

(1992) 09 PAT CK 0026

In the Patna High Court

Case No : C.W.J.C. Nos. 7075 to 7077, 7132, 7206, 7278, 7328, 7595, 7610, 7701, 7706, 7708, 7709, 7742 and 7752 of 1992

Ramjee Prasad Sahu and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-09-1992

Acts Referred:

Citation : (1992) 09 PAT CK 0026

Judgement

G.C. Bharuka, J.—The only question which survives for our consideration in this set of writ applications is, as to whether a sum equal to 15 per cent. of the excise duty payable by the petitioners on account of purchase of country spirit can be collected as Income Tax under the provisions of Section 206C of the Income Tax Act, 1961 (hereinafter in short, " the Act " only).

2. The foundational facts as set out by the petitioners may briefly be stated as below. The petitioners are retail vendors in country spirit, which is an alcoholic liquor meant for human consumption. This privilege has been acquired by them by participating in auction-cum-tender system of settlement of shops envisaged under the provisions of the Bihar Excise Act, 1915 (hereinafter, in short, " the Excise Act " only), and the Rules framed thereunder. Consequent upon the settlements, they have been granted licences in Form No. 26 by the respective Collectors on different dates for the period ending March 31, 1995. Copies of some of such licences have been annexed by some of the petitioners to the respective writ applications. The State Government as a condition for grant of the said privilege has made it mandatory for the petitioners to lift a prescribed minimum quantity of liquor from the specified warehouses in every month. Sale of the country spirit is effected in sachets (polythene packs) by the wholesale licensee acquiring such privilege for the area concerned from the specified warehouses, Messrs. S. K. G. Sugar Ltd., Patna, Messrs. Shri Shiv Shankar Chemical Industries (Bihar) Ltd., Bhagalpur, and Messrs. Kanpur Sugar Works Limited, Saran, and all these companies incorporated under the Companies Act, 1956, have acquired the privilege of supply in wholesale of country spirit from the

respective warehouses to the petitioners. According to the statutory rules and directions, before taking the supply of the country spirit, the petitioners have to pay the cost price (i.e., purchase price), thereof by way of bank draft drawn in favour of the wholesaler and they have also to deposit the excise duty payable thereon in the Government treasury.

3. In the above factual background, it has been submitted by learned counsel for the petitioners that in view of the newly inserted provisions contained in Section 206C of the Act, any amount as Income Tax can be collected only in respect of the cost price paid by them to the respective wholesalers and not in respect of the excise duty paid by them to the Government. In support of their submissions, apart from relying on the plain language of the said Section, our attention has been invited to the various provisions of the Excise Act, the rules, sale notification, terms and conditions of the licence relating to the retailers and wholesalers and the directions issued by the statutory authorities.

4. Section 206C of the Act as substituted by the Finance Act, 1992, with effect from April 1, 1992, reads as below :

" Section 206C(1) Every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage specified in the corresponding entry in column (3) of the said Table, of such amount as Income Tax.

Sl. No. Nature of goods Percentage

(1) (2) (3)

(i) Alcoholic liquor for human consumption (other than Indian-made foreign liquor) Fifteen per cent.

(ii) Timber obtained under a forest lease Fifteen per cent.

(iii) Timber obtained by any mode other than under a forest lease Five per cent.

(iv) Any other forest produce not being timber Fifteen per cent.

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this Sub-section shall not apply so long as the certificate is in force. ;

(b) after Sub-section (8), the following Explanation shall be inserted, namely :--

"Explanation.-- For the purposes of this section,--

(a) " buyer " means a person who obtains in any sale, by way of auction, tender or any other mode, goods of the nature specified in the Table in Sub-section (1) or the right to receive any such goods but does not include,--

(i) a public sector company,

(ii) a buyer in the further sale of such goods obtained in pursuance of such sale, or

(iii) a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act.

