

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10349 of 2002

M/S Indchemie Health Specialties Pvt. Ltd. through its authorized Manager Sri Narendra Shahi aged 34 years, son of Sri Parasuram Shahi, resident of Rajendra Nagar, P.O. Rajendra Nagar, P.S. Kadam Kuan, Patna.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Commissioner of Commercial Taxes, Bihar, Patna.
3. The Deputy Commissioner of Commercial Taxes, Special Circle, Patna.

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Ajay Kumar Rastogi, Advocate
Mr. Parijat Saurav, Advocate

For the Respondent/s : Mr. Purnendu Singh, G.P.-27
Mr. Praveen Kumar, A.C. to G.P.27

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 07-09-2015

This writ application under Article 226 of the Constitution of India has been filed, seeking quashing of the assessment order and the demand notice, dated 27.06.2002, whereby, quantitative discount given by the petitioner as trade discount to its customers to the tune of Rs.20,68,257/ for the assessment year 2000-2001 has been included to the taxable turn over, for the purposes of imposition of tax, under the Bihar Finance Act, 1981 (hereinafter referred to as the 'Act').

2. The sole question, which has emerged to be decided, based on rival pleadings and submissions made on behalf of the

parties in the present proceeding is as to whether quantitative discount, which the petitioner has claimed as trade discount, could be included in the taxable turn over to the petitioning Company or not, for the purpose of assessment under the Act.

3. Before we deal with the legal issue involved in the present proceeding, as taken note of in the preceding paragraph, it would be apt to encapsulate facts of the case, briefly which are as under:-

4. The petitioner, M/s. Indchemic Health Specialties is a Private Limited Company, registered under the Bihar Finance Act, 1981, having registration No.SL-702 (R), engaged in manufacture and sale of medicines. It has been paying sales tax as per the law including the provisions under the Act. The Company had been granting trade discount to its customers, but the trade discount, so granted, by it was at no point of time, prior to the assessment under challenge, was included to its total turn over, for the purpose of assessment of sales tax under the Act. For the first time, for the financial year 2000-2001, the respondent-authorities disallowed the quantitative discount and included it in the taxable turn over of the Company. The "Trade Quantity Discount Offer" of the Company, has been brought on record by way of Annexure-2/A of the writ application, dated 01.04.2000, according to which certain quantity



of products were offered to be free to its stockists and retailers on purchase of the specified quantity of the Company's products. For example, a stockist was offered 30 vials of 2 ml pack of the product AMINEG 100 MG free on purchase of 100 vials, whereas a retailer was offered 3 vials free, of the said product, on purchase of 10 vials. Said differently, as per the said quantity discount offer, on payment of price of 100 vials of the said product, a stockist was entitled to get 130 vials. This fact that the petitioner had offered such discount, to its customers for the assessment year, in question, and in fact had given such discount has not been disputed. It is the case of the petitioner that in such circumstance, no sale price having been charged with respect to the products given to its customers on purchase of specified quantity of product, the said amount could not be added to the taxable turn over of the Company, for the purpose of assessment of sales tax.

5. The respondents- State of Bihar, on the other hand, has taken a plea, without disputing the petitioner's claim that the said trade quantity discount was given by the Company and no consideration amount had been received by it against the products given free, have asserted that such discount given by the Company was limited to the wholesalers and retailers and the said discount did not pass on to the end consumers. It is their case that on the

products, given to the wholesalers and retailers, free, under the said trade discount offer, no tax is shown to have been charged, but at the time of its sale to the consumer, price is realised along with all taxes.

6. It is specific plea on behalf of the respondent-State of Bihar that the petitioning Company had issued Form-IX C to its purchasers certifying that the goods sold to the wholesalers and retailers were tax paid at the first point, which included the products given free, such transactions also get covered as tax paid. It is their case that Form IX-C is issued only when the commodity is tax paid, but in cases of discount given to the wholesalers and retailers of the present nature, the Company does not show collection of tax on transactions covered by the trade discount but issue Form IX-C, which covers the said free transactions. Levy of tax by assessment done after including the trade discount given by the petitioner for the assessment year, in question, is sought to be justified by the State- respondents, accordingly.

7. From the assessment order under challenge, in the present writ petition, it is evident that the petitioner has been assessed on the gross turn over of Rs.7,03,62,525/- which includes the discount given by the petitioner to its customers to the tune of Rs.20,68,257/-.



