MOHAN BREWERIES AND DISTILLERIES LTD. ETC. ETC. A

v.

COMMERCIAL TAX OFFICER, MADRAS AND ORS.

SEPTEMBER 9, 1997

[S.P. BHARUCHA, K.T. THOMAS AND V.N. KHARE, JJ.] B

Sales Tax

Tamil Nadu General Sales Tax Act 1959/Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules, 1981 : Section 2(r)/Rule 22. C

Manufacturer—Indian Made Foreign liquor-Liability to pay excise duty—Held, primary obligation to pay excise duty on the manufacturer—Rule 22 only provides for convenient method of collection—Excise duty not physically entering manufacturer's till is not the decisive test for determining whether it would constitute manufacture's turnover. D

The appellants manufacture Indian Made Foreign Liquor (IMFL) on the strength of licenses issued to them under the provisions of the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules 1981. The Tamil Nadu State Marketing Corporation Ltd. (TASMAC) had the exclusive privilege of supplying by wholesale IMFL for the whole of the State. The Corporation paid the excise duty directly. The element of the excise duty did not enter into the turnover of the appellant. E

In the writ petitions filed in the High Court the contention of the appellant was that the liability to pay excise duty lay not upon them but upon the Tamil Nadu State Marketing Corporation. The said petition was dismissed. Hence the present appeals. F

In appeal before this Court the contention of the appellant was that under Rule 22 of the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules, 1981, the manufacturer of the IMFL was not liable for payment of excise duty but it was upon the party who removed the IMFL from the factory. It was further submitted that Rule 22 itself was a representation to the manufacturer and that an equitable estoppel arose against the respondent State preventing it from receiving sales tax from the manufacturer. G

Dismissing the appeal, this Court H

A HELD : 1.1. The liability to pay excise duty on the IMFL is that of the manufacturer thereof. Excise duty is levied upon goods manufactured or produced. Its incidence falls, therefore, on the manufacturer or producer of the goods. The collection of excise duty may be deferred to such later stage as is administratively or otherwise, most convenient. [14-B; 13-E]

B *Union of India and Ors.*, v. *Bombay Tyre International Ltd. and Ors.*, [1984] 1 SCC 467, relied on.

1.2. Rule 22 of the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules 1981 only provides a mode for collecting the excise duty, C a mode which is obviously convenient for it requires the party removing the IMFL from the factory of its production to pay in advance the excise duty thereon. That party might be the manufacturer. That IMFL should be supplied in the State by wholesale only through TASMAC cannot be a reason for holding that the primary obligation to pay excise duty is that of TASMAC or that the manufacturer is absolved of the obligation to pay excise duty. [14-B-D]

D 2. When the excise duty is collected from a party removing the IMFL from the factory of its production, other than the manufacturer, the payment of excise duty that party makes is in discharge of the obligation of the manufacturer. That party does not, as it would ordinarily do, pay the excise duty component along with the sale price of the IMFL it purchases from the E manufacturer; it pays the sale price to the manufacture and it pays the excise duty into the Treasury for and on behalf of the manufacturer. In effect, therefore, the element of excise duty does enter the turnover of the manufacturer just as much as it would ordinarily do. [14-H; 15-A-B]

F 3. The definition of "turnover" in section 2(r) of the Tamil Nadu General Sales Tax Act, 1959 referring as it does to the aggregate amount for which goods are sold whether for cash or other valuable consideration is wide enough to cover such excise duty. That the excise duty does not physically enter the manufacturer's till is not the decisive test for determining whether or not it would be a part of the manufacturer's turnover. [15-B-C]

G *Mc Dowell and Co. Ltd.* v. *The Commercial Tax-Officer*, [1985] 3 SCR 791, relied on.

4. The argument based on Explanation (1-A) of section 2(r) of the Tamil Nadu sales Tax Act cannot be entertained because the amount of excise duty H was not charged by the appellants by way of tax separately without including

the same on the price of the IMFL sold. [15-D] A

5. Since no representation had been made by sales tax authority, Rule 22 itself cannot be said to be a representation that could have misled the appellants that an equitable estoppel has arisen preventing the State from recovering Sales Tax from the manufacturer. [15-D-E]

The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, **1938 (1939) FCR 18 : AIR (1939) FCI and** *Province of Madras* **v.** *Boddu Paidanna and Sons,* **(1942) FCR 90 : AIR (1942) FC 33, referred to.** B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5105 of 1997. C

From the Judgment and Order dated 25.4.89 of the Madras High Court in W.P. No. 4975 of 1987.

