

(1998) 03 KAR CK 0092

In the Karnataka High Court

Case No : Writ Petition No's. 9910 to 9991 of 1997

Mahaveer Associates

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 30-03-1998

Acts Referred:

Constitution of India, 1950 — Article 110 (2), 19, 266, 300A
Karnataka Sales Tax Act, 1957 — Section 10 A (1), 10 A (3), 10 A (5)

Citation : (2001) 122 STC 466

Hon'ble Judges : V.P. Mohan Kumar, J

Bench : Single Bench

Advocate : B.P. Gandhi, for the Appellant; D'Sa, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Mohan Kumar, J.—Petitioners in all the writ petitions seek the following relief :

"(a) to declare the hike in payment of registration fees from Rs. 250 to Rs. 500 as per amendment made to Section 10A(1) and 10A(3) of the Karnataka Sales Tax Act, by Karnataka Taxation Laws Amendment Act (Act 7 of 1997) as unconstitutional and a colourable exercise of legislative power and as being outside legislative entry 66 of List II to the Constitution of India ;

(b) to declare Section 10A(5) of the Karnataka Sales Tax Act, in so far as it obliges registered dealers to pay renewal fees equivalent to registration fees every year as being constitutionally void and being violative of Articles 19 and 300A of the Constitution and as being a colourable exercise of power and being outside the legislative power under entry 66, List II to the Constitution."

Section 10A(1) as stood originally stipulated that an application for registration as a dealer shall be accompanied by a fee of Rs. 6. This was up to March 31, 1970. Subsequent thereto it was enhanced to Rs. 25 with effect from April 1, 1970. With effect from April 1, 1981 it was further enhanced to Rs. 50 and it was

so up to March 31, 1984 and from April 1, 1984 till March 31, 1995 it was Rs. 200. Thereafter from April 1, 1995 it was enhanced to Rs. 250 and later with effect from April 1, 1997 the respondent enhanced the registration fee to Rs. 500. The said enhancement is challenged in this proceeding by the petitioners on various grounds.

2. To begin with, it has to be borne in mind that the challenge made is in regard to the quantum of the registration fee, There is no challenge as such, as to whether the respondents are entitled to levy any licence fee at all on the ground that any such levy assumes the character of tax and not fee. There is no prayer made in these writ petitions to strike down the levy as it partakes of the character of tax. Nevertheless, in view of the forceful arguments advanced by Mr. B.P. Gandhi, learned counsel for the petitioners in this behalf as well, I would consider the said contention as well.

3. Mr. B.P. Gandhi, learned counsel for the petitioners, strenuously contended that the levy of tax and not fee as such it is not sustainable in law. He submitted, in the light of the principles laid down by the Supreme Court in the decisions reported in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, , *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, and *Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd.*, , the levy of licence fee in the instant case amounts to levy of tax, and there is no authority for the same. He contends that there is no clear principle at all in quantifying the levy of fee and as such the same is totally arbitrary.

4. Mr. D'Sa, learned Government Advocate, appearing on behalf of the respondents brought to my notice the statement filed by respondents in defence to the arguments of the petitioner. In the said statement it is stated as follows :

"1. That the incidents of tax is on him he being a registered dealer is authorised to collect the tax by passing on the same to his customer.

2. He is entitled for issue of statutory forms as under :

(a) Form 37, which enables him to purchase goods against concession rate of tax at 4 per cent if he is a manufacturer. The goods that could be purchased are raw materials, component parts and packing materials.

(b) Form 39 : Delivery note, which enables him to transport goods from one place to another place without any problem.

(c) He is also authorised to get form No. II, a delivery note prescribed for the intra-city movements of goods other than by way of sale.

(d) He is supplied with monthly returns in form No. 3, annual returns in form No. 4 without any cost.

(e) He is issued with form C which enables him to purchase goods from outside the State at concessional rate of tax at 4 per cent for resale or for use in

manufacture and sale.

(f) He is issued with form F through which he can receive goods by way of stock transfer or send goods by way of stock transfer.

