessee fairly submitted that it has no objection if the amount due is adjusted towards the future tax within a stipulated period of one year commencing 1st June, 2003.

16. The writ petitions are allowed to the extent indicated hereinabove. However, there shall be no order as to costs.