(2011) 09 PAT CK 0133

In the Patna High Court

Case No : CWJC No''s. 11114 and 11116 of 2004

M/s Bachan Traders — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:
Bihar Finance Act, 1981 — Section 2, 20(1), 3, 4
Constitution of India, 1950 — Article 226

Citation : (2011) 09 PAT CK 0133

Hon'ble Judges : R.M. Doshit, C.J;Birendra Pd. Verma, J

Bench : Division Bench

Judgement

R.M. Doshit, C.J.—These three writ petitions under Article 226 of the Constitution are filed by a dealer M/s Bachan Traders, a proprietary firm, through its Proprietor Arun Kumar, against the common judgment and order dated 2nd July, 2004 passed by the Commercial Taxes Tribunal (hereinafter referred to as ''the Tribunal''). The matter at issue is the penalty imposed upon the Petitioner for not disclosing the correct figures of the gross turnover and the deficit in payment of sales tax for the Assessment Years 1997-98, 1998-99 and 1999-2000. The Petitioner is a manufacturer of and a wholesale dealer in country liquor. The Petitioner had several establishments at various places in the then State of Bihar. Since the year 1977 the State of Bihar had exempted the country liquor from payment of sales tax. The said exemption continued up to 1997. By Government Notification dated 21st May, 1997 the said exemption was withdrawn and the sales tax at the rate of 25% was levied upon the country liquor. The said Notification was challenged by certain dealers, including the Petitioner in CWJC Nos. 5220 of 1997, 5221 of 1997, 5232 of 1997 and 5298 of 1997. By ad interim order dated 27th October, 1997 the operation of the Notification dated 21st May, 1997 was stayed. The said stay continued up to 17th November, 1997. The said CWJC No. .5298 of 1997 was ultimately withdrawn by the Petitioner on 10th December, 1998. We do not allude to the long line of litigations raised by the Petitioner, as they are not relevant for the purpose of the present issue. Suffice it to say that in none of the matters the Petitioner has succeeded.

2. Pending the said petition, the Petitioner continued to file sales tax returns. The gross turnover returned by the Petitioner did not include the amount of excise duty paid by the Petitioner over the country liquor manufactured by him. The Respondents, therefore, on 22nd December, 1999 issued Notice u/s 20(1) of the Bihar Finance Act, 1981 (hereinafter referred to as ''the Finance Act'') and called upon the Petitioner to show cause why he should not pay penalty for not disclosing the true turnover and for the deficit in sales tax paid by him. The Notice was answered by the Petitioner. On 6th January, 2000 a further notice was issued to the Petitioner calling upon him to file a revised return in respect of the excise duty paid and the tax payable thereon. By order dated 20th January, 2000, the Assistant Commissioner of Commercial Taxes, Patna, in exercise of power conferred by Section 20(1)(a) of the Finance Act, imposed 300% penalty upon the Petitioner for non-disclosure of the correct gross turnover and for the shortfall in payment of sales tax for the periods from (i)21.5.1997 to 31.3.1998; (ii) 1.4.1998 to 31.3.1999; and (iii) 1.4.1999 to 31.12.1999. The aforesaid orders of the Assistant Commissioner of Commercial Taxes were confirmed in appeals by the Joint Commissioner of Commercial Taxes, Appeal, and in revision by the Commissioner of Commercial Taxes. The said orders were upheld by the Tribunal under the impugned judgment and order dated 2nd July, 2004. Therefore, the present writ petitions.

3. The present writ petitions were heard and dismissed by this Court on 16th March, 2005. Applications for review, Civil Review Nos. 71 of 2005, 72 of 2005 & 73 of 2005 also were rejected. The matter traveled to the Hon''ble Supreme Court. By the judgment and order dated 31st March, 2009 passed in Civil Appeal Nos. 2117 of 2009 to 2119 of 2009, the Hon''ble Supreme Court has remitted the matter to the High Court on a limited issue "Whether imposition of penalty and the quantum thereof was proper or not". Thus, we are called upon to consider (i) Whether imposition of penalty for shortfall in the payment of sales tax by the Petitioner was warranted; and (ii) Whether the penalty at the rate 300% imposed by the Respondent authority is justiciable.

