

(1961) 07 KAR CK 0005

In the Karnataka High Court

Case No : Revision Petition No. C.T.R. 90 of 58-59, Writ Petition No. 123 of 1959

P.V. Beedies (Private) Ltd.

APPELLANT

Vs

The State of Mysore and Others

RESPONDENT

Date of Decision : 10-07-1961

Acts Referred:

Central Excise Act, 1944 — Section 12, 37, 6
Central Excise Rules, 1944 — Rule 140, 2 (15)

Citation : (1963) 14 STC 139

Hon'ble Judges : B.M. Kalagate, J;A.R. Somnath Iyer, J

Bench : Division Bench

Advocate : B.B. Shetty, for the Appellant; D.M. Chandrasekhar, Government Pleader, for the Respondent

Judgement

Somnath Iyer, J.—The petitioner is a company incorporated under the Companies Act manufacturing and dealing in beedies, possessing a

licensed private warehouse as defined by rule 2(xv) read with rule 140 of the Central Excise Rules, 1944, framed under the provisions of the

Central Excises and Salt Act, 1944. On 1st June, 1955, this company purchased 7,895 1/2 pounds of un manufactured tobacco for a sum of Rs.

15,650. On 2nd June, 1955, it purchased another 8,102 1/2 pounds of un manufactured tobacco for Rs. 16,060. Theses purchases were made by

the company from a dealer known as B. V. Baliga & Company. Theses quantities of tobacco purchased by the company were stored by it in its

licensed private warehouse, and when the purchases were made by it the excise duty payable in respect of those quantities of tobacco had not

been paid by the dealer from which the company purchased it. On 9th August, 1955, and 22nd August, 1955, the company, after obtaining the

necessary permission for that purpose, removed those quantities of tobacco along with others for the purpose of preparing manufactured tobacco, viz., beedies. At the time of the removal of the tobacco in that way, the company paid a sum of Rs. 10,111-7-6 as the excise duty payable in respect of those goods under the provisions of the Act.

2. For the assessment year 1955-56, the company's turnover was taxed by the Deputy Commercial Tax Officer under the provisions of the

Madras General Sales Tax Act. Then, the Assessing Officer did not include in the turnover of the company this sum of Rs. 10,111-7-6 as part of

the taxable turnover. This assessment was made on 15th January, 1957. Acting under the provisions of section 12(1) of the Act, the Commercial

Tax Officer, in the exercise of his revisional powers, revised the assessment and made an assessment on 8th October, 1957, in the course of which

he treated the excise duty amounting to Rs. 10,111-7-6 paid by the company as part of the taxable turnover. The company appealed to the

Deputy Commissioner of Commercial Taxes and the Sales Tax Appellate Tribunal and eventually to the Commissioner of Commercial Taxes,

without being able to obtain any relief from any one of them. This petition is accordingly directed against the order made by the Commercial Tax

Officer on 8th October, 1957, treating the excise duty paid by the company as part of its taxable turnover.

3. The contention urged in this writ petition is two-fold. The first is that the Commercial Tax Officer was not right in thinking that the excise duty

paid by the company in respect of the goods which it had purchased from Baliga & Co., was part of the purchase turnover of the company. The

second is that even assuming such excise duty to be part of the purchase turnover of the company, there has been excessive inclusion of such

excise duty in the company's taxable turnover by reason of the fact that the sum of Rs. 10,111-7-6 so added by the Commercial Tax Officer not

only represented the excise duty paid in respect of the tobacco purchased by the company from Baliga & Co., but also from others.

4. The first question therefore to be decided is whether the excise duty paid by the company to the Central Excise Authorities in respect of the

tobacco purchased by it from B. V. Baliga & Co., is, and can be regarded as, part of the purchase turnover of the company. An investigation into

this question involves a reference to the relevant provisions of the Central Excises and Salt Act, 1944, the Madras General Sales Tax Act and the Sale of Goods Act.

5. Section 3(1) of the Central Excises and Salt Act provides that duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India shall be levied and collected in such manner as may be prescribed. "Excisable goods" are defined by section 2(d) of that Act as meaning goods specified in the First Schedule as being subject to a duty of excise. Item 9 of the First Schedule to the Act specifies tobacco as one of such goods on which excise duty may be levied and collected.