WITH

C.A. No. 5106/97, 5122/97, 5123/97, 5124/97, 5125/97, 5126/97, 5127-28/97, 5129/97, 5130/97, 5131-5133/97. D

G.L. Sanghi and A.T.M. Sampath for the Appellants.

V.R. Reddy, V. Krishnamurthy and T. Harish Kumar for the Respondents.

The Judgment of the Court was delivered by E

S.P. BHARUCHA, J. These are appeals against the judgments and orders of Division Benches of the High Court at Madras in tax revision cases that involve the same issue namely, whether the excise duty on potable liquor manufactured by the appellants, paid by the purchasers thereof , is includible in the taxable turnover of the appellants for the purpose of levy of tax under the Tamil Nadu General Sales Tax Act. F

The appellants manufacture Indian Made Foreign Liquor (IMFL) on the strength of licences issued to them under the provisions of the Tamil Nadu Indian Made Foreign Spirits (Manufacture) Rules, 1981. The manufacture, supply and sale of the IMFL is governed by the Tamil Nadu Prohibition Act, 1937 (now referred to as 'the Act'), the Tamil Nadu Indian-made Foreign Spirits (supply by wholesale) Rules, 1981, and the Tamil Nadu Indian Made Foreign Spirit (Manufacture) Rules, 1981 (now referred to as the 'Wholesale Rules' and the 'Manufacture Rules' respectively). G

By reason of Section 17-C of the Act, (introduced by an amendment in H

A 1983), the Tamil Nadu State Marketing Corporation Limited, a corporation wholly owned and controlled by the Government of State of Tamil Nadu, had at the relevant time the exclusive privilege of supplying by wholesale IMFL for the whole of that State. Section 18-A provides for excise duty on liquor. Sub-section (1) thereof reads thus :

B "(1) An excise duty or countervailing duty of such amount as the State Government may, by notification in the Fort St. George Gazette, specify from time to time shall, if they so direct, be levied on all liquors and intoxicating drugs permitted to be imported , exported, transported, manufactured, issued from any manufactory or institution or sold, C under the provisions of this Act or any rule, notification, licence or permit issued thereunder."

Section 18-B provides for excise duty on excisable articles. It reads, so far as is relevant, thus :

D "18-B. Excise duty or countervailing duty on excisable articles- Notwithstanding anything contained in section 18-A, with effect on and from the date of the commencement of the Tamil Nadu Prohibition (Amendment) Act, 1981, an excise duty or countervailing duty at such rate not exceeding rupees thirty per proof litre as the state Government may, from time to time by notification specify, shall be levied [only E under this Section] on all excisable articles-

xxx xxx xxx

(d) manufactured under any licence granted under this Act;

F (e) manufactured at any distillery, blending unit or brewery licensed or established under this Act;

(f) issued from a distillery, blending unit, brewery or warehouse licensed or established under this Act."

G Section 18-C, so far as is relevant, reads thus :

"18-C. How duty may be imposed.—The excise duty or the countervailing duty under section 18-B may be levied in one or more of the following ways :

(a) by duty of excise to be charged in the case of spirits or beer either H on the quantity produced in, or passed out of a distillery, blending

unit, brewery or warehouse licensed or established under this Act, or 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 may be prescribed."

Rule 22 of the Manufacture Rules, as amended on 4th October, 1982 reads thus :

"22. Payment of excise duty and vend fee.-

(1) an excise duty, at such rate as the State Government may prescribe from time to time, shall be paid by the person who removes the goods from a manufactory, on the stock of Indian-made foreign Spirits so removed from the manufactory.

