RAJASTHAN TAX BOARD, AJMER

Appeal No. 2209/2014/Alwar

M/s Pernod Recard India Pvt. Ltd.,
Village Karora, Tehsil Behror, Distt. Alwar ..... Appellant

Versus

1. The Commercial Tax Officer,
   Anti -Evasion, Bhiwadi, Rajasthan.
2. The Commissioner,
   Commercial Tax Department, Raj., Jaipur.
3. The Union of India
   Through Secretary Finance
   Ministry of Finance, North Block, New Delhi-110001.
4. The State of Bihar
   Through Secretary Finance
   Patna, Bihar.
5. The Deputy Commissioner of Commercial Tax
   O/O The Deputy Commissioner of Commercial Tax
   Patliputra Circle, Patna, Bihar. ..... Respondents

D.B.
Shri B.K. Meena, Chairperson
Shri Madan Lal, Member

Present:-
Shri Punit Agarwal,
Advocate for the Appellant

Shri Ram Karan Singh,
Advocate for the Respondents

JUDGEMENT

Dated 17 Nov.,2015

1. This appeal has been filed under section 83 of the Rajasthan Value Added Tax Act, 2003 (for short the RVAT Act), read with section 18A of the Central Sales Tax Act, 1956 (for short the CST Act), against the assessment order of the Commercial Taxes Officer, Anti-evasion, Bhiwadi (for short "The Assessing Officer") dated 28.11.2014 passed under section 9 of The CST Act read with section 25,55 & 61 of the RVAT Act 2003.

2. The facts of the case are that the Assessing Officer made a survey of the business premises of the Appellant dealer on 16.08.2013 who is registered with the Commercial Tax Departments (for short CTD), Rajasthan, and the branch of the Appellant in Patna, Bihar is also registered in the Bihar CTD. The appellant has

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filed this appeal, against the levy of the central Sales Tax, penalty and interest in the impugned order by the Assessing Officer against the inter -state sale of IMFL in the states of Bihar under section 3A of the CST Act, which appellant has showed as tax free under section 6A of the CST Act. Assessing Officer levied CST Rs. 13,02,385/- on CST sales, penalty Rs. 26,04,770/- under section 61 along with interest Rs. 8,37,794/- under section 55 of the RVAT Act read with section 9 of the CST Act.

3. Being aggrieved with the order of the Assessing Officer, the appellant preferred appeal before the Rajasthan Tax Board, the highest Appellate Authority of the State, under section 18A of the CST Act.

4. Shri Punit Agarwal, learned counsel for the appellant argued and also submitted written submissions.

1. He submitted that appellant assessee M/S Pernod Recard India Pvt. Ltd. (in Short PRIPL) was originally assessed by assessment order dated 15.11.2011 under section 9 of the CST Act 1956 read with section 24 of the RVAT Act, and the transactions of the stock transfer from the state of Rajasthan by the appellant were accepted and assessed as such, but this assessment has now been changed by the impugned order under the provisions of section 25 of the RVAT Act, which requires that the assessing authority must have "reason to believe" that the dealer has avoided or evaded tax or has not paid tax in accordance with law. If he has such "reason to believe" after giving the dealer a reasonable opportunity of being heard determine taxable turnover on which tax has been evaded or avoided or has not been paid in accordance with law.

2. He further argued that show cause notice (in short the SCN) to make assessment under section 25 did not show any independent judgement of the assessing authority, because dealer has nor avoided or evaded tax or has paid in accordance with law. It is clear that the basis for issuing the said SCN was the investigation report of the investigation officer. It is well settled principle belief that the dealer has avoided or evaded tax, has to be of the authority assessing the turnover to tax, and it cannot be from a second source. Reliance in this regard is placed on the judgement of Rajasthan High Court in the case of **CIT V Shiv Ratan Soni (2008) 217**

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CTR (Raj) 222.

3. Shri Agarwal contended that this issue was raised by the appellant before the assessing authority that no independent application of mind is demonstrated in the SCN. However, he ignored the objection of the appellant on the basis that since he has given the appellant an opportunity of being heard therefore this ground is not sustainable. Since assessing authority had no "reason to believe" as contemplated in section 25, the present case is of lack of jurisdiction and the impugned order passed without jurisdiction, is violative of Article 14 and Article 21 of the Constitution, and hence is bad in law.

4. Further in his arguments he submitted that the Supreme Court in **M/S GKN Driveshafts (India) Ltd (2003) 1 SCC 72,** has said that the officer is bound to dispose of the preliminary objections against existence of reason to believe, by passing a speaking order before proceeding with the reassessment. Relevant portion of the judgement is reproduced below:

> *"However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instance case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."*

That by following GKN Driveshafts case, on the basis that reasoned order disposing the objections have not been passed by the assessing authority, the Hon'ble Rajasthan High Court had quashed the notices and the assessment orders in the case of **Mukesh Modi v DCIT 2014 (366) ITR 418 Raj.** Reliance is also placed on the judgement in the case of **Gehna v UOI 2003 132 TAXMAN 592 (Raj)** in this regard.

