(1997) 02 NCDRC CK 0060

In the National Consumer Disputes Redressal Commission

MANAGING DIRECTOR TRUST MEDICALS (P) LTD. APPELLANT

Vs

Krishnankutty RESPONDENT

Date of Decision : 04-02-1997

Acts Referred:

Citation : 1997 3 CPR 100 : 1998 2 CPJ 515

Hon'ble Judges : P.K.Shamsuddin , K.Balakrishnan Nair , K.M.Latha J.

Final Decision : Appeal dismissed subject to modification

Judgement

1. THIS appeal is directed against the order passed by the District Forum, Thrissur, in O.P. No. 1172/95. The opposite party is the appellant.

2. THE appellant who is retail dealer in medicines sold an item of medicine by name Betnovate 15 mg from their Medical Shop at Thrissur to the respondent/ complainant on 11.11.1995. THE appellant charged in the bill an amount of Rs. 11.93 being the maximum retail price printed on the outer cover of the medicine and also 79 paise towards reimbursement of sales tax borne by the appellant under the name TPS (Tax payable to the supplier). THE respondent/complainant filed a complaint before District Forum alleging unfair trade practice in the collection of TPS and claiming compensation. THE appellant filed objections stating that there is no illegality in collecting TPS. The District Forum took the view that the Kerala General Sales Tax Act does not authorise such collection. It also held that Clause 16 of Drugs (Price Control) Order doesnot permit sale of any drug at a price exceeding the price specified in the current price list or price indicated on the label if the container or pack thereof whichever is less plus excise duty and all local taxes if any payable in the case of scheduled formulation or maximum retail price inclusive of all taxes in the case of non-scheduled formulations and in that view directed the appellant to pay compensation of Rs. 1,000/-.

Feeling aggrieved by the said order this appeal has been preferred.

3. MEDICINE is item 79 of Schedule 1 of the Kerala General Sales Tax and is

taxable under the Kerala General Sales Tax Act, 1963 at 8% at the point of 1st sale in the State. The District Forum has taken the view since the sale to the complainant is not the 1st sale no sales tax can be collected from the respondent/ complainant. On the other hand the case of the appellant is that they paid sales tax when they purchased the medicine in Kerala and nothing prevents them from claiming reimbursement of sales-tax paid by them. Before the District Forum Ext. B1, a photocopy of a letter, sent by the Secretary to Government, Government of Kerala, to the President, All Kerala Chemists and Druggists Association, stating that the Board of Revenue has issued instructions to the Intelligence Wing and other officers concerned that the collection of TPS at whatever stage should not be treated as illegal collection. The District Forum took the view the Secretary had no authority to issue an order in the nature of Ext. B1. This finding of the District Forum is challenged in this appeal.

4. THE 1st question to be considered is whether the collection of an amount in the name of TPS for getting reimbursement of the sales-tax paid by the retail dealers to their suppliers is invalid. In this context the respondent/ complainant has pressed into service Clause 16 of the Drugs (Price Control) Order, 1995, which provides that no person shall sell any bulk drug or formulation to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less, plus excise duty and all local taxes if any payable in the case of scheduled formulation and maximum retail price inclusive of all taxes in the case of non- scheduled formulations and argued that the opposite party is not entitled to collect anything in excess of the price displayed on the package and excise duty and other local taxes and that as the sales tax is payable only at the first point of sale it cannot be considered as the local tax as the concerned sale is only the second sale and no charge of sales tax is involved at the point of second sale. This contention has found favour with the District Forum. In this context reference also may be made to Sub-section 2 of Section 22 of the Kerala General Sales Tax Act which reads as follows : "No registered dealer shall collect any sum purporting to be by way of tax : (a) on the sales of any goods (i) in respect of which he is not liable to pay tax; or (ii) at a rate exceeding the rate at which he is liable to pay tax; or (b) in respect of the purchase of any goods, whether or not he is liable to pay tax on such purchase."

It is contended by Counsel for the appellant that the appellant is not collecting any tax at the subsequent sales but only collecting the amounts paid by them to their suppliers as tax by way of reimbursement. This is described by them as T.P.S. (Tax Payable to Suppliers). It is also contended by the learned Counsel for the appellant that if medicine is sold by the opposite parties without including the sales-tax paid by them they would be suffering heavy loss and they would not be able to continue the business. Considerable reliance is also placed on Ext. BI, a photocopy of letter, sent by the Secretary to the Government of Kerala, to the President, All Kerala Chemists and Druggists'' Association, stating that the Board of Revenue has issued instructions to the Intelligence Wing and other Officers concerned that collection of TPS at whatever stage should not be treated as illegal collection.

