(2014) 03 MP CK 0040

In the Madhya Pradesh High Court

Case No : Writ Petition No. 4718 of 2011

M/s. Gail India Ltd. APPELLANT

Vs

State of M.P. and Others RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Madhya Pradesh Value Added Tax Act, 2002 — Section 2(h) 2(j) 2(v) 2(v)(iii) 20

Citation : (2014) 44 GST 714 : (2014) 72 VST 161

Hon'ble Judges : S.K. Gangele, J;D.K. Paliwal, J

Bench : Division Bench

Advocate : G.N. Purohit and Mr. Prashant Sharma, for the Appellant; M.P.S. Raghuvanshi, Additional Advocate General for State, for the Respondent

Judgement

S.K. Gangele, J.—The petitioner has filed this petition against the orders dt. 25.5.2011 (Annexure P/1) and dt. 25.5.2011 (Annexure P/2). By the aforesaid orders, the authority imposed tax liability of Rs. 16,04,66,104/- against the petitioner. The question for consideration before the court is that what is the sale price in accordance with the provisions of Central Sales Tax Act and M.P. VAT Act, 2002 (hereinafter referred to the VAT Act.)

2. The petitioner company is a public limited company listed in the Stock Exchange. It is a public sector undertaking owned and controlled by the Union of India. The petitioner is engaged in the business of procuring and selling natural gas through its pipelines and also processing natural gas to manufacture liquefied petroleum gas (LPG) and other liquid hydrocarbons at its factory Vijaypur. Petitioner also sells LPG to Oil Marketing Companies (IOCL, BPCL and HPCL), Central Public Sector Undertakings. The price of petroleum and natural gas is controlled by the Ministry of Petroleum and Natural Gas (MOP & NG). The regulation and development of petroleum and petroleum products is the subject matter of Union Government under Entry No. 53 List-I of the 7th Schedule. Public Sector undertakings sale LPG to public on subsidized rates. Prior to 1.4.2002 the subsidy was allowed by Union of India through Oil Pool Account. It

was not a part of the sale price and was not a subject to State taxation.

3. From 1.4.2002 new pricing system of LPG and kerosene was introduced and the job of regulating and controlling the price of LPG and kerosene was assigned to Petroleum Planning and Analysis Cell (PPAC) attached to the Ministry of Petroleum and Natural Gas, Government of India vide gazette notification dt. 30.3.2002.

4. PPAC discharges following functions:--

a) Administration of subsidy on PDS Kerosene and domestic LPG and freight subsidy for far-flung areas.

b) Maintenance of information data bank and communication system to deal with emergencies and unforeseen situations.

c) Analyzing the trends in the international oil market and domestic prices.

d) Forecasting and evaluation of petroleum import and export trends.

5. It was also decided by the Ministry that the price of the LPG would be provisional and it would be subject to the provisions of the scheme to be put in place by the government, hence, the provisional price of LPG was subject to revision on the basis of prices fixed by the PPAC. In accordance with the scheme of fixation of price of LPG by the Union of India, the manufacturing companies raise provisional bills for supply of LPG to OMCs communicated by IOC, nodal agency for provisional price and PPAC determine final price on quarterly basis and the price discount used to be made on quarterly basis. Under the aforesaid scheme, credit or debit notes were issued by the petitioner in favour of Oil Manufacturing Companies. The petitioner accordingly revised its liability of tax reducing the turn over as per the final price. After fixing the price in accordance with credit or debit note, the petitioner used to fix its tax liability calculating the operative price in respect of VAT Tax as well as Central Sales Tax.

6. Under the scheme, the petitioner is not at all at liberty to fix the price. The Petroleum Ministry and other agencies fix the price of the gas. The petitioner used to get information about the price at the end of quarter after taking into consideration foreign crude price. The company at the time of supply of LPG to the oil companies issue provisional invoice and after receiving information about quarterly price, the company issue final bill or invoice by issuing credit or debit note in accordance with fluctuation in price as per the directives of PPAC. The directions issued by the PPAC in this regard are binding on the petitioner seller as well as the purchasers. The taxing authority in the impugned order fixed the sale price of LPG of the petitioner on the basis of provisional invoice. The authority has held that subsequent credit or debit notes could not be taken into consideration for the purpose of fixation of price in accordance with the provisions of Central Sales Tax Act and VAT Act because the subsequent credit notes in the form of discount would not cover under the definition of discount mentioned in VAT Act. The authority also held that the petitioner had received

input tax rebate on the basis of initial invoice, hence, it could not get the benefit of subsequent credit notes.

