(1995) 03 MAD CK 0090

In the Madras High Court

Case No : Tax Case (Revision) Petition No''s. 988 and 989 of 1983

State of Tamil Nadu APPELLANT

Vs

Auro Food (P) Ltd. RESPONDENT

Date of Decision : 27-03-1995

Acts Referred:
Central Sales Tax Act, 1956 — Section 2

Citation : (1995) 03 MAD CK 0090

Hon'ble Judges : T. Jayarama Chouta, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : Mrs. Chitra Venkataraman, Additional Government Pleader Taxes, for the Appellant; N. Inbarajan, for the Respondent

Judgement

Thanikkachalam, J.—The department is the petitioner herein. In the assessment years 1978-79 and 1979-80 the assessee who is a dealer under the Central Sales Tax Act, 1956, effected inter-State sales of wheat bran and screenings to an extent of Rs. 36,39,270 during the assessment year 1978-79 and Rs. 34,58,907.50 for the assessment year 1979-80. The assessee has supplied wheat bran in gunny bags. The sale value of the gunny bags in each of the assessment year was estimated at Rs. 3 per bag and brought to tax the sale turnover of gunny bags. On appeal, the Appellate Assistant Commissioner deleted the sale turnover of gunny bags brought to tax by the assessing officer in both the assessment years under the consideration. Aggrieved, the department filed enhancement petition before the Tribunal contending that the Appellate Assistant Commissioner was not correct in deleting the addition made with regard to the sale turnover of gunny bags. On appeal, the Tribunal relying upon the decision of this Court in Natarajan and Sons v. State of Tamil Nadu 1977 39 STC 443 held that when the content is not taxable, the container is also not taxable. Accordingly, the enhancement petition filed by the department was dismissed. As against this order, the State is in revision before this Court.

2. The learned Additional Government Pleader (Taxes) submitted that there is no

evidence on the side of the assessee to show that the sale value of the bran would include the sale value of the gunny bags also. No agreement was produced to show that the assessee is compelled to sell the bran along with the gunny bags. It was further pointed out that as per the definition of sale price contained in section 2(h) of the Central Sales Tax Act, when the assessee sold the bran packed in gunny bags, it would be deemed that the bran and the gunny bags were separately sold. Therefore, the sale value or turnover of the bran as well as the packing material, namely, the gunny bags are taxable under the Central Sales Tax Act. In order to support the abovesaid contention, the learned Additional Government Pleader (Taxes) relied upon various decisions about which we will advert when we are dealing with the revision on merits.

3. On the other hand, the learned counsel appearing for the assessee submitted while supporting the order passed by the Tribunal as under :

The burden is on the department to show that the gunny bags were sold separately by the assessee. There is no evidence on record to show that the sale value of bran does not include the sale value of the gunny bags. Without packing materials the bran could not be sold separately to the buyers. The learned counsel further submitted that according to the decision rendered by this Court, if it is proved that as per the agreement the value of the contents including the value of the container, then there cannot be a tax on the value of the container separately. In the present case, the value of the bran includes the value of the packing materials also. Therefore, it was submitted that tax on the sale turnover of packing materials is not sustainable. Accordingly, the learned counsel appearing for the assessee submitted that the sale turnover of the gunny bags in the present case is not taxable, as claimed by the department.

4. We have heard the rival submissions.

5. The assessee during the assessment years under consideration sold bran packed in gunny bags. There was no contract entered into between the buyers and sellers to show that the bran should be sold along with the gunny bags or the value of the bran would include the value of the gunny bags also. No doubt, the burden is on the department to show that the value for the gunny bags was charged separately and therefore, the sale turnover of gunny bags is taxable. In the absence of any materials on record, the department presumed that the sale turnover of bran would include the sale turnover of gunny bags also. In order to dislodge the presumption it is for the assessee to show that the bran was sold and the sale proceeds would include the alleged sale turnover of gunny bags also. But, in order to substantiate the contention put forward by the assessee, at least the assessee could have filed the bills under which the bran was sold. In fact, the bills were not produced by the assessee in the present case. Suppose, if the bills were filed and if the bills show that no separate price was collected for the sale of gunny bags, then there is a possibility for the assessee to contend that the sale value of the bran includes the sale value of the gunny bags and therefore a separate tax need not be levied on the sale value of the gunny bags.

