

M/s. McDowell & Company Ltd.

Vs

Commercial Tax Officer Vii Circle, Hyderabad

Civil Appeal Nos. 248-251 of 1976

(H.R. Khanna, Jaswant Singh JJ)

25.10.1976

JUDGMENT

JASWANT SINGH, J. –

1. This batch of appeals by special leave which are directed against three separate judgments of the High Court of Andhra Pradesh at Hyderabad dismissing three sets of writ petitions 1195 to 1198 of 1975, 3931, 3944 and 4929 of 1975 and 6790 of 1974 filed by the appellants to challenge certain orders of the sales tax authorities made in respect of redetermination of their turnover for certain years under the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter referred to as 'the Act') shall be disposed of by this judgment, as they raise a common question as to whether the excise duty deposited directly in a State treasury or a sub-treasury by the purchasers of the Indian made foreign liquor called 'Indian liquors' before removing the said liquor from a distillery and the countervailing duty remitted directly to a State treasury or a sub-treasury by the purchasers of the aforesaid specie of liquor before removing it from a bonded warehouse can properly be said to form part of the turnover of the manufacturer and of the owner of the bonded warehouse respectively and as such liable to sales tax under the Act.

2. The circumstances which have given rise to these appeals lie in a short compass and may be briefly stated : The appellants in the first two sets of appeals 248 to 251 of 1976 and 934 to 936 of 1976 carry on the business of manufacture of 'Indian liquor' in their distilleries established in Andhra Pradesh under licenses issued to them by the Commissioner of Excise under the Andhra Pradesh Excise Act, 1968 (Act 17 of 1968) and the rules made thereunder and sell their finished products to the wholesale dealers who in turn sell them to retail dealers. Under Rule 76 of the Andhra Pradesh Distillery Rules, 1970, removal of any liquor manufactured or stored without prepayment of the excise duty specified in Rule 6 is forbidden. Rule 77 of the Rules prohibits issue of any liquor until its quantity and strength have been duly verified by the distillery officer. Rule 79 of the Rules authorises the distillery officer on payment of excise duty to grant a distillery pass for removal of the liquor fit for human consumption to the persons specified in the said rule including a person holding a licence for sale of liquor by wholesale or retail. Under Rule 81 of the Rules, every application for a distillery pass for removal of liquor has to be addressed in writing to the distillery officer and has to be accompanied by a challan in original for payment of excise duty therefor and a general or special permit for the purpose of removal of the liquor. Rule 82 of the Rules enjoins the distillery officer upon tender of cash payment of excise duty by the applicant to fill up the challan for presentation with the cash at a treasury or sub-treasury of the district in which the distillery is situate, and the applicant for distillery pass to present the treasury receipt in token of his having made payment of the duty whereafter the distillery officer has to affix the said receipt to the counterfoil of Form D-6. Rule 83 of the Rules casts responsibility upon an applicant for a distillery

pass to make a correct calculation and full payment of the excise duty upon the liquor desired to be removed. Rule 84 of the Rules requires the distillery officer to issue the liquor under a pass in Form D-6 sending a duplicate thereof to the Excise Superintendent of the district of destination on being satisfied that the applicant is entitled under the Rules to remove the liquor and has made payment of the requisite excise duty. Accordingly every buyer of the Indian liquor from either of the appellants' distilleries during the years in question obtained the distillery pass for release of the liquor after making payment of the excise duty and presented the same at the concerned distillery whereupon a bill of sale or invoice was prepared by the distillery showing the price of the liquor. The said bill did not include the excise duty paid by the buyer. The appellants' books of accounts also did not contain any reference regarding the excise duty paid by the purchasers in the manner stated above. The appellants paid the sales tax in full as per final assessments made by the sales tax authorities under the Act. It appears that after the completion of the assessments of the sales tax under the Act for the years in question, the Commercial Tax Officer felt that there had been a failure to include the excise duty paid on the aforesaid liquors vended by the appellants in their taxable turnover. Accordingly, acting under the provisions of Section 14(1) of the Act, the Commercial Tax Officer issued notices in February, 1975 to the appellants in the aforesaid first two sets of appeals to show cause why the assessments be not reopened. Aggrieved by the said action of the Commercial Tax Officer, the appellants filed Writ Petitions 1195 to 1198 of 1975 and 3931, 3944 and 4929 of 1975 in the High Court of Andhra Pradesh challenging the said notices which, as already stated, were dismissed by the High Court.