(2) A vend fee of rupees two per bulk litre shall be paid by the licensee on all stocks of Indian-made Foreign Spirits issued from the manufactory"

Rule 15 (1) of the wholesale Rules, amended at the same time, reads thus:

"15. Payment of excise duty and vend fee.—(1) The licensee shall pay the excise duty on the stock of Indian-made Foreign Spirits removed by him from a manufactory in the State as required under sub-rule (1) of rule 22 of the Tamil Nadu Indian-made Foreign Spirits (Manufacture) Rules, 1981 or the countervailing duty on the stock of Indian-made Foreign Spirits imported from a manufactory outside the State or the excise duty or countervailing duty as the case may be, on the stock of Indian-made Foreign spirits removed by him from a bonded warehouse licensed under the Tamil Nadu Indian-made Foreign Spirits (Storage-in-Bond) Rules, 1981."

These amendments were given retrospective effect form 23rd May, 1981.

It was contended on behalf of the appellants in their writ petitions before the High Court that the liability to pay excise duty upon the basis of the aforesaid provisions lay not upon them but upon the Tamil Nadu State Marketing corporation (TASMAC). TASMAC had to submit an application for its requirement of IMFL and thereupon the excise duty thereon was assessed. TASMAC paid the amount thereof directly. The appellants neither collected the excise duty from the wholesaler nor had they the statutory or contractual authority to realise the same from it. The appellants were not,

A therefore, liable to pay sales tax on excise duty which was neither part of the sale price nor consideration for the sale. In the principal judgment, followed in the other cases, the High court , primarily basing itself upon the decision of this court in *Mc Dowells & Company Limited* v. *The Commercial Tax Officer,* [1985] 3 SCR 791, rejected the contentions on behalf of the appellants and dismissed the writ petitions. Hence these appeals.

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It is convenient at this stage to set out certain provisions of the Tamil Nadu General Sales Tax Act, 1959 (now referred to as ''the Sales Tax Act'') Section 2(r) , and Explanation (1-A) thereto, read thus:

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> ''Section 2(r) ''turnover'' means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n) ,by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of sale by a person of
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> D agricultural or horticultural produce, other than tea, and rubber (natural rubber latex and all varieties and grades of raw rubber), grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover;
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> E xxx xxx xxx
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> Explanation (1-A) : Any amount charged by a dealer by way of tax separately without including the same in the price of the goods bought or sold shall not be included in the turnover.

F Section 2 (n) defines ''sale'' to mean ''every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration.....'' Section 3 provides for the levy of tax on sales or purchase of goods.

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Learned counsel for the appellants submitted that, by virtue of the provisions of the Act and the Rules aforementioned, particularly Rule 22 of the Manufacture Rules, the manufacturer of the IMFL was not liable for the payment of the excise duty thereon. The imposition of the excise duty by reason of Rule 22 was squarely on the party who removed the IMFL from its

H manufacturory, namely, TASMAC. The manufacturer could not, by reason of

Rule 22, seek to recover the excise duty from the party so removing the IMFL. The element of the excise duty did not enter into the turnover of the manufacturer and, accordingly, no sales tax was payable on the element of excise duty. Learned counsel cited the judgment of this Court in *Union of India and others* v. *Bombay Tyre International Ltd. and others, Rules,* [1984] 1 SCC 467, and emphasised the reference to the judgments of the Federal Court in *The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act and Province of Madras* v. *Boddu Paidanna and Sons.* In learned counsel's submission, the observations therein supported the argument that the imposition of excise duty was upon the party who removed the IMFL from the factory. Learned counsel submitted that the ratio of the judgment in *Mc Dowell and Company Limited* v. *The Commercial Tax Officer,* [1985] 3 SCR 791, (the second Mc Dowell case), upon which the High Court had relied, was restricted to the Andhra Pradesh rules therein mentioned and was inapposite to the provisions which are before us. Learned counsel sought to draw assistance from Explanation (1A) to Section 2(r) of the Sales Tax Act, Learned counsel submitted that Rule 22 itself was a representation to the manufacturer and even the Sales Tax authorities had been misled by it; in their submission, an equitable estoppel arose against the respondent State which prevented it from recovering sales tax from the manufacturer on the element of excise duty.

Excise duty is levied upon goods manufactured or produced (Entry 84 of List I and Entry 51 of List II of the Seventh Schedule to the Constitution). Its incidence falls, therefore, on the manufacturer or producer of the goods. The collection of excise duty may be deferred to such later stage as is, administratively or otherwise, most convenient.

