

(2000) 09 AP CK 0017

In the Andhra Pradesh High Court

Case No : Writ Petition No. 19304 of 1996

Associated Cement Companies Ltd., Sec"bad

APPELLANT

Vs

Govt. of A.P. and another

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 6
Constitution of India, 1950 — Article 14

Citation : (2000) 5 ALD 685 : (2000) 5 ALT 634

Hon'ble Judges : P. Venkatarama Reddi, J;D.S.R. Varma, J

Bench : Division Bench

Advocate : Mr. K. Srinivasa Murthy, for the Appellant; Special Government Pleader for Taxes, for the Respondent

Judgement

P. Venkatarama Reddi, J.

1.Adventures and innovations are the ways of some affluent tax payers. Revenue does not lag behind to combat and outwit them if possible. In this on-going race, who would be the ultimate loser or winner, it is often difficult to predict. The Courts would act as umpires and give their verdict. There would be further efforts on either side to find ways and means of getting over the adverse effects of such verdict. There will be resistance by the other side. That is how it goes on. Legislation is the potent weapon in the hands of Revenue and naturally, the Revenue would like to surge forward to draw out that potent weapon in its arsenal. Perhaps, the case on hand is a case of that kind and typical of that running feud.

2. The petitioner is a manufacturer and dealer in cement. It is common knowledge that the cement, barring some bulk supplies, is ordinarily sold in packed condition. Either gunny bags or HDPE bags are used for packing the cement. Going by ordinary business practice and common sense, one does not think of purchasing the cement and bag separately. The agreement and the bargain would be for sale and purchase of cement in packed condition, that is to

say, together with the container. Nevertheless, the petitioner wants to contend that cement and the bages used for packing were sold and billed for separately as the law does not prohibit it. The petitioner further contends that the factum of separate sale of packing material should not influence the tax rate on cement and that is the premise on which the Entry 18 to the I Schedule is sought to be challenged by the petitioner. This move is considered to be an artificial tax avoidance measure and the respondents maintain that the Legislature wanted to resist such move by tightening the provisions of law in the A.P. General Sales Tax Act. By APGST Amendment (Act No.27 of 1996), the following Entry was substituted in the place of the then existing entry "Cement".

18. Cement:

(a) where the sale price of Cement includes the value of packing material - At the point of first sale in the State - 16ps. in rupee.

(b) where the packing material and cement are sold separately and/or the sale price of cement does not include the value of packing material - At the point of first sale in the State - 20 ps. in rupee.

3. The amendment to the said entry came into force with effect from 1-8-1996 i.e., the date on which the Ordinance No.19 of 1996 was promulgated. Originally, the prayer in the writ petition was to restrain the respondents from enforcing the A.P. Ordinance No.19 of 1996 "to the extent of additional rate of sale tax for cement wherein the bills are prepared for the packing material and cement sold in loose condition". After the Ordinance was replaced by the Act passed by the Legislature, the petitioner sought amendment of the prayer and it was allowed.

4. The Constitutional validity of Entry 18 of First Schedule as introduced by the A.P. Act 27 of 1996 has been challenged on the ground that it is violative of Article 14. The same commodity, i.e., cement, it is contended, cannot be subjected to different rates of taxation depending on whether the cement and packing material are sold separately. The learned Counsel for the petitioner contends that the factum of separately selling the cement and packing material is recognised by the Department itself as evident from the finding recorded in the provisional assessment order dated 12-7-1998 covering the period - August to December, 1996. It is on that premises, clause (b) of Entry 18 is sought to be applied. The resultant position is that the cement is being subjected to different rates of tax depending on whether the packing material is sold separately or as an integral part of the cement and the price thereof. It is submitted that discrimination is writ large on the face of the impugned Entry in the Taxation schedule and such discriminatory treatment cannot be justified on the grounds put forward in the counter-affidavit. Strong reliance is placed on the judgment of the Supreme Court in *Ayurveda Pharmacy and Another Vs. State of Tamil Nadu*, . In reply, the learned Government Pleader has endeavoured to justify the amendment. His contention is that far from creating discrimination, the object was to see that the tax revenue on packing material is not lost to the State by

reason of adoption of artificial tax planning devices. The learned Government Pleader points out that the decision in Ayurveda Pharmacy's case is distinguishable and the prescription of different rates of tax in the peculiar circumstances obtaining in cement and liquor trade is not impermissible.

