(1998) 09 GAU CK 0007

In the Gauhati High Court

Case No : Writ Appeal No. 17 of 1998

Bijoy Singh Bimal Kumar and Others APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 01-09-1998

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 2, 2(34), 8, 9, 9(1)

Citation : (1998) 3 GLT 385

Hon'ble Judges : N.C. Jain, Acting C.J.;P.G. Agarwal, J

Bench : Division Bench

Advocate : O.P. Bhati, M.K. Jain, J.C. Gour and A. Biswas, for the Appellant; K.H. Choudhury, for the Respondent

Judgement

P.G. Agarwal, J.—This writ appeal is directed against the order dated 4.12.97 passed by a learned Single Judge of this Court in Civil Rule No. 918/97. The Appellant No. 1 M/s. Bijoy Singh Bimal Kumar is a wholesale dealer of food articles. The firm sells food articles like sugar, pulses, cereals etc. packed in gunny bags and edible oil packed in tin containers. For the period ending 31.3.94 the dealer filed his annual return stating that the goods sold are exempted from tax u/s 9 of the Assam General Sales Tax Act, 1993, for short ''the Act, ''However, the Assessing Officer was of the opinion that as the goods were sold in containers, the price thereof was realised and it formed part of the sale price realised by the dealer. The Superintendent of Taxes determined the sale of containers at 1% of the total sale (by weight) and imposed tax at 8% as provided u/s 8 of the Act. Feeling aggrieved , the dealer moved before the competent authority but the revisional authority uphold the levy of tax on containers, hence the writ petition. The learned Single Judge vide impugned order dismissed the writ, holding that there is no merit, hence the present appeal.

2. In the present case, there is no dispute at the Bar that the goods sold by the Assessee are exempted from tax u/s 9(1) of the Act. The list of exempted items is provided in Schedule I of the Act. There is also no dispute that the containers,

that is, the gunny bags and tin are liable to be taxed at 8% u/s 8 of the Act. Shri O.P. Bhati, learned Counsel for the Appellant has also submitted that although the seller had not charged separately for the containers used as packing materials, these were not sold without consideration. As a matter of fact, the practice is that the weight of the gunny bag is included in the costs of materials. The goods contained in the gunny bage are weighed and the price is realised from the total weight of the goods including the bag. At this stage, it will be useful to refer to Explanation 2 of sub- Clause (34) of Section 2 of the Act, which reads as follows:

Where any goods are purchased or sold packed in containers or other packing materials of value which is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods then, notwithstanding any agreement to the contrary such container, or other packing material shall be deemed to have been purchased or sold with such goods and their value, whether charged separately or not, shall be included in the purchase or sale price of such goods.

3. The section thus provides by legal fiction that the packing materials shall be deemed to have been sold along with the goods. While dealing with the above deeming provision, the learned single Judge observed:

The fiction was introduced with a view to include the containers or other packing materials comprising with the goods purchased or sold to be included in purchase or sale price of such goods. If by the fiction enumerated in the explanation 2, the container or the packing material is to be reckoned to have been purchased or sold with such goods and their value is to be included in the purchase or sale price of the goods. Full effect of the legal fiction must be given effect to attain the purpose for which the fiction was created. The legislative mandate is to be given full effect to and the fiction introduced by the statute is required to be carried to its logical conclusion. In this context it is worthwhile to recall the celebrated quotation of Lord Asquith in East End Dwelling Company Ltd. v. Fins bury Borough Council reported in 1951 2 All E.R. 587 (House of Lords)

If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequence and incidents which, if the punative state of affiairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corrollaries of that state of affairs.

The explanation 2 of Section 2(34) of the Act furnishes an example of legal fiction which extends the meaning of the word. The assessing authority assessed the value of the container to the best of its judgment and levied taxes thereon.

4. In the case of G. Viswanathan Vs. The Hon''ble Speaker, Tamil Nadu Legislative Assembly, Madras and another, the Apex Court while considering the

scope of legal fiction observed:

The legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow therefrom, and give effect to the same.

5. The above legal fiction was reiterated in the case of A.S. Glittre D/5 I/S Garonne and others Vs. Commissioner of Income Tax, Kerala-II, In case of Raj Steel and Others Vs. State of A.P. and Another, the Hon''ble Pathak, C.J., as he then was, was of the view that the deeming clause should be given a restricted meaning. In a Premier Breweries Vs. State of Kerala, the above view did not find favour with the Apex Court. The learned single Judge in the above mentioned observation was also of the view that the full effect of legal fiction must be given effect to attain the purpose for which the fiction was created. The legislative mandate is to be given full effect to and the fiction introduced by the statute is required to be carried to its logical conclusion.

6. As per Explanation 2 to Section 2(34) of the Act, a legal fiction is created that the packing materials shall be deemed to have been sold along with the goods. In view of the admitted position that the price of the packing materials was included in the sale price by way of weighment, there is not much need to extend the said fiction. The admitted position is that the price of the packing materials formed part of ''sale price.''