(b) " seller " means the Central Government, a State Government or any local authority or Corporation or authority established by or under a Central, State or Provincial Act, or any company or firm or co-operative society." "

5. From a plain reading of the aforesaid provisions, it is clear that seller of country spirit will be liable to collect 15 per cent. of the amount received or receivable by him from the buyer as Income Tax. This provision is somewhat unconventional. It is not a provision for deduction of tax at source out of any amount of income. It is a provision by which a new concept of collecting the provisional Income Tax has been envisaged by the " Legislature by making it incumbent upon the seller of certain goods to collect a specified amount as Income Tax from the buyer. The terms " buyer " and " seller " have been defined under Causes (a) and (b) of the Explanation to the above quoted Section.

6. For proper appreciation of the question involved, it is necessary to first examine the relevant provisions of the Excise Act, and the rules, orders and directions issued thereunder. To start with, let me first set out the basic principles that govern the trade and business in intoxicants in our present constitutional set up. These are :

(i) There is no fundamental right to do trade or business in intoxicants.

(ii) This right or privilege exclusively belongs to the State and it can part with that right for a consideration, right from the point of its manufacture till its sale to the seller.

(iii) The State Legislature is authorised to make provisions for public auction of the said privilege and regulation thereof by reason of the powers contained in entry 8 of List II (State List) to the Seventh Schedule of the Constitution.

(iv) Entry 51 of the said State List also empowers the State Legislature to make laws in respect of duty of excise on alcoholic liquor for human consumption.

7. These principles have been spelt out by the apex court in a catena of decisions. Reference may be made to some of those, namely, *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, , *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and *Synthetics and Chemicals*

Ltd. and Others Vs. State of U.P. and Others, .

8. Excise Act contains the provisions covering both the fields envisaged by the aforesaid two entries, in the State List, Section 22 of the Excise Act empowers the State Government to grant to any person on such conditions and for such period as it may think fit, the exclusive privilege, inter alia, of manufacturing, supplying, selling in wholesale or retail and the grantee of such a privilege has to obtain a licence in that behalf from the competent authority. Chapter V of the Excise Act deals with the levy of duty of excise. Section 29 provides that instead of or in addition to any duty leviable under this Act, the State Government may accept payment of a sum in consideration of a grant of exclusive privilege u/s 22.

9. The rules framed by the Board u/s 90 makes specific provisions for licensing and regulation of distilleries as also for establishment and regulation of warehouse for wholesale supply to retail vendors. Rules 44 to 62 have more relevance for the present set of cases as they provide for regulation of supplies by the wholesalers to the retailers. Licence for retail vending in country spirit is granted in Form No. 26 and for wholesale in Form No. 27.

10. From a reading of the provisions of the Excise Act and the Rules, it transpires that the retail vendors like the petitioners have to purchase country spirit by taking supplies thereof from specified warehouses. The supplies in the warehouse are made by either the manufacturer or the wholesale dealer within whose area of supply such warehouse lies. The warehouse has to be in the charge of an Excise Officer. Rules 44 to 54A make provisions casting certain obligations on the suppliers of the country spirit with regard to quality, storage and reduction of strength. For the present purpose, it is not necessary to enter into the details thereof. But Rules 53 and 55 to 59 are material for the present purposes since these rules provide for the mode and manner of payment of duty by the retail vendor while taking supplies from the warehouse, Rule 55 provides that the retail vendors have to take their supplies of spirit from the warehouse, which is established in the area in which the retail shops are situated. Under Rule 53, such supplies have to be made in the order in which the retail vendors present their challan or money order receipts showing payment of duty and the cost price. Rule 56 provides that duty has to be paid into the treasury or sub-treasury of the place. In the other rules, provisions have been made to meet the different situations pertaining to the payment of duty by the retail vendors. It is important to note here that though in the rules specific provisions have been made with regard to the mode and manner of payment of excise duty but no mode has been prescribed for payment of the cost price payable to the manufacturer or the wholesaler whose goods are sold from the warehouse.

11. Before proceeding further, I may deal with two terms which are typical in the trade in country spirit as used in this State. These are " contractors " and " cost price ". Though these terms have not been defined anywhere in the Excise Act or the rules, in various rules these terms have been used. In the Bihar Excise Manual, Vol. HI, published by the State Government, in paragraph 217A, while

dealing with contract supply system as referred to in rule 44, it has been said that :

" By this method a monopoly of the supply of country spirit in any specified area or areas is granted under a contract, the contractor selling spirit subject to rate or rates of excise duty in force within such areas, to licensed vendors only at a fixed wholesale rate, which is known as the cost price."