3. The appellant in appeal 693 of 1976 is a firm which is a licensed wholesale dealer in liquors and owner of a bonded warehouse under the Andhra Pradesh Indian Liquor (Storage in Bond) Rules, 1969 where it stores or deposits Indian liquors such as whisky, brandy, gin etc. imported by it from various States outside the State of Andhra Pradesh without prepayment of countervailing duty or other fee and issues the same according to the rules to its customers. The modus operandi of the appellant is that it makes a bill for the value of the liquor required by an intending purchaser, who thereafter pays the requisite countervailing duty in his own name and the Excise Officer incharge of the bonded warehouse grants him a pass entitling him to remove the liquor from the warehouse. According to the appellant, it gets only the price of the liquor from its buyers. For the assessment year 1971-72, the Commercial Tax Officer, Hyderabad III by its order dated August 16, 1972 included the amount representing the countervailing duty paid by the purchasers in respect of the Indian liquors in bond which was not included in the bills of sale issued by the appellant. On appeal, the Assistant Commissioner by its order dated March 26, 1973 deleted from the turnover of the appellant the item pertaining to the excise duty paid directly by the purchasers holding that the excise duty so paid by the purchasers did not, in the circumstances, form part of the turnover of the appellant. Sometime thereafter, the Sales Tax Appellate Tribunal by its order dated August 5, 1974 passed in T As 331 of 1973 and 5 of 1974 upheld the assessment made under similar circumstances by the Commercial Tax Officer, Vijayawada, on the turnover of M/s. Shaw Wallace & Co. Thereupon the Deputy Commissioner, Commercial Taxes, Hyderabad, by virtue of the power vested in him under Section 20 of the Act issued the impugned notice dated October 9, 1974 to the appellant calling upon it to show cause why the order passed by the Assistant Commissioner, Commercial Taxes, on March 26, 1973 should not be set aside and the original assessment order of the Commercial Tax Officer dated August 16, 1972 restored. The appellant was also required to file objections and adduce evidence in support thereof within 7 days from the date of receipt of the impugned notice. Aggrieved by the notice, the appellant filed a petition, being petition 6790 of 1974, before the High Court of Andhra Pradesh, seeking issue of an appropriate writ, order or direction declaring that the appellant was not liable to pay sales tax on excise duty paid by the

purchasers in their own names and restraining the Deputy Commissioner, Commercial Taxes, Hyderabad, respondent in the appeal from taking further proceedings in pursuance of the said notice. The said petition having been dismissed, the appellant has, as already stated, come up in appeal to this Court.

4. At the hearing of these appeals, Mr. Sorabji and the other counsel appearing on behalf of the appellants have assailed the aforesaid judgments and orders of the High Court by urging in the first instance that the view taken by the High Court about the nature and character of excise duty and countervailing duty is not correct. They have also after trying in vain to argue for considerable length of time that on the true construction of the Andhra Pradesh Excise Act, 1968, the Andhra Pradesh Distillery Rules, 1970, the Andhra Pradesh Foreign and Indian Liquor Rules, 1970 and the Andhra Pradesh Indian Liquor (Storage in Bond) Rules, 1969, a manufacturer of Indian liquors and an owner of a bonded warehouse are not primarily responsible for payment of the excise duty or countervailing duty, as the case may be, contended that a manufacturer and owner of the bonded warehouse are not solely responsible for payment of the said duties and a purchaser of the liquor who obtains a distillery pass or a warehouse pass and a transport permit is also legally responsible for payment therefor and if he does pay the duty, it is something which he does in discharge of his own statutory liability and not something which he does for or on behalf of or for the benefit of the manufacturer or the owner of the bonded warehouse. They have alternatively contended that on a true construction of the expression 'turnover' as defined in Section 2(1)(a) of the Act, the determinative factor is the total amount set out in the bill of sale as consideration for the sale of the liquor and since the excise duty or the countervailing duty was directly paid by the purchasers to the excise authorities and did not at all form part of the consideration for the sale of the said liquor as set out in the bills of sale, it was not permissible for the sales tax authorities to assess the turnover by roping therein something which was not set out in the bills of sale as consideration for the sales. They have lastly contended that in any event as the excise duty or the countervailing duty was at no time charged by the appellants for anything done in respect of the liquors sold but was charged by the excise authorities before removal of the liquors under the Andhra Pradesh Excise Act, 1968 and the rules made thereunder, it could not constitute a part of the turnover and taxed under the Act.