7. Learned Counsel for the Respondent State of Assam has drawn our attention to a decision of the Apex Court in the case of Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, In the above case, the Apex Court held that the value of containers of hydrogeneted oil is assessible to sales tax under the Act if there is an express or implied agreement for the sale of such containers. The above decision was in respect of the Assam Sales Tax Act, 1947, which stand repealed by virtue of the present Act. In the repealed Act, the ''sale price'' was defined in Section 2(13) and the language was altogether different from the present enactment. Hence the above referred decision is not applicable.

8. Learned Counsel for the Appellant referring to the decision of the Apex Court in Premier Breweries (Supra) has submitted that when the goods are exempted from tax, no tax is leviable on the containers. The above case was in respect of Kerala General Sales Tax Act and the language of Sub-section (5) and (6) of Section 5 of the Kerala Act are clear and unambiguous and specifically deals with the method of valuation of pecked goods and the rate of tax payable thereon. So far as the Assam Act is concerned, we are unable to opine that the language of the Act is clear and unambiguous as regards the taxing of packing materials. Vide an amendment, Assam Act XXII of 1994, the words "and charged to tax at the rate, if any, applicable to such good," were deleted with effect from 6.1.94.

9. Shri K.H. Choudhury, learned Addl. Sr. Govt. Advocate for the State of Assam

has taken pains to produce a copy of the statement of object and reasons for introducing the amending Act, Assam Act XXII of 1994. The said statement of object and reason does not contain anything about the packing materials but clause 2(b) of the clause-wise explanatory notes read as follows:

There was some controversy over the question of levy of tax on the containers sold with the exempted goods. Hence by deletion of the words as proposed, the containers sold with the exempted goods are sought to be taxed.

10. It is thus seen that while enacting the above mentioned amending Act the Government intended to impose tax on containers used for selling non-taxable goods but mere intendment cannot fasten fiscal liability. Therefore, the deletion of above mentioned words from Explanation 2 cannot be said to provide tax on packing materials used for selling non-taxable goods, and in our view the Explanation 2 remains ambiguous inspite of the deletion made in by the amending Act.

11. While considering Explanation 2 of Section 2(34) of the Act, it will be useful to reproduce the words of Maxwell on ''Statutes Imposing Burdens'':

Statutes which impose pecuniary burdens are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties; the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been coveted by appropriate Words. ''In a taxing Act'', said Rowlatt J., ''one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One. can only look fairly at the language used. But mis strictness of interpretation may not always ensure to the subject''s benefit, for ''if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.

Page 256, Maxwell on The Interpretation of Statutes, Twelfth Edition by P.St. J. Langan.

12. The underlying idea behind explanation 2 is that the packing materials whether sold separately or not will have to be included in calculating the turnover of the goods. In Premier Brewries (Supra), The Apex Court observed:

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 charge seprately. The logical corollary to this principle 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.

13. In the instant case, by way of legal fiction the costs of containers are included in the turnover. The effect or consequence of the said fiction cannot be circumscribed. In our opinion, the said fiction is liable to end in its logical conclusion, that is if the goods are taxable then the packing materials shall also be taxable at the same rate and if the goods are not taxable, then the packing materials are also not to be taxed. In Premier Brewries (Supra), the Apex Court did not accept the contention of the Petitioner that the packing materials which are shown sold separately should be taxed at a lower rate of 8% and not at 50% which was the rate prescribed for the goods. Under the Assam Act also the packing materials are taxable at the rate of 8% and liquor is taxable at 50%.

14. There is Anr. aspect of the matter In a given case, where the price of the container or packing materials have been charged separately by the dealer, in view of the deeming provisions, the same shall be included in the sale price. Naturally the question is why and for what purpose this is to be done? If the containers are to be taxed separately, there was no need for such legal fiction. This goes to show that when the goods contained in containers are sold, the containers will have to be taxed at the same rate at which the goods are liable to tax, and as a corrollary, as the goods are not liable to be taxed, the containers are also not liable to be taxed. This interpretation seems to be the only outcome of the language of Explanation 2, wherein it is stated that the containers or other packing materials should be of small value in comparison with the value of such goods; or such packing is essential or customary for the purchase or sale of such goods. Learned Counsel for the Appellant has submitted that the gunny bags or the tin containers were essential for selling the goods in question and these are also customary in the sense that from long time these are being used for the sale and purchase of goods in question. There is no dispute to the above, we also find that the value of the packing materials in the instant case was small in comparison with the value of goods sold. From the assessment order, we find that the dealer sold the goods worth Rs. 6,70,33,455.46 Paise. The Superintendent of Taxes determined the price of containers at Rs. 3,62,686/- which is around half percent of the gross sale and 1 % of the total gross weight sale. If the legislature had intended that the packing meterials/contaniners used for selling non-texable goods, shall be liable for taxation under the Act, there was no need to use the above adjectives "value of which is small in comparison with the value of such goods or such packing materials is essential or customary". In that case the value of the packing materials would not have been at all relevant or material.

15. The Act nowhere specifically provides that the container or packing materials used for selling non-taxable goods shall also be liable for taxation. As stated above there is no presumption in favour of imposition of tax and there is no room for any intendment.

16. In view of the foregoing discussion, we are of the view that if no tax is leviable on the goods then no tax can be levied on the containers in which the said goods are contained, provided the value of such packing materials or containers is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods. As such the appeal is allowed, the impugned judgment and order is set aside. There will be no order as to costs.