5. He contended that appellant had vide its letters/ replies dated 28.06.14

and 01.08.2014 had questioned the jurisdiction of the SCN u/s 25 of the RVAT Act saying that the provision requires a reason to believe on the part of the assessing authority and it cannot be based on a mere change of opinion. There was no independent application of mind by the assessing authority as the reassessment was made by placing reliance on the findings of investigating officer without reasonable link between the reasons mentioned in the SCN and the conclusions in the impugned order.

6. It was submitted by the learned counsel that no order can be passed without reasoning and here the order was passed in defiance of this principle, so the impugned assessment order was bad in law. Reasoning is considered to be the backbone of any legal decision, without which it cannot stand on legs. In this regard, reliance is placed on the judgement of ***Steel Authority of India Limited (2008) 16 VST 181 SC.***

7. In his arguments he contended that the Hon'ble Supreme Court has continuously accepted importance of reasoned orders, and without it present order was invalid exercise. This principle of giving reasoned orders is applicable to all judicial proceedings. Reliance in this regard is placed on:

a. *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Amr. (AIR 1976 SC 1785),*

b. *Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. [(2006) SLT 345],*

c. *In Gurdial Singh Fijji v. State of Punjab- [(1979) 2 SCC 368],*

and

d. *Shukla & Brothers [2010] 30 VST 114 (SC); [2010]4 SCC 785,*

e. *Bharat Constructions Company v CCT [2013] 64 VST 353 (M.P.)*

8. He further argued that the Assessing Officer did not pass any order on the preliminary objections regarding jurisdiction and made conclusions arbitrarily. Thus, the impugned order is improper, beyond jurisdiction and bad in law, and passed in clear violation of principles and natural justice, and hence liable to be set aside.

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9. Shri Agarwal argued that the appellant has given the clauses of the Framework Agreement read with the Liquor Sourcing Policy which says that Order For sale is the Agreement to sell. Without going through them, the Assessing Officer decided that the Framework agreement is the Agreement to Sale. The respondent has not alleged that the parties have colluded or that the terms of the contract are not applicable. In these circumstances, the agreement between the parties is paramount, and the revenue cannot read in conflict with the express terms of the agreed terms. Thus the impugned order is thus arbitrary and has been passed in complete violation of principles of justice.

10. It was submitted by the learned counsel Shri Agarwal for the appellant submitted that the Revenue could not prove that the movement of goods was in pursuance of agreement to sale. The department taxed the same under Interstate sale on the basis of mere allegation. The Hon'ble Supreme Court in **Tata Engineering & Locomotives Ltd. 1970 (1) SCC 622,** said the revenue has to examine each and every individual transaction for purposes of interstate sale and contention of similar nature sales was not a true interpretation in this regard. The claim of evasion or avoidance was never considered or decided in the impugned order.

He argued the goods did not move from Rajasthan to PRIPL Bihar depot in pursuance of any contract of sale and their movement was for general stocking purpose, the appellant filed complete stock register and documents of sale at Bihar depot/branch. However, the same were not considered. Therefore, on merits, the case of the Appellant is covered by the judgments of the Supreme Court in Telco case and Kelvinator Case.

11. Shri Agarwal submitted on the merit that transaction is considered as an interstate sale if movement of goods is caused by an agreement for sale as per section 4 of the Sale of Goods Act, an agreement to sell refers to a contract where the seller agrees to transfer property in goods to the buyer for a price. From a bare perusal of the 1st paragraph of the framework agreement, it is clear that it does not give the appellant any right to supply

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liquor to BSBCL. BSBCL has power to take it from the supplier which would depend upon demand of brands manufactured by the supplier. These express terms of the agreement set aside conclusion drawn by the CTO that the framework agreement is the agreement to sell. The Para 2.5 of the said framework agreement further clarifies that delivery shall be on the OFS placed by the BSBCL within the period specified by it. If there are any short supplies, the same shall not be carried forward beyond the validity of the OFS. Paragraph 4 relates to cancellation of orders. These paragraphs clearly state that supply of liquor begins only when OFS is placed by the BSBCL and not before. That in line with the agreement between the parties, the actual implementation of the same points out that the goods move from the State of Rajasthan to PRIPL Bihar branch, nor on the basis of any agreement to sell, but for stock keeping purposes. In line with this the appellant keeps on sending goods from Rajasthan to its branch in Bihar.

12. Shri Agarwal submitted that there is no relationship between the order for sale (OFS), and the movement of goods from Rajasthan to PRIPL Bihar branch is evident from the stock register of PRIPL submitted with the reply dated 09.10.14, even the State Excise duty in Bihar is paid by PRIPL Bihar bond. One of the contracting parties in the present case is a statutory corporation incorporated by the government of Bihar. That there is no allegation that the terms of the contract are false or have not been implemented. In these circumstances, the conclusion drawn by the respondent authorities that the framework agreement is an agreement to sell is clearly whimsical and conjectural and is not borne out from the facts on record.

