(2004) 02 PAT CK 0053

In the Patna High Court

Case No : CWJC Nos. 4959, 5165, 5527 and 5528 of 2003

Nagendra Prasad APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 04-02-2004

Acts Referred:

Citation : (2004) 02 PAT CK 0053

Judgement

Nagendra Rai, J.—The petitioner in all the four cases is one and the same and the points involved in all the cases being also the same, they have been heard together and are being disposed of by this common judgment.

2. The petitioner is engaged in the business of manufacture and sale of country liquor. The matter relates to the assessment under the provisions of the Bihar Finance Act (hereinafter referred to as the Act) for the two assessment years, i.e. 1999-2000 and 2000-2001. He has challenged the order dated 25.2.2003 passed in all the four cases which has been annexed as Annexure-7 to all the writ applications whereby the Joint Commissioner of Commercial Taxes (Admn.), Patna Division, Patna in exercise of power u/s 46(4) of the Act while remanding the matter to the assessing authority has observed that the excise duty is component of sale price and the sale price cannot be segregated into different components but discount is not permissible or allowable on the excise duty, a component of the sale price.

3. The necessary facts for disposal of the aforesaid writ applications are that the petitioner has been granted licence to manufacture and sale country liquor at places Buxar, Ara, Sasaram, Mohania, Bikramganj & Bihia. For the relevant assessment years, he filed the returns showing total turn over and paid the taxes under the provisions of the Act. The assessing authority made assessment u/s 17(3) of the Act by order dated 18.11.2000 in CWJC Nos. 4959 and 5165 of 2003 and by order dated 14.6.2002 and 10.4.2002 in CWJC Nos. 5527 and 5528 of 2003 respectively. The assessing authority did not allow the claim of cash discount with reference to excise duty being a part of the sale price and other

claims and brought them to the tax under the provisions of the Act. Copies of the said orders have been annexed as Annexure-1 to the writ applications. The petitioner filed an appeal before the Joint Commissioner of Commercial Taxes (Appeals) who after having considered the question of discount with reference to the definition of sale price as defined u/s 2(u) of the Act read with Explanation II thereunder and remanded the matter to the assessing authority to consider the question afresh by order dated 15.3.2001 passed in all the cases. The said orders have been annexed as Annexure-2 to the writ applications. Thereafter the assessing authority considered the question and by order dated 31.7.2001, annexed as Annexure 3 to the writ applications, allowed the trade discount from the sale price as claimed by the petitioner.

4. On 5.6.2002, the Commissioner of Excise, Govt. of Bihar, Patna issued an instruction to all the assessing officers to disallow the claim of discount on licence fee and excise duty as claimed by the persons dealing in country liquor and spiced country liquor and in case discount has been allowed, immediate steps should be taken to file revision before him u/s 46(4) of the Act. The said direction of the Commissioner of Excise, Govt. of Bihar was challenged by the petitioner by filing writ application being CWJC No. 10949 of 2002 which was disposed of on 27.9.2002 and this Court quashed the aforesaid notification on the ground that the Commissioner is not authorised under the provisions of the Act to issue any direction to the assessing authority in the matter of assessment proceedings and the notices issued in pursuance of that were also quashed.

5. on 29.11.2002 the notices in all the four cases were issued to the petitioner by the Joint Commissioner of Commercial Taxes (Admn.), Patna Division, Patna u/s 46(4) of the Act to show cause as to why the legality and propriety of the assessment orders which were passed without verifying the information received from the excise department and without making any inquiry with regard to legality and propriety of the statements be not examined and adjudged. A copy of the said notice has been annexed as Annexure 4 to the writ applications. The petitioner challenged the aforesaid notice by filing four writ applications being CWJC Nos. 14294, 14295, 14298 and 14299, all of 2002. This Court by order dated 20.12.2002 did not interfere with at that stage and directed the petitioner to appear and file a show cause. Thereafter, the authority will determine the question in accordance with law. Thereafter, the petitioner filed show cause (Annexure-6 series to the writ applications) and subsequently, the impugned order has been passed whereby the matter has been remanded after giving the finding that the cash discount is not allowable with regard to excise components of the sale price as defined under the Act.

