

(1994) 05 KL CK 0012

In the High Court Of Kerala

Case No : O.P. No's. 11298, 13635, 16522, 17814 of 1993, 78, 970, 1034, 1423, 1448, 1491, 1604, 1757, 1814, 1823, 2022, 2405, 2974, 4075, 4105, 4483, 4773 and 5386 of 1994

Hemant Spices

APPELLANT

Vs

Assistant Commissioner (Assessment), Sales Tax and Another

RESPONDENT

Date of Decision : 24-05-1994

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2
Transfer of Property Act, 1882 — Section 3

Citation : (1994) 95 STC 336

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : N. Muraleedharan Nair, for the Appellant; T. Karunakaran Nambiar, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

T.L. Viswanatha Iyer, J.—The petitioners in these writ petitions are exporters of goods manufactured by them or otherwise. They have filed these writ petitions challenging either the levy, or the proposed levy, of tax under the Kerala General Sales Tax Act, 1963 ("the Act") on the amounts received by them for the transfer of import replenishment licences (hereinafter referred to as "the REP licences") and of exim scrips to others. The writ petitions have been filed either at the stage of pre-assessment notices or attempt to reopen completed assessments, or after completion of assessments. The question for determination is however the same in all the cases.

2. The Government of India formulated a scheme in their Import and Export Policy for 1985-88 for the grant of REP licences to registered exporters to enable them to secure replenishment by import, of materials required by them in the manufacture of the products exported. Chapter XIV sets out the policy in all its detail, namely, the eligibility criteria, extent of the import replenishment, items

permissible for import and the like. It will be seen therefrom that the holder of the REP licence is conferred a very valuable right of effecting direct import of canalised items as appearing in that licence to the extent permitted therein, as also of samples and others, as mentioned in the various clauses. Clauses 225 and 226 deal with utilisation of REP licences. The licence will be issued in the name of the registered exporter only, and will not be subject to actual user conditions. The licence holder may transfer the licence in full or in part in favour of any other person except in certain specified cases. The licence holder or the transferee may import the goods permitted therein. The transfer of the licence does not require any endorsement or permission from the licensing authority. It will be governed by the ordinary law. Accordingly, clearance of the goods covered by a REP licence will be allowed by the customs authorities on production by the transferee of only the document of transfer of the licence concerned in his name. The transferor should give a formal letter to the transferee giving full particulars regarding number, date and value of the licence transferred, and the name and address of the transferee, and complete description of the import items for which the licence is transferred. These are some of the salient features of the REP licence.

3. Similar provisions (with some variations) were contained in the subsequent Import and Export Policy for 1990-93 also, but a change was brought about in July, 1991, abolishing the REP licence and replacing it by a new instrument, named exim scrips. These scrips are issued on the basis of f.o.b. value of the exports, the basic rate being 30 per cent of the f.o.b. value. It is not necessary to go into the details of this policy except to state that these scrips were also freely tradeable and transferable under the ordinary law and could be used for import of items as admissible under the import policy in force. There were certain other advantages attaching to an exim scrip, the benefits being more liberal than a REP licence.

4. The petitioners have transferred either REP licences or exim scrips or both. The question is whether the amount obtained on such transfer is exigible to sales tax as if the transfer involved a sale of goods. I shall hereinafter refer to the REP licences and exim scrips together as REP licences, for purposes of convenience, it being agreed that both REP licences and exim scrips stand on the same footing so far as the question involved in these cases is concerned.

5. The stand taken by the Revenue is that REP licences constitute "goods" as defined in Section 2(xii) of the Act, meaning all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities). Movable property is not defined in the Act, but it is defined in Section 2(23) of the Interpretation and General Clauses Act 7 of 1925, as meaning property of every description except immovable property. Section 2(17) of the said Act defines immovable property as including land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth, but not standing crops. Respondents have taken the stand

that REP licence constitutes movable property, which confers a present right to import goods which otherwise will not be permissible under the Imports and Exports (Control) Act, 1947. It is not a chose in action and therefore not excluded from the definition of "goods" in the Act. The transfer thereof therefore attracts tax under the Act.

6. Petitioners on the other hand have taken various contentions. It is stated first that REP licence is not property at all, much less movable property. It is only a permission to do something which otherwise will not be lawful, namely, to transport goods across the customs frontier. In any case, it is a chose in action, and therefore excluded from the purview of definition of "goods". Another contention is that the levy is not a levy of sales tax at all, but of customs duty falling under entry 83 of the Union List. The levy is also stated to encroach upon the power of Parliament to legislate on import and export under entry 41 of the Union List.