7. The period of dispute in this petition is of calender year 1.4.2008 to 31.3.2009. The authority in the impugned order observed that the petitioner sold LPG to different oil marketing companies through sale invoices and in the aforesaid invoices, the provisional bills have been mentioned. Those bills were not finalised up to certain period and subsequently on the basis of credit notes, the sale price was revised and the petitioner fixed the tax liability on the basis of aforesaid sale price.

8. Section 2(v) of the VAT Act prescribes sale price, which is as under:--

Sec. 2(v) "Sale price" means the amount or any other consideration payable to a dealer as valuable consideration for the sale of any goods less any sum allowed as discount according to ordinary trade practice but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

Explanation-(i) Where goods are sold on hire purchase or any system of payment by installments, the sale price of such goods shall be exclusive of insurance charges, interest and hire charges and such other charges as may be prescribed.

(ii) Where goods are sold by way of transfer of right to use such goods, the sale price thereof shall be the amount of valuable consideration received or receivable by the transferor for such transfer:

(iii) Discount at the time of sale as evident from the invoice shall be excluded from the sale price but any ex post facto grant of discounts or incentives or rebates or rewards and the like shall not be excluded;

(iv) The amount of valuable consideration paid or payable to a dealer for sale of drugs and medicines specified in entry 10 of part III of Schedule II shall be the maximum retail price printed on the package containing the drugs and medicines, for the purposes of levy of tax u/s 9.

9. In accordance with the aforesaid provisions, the sale price means the amount or any other consideration payable to a dealer as valuable consideration for the sale of any goods less any sum allowed as discount according to ordinary trade practice. In the aforesaid section, it has also been mentioned that the discount at the time of sale shall be excluded from the sale price which must be evident from the invoice.

10. The taxing authority did not consider the pricing mechanism of LPG. It has simply considered the fact that in accordance with the definition of Section 2(v) of the VAT Act, the sale price means a consideration payable to a dealer as valuable consideration for the sale of any goods. Because the petitioner issued provisional bills at the time of sale of LPG to Oil Marketing Companies, hence, the

sale price would be the price which was fixed by the petitioner in provisional bills and the petitioner is liable to pay tax accordingly. The petitioner is not eligible to make deductions in the provisional bills on the basis of credit note, which was received by the petitioner subsequently on the basis of fixation of price or instructions by PPAC. The aforesaid credit note could also not be treated as discount as mentioned in Section 2(v)(iii) of VAT Act.

11. Similar is the position in regard to Central Sales Tax Act, Section 2(h) of the aforesaid Act defines sale price which is as under:--

Sec. 2(h) Sale price means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

12. Andhra Pradesh High Court in The State of Andhra Pradesh Vs. T.V. Sundaram Iyengar and Sons Ltd., has held as under in regard to discount:--

The assessee''s contention was that for allowing the discount as a deduction from out of the turnover, it was not necessary that the discount should be allowed as and when each bill is made out and that even where the discount is allowed at the end of year when the accounts are made out (at the end of the year) according to the normal trade practice. The Supreme Court has considered an identical rule in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Motor Industries Co., Ernakulam, . The Supreme Court was considering rule 9(1) of the Kerala General Sales Tax Rules, 1963, which corresponds to rule 6(a). The Supreme Court held that ordinarily any concession shown in the price of goods for any commercial reason would be a trade discount which can legitimately be claimed as a deduction from the turnover under clause (a) of rule 9 of the Kerala General Sales Tax Rules, 1963. It was observed that the fact that the discount was not allowed at the time of sale, but on a later date, at the end of the month, did not make it any the less a trade discount. In our opinion, the principle is the same where the discount is paid at the end of the year as well. Following the said decision of the Supreme Court, we must hold that the Tribunal was right in holding that the amount paid to the stockists as discount at the end of the year, on making out of the accounts to the normal trade practice, was a permissible deduction from the turnover of the assessee.

