
(1991) 12 AP CK 0003

In the Andhra Pradesh High Court

Case No : Tax Revision Case No. 350 of 1990

Industrial Oxygen Company Pvt. Ltd.

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 11-12-1991

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 5E

Citation : (1992) 86 STC 539

Hon'ble Judges : V. Sivaraman Nair, J;S. Parvatha Rao, J

Bench : Division Bench

Judgement

S. Parvatha Rao, J.—This tax revision case is preferred against the order of the Sales Tax Appellate Tribunal in T.A. No. 209 of 1989 dated March 31, 1990, dismissing the appeal preferred by the petitioner herein and holding that the charges on retention of cylinders collected from the customers by the petitioner are correctly taxed u/s 5-E of the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter called as "the Act").

2. The petitioner is a manufacturer of industrial gases such as oxygen, acetylene, etc. It fills the gases produced by it in cylinders and sells to the customers. The terms and conditions subject to which the gases were sold by the petitioner establish that the gas cylinders in which the gas was sold were given on loan to customers for their use on a rent-free basis for a limited period only; after that stipulated period, rent per cylinder per day was charged by the petitioner. The petitioner contends that the said rent collected for use of the cylinder beyond the stipulated period, though described as "rent" in the terms and conditions, is not really rent chargeable u/s 5-E of the Act and that the authorities below erred in subjecting the same to sales tax u/s 5-E of the Act. The Sales Tax Appellate Tribunal considered the terms and conditions on which the cylinders were supplied by the petitioner to the customers. The Tribunal observed that the terms and conditions clearly stated that the cylinder was given on a loan basis to the customers for their sole use only and for no other purpose and that the loan of

the cylinder was stated to be free for a particular period of time and for subsequent period charges were to be collected per day. The gas was sold as filled in the cylinder and supplied along with the cylinder and the customer paid for the gas and was free to return empty cylinder within 15 days and after the 15th day Re. 1 per day per cylinder was collected by the petitioner. The Tribunal rejected the contention of the petitioner that the cylinder was not used and that there was no transfer of right to use the cylinder. It held that the usage of the cylinder consisted in storing the gas purchased by the customer till he utilised the same. The Tribunal therefore held that section 5-E was attracted and that the charges collected for using the cylinder beyond 15 days was exigible to sales tax.

3. The learned counsel for the petitioner drew our attention to the "terms and conditions for supply of all gases" in the bill, a copy of which is filed as material papers. Condition No. 2 states that "company"s cylinders are given on loan to customers for their sole use only and for no other purpose at all and shall not be lent, hired, sold, transferred, refilled or used for any purpose other than storage of the gas compressed therein by the company". Condition No. 3 states that the cylinders are supplied on free loan basis for a limited period and that after the said period a nominal rent per cylinder per day will be charged and that the rent will be charged in the case of lost or misplaced cylinders till their return or till the company is paid the full replacement value. Condition No. 7 states that further supplies (of gases) in company"s cylinders will not be made until the empties are received back. Condition No. 13 states that gases may be supplied in customer"s own cylinders provided the cylinders conform to the provision of the Gas Cylinder Rule, 1981 and that the customer will be charged for servicing their cylinders. From these conditions it is clear that the petitioner"s cylinders were given to its customers for their use for storage of the gases purchased by the customer from the petitioner and that rent was being collected by the petitioner for such use of the cylinders beyond the stipulated period.

4. The learned counsel for the petitioner argues that though the expression "rent" was used in the terms and conditions, the amount was collected only as an incentive for the consumers returning the cylinders promptly. He also submits that the cylinder could not be used by the consumer for any purpose other than for using the gas contained in it and that when the gas in the cylinder was consumed, the cylinder would be of no use to the consumer. But this submission proceeds on the basis that the consumer could exhaust the gas in the cylinder within the stipulated period and yet would retain the cylinder even after the gas in it was utilised. So far as the consumer is concerned, normally he would be retaining the cylinder beyond the stipulated period only if the gas in it was not fully utilised within the stipulated period. Obviously, the rent charges were for the use of the cylinder beyond the stipulated period. When the petitioner itself described the charges that were collected by it from the customers as hire charges "for their sole use only" it is not necessary to enquire further into the matter because it is the intention of the petitioner that is material. So far as the petitioner is concerned, the amount that was collected was treated as rental

charges for the use of the cylinders beyond the stipulated period till they were returned.

