

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 03.12.2012
PRONOUNCED ON: 14.12.2012

+ **WP (C) No. 4717/2011 & CM No.9555/2011**

PANACEA BIOTECH LTD. Petitioner

Through: Shri Rajesh Mahna with Mr. Ruchir Bhatia
and Mr. Ankit Singh, Advocates

Versus

COMMISSIONER OF TRADE
AND TAXES & ORS. Respondents

Through: Sh. Vineet Bhatia, Advocate

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. The writ petitioner is a public limited company is engaged in the business of manufacturing and sale of pharmaceutical products registered with the Department of Trade and Taxes. It has been purchasing goods based on the strength of the Registration certificate. It impugns the determination of the respondent authorities that the consideration it received for the sale of its cars, should be included in its total turnover for the relevant assessment year.

2. The Sales Tax Officer (Assessing Authority, the third Respondent), for the assessment year 2004-05, demanded tax to the extent of ₹. 1, 51, 967 under the Delhi Sales Tax Act 1975 (“the local Act”) and ₹.7,73,082 under the Central Sales Tax Act 1956 by an order dated 28.03.2006 on the sale of car made by the Petitioner in the F.Y. 2004-05. The respondent asserted that these articles were used in the connection of running the business itself and when the vehicle has ceased to serve the desired purpose, the same were sold, after claiming depreciation. The Petitioner filed two revision petitions, under Section 43(5) of the local Act read with Rule 36(6) of the Delhi Sales Tax Rules 1975 and another under Section 9 (2) of the Central Sales Tax Act 1956 read with abovementioned provisions of the Delhi Sales Tax Act and Rules) under Joint Commissioner, Trade and Taxes (i.e. the second Respondent) on the basis of the abovementioned two orders. The second Respondent issued the impugned order on 16.05.2007 which is alleged by the petitioner The petitioner filed a review application to the Additional Commissioner (Appeals) which again reiterated the demand of tax regarding the sale of a car vide an order dated 07.04.2011.

3. The impugned assessment order argues the petitioner, was passed without paying heed to two previous orders of the Appellate Tribunal i.e. *Powertron Products* (2001-02) [41 DSTC J-3] (dated 21.05.2002) and reiterated in *L & T Finance Ltd* (2003-04) [43 DSTC J-182] (dated 15.12.2004):

“Coming back to the facts the appellant has purchased the car, falling within notification u/s 5 on which the tax has been paid in Delhi to our satisfaction in accordance with the said notification. Hence, the same cannot be taxed again in the hands of the appellant. The tax is deleted.”

4. The petitioner’s contention in the present appeal is that the impugned orders are unsustainable. It is contended that the impugned orders do not disclose any reasons why the two orders by the Tribunal with the same material facts are inapplicable to its case and why it is treated discriminatorily. The petitioner relied on a number of judgments in support of its contentions. In the case of *Morarji Bros. (I&E) Pvt. Ltd v. State of Maharashtra 1995 (99) STC 117*, the Bombay High Court held that:

“In the view of the above, we are of the clear opinion that the sales of three used motor cars by the assessee, who was a dealer carrying on business of manufacturing, selling and supplying of chemicals, did not amount to sale by a dealer within the meaning of section 3 read with clauses (11) and (5A) of Section 2 of the Bombay Sales Tax Act, 1959.”

The petitioner also relies on *Base Repair Organisation (Now Naval Dockyard), Vishakhapatnam v. State of A.P. [(1983) 53 STC 223]* cited in the *State of Tamil Nadu v. Board of Trustees of the Port of Madras ([1999] 114 STC 520)*. In *Base Repair Organisation*, the Naval Dockyard was established for repairing and servicing ships of the Navy. It was obliged by section 46 of the Factories Act to run a canteen to cater to the needs of its employees and the canteen was run on no-profit no-loss basis. It was held that the sales in the

canteen were not liable to sales tax. The Andhra Pradesh High Court held as follows:

“It should be noticed that the canteen is not only being run in discharge of a statutory obligation, but that it constitutes an infinitesimal and insignificant part of the entire activity of the assessee. Having regard to the nature of the functions and the purpose for which the canteen sub serves the main object and purpose of the assessee, and is an integral and inseparable part of it, it would be unrealistic to separate the said activity and treat it as a business.”

