

Harvansh and Sons Vs. Union of India

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Court : Madhya Pradesh

Decided On : Apr-01-2002

Reported in : [2003]133TAXMAN926(MP)

Appeal No. : Dipak Misra, J. Writ Petition No. 3476 of 2001 1 April 2002

Appellant : Harvansh and Sons

Respondent : Union of India

Advocate for Pet/Ap. : Ashok Agrawal, *for the Assessee Rohit Arya, for the Revenue*

Judgement :

ORDER

The petitioner M/s. Harvansh and Sons, is a partnership firm and had taken a contract for retail sale of country liquor for the entire arisen district for the excise year 2001-02 for a sum of Rs. 13,30,00,000. For the purpose of sale of country liquor the petitioner has to transport his stock from the Warehouses of Gairatganj and Abdullaganj. At the time of making payment towards licence fees, tax at source was deducted at the rate of 10 per cent on the issue price which is inclusive of cost of liquor plus excise duty on it. The said deduction was done as per section 206C of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. As put forth in the writ petition many contractors submitted representations to the Central Government for a direction that the tax at source should be deducted

only on the cost of liquor purchased by the State Government and exclusive of the excise duty as the same is the practice which is prevalent in other States. The Central Government accepted the demand and issued a direction that the tax at source should be deducted only on the cost of the liquor. Even after the issuance of the direction of the Central Government the respondents insisted of deduction of tax at the rate of 10 per cent on the issue price.

3. It is urged in the writ petition that a writ petition was filed at Indore Bench forming the subject-matter in *Ashok Kumar v. Union of India* (1998) 98 Taxation 32, this court directed the tax at source should be deducted only on the cost of liquor supplied by the Govt. of Madhya Pradesh. Similar view was also taken by the Gwalior Bench in *Vinod Kumar Rathore v. Union of India* (Writ Petition No. 2325 of 1996). It is set forth in the petition that in compliance of the aforesaid orders the Excise Commissioner, Madhya Pradesh had issued a circular to all the districts to follow the order and collect the tax at source only on the cost of liquor. Copy of the said circular has been brought on record as Annexure P-4.

4. It is averred in the writ petition that in spite of the aforesaid orders and circular the respondents are insisting on collection of tax at source on the issue price. The petitioner has submitted a representation to the District Excise Officer, Raisen but the same has not been looked into. With the aforesaid averments prayer has been made to issue a writ in the nature of mandamus commanding the respondents to deduct the tax at the rate of 10 per cent on the cost price of liquor exclusive of excise duty and further to adjust the tax already collected in respect of future purchase of the liquor.

5. A return has been filed by the respondent Nos. 1 and 2 contending, inter alia, that the decision which was rendered in the case of *Ashok Kumar* (supra) was delivered in absence of any reply from the respondents and further relying on the letter of the Finance Minister dated 1-8-1994 addressed to the Member of Parliament and, therefore, same cannot form a base for interpretation of statutory provisions of law. It is also put forth that a circular has a different status and letter cannot be equated with that. A stand has been taken in the return that the decision by the Gwalior Bench in *Vinod Kumar Rathores* case (supra) has been assailed by

the department in L.P.A. No. 19/2000. It is the stand of the respondents that if the seller is insisting for collection of tax at source with reference to the issue/sale price, the action of the seller cannot be said to be contrary to the relevant provisions of the Act. The contention that the deduction is very heavy on the petitioner has no force as the deduction is being done in conformity with the provisions of the Act. It is the case of the respondents that the excise duty forms a part of purchase price of liquor as the auction money comprises of various constituents like licence fee, excise duty, permit fee and these items are clearly part of purchase price paid by a contractor/purchaser for purchasing from the government and these amounts are clearly covered by the expression 'amount payable by the buyer' as per section 206C(1) of the Act. It is put forth that the country liquor contractors are the buyers and the State Government authorities are the seller and, therefore, as per the provisions engrafted under section 206C(1) the payment made by the buyer to the seller including the auction money would be subject to the collection of tax at source. A reference has been made to Circular No. 585, dated 27-11-1990 issued by the Government of India, Ministry of Finance, department of revenue, Central Board of Direct Taxes, New Delhi to show that the issue has been clarified in the said circular and that should govern the field.

6. Assailing the action of the respondents Mr. Ashok Agrawal, learned counsel for the petitioner has placed heavy reliance on the decisions rendered by the Indore Bench and Gwalior Bench. It is his submission that the excise duty cannot be regarded as a part of sale price if the sale contents are scrutinised in proper detail. The learned counsel has submitted that the excise duty is not the price of liquor and, therefore, its inclusion for the purpose of determination of price in order to deduct the tax at source is absolutely unsound.