4. Learned Counsel Mr. Y.V. Giri has appeared for the Petitioner. He has conceded that the matter now revolves around a narrow issue-whether for the shortfall in payment of sales tax in respect of the excise duty paid by the Petitioner, the Petitioner can be held liable to pay penalty. Mr. Giri has conceded that the price of country liquor manufactured by the Petitioner comprises the price of liquor and the excise duty payable on such liquor. He has submitted that as per the prevalent rules the amount of excise duty is paid by the retailers (purchasers from the Petitioner) directly to the Government treasury. The Petitioner, in fact, does not pay the amount of excise duty. He has submitted that the question whether the amount of excise duty paid on the country liquor by a manufacturer should be included in the sale price for the purpose of computation of gross turnover was a grey area which has now been settled finally by the Hon''ble

Supreme Court and by the Patna High Court not until after 2000. He, therefore, concedes that the amount of excise duty paid by the Petitioner on the country liquor manufactured by him indeed formed part of the sale price and was exigible to safes tax. Mr. Giri has, however, submitted that at the relevant time the issue was not yet settled. The liability of the manufacturer was not crystal clear. The Petitioner was, therefore, justified in not including the amount of excise duty paid by it in the gross turnover returned by it.

5. In support of his submissions, Mr. Giri has relied upon the judgments B.K. Jaiswal and Others Vs. State of Bihar and Others, ; of Hamid Husain and Others Vs. State of Bihar and Others ; of Nagendra Prasad Vs. State of Bihar and Others ; of Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others ; of First McDowell & Co. Ltd. v. Commercial Tax Officer and Ors. {[1977 J 39 STC 151}; of Second McDowell & Co. Ltd. v. Commercial Tax Officer { [1985] 59 STC 277}; of General Marketing & Manufacturing Co. Ltd. v. The State of Tamil Nadu { [1980] 45 STC 96]; of Hindustan Steel Ltd. v. The State of Orissa { [1970] 25 STC 211}; of Thiru Arooran Sugars Ltd. v. Assistant Commissioner (C.T.) and Ors. { [2000] 117 STC 457}; of Kisan Agency Vs. State of Bihar and Others, and of M/s Mahabir Abhushan Bhandar v. Govt, of Bihar and Ors. [2010(4) PLJR 784].

6. Learned Advocate Mrs. Nilu Agrawal has appeared for the Respondents. She has contested the writ petitions. She has submitted that the term "Sale price", as defined in the Finance Act, explicitly includes any amount charged by the dealer. The amount of excise duty payable by the manufacturer and recovered from the retail purchasers will form part of the sale price. The gross turnover returned by a manufacturer shall include the amount of excise duty paid on the goods. There was no question for the Petitioner not to include the excise duty paid by him in the gross turnover returned by him. She has taken us through the records. She has submitted that the Petitioner was not only deficient in payment of sales tax insofar as the Petitioner did not disclose or include the amount of excise duty paid by him in the gross turnover; he was deficient in payment of the admitted taxes to the extent of crores of rupees. The admitted taxes also, the Petitioner paid much later in the years 2000 and S001, that too not the full amount. She has, therefore, submitted that the Petitioner had willfully and deliberately concealed the amount of gross turnover insofar as he did not include the amount of excise duty paid by him. Further, the Petitioner also did not pay the admitted taxes within the statutory period. In fact, the Petitioner avoided payment of sales tax until he was compelled to pay the same. The conduct of the Petitioner, first, in not disclosing the amount of excise duty in Jts gross turnover; and second, in not paying the admitted taxes within the statutory period did call for imposition of penalty u/s 20(1)(a) of the Finance Act; that too, at the maximum rate of 300%.

7. The terms "gross turnover" and "sale price" are defined in Clauses (j) and (u) of Section 2 of the Finance Act as under:-

(j) "gross turnover" means-

(i) for the purposes of levy of sales tax, in respect of sale of goods, aggregate of sale prices received and receivable by a dealer, including the gross amount received or receivable for execution of works contract or for the transfer of right to use any goods for any purpose (whether or not for a specified period) during any given period (and also including the sale of goods made outside the State, in the course of inter-State trade or commerce or export), but does not include sale prices of goods which have borne the incidence of purchase tax u/s 4;

(ii) for the purposes of levy of purchase tax, aggregate of purchase prices paid or payable by a dealer during any given period in respect of purchase of goods or class or description of goods which have borne the incidence of purchase tax u/s 4;

(iii) for the purposes of Section 3, the aggregate of the amounts under Sub-clauses (i) and (ii)."

"(u) "sale price" means the amount payable to a dealer as valuable consideration in respect of the sale or supply of goods.

Explanation-1.-Sale price shall include any amount charged by the dealer for anything done in respect of the goods at the time of, or before delivery thereof to the buyer.

Explanation-II.-Sale price shall not include the cash discount allowed by the dealer according to the ordinary trade practice, if shown separately. It shall also not include the cost for transport of the goods from the seller to the buyer, provided such cost is separately charged to the buyer.