5. The second Respondent relied on two judgments of Madras High Court and the Supreme Court respectively to come to its order. Firstly, in the *State of Tamil Nadu v. Thermo Electrics* (1977 39 STC 317 Mad), the Madras High Court held:

“...if an assessee is a dealer, with reference to the business carried on by him, every transaction of sale, whether it is of capital asset or a stock-in-trade would be liable to be included in the turnover of the assessee.”

In *State of Tamil Nadu v. Burmah Shell Oil Storage and Distributing Co. of India Ltd and Others* (AIR 1973 SC 1045), the Supreme Court held that sale of scrap, periodically unserviceable oil drums, rubber hoses, jerry cans, rims, unserviceable pipe fittings and old furniture etc. are parts of its trading activity and any sale of these unserviceable goods as scrap is a transaction connected with trade/commerce/business of the company and the turnover of this commodity is liable to tax.

6. The definition of “*business*” is to be found in Section 2 (c) of the Delhi Sales Tax Act, 1975. It reads as follows:

(c) "business" includes:-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern, and

(ii) any transaction in connection with, or incidental ancillary to, such trade, commerce, manufacture, adventure or concern.”

“Dealer” on the other hand, means “*any person who carries on business of selling goods in Delhi...*” by virtue of Section 2 (e). The expression “turnover” has been defined as follows (Section 2 (o)):

(o) "turnover " means the aggregate of the amount of sale price receivable, or if a dealer so elects, actually received by a dealer in respect of any sale of property in goods, made during any prescribed period in any year after deducting the amount of sale price, if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the prescribed period;

PROVIDED that an election as aforesaid once made shall not be altered except with the permission of the Commissioner and on such terms and conditions, as he may think fit to impose...”

7. An issue somewhat similar to the present one arose for consideration for the first time, before in the Supreme Court in *State of Gujarat v. Raipur Manufacturing Co. Ltd* AIR 1967 SC 1066. That case arose under the Bombay Sales Tax Act 1953, the disposal by a company carrying on the business of manufacturing and selling cotton textiles of its miscellaneous old and discarded items such as cans, boxes, cotton ropes, rags etc., was held by the Court not to be carrying on the business of selling these items of goods. The Supreme Court held that:

"But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly from the frequency, volume, continuity and regularity of transactions carried on with a profit motive, an inference that it was intended to carry on business in the commodity may arise. But it does not arise merely because the price received by sale of discarded goods enters the accounts of the trader and may on an overall view enhance his total profit, or indirectly reduce the cost of production of goods in the business of selling in which he is engaged. An attempt to realize price by sale of surplus unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to inference that business is intended to be carried on in selling those goods. The contention on behalf of the State in respect of the first part of the turnover for 1964-65 therefore fails.

With respect to the second part of the turnover the question whether the amendments in 1964 to the definition of "business" and "casual trader" are directly applicable has to be considered. It will be observed that under the definition of

"business" even commercial transactions carried on without a motive to make gain or profit, or whether or not any profit accrues from such activity are included in that definition. The amended sub clause (ii) also includes with that definition transaction in connection with or incidental or ancillary to such trade, manufacture or adventure or concern. The question is, whether the word "such" in sub-cl. (ii) of cl. (d) of s. 2 refers to the trade etc. defined in sub-cl. (i). It was contended before the Madras High Court that it is not so and that incidental or ancillary activity must partake the nature of 'business in its generic sense. In Dy. Commr. of Commercial Taxes v. Thirumagal Mills Ltd. (supra) a Bench of that Court had held that notwithstanding the amendment the presence or absence of profit will not make any difference. According to it what has to be considered is that the activity should be of a commercial character and in the course of trade or commerce and accordingly the definition of 'business' in the second clause was still one invested with commercial character inasmuch as the reference was to "any transaction in connection with or incidental or ancillary to any trade, commerce, manufacture, adventure or concern'. It was observed that unless the transaction is connected with trade that is to say, it has something to do with trade or has the incidence or elements of trade or commerce it will not come within the definition."