8. Assailing the impugned assessment order and the demand notice, learned counsel for the petitioner has relied upon a Division Bench decision of this Court in case of *M/s Mapra Laboratories Pvt. Ltd. Vs. The State of Bihar & Ors., reported in 2003(4) PLJR 507*. It has been contended by him that as per the scheme of 'trade quantity discount offer' of the petitioner, brought on record by way of Annexure-2/A to the writ application, on purchase of different types of medicines of particular quantity, the petitioner had given certain quantities of stripes and vials free to the purchasers without charging any consideration and, therefore, such products which were supplied to the customers by the petitioner free in terms of its above mentioned scheme, was not covered by the definition of sale, as defined under the Act, no consideration money having been passed. It has also been submitted that the discount which was given by the petitioner, in question, was in the nature of "trade discount" given as per the trade practice which ought to have been excluded from the taxable turn over of the Company for the purpose of imposition of tax in accordance with the provisions of the Act.

9. Learned Government Pleader-27, appearing for the respondents-State of Bihar, on the other hand, in opposition to the claim of the writ petitioner would submit, referring to definition



clause 2 (u) of the Act read with *Explanation II*, that only cash discount given by a dealer, according to ordinary trade practice is not required to be included as 'sale price'. Referring to the Supreme Court decision in case of *The Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) V. M/s. Advani Coorlikon (P) Ltd., reported in AIR 1980 SC 609*, he has submitted that there is difference between cash discount and trade discount. Cash discount is allowed when the purchaser makes payment promptly within the period of credit allowed and such discount only could be excluded from the taxable turn over of the petitioner in view of the definition of sale price under Section 2(u) of the Act read with its *Explanation II*. He has gone to the extent of making submission that the discount, in the present case, is neither cash discount, nor trade discount granted by the petitioner to its customers, rather suppressed sale.

10. In order to arrive at a conclusion whether the discount given by the petitioner to its customers could be added legally by the assessing officer to the taxable turn over for the period in question, it would be apt to take note of the definitions of "sale" and "sale price" under Sections 2(t) and 2 (u) of the Act, which read thus:-

"2(t) 'Sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration

but does not include a mortgage or hypothecation of or a change or pledge on goods, and includes.-

- (i) transfer of property in any goods, otherwise than in pursuance of a contract;*
- (ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
- (iii) delivery of goods on hire purchase or any system of payment by instalments;*
- (iv) transfer of the right to use any goods for any purpose (whether or not for a specified period);*
- (v) supply of goods made by a society, trust, club or association, whether incorporated or not, to its members or otherwise;*
- (vi) supply by way of or as part of any service or in any other manner, whatsoever, of goods being food or any drink whether or not intoxicating;*

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply, and all grammatical variations and cognate expression shall be construed accordingly;

and "purchase" means such acquisition of property in goods or purchase of those goods by the person to whom such transfer, delivery or supply is made.

Explanation-I. - *A transfer or acquisition of goods on hire purchase or under any other system in which payment of valuable consideration is made by instalments, shall, notwithstanding the fact that the seller retains that title in the goods as a security for the payment of the valuable consideration or for any other reasons, be deemed to be a sale or purchase.*

Explanation-II- *Notwithstanding anything contained in any law for the time being in force, two independent purchases or sales shall, for the purpose of this part, be deemed to have taken place-*

- (a) when the goods are transferred from principal to his selling agent and, from the selling agent to the purchaser; or*
- (b) When the goods are transferred from the seller to a buying agent and from buying agent to his principal, if the agent is found-*

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- (i) to have sold the goods at one rate and to have passed on the sale price to his principal at another rate; or*
 - (ii) to have purchased the goods at one rate and to have passed on to his principal at another rate; or*
 - (iii) not to have accounted to his principal for the collections or deductions made by him in the sales or purchases effected by him or on behalf of his principal; or*
 - (iv) to have acted for a fictitious or non-existent principal;*

2(u) “sale price” means the amount payable to a dealer as valuable consideration in respect of the sale or supply of goods.

Explanation I.- Sale price shall include any amount charged by the dealer for anything done in respect of the goods at the time of, or before delivery thereof to the buyer.

Explanation II.- Sale price shall not include the cash discount allowed by the dealer according to the ordinary trade practice, if shown separately. It shall also not include the cost for transport of the goods from the seller to the buyer, provided such cost is separately charged to the buyer.