5. Although some controversy was sought to be raised by counsel for the appellants regarding the nature and character of the excise duty and countervailing duty but as rightly pointed out by the learned Attorney General, the matter has been put beyond doubt by the decisions of this Court. In *R. C. Jall v. Union of India* [1962 Supp 3 SCR 436 : AIR 1962 SC 1281] after a review of the authorities bearing on the matter, it was held by this Court as follows :

The excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost is not lost. The method of collection does not affect the essence of the duty but only relates to the machinery of collection for administrative convenience.

6. Again in *In re Sea Customs Act* [(1964) 3 SCR 787 : AIR 1963 SC 1760] it was observed :

This question with respect to excise duties was considered by this Court in the case of *Amalgamated Coalfields Ltd. v. Union of India* [1962 Supp 3 SCR 436 : AIR 1962 SC 1281]. After considering the previous decisions of the Federal Court. In *re The Central Provinces and Berar Sales of Motor Spirit and Lubricant Taxation Act*

[1939 FCR 18]; Province of Madras v. M/s. Budhu Paidanna [1942 FCR 90] and of the Judicial Committee of the Privy Council in Governor General in Council v. Province of Madras [1945 FCR 179], this Court observed as follows at p. 1287 :

With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that its ultimate incidence will always be on the customer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience.

This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event, is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.

7. It is, therefore, clear that excise duty is a duty on the production or manufacture of goods produced or manufactured within the country though as observed by one of us (Khanna, J.) in A. B. Abdul Kadir v. State of Kerala [(1976 3 SCC 219)] laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production.

8. The position with regard to the nature and character of countervailing duty has equally been made clear in a number of decisions of this Court. In Kalyani Stores v. State of Orissa [(1966) 1 SCR 865 : AIR 1966 SC 1686] which was followed in M/s. Mohan Meakin Breweries Ltd. v. Excise & Taxation Commissioner, Chandigarh [(1976) 3 SCC 421], Shah J. (as he then was) observed :

This brings us to the consideration of the meaning of the expression "countervailing duties" used in Entry 51, List II of the Seventh Schedule to the Constitution. The expression "countervailing duties" has not been defined in the Constitution or the Bihar & Orissa Act 2 of 1915. We have, therefore, to depend upon its etymological sense and the context in which it has been used in Entry 51. In its etymological sense, it means to counterbalance; to avail against with equal force or virtue; to compensate for something or serve as an equivalent of or substitute for : see Black's Law Dictionary, 4th Edn. p. 421. This would suggest that a countervailing duty is imposed for the purpose of counterbalancing or to avail against something with equal force or to compensate for something as an equivalent. Entry 51 in List II of the Seventh Schedule to the Constitution gives power to the State Legislature to impose duties of excise on alcoholic liquors for human consumption where the goods are manufactured or produced in the State. It also gives power to levy countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The fact that countervailing duties may be imposed at the same or

lower rates suggests that they are meant to counterbalance the duties of excise imposed on goods manufactured in the State. They may be imposed at the same rate as excise duties or at a lower rate, presumably to equalise the burden after taking State. It seems, therefore, that countervailing duties are meant to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. If no alcoholic liquors similar to those imported into the State are produced or manufactured, the right to impose counterbalancing duties of excise levied on the goods manufactured in the State will not arise. It may, therefore, be accepted that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied.

