(1990) 11 RAJ CK 0010

In the Rajasthan High Court

Case No : S.T. Revision No''s. 104 and 105 of 1988

C.T.O. and Another — APPELLANT

Vs

Kundan Mal Mukund Mal — RESPONDENT

Date of Decision : 15-11-1990

Acts Referred:

Citation : (1991) 81 STC 404

Hon'ble Judges : Milap Chand Jain, J

Bench : Single Bench

Advocate : G.S. Bapna, for the Appellant;

Final Decision : Dismissed

Judgement

M.C. Jain, J.

Revision No. 104 of 1988 :

1. This reference treated as revision is directed against the order of the Board of Revenue dated 16th January, 1979, whereby the learned Division Bench set aside the order of the single Bench and remanded the case to the assessing authority with the direction that the assessing authority may re-examine the issue regarding taxability of the bardana used for the packing of cloth sold by the assessee and if tax is found to be payable in respect of the bardana used by the assessee for packing and selling taxable goods, then such tax may be levied at the same rate which is applicable to the goods packed in the bardana. The Division Bench also observed that it is clarified that no tax would be leviable on the implied sale of bardana which has been used for the packing of tax-free or tax-paid goods which had been sold by the assessee.

2. It may be stated that the assessing authority imposed tax on sale of bardana. The same was challenged by the assessee in appeal. The appellate authority, however, set aside the order of levy of tax on the sales of bardana and the assessing authority was directed to pass a fresh order after giving proper

opportunity to the assessee of being heard. Against the order of remand the assessing authority went in revision before the Board of Revenue. The learned Member of the Board of Revenue after examining the legal position on facts found that in the present case bardana has been passed on along with the cloth contained therein without charging any sale price therefore and, therefore, the same is not liable to any tax and same is the position with regard to sale of jeera contained in bardana. This conclusion was arrived at on the basis of material which was on record after examining the two decisions of the Supreme Court laying down that agreement to sell packing materials is a pure question of fact depending upon the circumstances found in each case. The department preferred special appeal against the order of the learned single Member. The Division Bench set aside the direction of the single Bench and remanded the matter to the assessing authority to re-examine the issue in the light of the observations made by the Division Bench. While considering the reference application, reference was made to the fifth proviso to Sub-section (1) of Section 5. It has been brought to my notice that the fifth proviso of which reference has been made by the learned Members of the Board of Revenue dated 31st July, 1979, was not in force at the relevant time. The assessment relates to the period 24th October, 1965 to 12th November, 1966 and the proviso was inserted by Act No. 4 of 1967, with effect from 24th July, 1967, so consideration of the matter on the basis of the proviso was wrong. However the question that has been raised in the present revision petition is as to whether sales tax was leviable on the imported bardana used for packing of cloth sold by the assessee. This question has been examined by the learned single Bench and observation has also been made by the Division Bench and as already stated above so far as the present case is concerned, a finding has been reached by the learned single Bench that in respect of bardana no sale price was charged. It has not been pointed out to me as to how this finding is wrong or perverse. The estimated price of bardana has already been arrived at by the assessing authority separately by looking into the accounts of the assessee. What is essential for leviability of tax on the packing material is the existence of agreement to sell the packing material expressly or impliedly. It is true that the learned single Member did not deal with the question with reference to the returns and the figures of sales mentioned by the assessee and elaborate examination was no doubt possible but for want of such elaborate examination, in my opinion the finding arrived at by the learned single Member is not vitiated. So far as this aspect of the matter is concerned, the Division Bench has also accepted this position that if there has been no sale of packing material, then in that situation no tax would be leviable. The Division Bench has made use of the expression implied sale loosely. From that expression it cannot be taken that the Division Bench was of the opinion that it is a case of implied sale. It was the duty of the department to have accepted the position taken by the Deputy Commissioner (Appeals) whereby the Deputy Commissioner (Appeals) remanded the matter to the assessing authority but it appears that the matter was argued on merits and the merits of the matter were examined by the learned single Member. It is after consideration of the merits the finding was arrived at that the bardana passed on along with cloth contained therein without charging any sale price. I am, therefore, of the opinion that such a finding calls for no interference and on the basis of that finding I hold that sales tax is not leviable on the bardana used for the packing of cloth sold by the assessee.

3. This revision petition has, therefore, no force ; so it is hereby dismissed.

4. Revision No, 105 of 1988 :

The same question is involved in Revision No. 105 of 1988. The period in this revision is from 15th November, 1963 to 4th November, 1964. In view of what I have considered in Revision No. 104 of 1988, this revision also deserves to be dismissed.

5. Accordingly, this revision petition has no force ; so it is hereby dismissed.