5. Before we proceed to examine the respective contentions, it is necessary to advert to the legislative measures undertaken to plug the leakage of revenue to overcome the tax planning devices in relation to packing material.

6. Section 6-C was introduced by the APGST (Amendment) Act (Act No. 11 of 1984). The provision reads as follows:

"6-C Levy of tax on packing material :-- Notwithstanding anything in Sections 5 and 6-A where goods packed in any materials are sold or purchased, the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax, if any, as applicable to the sale, or, as the case may, purchase of goods themselves."

7. The introduction of this provision did not achieve the desired objective. The judicial interpretation of Section 6-C belied the expectations of the Legislature to find an antidote to the tax avoidance measures, In Raj Steel and Others Vs. State of A.P. and Another, , the Supreme Court expressed that "Section 6-C can at best be regarded as a provision by way of clarification of existing legal situation". The Supreme Court pointed out:

"Section 6-C merely clarifies and explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves. We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case u/s 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated."

8. So observing, the Supreme Court remanded the matter to the High Court for fresh consideration and disposal in the light of the observations made in the judgment.

9. Earlier, the Supreme Court after referring to the various decisions summarised the legal position vis-a-vis sales tax on the turnover relatable to packing material thus:

"It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell

the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing."

10. Thus, the effect of the deeming provision has been held to be a matter of insignificance. This interpretation put the assessing and appellate authorities to the need of making elaborate enquiries on the question whether there was an agreement express or implied for the sale of packing material and whether any artificial or colourable devices were adopted to split up the transaction so as to take the plea that there was a separate contract for the sale of packing material.

11. Taking clue from the provisions in Kerala General Sales Tax Act and Karnataka Sales Tax Act, the Andhra Pradesh State Legislature made another attempt to introduce Section 6-C in a modified form. Accordingly, the following provision was substituted by A.P. Act 22 of 1995 with effect from 1-4-1995. The amended Section 6-C reads as follows:

"6-C Levy of tax on packing material:-- Notwithstanding anything contained in Section 5, Section 5-F, Section 6 and Section 6-A, the rate of tax on packing material sold with the goods shall be the same as that of the goods packed or filled, whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled."

12. In order to follow up the amendment to the best of advantage from the Revenue's point of view, the Entry in the first schedule relating to cement was amended as follows by Act 27 of 1996 with effect from 1-8-1996.

"18. Cement:--(a) Where the sale price of cement includes the value of packing material - (at first point of sale) - 16 ps. in the rupee - effective from 1-8-1996.

(b) Where the packing material and cement are sold separately and/or the sale price of cement does not include the value of packing material (at first point of sale) - 20 ps. in a rupee - effective from 1-8-1996."

13. As already indicated, it is this amendment that has been challenged.

14. The Legislature took yet another step in the year 1997 by substituting the Entry relating to containers by the following Entry dealing with the packing material of various types. This was done by Act 30 of 1997 with effect from 12-5-1997 in order to invigorate the charging provision read with Section 6-C to the desired extent. The substituted Entry 19 reads as follows:

"19. Packing material that is to say bottles of all types whether made of glass, plastic or any fibre or any other material.

(a) when sold without contents; (at the point of first sale) - 4 ps. in the rupee - effective from 12-5-1997.

(b) when sold containing contents - (at the first point of sale) - the rate at which

the content is liable to tax.

15. However, at the same time, the State Government, in order to see that the value of the packing materials is not taxed twice, exercised the power conferred u/s 9(1) of the APGST Act and provided for set off of the tax paid on packing materials. It was provided that the tax levied and collected on packing materials in respect of sale or purchase of such materials inside the State shall be reduced from the tax payable on the packed goods. The new Section 6-C introduced by Act 22 of 1995 is almost in pari materia with sub-sections (5) and (6) of Section 6 of Kerala General Sales Tax Act which was interpreted by the Supreme Court in *Premier Breweries v. State of Kerala*, 108 STC 598. Sub-sections (5) and (6) of Section 5 of the said Act reads as under:

"Notwithstanding anything contained in sub-section (1) of sub-section (2), but subject to sub-section (6) where goods sold are contained in containers or are packed in any packing materials, the rate of tax and the point of levy applicable to such containers or packing materials, as the case may be, shall, whether the price of the containers or the packing materials is charged is separately or not be the same as those applicable to goods contained or packed, and in determining turnover of the goods, the turnover in respect of the containers or packing materials shall be included therein".