(g) He is issued with forms EI and E2 through which he can claim exemption on second and subsequent inter-State sales.

(h) He is issued with H form through which he can claim exemption on the penultimate sale in the course of exports."

According to him, the above statement details the services rendered by the department entitling them to levy the licence fee.

5. Now we will first examine the decisions cited by the learned counsel for the petitioners.

6. To begin with, he cited the decision of the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, . Therein their Lordships considered the question in detail and laid down as follows :

"(44) Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay, vide Lutz on "Public Finance" P. 215. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

(45) As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government ; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think, that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees.

.....The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage....."

This is the basic decision on which subsequent decisions have developed various

tests to ascertain whether the levy impugned in the respective cases is a fee or tax. The next decision cited at the Bar is Kewal Krishan Puri and Others Vs. State of Punjab and Another, . Therein their Lordships after detailed consideration, formulated seven tests to ascertain whether the levy is fee or tax. In particular their Lordships stated at pages 1009 and 1010 thus :

"(1) That the amount of fee realised must be earmarked for rendering services to the licensees in the notified market area and a good and substantial portion of it must be shown to be expended for this purpose.

(2) That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce.

(3) That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions.

(4) That while conferring some special benefits on the licensees it is permissible to render such service in the market which may be in the general interest of all concerned with the transactions taking place in the market.

(5) That spending the amount of market fees for the purpose of augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such services in the long run go to increase the volume of transactions in the market ultimately benefiting the traders also. Such an indirect and remote benefit to the traders is in no sense a special benefit to them.

(6) That the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

(7) At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services of the kind mentioned above."

7. Again when we come to the still later decision reported in Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd., their Lordships elaborately considered the respective contentions again and formulated the tests thus at para 21 of the judgment :

"21. Thus what emerges from the conspectus of the aforesaid decisions is as follows :

(1) Though levying of fee is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fee under a separate category for purposes of legislation. At the end of each one of the three legislative Lists, it has given power to the particular Legislature to legislate on the imposition of fee in respect of every one of the items dealt with in the List itself, except fees taken in court.

(2) The tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. There is no quid pro quo between the tax-payer and the public authority. It is a part of the common burden and the quantum of imposition upon the tax-payer depends generally upon his capacity to pay.

(3) Fee is a charge for a special service rendered to individuals or a class by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service though in some cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.

(4) The element of compulsion or coerciveness is present in all kinds of impositions though in different degrees and it is not totally absent in fees. Hence it cannot be the sole or even a material criterion for distinguishing a tax from fee. Compulsion lies in the fact that payment is enforceable by law against an individual in spite of his unwillingness or want of consent and this element is present in taxes as well as in fees.

(5) The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which is conferred and accruing which is the reason for imposition of the levy. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. A fee is a sort of return or consideration for services rendered and hence it is primarily necessary that the levy of fee should on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110(2) of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. The first is of grant of permission or privilege and the second for services rendered. In the first class of cases, the cost incurred by the Government for granting of permission or privilege may be very small and the amount of imposition levied is based not necessarily upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, the tax element is predominant. If the money paid by privilege-holders goes entirely for the expenses of matters of general public utility, the fee cannot but

be regarded as a tax. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered.

(6) There is really no generic difference between tax and fee and the taxing power of the State may manifest itself in three different forms, viz., special assessments, fees and taxes. Whether a cess is tax or fee, would depend upon the facts of each case. If in the guise of fee, the Legislature imposes a tax it is for the court on a scrutiny of the scheme of the levy, to determine its real character. In determining whether the levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specific area or classes. It is of no consequence that the State may ultimately and indirectly be benefited by it. The amount of the levy must depend upon the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a tax. Nor can the method prescribed, by the Legislature for recovering the levy by itself alter its character. The method is a matter of convenience and though relevant, has to be tested in the light of other relevant circumstances.