7. Mr. Rohit Arya, learned standing counsel for the department has submitted that the decisions rendered at Indore Bench as well as Gwalior Bench are not attracted and that is why the department has challenged the order in L.P.A. before the Division Bench at Gwalior Bench. It is put forth by him that if section 44AC of the Act is read conjointly with sections 206C and 276BB of the Act it would become crystal clear that the excise duty payable by the buyer will form a part of purchase

price. He has referred to the circular contained in Annexure R-II to buttress his submission.

8. Learned counsel for the parties have cited certain decisions which I shall refer to at the relevant time.

9. The real crux of the matter is whether the excise duty would form a part of sale price. In the case of Ashok Kumar (supra) the learned single judge referred to the letter written by the Finance Minister to the Member of Parliament. It reads as under :

'I am glad to inform you that the request for collection of tax at source only in respect of cost of liquor supplied by the Madhya Pradesh Government has been found acceptable and necessary instructions in this regard have been issued to the concern authorities.'

10. The learned Single Judge, thereafter, in paragraphs 7 and 8 held as under :

'7 In view of the aforesaid letter, the counsel for the parties agree that this petition be disposed of in conformity with this letter, but with liberty to the authorities to make appropriate adjustment, if found necessary, at the time of the assessment of tax.

8. Consequently, I do not go into the merits of the matter, but dispose of this petition with directions as under :

(a) The authorities shall make collection of tax at source only in respect of cost of liquor supplied by the Government of Madhya Pradesh in conformity with the letter dated 1-8-1994 and instructions issued in this regard so far as these petitioners are concerned hereafter.

(b) However, if the Act permits, levy of Income-tax also on excise duty, the authority shall be free to make appropriate adjustments at the stage of assessment of tax.'

On a perusal of this decision it is quite perceptible that the law was not laid down in that case and the matter was disposed of on concession given by the counsel

for the parties keeping in view the letter dated 1-8-1994. It is submitted by Mr. Rohit Arya, learned standing counsel for department, that as the decision was rendered on consent and making reference to a letter the same cannot be a binding precedent. Without getting into the subtleties of said submission I may only state that as the learned counsel for the parties have argued at length I will deal with the matter keeping in view the provisions and the law relating to the field.

11. In the case of Vinod Kumar Rathore (supra) the learned Single Judge referred to the decision in the case of Ashok Kumar (supra) and mentioned what transpired in the case of Ashok Kumar (supra) and noted the submissions of the department and, thereafter, posed the question in paragraph 6 as under

'6. The only question involved in this case is about the purchase price within the meaning of section 44AC of the Act (as it stood then). The explanation clarified that purchase price means and amount (by whatever name called) paid or payable by the buyer to obtain the goods referred to in this clause.'

Thereafter, the learned Single Judge referred to decisions in the cases of Union of India v. A. Sanyasi Rao (1996) 85 Taxman 321 (SC) and Bharat Prasad Choudhary v. Union of India : [1998]229ITR363(Patna) . After referring to said decision the learned Single Judge in paragraph 8 expressed the view as under :

'8. Since the case is covered by the judgment of this court in Writ Petition No. 1042/95 (Ashok Kumar v. Union of India) petition succeeds and is allowed and it is direct that tax at source shall be collected only in respect of cost of liquor supplied by the Madhya Pradesh Government and shall not include excise duty paid by the petitioner.'

12. It is canvassed by Mr. Rohit Arya that as no independent reasonings have been given in this case and the learned Single Judge has followed the decision rendered in the case of Ashok Kumar (supra) and hence, it also does not have the effect of binding precedent. As I have already indicated, I need not dilate on the said issue and deal with the situation as has been put forth by the learned counsel for the parties.

13. The heart of the matter is whether the excise duty paid by retailer is to be included towards the cost price. In this context it is apposite to refer to section 206C of the Act as that is the provision which is relevant for determining the controversy of the case at hand. The said provision reads as under :

'Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.(1) Every person, being a seller shall, at the time of debating 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) and tendu leaves

Ten percent

(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 or tendu leaves

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.

(3) Any person collecting any amount under sub-section (1) shall pay within seven days the amount so collected to the credit of the Central Government or as the Board directs.

(4) Any amount collected in accordance with the provisions of this section and paid under sub-section (3) shall be deemed as payment of tax on behalf of the person from whom the amount has been collected and credit shall be given to him for the amount so collected on the production of the certificate furnished under sub-section (5) in the assessment made under this Act for the assessment year for which such income is assessable.