6. Dr. Devi Pal appearing for the petitioner submitted two points. Firstly he submitted that u/s 46(4) of the Act, the order passed by the subordinate authority can be revised only to consider the legality and propriety of the order and the authority cannot act as an appellate forum in disguise. Once the assessing authority having considered the matter has allowed the claim, the

interference by the revisional authority u/s 46(4) of the Act was not permissible as no question of legality and propriety was involved in the matter. Secondly, he submitted that under the provisions of the Bihar Excise Act read with Rules framed u/s 90 of the Act, the excise duty is paid by the purchaser and not by the petitioner engaged in manufacturing country liquor, the same is not a part of the sale price and as such no tax is leviable with regard to excise duty paid. In support of the aforesaid submission, he relied upon the decisions of the Apex Court in the Mcdowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, and McDowell and Co. Ltd. Vs. Commercial Tax Officer, and a division bench judgment of this Court in the case of Ramjee Prasad Sahu and Others Vs. Union of India (UOI) and Others . He further submitted that even if the excise duty is treated as a component of the sale price u/s 2(u) of the Act, excise component cannot be segregated from the sale price and as such the trade discount is allowable with regard to entire sale price and not only with regard to price of the country liquor.

7. Learned counsel appearing for the State on the other hand submitted that Section 46(4) of the Act vests power under the authority to consider the question as to whether the order passed by the subordinate authority is legal and proper or not. Non consideration of the relevant materials or allowing the claim contrary to law is a question that can be looked into by the authority in exercise of power u/s 46(4) of the Act. He further submitted no doubt the excise duty is payable by the purchaser under the relevant provision but excise duty is leviable on the goods manufactured or produced and it is payable by the manufacturer or the producer. The only fact that the excise duty is paid by the purchaser will not exclude it from the sale price. The excise duty is also a component of the sale price because that is payable by the producer as a consideration for the sale of the goods. He further submitted that no doubt, the trade discount is permissible with regard to sale price and the sale price cannot be segregated but trade discount claim must be valid and reasonable one and no dealer can be allowed to indulge in tax evasion in the garb of trade discount. In the present case if the claim of trade discount as made by the petitioner is allowed, then he would be selling the country liquor for a price lesser than the profit available to him in terms of the price fixed by the department and as such trade discount is nothing but a device to tax evasion.

8. Section 46 of the Act contains a provision with regard to revision. Sub-section (4) of Section 46 vests power under the Commissioner, which power has been vested to the Joint Commissioner under the notification, to suo motu call for the records of any proceeding in which order has been passed by any authority appointed u/s 9, for the purpose of satisfying himself as to the legality or propriety of such order and after examining the record and making such enquiry to pass necessary order as he thinks proper. According to Sub-section (5) of Section 46, an order has to be passed after giving a reasonable opportunity of hearing to affected person. Sub-section (4) of Section 46 of the Act runs as follow :

"(4) The Commissioner may, on his own motion call for and examine the records of any proceeding in which any order has been passed by any other authority appointed u/s 9, for the purpose of satisfying himself as to the legality or propriety of such order and may, after examining the record and making or causing to be made such enquiry as he may deem necessary, pass such order as he thinks proper."

9. u/s 9 of the Act, the State Government has been empowered to appoint the authorities to carry out the purposes of the Act and the aforesaid authorities are vested with the power to pass order with regard to assessment and other orders. With regard to the same, suo motu power has been vested in the Joint Commissioner.

10. Power vested u/s 46(4) of the Act is a supervisory power vested in the Commissioner to see that the Subordinate authorities are discharging the functions in accordance with law. The said power cannot be equated with a power of appeal. The Commissioner has to see that the order is legal and proper. In other words, the order is not illegal and improper. Such power can be exercised by the authority when there is a manifest error on the point of law or a glaring defect in the procedure. It is neither practicable nor possible to give all the situations where such power has to be exercised, in other words, the circumstances under which the power can be exercised cannot be put into straight jacket formula. However, whenever the Commissioner finds that the order is not legal in the sense that the statutory provisions have either been overlooked or wrongly interpreted or mistake has been committed with regard to procedural aspect resulting into serious error of law or the authorities have overlooked the material evidence or has relied upon certain irrelevant materials or there is a breach of the principles of natural justice, he can interfere with the orders passed by the Subordinate authority in exercise of power u/s 46(4) of the Act.