12. Therefore, in the present context, the words " contractor " and " cost price " should only mean " wholesaler " and " the price of the country spirit", respectively.

13. One of the conditions incorporated in the licence granted to the wholesalers is that they have to sell the country spirit to the licensed vendors at the warehouses specified in the licence at the fixed prices on production of passes in the prescribed form by them. The storage, reduction, etc., of the spirit have to be made under the immediate supervision of a Government Officer incharge of the warehouse. In view of condition No. 15 of the licence read with the directions issued by the State Government as contained in memo No. 698, dated March 12, 1992, the wholesalers are to collect the cost price of the liquor from the licensed vendors in the form of bank draft directly.

14. The conditions incorporated in Form No. 26 meant for granting licence to the retail vendors, provide that they have to purchase the country spirit from the specified warehouses. Pursuant to the conditions of the licence and the sale notification, the retail vendors have to deposit the cost price through a bank draft drawn in favour of the wholesaler.

15. From the discussions aforesaid, it is clear that a retail vendor can acquire country spirit meant for human consumption on the fulfilment of two conditions, relevant for the purpose, namely, (1) they have to pay the price of the goods in the form of bank draft drawn in favour of the wholesaler and (2) have to deposit the requisite excise duty in the Government treasury payable by them either with reference to the actual delivery or minimum monthly quota, which they had undertaken to purchase at the time of acquiring the privilege.

16. From the scheme of the State Act, it is also clear that the wholesaler receives only the price of the liquor which is known as cost price in this State and the duty is paid by the retail vendors either as a consideration of the privilege acquired by them or as the excise duty payable under the provisions of the State Act, by depositing the same in the Government treasury. Apparently, there is no privity of contract between the wholesalers and the retailers in the strict sense and the entire transaction by which the title in the country spirit passes from the wholesaler to the retailer is regulated by the statutory provisions and the volition on their part is minimal. None the less in view of the decision of the Supreme Court in the case of Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, , the transaction still remains to be a sale and the wholesaler and the retail vendor will be the seller and the buyer, respectively.

17. Mr. Rastogi appearing for the Income Tax Department has placed strong reliance on a decision of the Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, , to substantiate that the actual cost and the excise duty both form part of the consideration for sale of country spirit and, therefore, Income Tax is liable to be collected by the wholesaler with reference to both. In my opinion, the said decision rather dispels the argument advanced by Mr. Rastogi. It is so because in the first round of litigation by McDowell and Co. Ltd. v. CTO [1977] 39 STC 151, the Supreme Court, after examining the provisions of the Excise Act, has held that excise duty paid directly to the excise authority of the State or deposited directly in the State exchequer in respect of Indian liquor by the buyers thereof, before removing it from the distillery or the bonded warehouse and not included in the sale bills issued by the manufacturers or the owners of the bonded warehouse, cannot be said to be covered by the phrase "any sums charged by the dealer", in its ordinary popular sense. In this case the dispute had arisen in respect of leviability of sales tax under the Andhra Pradesh General Sales Tax Act, 1957. Subsequent to the said decision of the Supreme Court, Rules 76 and 79 of the Andhra Pradesh Distilleries Rules were amended with effect from August 4, 1981, and the manufacturers were made liable to pay the excise duty on removal of liquor. Pursuant to this amendment, the sales tax authorities levied tax by treating the excise duty as part of the sale consideration. The plea of the company was that notwithstanding the said amendment since the purchasers are directly depositing the excise duty with the Government, therefore, the same cannot be treated to be a part of the appellant's turnover. It was in this context that in the subsequent case of McDowell, it was held by the Supreme Court that since in view of the amended rules the liability for payment of the excise duty was that of the manufacturer, therefore, though the excise duty was paid by the purchasers to meet the liability of the appellant, it was very much the part of the consideration for sale and is includible in the turnover of the company.