7. The challenge on the ground of legislative competence and of encroachment into the Parliamentary field is taken on the ground that the levy of sales tax on the transfer of REP licence is in substance and in effect a levy of customs duty by imposing an additional burden on the holder of the licence over and above the customs duty payable by him. Secondly, the levy affects the transferability of the licence and therefore entry 41 of the Union List is encroached upon. Both these aspects can be dealt with together.

8. The taxable event in the levy of sales tax is the transfer of property in goods from one person to another for a price. The levy proposed, or imposed, in these cases arises only because of the sale of the REP licences by the holders thereof to others. It is imposed on that sale and not on the occasion of import of the goods from foreign countries to India. The taxable event is not the import of the goods, but the sale of the REP licence. Nor is the transferability of the licence affected or impeded by the levy in any manner. There is thus no encroachment either on entry 41 or entry 83 of the Union List, both of which are linked with the import of the goods. I reject these pleas of the petitioners.

9. The main point that arises for consideration is whether the transfer of REP licence is sale of goods attracting the levy of sales tax. The question is whether the licence constitutes "goods" as defined in Section 2(xii) of the Act. To constitute goods, it must first of all be movable property, and if it is, it should not be an actionable claim, as otherwise, it will get excluded from the definition of "goods" under the Act.

10. What is movable property for purposes of sales tax has been the subject of consideration by the Supreme Court in *Anraj v. Government of Tamil Nadu* [1986] 61 STC 165, which forms the sheet anchor of the case of the respondents. The question involved in that case was whether sales tax could be levied by the State Legislature on the sale of lottery tickets. One of the questions posed for consideration was the meaning of the expression "movable property"

and whether lottery tickets constitute "goods" as defined in Section 2(7) of the Sale of Goods Act, 1930, the definition of "goods" in which is similar to that in Section 2(xii) of the Kerala General Sales Tax Act, 1963. After referring to the definitions of "movable" and "immovable property" in the General Clauses Act, 1897 (which are akin to those in the Interpretation and General Clauses Act, 1125), the court held that the expression "movable property" is used in contradistinction with "immovable property" and that it must mean property of every description except immovable property. It was accordingly held that lottery tickets would be movable property as opposed to immovable property and would normally qualify to fall within the expression "goods".

11. The same ratio must apply to REP licence as well. It is not immovable property. It must therefore ordinarily constitute movable property, unless it is held to be not property, but a mere permission, as contended by some of the petitioners. Their contention is that a REP licence is just a privilege or a permission to do something which otherwise would be unlawful. Counsel draws the analogy of a licence related to immovable property in contradistinction to a lease thereof where it has been held that it does not create any interest in the property at all [Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, ; Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others,]. Definitions of "licence" in Stroud's Judicial Dictionary and Bouvier's Law Dictionary were referred to for support, besides the decisions in Frank Warr & Co. Ltd. v. London County Council [1904] 1 KB 713 at page 721 ; and Millenium Productions Ltd. v. Winder Garden Theatre (London) Ltd. [1946] 1 All ER 678.

12. I do not think the above propositions can be disputed in so far as they relate to immovable property, but they have no application to a REP licence. The REP licence is issued to a registered exporter of goods, with the object of providing him with replenishment of necessary materials for his manufacturing activity. It is intended to confer a benefit on him. The issue of the licence carries with it the right to import items which otherwise he will not be entitled to import in the normal course under the Import and Export Policy. It is an over-simplification to state that it is only a passport to carry the goods across the customs frontier, as counsel for the petitioners would claim it to be. If this argument were valid, every import licence is no more than a mere permission to transport goods across the customs frontier. An import licence has never been understood in this simplistic way. It is a document of great significance in the country's international trade, the possession of which is itself a valuable right. It is not a mere right to do something as in an ordinary licence pertaining to immovable property. It is something more. It signifies a beneficial right which has a money value, as evident from the transfer for a price effected by the petitioners themselves. The right is a valuable one, considerable sums being involved in the process of import. The right is one of property. It is not possible to deprive a licence holder of this right except in accordance with law.

13. The Supreme Court dealt with this question in relation to lottery tickets in H.

Anraj Vs. Government of Tamil Nadu, with reference to the decision in Swami Motor Transport (P) Ltd. and Another Vs. Sri Sankaraswamigal Mutt and Another, and Anwar Khan Mehboob and Co. Vs. State of Madhya Pradesh and Others, and distinguished them as dealing with rights under a statute or contract which created merely obligations or rights in personam and not with agreements in the nature of a grant. In the latter type of cases, the rights or benefits arising will be property, more so when the party has become entitled to the same on performing his part of the contract and in fact such rights or benefits would be assignable. That according to me is the position with a REP licence. It is granted because of the holder exporting goods. It is intended to be an incentive for export and therefore the benefit of the licence is more than a mere permission to do something.