The tobacco referred to in that item is of two varieties. The first is unmanufactured tobacco and the other is manufactured tobacco. Rule 2(ix) of the Central Excise Rules framed under sections 6 and 37 of the Central Excises and Salt Act defines "unmanufactured goods" as goods which are described in the First Schedule to the Act as unmanufactured or cured. Manufactured goods referred to in item 9 of Schedule I, consist of three classes of goods, viz., cigars or cheroots, cigarettes and biris. The biris referred to in this item are no other than those which are referred to as beedies in this part of the country.

6. It is not disputed that what was purchased by the company from Baliga & Co., on 1st June, 1955, and 2nd June, 1955, was unmanufactured tobacco within the meaning of that expression occurring in item 9 of Schedule I to the Central Excises and Salt Act. What the company purchased in that way was cured tobacco and was therefore cured unmanufactured tobacco. That being so, cured unmanufactured tobacco so purchased by the company from Baliga & Co. clearly constituted goods on which excise duty was payable u/s 3 of the Act.

7. The persons from whom excise duty recoverable in respect of excisable goods could be collected are enumerated in rule 7 of the Central Excise

Rules and that rule reads -

Every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated in, or under the authority of these rules, whether the

payment of such duty or duties is secured by bond or otherwise.

8. Baliga & Co. from whom the petitioner-company purchased the tobacco in this case was not the curer or the manufacturer of the tobacco

which it sold to the petitioner-company. Baliga & Co., it appears, had purchased this un manufactured tobacco from some dealer and was, when it

sold the tobacco to the petitioner-company, storing it in its own licensed warehouse. So, Baliga & Co., was, under rule 7 extracted above, liable

to pay the excise duty on the tobacco which it sold to the petitioner-company. After the petitioner-company purchased the tobacco from Baliga &

Co., it stored that tobacco in its own licensed warehouse. By storing the tobacco which it purchased in that way, the petitioner-company also

became liable to pay the excise duty in respect of the tobacco stored by it. So, even after the sale by Baliga & Co. to the petitioner-company, both

Baliga & Co. and the petitioner-company were both liable to pay the excise duty and although Baliga & Co. was also so liable to pay it, it was

paid only by the petitioner-company when it remove the tobacco from its licensed private warehouse to the place where it proposed to

manufacture beedies.

9. The question therefore is whether, if the excise duty was paid by the petitioner-company in that way, it can be said that what it paid to the

Central Excise Authorities represented part of the turnover of the company on which sales tax may be levied and collected under the Madras

General Sales Tax Act.

10. I now turn to the provisions of the Madras General Sales Tax Act. Section 2(i) of that Act defines ""turnover"". Section 3 which is the charging

section provides that every dealer shall pay for each year a tax on his total turnover for such year. Sub-section (4) of that section reads :-

For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be

prescribed.

11. The Madras General Sales Tax (Turnover and Assessment) Rules, 1939, are the rules which prescribe the manner in which the taxable

turnover shall be determined. Rule 4(2) of those rules directs that in the case of the un manufactured tobacco what is taxable is that amount for

which the goods were bought by the dealer. In other words, the taxable turnover

in the case of the sale of un manufactured tobacco is the purchase turnover of the buyer and not the sale turnover of the seller.

12. So, what has been directed by the Act and the rules is that where un manufactured tobacco is purchased, the price for which it is so purchased is the turnover which can be taxed under the provisions of the Act. The turnover of the company which was therefore taxable under the statutory provisions was the amount for which the tobacco was bought by the petitioner-company in this case.

13. It is stated in the invoices prepared when the company purchased the tobacco that the amount for which the company purchased tobacco from Baliga & Co., was Rs. 15,650 in the one case and Rs. 16,060 in the other. It is contended on behalf of the petitioner-company that these are the amounts for which the company bought the goods and that those amounts are the only amounts which can constitute the turnover in respect of the un manufactured tobacco which it purchased from Baliga & Co. On the contrary, what is contended by the learned Government Pleader is that the amount for which the company purchased the tobacco was not only the amount which is the aggregate of those sums of money which the company paid to Baliga & Co., but also Rs. 10,111-7-6 which represented the excise duty which was payable in respect of the goods purchased by the company from Baliga & Co. The aggregate of the cash paid to Baliga & Co., and the excise duty payable by the petitioner-company to the excise authorities was, according to the learned Government Pleader, the amount for which the goods were ""bought"" by the petitioner-company from Baliga & Co., within the meaning of that expression occurring in rule 4(2) of the Madras General Sales Tax (Turnover and Assessment) Rules.