13. Shri Agarwal placed reliance on the decision by the Hon'ble High Court of Patna in the case of ***M/S United Breweries Ltd V. BSBCL & Ors*** has held that no contract of sale comes into existence without the issuance of OFS and the contract of sale is only complete after its issuance. A portion of the judgement is reproduced below:

"On examining the scheme and the terms and conditions under

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the LSP 2008-09, it is apparent that it is the manufacturer who will approach the Corporation to offer its products for sale. On receipt of such offer the Corporation will, depending upon the demand in the retail market, place an order for supply. The manufacturer then is supposed to supply the liquor, according to the specification of quantity, time, location etc. mentioned in the OFS. Thus the contract for sale is complete on the Corporation issuing OFS."

14. He argued further that the case at hand is squarely covered by the TELCO case : the Constitution bench of the Supreme Court held that if the goods are moving without any firm sale contract the same cannot be considered to be an interstate sale. He said case was followed by the Hon'ble Supreme Court in the case of **Kelvinator of India Ltd (19111173) 2 SCC 551.** In that case the petitioner had distributorship agreement for distribution of its specific brand. The goods moved from factory to the Delhi godown of the petitioner. The authorities contended that the goods have moved pursuant to the distributor agreement, so it was an agreement to interstate sale from the state where the factories were located. The Supreme Court noted as follows:

"12. In the face of the facts of the present case, we find it difficult to hold that the sale of refrigerators by the appellant to the three distributors took place at Faridabad. We are also unable to agree with the High Court that the distribution agreements constituted agreements of sale. It is noteworthy in this context to observe that the number of refrigerators which were to be purchased by each of the distributors was not specified in the distribution agreements, nor did the agreements contain the price which was to be charged for each refrigerator. According to the agreement dated April 26, 1965 the appellant undertook to sell and the distributors undertook to purchase the products of the appellant "as

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mutually agreed upon from time to time." It is, therefore, plain that sales by the appellant company to the distributor referred to n the distribution agreement dated April 26, 1965 depended upon the future agreement between the parties from time to time....."

It was held that these type of distribution agreement were merely framework agreements within which the different contracts of sale are entered into by distributor with the petitioner, and the distribution agreement by itself cannot be considered to be an agreement to sell.

15. Shri Agarwal, the learned counsel, also relied on the Hon'ble Apex Court in the case of Balabhagas Hulaschand v. State of Orissa, reported in {1976} 37 STC 207, which held that an interstate sale should stipulate, express or implied, regarding movement of goods from one State to another and this movement of goods should be caused in pursuance of that agreement from one State to another; and a concluded sale is completed in the State to which the goods are sent from the another State.

16. He further submitted that the appellant has treated the said transaction as transfer of stock to Bihar. The sales made to BSBCL were local sales in Bihar and sales tax paid in Bihar @ 50%. Therefore, in case it is held that the impugned transactions are inter-state sales, it could not be a local sale in the State of Bihar.

He said that in case these sales are held to be interstate sales from Rajasthan, the tax already paid in State of Bihar was sufficient payment and it should be paid by the State of Bihar to the State of Rajasthan, because the appellant treated them as local sale in Bihar, form C were not furnished. Therefore they should be allowed to obtain form C from BSBCL.

17. On the merit Shri Agarwal vehemently opposed that in any case, imposition of interest and penalty are bad in law because the tax itself is not

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payable.

The penalty imposed under section 61 of the RVAT Act cannot be imposed because the ingredients of the said section are not attracted. That section 61 very clearly lays down that penalty is chargeable where a dealer-

a. Has concealed any particulars from any return furnish by him,

or

b. has deliberately furnished inaccurate particulars therein, or

c. has concealed any transaction of sale or purchase from his accounts, registers and documents required to be maintained under this Act, or

d. has avoided or evaded tax in any other manner

.....then the assessing officer may direct that the dealer shall pay penalty equal to twice the amount evaded

18. He further argued that on perusal of the language of the section is amply clear that where the person has deliberately furnished inaccurate facts/ or has concealed any particulars which have lead to evasion of tax. There was no such possibility in the present case to impose penalty and interest.

19. Reliance in this regard is placed on the judgement of the Hon'ble Supreme Court in the case of Hindustan Steel Limited Vs. State of Orissa 1972 (83) ITR 26 SC.

The learned counsel for the appellant argued that the sales in question are, stock transfers. The appellant rely on case of Central Distilleries & Breaweries (Cited supra), the Hon'ble Allahabad High Court held that such sales were only stock transfers and not inter-state sales. The learned counsel said that stock transfers of the appellant have been converted into interstate sales by the Assessing Authority merely on presumptions and conjectures, and a wrong view created double taxation on the same goods. Relying upon

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the judgement of Hon'ble Supreme Court in the case of M/s Shri Krishna Electricals vs State of Tamil Nadu (supra), he wanted that unjust levy of penalty under section 61 of RVAT Act should be set aside", and submitted that all their transactions were entered in the appellant's books of accounts and, therefore there was no ground for imposing penalty in such cases.

20. The Appellant further relied on C.I.T., Ahmadabad V/s Reliance Petro products Pvt. Ltd 322 ITR 158 SC = AIT 2010 105 SC where it was decided that the assessee's claim was not accepted or not acceptable to the Revenue, that by itself would not, attract the penalty under Section 271 (1)(c) of IT Act.