18. So far as the provisions of the Excise Act in this State are concerned, as noticed above, the obligation to pay the excise duty is still of the retail vendors and, therefore, the present case is clearly covered by the decision of the Supreme Court in the first case of McDowell and Co. Ltd. [1977] 39 STC 151. This distinction has been duly noticed by the Supreme Court in its later decision, which has been relied upon by Mr. Rastogi.

19. Mr. Rastogi has further submitted that in view of the recent Bench decision of this court in the case of State of Bihar and Another Vs. Commissioner of Income Tax and Others , it has to be held that in respect of the supplies of the country spirit made to the retail vendors from the warehouse, the State Government will be deemed to be the dealer and the collection at source in respect of the Income Tax has to be made with reference to both the cost price as well as the excise duty paid in respect thereof. In my opinion, the submission is not tenable because in the above referred case (C. W. J. C. No. 2429 of 1992), the provisions contained in Sections 44AC and 206C of the Act were the subject matter of

interpretation, which are no more on the statute book and the provisions of the substituted Section 206C of the Act, which are being considered in the present case, are materially different in certain important aspects. The originally incorporated Section 206C of the Act has acquired the meaning of the word "seller" from Section 44AC which statutorily included the persons selling as well as his agent within the ambit of expression "seller". But now Section 44AC stands repealed and Section 206C which is self-contained does not include the agent of a person selling the goods within the definition of "seller" for the purposes of the said Section. Therefore, the State Government, which was held to be a seller being an agent of the wholesaler ceases to be a seller for the present purposes. The second important aspect is that by the Finance Act, 1990, an Explanation was inserted in Sub-section 1(a) of Section 44AC of the Act whereby "purchase price" was defined to mean any amount (by whatever name called) paid or payable by the buyer to obtain the goods referred to in that clause, except the amount paid or payable towards bid money in an auction, or, as the case may be, the highest accepted offer in case of a tender or any other mode. As explained by the Central Board of Direct Taxes in Circular No. 585, dated November 27, 1990 (see (1990) 186 ITR 156), the said definition was incorporated so as to make incumbent the collection of Income Tax at source also by reference to the excise duty. The said concept of the "purchase price" has not been retained by the Legislature in the substituted provisions. Therefore, in my opinion, the Bench decision, referred to above, has no bearing on the question involved in the present cases.

20. In the above view of the matter, since the sellers are entitled to receive only the cost price from the retail vendors, therefore, neither it is incumbent nor permissible on their part to collect any amount by way of Income Tax with reference to the excise duty payable by the buyers to the Government as a measure of tax or consideration for parting with the exclusive privilege. They will be statutorily liable to collect an amount as Income Tax with reference to the cost price only.

21. It is also important to ascertain as to whether by employing any interpretational tool, the State Government can also be held to be a seller for the purposes of the provisions of the Income Tax Act in question so as to make it incumbent upon the State Government also to collect 15 per cent. of the excise duty received or receivable by it as Income Tax under the provisions in question. There cannot be any dispute that the amount which the retail vendor deposits in the Government treasury as excise duty either as a liability under the State Act or as a consideration of the privilege acquired by him is not deposited as a price of the country spirit. The State Government does not hold any title to the country spirit. In fact, under the provisions of the Act no such authority to purchase and sell liquor has been conferred on the State Government. The State Government can only regulate the transaction of the country spirit right from the point of its manufacture till the point of its sale. Therefore, the State Government cannot be deemed to be a seller of the country spirit to the retail vendors. As such, the

question of collecting any amount by way of any tax by the State Government cannot arise.

22. For the reasons aforesaid, I am of the view that under the facts and circumstances of the present case and the attending legal provisions, no amount as Income Tax can be collected from the petitioners with reference to the excise duty payable by them to the Government on account of purchase of country spirit.

23. The writ applications are, accordingly, allowed to the extent indicated above but without any costs.

S.B. Sinha, J.

24. I agree with the operative portion of the orders passed by my learned brother, but, however, I would like to state separate reasons therefor.

25. The question as to whether Section 44AC and Section 206C of the Income Tax Act, 1961 (hereinafter to be referred to as the said " Act"), is unconstitutional is pending consideration before the Supreme Court.