14. The question, therefore, is whether the excise duty paid by the company was part of the price for the sale of the tobacco to it. A sale is defined by section 2(h) of the Madras General Sales Tax Act, and that definition reads :-
"Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade of business for cash or for deferred payment or other valuable consideration, and includes also transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge

15. The company's stand is that there was a sale to it for cash and that the cash for which there was a sale was the aggregate of the sums of Rs.

15,650 and Rs. 16,060 paid by it to the seller. If this submission is correct, it follows that the amount for which there was a sale in favour of the

company did not exceed the sum of Rs. 31,710 paid by the company to the seller in cash and there would be no justification for the view that to

that amount should be added the amount paid by way of excise duty by the company to the Central Excise Authorities.

16. Now, it is clear that whether the consideration paid is cash or is a deferred payment or some other valuable consideration, the sale is always

for a price paid by the buyer to the seller. Although the word "price" is not defined by the Sales Tax Act, it is defined by the Sale of Goods Act.

Section 2(10) of the Sale of Goods Act defines "price" as "money consideration for a sale of goods".

17. It is thus clear that before it can be said that the excise duty paid by the company constituted part of its taxable turnover, it should be

established that the duty so paid is part of the price for the sale. It is only then that the excise duty could be included in the turnover of the

company, since the turnover of a dealer is the aggregate of the amounts for which the goods are bought or sold.

18. Mr. Shetty appearing on behalf of the company has urged that the excise duty paid by the company in this case is no part of the price since,

according to him, the company paid the duty only in discharge of its own statutory liability imposed on it by rule 7 of the Central Excise Rules. The

learned Government Pleader however urges that part of the consideration for the sale was the acceptance by the company of the liability of Baliga

& Co., to pay the excise duty. He also submits that the excise duty should be regarded as the amount of a deferred payment within the meaning of

that expression occurring in section 2(h) of the Sales Tax Act.

19. If excisable goods are sold after the payment of duty, ordinarily, the duty so paid is part of the price. Before section 5 of the Madras General

Sales Tax Act was amended, the seller of unmanufactured tobacco was liable to pay sales tax on his sale turnover. Since the amount for which the

dealer sold his tobacco constituted the taxable turnover, and since it would ordinarily include the excise duty paid by him if he had paid it, the rule-

making authority, in order to relieve the dealer from payment of sales tax on such part of the turnover which represented the excise duty,

introduced into rule 5(1) of the Madras General Sales Tax (Turnover and Assessment) Rules, the following clause 5(1)(i) -

5(1) The tax or taxes u/s 3 or 5 or the notification or notifications u/s 6(1) shall be levied on the net turnover of a dealer. In determining the net

turnover the amounts specified in clauses (a) to (k) shall, subject to the conditions specified therein, be deducted from the gross turnover of a

dealer -

* * * *

(i) the excise duty, if any, paid by the dealer to the Central Government in respect of the goods sold by him.

20. But, by reason of the amendment of section 5 of the Sales Tax Act, the taxable turnover in the case of un manufactured tobacco become the

purchase turnover, and the first purchaser in the State become liable to pay it.

21. But, no provision for the deduction of the excise duty from such purchase turnover similar to rule 5(1)(i) was introduced into the rules after

section 5 of the Sales Tax Act was amended.

22. That is how the question whether the excise duty paid by the purchaser is part of his turnover arises in this case.

23. It seems to me that if a buyer purchased tobacco from a dealer when excise duty on such tobacco is chargeable, and there is no stipulation in

the contract of sale about the payment of such duty, if the tobacco is sold non-duty-paid and the duty is subsequently paid by the buyer, the duty

so paid by him is not part of the price.

24. Such duty is part of the price only if it forms part of the consideration for the sale. Consideration, it is well settled, means something in the eye

of the law which moves from one person to another involving benefit to the person to whom it moves and detriment to the other from whom it

moves. If there is an express or implied agreement between the buyer and the seller that the excise duty shall form part of the consideration, there

would be no difficulty in coming to the conclusion that the duty even if paid by the buyer after the sale is accomplished, forms part of the price and

therefore part of the purchase turnover of the buyer. If, however, the sale is of goods in respect of which the duty is not paid and the consideration

for the sale is a specified amount, and nothing is mentioned in the contract of sale about the payment of excise duty, it is not easy to understand

how the excise duty payable in respect of the goods sold, is part of the price payable by the buyer to the seller. The duty paid by the company in

this case is what it was liable to pay under rule 7 of the General Excise Rules.