13. Same principle has been laid down by the High Court of Karnataka in Belgaum Structural Engineering Pvt. Limited Vs. Additional Commissioner of Commercial Taxes, Belgaum Zone, where the court has held as under:--

A close look at the definition reproduced above would reveal that trade discount allowed by the dealer does not represent the price of the goods sold. Under rule 6(1)(b) the total amount paid or payable to the dealer as the consideration for the sale is to be taken as the taxable turnover. A combined reading of the definition of "taxable turnover" with rule 6(1)(b) leaves no manner of doubt that whatever prices were received by the dealer for the sale of goods would go towards the taxable turnover and the trade discount/cash discount given by the dealer to the purchasing dealer and not received by him, shall not be includable in the taxable turnover. The revisional authority was not justified in including the trade discount amount as the turnover for the purpose of section 6(1)(b) of the Act. Nothing can be treated as turnover which does not represent either sale price or the purchase price. The sale price or the purchase price is nothing but the price paid for goods while purchasing or selling. After invoicing the price of the goods allowing the trade discount, the balance amount is the price received of the goods sold and not the amount before deduction and therefore the trade discount/cash discount cannot be treated as total turnover at all. If the amount of Rs. 3,47,685 which was given as discount is deducted then taxable turnover comes to Rs. 8,47,685 which was given as discount is deducted then taxable turnover comes to Rs. 8,68,908 which would be less than Rs. 10,00,000 and therefore turnover tax would not be leviable. It is not disputed that the turnover tax is leviable in case in case the total taxable turnover is Rs. 10,00,000 or above.

14. Hon''ble Supreme Court in IFB Industries Ltd. Vs. State of Kerala, has held as under:--

21. In Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam Vs. Advani Oorlikon (P) Ltd., , this Court pointed out that cash discounts and trade discounts are wholly distinct and separate concepts and are not to be confused with one another. Advani Oorlikon was a case under the Central Sales Tax Act and section 2(h) of the Act defined the expression ''sale price'' to mean the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount...". It is to be noted that though the Central Sales Tax Act mentioned only cash discount as being deductible from sale price, this Court nevertheless held that any trade discount must also be similarly deducted for determining sale price of goods.

22. In paragraphs 5 and 6 of the judgment the Court observed and held as follows:--

5. At the outset, it is appropriate that we set forth the two relevant definitions contained in the Central Sales Tax Act. Section 2(j) defines "turnover" to mean "the aggregate of the sale prices received and receivable by him (the dealer) in respect of sales of any goods in the course of interstate trade or commerce...". And Section 2(h) of the Act defines the expression "sale price" to mean "the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade...". It is true that a deduction on account of cash discount is alone specifically contemplated from the sale consideration in the definition of "sale price" by Section 2(h), and there is no doubt that cash discount cannot be confused with trade discount. The two concepts are wholly distinct and separate.

Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer shows the catalogue price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount reliable. Orient Paper Mills Ltd. Vs. State of Orissa, .

6. Under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the assessee. In a case where trade discount is allowed on the catalogue price, the sale price is the amount determined after deducting the trade discount. The trade discount does not enter into the composition of the sale price, but exists apart from and outside it and prior to it. It is immaterial that the definition of "sale price" in Section 2(h) of the Act does not expressly provide for the deduction of trade discount from the sale price. Indeed, having regard to the circumstance that the sale price is arrived at after deducting the trade discount, no question arises of deducting from the sale price any sum by way of trade discount.

23. The decision of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Motor Industries Co., Ernakulam, , is on rule 9(a) of the Kerala General Sales Tax Rules and the discount admissible to exemption under that provision. It may, however, be clarified that in terms of the rule, as it stood at that time, exemption was allowable on trade discount given not only in accordance with the regular practice in the trade but also in accordance with the terms of the contract or agreement entered into a particular case.