21. The Appellant further relied upon decision of the Hon'ble Supreme Court in *Union of India V/S Rajasthan Spinning & Weaving mills 2009 (238) E.L.T. (S.C.)* wherein it was held that levy of penalty is not automatic and can be imposed only in accordance with strict provisions of the section.

The Hon'ble Rajasthan High Court have followed the principles laid down in aforesaid judgements in context of sales tax. Reference is invited to the case of *Lord Venkateshwara Caterers 2007 (10) VST 535 (Raj):*

22. The exact offence was not communicated to the appellant so that the appellant can adequately safeguard his case. The Courts have held that there is requirement to specify the exact offence and reliance in this regards is placed on:

a. H.M.M. LIMITED 1995 (76) E.L.T. 497 (S.C.)
b. AMRIT FOODS 2005 (190) E.L.T. 433 (S.C.)
c. Kejriwal Iron Stores 1988-(169)-ITR-0012-RAJ
d. CIT v. Lakhdhur Lalji [1972] 85 ITR 77
e. New Sorathia Engineering Co. 2006 (282) ITR 642 GUJ

23. Mr. Ramkaran Singh, DAG, for the respondent department, at the beginning brought the attention of the bench to the fact a bunch of similar cases based on identical facts of beer supply to Bihar and Jharkhand States by beer manufacturing companies from Rajasthan State had been decided by the Hon'ble Rajasthan Tax Board in cases of M/s Shivalik Brewries Vs

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Asstt. Commissioner, Anti Evasion, M/s United Brewries vs Asstt. Commissioner, Anti Evasion and M/s Carls Brevaries Vs Asstt. Commissioner, Anti Evasion and others, reported in TUD, pages: *exclusive edition,* (emphasis), and the facts and issues involved in the aforesaid case are *peri materia* to the facts, circumstances and issues of the present case. He argued that in the above mentioned cases, the DB of the Hon'ble had upheld the assumption of jurisdiction under section 25 of the Act by the Assessing Authority, kept intact levy of tax and penalty and given decision in favour of the CTD, Rajasthan.

24. He argued that the Assessing Authority similarly here had not passed order OF REVISION, but an assessment order had been passed by the Assessing Authority under section 25. He said, the jurisdiction was assumed under section 25 by the Assessing Authority after he had sufficient reasons to believe that the appellant had avoided paying due CST tax in earlier assessment order.

25. It was submitted by the learned DGA that proper enquiry in the present matter was made and then notices were issued to the appellant who replied and then the orders were passed under section 9 A of the CST Act read with section 25 of the RVAT Act.

26. He argued that the Liquor Sourcing Policy (LSP) 2008-09 clearly mentioned that BSBCL was the whole seller of liquor in the State of Bihar and executed sourcing of all kinds of Foreign Made Foreign Liquor (FMFL), IMFL (brandy, whisky, rum, gin, vodka, etc.,) Beer & Wine.

27. He said that the appellant companies described procedure for transport of beer creates in Patna depots from their manufacturing units in Rajasthan as branch transfers and concealed the fact that entry of goods in Patna depot was result of Agreement to Sale executed between the appellant assessee and the BSBCL. Order of beer supply from the BSBCL is procured by the appellant companies only under an Agreement to Sale executed with the BSBCL. The appellant wrongly held it as an Agreement for Distribution of

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beer in Bihar.

28. The learned Government counsel said that the appellant submitted F forms but the Assessing Officer made a case that inter-State stock transfers were actually inter-State sales after a detailed enquiry and with ample reasons. It was not on presumption. He rejected the initial objections against the validity of the show cause notice. He said that the show cause notice was specific and the Assessing Officer made case on the facts of enquiry. The appellant wrongly called 'Agreement for Sale' as an 'Agreement for Distribution.' It was not a stock transfer of beer but inter-state sales of beer to the retailers of the BSBCL in Bihar between appellants and BSBCL.

29. The learned Government counsel said that beer supplies to the BSBCL were made only when the OFS was issued by the Corporation on the basis of stock requirement of depots (Rule 6.2 of the LSDP) and the corporation was not bound to obtain any specified minimum quantities of any type of beer as the order was dependent upto the demand and not simply they signed this Agreement and made an offer.

30. He said that the BSBCL obtained tenders from the appellant companies to given permission for manufacture of alcohol brands, labels to fix sale price to retailers with maximum retail price to keep beer cartons in warehouses of BSBCL in Bihar and BSBCL receiving Bihar VAT paid invoices against local sales of the beverages from the appellants to the retail vendors in the state.

31. After hearing both the parties and studying above mentioned judgments of the Hon'ble Courts including the DB decision of the Rajasthan Tax Board in similar matter, we now decide that the decision made by the Hon'ble Supreme Court in the case of **M/s Hyderabad Engineering Vs State of Andhra Pradesh**, is fully applicable in the present case : "the Hon'ble Apex Court had therein enunciated the principle that when the department did not take advantage of presumption under section 3(a) of the CST Act, but came out with a positive case of inter-State sale in the course

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of inter-State trade and commerce to make it liable to tax under Section 6, the Declaration in Form "F" **UNDER** Section 6A would be of no avail.