25. If, as it is well settled, the consideration is a benefit which flows from the buyer to the seller, normally it would be impossible to suggest that the

excise duty paid by the buyer in discharge of his own statutory liability involved any benefit to the seller, unless the duty was paid on behalf of the

seller.

26. Now, in this case, the goods sold to the company were goods non-duty-paid. There was no stipulation that the duty payable in respect of

those goods should be paid by the buyer or that it should be paid by the buyer in behalf of the seller. The buyer in this case paid the excise duty in

discharge of his own liability to pay it under rule 7, since it was impossible for the buyer under the provisions of the Excises and Salt Act and the

rules made thereunder to remove the goods for the purchase of manufacturing beedies from his licensed warehouse without making payment of

such excise duty.

27. In a case like this where the only material before us is that, after the sale to the company, the company paid the excise duty to the Central

Excise Authorities, which it was liable and bound to pay under rule 7, there is no justification for the conclusion that the payment so made by the

company was a payment made on behalf of the seller and therefore constituted part of the consideration.

28. Ordinarily, it seems to me, that if A sells goods non-duty-paid to B and there is no stipulation about the payment of duty although the goods

were chargeable with excise duty, the price for which there is a sale is the price paid by B to A and does not include the duty paid by B after sale.

So tested, the excise duty paid by the company in this case was no part of the price payable by the company seller and was not, therefore, an

amount for which the goods were bought by the company from the seller.

29. The acceptance of the argument to the contrary might lead to strange consequences.

30. u/s 32 of the Sale of Goods Act, the payment of the price of the goods and

the delivery of the goods are concurrent conditions, and in the absence of a contract to the contrary, the seller should be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer should be ready and willing to pay the price in exchange for possession of the goods. There was no agreement to the contrary between the parties in this case with the result that it would have been open to the seller in this case, even after he was paid the amount specified in the invoices relating to the sales, to insist on payment of the amount of the excise duty also, in exchange for the possession of the goods at the time of the sale, if such excise duty represented part of the price, as contended by the learned Government Pleader. Then again, if the excise duty represented part of the price, the seller in this case become an unpaid seller since that part of the price had not been paid by the buyer to the seller, If that was so, the seller in this case would have been entitled to the rights conferred on him by section 46 of the Sales of Goods Act. Section 46(1)(b) entitles the seller to right of stopping the goods in transit after he had parted with the possession of the goods if the buyer become an insolvent. If what the learned Government Pleader says is right and the excise duty is part of the price, what would happen would be that in a case where goods non-duty-paid are sold by one person to another and the goods of which the buyer had got possession were in transit and the buyer then become an insolvent, the seller could, claiming to be an unpaid seller within the meaning of that expression occurring in section 45 of the Sale of Goods Act, claim the right to stop the goods in transit for the reason that the excise duty had not been paid by the buyer, since the seller would be an unpaid seller.

31. Then, section 55(1) entitles a seller to sue for the price of the goods, and if the excise duty is also part of the price, it would lead to the result that the seller could sue the buyer for the recovery of the excise duty as part of the price although such duty is payable only to the Central Excise Authorities.

32. Then again, there is section 58 of the Sale of Goods Act under the provisions of which a suit be brought for specific performance of the contract of sale in which it would be open to the Court to make a decree for the specific performance of the contract, instead of merely making a

decree for damages. Such decree may be conditional upon such terms as to payment of the price or otherwise, and if a Court making such a

decree wishes to impose a condition in regard to the payment of the price, if Mr. Government Pleader is right, it would be open to the Court to

direct payment to the seller not only of the price agreed upon but also of the excise duty which, according to the learned Government Pleader,

forms part of the price.

33. A contention leading to such curious results is one which should not, in my opinion, commend itself to us.

34. There is, in my opinion, also a manifestation of the true principle to be applied in such cases in section 64-A of the Sale of Goods Act. That

section reads :-

In contracts of sale amount of increased or decreased duty to be added or deducted. - In the event of any duty of customs or excise on any

goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the

payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was

chargeable at that time -

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add

so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid

and to sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so

much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in

respect of, such deduction.

35. The meaning of this section is that if there is a sale of goods when no duty was chargeable on those and there is a subsequent imposition of

duty as a consequence of which the seller pays such duty, the buyer is liable to pay to the seller the duty so imposed and paid. That is the meaning

of clause (a) of section 64-A. Then, clause (b) provides that if there is a sale of goods duty-paid and there is, after such a sale, a decrease or

remission of the duty, the buyer is entitled to deduct from the contract price such amount as would be equivalent to the decrease of the duty or the remitted duty and to sue the seller for the payment of that amount to him.