11. The two definitions, as mentioned above, make it clear that in order to constitute “sale”, there must be transfer of property in goods for “cash or deferred payment or other valuable consideration” and unless transfer is made for consideration of money, it cannot be treated to be sale for the purpose of levy of tax under the provisions of the Act. Law is well settled that there must be following four elements to constitute a valid sale:- (i) parties are competent to enter into a contract; (ii) there is mutual assent between/among the parties; (iii) the property must pass from the



seller to the buyer; and (iv) price in money is paid or promised to be paid. In the absence of any one of the ingredients, as noted above, the transaction would not constitute a valid “sale” within the meaning of the Sales of Goods Act, 1930. It is trite that the definition of sale as given in the Sales Tax Law is to be interpreted as having the same meaning as in the Sales of Goods Act, 1930.

12. The Supreme Court in case of ***Advani Oerlikon (P) Pltd.*** (supra), relied upon by the learned State Counsel, is of no help to support the case of the respondents. Paragraphs 5 and 6 of the said decision read thus:

“5. At the outset, it is appropriate that we set forth the two relevant definitions contained in the Central Sales Tax Act. Section 2 (j) defines "turnover" to mean "the aggregate of the sale prices received and receivable by him (the dealer) in respect of sales of any goods in the course of inter-State trade or commerce....." And S. 2 (h) of the Act defines the expression "sale price" to mean "the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade....." It is true that no deduction on account of cash discount is alone specifically contemplated from the sale consideration in the definition of sale price by S. 2 (h), and there is no doubt that cash discount cannot be confused with trade discount. The two concepts are wholly distinct and separate. Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer

shows the catalogue price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount realisable. Orient Paper Mills Ltd. v. State of Orissa, (1975) 35 STC 34 (Orissa).

6. Under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the assessee. In a case where trade discount is allowed on the catalogue price, the sale price is the amount determined after deducting the trade discount. The trade discount does not enter into the composition of the sale price, but exists apart from and outside it and prior to it. It is immaterial that the definition of "sale price" in S. 2 (h) of the Act does not expressly provide for the deduction of trade discount from the sale price. Indeed, having regard to the circumstance that the sale price is arrived at after deducting the trade discount, no question arises of deducting from the sale price any sum by way of trade discount.

(Emphasis supplied).

13. The case before the Supreme Court in case of **Advani Oerlikon (P). Ltd.** (supra), was under Central Sales Tax Act which contained the definition of sale price under Section 2(h) of the Act which is similar to Section 2(u) of the Bihar Finance Act defining "sale price". Dealing with the said provision, the Supreme Court laid down that though the said definition under Section 2(h) of the Central Sales Tax Act provided for cash discount only, a trade discount is also required to be deducted from the sale price.

14. Learned Counsel for the State has also placed reliance on another Supreme Court decision in case of **Anant Raj**

Industries Ltd. Vs. Commissioner of Central Excise, New Delhi, reported in (2001) 9 SCC 724, in support of his submission that the trade discount could be allowed only if its effect travelled up to the end consumer. The said submission cannot be accepted. The Supreme Court held in paragraph 4 of the said decision as follows:

4. *In our view, the circumstances in the case before the Bombay High Court and the case before us are entirely different. In the case before us, what is offered is a quantity discount. It is available only to those buyers who purchase more than eighty thousand boxes in a year. It cannot be treated as available to all buyers, regardless of whether or not they purchase eighty thousand boxes or more. The case of a quantity discount, which is dependent upon the purchaser buying a certain quantity of the goods, and a cash discount, which is available to all purchasers, is very different. The Tribunal's view is correct.*

15. The Supreme Court, in that case, held that buyers who did not fulfill the condition of lifting the quantity of product prescribed under the discount scheme were not entitled for the quantitative discount.

16. In view of aforesaid discussion, this being an admitted fact, that the petitioner had not received any amount, for the supply of products, free to its customers under the scheme, as referred to above, the said discount could not have been added to the taxable turn over of the petitioner, no "sale" of goods within the meaning of Section 2(t) of the Act having been taken place and no

“sale price” having been received by the petitioner. Learned counsel for the petitioner is right in his submission that the Division Bench decision in case of *M/s Mapra Laboratories Pvt. Ltd.* (supra) squarely covers the dispute in question.

17. We are, accordingly, of the considered view that the respondents were not justified in including the quantitative discount/trade discount allowed by the Company to its customers, to his taxable turn over for the assessment year 2000-2001. The said discount to the tune of Rs.20,68,257/- has been wrongly assessed to be included in the taxable turn over. The consequential demand notice, based on such assessment, dated 27.06.2002, issued by the Assistant Commissioner, Sales Tax, Special Circle, Patna, cannot be sustained. Both, the assessment order and the demand notice are, accordingly, set aside.

18. Thus, the writ application is allowed.

19. There shall, however, be no order as to costs.

(I. A. Ansari, ACJ)

(Chakradhari Sharan Singh, J)

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