32. "however the Assessing Authority had a case made out that impugned inter-State stock transfers were actually inter-State sale transactions after a detailed enquiry and armed with ample reasons, not on presumption, proceeded ahead with passing impugned assessment orders converting inter-State transfers as transactions of sale in the course of inter-State trade, without having taken recourse to rejection of these forms."

33. We hold that here also the detailed enquiry was made which revealed with ample reason that movement of beer from Rajasthan to Bihar in the impugned case was the result of the contract of sale and thus it was an inter-Sate sale under section 3(a) of CST Act and also covered by Telco case.

34. After going through the judgement delivered by the DB of the Hon'ble Rajasthan Tax Board dated November 24, 2014 in cases of **M/s United Breweries Limited, Bhiwadi, Carlsberg India Private Limited, Alwar, M/s Mount Shivalk Industries Limited Behrod, Alwar (appeal nos.: 1229 to 1234/2014, 1330 to 1334/2014, 541 to 544/2014), reported in TUD, (supra),** we agree that in present case also the similar factual and legal position exists as discussed in the aforesaid judgement (supra) and that facts and circumstances of the aforesaid cases cover and are squarely applicable to the facts and circumstances of the present case. To apply this binding decision in the preset appeal, its decision in the present appeal, its part is reproduced below:

"Amidst rival contentions of the counsel, what transpires is that all essential conditions of section 3(a) of the CST Act are witnessable in the present case. On the authority of M/s TELCO Vs Assistant Commissioner (supra) they could be deduced from Agreement to sale (supply) of beer between BSBCL and the appellants, necessitating and occasioning movement of beer from appellants manufacturing units in Rajasthan to Bihar on the premise of same transaction.

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The Interstate movement of beer in instant cases was preceded by Agreement to sale and interstate sale related to it was inextricably interwoven with corresponding beer movement from district Alwar, Rajasthan to Patna, Bihar. The facts here are distinguishable from those of Central Distilleries and Breweries (supra), on the authority of case applicable in present scenario, that is M/s India Oil Corpn. Ltd., (supra). It is manifest that interstate movement of beer from Alwar to Patna did not beak there but after a brief interval continued to finally terminate at different BSBCL depots in Bihar. It did not rupture the in- extricate relationship between the movement of goods and sale, because sale could only be made to BSBCL by the sole seller, appellant manufacturers. With no third party involvement in the whole scheme of sales, such a brief stoppage of movement of beer at Patna at appellants depot at Patna for a while did not impact the nature of interstate sale because at the most it was a transit halt of the goods in question.

The respondent Assessing Authorities have made out a case that in relation to the movement of beer stocks round the year from the appellant assesses' manufacturing units situate in district Alwar of Rajasthan to their branch offices at Patna was not result of bare stock transfers of beer but rather sales thereof to the various retail outlets of the BSBCL (or, JSBCL) spread across the State of Bihar (or, Jharkhand) made in course of the inter-State trade and commerce, between appellants and BSBCL.

The facts of present cases require analysis in the light of the provisions of the section 3 of the CST Act, 1956. It is a simple fact that Inter State sale or purchase is carved out of and separated from inside sales or purchases for the purpose of situs of taxation. It is to be explored whether the movement of beer from the State of Rajasthan to the State of Bihar (or, Jharkhand) was the result of a covenant or an incident of the contract of sale entered to between the authorized representative of

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appellant company and Bihar State Beverage Corporation Limited, if it were so, the sale was an inter-State sale.

We may have a look at the provisions of the LSP which are contextually relevant in the present case and reproduced as under:

1.The clause 3.1 of the LSP stipulates that manufacturers desirous of supplying liquor to the BSBCL for subsequent supply to buyers shall submit certain documents, before their offer can be considered and action initiated, one of them being (iv) is, as follows:

"an agreement as in the format in Annexure 4 duly executed by the authorized signatory of the manufacturer/supplier in a stamp paper of denomination of Rs. 100/-.

2. Clause 4.1 of the LSP says that labels of brands proposed to be supplied / marketed in Bihar by a manufacturer / supplier located in or outside the state have to be approved by the Excise Commissioner, Bihar, Patna. Such an approval shall be obtained by the manufacturer / supplier and submitted to the Corporation.

3. Clause 4.2 of the LSP lays down that manufacturers / suppliers located outside the state shall submit a copy of the permission for the manufacture of the brands proposed to be supplied, approval for labels as granted by the competent excise authorities of that state and the authorization for exporting from that state to Bihar.

4. Clause 5 of the LSP says that a statement for each brand of FMFL/IMFL/BEER/WINE indicating information for label registration of a branch of FMFL/IMFL/BEER/WINE shall be submitted.

5. Clause 5.5 (A) (i) of the LSP determines that the price, which will be offered now, shall be valid, at the option of the offerer.

6. Clause 5.5 (ii) of the LSP says that in respect of brands manufactured in Bihar or imported from outside the state the corporation is required to declare the price for sale to retailer and the maximum retail selling price of such products. Manufacturer shall quote the landed price.

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7. Clause 5(B) stipulates that the landed prices quoted should be F O R destination. The manufacturer / supplier has to incur the entire expenditure till the consignment is received and stacked at the destination i.e., designated depots of the Corporation or any other location within Bihar, as specified in the permit. Unloading of the goods at the depots shall be the responsibility of the manufacturer / supplier located both inside and outside the State of Bihar, the consignments have to be dispatched under valid permit issued in the name of the M/s Bihar Beverages Corporation Ltd., Patna by the competent authority.