26. In the Supreme Court, however, in Transfer Petition No. 42 of 1989 (Bihar Excise and Vendors" Association v. Union of India) directed that the High Court may dispose of the interim applications filed by the assesseees.

27. In view of the aforementioned observations made by the Supreme Court, a large number of writ applications have been filed before this court, inter alia, questioning the vires of the said provisions of Sections 44AC and 206C of the said Act.

28. Amongst others, the State of Bihar had filed a writ petition in this court against the Commissioner of Income Tax and others being C. W. J. C. No. 2429 of 1992.

29. In that case, the Division Bench of which I was a member held that the State of Bihar is a " seller" within the meaning of Section 44AC of the said Act.

30. In that decision, it was further held that in terms of the rules as also circular letters issued from time to time, an extended meaning of the definition of " seller" has to be given.

31. From a perusal of paragraph 28 of the said judgment, it would be evident that it was not disputed therein that the retail dealers purchase country liquor by paying the cost price as well as excise duty by challan to the State Government.

32. In that case, the learned Additional Advocate-General No. 1 who appeared for the State of Bihar accepted the position that the cost price of country liquor was realised by the State along with the excise duty by way of challans which are kept in a separate account. The State, thereafter, debits the cost price in the account of the distiller.

33. In that situation, it was observed that for the purpose of Section 206C of the said Act, tax has to be deducted not only on the basis of the cost price but for that purpose the amount of excise duty has also to be taken into consideration.

34. In these cases, however, the petitioners have, inter alia, contended that they are liable to pay Income Tax only on the cost price and not on the excise duty payable by them to the State of Bihar.

35. In that case, the question as to whether Income Tax at 15 per cent. was to be deducted only on the cost price of the country liquor or on the basis of the cost price plus the excise duty payable to the State of Bihar did not fall for consideration directly. Mr. Rastogi, learned senior standing counsel, Income Tax Department, has also accepted this position.

36. In this, view of the matter, in all these applications the contention urged before us, i.e., whether Income Tax in terms of Section 206C of the said Act is to be deducted only on the basis of the cost price or not, has to be considered independently. We have taken up the hearing of these writ applications, although the question of the constitutionality of Section 44AC and Section 206C of the said Act is pending consideration before the Supreme Court of India as, in the meanwhile. Parliament by reason of the provision of the Finance Act, 1992, deleted the provision of Section 44AC of the said Act and further substituted the provision of Section 206C with a new provision.

37. I, however, intend to make it clear that we have proceeded on the basis that the provision of Section 206C as it now stands is intra vires the Constitution of India, and, thus, it goes without saying that in the event it is held by the Supreme Court of India that Section 44AC and Section 206C of the said Act as they stood before the enactment of the Finance Act, 1992, or Section 206C, as it now stands, are ultra vires, these cases would also be governed by the decision of the Supreme Court.

38. The relevant portion of Section 206C as it then stood reads as follows :

" Section 206C. Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc. -- (1) Every person, being a seller referred to in Section 44AC, shall, at the time of debiting of the amount payable by the buyer referred to in that Section to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as Income Tax on income comprised therein.

Sl. No. Nature of goods Percentage

(1) (2) (3)

(i) Alcoholic liquor for human consumption (other than Indian-made foreign

liquor)... Fifteen per cent....

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this Sub-section shall not apply so long as the certificate is in force.

(2) The power to recover tax by collection under Sub-section (1) shall be without prejudice to any other mode of recovery, " (underlining is mine).

39. From a perusal of the aforementioned provisions, it would appear that by necessary implications the definition of seller which had been incorporated u/s 44AC of the said Act was adopted for the purpose thereof.

40. The relevant provisions of Section 44AC of the said Act, as it then stood read thus :

" Section 44AC. Special provisions for computing profits and gains from the business of trading in certain goods.--(1) Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an assessee, being a person other than a public sector company (hereafter in this Section referred to as " the buyer "), obtaining in any sale by way of auction, tender or any other mode, conducted by any other person or his agent (hereafter in this Section referred to as " the seller),--

(a) any goods in the nature of alcoholic liquor for human consumption (other than Indian-made foreign liquor), a sum equal to forty per cent. of the amount paid or payable by the buyer as the purchase price in respect of such goods shall be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head " Profits and gains of business or profession" :

Provided that nothing contained in this clause shall apply to a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act. . . .