This was not a case put forward by the assessee herein.

6. In similar circumstances, in A.R. Manickam Chettiar & Sons v. State of Tamil Nadu 1992 87 STC 134; (1992) 2 MTCR 6 this Court held that the question as to whether there is an agreement to sell packing material is a pure question of fact depending upon the circumstances of each case. Whether packing material was subject to any agreement, expressed or implied, needs to be determined and would depend upon the nature of the transaction. In that case, this Court has held that what was sold was not merely rice or paddy, but the same along with the packing material, that is, gunny bags. Therefore, the assessing authority was correct in levying tax on the sale turnover of gunny bags.

7. Similarly, in the decision in A. Prakasam Pillai and Sons v. State of Tamil Nadu [1993] 91 STC 95; (1992) 2 MTCR 117 the facts arising are that the jaggery was sold by the assessee packed in gunny bags. The assessee submitted that the sale value of the gunny bags is not taxable. While deciding the issue arising in that case, this Court has held as under :

".......... So far as the case hand is concerned, not only the value of the packing material was found to be insignificant when compared to the value of the jaggery but that the prices charged was for the net weight of the jaggery and there was no material to show that either the sale price of the jaggery included the value of the packing material or that an implied sale of packing materials was proved by the existence of any material on record."

Therefore, it was held that the alleged turnover of gunny bags is not taxable.

8. Further, on facts this Court found in that case that the agriculturist sold the jaggery to the assessee and the assessee in turn sold the jaggery to the purchasers outside the State. Neither the assessee nor the agriculturist agreed to charge any price for the gunny bags. Therefore, this Court came to the abovesaid conclusion.

9. A similar question came up for consideration before the Kerala High Court in Deputy Commissioner of Sales Tax, Ernakulam v. Raja Oil Mills [1979] 43 STC 78 (FB). According to the facts arising in that case, the assessee is a dealer in copra, coconuts, etc. For packing the copras sold in the course of inter-State sale the assessee purchased gunny bags. The assessee contended that the sale value of the gunny bags is not taxable. While considering this issue the Kerala High Court held as under :

"The question whether there was a sale of the packing materials was matter for inference from the various circumstances of the case. An agreement for sale could not be implied from one circumstance alone irrespective of its relationship or impact on the other circumstances connected with the transaction. The fact that gunny bags retained their physical or commercial identity after the contents were removed might not be decisive of the question. It could not be said that the making out of a separate bill for the container or its separate itemising in the bill made out for the goods, or the physical or commercial identity of the container, or its value in proportion to the goods would, by themselves, be decisive of the question. They are only aids to understand the nature of the bargain."

10. A similar question arose before the Supreme Court in Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 STC 624. According to the facts arising in that case, by a notification issued by the Andhra Pradesh State Government, sales or purchases of tobacco and all its products were exempted from sales tax. The department sought to assess the assessee, a manufacturer of and dealer in cigarettes, on the turnover in respect of packing materials consisting of cardboard and dealwood. The assessee contended that the packing materials are not taxable. While deciding this issue, the Supreme Court held that "in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it should be supported by money consideration and that as a result of the transaction property should actually pass in the goods. Unless all these elements are present there could be no sale. What the sales tax authorities had to do was to ask and answer the question whether the parties, having regard to the circumstances of the case, intended to sell or buy the packing materials or whether the subject-matter of the contracts of sale was only cigarettes, and packing materials did not form part of the bargain at all, but were used by the sellers as a convenient and cheap vehicle of transport."

11. If might be that for the purpose of excise duty the packing materials were not separated from the cigarettes, but that could not possibly preclude the sales tax authorities from taxing the packing materials if they were the subject-matter of the agreements to sell.

