

(1973) 12 PAT CK 0004
In the Patna High Court
Case No : Taxation Case No. 18 of 1969

New Gobindpur Coal Co. (P.) Ltd.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 14-12-1973

Acts Referred:

Bihar Sales Tax Act, 1959 — Section 33(1)
Coal Mines (Conservation, Safety and Development) Act, 1952 — Section 8
Coal Mines Labour Welfare Fund Act, 1947 — Section 3

Citation : (1974) 7 PLJR 363 : (1974) 33 STC 530

Hon'ble Judges : Nand Lall Untwalia, C.J.; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : Tarkeshwar Prasad, Rameshwar Prasad and Manindra Nath Verma, for the Appellant; Shreenath Singh, Standing Counsel and Akhileshwar Prasad Singh and Guru Sharan Sharma, for the Respondent

Judgement

Nand Lall Untwalia, C.J.—This is a reference u/s 33(1) of the Bihar Sales Tax Act, 1959 (hereinafter called the "Act") by the Commercial Taxes Tribunal, Bihar, Patna, on the following question of law:

Whether the amount of Rs. 54,305 realised by the applicant as excise, welfare and rescue cesses on despatches of coal by road has been correctly taxed by the sales tax authorities?

2. The short facts which are necessary to be stated for the disposal of this reference are these: The assessee-company is a coal mine-owner and carries on business of raising and selling coal. It appears that coal was despatched by rail as also by road. The dealer despatched 24,797 tons of coal by road. It collected excise, welfare and rescue cesses in accordance with the various Acts and the Rules to be referred to hereinafter. The total amount came to Rs. 54,305. The assessee did not treat this amount as a part of the sale price charged from its customers and, therefore, did not include it in its turnover. The assessing officer included this amount in its gross turnover stating that "as this amount forms part

of the sale proceeds the gross turnover will have to be added by the total amount received on this account". Before the appellate authority the stand taken on behalf of the assessee-company, as evidenced by the grounds of appeal, was that the said amount of cesses did not form part of the value of the coal but was levied on despatches and even on despatches by rail such cesses are realised from the customers and the amounts are not subjected to the provisions of the Act. The appellate authority overruled the objection of the assessee. It purported to follow a decision in *National Cement and Mines Industries v. State of Bihar* 1961 B.R. & L.J. 62. The appellate authority also took the view that the amount in question formed part of the sale price and was, therefore, chargeable to sales tax. The assessee went up in revision before the Tribunal and was overruled by it also. On being asked to state a case, the Tribunal did it and referred the question of law aforesaid to this court for determination.

3. There are three types of statutes and the rules framed thereunder in accordance with which the amounts which have been described as excise, welfare and rescue cesses in the order of the various authorities are levied and collected. In the Mines Act, 1952 (Central Act 35 of 1952), in the statute itself there is no provision for levy or collection of such cesses. But, Section 58 empowers the Central Government to make rules for the purposes of the Act, and specially clauses (r) to (w) empower the Central Government to make rules to require the establishment of Central rescue stations and provide for the levy and collection of a duty of excise on coke and coal produced in, and despatched from, mines. In exercise of the said power, the Central Government framed rules called the Coal Mines Rescue Rules, 1959. The imposition and recovery of excise duty has been provided for in Rule 13, Sub-rule (1), of which says:

Rule 13. Imposition and recovery of excise duty. -- (1) There shall be levied and collected on all coal and coke despatched by rail, road, sea or other means, from collieries or coke plants situated in the areas to which these rules apply, a duty of excise at the rate of 3 paise per ton.

It will be noticed from the scheme of the Rules aforesaid that, for the purpose of Central rescue stations, rescue station committees have been formed and to finance the work this impost has been levied. But, the levy and collection is on despatch of coal, and not on sale of coal. Despatch may be in pursuance of a completed sale or in course of a sale; but the levy distinctly is on the incidence of despatch. Under Sub-rule (2) (a) of Rule 13, the excise duty imposed under Sub-rule (1), when the coal is despatched by rail, is to be collected by the railway administration concerned by means of a surcharge on freight. It has been provided that such duty of excise shall be recovered, where the coal is despatched to any station in India, from the consignor, if the freight charges are being pre-paid at the forwarding station, or from the consignee, if the freight charges are collected at the destination of the consignment. Rule 13(2)(b) enjoins the railway administration to remit the amount to the Reserve Bank of India at Calcutta to the credit of the Central Government under a separate head,

namely, II -- Union Excise Duties -- Coal and Coke -- Excise duty levied and collected as rescue cess on despatches of coal and coke. Sub-rule (3) of Rule 13 provides for the manner of recovery of the impost from the owner of the mine, when the despatch of coal or coke is otherwise than by rail. Under Sub-rule (3) (c), an obligation has been cast on the mine-owner to desposit the impost in the Government treasury under a challan showing a separate head as in the case of railway. If the mine-owner does not pay, then the president of the committee has been authorised to recover the unpaid amount of the duty of excise in the same manner as laid down in Chapter IV of the Welfare Fund Rules for the recovery of duty of excise by the Commissioner, that is to say, more or less, as a land revenue. Rule 14 deals with payment, deposit and application of duty of excise collected in accordance with Coal Mines Rescue Rules. The fund has to be applied towards meeting the expenses of the committee and allied works.