8. In respect of stocks of FMFL/IMFL/BEER/WINE, imported from outside the State or procured from within the State, all the bottles are to be affixed with holograms if it is supplied by the Excise Commissioner, Govt. of Bihar.

9. Clause 5 (C) The price quoted shall be uniform irrespective of the location of the destination within Bihar.

10. Clause 5.6 says that (a) The offerer shall quote only for the brands for which the labels are approved by the Excise Commissioner, Govt. of Bihar, as on the date of submission of offer.

11. Clause 5.8 of the LSP cautions manufacturers to note that they are required to work out the Landed cost and the maximum retail selling price, taking due note of the provisions of the different notifications with respect to duties, fees issued by the Excise Department or the Excise Commissioner, Government of Bihar under the Bihar Excise Act and rules framed there under.

12. Clause 5.9 of the LSP fixes the margin of Corporation to be calculated in such a way that it is not more than 5% of the M.R.P. Likewise retailers margin will also be calculated in such a way that it is not more than 15% of the MRP.

13. Clause 5.16 of the LSP declares there shall be a Purchase Committee duly constituted by Govt. of Bihar which will fix the price of brands quoted.

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14. Clause Rule 6.1 of the LSP provides for the mechanism of issuance of OFS : Manufacturers / Supplies to the Corporation shall be based on the OFS issued by it. The corporation shall issue OFS based on the stock requirement of depots after duly considering the quantity held, the sales trend and requests of the manufacturer / supplier, if any. To facilitate the process, the manufacturer / supplier may indicate the requirement of its brands, and pack sizes in various depots. However, the corporation reserves its right to decide the quantity for which OFS can be issued.

15. Clause Rule 6.2 of the LSP holds that the Quantity to be procured from time to time shall depend upon the demand for the product. Further, the corporation shall not be under any legal compulsion to procure all or any brands produced by a particular manufacture / supplier, simply because they have signed this Agreement and have made an offer.

16. Clause Rule 6.4 of the LSP declares that two copies of the OFS will be issued for the exact quantity that the supplier / manufacturer proposes to transport. It is, therefore, imperative that manufacture / supplier indicate their dispatch plan for issue of OFS. The OFS shall be signed by either of the authorized signatories of the Corporation.

17. Clause Rule 6.7 of the LSP sets out that in respect of supplies from within state or outside the State, the manufacture / supplier or their authorized representatives shall, after the issue of OFS, deposit the Import Fee, Excise Duty and other applicable duties or fees for their respective brands with the Excise Department and obtain required transport permit to ensure delivery.

18. Clause 2 GENERAL D. Landed Price defines Landed Price at BSBCIL ware house means all inclusive of EDP, Freight, handling, Insurance, State/Central levies, duties, fees & excise duty and Commercial Tax.

A. In this regard, it is imperative to go through the agreement entered into between the appellant and the BSBCL under the terms and conditions of the LSP as described in its Circular no. 675/BSBCL, dated 12.03.2008 (extended for the relevant years : 2009-10, 2010-11, 2011-12,

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2012-13 and 2013-14).

B. Against the background of above, it is apparent that the appellant manufacturers who were desirous of supplying liquor to the BSBCL for subsequent supply to buyers in reference to the aforesaid Clause 3.1 of the LSP submitted certain documents, before their offer was considered and action initiated by BSBCL. We find that in terms of Clause 3.1 (iv) of the LSP, an Agreement was struck between the two parties to the issue, the BSBCL and the appellant company, the introductory part of which is reproduced as under:

"This Agreement made at Patna.....of 2008 between the Bihar State Beverage Corporation Limited (hereinafter called the Corporation) having its head office at.....Patna represented by ..... which term shall mean and include its executors, ...etc., of the ONE PART AND M/S Shivalik Industries Limited represented by Shri L.K. Tiwari (Hereinafter called manufacture / supplier, the term including supplier) which term, unless repugnant to the context, shall mean and include its executors, administrators, successors in interest, assigns, etc., of the OTHER PART

In all matters connected with an in relation to all matters of liquor supplies to the Corporation for the year 2008-09 in the territory of the State of Bihar and witnessed", amongst other stipulations, under sub clause 1 of clause 1 " that the quantity of liquor to be procured and distributed shall be determined by the Corporation from time to time, keeping in view the demand for liquor manufactured / supplied by the manufacturer / supplier"

4.This Agreement entered into between the BSBCL and the company having manufacturing unit in Alwar, Rajasthan and the branches at Patna in Bihar and Ranchi in Jharkhand is the cause célèbre in the present context, enabling appellants' beer sales in the State of Bihar (or, Jharkhand) through the instrument called 'Order for Supply' issued by the

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BSBCL to the appellant's branch at Patna in Bihar.

5. The appellant assesses hold the above Agreement not as an Agreement for Sale of beer but an Agreement for distribution of beer in the State of Bihar.