9. Having seen that a provision can be inserted in the excise law for collection of the excise duty at a stage subsequent to the manufacture or production of the excisable article, we shall now proceed to examine the main contentions raised by counsel for the appellants. We have first to see as to how far the contention of counsel for the appellants that apart from a manufacturer of Indian liquors and an owner of a bonded warehouse who in our opinion cannot but be regarded as primarily responsible for payment of excise duty and countervailing duty respectively in view of Section 21, 28 and 65 of the Andhra Pradesh Excise Act, 1968, and Rules 3, 4, 5, 6, 67 and 76 of the Andhra Pradesh Distillery Rules, 1970, and condition 9 of the distillery licence granted under Rule 5 of these Rules; Rules 5 and 10 of the Andhra Pradesh Indian Liquor (Storage in Bond) Rules, 1969, conditions 7 and 10 of the licence granted in Form BW 1 under Rule 5(2), the phraseology of the application for receipt of liquor into the bonded warehouse prescribed by Rule 9(2) and the terms of the counterpart agreement required to be executed by a licensee of an Indian liquor bonded warehouse under Rules 3(2) and 5(2) of these Rules the buyers of the said liquors are also liable under the law for payment of the aforesaid duties can be sustained. For a proper determination of this question, it is necessary to recall the provisions of the Andhra Pradesh Distillery Rules, 1970 which have been set out in the earlier part of this judgment. The said rules particularly Rules 79, 81, 82, 83 and 84 lend a good deal of support, in our opinion, to the contention of counsel for the appellants and make every intending buyer of the Indian liquor liable for payment of the excise duty before obtaining the distillery pass and lifting the quantity mentioned therein from the distillery. Accordingly agreeing with counsel for the appellants we hold the intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty which is collected from them by the authorities of the Excise Department.

10. The position in regard to the countervailing duty is not, however, clear though Rule 10(1) of the Andhra Pradesh Indian Liquor (Storage in Bond) Rules, 1969 and Rules 5(2) and 17 of the Andhra Pradesh Foreign and Indian Liquor Rules, 1970 enable the intending buyers of Indian liquors to remove the same from a bonded warehouse on payment of the said duty, to the excise authorities.

11. This is not, however, sufficient to dispose of the matter. The real and pivotal question that requires to be determined is whether the excise duty or the countervailing duty, as the case may be, paid directly to the excise authorities of the State or deposited directly in the State exchequer in respect of the Indian liquor by the buyers thereof before removing it from any of the aforesaid distilleries or the warehouse can be said to form part of the taxable turnover of the appellants, as according to Section 5 of the Act which is the charging section, sales tax is required to be paid by the appellants on their turnover of the year. It will be useful at this stage to advert to the definitions of the words 'turnover' and 'sale' as given in clauses (a) and (n) of sub-section (1) of Section 2 of the Act. Shorn of unnecessary details, these definitions run as under :

"turnover" means 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 or 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. . .

"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 or business for cash, or for deferred payment, or for any other valuable consideration. . .