(2) For the removal of doubts, it is hereby declared that the provisions of Sub-section (1) shall not apply to a buyer (other than a buyer who obtains any goods, from any seller which is a public sector company), in the further sale of any goods obtained under or in pursuance of the sale under Sub-section (1).

(3) In a case where the business carried on by the assessee does not consist exclusively of trading in goods to which this Section applies and where separate accounts are not maintained or are not available, the amount of expenses attributable to such other business shall be an amount which bears to the total expenses of the business carried on by the assessee the same proportion as the turnover of such other business bears to the total turnover of the business

carried on by the assessee.

Explanation.-- For the purposes of this Section, "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act, or any company, or firm or co-operative society."

41. Section 206C of the said Act, as has been substituted by the Finance Act, 1992, reads thus :

"Section 206C.(1) Every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage specified in the corresponding entry in column (3) of the said Table of such amount as Income Tax :

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this Sub-section shall not apply so long as the certificate is in force."

(b) after Sub-section (8), the following Explanation shall be inserted, namely :

"Explanation.-- For the purposes of this section,--

(a) "buyer" means a person who obtains in any sale, by way of auction, tender or any other mode, goods of the nature specified in the Table in Sub-section (1) or the right to receive any such goods but does not include,--

(i) a public sector company,

(ii) a buyer in the further sale of such goods obtained in pursuance of such sale, or

(iii) a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act ;

(b) "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act, or any company or firm or co-operative society.'"

42. Thus, upon a comparison of the aforementioned provisions, it is evident that now there is a qualitative change in the expression " seller" as contained in Section 206C of the Income Tax Act in so far as the definition is concerned, meaning of the word "seller" within the meaning of Section 44AC of the said Act is no longer available.

43. It is also clear that 15 per cent. of the amount debited has to be collected by way of Income Tax. Section 206C provides for the machinery for recovery of the tax.

44. It appears that some changes have been made by the Excise Department in relation to collection of cost price of the liquor.

45. On or about February 8, 1989, the State of Bihar issued a notification whereby changes were made in Form No. 27. In terms of Clause 15 of the conditions of the licence it was provided that the District Magistrate should realise the price of the country liquor from the licence holders which would on expiry of every month be paid to the "contractors" from the District Treasuries. However, it was further provided therein that the contractor could realise the cost price of the country liquor from the licensees in cash or by bank draft straightaway before taking delivery thereof. Receipts in relation to such prices were required to be given by the contractors to the retailed licensees which were to be kept secured in the guard file of the warehouse.

46. However, by a circular letter bearing No. 698 dated March 12, 1992, the Deputy Commissioner of Excise informed all the Assistant Commissioners of Excise and Superintendents of Excise of all the districts that it has now been decided that from the security point of view, the price of the licensed country liquor shall be paid to the contractors by way of bank draft by the licensee directly who would grant receipts therefrom and which shall be produced by the retail licensees before the authorities of the warehouse so that the country liquor may be released on the basis thereof.

47. It has further been clarified that so far as the realisation of Income Tax from the retail vendors is concerned, the same shall be deposited by them by way of bank draft and one photocopy thereof shall be retained by the warehouse officers and another photocopy shall be retained by the contractor.

48. Thus, after March 12, 1992, the contractors who are either the manufacturer or the wholesaler have been receiving the amount of cost price of the country liquor directly. Even the amount of Income Tax has to be deposited by a separate bank draft. Thus in terms of the present arrangement, the State does not realise the cost price from the retail vendors either along with the excise duty nor does it realise the said amount on behalf of the manufacturer/wholesaler.

49. In this view of the matter, in my opinion, if this arrangement continues, it is not necessary for us to consider whether the State is a "seller" within the meaning of Section 206C of the Act or not.

50. In my opinion, however, if the State realises any amount of cost price either on behalf of the wholesaler or on behalf of the manufacturer, it may come within the purview of definition of "seller" but as indicated hereinbefore for the purpose of disposal of this case, it is not necessary to decide the aforementioned question.