14. I do not therefore find any reason to treat the right over a REP licence as a right without any substance, as mere husk without grain. I am of the view that it constitutes property ; if so, it is movable property, and therefore "goods" as defined in the Act, unless it is excluded therefrom as an actionable claim.

15. The next question that requires to be considered is whether it is an actionable claim. "Actionable claim" is defined in Section 3 of the Transfer of Property Act, 1882, as meaning, inter alia, a claim to any beneficial interest in movable property not in possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether the beneficial interest be existing, accruing, conditional or contingent. In English Law (to which this definition traces its origin), all personal property may be either (i) in possession called chose in possession or (ii) in action, or chose in action. Choses in possession are things of which the owner has the present possession and enjoyment and which he can deliver over to another. But things, of which he had no actual possession or enjoyment but to which he had only a right enforceable by suit, were designated choses in action as they could only be recovered or realised by an action (Gour's Transfer of Property Act, Ninth Edition, page 3). Halsbury (Fourth Edition, Volume 6, page 2) states that the expression "chose in action" is now used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession.

16. The Supreme Court considered the nature of a lottery ticket, whether it is a chose in action, in Anraj [1986] 61 STC 165. It was held that it conferred a twin right, (a) a right to participate in the draw, which was a right in praesenti, and (b) a right to claim a prize contingent upon the holder being successful in the draw, which was a right in future depending on a contingency. The contention of the dealers that the concept of lottery cannot be subdivided into these two rights and that the two together constitute one single right was not accepted by the court with the following observations :

"It is not possible to accept this contention for the simple reason that the two

entitlements which arise on the purchase of a lottery ticket are of different character, inasmuch as the right to participate arises in praesenti, that is to say, it is a choate or perfected right in the purchaser on the strength of which he can enforce the holding of the draw while the other is an inchoate right which is to materialise in future as and when the draw takes place depending upon his being successful in such draw. Moreover, on the date of the purchase of the ticket, the entitlement to participate in the draw can be said to have been delivered unto the possession of the purchaser who would be enjoying it from the time he has purchased the ticket and as such it would be a chose in possession while the other would be an actionable claim or a chose in action as has been held in *Jones v. Carter* 8 QB 134 ; 115 ER 825 and *King v. Connare* 61 CLR 596 on which counsel for the dealers relied. It is thus clear that a transfer of the right to participate in the draw which takes place on the sale of a lottery ticket would be a transfer of beneficial interest in movable property to the purchaser and, therefore, amounts to transfer of goods and to that extent it is no transfer of an actionable claim ; to the extent that it involves a transfer of the right to claim a prize depending on a chance it will be an assignment of an actionable claim."

I have already held that a REP licence confers a right which is a present right and not one enforceable only by an action to import the goods of the nature permitted. It is a perfected or choate right in possession and not one in action, and therefore not an actionable claim, as was held by a Division Bench of the Karnataka High Court in *Bharat Fritz Werner Ltd. v. Commissioner of Commercial Taxes* [1992] 86 STC 175 SC confirming a decision of a learned single Judge reported at page 170 of the same volume.

17. I therefore hold that REP licence is goods as defined in Section 2(xii) of the Act, the sale of which is eligible to tax thereunder. The levy of tax or the proposed levy under the proceedings impugned in these petitions are valid in law and do not call for interference.

18. In this view of the matter, I am not expressing any opinion on the contentions very seriously urged by Sri T. Karunakaran Nambiar, Special Government Pleader for Taxes, that the writ petitions are not maintainable inasmuch as petitioners have opportunities provided to them by the Act to urge their objections either before the assessing authority or the appellate authorities, or before this Court in revision. I do find considerable force in this submission, but having heard the cases in detail, I do not think I should leave the question unanswered.

19. But one case requires special mention and that is O.P. No. 17814 of 1993. In that case, the petitioner states that it had its head office in Bombay and a branch office at Kochi. The petitioner purchased REP licence from three persons and sold then to different persons in Bombay and in Rajasthan. According to the petitioner, the sales took place outside Kochi where the REP licences were not even brought. It is therefore stated that this State had no nexus with the transaction of sale, except that the petitioner issued C forms from Kochi, which

resulted in the levy of tax. I decline to go into these matters which should properly be urged in statutory appeal.

The original petitions are therefore without any merit. They are accordingly dismissed.