(5) Every person collecting tax in accordance with the provisions of this section shall within ten days from the date of debit or receipt of the amount furnish to the buyer to whose account such amount is debited or from whom such payment is received, a certificate to the effect that tax has been collected, and specifying the

sum so collected, the rate at which the tax has been collected and such other particulars as may be prescribed.

(5A) Every person collecting tax in accordance with the provisions of this section shall prepare half yearly return for the period ending on 30th September and 31st March in each financial year, and deliver or cause to be delivered to the prescribed income-tax authority such returns in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.

(5B) Notwithstanding anything contained in any other law for the time being in force, a return filed on a floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media as may be specified by the Board (hereinafter referred to as the computer media) shall be deemed to be a return for the purposes of sub-section (5A) and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein.

(5C) A return filed under sub-section (5B) shall fulfil the following conditions, namely :

(a) while receiving returns on computer media, necessary checks by scanning the documents filed on computer media will be carried out and the media will be duly authenticated by the assessing officer; and

(b) the assessing officer shall also take due care to preserve the computer media by duplicating, transferring, mastering or storage without loss of data.

(6) Any person responsible for collecting the tax who fails to collect the tax in accordance with the provisions of this section shall, notwithstanding such failure, be liable to pay the tax to the credit of the Central Government in accordance with the provisions of sub-section (3).

(7) Without prejudice to the provisions of sub-section (6), If the seller does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of two per cent per

month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid.

(8) Where the tax has not been paid as aforesaid, after it is collected, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (7) shall be charged upon all the assets of the seller.

(9) Where the assessing officer is satisfied that the total income of the buyer justifies the collection of the tax at any lower rate than the relevant rate specified in sub-section (1), the assessing officer shall, on an application made by the buyer in this behalf, give to him a certificate for collection of tax at such lower rate than the relevant rate specified in sub-section (1).

(10) Where a certificate under sub-section (9) is given, the person responsible for collecting the tax shall, until such certificate is cancelled by the assessing officer, collect the tax at the rates specified in such certificate.

(11) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for grant of a certificate under sub-section (9) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

ExplanationFor 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 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 cooperative society.'

14. I may hasten to add that in the case of Vinod Kumar Rathore (supra) the learned single judge has dealt with section 44AC of the Act which has been deleted from the statute book but had the almost similar import and impact. In this connection I may state here that section 44AC of the Act which has been deleted was earlier governing the field, Mr. Arya has referred to the circular dated 27-11-1990 contained in Annexure R-II. The said circular reads as under :

'1. Reference is invited to Boards Circular No. 565, dated 11-7-1990 regarding collection of Income-tax at source under section 206C of the Income Tax Act in respect of profits and gains from the business of trading in alcoholic liquor, forest produce, etc., as also to earlier circulars referred in paragraph 1 of circular No. 565.

2. As a result of different systems prevailing in different States, the term purchase price, used in section 44AC of the Income Tax Act was being understood in different ways. In order to clarify this point, the Finance Act, 1990 has amended the said section to provide that the purchase price would mean any amount (by whatever name called) paid or payable by the buyer to obtain the goods referred to in that section except the bid amount in an auction. Accordingly, the excise duty paid or payable by the buyer will also form part of the purchase price for the purposes of section 44AC. On the same analogy, the Nirgam Mulya or Issue Price which is paid by a buyer in the State of Uttar Pradesh will also form part of the purchase price. Thus, income-tax will have to be collected at source under the provisions of section 206C by all persons referred to in section 44AC of the Income Tax Act, 1961 (e.g. Central Government, State Government, Local Authority, Corporations, etc.) at the specified rates, with reference to the purchase price including the excise duty, etc.

3. The above amendment has come into force with effect from the assessment year 1991-92-and, therefore, will be applicable to the collections under section 206C made during the financial year 1990-91.

4. The Finance Act, 1990 has further amended section 44AC so as to include a co-operative society also within the meaning of the term seller as defined therein, The said amendment has also come into effect from assessment year 1991-92 and will, accordingly, apply to collections made under section 206C during the financial year 1990-91.'

The aforesaid circular was issued when section 44AC was in vogue. It is apposite to mention here that section 44AC was omitted on 1-4-1993 by Finance Act, 1992 and section 206C has become the self-contained provision.

