

(1999) 09 AP CK 0110

In the Andhra Pradesh High Court

Case No : TRC No. 31 of 1991 and Batch

Sri Satya Winery and Distillery (P) Ltd., Hyd.

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 27-09-1999

Acts Referred:

Andhra Pradesh Distillery Rules, 1970 — Rule 76, 79
Andhra Pradesh General Sales Tax Act, 1957 — Section 20

Citation : (1999) 6 ALD 578

Hon'ble Judges : S. Ananda Reddy, J; Ramesh Madhav Bapat, J

Bench : Division Bench

Advocate : Mr. S.R. Ashok, for the Appellant; Spl. Government Pleader for Taxes, for the Respondent

Judgement

S. Ananda Reddy, J

1. Though these Tax Revision Cases were heard and orders were dictated on 30-6-1999 in the open Court, as certain decisions were not considered these tax revision cases are reposted for hearing and heard on 17-9-1999 and disposed of by this common order.

2. This Batch of lax revision cases arc at the instance of the manufacturer for different assessment years. Three points are raised in this Batch of revision cases viz., (1) jurisdiction of the revisional authority; (2) whether the excise duty paid by the purchasers should be included in the total turnover of the manufacturer; and (3) service charges are to be treated as part of the turnover.

3. At the time of hearing it is represented by the learned Counsel for the petitioners that the 1st and 3rd issues are not seriously contested, except in the case of TRC No.46 of 1991. Therefore, these two issues are held against the petitioners, except in the case of TRC No.46 of 1991 where the issues are contested.

4. Com ing to the second issue relating to the inclusion of excise duty component

paid by the customer/dealer on behalf of the assessee should be treated as part of the turnover, originally the assessments were completed accepting the turnover declared by the assessee. However, the said assessments were revised by (he Deputy Commissioner (Commercial Taxes) and excise duty component was added to the total turnover even though the same was not paid by the manufacturer. Questioning the same the assessee preferred appeals to the Sales-Tax Appellate Tribunal. The Tribunal after considering the contentions of the manufacturer elaborately and relying upon the decisions of the Supreme Court as well as the decision of this Court confirmed the orders of the Deputy Commissioner. The said orders are being assailed in this Batch of tax revision cases.

5. The learned Counsel for the petitioners contended that the assessee had paid the sales tax on the turnover excluding the excess duty and assessments have been framed accepting the same. But the said assessments have been revised by the Deputy Commissioner and added the excess duty component to the total turnover though the same was not paid by the assessee. It is stated that Rules 76 and 79 of the Andhra Pradesh Distillery Rules were amended casting the obligation on the D2 Licence holder to pay the excise duty with effect from August 4, 1981 and prior to that there was no such obligation, therefore the ratio laid down by the Supreme Court in the case of McDowell & Co. Ltd v. Commercial Tax Officer, (1977) 39 STC 151, applies and in accordance with the said decision the excise duty paid by the customers should not be included in the turnover of the assessee. The learned Counsel also contended that in view of the above decision the Sales Tax Act was amended by substituting Entry 26 of the First Schedule to the A.P. General Sales Tax Act and as per which two different rates are prescribed -- one when excise duty is included in the total turnover and another when excise duty is not included. This further supports the view of the assessee that the assessments as framed by the original authority accepting the turnover excluding the excise duty component is proper and the revision of such assessments is illegal. The learned Counsel also contended that the Tribunal relied upon a later decision in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, , though in the said decision the issue in dispute in the present case was not considered. The learned Counsel also contended that while interpreting the provisions of the Act if there is ambiguity, the benefit of such ambiguity should be given to the assessee. In support of it he relied upon in the case of Safari Industries (India) Pvt. Ltd. v. State of Kerala, (1989) 72 STC 264. The learned Counsel also contended that the words takes the colour on the context in which they were used and the entry if so interpreted, which was substituted by way of amendment after the first McDowell's case (supra), the contention advanced by the assessee has to be accepted and the turnover has to be assessed under the Entry 26(a) and not under 26(b). of the First Schedule to the A.P. General Sales Tax Act.

6. The learned Special Government Pleader, on the other hand, supported the order of the Sales Tax Appellant Tribunal. He has taken us through the order of

the Tribunal, where the decision relied upon by the assessee and the Department were considered elaborately by the Tribunal. It is also contended that the obligation to pay excise duty is always on the manufacturer and even for the sake of convenience if it is paid by a customer/dealer, the said payment is only on behalf of the manufacturer and the same forms part of the sale consideration to the customer/dealer, whether it is shown as a merged figure of sale consideration or separately. Therefore, it is contended that the order of the Tribunal is proper and just and it does not call for any interference.