11. In the present case, the Joint Commissioner decided to exercise the power u/s 46(4) of the Act on the ground that the relevant statements from the excise department were not considered and the claim of discount has been allowed contrary to legal provision. Such grounds are valid grounds for exercising power u/s 46(4) of the Act as such the submission advanced on behalf of the petitioner that the order is vitiated on the ground that Section 46(4) of the Act was not attracted is devoid of any substance.

12. To decide the other submissions raised on behalf of the petitioner it is necessary to refer to two provisions of the Act which have a bearing on the subject. One is the definition of the gross turn over as defined u/s 2(j) of the Act and the other is the definition of sale price as defined u/s 2(u) of the Act. The said two definitions are as follows :

2(j) Grass turnover,--

(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 and 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);

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

Explanation I.--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."

13. According to the definition of sale price, the amount payable to a dealer as valuable consideration in respect of sale or supply of goods is a sale price. Explanation II says inter alia that the cash discount shall not be part of the sale price. Gross turnover means for the purposes of sale tax aggregate of sale prices received or receivable in respect of sale of goods.

14. The question for consideration in this case is as to what is the sale price with regard to sale of excise commodity whether it includes the excise duty also as a component of sale price.

15. Taxing event in the case of excise duty is the manufacture, of goods and the liability to pay excise duty is on the manufacture itself. The liability is ultimately passed to the consumer and the collection of the excise duty can also be deferred to a later stage as a measure of convenience or expediency or excise duty may be paid under the contract or agreement by a person other than manufacturer but in all such situations, it is the obligation of the manufacturer or producer which is being met by payment of excise duty, Thus, the payment of excise duty either by the manufacturer or producer or by the purchaser will not make any difference as the purchaser is doing nothing but meeting the obligation of the manufacturer. The mode of payment of excise duty will not be a decisive factor to decide the question as to the sale price of the excise commodity

(country liquor).

16. This question was considered by the Supreme Court in the first Mc. Dowell''s case (supra). In the said case, the question for consideration was the provisions of the Andhra Pradesh General Sales Tax Act and the Andhra Pradesh Excise Act. In terms of the provisions of the Act, the excise duty or the countervailing duty was paid directly to the excise authorities of the State in case of Indian Liquor by the buyers before removing it from the distillery or the bonded warehouse and the same was not included in the sale bills issued by the manufacturer or the owner of the bonded warehouse. Dealing with the said matter, the Apex Court held that the taxable event in the case of duties of excise is a manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. After considering the definition of turn over and sale it was held that as the excise and countervailing duties did not go into the common tills of the manufacturer and did not become a part of their circulating capital the same could not be included in the turnover as the excise duty and countervailing was not charged by them but was charged by and paid directly to the excise authorities by the buyers of the liquors. In other words it was held in that case that the excise duty as well as countervailing did not form part of the consideration for sale and as such it could not be included in the turn over for the purpose of assessment of tax under the Act.

17. Thereafter, it appears that the Rules framed under the Andhra Pradesh Excise Act was amended to the effect that "no spirit or liquor manufactured or stored shall be removed unless the excise duty specified under the rule has been paid by a holder of D-2 licence before such removal and on payment of the excise duty by the holder of D-2 licence a distillery pass for the removal of spirit fit for human consumption may be granted in favour of persons as prescribed therein. The Apex Court in the second Mc. Dowell and Co. Ltd., case (supra) held that the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage as a measure of convenience or expediency. With regard to view taken in the first Mc. Dowell, case (supra) that intending purchasers of the Indian Liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty it was held that this proposition was too broadly stated. The "duty" was primarily a burden which the manufacturer had to bear and even if the purchasers paid the same under the Distillery Rules, the provisions were merely enabling and did not give rise to any legal responsibility or obligation for meeting the burden.