"5. (6) Where the sale of purchases of goods contained in any containers or packed in any packing materials is exempt from tax, then, the sale or purchase of such containers or packing materials shall also be exempt from tax".

16. In *Premier Breweries*" case (supra), the assessee contended that the containers were separately billed and charged for and it was not open to the assessing authority to include the value of the containers in the price of the liquor for the purpose of calculating the rate of tax. In other words, the assessee contended that the rate of 8% applicable to the containers should be applied. This contention was rejected by the Kerala High Court. On appeal, the decision of the High Court was affirmed by the Supreme Court. Analysing the ingredients of relevant provisions quoted above, the Supreme Court pointed out at Para 6 that:

"The language of sub-sections (5) and (6) of Section 5 is clear and unambiguous. These two sub-sections deal with the method of valuation of packed goods and the rate of tax payable thereon. The rules laid down are: (1) Where goods sold are contained in a container or packed in any packing material, the rate of tax payable on the containers shall be the same as that applicable to the goods contained or packed. (2) This will be the position even if price of the containers or packing materials is charged separately. (3) The turnover of the goods will include the turnover in respect of containers or packing materials in which the goods are contained or packed. (4) The point of levy of the tax on the containers or the packing materials will be the same as applicable to the goods contained or packed. (5) If the sale or purchase of goods contained in a container or packed in a packing material is exempted from tax, then, no tax shall be payable on the

sale or purchase of the containers or packing materials in which the goods are sold."

It was then observed at Para 7 thus:

(a) "The underlying idea behind these rules is that packed goods are to be taxed as composite units. In calculating the turnover of the goods, the turnover of the containers will have to be included. The appropriate rate of tax will be the rate payable on the goods. It will not make any difference, if the containers are shown to have been sold and charged separately. The logical corollary to this principles is that when the goods are exempted from tax, no tax is leviable on the containers. This will be the position even when the goods and the containers are sold and charged separately".

17. After referring to Raj Sheel's case (supra), their Lordship of the Supreme Court observed that the difficulty arising out of the restricted meaning giving to a deeming clause in Section 6-C of the A.P. Act has been obviated by specific provisions of Section 5(5) of the Kerala Act by providing that the turnover of the goods shall include the turnover in respect of packing materials or containers.

18. Referring to the decision in Vasavadatta Cements Vs. State of Karnataka and another, , wherein the Supreme Court followed the principle laid down in Raj Sheel case, their Lordships pointed out that in Vasavadatta's case, the Supreme Court "overlooked the marked dissimilarity between Section 6-C of the Andhra Act and Section 5(3-D) of the Karnataka Sales Tax Act". It may be stated that Sections 5(5) and 5(6) of the Kerala General Sales Tax Act are almost similar.

19. The Supreme Court categorically held that sub-sections (5) and (6) of Section 5 of the Kerala General Sales Tax Act will have to be construed uninfluenced by the decision in Raj Sheel's case (supra). It was then observed at Para 21 thus:

"Section 5(3-D) of the Karnataka Act, if anything, is more specific than Section 5(5) of the Kerala Act which deals with cases where the goods sold or purchased are contained in containers or are packed in any packing material. It specifically provides that the rate of tax and the point of levy applicable to turnover of such containers or packing materials will be the same as those applicable to the goods contained or packed. This rule will apply even in a case where the containers or the packing materials had already been subjected to tax under the Act. It also provides that the rule will apply "whether the price of the containers or the packing materials is charged separately or not". In view of these clear provisions of Section 5(3-D) of the Karnataka Act and the corresponding provisions of Section 5(5) of the Kerala Act there is no basis for the argument that if the price of the goods and the price of the containers or packing materials are separately charged, the provisions of the aforesaid two sections will not be applied at all. In the context of these provisions, there was no scope for invoking the principle laid down in Raj Steel and Others Vs. State of A.P. and Another, , for making any inquiry as to whether the containers or packing materials were sold along with

the goods or separate bills were made in respect of them or whether they were separately charged. The law is quite clear that when the goods contained in containers or packed in packing materials are sold, the containers and the packing materials will have to be taxed at the same rate at which the goods are liable to be taxed. It will not make any difference if the price payable for the containers or packing materials are shown separately in the bills raised by the seller."

