

(1970) 02 OHC CK 0035
In the Orissa High Court
Case No : S.J.Cs. No"s. 35 to 39 of 1965

Shamsuddin Akbar Khan and Co.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-02-1970

Acts Referred:

Citation : (1970) 26 STC 280

Hon'ble Judges : G.K. Misra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : N.N. Bhattacharya, for the Appellant; Standing Counsel (Sales Tax), for the Respondent

Judgement

G.K. Misra, C.J.—For the five quarters ending 31st December, 1957, 31st March, 1958, 30th June, 1958, 30th September, 1958 and 31st December, 1958, the petitioner was assessed to sales tax on containers of gudaku. There is no dispute that during this period gudaku was tax-free. The assessing authorities, however, taxed on the total turnover of the sale price of containers.

2. The Sales Tax Tribunal has given an idea, based on materials on record, as to how gudaku is sold. It is sold both loose and in tin containers. The petitioner manufactures and sells gudaku. The containers are purchased from outside. The cost price of the containers is included in the cost price of the gudaku. On this an enquiry was made by the Tribunal and it recorded the following findings as being the admitted facts. They are :

(i) The purchase price of the container is taken into consideration in fixing the sale price of the contained article, namely gudaku. Thus, admittedly the container is not made a free gift. The dealer does not bear any loss on account of the containers as he does not make a free gift of it. While fixing the price of manufactured gudaku the price of the container is taken into consideration along with other materials.

(ii) Though the purchase price of the containers is taken into consideration in

fixing the price of gudaku, yet no separate price is charged from the customers for the containers when they purchase gudaku with containers.

(iii) Gudaku is sold loose and also in tins but the price is the same. The purchaser of gudaku in tins does not pay any higher price for the gudaku packed in tins, nor any separate price for the tins.

3. Some of the statements made by the learned Tribunal are purely his opinions and not findings of fact. For instance, his observations "Thus admittedly the container is not made a free gift. The dealer does not bear any loss on account of the containers as he does not make a free gift of it" are pure inferences and not findings of fact.

4. The findings of fact are therefore essentially two :

(i) The purchase price of the container is taken into consideration in fixing the sale price of gudaku.

(ii) No separate price is charged for the container and even when gudaku is sold loose, the same price is charged. The existence or non-existence of the container plays no part in the price of gudaku realised from customers.

5. The question for consideration is whether, on the aforesaid findings, the Tribunal was justified in holding that there was sale of containers.

6. The connotation of the expression "sale" in the Orissa Sales Tax Act is the same as in the Sale of Goods Act. In *State of Madras v. Gannon Dunkerley & Co.* [1958] 9 S.T.C. 353, their Lordships held that in order to constitute a valid sale there must be an intention to sell either express or implied; title to the goods should pass; the goods should be identical with the goods in respect of which agreement to sell had taken place; and transfer of property must be for consideration. In this case, there is no dispute that the title in the container passed from the seller to the purchaser and the consideration was in cash. Even if the consideration be one consolidated whole, both for the gudaku and the container, the position would not be affected, as has been held in *Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd.* [1967] 19 S.T.C. 84.

7. The main question for consideration is whether there was an intention to sell the containers. The onus is on the taxing authorities to establish that the assessee had a taxable turnover : see *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C. 624. The taxing authority must establish that there was an intention to sell either express or implied. Admittedly, there is no express agreement to sell containers. The question is whether there is any implied agreement to sell containers which can be inferred from the findings of fact recorded. It need hardly be stated that in the case of an implied agreement it would be a reasonable inference from various facts and circumstances established in a case. The inference would naturally vary from case to case, according to the facts and circumstances. It was accordingly held in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C.

624 (AP) that no broad and general proposition of law can be laid down that in no case containers would not be taxable. An illustration was given to the effect that if cigarettes are sold in a gold casket, there cannot be an inference that there was no implied agreement to sell the gold casket which is more valuable than the cigarettes. The converse would be the position when the value of the containers is so insignificant that a reasonable inference can be drawn that the title to the containers passed not as a result of an implied agreement to sell, but passed as incidental thereto, as a part of the normal business dealings. As their Lordships put it the real point to consider would be :

Whether the packing materials, which were comparatively of insignificant value, were used only as a convenient vehicle to put the purchasers in possession of the cigarettes sold.

8. Applying the aforesaid principles to the facts of this case, on the findings recorded, one cannot escape the conclusion that the containers constituted no integral part of the agreement to sell. Whether the gudaku was sold in tins or loose, the sale price was the same. Obviously, nothing extra was charged for the container at the time of the sale of the gudaku. The present case comes within the second part of the dictum, namely, that the containers were of comparatively insignificant value and were used only as a convenient vehicle for putting the purchaser in possession of the gudaku.

9. On the aforesaid analysis, we are unable to agree that the learned Tribunal came to the correct conclusion.

10. The following three questions were referred to this court:-

(i) Whether the Tribunal is justified in holding that the petitioner is realising the price of the containers from its customers in the sale of gudaku, either loose or contained ?

(ii) Whether in the facts and circumstances of the case, the petitioner can be treated as a dealer in containers ?

(iii) Whether in the facts and circumstances of the case there is sale of the containers to the purchasers of gudaku ?

For the reasons already given above, our answers to all the three questions would be in the negative.

11. In the result, the references are accepted. The petitioner is entitled to a refund of the reference fee deposited in all the five cases. In the circumstances, there will be no order as to costs.

S. Acharya, J.

I agree.