51. I may, however, add that in the facts and circumstances of the case also I am

also not expressing any opinion, as it is not necessary to do as to whether in view of the provisions of the Bihar and Orissa Excise Acts and the rules framed thereunder and conditions of the licences granted by the State of Bihar to the wholesaler manufacturer, vis-a-vis, the retail vendors, a privity of contract comes into being by and between the wholesaler/manufacturer of country spirit on the one hand and retail vendors on the other. I am also expressing no opinion as to whether the decision of the Supreme Court in the case of Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, , has any application in the facts and circumstances of the case or not.

52. The question, however, which arises for consideration in this writ application as has rightly been formulated by my learned brother is as to whether the Income Tax is payable on cost price of the country liquor or the entire price consisting of the cost price as also the excise duty.

53. I have indicated hereinbefore that the decision of the Division Bench in C. W. J. C. No. 2429 of 1992 State of Bihar and Another Vs. Commissioner of Income Tax and Others is not an authority for that proposition.

54. In McDowell's case [1985] 59 STC 277, the Supreme Court was considering the concept of "turnover" within the meaning of the provisions of the Andhra Pradesh General Sales Tax Act, 1957. In that case after the decision of the Supreme Court in McDowell and Co. Ltd. v. CTO [1977] 39 STC 151, Rules 76 and 79 of the A. P. Distillery Rules were amended with effect from August 4, 1981.

55. In view of the aforementioned amendments, the authorities of the Commercial Tax Department issued a notice as to why the excise duty paid directly by the buyers shall not be included in the appellant's turnover for a part of the year 1982-83.

56. A writ petition was filed before the High Court for quashing the notice issued by the authorities of the Sales Tax Department and the said writ petition was dismissed. On special leave having been granted by the Supreme Court against the aforementioned judgment of the High Court, the correctness of the decision in the earlier case of the said company was doubted.

57. Before the Supreme Court, the vires of the amended rules was not questioned.

58. The Supreme Court, therefore, considered the definition of "turnover " as contained in Section 2(8) of the Sales Tax Act, i.e., to mean "the total amount set out in the bill of sale (or if there is no bill of sale, the total amount charged) as the consideration for the sale or purchase of goods (whether such consideration be cash, deferred payment or any other thing of value) including any sums charged by the dealer for anything done in respect of goods sold at the time of or before the delivery of the goods and any other sums charged by the dealer, whatever be the description, name or object thereof. ..."

59. The Supreme Court held (at page 290 of 59 STC) :

"The definition clearly indicates that the total amount charged as the consideration for the sale is to be taken into account for determining the turnover. Where a bill of sale is issued (and obviously the bill has to state the total amount charged as consideration), the total amount set out therein is to be taken into account. In every transaction of sale, there is bound to be a seller at one end and a buyer at the other and transfer of title in the goods takes place for a consideration."

60. The Supreme Court upon consideration of its earlier decision in Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13(Raj), and various other decisions had come to the conclusion that the consideration for sale is thus the total amount and not what is reflected in the bill.

61. It was held (at page 292 of 59 STC) :

" 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 includible 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."

62. The situation obtaining in this case is absolutely different as, by reason of the present arrangement, excise duty is to be paid separately to the State of Bihar, whereas the cost price is to be paid directly by way of bank draft to the contractors, i.e., wholesaler and/or manufacturer of country spirit. Retail dealers, in this case are required to deposit the excise duty payable to the State of Bihar, which is realisable from them. They do not pay any excise duty which is payable by the contractors.

63. As noticed hereinbefore, the cost price is now required to be paid directly to the contractor and, therefore, the same would be the amount to be debited by the "seller" which would not include the amount of "excise duty" as the same is required to be paid separately to the State.

64. As has rightly been noticed by my learned brother, " excise duty" is not leviable on goods but on the right to vend. The concept of sales tax thus, in my opinion, cannot be brought into for the purpose of determining the amount of consideration for the goods in the case of dealing in country spirit in terms of the provisions of the Bihar and Orissa Excise Act and the Rules framed thereunder.

65. For the reasons aforementioned, I am in full agreement with the view of my learned brother that Income Tax is now payable on the cost price of the country spirit.