
(1973) 10 KL CK 0018

In the High Court Of Kerala

Case No : T.R.C. No"s. 35, 36 and 37 of 1973

A. Srinivasa Pai

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-10-1973

Acts Referred:

General Sales Tax Act, 1125 — Section 5(vi)

Citation : (1975) 36 STC 482

Hon'ble Judges : P. Govindan Nair, C.J;K. Sadasivan, J

Bench : Division Bench

Advocate : S.A. Nagendran and N.N.D. Pillai, for the Appellant; The Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Sadasivan, J.—These tax revisions arise from the order of the Kerala Sales Tax Appellate Tribunal, Trivandrum, in Appeals Nos. 228/68, 1085/69 and 1149/69. The appellants in those appeals were M/s, A Srinivasa Pai, Merchants, Quilon, who were dealing in ration foodgrains, sugar, provisions, etc. The common question that arose in those appeals was whether the assessment of the estimated turnover of containers was unlawful. The question was decided against the assessee by the Sales Tax Officer, Appellate Assistant Commissioner in appeal and, finally, by the Sales Tax Appellate Tribunal. The packing materials involved in the appeals were gunny bags, tea-chests and F.A.C.T. manure bags. In respect of the first two, the Tribunal held that there was an implied agreement for the sale of the containers and, as such, the assessment of the estimated turnover of the containers was correct; but in respect of the last one, F.A.C.T. manure bags, the Tribunal held that the manure bags do not have a substantial resale value as the bags had got spoiled on account of the corrosive action of the contents and it is not possible to draw an inference of implied sale of such bags. Therefore, the assessment in respect of the F.A.C.T. manure bags was directed to be deleted.

2. The case of the assessee is that they are not dealers in containers and there is no sale of the containers when rice, wheat, sugar, etc., are sold in packed containers. The State representative, on the other hand, contended that the assessment is proper in that when foodgrains are sold in packed containers, the container does not lose its physical or commercial identity and the price fetched for the grains is inclusive of the price of the container. So the turnover in respect of the container would be liable to sales tax under the Kerala General Sales Tax Act, 1963 (for short the "Act"). The principles to be borne in mind in a matter like this as has come out from the decisions of the Supreme Court are :

- (1) The value of the containers would be assessable to sales tax if there is an express or implied agreement for the sale of such containers ;
- (2) The question as to whether there is an agreement to sell packing materials is a pure question of fact depending upon the circumstances found in each case;
- (3) Where the containers are of substantial value it is possible to infer an implied agreement to pay an extra price for the containers ; and
- (4) The mere fact that the price of the containers is not separately fixed makes no difference to the assessment of sales tax.

3. An array of decisions were cited before us, of which Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 STC 624 SC. Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, and Razack & Co. v. State of Madras [1967] 19 S.T.C. 135 (S.C.) are important. In Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., the assessee-company was a dealer carrying on business of re-drying in the company's factory raw tobacco entrusted to it by its customers. The assessee re-dried the tobacco, packed it in packing materials purchased from the market and delivered it to the customers. For re-drying each bale of tobacco, the assessee charged the customers a certain sum but there was no separate charge for the value of the packing materials used. The assessee was assessed to sales tax under the Madras General Sales Tax Act, 1939, on the value of the packing materials on the ground that there was a sale of the packing materials. The Supreme Court held,

on the finding recorded by the High Court, that it was intended by the parties that the "packing material" should form an integral part of the process of re-drying and without the use of the "packing material" re-drying process could not be completed, and that there was no independent contract for sale of "packing material". It was only as an incident of the re-drying process and as a part thereof that the assessee had to seal up the package of tobacco, after it emerged from the reconditioning chamber, with a view to protect it against atmospheric action. In the absence of any evidence from which contract to sell "packing material" for a price might be inferred, the use of "packing material" by the assessee must be regarded as in execution of the works contract and the fact that the tobacco delivered by the constituent was taken away with the "packing

material" would not justify an inference that there was an intention to sell the "packing material".

4. The court further held :

Re-drying is a process designed to create suitable conditions for the proper maturing of the leaf in storage. The process of re-drying raw tobacco brought to the assessee by their constituents is one, entire and indivisible. The object of the re-drying process is to standardise the moisture content at the required level of 10 to 12 per cent, and when the tobacco leaf emerges from the reconditioning chamber, it must be packed in waterproof packing material and stored for the requisite period. Unless the packing is done immediately, the tobacco loses its standardised moisture content, and without the packing, the process is not complete.

5. The conclusion drawn, therefore, was that there was no intention to sell the packing materials. This case, however, is not applicable to the case on hand. Here, the position is that the packing material or container is different from the contents, and has to be treated as such. In such a situation, the question to be asked is whether there was an agreement, express or implied, to sell the container along with the contents and, in answering the question, the further factors to be considered are whether the packing materials have a resale value or they are insignificant when compared to the value of the contents.