20. The situation is the same here. The legal position enunciated above will apply with full force to the interpretation of Section 6-C and Entry 18 of the First Schedule to APGST Act. The decision in Premier Breweries" case (supra) establishes beyond doubt that there is nothing anomalous or incongruous in prescribing the same rate of tax for the packing materials as well as the goods packed irrespective of the fact whether they are charged for and sold separately. On the other hand, the dissection of the anatomy of Entry 18 as introduced by Act 27 of 1996 would reveal that the rate of tax on cement which is normally and ordinarily sold in packed condition is 16%. However, if the packing material viz., gunnies or HDPE woven sacks are sold or purportedly sold separately without including the value of the packing material in the sale price of cement, the cement will be liable to be taxed at higher rate of 20%.

21. The petitioner"s case as set out in paragraph 4 of the affidavit is thus:

The purpose of showing separately the value of the cement and the value of material used for packing the cement is only for the purpose of claiming exemption on the packing material as sales tax is not levied on second sales of packing material as per the Act. In the written submissions, it is mentioned that the petitioner-Company wants to claim the benefit of single point levy in respect of packing material purchased within the State of Andhra Pradesh.

22. Insofar as the petitioner wants to claim exemption or deduction on the value of packing material purchased within the State, there is no difficulty at all by virtue of G.O. Ms. No.374, dated 25-4-1987. The tax paid on packing material at the point of first sale and corresponding purchase by the petitioner will be given set off. Therefore, to the extent of the value of gunnies or HDPE bags, there will be reduction of tax already suffered while paying the tax on the cement. But what the petitioner wants is that the rate of tax on cement should not vary depending on whether the packing material cost is split up and charged for separately in the bills. In others words, there must be uniform rate of tax for cement without linking it up to the packing material. The question is whether the Legislation providing for different rates of tax on cement can be said to be violative of Article 14 of the Constitution.

23. As already noted, the sheet anchor of petitioner"s argument is the decision of the Supreme Court in Ayurveda Pharmacy"s case (supra). The facts in that case were that the patented or proprietary preparations belonging to different systems of medicine were subjected to tax at the rate of 7% as per the first

schedule to the Tamil Nadu General Sales Tax Act. However, Arishtams and Asavas prepared under Ayurvedic system were subjected to higher rate of 30%. That was for the reason that they contained high alcohol percentage and it was being manufactured and sold by several Ayurvedic Pharmacies for the purposes other than medicinal use i.e., for consumption as liquor. The Supreme Court held thus:

"The two preparations, Arishtams and Asavas, are medicinal preparations, and even though they contain a high alcohol content, so long as they continue to be identified as medicinal preparations they must be treated, for the purpose of sales tax law, in like manner as medicinal preparations generally, including those containing a lower percentage of alcohol."

24. The Supreme Court found no justifiable reason for discrimination and therefore, the Entry was struck down as violative of Article 14. Perhaps, this decision of the Supreme Court stands as a lone decision in the Law Reports upholding the plea of discrimination for taxing a particular commodity to higher rate of tax in certain situations. It goes apparently against settled principles laid down in a series of decisions of the Supreme Court while judging Constitutional validity of a taxing provision. In fact, such principles were adverted to and recognised by their Lordships in the above cited case itself. It would be appropriate at this juncture to recapitulate some of these principles.

25. In *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, *Hidayatullah, J.*, speaking for the Constitutional Bench of the Supreme Court narrated the principles governing the application of Article 14 to taxing Statutes with reference to various authorities. The relevant portion at Para 15 reads as under:

"We may now state the principles on which the present case must be decided. These principles have been stated earlier but are often ignored when the question of the application of Article 14 arises. One principle on which our Courts (as indeed the Supreme Court in the United States) have always acted, is nowhere better stated than by Willis in his "Constitutional Law" Page 587. This is how he put it:

"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation.

This principle was approved by this Court in *East India Tobacco Co. Vs. State of Andhra Pradesh*, . Applying it, the Court observed:

"If a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation.

This indicates a wide range of selection and freedom in appraisal not only in the

objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable".

The next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. This was also observed in the same case of this Court at page 411 (of SCR) - (at p. 1735 of AIR) approving the dictum of the Supreme Court of the United States in *Madden v. Kentucky*, (1940) 309 US 83:84 Law Ed. 590:

In taxation even than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it".