15. In the present case, the provisional invoice price and final price both are controlled by PPAC. The petitioner has no liberty to fix price. The change in sell price is due to the directions and fixation of price by PPAC because the domestic LPG is being sold to a consumer on a subsidized price and shortfall has been made good by the manufacturing companies and Oil Marketing Companies on sharing basis as directed by MOP and NG and also partly from the contribution of Central Government through issue of Oil Bonds. Hence in our opinion, the sale price of LPG in the case of the petitioner would be the price fixed by the petitioner after deduction in primary invoice on the basis of credit notes issued subsequently because that was the price, which was released by the petitioner effectively and fixed under the price fixation mechanism. The authority committed an error of law in disallowing the deductions from total turnover on the basis of credit notes issued to Oil Marketing Companies which had resulted

reduction in the turn over and liability of tax of the petitioner.

16. The respondents have also raised a preliminary objection regard to maintainability of writ petition in view of alternative remedy in accordance with Section 46 of VAT Act and also in accordance with provisions of Central Sales Tax Act.

17. The question involved in this writ petition is in regard to interpretation of sale price in accordance with the provisions of VAT ACT and Central Sales Tax Act.

18. Hon''ble Supreme Court in Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, considered the same situation and held as under:--

11. We are of opinion that the High Court should have examined the merits of the case instead of dismissing the writ petition in limine in the manner it has done. The order passed by the Commissioner of Sales Tax was clearly binding on the assessing authority u/s 42B(2) and although technically it would have been open to the appellants to urge their contentions before the appellate authority namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed a well considered order in the exercise of his statutory jurisdiction under Sub-section (1) of Section 42B of the Act holding that 21 varieties of the compressed woollen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. In such circumstances we consider that the High Court ought to have considered and pronounced upon the merits of the contentions raised by the parties and the summary dismissal of the writ petition was not justified. In such a situation, although we would have, ordinarily, set aside the judgment of the High Court and remitted the case to that court for fresh disposal, we consider that in the present case it would be in the interests of both sides to have the matter finally decided by this Court at the present stage itself especially since we have had the benefit of elaborate and learned arguments addressed by the counsel appearing on both sides.

19. Hon''ble Supreme Court further in State of Tripura v. Manoranjan Chakraborty reported in : (2001) 10 SCC 740 considered the availability of alternative remedy in the matter of sales tax and held as under:--

3. As we see it, the point in issue is no longer res integra. This Court in Gujrat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad dealing with an analogous provision, where discretion to waive pre-deposit was limited only to the extent of 25 per cent of the tax, was upheld by this Court. To the same effect is the decision of this Court in Shyam Kishore v. Municipal Corpn. of Delhi. 4. For the reasons contained in the said decisions, we hold that the impugned provisions are valid. It is, of course, clear that if gross injustice is done and it can be shown that for good reason the court should interfere, then

notwithstanding the alternative remedy which may be available by way of an appeal u/s 20 or revision u/s 21, a writ court can in an appropriate case exercise its jurisdiction to do substantive justice. Normally of course the provisions of the Act would have to be complied with, but the availability of the writ jurisdiction should dispel any doubt which a citizen has against a high handed or palpable illegal order which may be passed by the assessing authority.

20. Hon''ble Supreme Court in CST v. Amara Raja Batteries Ltd. reported in (2009) 8 SCC 209 has also considered the availability of alternative remedy and held as under:--

30. Mr Venkatanarayanan also is not correct in contending that in a situation of this nature, the High Court should not have entertained the writ applications directly from the orders of assessment.

31. As the Tribunal had already expressed its view in the matter, it has rightly been contended that appeal to the appellate authority as also the Tribunal would have been an idle formality.

21. Hence, in our opinion, the objections raised by the respondents in regard to maintainability of writ petition are not sustainable. Consequently, the writ petition of the petitioner is allowed. Impugned orders dt. 25.5.2011 (Annexure P/1) and dt. 25.5.2011 (Annexure P/2) are hereby quashed. No order as to costs.