6. In *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.) the department sought to assess the appellant, a manufacturer of, and dealer in, cigarettes, on the turnover in respect of packing materials consisting of cardboard and dealwood. The appellant contended that there was no sale of the packing materials as he sold only cigarettes at Rs. 8.60 per thousand without charging extra for packing materials and that the price was the same to whatever place they were sent. It was not disputed that there was no express contract of sale of the packing materials. The Supreme Court held :

(i) that whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay upon the Commercial Tax Officer to prove that a turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee ; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied ;

(ii) that in order to constitute a sale it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it should be supported by money consideration and that as a result of the transaction property should actually pass in the goods ;

(iii) that what the sales tax authorities had to do was to ask and answer the question whether the parties, having regard to the circumstances of the case,

intended to sell or buy the packing materials or whether the subject-matter of the contracts of sale was only cigarettes, and packing materials did not form part of the bargain at all, but were used by the sellers as a convenient and cheap vehicle of transport.

7. The order of the High Court was set aside and the case was sent back for a consideration of the question whether the packing materials were the subject-matter of the agreement to sell.

8. In *Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati*, the respondent sold hydrogenated oil which was exempt from sales tax under the Assam Sales Tax Act, 1947. The question was whether the value of the containers in which the oil was sold could be assessed to sales tax under the Act. The High Court held that the value of the containers was not assessable to sales tax unless separate price had been charged for the containers. On appeal, the Supreme Court held that:

The value of the containers was assessable to sales tax under the Act if there was an express or implied agreement for the sale of such containers and the mere fact that the price of the containers was not separately fixed made no difference to the assessment of sales tax. It is not possible to state as a proposition of law that whenever particular goods were sold in a container the parties did not intend to sell and buy the container also. Many cases may be visualised where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied.

10. In *Razack and Co. v. State of Madras* [1967] 19 S.T.C. 135 (S.C.) the appellants were dealers carrying on business in chewing tobacco. They did not mention in the bills issued for sale of chewing tobacco, separate prices of chewing tobacco and of the packing materials as required by Rule 5(1)(g) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. It was held that the appellants were not entitled to claim exclusion from the taxable turnover of the value of the packing material.

11. In the light of the above principles it is impossible to hold that tea-chests and gunny bags are things of no value or the value they fetch is too insignificant to be taken into consideration. They are independent commercial commodities having substantial resale value and they do not lose their physical or commercial identity when foodgrains are packed in them. The contention is not open to the Commercial Tax Officers (sic) that these packing materials were the materials necessary to give or send the commodity to the customers and that it could not have been possibly the intention of the seller to sell or the buyer to buy the said materials which had no intrinsic worth apart from the thing it contained. In such cases, as has been held in *Commissioner of Taxes Assam, Shillong Vs. Prabhat*

Marketing Co. Ltd., Gauhati, cited already, an agreement to pay an extra price for the container may be more readily implied. It must, therefore, be inferred that in fixing the value of the contents the value of the containers has also been taken into consideration, and when that is the position, the contention that the rate at which the contents are sold is the same with or without the container is of no significance. It is not possible to infer that the bag or the tea-chest was conveyed free along with its contents. This court has held in *Srinivasa Pai v. Sales Tax Appellate Tribunal, Trivandrum* [1961] 12 S.T.C. 80 that:

The exemption u/s 5(vi) of the General Sales Tax Act, 1125, is only in respect of the sale of foodgrains and when foodgrains are packed in gunny bags, the gunny bags do not lose their physical or commercial identity and form a part of the foodgrains themselves. Hence, when bags of rice are sold for a price which includes the price of the gunny bags the turnover in respect of the gunny bags would be liable to sales tax under the Act.

12. In *West Coast Weaving Establishments v. State of Kerala* [1964] 15 S.T.C. 898 this court held that packing material used in packing handloom cloth were incapable of being resold or consumed by their customers. So it was held that the price of the cloth sold included the cost of its packing was not based on any evidence, nor was it warranted by the circumstances of the case. The learned Judges observed :

We think it absurd to call as "containers" the materials in which bundles of cloth are packed in the usual course of trade. It is a well-known courtesy observed by the traders that goods purchased are wrapped or packed before they are delivered to the customers and they charge nothing extra for such wrapping or packing-the case of containers made of metal, glass, etc., being quite different.

13. It is on those materials that a slightly different view had to be taken in that case.

14. We, therefore, agree that the view of the Tribunal that in the first two cases wherein gunny bags and tea-chests are the containers the assessment is proper and that in respect of the F.A.C.T. manure bags the assessment has to be deleted. These tax revision cases are, therefore, dismissed; in the circumstances without costs.