12. Again, the Supreme Court had an occasion to consider a similar question in the decision in Jamana Flour & Oil Mill (P) Ltd. v. State of Bihar 1987 65 STC 462. According to the facts arising in that decision, there is an implied agreement to sell packing materials along with the products contained therein. The High Court recorded a finding that there was an implied contract for sale of gunny bags along with the the wheat products contained therein. The assessee sold the wheat products packed in gunny bags at the price fixed under the Roller Mills Wheat Products (Price Control) Order, 1964. While considering this question, the Supreme Court pointed out that the abovesaid order contemplated a net weight which means that the weight of the bag was included in the price to be charged by the dealer. Therefore, it was concluded that the turnover of gunny bags was assessable separately. Ultimately, the Supreme Court held that the sale turnover of gunny bags at the higher rate of 4 1/2 per cent is valid.

13. So also the Supreme Court had an occasion to consider a similar question in the decision in Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd. 1967 19 STC 84. According to the facts arising in that case, the assessee sold hydrogenated oil which was exempt from sales tax under the Assam Sales Tax Act, 1947. The question was whether the value of the containers in which

hydrogenated oil was sold could be assessed to sales tax under the Act. The Supreme Court held that the value of the containers was assessable to sales tax under the Act if there was an express or implied agreement for the sale of such containers and the mere fact that the price of the containers was not separately fixed made no difference to the assessment of sales tax. The question as to whether there is an agreement to sell packing material is a pure question of fact depending upon the circumstances found in each case.

14. Lastly, our attention was drawn to a decision of the Supreme Court in Raj Sheel v. State of Andhra Pradesh 1989 74 STC 379. According to the facts arising in that case, the beer was sold in bottles packed in cartons and cement was sold in gunnies. While considering the provisions of sections 2(s) , 5(2), 6-C, Schedule I, entries 18, 19, 67, 123 and 157 of the Andhra Pradesh General Sales Tax Act, 1957 and Schedule VI, entry 1 of the Andhra Pradesh General Sales Tax (Amendment) Act, 1984 and section 3 of the Andhra Pradesh General Sales Tax Rules, 1957, the Supreme Court held as under :

"It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing material is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. Whether a transaction for the sale of packing material is an independent transaction will depend upon several factors, some of them being : (1) the packing material is a commodity having its own identity and is separately classified; (2) there is no change, chemical or physical, in the packing either at the time of packing or at the time of using the contents; (3) the packing is capable of being reused after the contents have been consumed; (4) the packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing; (5) the mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product."

15. As already seen, according to the facts arising in the present case, the assessee sold the bran packed in gunny bags. According to the assessee, the alleged sale turnover of gunny bags is not taxable. The assessee has not produced any agreement to show that the sale value of the bran would include the sale value of gunny bags also. No bills were produced to show that no price was collected for the sale of the gunny bags separately. Therefore, there was no material on record to show that the sale value of the bran would include the sale value of the gunny bags also. In the absence of any particulars furnished by the assessee, the presumption would be that the assessee collected sale value for the packing materials, namely, the gunny bags also. The fact that the sale value of the gunny bags would be insignificant is immaterial. If once when the

assessee was unable to establish that the sale value of the bran included the sale value of the gunny bags, then the assessee cannot escape from taxing the sale value of the gunny bags separately, in view of the abovesaid judicial pronouncements of various High Courts and the Supreme Court on this aspect. Accordingly, we consider that the order passed by the Tribunal in deleting the sale turnover of packing materials, namely, the gunny bags from the purview of the levy of tax under the Central Sales Tax Act is unsustainable, in both the assessment years under consideration. Accordingly, we restore the order passed by the assessing officer levying the tax on the sale turnover of the packing materials, namely, gunny bags.

16. In that view of the matter, we allow the revisions filed by the department by setting aside the order passed by the Tribunal on this aspect. There will be no order as to costs.

17. Petitions allowed.