12. In the instant case, it is not disputed that excise duty or countervailing duty paid directly to the excise authorities by the purchasers of Indian liquors before removal thereof from the distilleries or the bonded warehouse on the strength of the distillery and warehouse passes was not included in the bills of sale as the consideration for the sales, but that alone, according to the Attorney General, is not determinative of the matter. He has invited our attention to the second part of the definition of the word 'turnover' as set out above and has strenuously urged that as in addition to the price of the liquor set out in the bills of sale as consideration for the sales, other sums charged by the dealer at the time of or before the delivery of the goods also form part of turnover, and according to the well established canon of construction, a taxing statute has to be interpreted reasonably so that there is no evasion of the tax, the phrase 'any sums charged by the dealer' occurring in the aforesaid definition of the word 'turnover' must be construed as meaning any item of expense including the excise duty or the countervailing duty to which the buyers were put by the manufacturers of the liquors or the owner of the bonded warehouse. We find ourselves unable to accept the construction sought to be put by him as it is opposed to the plain meaning of the said phrase. It will be advantageous here to refer to the decisions of this Court in *A. V. Fernandez v. State of Kerala* [1957 SCR 837 : AIR 1957 SC 657] where Bhagwati, J. speaking for the Bench after quoting the observations made by Lord Russell of Killowen in *Inland Revenue Commissioners v. Duke of Westminster* [1936 AC 1, 24] which were approved by the Privy Council in the *Bank of Chettinad v. Income Tax Commissioner* [AIR 1940 PC 183] observed :

It is no doubt true that in construing fiscal statutes and determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the sales tax authorities.

13. Bearing in mind the principle set out in *A. V. Fernandez's* case, the phrase 'any sums charged by the dealer' has to be understood in its ordinary popular sense. So construing the phrase, it means "what is demanded, collected or received by the dealer". In the instant cases, the excise duty or the countervailing duty has, as already stated, not been charged or received by the dealers but has been charged by the excise authorities and deposited directly by the buyers of the liquor in the State exchequer. It is, therefore, difficult to hold that excise duty or countervailing duty was charged by the appellants.

14. The reason for inclusion of tax or a duty in the turnover was explained in two decisions of this Court bearing the same cause title viz. Messrs George Oakes (Private) Ltd. v. State of Madras [(1961) 12 STC 476 : AIR 1962 SC 1037 : (1962) 2 SCR 570 and (1962) 13 STC 98 : AIR 1962 SC 1352]. In the first of these cases, it was observed :

Under the definition of turnover the aggregate amount for which goods are bought or sold is taxable. This aggregate amount includes the tax as part of the price paid by the buyer. The amount goes into the common till of the dealer till he pays the tax. It is money which he keeps using for his business till he pays it over to Government. Indeed, he may turn it over again and again till he finally hands it to Government.

15. In the other decision, Hidayatullah, J. (as he then was) said :

In laws dealing with sales tax, turnover has, in England and America also, been held to include the tax. The reason for such inclusion is stated to be that the dealer who realises the tax does not hand it over forthwith to Government but keeps in with him, and turns it over in his business before he parts with it. Thus, the tax becomes, for the time being, a part of the circulating capital of the tradesman, and is turned over in his business. Again, it was said that the price paid by the purchaser was not so much money for the article plus tax but a composite sum. Therefore, in calculating the total turnover, there is nothing wrong in treating the tax as part of the turnover, because "turnover" means the amount of money which is turned over in the business.

16. In the instant cases, the excise and countervailing duties did not go into the common tills of the appellants and did not become a part of their circulating capital. We are, therefore, of the view that the sales tax authorities were not competent to include in the turnovers of the appellants the excise duty and the countervailing duty which was not charged by them but was charged by and paid directly to the excise authorities by the buyers of the liquors as stated above.

17. The Full Bench decision of the High Court of Andhra Pradesh in Government of Andhra (now Andhra Pradesh) v. East India Commercial Co. Ltd. [(1957) 8 STC 114 (AP)] relied upon by the Revenue is clearly distinguishable. In that case, it was the actual collection of certain sums as dharmam or charity by the dealer from the purchasers on the occasion of the sales that made the learned Judges to hold that they constitute part of the turnover. In Messrs George Oakes (Private) Ltd.'s case also, the tax in question was collected by the registered dealer.

18. We have, therefore, no hesitation in holding that the excise duty and the countervailing duty paid directly by the buyers of the Indian liquors as stated above did not constitute a part of the turnovers of the appellants.

19. For the foregoing reasons, we allow the appeals and set aside the impugned judgments and orders. In the circumstances of the case, we leave the parties to pay and bear their own costs of these appeals.

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