8. "Ancillary" according to the Concise Oxford English Dictionary (10th ed.) means something providing support to the primary activities of an organisation; something which is additional or subsidiary. In *Board of Trustees of the Port of Madras* ([1999] 114 STC 520), the Supreme Court held:

"If the main activities are "business" then the sales in connection with or incidental or ancillary thereto need not have been intended as a business or commercial activity. Their mere connection with or being incidental or ancillary

to something else which was “business” was sufficient to include such sales in the main business.”

9. The leading case (*Raipur Manufacturing Co. Ltd*) is based on the definition of “business” in S.2 (d) (g) prior to it being amended in 1992 in Tamil Nadu General Sales Tax Act 1959 i.e. when it did not include connected, ancillary or incidental sales. The judgment by Shah, J. held that the definition of “business” did not exclude profit motive nor did it include sales “in connection with” the main activity. The textile mill’s main activity did indisputably amount to “carrying on business” but in regard to the incidental sales of “unserviceable or discarded” goods, it was held that these sales were intended only for reduction of the space and to save accommodation and were not so integrated with (or connected with) the main business even if they were of considerable volume and frequency.

10. The other argument of the petitioner rests on the fact that when the vehicles/cars were purchased the said items were taxable at first point i.e. w.e.f. 29.03.1996 to 02.09.2001 therefore accordingly purchases were made after payment of tax. Since the tax had been paid at the time of purchase, the sale of said vehicles cannot be taxed in view of provisions of Section 5 of the Delhi Sales Tax Act 1975 whereunder notification No. F. 4 (67)/95 Fin. (G) (i) dated 29.03.1996 was issued. The said notification was withdrawn on 03.09.2001. Thereafter, sale of cars/vehicles became taxable at last point in notification No. F. 101 (69) 2001 – FIN (A/Cs) 2318-26 dated 03.09.2001 no protection/saving clause was

provided/incorporated in respect of cars/vehicles which were purchased under the first point regime and were sold (after use) during the last point regime from levy of tax.

11. Sales tax is an indirect tax. It is leviable on transfer of goods. It is, however, well-settled that while construing a taxing statute one has to look merely at what is clearly said. [See speech of Viscount Simon referred to in *State of West Bengal v. Kesoram Industries Ltd. and Ors.* [2004]266 ITR 721 (SC), wherein it was noticed:

“105. Justice G.P. Singh in Principles of Statutory Interpretation (8th Edn., 2001) while dealing with general principles of strict construction of taxation statutes states:

A taxing statute is to be strictly construed. The well-established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means: The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words. In a classic passage Lord Cairns stated the principle thus: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words: In a taxing Act one has to look merely at what is clearly said. There is

no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (at p. 635) ”

12. In the present case, the main business of the petitioner is manufacture and sale of pharmaceutical products and the vehicles are used by it in the course of business (as written by Respondent No.-2 in the impugned order (Annexure A-1)). This may lead to the inference that proceeds from the sales of such vehicles should have been included in the turnover and must be taxed accordingly. But the selling of used cars cannot by any stretch of the imagination be characterized as “ancillary” or incidental to the business of a pharmaceutical company. It is not shown that the cars were of a special character e.g. air conditioned vehicles especially designed to store and ferry pharmacy products. They were purchased for use of company employees and executives, for office purposes. At the stage of purchase, they suffered sales tax, which the assessee, as buyer, was bound to pay. However, the assessee never held them for the purpose of sale and purchase, but for using them. After their use, having regard to lapse of time, and their wear and tear, the assessee decided to replace them. These cars were then sold. Their sales, in a sense are twice removed from the business of the assessee. They cannot be called “incidental” or “ancillary” to the manufacture and sale of pharmaceutical products, which the assessee is engaged in.

13. This court also notices that the vehicles had already been taxed once under the first point tax regime then in cases of transactions which are redundant and cannot be considered under the definition of “business” as they were aimed mainly to get rid of old vehicles which are carried on by persons in normal course of their lives as well and previous orders of the Appellate Tribunal have also been in favour of the petitioner itself, the levy of sales tax on an already taxed vehicle with little relation to the business will give rise to an anomaly.

14. In view of the above discussion, it is held that the view taken by the respondents, regarding inclusion of the sales transaction of the cars in question, in the turnover of the petitioner, is unsustainable in law. The impugned orders are consequently quashed; the writ petition is allowed. In the circumstances, there shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

DECEMBER 14, 2012