5. The learned counsel for the petitioner relies on the decision of this Court in *State Bank of India and Others Vs. State of Andhra Pradesh*, wherein the question that arose was whether hire charges recovered by the wherein the question that arose was whether hire bank on its lockers were attracted by section 5-E of the Act. This Court held that no power was conferred on the sales tax authorities to levy sales tax in respect of hire charges collected by banks for providing safe deposit lockers u/s 5-E of the Act. Three considerations persuaded this Court to take that view. The first was that the court doubted whether the lockers that were hired by the banks to its customers were "goods" because if the safe deposit lockers were embedded in the earth in the storing rooms of the banks, they did not constitute "goods" for the purpose of levy of tax on the charges realised for transferring the right to use the lockers. The second consideration was that the hire charges charged by the banks for hiring lockers was with the lockers and that levying tax on the aggregate hire charges collected by the bank would amount to levying tax not only on the right to use locker but also on the charges collected by the bank for the provision of strong rooms, providing round the clock watch and ward and employing necessary staff to have a close supervision in the operation of strong rooms. This Court felt that the hire charges were inseparable from the composite charges and at the banks could not be called upon to pay sales tax on the hire charges received for the use by the constituents of the lockers which formed a fractional and inseparable part of the composite charge for a variety of services. The third consideration was that the hire of the lockers did not involve transfer of their possession and that section 5-E had no application to cases where the person concerned was merely a licensee without possession of the goods. None of these considerations arise on the facts of the present case. The cylinders were goods and they were actually being handed over to the customers by the petitioner, and the customers were having physical possession of the cylinders.

6. The learned counsel for the petitioner also seeks support from the decision of this Court in *Rashtriya Ispat Nigam Ltd v. Commercial Tax Officer* [1990] 77 STC 182. The question which fell for consideration in that case was whether sales tax was exigible u/s 5-E of the Act on the hire charges collected by Rashtriya Ispat Nigam Limited (the assessee) for the use of the sophisticated machinery supplied by it to its contractors engaged by it for execution of the work entrusted to them. Dealing with the scope of the expression "transfer of the right to use" in section 5-E, this Court held :

"The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the

transferee

Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use."

On a consideration of the facts and the agreement in that case, this Court held that there was no transfer of right to use the machinery as such in favour of the contractors because the machinery continued in the possession of the assessee. In that connection this Court observed that the contractors were not free to make use of the machinery for other works or move it out during the period it was in their use and that the effective control of the machinery remained with the assessee even while the machinery was in the use of the contractor. As the fundamental requirement of section 5-E, i.e., transfer, was absent, this Court held in that case that the hire charges collected from the contractors were not exigible to tax. In the present case, however, the cylinders did not continue to be in the possession of the petitioner herein; possession of the cylinders was delivered to the customers. These facts satisfy the requirement of section 5-E.

7. As already held by us, on the facts of this case, we are satisfied that the charges collected by the petitioner were charges for the use of the cylinders by its customers who were given full possession of the cylinders. There was transfer of the right to use the cylinders as containers of the gases purchased by the customers. Therefore all the requirements of section 5-E are satisfied in the present case and the hire charges were validly subjected to tax. We also notice that out of a total turnover of Rs. 1.09 crores, the rental charges are Rs. 5.27 lakhs which is a substantial amount.

8. In the circumstances, we find no merit in this tax revision case. It is therefore dismissed.

9. Petition dismissed.