18. The sale price in terms of the definition is the amount payable to a dealer as a valuable consideration. Thus, the total consideration paid by the buyer is the sale price. The excise duty is the liability of the manufacturer and the payment by a purchaser is only as a measure of convenience or expediency as by making payment the purchaser is only meeting the legal liability of the manufacturer as such when the manufacturer sells the goods he passes the excise duty to the customer also. Under the relevant rules or agreement, the legal liability for

payment of excise duty is satisfied by the purchaser by direct payment to the excise authorities or the State exchequer.

19. In the case of sale title passes in the goods for consideration. As what forms consideration was considered in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, , wherein it was held as follows :

"The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer."

20. The Apex Court in the second Mc. Dowell case relying upon the aforesaid provision held that the position is not different when under a prior agreement, the legal liability of the manufacturer-dealer for payment of excise duty is satisfied by the purchaser by direct payment to the excise authorities or to the State exchequer. It further held that we are, therefore, clearly of the opinion that excise duty though paid by the purchaser to meet the liability of the appellant is a part of the consideration for the sale and is includable in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer.

21. Thus, in view of the settled law, the excise duty which is the liability of the manufacturer though paid by the purchaser is a part of the consideration money and thus is part of the sale price as defined under the Act. According to definition of the gross turnover, the relevant provision is aggregate of sale prices received and receivable by a dealer in respect of sale of goods is the gross turnover. The excise duty, as stated above, being the part of the consideration paid to the manufacturer though under the relevant rules, as stated above, is deposited by the purchaser, is thus included in the gross turnover.

22. Thus, it is held that the excise duty is component of the sale price and as such it is included in the definition of gross turn over. Thus, the submission advanced on behalf of the counsel appearing for the petitioner that the excise duty is not part of the sale price and as such cannot be included in the turn over and consequently no tax can be levied with regard to excise duty is without any substance.

23. Under the definition of the sale price, cash discount is not the sale price. What is given by the petitioner is a trade discount. There is no dispute between the parties that though Explanation II of the definition of sale price speaks of only cash, discount not being included in the sale price, the trade discount is also permissible and the same cannot form part of the sale price. The Apex Court in the case of the Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. Advani Coorlikon (P.) Ltd., reported in AIR 1980 SC 609, dealing with the similar definition of the Central Sales Tax Act, held that though the cash

discount is not specially mentioned in the definition, the same is permissible in law and trade discount has been excluded from the sale price. It was held in paragraph 5 as follows :

"It is true that 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 mount which is entered in the books of the respective parties as the amount realisable."

24. The trade discount is claimed with regard to sale price and the said discount cannot be a part of the sale price for being included in the gross turnover. The sale price cannot be segregated component wise, namely, excise duty, price claimed by the manufacturer for the sale of excise commodity to decide as to whether the cash discount can be allowed with regard to one, component or the other. Thus, the Joint Commissioner of Commercial Taxes has rightly held that the sale price cannot be segregated into componentwise. After having held so he was not justified in holding that trade discount is not permissible with regard to excise duty. Once the excise duty becomes part of the sale price, the trade discount is also permissible with regard to the same.

25. The very purpose of trade discount is to encourage the business. It enables the dealers to sell the goods and yet make a reasonable margin of profit after taking into account his business expense etc. Thus, when a claim for trade discount is made, it has the question to be considered is as to whether the trade discount is bona fide or reasonable one or it is a device to tax evasion.

26. Learned counsel appearing for the State drew our attention to the averments made in the counter affidavit that if the claim of trade discount as made by the petitioner is accepted, then he would be incurring loss and no businessman would indulge himself in the business of manufacturing excise commodity to incur loss. In other words, he submitted that the claim of trade discount by the petitioner is unreasonable and a device to tax evasion.

27. As the matter has been remanded to the assessing authority, we are of the view that it would not be proper to express final opinion with regard to the said matter. The authorities should consider the said matter having regard to factual aspects. However, we would like to make it clear that the authority will consider

the question of discount in terms of the observations made above. We have only clarified the legal position that once the excise duty becomes component/part of the sale price, then trade discount is permissible with regard to sale price and it cannot be confined to one or the other component of the sale price. It depends upon the facts of each case as to whether the trade discount is to be allowed or not and if allowed to what extent.

28. In the result, all the four writ applications are disposed of with the direction to the assessing authority to consider the question in the light of the observations made above.

R.S. Garg, J.

29. I agree.