14A. In the case of Ramjee Prasad Sahu v. Union of India (1993) 202 ITR 800 (Pat) the learned Judges wrote separate judgments. G.C. Bharuka, J. expressed the view as under :

'. . . 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 where by 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.

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.' (p. 808)

S.B. Sinha, J. while agreeing with the conclusions came to hold as under :

'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.

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.

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 there under.' (p. 817)

15. In this context, I may also refer to the decision rendered in the case of Madan Mohan Gupta v. Union of India : [1993]204ITR384(Patna) , wherein a Division Bench of Patna High Court following the decision rendered in the case of Ramjee Prasad Sahu (supra) held that income-tax can be collected only with reference to the cost price of the country spirit.

16. In this context I may also profitably refer to a Division Bench decision in the case of Bharat Prasad Choudhary (supra) wherein the Division Bench referred to the earlier decisions rendered in the cases of Ramjee Prasad Sahu (supra) and A. Sanyasi Rao (supra) and came to hold as under :

'Further, it is clear from the decision of this court in the case of Ramjee Prasad Sahu : [1993]202ITR800(Patna) , that so far as section 206C of the Act is concerned, in pursuance of the said provision, no tax is to be collected or is to be paid on the amount deposited by a retail vendor by way of excise duty directly with the State Government.' (p. 366)

17. It is apposite to mention here that the petitioner has put forth in the writ petition that the firm is a retailer in sale of country liquor and lifts its stock from the warehouses at Gairatganj and Abdullaganj, In this context I may also profitably refer to section 2(6a) of M.P. Excise Act, 1915 which defines excise duty. The said provision reads as under :

'2(6a) excise duty and countervailing duty cans any such excise duty or countervailing duty, as the case may be, as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution.'

Section 13 of the aforesaid Act deals with grant of licence required for manufacture etc., of intoxicants. Section 14 provides for establishment or licensing of distilleries and warehouses. Section 15 of the aforesaid Act which deals with the payment of duty on removal from distillery, brewery or place of storage reads as under :

'15. Payment of duly on removal from distillery, brewery or place of storage. Without the sanction of the State Government no intoxicant shall be

removed from any distillery, brewery, warehouse, or other place of storage established or licensed under this Act unless the duty (if any) payable under Chapter V, has been paid or a bond has been executed for the payment thereof.'

In this context I may also refer to section 26 of the aforesaid Act which deals with ways of levying such duty. The said provision reads as under :

'Ways of levying such dutySubject to such rules regulating the time, place and manner as the State Government may prescribe, such duty shall be levied ratably on the quantity of excisable article imported, exported, transported, collected or manufactured in or issued from a distillery, bewery or warehouse :

Provided that

(1) duty may be levied

(a) on intoxicating drugs by an acreagate rate levied on the cultivation of the hemp plant or by a rate charged on the quantity collected;

(b) on spirit or beer manufactured in any distillery established or any distillery or brewery licensed under this Act

(i) in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe or;

(ii) by a rate charged directly on the materials used;

(c) on tari, by a tax on each tree from which the tari is drawn.

(2) Where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from the warehouse.

(3) Whether the rate of duty is enhanced or reduced after payment of duty on issue of excisable article from warehouse and the excisable article is in stock with a holder of a licence, the excisable article in stock shall be subject to the levy of

duty at the rate so enhanced or reduced and the difference in duty shall be payable or refundable, as the case may be, by or to the holder of a licence, with whom such duty paid excisable article is in stock at the material time.'

If both these provisions are read together it is quite vivid that when the liquor is purchased from a warehouse, payment of excise duty is to be made at the rate of duty in force on the date of issue of liquor from the warehouse. In absence of any dispute that the petitioner is retailer and has asserted that he has been lifting from two warehouses, he has to pay the excise duty as per the aforesaid provision.

18. In view of this factual backdrop, in my considered opinion, the view expressed by the Patna High Court in the case of Ramjee Prasad Sahu (supra) which was affirmed by the Bharat Prasad Choudharys case (supra) is squarely applicable to the instant case. I do respectfully agree with the view taken in the said decisions and see no reason to differ with the same. Though Mr. Arya, learned counsel for Income Tax Department made enormous effort to interpret section 206C of the Act in a different manner and referred to Circular No. 585, dated 27-11-1990, I may hasten to add that said circular was issued when section 44AC was in vogue and not section 206C.

19. Ex consequenti, the writ petition is allowed and it is commanded that the respondents shall deduct the tax at the rate of 10 per cent on the cost of liquor excluding the amount paid towards the excise duty. Any amount already paid shall be adjusted in respect of future sale. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition allowed.