6. Agreement to Sale or contract to sale, or in opinion of the appellants an agreement to Distribution was implemented when OFS was issued by BSBCL, leading to import of beer from the manufacturing units of the appellant assesses and supply of which was as usual shown as having been stock transferred to Patna (or, Ranchi) branch of the appellants which in turn sold beer to the designated Depots of the BSBCL located in various towns of Bihar. The plea of the appellants that the beer by way of stock transfer, independent of any order, was continually transferred to the Patna branch of the appellants, where it was unloaded and stacked in the godown of the appellant company at Patna. When an OFS was issued by BSBCL for supply of beer to any of its depots located in any of the towns or city of Bihar, they raised the VAT invoice for such a sale and arranged transport for carrying beer to the designated depot of the BSBCL. This way, the sale of beer in Bihar was a local sale, and the bogey of inter-State sale raised by the respondents was a wild goose chase.

In the background of the above facts, it is found that the respondent Assessing Authority was right in assuming jurisdiction under section 25 of the RVAT Act, because he had sufficient reason to believe that the appellant had avoided paying CST on impugned transactions. On the authority of finding in case of M/s Hyderabad Engineering Vs State of Andhra Pradesh (supra), the respondent Assessing Authority rightly considered that it has not taken advantage of the presumption under Section 3 (a) of the CST Act, but had rather made a positive case of inter-State sale in the course of Interstate trade and commerce that rendered declaration in Form "F" under section 6A irrelevant.

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Against the back drop of aforesaid analysis of facts and legal position, it is decided that impugned transactions were verily interstate sales under Section 3 (a) of the CST Act, in which aforesaid Agreement to sale executed between BSBCL and appellants acted as contact to sale and caused interstate sales that occasioned movement of beer from district Alwar, Rajasthan to Patna, Bihar.

As regards, the imposition of interest under section 55 of the RVAT Act on the impugned interstate sale transactions, the learned counsel of the appellants had argued that interest was payable on the tax due in the books and returns and not the tax due as per assessment orders, whereas counsel for the respondent said it was due when leviable and payable. We find that the assessing authority levied tax on the impugned transactions which made the interest thereon payable. The assessing authority has correctly imposed interest.

As regards penalty imposed under Section 61 of the RVAT Act it could be levied in any of the following circumstances:

(a) Concealment of particulars from any return; or

(b) Deliberately furnishing inaccurate particulars in any return; or

(c) Concealment of any transaction of sale or purchase from accounts, registers or documents; or

(d) Avoidance or evading tax in any other manner

It was argued that the appellants had no intention to evade tax on the impugned transactions shown as stock transfers which were in reality transactions of interstate sales. Of Course, it is an undisputed fact that impugned stock transfer transactions were declared and disclosed by the Appellant in the returns furnished with the VAT Authorities and further the disputed stock transfer transactions were well recorded and accounted

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for in the books of accounts maintained by the appellant companies.

The learned counsel for M/s Carlsberg India (P) Ltd., Mr. Lasamikumaran had argued that the appellant was under a bonafide belief that the transactions in question were a stock transfer transaction: the bonafide of the Appellant was based on the ratio decendi of decisions and case laws cited above, specifically, the case of Central Distilleries & Breweries, (Cited supra), wherein under similar facts and circumstances the Hon'ble Allahabad High Court was said to have held transactions identical to the Appellants to be in the nature of stock transfer and not inter-state sales.

The learned counsel for M/s Mount Shivalik Industries Ltd, Mr. Alkesh Sharma, and Mr. Vivek Singhal for M/s United Breweries had emphasized that stock transfers of the appellant were converted into interstate sales by the Assessing Authority merely on presumptions and conjectures, based on a change of opinion inasmuch as not a single transaction of alleged sale or purchase had been detected by the Assessing Authority and which led to double taxation on the same goods. Relying upon the judgement of the Hon'ble Supreme Court in the case of M/s Shree Krishna Electricals vs State of Tamil Nadu (supra), they wanted that unjust levy of penalty under section 61 of 2003 Act be set aside. They had argued that Hon'ble Apex Court had held in the aforesaid case that "so far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's books of accounts.

Where certain items are not included in the turn over, are disclosed in the dealers own books of accounts and the Assessing Authorities include these items in the dealers turnover disallowing exemption penalty cannot be levied", and submitted on this account that in their case all the

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transactions were appearing in the appellant's books of accounts and the deduction in respect of such branch transfers had been allowed, therefore there was no ground for imposing penalty in such cases.

In the humble opinion of the Bench, the facts of the present case differ from the facts prevailing in the aforesaid case of M/s Shree Krishna Electricals, wherein the assessee had not included certain items in the turnover but they were fond entered in his books of accounts. Here, it is a case of the malafide intention of the appellants in consciously depriving the state of Rajasthan of their due tax revenue under Central Sales Tax by concealing the nature of inter-state transactions under the garb of stock transfers made from the State of Rajasthan to the State of Bihar (or, Jharkhand). The facts of the present cases are distinguishable from those of the aforesaid cases cited above. In the present context, they are not based on commodity and turnover but on nature of sales which has been deliberately misrepresented in the books of accounts and disclosed in returns as branch transfer Instead of as interstate sales.