26. In *Khandige Sham Bhat v. AGRL I.T. Officer* AIR 1963 SC 591, the Constitution Bench of the Supreme Court while pointing out that taxation law is not an exception to the doctrine of equality, clarified :

"But in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways".

27. In *Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others*, , another decision of the Constitution Bench, it was observed:

"Even so, taxing statutes have enjoyed more judicial indulgence. This Court has uniformly held that classification for taxation and the application of Article 14, in that context, must be viewed liberally not meticulously".

28. Krishna Iyer, J., in his inimitable language then observed :

"Article 14 is not intellectual chess unrelated to actual impact or the wear and tear of life but even-handed justice with some play in the joints."

29. By holding the view that there was invidious discrimination on account of the goods falling within the broad classification of medicinal preparations not being treated alike, in our humble view, the Supreme Court adopted an approach at variance with well established principles laid down in larger Bench decisions. Whatever may be our personal view, we are duty bound to give effect to the decision if the ratio does apply unequivocally to the issue arising in the instant case. We are afraid, it does not. The present case is not a case in which a species of the genus is picked up for higher taxation without apparent justification. The charge of discrimination was upheld in *Ayurveda Pharmacy's* case (*supra*) having regard to the inherent nature of the commodity and its similarity with others falling within the same category. In the present case, the rate of tax on cement is made dependant on whether the sale price of cement includes the cost of packing materials. If the packing material cost is shown as an integral part of the

price at which the cement was sold, it would attract lesser rate of tax. However, if the packing material cost is excluded from the sale value of the cement, the turnover will be less and in such an event, the Legislature thought it fit to prescribe a higher rate of tax. It is left to the dealer to choose one of the courses. Different rates of tax for the same commodity is prescribed depending on whether the price includes packing material cost, obviously with a view to check tax avoidance. Such was not the situation in *Ayurved Pharmacy case* (supra).

30. The reason for imposing a higher rate of tax in the case falling under clause (b) of Entry 18 is to check the tax avoidance measures which are said to be rampant. Contrary to the normal business practices and modalities of sale of cement, the manufacturers have started bifurcating the price of cement and packing material to make it to appear that there was separate sale of each of them, so that they need not have to pay the higher tax on the component of packing material. Such practice, prima facie, goes contrary to the test laid down by the Supreme Court in *Hyderabad Deccan Cigarette Factory v. State of A.P.* 17 STC 624, as long back as in the year 1966. It was observed therein:

"In the instant case, it is not disputed that there were no express contracts of sale of the packing materials between the assessee and its customers. On the facts, could such contracts be inferred? The authority concerned should ask and answer the question whether the parties in the instant case, 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 the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport.

It was then graphically said:

"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".

31. Going by the above enunciation of law, it could be said that the gunny bag is used to facilitate the transporting and marketing. The value of bag would normally be a minor percentage of the value of cement. In such a situation, it would be difficult to infer a separate agreement for the sale of bags used for packing the cement. However, the manufacturers, in order to claim the tax benefit have been resorting to the modus operandi of the sale of containers (bags) by bifurcating the price. When evidence is created prima facie supporting the plea of separate sale of packing material, it would be difficult for the taxing authorities to establish otherwise even though the design and purpose of creating such evidence by the process of billing etc., is quite evident. In every case, elaborate enquiries will have to be made to decide on which side of the

line, the transaction falls. To obviate such uncertainties and long drawn enquiries, a straight formula has been prescribed and the rate of tax on cement is made to depend on the two contingencies envisaged in (a) and (b) of Entry 18. We do not find any basis to hold that such classification of the same commodity is impermissible and would per se amount to discrimination. The classification rests on an intelligible and rational basis having nexus with the object sought to be achieved viz., to plug the leakage in revenue. The question of infraction of Article 14 does not therefore arise.

32. A Division Bench of this Court in *Poorna Wines v. Commissioner of Commercial Taxes*, 13 APSTJ 173, held that notwithstanding the artificial bifurcation of the price which the assessee paid to the manufacturer while purchasing the beer and the price received while selling the same to the retail dealers, the assessee must be deemed to have received a single amount for the sale of the bottled beer and the cost of the bottle cannot be separated from the price of the beer.

33. Considering the purpose and objective behind the impugned provision and the mischief sought to be remedied, it cannot be said that the differentiation in the rate of cement is unreasonable or irrational. We cannot therefore, uphold the petitioner's contention.

34. The writ petition is dismissed with costs quantified at Rs.2,000/-.