36. This section contains an unmistakable indication that where there is a sale of goods non-duty-paid and the sale takes place when the duty was

chargeable on those goods, the duty payable in respect of such goods does not constitute part of the contract price. Any other construction would

lead to this result that, if a sale takes place of goods non-duty-paid and after the sale is made there is a decrease in the amount of duty or its total

remission, the buyer would be entitled to claim from the seller the amount which is equivalent to the decrease of the duty or the remitted duty

notwithstanding the fact that the buyer himself did not pay any duty in respect of those goods. This claim he would be entitled to make on the

ground that, although no one paid any duty on the goods, since the duty formed part of the contract price, or its remission, there was a

corresponding abatement of the contract price to the benefit of which the buyer became entitled. The fact that section 64-A makes no provision at

all in respect of sales of goods non-duty-paid, is to my mind of the greatest significance. Likewise, the fact that when the rule-making authority

under the Madras General Sales Tax Act made a rule like rule 5(1)(i) providing for the duty paid by the seller when his turnover was taxable, but

did not consider it necessary to make any such rule when section 5 of the Madras General Sales Tax Act was amended, is also to my mind

indicative of the fact that it was apparent to that rule-making authority that the purchase turnover where goods non-duty-paid are sold does not

include the duty paid subsequently by the purchaser, and that there was therefore no necessity for a rule providing for the deduction of the duty so

paid by the purchaser subsequently.

37. It was, however, submitted that if the buyer of goods non-duty-paid paid the excise duty which was also payable by the seller, such payment

being beneficial to the buyer, absolving as it did the seller from his own liability, became part of the contract price. The answer to this argument is

that it has not been suggested at any stage of the proceedings that the company paid the excise duty in this case to extinguish the liability of the

seller and not its own.

38. It was however urged that if a buyer neglected to pay excise duty, although required by law to pay it and the Central Excise Authorities

recovered the duty from the seller instead of proceeding against the excisable goods or the buyer, the seller would be entitled to bring a suit for the

recovery of the excise duty so paid. But it is clear that the amount for the recovery of which the seller can so sue the buyer, is not part of the price

for which he had sold the goods to him but what he may claim by way of contribution or reimbursement as the case may be.

39. The case before us, in my opinion, resembles a case where a property burdened with an unpaid tax or imposition is sold by the owner to

another for a stated price. Even if there be no stipulation as to the payment of the arrears of such tax or imposition, it is clear that the arrears

recoverable from the property in the hands of the transferee in the same way in which they were recoverable from the transferor. But the fact that

they so recoverable does not mean that if there were any arrears of tax at the time of the sale, the amount in arrears in that way also formed part of

the price for which there was a sale.

40. In my opinion, the Commercial Tax Officer in this case was not therefore competent to include in the turnover of the company, the excise duty

paid by it. I should not however be understood to say that in no case can the excise duty paid by a buyer form part of the purchase turnover.

There may be cases in which, if there is a stipulation to that effect or the terms of the contract of sale are such as to justify that conclusion, the

excise duty paid by the buyer may form part of the contract price. But this case is not one such.

41. The decision in *Dayabhai Gokulbhai Patel v. The State of Bihar* ([1959] 10 STC 483), on which the Government Pleader placed strong

reliance, was one in which there was a contractual agreement between the parties under which the buyer agreed to pay the excise duty payable in

respect of the goods.

42. The decision in *Mohammed Kunju Abdul Kadir v. The Sales Tax Officer* [1957] 8 S.T.C. 689 on which Commissioner of Commercial Taxes

relied is clearly distinguishable. That was a case in which the excise duty was paid by the buyer to the warehouse licensee.

43. In the view that I take, it becomes unnecessary for us to consider the second

contention urged on behalf of the company that the Commercial

Tax Officer included in the turnover of the company excise duty paid in respect of goods other than those purchased by it from Baliga & Co.

44. In my opinion, this writ petition should succeed and the order of the Commercial Tax Officer made on 8th October, 1957, should be quashed

and it is ordered accordingly. The order made by the Deputy Commercial Tax Officer on 15th January, 1957, is restored. The excess tax, if any,

paid by the petitioner-company should be refunded to it.

45. The petitioner-company is entitled to get the costs of this writ petition, the Advocate's fee being fixed at Rs. 100.

Kalagate, J.

46. I agree.

47. Petition allowed.