8. The gross turnover is the aggregate of the sale prices received and receivable by a dealer. The sale price is the amount payable to a dealer as valuable consideration for the goods supplied.

9. The meaning of the aforesaid terms has been the subject matter of consideration by the Courts time and again. True, in the matter of McDowell & Co. Ltd. { [1977]39 STC 151} the Hon''ble Supreme Court had occasion to consider the meaning of the term ''Gross turnover'' in respect of Indian-made foreign liquor; particularly whether the excise duty payable over the liquor manufactured would form part of sale price of the liquor manufactured and sold. The Hon''bie Supreme Court noticed that the excise duty payable over the liquor manufactured was under the Liquor Rules, payable by the retail purchasers directly to the Government Treasury. The Court held that the excise duty not charged by the manufacturer (the Appellant) but charged and paid directly to the excise authority by the buyers did not constitute part of the turnover. The Court held "... the excise duty and the countervailing duty paid directly by the buyers of the Indian liquors as stated above did not constitute a part of the turnovers of the Appellants". However, the aforesaid view was reversed by the Constitutional Bench of the Hon''ble Supreme Court in the matter of McDowell & Co. Ltd.

{ [1985]59 STC 277}. The Constitutional Bench did not approve the earlier view and held that the amount of excise duty paid on the manufacture of liquor did constitute part of the sale price irrespective of the fact that the payment of the excise duty was deferred till a later stage and that it was paid by the buyer. The aforesaid view has been followed by the Patna High Court Hamid Husain and Others Vs. State of Bihar and Others and of Nagendra Prasad Vs. State of Bihar and Others . It may also be noted that prior to 1985 or for that matter until 21st May, 1997, in the State of Bihar, country liquor was exempted from the payment of sales tax. The question of computation of gross turnover, therefore, did not arise. The rest of the judgments relied upon by Mr. Giri have no relevance''.

10. The submission made by Mr. Giri that the matter at issue had not been finally settled until after 2000 and that the Petitioner was justified in not including the amount of excise duty in the gross turnover returned by him cannot be countenanced. The law is settled since 1985.

11. Undoubtedly, the Petitioner was aware that he was liable to include the amount of excise duty in the gross turnover. He did collect the sales tax over the amount of excise duty; but by a separate transaction. Hence, it is evident that not only the Petitioner was conscious of his liability, he also collected the sales tax over the amount of excise duty. He did not deposit the amount of sales tax so collected in the Government Treasury. In fact, till date after more than 10 years, the said amount has not been deposited in the Government Treasury. The intention of the Petitioner to deflate the gross turnover and thereby reduce his liability of sales tax is evident from the conduct of the Petitioner in collecting the sales tax on the amount of excise duty by a separate transaction. Moreover, as recorded hereinabove, it is not only the sales tax payable on the amount of excise duty which was not paid by the Petitioner; the Petitioner also did not pay the admitted tax within the statutory period. The conduct of the Petitioner is far from being honest, genuine or bona fide.

12. The submission that in view of the stay against recovery of sales tax ordered in CWJC No. 5298 of 1997 and other writ petitions, the Petitioner is not liable to pay sales tax for the period from 21st May, 1997 till 17th September, 1997 is also not acceptable. The aforesaid stay operated from 27th October, 1997 to 17th November, 1997. The Petitioner having obtained the stay order that was not confirmed and the Petitioner having withdrawn the writ petition, it is the liability of the Petitioner to indemnify the State. The Petitioner cannot be permitted to take shelter under the ad interim order to avoid payment of due tax.

13. In view of the intentional evasion of sales tax by manipulating the accounts the Petitioner is liable to penalty u/s 20(1) of the Finance Act, It is also evident that the Petitioner has been continuously litigating for more than 10 years with a view to avoiding his liability to pay sales tax although the Petitioner has collected the amount of sales tax. The Petitioner is thus guilty of usurping the public money. In view of the deliberate and intentional avoidance of payment of proper tax by the Petitioner and of procrastinating the litigations in one or the other

manner, we are of the opinion that the maximum penalty of 300% imposed upon the Petitioner is justified. For the aforesaid reasons, we dismiss the writ petitions with cost. The impugned judgment and order dated 2nd July, 2004 passed by the Commercial Taxes Tribunal, Bihar, Patna insofar as the Tribunal has confirmed the imposition of 300 percent penalty u/s 20(1)(a) of the Finance Act in respect of the Petitioner is confirmed. The Petitioner will pay cost of Rs. 10,000/- (Ten thousand) in each petition.

Birendra Prasad Verma, J.

14. I agree.