4. The second impost is u/s 3 of the Coal Mines Labour Welfare Fund Act, 1947 (Central Act 32 of 1947), which runs as follows:

Sections. Imposition and collection of duty. -- (1) There shall be levied and collected as a cess for the purposes of this Act a duty of excise on all coal and coke despatched from the collieries in the territories to which this Act extends, at such rate not less than four annas and not more than eight annas per ton, as may from time to time be fixed by the Central Government by notification in the official Gazette:

Provided that the Central Government may, by notification in the official Gazette, exempt from liability to the duty any specified class or classes of coal or coke.

(2) The duty levied under Sub-section (1) shall, subject to and in accordance with the Rules made in this behalf, be collected by such agencies and in such manner as may be prescribed.

The preamble of this Act shows that the object of the Act is to make better provision for financing measures for promoting the welfare of labour employed in the coal-mining industry. In exercise of the power conferred by Section 10 of the Coal Mines Labour Welfare Fund Act, the Central Government has made rules called the Coal Mines Labour Welfare Fund Rules, 1949. As in the case of Rescue Rules, an advisory committee has been established for the purpose of the mines labour welfare. Similarly, a provision has been made for collection of the duty of excise imposed u/s 3 of Act 32 of 1947, in case of despatch of coal by rail, by the railway administration concerned by means of a surcharge on freight. The provisions of the two Rules are almost identical as would appear from Rule 27. Rule 27(1) (ii) says:

27. Recovery of excise duty. -- (1) The duty of excise imposed under Section 3 of the Act on coal and coke shall-

* * * *

(ii) When such coal or coke is despatched from any colliery in the State otherwise than by rail, be recovered from the owner of the colliery concerned and collected in the manner as provided in Chapter IV of these Rules.

Chapter IV prescribes the procedure for recovery of excise duty on coal and coke despatched otherwise than by rail. Every owner of a colliery has been made liable for payment of this impost.

5. A third impost is u/s 8 of the Coal Mines (Conservation and Safety) Act (Central Act 12 of 1952). This provides for imposition of such excise duty on all coal raised and despatched and on all coke manufactured and despatched from the collieries in India, as may be fixed from time to time by the Central Government by notification in the official Gazette. Section 17(2)(b) empowers the Central Government to make rules providing for the levy, collection and payment of the duties of excise. In exercise of the said power, the Central Government framed the Coal Mines (Conservation and Safety) Rules, 1954. It will be noticed from the provisions contained in Chapter V of these Rules that the procedure for levy and collection of excise duty is almost identical to the one provided for in the Coal Mines Labour Welfare Fund Rules. The object of the Coal Mines (Conservation and Safety) Act is to provide for the conservation of coal and make further provision for safety in coal mines. A board has been established u/s 4 of this Act to carry out its purposes.

6. It would thus be seen in all the three cases of levy of excise duty, which have been collectively described as excise, welfare and rescue cesses, that for specific purposes on despatches of coal or coke certain amount is levied and collected. Section 3(2) of the Coal Mines Labour Welfare Fund Act in express terms and the other provisions by necessary implication create agencies for collection of the various excise duties in question. When the despatches are by rail, collecting agency is the railway administration. The Act or the Rules do not fix any liability on a particular person at a particular stage. It simply provides that the railway administration is to collect this impost in some cases from the consignor and in some cases from the consignee and then pay it to the Central Government. If the consignee happens to be the purchaser of coal or coke, it is plain that the amount paid by him to the railway administration as a surcharge on the railway freight can never form part of the sale price within the meaning of Section 2(q) of the Act. The definition of "sale price" given in the said clause is:

2. Definitions. -- In this Act, unless there is anything repugnant in the subject or context, --

* * * *

(q) "sale price" means the amount payable to a dealer as valuable consideration in respect of the sale 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.

(2) 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.

If the amount of excise duty is paid by the consignor, namely, the mine-owner, to the railway administration by way of surcharge on the railway freight, then also, if such amount is separately charged from the customer, I am inclined to think, it will be quite legitimate to take the view that explanation (2) will exclude the amount from the sale price, treating it as a part of the railway freight. But, the better view to take is that it will not be a part of the railway freight within the meaning of explanation (2), but will be a separate charge altogether paid by the dealer to the railway administration for the purpose of despatch of the goods by rail. It will obviously be for the benefit of the customer. The burden of this impost ultimately will be on the customer; the dealer would be entitled to charge it from him not as a valuable consideration in respect of the sale of the goods, but as an impost paid to the railway administration in respect of the despatch of the goods.