7. The issue, therefore, arises for consideration is whether the inclusion of the excise duty in the total turnover is valid.

8. The contention is that all the tax revision cases relate for the assessment years prior to the amendment of Rules 76 and 79 of the Andhra Pradesh Distillery Rules on 4-8-1981 and it is the contention of the assessee that there was no obligation on the part of the manufacturer to pay the excise duty prior to such amendment and therefore the same should not be includable in the total turnover in view of the decision of the Supreme Court in the case of *First McDowell Co. (supra)*. A perusal of the said decision no doubt shows that the intending purchaser of Indian Liquor, who seeks to obtain distillery passes are also legally responsible for payment of excise duty and hence the same should not be includable in the total turnover of the manufacturer. But this view was modified in the subsequent decisions of the same Court and according to the later view the primary duty to pay the excise duty is that of the manufacturer. In fact, the Tribunal relied upon a decision of this Court in the case of *Raj Sheel Vs. The State of Andhra Pradesh*, which was rendered after considering both the *McDowell* cases (*supra*). In that case it was held that the primary responsibility to pay excise duty lies on the manufacturer. May be in a given case the wholesale dealer to whom the manufacturer sell the beer may directly pay excise duty to the Government and obtain brewery passes. It is true that the excise duty is not the amount retained by the manufacturer but on that ground alone, it cannot be said that the excise duty does not form part of the sale price. The Tribunal further relied upon the observations of the Hon'ble Supreme Court in the case of *Hindustan Sugar Mills Ltd. v. State of Rajasthan*. (1979) 43 STC 13, which are as follows:

"Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The "sale price" in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him on the manufacture of the goods. But even so, it would be part of the "sale price" because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the

consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the "sale-price.""

Further in the latter *McDowell Co. case* (supra) the Supreme Court had enunciated the legal position relating to the incidents of excise duty as under:

"Thus, the incidence of excise duty is directly relatable to manufacturer but its collection can be deferred (to a later stage as a measure of convenience or expediency).

On an examination of the provisions of the Excise Act, the Rules framed thereunder and the pronouncements referred to above, we are of the view that the conclusion of this Court at Page 921 of the Reports *McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad*, that intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty is 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."

After considering the above decisions the Tribunal held that the primary duty to pay the excise duty is that of the manufacturer and the same also forms part of the sale consideration. Accordingly, it should be treated as part of the total turnover of the manufacturer. Therefore, the Tribunal upheld the order of the Deputy Commissioner.

9. Though it is contended before us that in that later *McDowell's case* (supra) the decision rendered in the first *McDowell v. case* (supra) was not overruled, therefore, the said decision still holds good and if so, the excise duty paid by the customers/ dealers should not be treated as part of the turnover of the manufacturer. We are unable to accept the said contention of the learned Counsel for the petitioners. As already referred to earlier the Supreme Court itself has clarified the decision rendered by it in the first *McDowell's case* (supra) and in fact in the light of the later decision of the Supreme Court this Court has considered this issue and decided against the manufacturer holding that it is the primary duty of the manufacturer to pay excise duty and though it was paid directly to the Government by the purchaser, still it forms part of the turnover of the manufacturer. In the light of the said decision, we do not find any merit in the contentions advanced by the petitioners. Further, as rightly observed by the Tribunal, that the Entry 26(a) applies only in cases which are not covered by Entry 26(b). Further, in the light of the decision rendered by this Court in the

case of Rajsheel (supra) we do not find any merit in the contentions advanced by the learned Counsel for the petitioner. We, therefore, uphold the orders of the Tribunal.

10. Coming to TRC No.46 of 1991, it is the argument of the learned Counsel for the assessee with regard to the jurisdiction that an order passed by the Appellate Deputy Commissioner was revised by Deputy Commissioner, who is an Officer of equivalent rank. It was stated by the learned Counsel that u/s 20(2) of the A.P. General Sales Tax Act, the Deputy Commissioner has got the power to revise the orders of his subordinate officers and not the order of an officer, who is of an equivalent rank. The action of the Deputy Commissioner in revising the order of the Appellant Deputy Commissioner is clearly without jurisdiction. We, therefore, set aside the order of the appellate Tribunal and restore that of the order of Appellate Deputy Commissioner.

11. In the result, TRC Nos.31, 129, 130, 131, and 133 of 1991 are dismissed and TRC No.46 of 1991 is allowed. No costs.