Going by the facts and legal pronouncements as aforesaid hereinabove, we have come to the conclusion that agreement for supply of Beer to the BSBCL by the appellants was an agreement to sale which was duly executed between the BSBCL and the appellant companies having their manufacturing units in district Alwar Rajasthan and branch offices in Patna in year 2008, which inter alia, had agreed upon the terms and conditions in respect of the fix Landed Price for supply and delivery of beer by the manufacturer to destinations of the designated warehouses in Bihar. The BSBCL in its liquor sourcing policy clearly defines the Landed Price as "Landed Price at BSBCL warehouse means all inclusive of EDP, Freight handling Insurance, State / Central levies, duties, fees & excise duty and Commercial Tax".

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The wording of Landed Price is quite revealing inasmuch as tax provisions are the concerned, it uses the word commercial tax which includes both state VAT & Central Sales Tax, the relevant document has not excluded Central Sales Tax from the ambit of the Landed Price. Nor has it confined itself to the local VAT in the state of Bihar. Appellant companies were asked to offer the firm prices for their liquor products on the basis of the Landed Price which included local Bihar VAT @ 50% on the sale of liquor products including beer to the designated depots of BSBCL in territories of Bihar. None debarred them from the inclusion of due CST applicable on such interstate sales of beer from their units in Alwar to the designated depots of BSBCL. Mere interruption of sales during the course of transit at their branches in Patna could not divert the nature of interstate sale effected between the appellants and BSBCL. So far as the liability to pay 50% VAT on local sales in Bihar is concerned it could have been taken care of by their inside sale mechanism in the state of Bihar on which the Board would not like to dwell upon as it would amount to exceeding its jurisdiction.

The charge that a single stock transaction has been converted into interstate transaction would lead to double taxation on the same product because the appellant had deposited VAT @ 50% on such transaction as local sale in state of Bihar is not correct proposition because the appellant is trying to coalesce the interstate sale from Bihar to Rajasthan into subsequent local sale in the state of Bihar in one transaction which in fact were two different sale transactions: one, interstate sale of beer between the appellant assessee and BSBCL and second local sale in the state of Bihar regarding which the respondent Revenue had no right to interfere in or advise on inasmuch as workability and applicability of local VAT on subsequent sale in other state was concerned. It was exclusively in the domain of appellant and BSBCL.

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It would be worthwhile to go through Clause 5.7, Clause 5.8 and Clause 5.9 of the Liquor Sourcing Policy:

Clause 5.7 "The offerer shall quote the prices for their products on competitive basis keeping in view the existing prices of similar brands".

Clause 5.8 " Manufacturers may please note that they are required to work out the Landed cost and the maximum retail selling price, taking due note of the provisions of the different notifications with respect to duties / fees issued by Government of Bihar (Excise Department) / Excise Commissioner under Bihar Excise Act and rules framed there under. The Corporation reserves the right to decide the extent of incidental overhead to be allowed for Bihar. Incidental overhead will include all other fees /levies / cost applicable other than the EDP."

Clause 5.9 "The margin of Corporation shall be calculated in such a way that it is not more than 5% of the M.R.P. Likewise retailers margin will also be circulated in such a way that it is not more that 15% of the MRP".

From the analysis of above Clauses emerges a picture that the appellants were allowed to fix Landed Cost and maximum selling price in which they could have included CST as well, apart from making provision for local VAT in Bihar which the appellants may have already done as component of price quoted. However, Clause 5.9 in that case might have curtailed their profit margins. But that is not a point in consideration before us from the view point of applicability of incidence of Central Sales Tax on the impugned transactions. In conclusion it comes about that the supply of beer to the BSBCL by the appellants from the initial stage was a premeditated deliberate exercise to excise CST on the inter-State sale transactions by the appellants in flagrant violation of conditions as exhibited in the aforesaid Agreement, implications of which were well

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known to the appellants right from the beginning when such interstate sales were deliberately disclosed as branch transfer transactions by them. In fact, the ratio decidendi was in favour of Assessing Authorities in respect of imposition of penalty under section 61 of the RVAT Act in the impugned assessment orders and is, therefore, upheld."

35. In conclusion, we hold that agreement for supply of beer to the BSBCL by the appellants was an agreement to sale duly executed between BSBCL, Patna and the appellant assessee of Rajasthan and that "the OFS was but an instrument born out of the wedlock of the 'Agreement for Sale' between BSBCL and appellant companies to carry out liquor supply as per terms and conditions in respect of the 'Agreement for Sale.'

36. In the light of the analysis of the above mentioned legal pronouncements and facts in present case on analogy of the similar facts described in the DB decision of the Board dated November 24, 2014 in cases of M/s United Breweries Limited, Bhiwadi, Carlsberg India Private Limited, Alwar, M/S Mount Shivalik Industries Limited, Behrod, Alwar (appeal nos.: 1229 to 1234/2014, 1330 to 1334/2014, 541 to 544/2014) aforesaid, we uphold the levy of tax, interest and penalty in the impugned assessment orders passed by the Assessing Officer, as such appeal dismissed.

In result, appeal is dismissed.

Order pronounced.

(Madan Lal)
Member

(B.K. Meena)
Chairperson