7. In the case of despatch by rail, the collecting agency being the railway administration, whether the impost is paid by the consignor or the consignee, it is legitimate to take the view that the amount of excise duty or cess will not form part of the sale price. Does it stand to reason that, merely because, the despatch is by road, the amount paid by the dealer in the first instance and collected by him ultimately from his customer forms part of the sale price? To my mind the answer must be in the negative. Does the dealer realise the amount deposited by him in the Government treasury on account of excise duty and cess as part of the valuable consideration for the sale of the goods? Ordinarily and generally, whatever is expended or invested by the dealer in making the goods in a salable or deliverable state and realised by him from his customer will be treated as valuable consideration in respect of the sale of the goods and, therefore, would mean the sale price. But all sums spent by the dealer for the purpose of facilitating delivery or despatch of the goods to the customer would not necessarily form part of the sale price. If the dealer charges a consolidated amount for whatever he has done from his customer, then the whole amount charged by him may be treated as sale price either within the meaning of the main part of the definition or as being not possible to be excluded within the meaning of explanation (2). But, if something is charged separately, then one has to endeavour to find out as to on which side of the dividing line that charge can be put. As I have said above, ordinarily and generally, all that has been expended for putting the goods in a salable or deliverable state will fall on the side of the sale price. But, all that is done thereafter will not necessarily be a part of the sale price. The impost and collection of the amount in question is not on the incidence of sale, but divorced from it. I cannot persuade myself to take the view, as was argued on behalf of the State, that in case of despatches by rail

the amount might not form part of the sale price, specially when the impost is to be realised by the railway administration from the consignee, namely, the purchaser; but in case of despatches by road, it will be treated as excise duty imposed on the goods sold by the mine-owner. In my opinion, reading the scheme of the Acts and the Rules, which have brought about the levy of this impost, it is quite sound to say that the impost is on the incidence of despatch, whether it is by rail or by road, the ultimate burden is on the customer. The collecting agency is the railway administration in one case and the mine-owner in the other.

8. Recently, a Bench of this Court, of which I was a member, had to deal with a similar question in the case of Commissioner of Commercial Taxes Vs. Ashoka Marketing Limited, . On a consideration of almost identical definition of sale price in the Bihar Sales Tax Act, 1947, it was held that the railway freight paid in that case by the customer formed part and parcel of the price paid or payable by him to the dealer on account of cement supplied. The deciding factor is, whether the disputed amount forms part of the price of the goods, irrespective of the fact whether It is paid by the customer to the railway administration, or it is paid by the dealer in the first instance to somebody. In that connection, I had to refer to a decision of the Supreme Court in Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, , where, on the language of clause 16 of the contract, it was held that there was no obligation on the company to pay the freight and under the terms of the contract the price received by the company for sale of the goods was the invoice amount less the freight. In the instant case, it should be noticed that there is no finding by any of the authorities below that the dealer treated the amount as a part of the price or charged sales tax upon it. There is no finding that in some cases the dealer was realising the amount of excise, welfare and rescue cesses from its customers, and in some cases it was not. On the findings, the position seems to be that invariably the dealer was realising the amount from its customers on despatches of coal made by road. Therefore, by necessary implication, it can be safely inferred that the course of dealing between the parties was that the obligation to pay the amount was ultimately on the customer. I am, therefore, of the opinion that the sum paid by the dealer on account of excise, welfare and rescue cesses to the tune of Rs. 54,305, in accordance with the three rules aforesaid, and realised by it from its customers, was not a part of the valuable consideration in respect of the sale effected by it, but was something distinct and separate from it. The line of distinction may be thin, yet it is distinguishable and appreciable. I am clearly of the opinion that an impost of the kind in question on the despatch of coal cannot be treated as a part of the sale price, when it has been separately charged and realised by the dealer from its customers.

9. The Tribunal, in my opinion, was not correct in saying that all charges which are not permissible to be excluded within the meaning of explanation (2) to Section 2(q) of the Act should be and must be included within the sale price. In support of its view, it has relied upon a Bench decision of this Court in Dayabhai

Gokulbhai Patel v. The State of Bihar [1969] 10 S.T.C. 483 PAT. That was a case where the question for consideration was as to whether the excise duty imposed under the Central Excises and Salt Act, 1944, and in pursuance of the Rules framed thereunder could go to form a part of the sale price. The opinion expressed was that it was so. It was chiefly based upon Rule 19 of the relevant Rules quoted at page 491, which provided that "duty shall become chargeable as soon as the products have been cured and are in a fit state for sale or where manufacture precedes sale for manufacture...." The line of distinction which might appear to be blurred to some eyes is distinct and clear on a comparison of the provisions of the three Acts and the Rules with those of Rule 19 framed under the Central Excises and Salt Act, 1944. The excise duty imposed under Rule 19 is at a stage which is prior to placing the goods in a fit state for sale while the other is not so connected or integrated with the incidence of sale as to make it a part of the sale price.

10. For the reasons stated above, I answer the question referred to this court by the Commercial Taxes Tribunal in the negative, in favour of the assessee and against the revenue, and hold that the amount of Rs. 54,305 realised by the assessee as excise, welfare and rescue cesses on despatches of coal by road has not been correctly taxed by the sales tax authorities. The decision of the Tribunal affirming their decision is not correct in law. In the circumstances there will be no order as to costs.

N.P. Singh, J.

I agree.