In the case of *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act,* it was noted that excise duty was a duty ordinarily levied on the manufacturer or producer in respect of the manufacture or production of the commodity taxed. A distinction was made between the nature of the tax and the point at which it was collected. It was subject to the legislative competence of the taxing authority to impose the duty at the stage which was most convenient and the most lucrative, wherever it might be, but "that is a matter of the machinery of collection, and does not affect the essential nature of the tax". This was reiterated by the Federal Court in *Boddu Paidann's* case. In the *Bombay Tyre's* case, this Court referred to the aforementioned two authorities of the Federal Court and several authorities of this Court to hold that excise duty was levied on manufacture but it could

A be levied at any convenient stage so long as the character of the impost, that is, that it was a duty on the manufacture or production was not lost. The method of collection did not affect the essence of the duty but only related to the machinery of collection for administrative convenience. This Court said, ''While the levy in our country has the status of a constitutional concept, the point of collection is located where the statute declares it to be''.

B

The liability to pay excise duty on the IMFL is, therefore, that of the manufacturer thereof. Rule 22 only provides a mode for collecting the excise duty, a mode which is obviously convenient for it requires the party removing the IMFL from the factory of its production to pay in advance the excise duty thereon. That party might be the manufacturer. That the Act provides in another section that all IMFL should be supplied in the State of Tamil Nadu by wholesale only through TASMAC dose not, in our view, make any difference to this position. It cannot be a reason for holding that the primary obligation to pay excise duty is that of TASMAC or that the manufacturer is absolved of the obligation to pay excise duty.

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D

We cannot agree with learned counsel for the appellants that the second Mc Dowell case was based only upon the provisions of the Andhra Pradesh rules that were under consideration. It is amply clear from the citation of the authorities of this Court in that judgment that it elaborated upon the concept of excise duty and concluded that ''the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage as a measure of convenience or expediency''. The Andhra Pradesh rules, it was held, ''did not detract from the position that payment of excise duty is the primary and exclusive obligation of the manufacturer and if payment be made under a contract or arrangement by any other person it would amount to meeting of the obligation of the manufacturer and nothing more''. Note was taken of the argument that excise duty had never come into the hands of the appellant and that the appellant had no opportunity to turn it over his hands and, therefore, the same could not be considered to be a part of its turnover. It was held that the argument that ''when the excise duty does not go into the common till of the assessee and it dose not become a part of the circulating capital, it does not constitute turnover, is not the decisive test for determining whether such duty would constitute turnover''.

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As we look at it, the primary obligation to pay excise duty on the IMFL is of the manufacturer thereof. Rule 22 only provides for a convenient method for its collection. When the excise duty is collected from a party removing the IMFL from the factory of its production, other than the manufacturer, the

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payment of excise duty that party makes is in discharge of the obligation of the manufacturer. That party does not, as it would ordinarily do, pay the excise duty component along with the sale price of the IMFL it purchases to the manufacturer; it pays the sale price to the manufacturer and it pays the excise duty into the Treasury for and on behalf of the manufacturer. In effect, therefore, the element of excise duty does enter into the turnover of the manufacturer just as much as it would ordinarily do. The definition of "turnover" in Section 2(r) of the Sales Tax Act, referring as it does to "the aggregate amount for which goods are bought or sold" and "whether for cash or .... other valuable consideration", is wide enough to cover such excise duty. That the excise duty does not physically enter the manufacturer's till is, as held in the second Mc Dowell case, not the decisive test for determining whether or not it would be a part of the manufacturer's turnover.

The argument based on Explanation (1-A) of Section 2(r) of the Sales Tax Act cannot be entertained because the amount of excise duty was not charged by the appellants by way of tax separately without including the same in the price of the IMFL sold.

Insofar as the argument of equitable estoppel is concerned, the short answer, in our view, is that, admittedly, no representation had been made by any Sales Tax authorities, and, given the construction that we have placed upon it, Rule 22 itself cannot be said to be a representation that could have misled the appellants.

In the premesis, the appeals are dismissed, with costs.

S.V.K.I. Appeals dismissed.