5. LEARNED Counsel for the appellant also heavily relied on a decision of Guwahati High Court in Assam Drug Dealers Association v. Commissioner of Taxes Assam, Guwahati & Ors; (Civil Rule No. 451 of 1989). In the above decision Guwahati High Court held that: "Provisions of the Price Control Order 1987 and 1995 specially permit the realisation of local tax if paid as discussed above. This tax which has been realised by the intermediary or the retailer is in fact only by way of reimbursement of taxes already paid at the first point and the said amount by way of tax is realised by the sales tax authorities at the first point. As such the question of further levy of tax on the retailers or intermediary does not arise." The Guwahati High Court has only said that though the amount shown is tax it is not tax but realisation of the tax already paid. This decision is not in any way helpful to the appellant. In this connection it is profitable to refer to the decision of the Supreme Court in M/s. Central Wines, Hyderabad v. Special Commercial Tax Officer, (1987) 2 S.C.C. 371. "Even if therefore the bill or the voucher issued to the purchaser indicates the amount of sales tax separately what is collected by the vendor from the vendee is not tax but is merely a part of the sale price charged by the vendor to the vendee. So far as the statute is concerned it does not cast any obligation on the purchaser of the goods to pay any tax and, therefore, what is collected by the vendor from the vendee by way of consideration for passing the property in the goods to the vendee is the price charged by him and not tax collected by him from the purchaser. The amount of money which goes from the pocket of the vendee to the pocket of the vendor as a condition or consideration for passing of the property in the goods is thus the sale price and not the tax. It is the amount, but for the payment of which, the vendor would not transmit his title to the goods in favour of the vendee, and not any amount paid by the vendee towards any tax liability incurred by him on making the purchase of the goods. It is no doubt true that a dealer as a prudent businessman would pass on the burden in the context of the sales tax liability to the buyer. But then he would be doing so in order that he may not make a loss on the transaction. Inasmuch as no businessman carries on business with a view to incur loss, that he would take into account this factor at the time of collecting the sale price from the vendee stands, to reason. That however does not mean that he is collecting the tax from the purchaser (for which in fact he has no authority in law under the act)".

6. THE other decisions cited by learned Counsel also would only go to show that the amount collected is not a tax, but only reimbursement of tax already paid and these cases also do not support the case of the appellant. As indicated above what Clause 16 of Drugs (Price Control) Order, 1955, permits to collect is only the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less, plus excise duty and local taxes, if any, payable in the case of scheduled formulations and maximum retail price inclusive of all taxes in the case of non- scheduled formulations. Ext. B1 letter

relied on by the appellant is not an order issued under the provision of Kerala General Sales Tax or Rules framed there under and cannot have any legal validity. In the light of the decision of Supreme Court referred to above it has to be held that what is collected by the appellant is not local tax payable under the Kerala General Sales Tax Act and the appellant is only trying to pass on the burden of the tax which he had already paid to the buyer. Tax is payable in the case of medicine only at the point of 1st point of sale and the collection of TPS would be in violation of the restriction contained in Clause 16 of Drugs (Price Control) Order. The above discussion would show that the view taken by the District Forum that collection is illegal is correct.

It may be true that as contended by learned Counsel appearing for the appellant that if the appellant and other retail dealers are not permitted to get reimbursement of sales-tax they paid to their suppliers they may be put to great loss since they are getting only a specified amount by way of commission. But the difficulties faced by them have to be salvaged by making necessary amendments to the Kerala General Sales Tax Act enabling the appellant to recover the amounts and not treating the collection as tax which it is not. Therefore, the finding of the District Forum that there is excess collection cannot be said to be erroneous.

7. HOWEVER in the circumstances of the case we feel that direction to the appellant to pay compensation is not justified. The appellant has been collecting T.P.S. under the bona fide belief that it is permissible under law. So we vacate the direction to pay compensation. The appellant will however refund the excess amount (T.P.S.) collected and also pay cost of Rs. 250/- to the respondent/ complainant. Appeal is dismissed subject to the above modification. Appeal dismissed subject to modification. _______________