(7) It is not a postulate of a fee that it must have relation to the actual service rendered. However, the rendering of service has to be established. The service, further, cannot be remote. The test of quid pro quo is not to be satisfied with close or proximate relationship in all kinds of fees. A good and substantial portion of the fee must, however, be shown to be expended for the purpose for which the fee is levied. It is not necessary to confer the whole of the benefit on the payers of the fee but some special benefit must be conferred on them which has a direct and reasonable correlation to the fee. While conferring some special benefits on the payers of the fees, it is permissible to render service in the general interest of all concerned. The element of quid pro quo is not possible or even necessary to be established with arithmetical exactitude. But it must be established broadly and reasonably that the amount is being spent for rendering services to those on whom the burden of the fee falls. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authorities to each individual to obtain the benefit of the service. The element of quid pro quo in the strict sense is not always a sine qua non for a fee. The element of quid pro quo is not necessarily absent in every tax. It is enough if there is a broad, reasonable and general co relationship between the levy and the resultant benefit to the class of people on which the fee is levied though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees.

(8) Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax. The Legislature has power to enact appropriate retrospective legislation declaring levies as fees by denuding them of the characteristics of tax.

(9) It is not necessary that the amount of fees collected by the Government should be kept separately. In view of the provisions of Article 266, all amounts received by the Government have to be credited to the Consolidated Funds and to the public accounts of the respective Governments."

Now keeping in mind these principles enunciated we will examine the question raised by the petitioners and decide as to whether the present levy for registration renewal by the respondent is fee or tax.

8. It is to be noted that every purchaser has to levy sales tax when he purchases the goods. The charging section of the statute charges sales tax on sale of goods. In other words, no sale can be effected without paying the tax to the Government charged on the goods by the statute. The Government has created a department to collect the sales tax and the dealer who sells the goods acts on their behalf. An individual carries on the profession of trade and engages himself in the purchase and sale of taxable commodities whereby he impliedly agrees himself to collect the tax on behalf of the department. It is optional for a person to be a trader/dealer. When he does so, it is essential for the department to ascertain as to whether he had acted in accordance with the statute. And when he intends to engage in the profession of a trader, he should register with the department by which he impliedly undertakes to carry out the provision of the Sales Tax Act and allied legislation levying tax on sale and purchase of goods. The collection of sales tax is thus effected by such a dealer on the authority of the Government and he in his turn makes over the same to the department. Being an agent he has to maintain true and correct account of the collection which necessitates maintaining of certain records to explain the collection made by him to satisfy the concerned authorities, to show that he acted within his authorisation and that there has not been any deficit or excess collection. Without these details, it is not possible for the department to check whether the collection made by the dealer is correct. The department has to satisfy that the dealer has collected the amount correctly and the purchaser has paid the correct tax. The dealer can satisfy the department only by maintaining a correct account and the department requires a set of officials to cross-check the same. By making a correct checking of the dealer's account, the department serves the dealer to assist him to carry on his profession as a dealer, conforming to the rule of law. It is for this service rendered by the department, to carry on the trade conjoining to the statute that the authorities are demanding fee required for registration. Thus reasonable service is rendered by the department in the matter of levy and recovery of the tax. Maintaining the correctness of collection of the tax is the duty of the dealer, That he has done so, is established with the aid of the department and that is the service rendered to the dealer by the department. In this case it is to be noted that the department is maintaining certain forms with respect to dealer to ascertain whether he is correctly collecting the sales tax and the department verifies whether the purchaser is paying tax to the dealer for the purchase effected in conformity with the statute. That verification has to be made only with reference to accounts, forms, etc.,

maintained by the dealer. Certain forms are being maintained by the dealer and the department has to cross-check all the details. It is to be remembered that no sale/purchase can be effected without paying the tax due and that the dealer is in the position of an intermediary between the purchaser and the Revenue and on whom statutory liability is cast to collect the tax ; if so it is thus the duty of such an "intermediary" to establish that he has collected the statutorily stipulated tax. This functioning of the intermediary has to be verified by the department and such verification, which is essential for the due discharge of the function on the dealer, is the service being rendered by the department for which they are levying fee. In view of rendering of service by the Government to the dealer as explained above, the levy is not a tax. The levy is directly geared to services rendered. It has nothing to do with the income or the profession. As such the levy is a fee and not a tax. In such circumstance there is service rendered for the department to the registered dealer. Therefore one has to uphold the levy of licence fee.

9. Another aspect that has to be remembered in this behalf is that as on the date when the levy was enhanced to Rs. 200 by virtue of amendment with effect from April 1, 1984 only person whose turnover was over Ra. 1 lakh was bound to register as a dealer under the Act. By amendment of Act 4 of 1992 the said amount was enhanced to Rs. 2 lakhs. This is with effect from October 1, 1991. That is to say, a dealer whose turnover is less than Rs. 2 lakhs need not register himself as such under the Act. Therefore the statute maker has fixed the fee reckoning the service that may have to be rendered to a dealer having larger turnover. Therefore as on October 1, 1991 the work discharged by the department has enhanced. As such the department has also consequently to increase the registration fee. It is also to be noted that subsequent to 1991 there is further increase in the overhead cost of maintaining the department by way of revision of salary pattern, benefits extended to such employees, etc., etc. Taking into account all these circumstances the department has now enhanced the registration fee to Rs. 500. One cannot say there is any irregularity involved in such enhancement. Whatever it may be, the levy of registration fee as such is not challenged in these proceedings ; therefore there is no question for this Court further examining the question whether the levy of the fee is justified or not. I do not see any reason to strike down the enhancement made by the amendment.

10. The next contention of the learned counsel is that there is no evidence led to support the enhancement. It cannot be disputed that the entire department is maintained by the respondent for the purpose of collecting the tax due to the Government through the dealer. To maintain the department there is undisputedly enhanced cost. There is revision of salary and the overhead charges have increased ; in view of these circumstances necessarily the levy of fee has to be enhanced to support the department. As there is quid pro quo to a substantial extent, the levy of Rs. 500 is justified.

11. The next contention of the learned counsel for the petitioners is that Section 10A(5) of the Act providing an identical amount for renewal is illegal and unconstitutional. According to him there is no service being rendered while granting a renewal. I am afraid that this contention is made without reckoning as to what exactly is meant by renewal. Virtually granting renewal u/s 10A(5) is granting a new licence after expiry of the old licence. The similar question was considered by the Madras High Court in the decision in *The Tuticorin Cinema Co. (Private) Ltd. Vs. Charles Missier Sons, Tuticorin and Others*, wherein the court states as follows :

"16. The learned Advocate-General urged that despite the use of the expression "renewal" in the rules, e.g., Rule 7(1)(b) and Rule 11, the issue of a certificate in form D would really be a fresh grant each time it is made. That grant depends upon the electrical apparatus, etc., coming up to the required standards as disclosed during the inspection that precedes the grant of the certificate, The learned Advocate-General referred to *Sharp v. Wagefield* 1891 AC 173 of the report, Lord Bramwell pointed out :

"The licence is a renewal. That word has been criticised. It may be misleading, but is, I think, correct. It is a "renewal"--i.e., a new licence, as we talk of a new lease being a renewal, though parties and terms may be wholly different".

In the light of the above cited decision the renewal granted expiry of the period of licence granted earlier for the stipulated period is virtually a new licence. Section 10A(5) reads thus :

"A certificate issued under Sub-section (2) shall be renewed from year to year on payment of the fee specified in Sub-section (1) until it is cancelled."

It means, the licence initially granted is for a period of one year. When the period expires, there is no licence. By renewal, a fresh licence comes into existence. It means, the renewal gives birth to a fresh licence. As such, a renewal necessarily partakes of the character of a fresh licence. Viewed in that manner the fee fixed for renewal of registration as Rs. 500 is just and proper. It is for the authority to decide what should be the quantum of licence fee reckoned Vis-a-vis the service rendered by it and it is not for this Court to interfere with such fixation. There are no grounds made out to grant the prayer as sought for. The writ petitions are dismissed accordingly.