(1971) 04 KL CK 0004

In the High Court Of Kerala

Case No : T.R.C. No. 21 of 1970

Tushar Trading Co. APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 06-04-1971

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

Citation : (1971) 28 STC 214

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;P. Unnikrishna Kurup, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer and E.R. Venkiteswaran, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

T.S. Krishnamoorthy Iyer, J.—The question for consideration is whether the petitioner is liable to pay sales tax at 10 per cent. on the turnover of Rs. 26,460.19 representing the value of empty gunnies, mats, coir twine, etc., used for transporting copra. The petitioner is a dealer in coconuts, pepper, copra, etc., and was assessed to sales tax for the year 1963-64 under the Central Sales Tax Act, 1956.

2. The assessee raised two contentions : (1) In computing the total turnover for assessment Rs. 26,460.19 have to be deducted in view of Rule 9(f)(ii) of the Kerala General Sales Tax Rules, 1963, and (2) even if the said deduction is not allowable the disputed turnover has to be taxed only at 2 per cent. at which copra was taxed on the ground that the sale of packing materials is only incidental to the sale of copra. Both these contentions were overruled by the Tribunal. The first contention was not pressed before us.

3. The second ground which alone was argued was that the turnover of Rs. 26,460.19 has to be taxed only at 2 per cent. It has been taxed at 10 per cent. as according to the Tribunal it represents the sale of packing materials and the

declarations in form C were not furnished in support of the said sales. The reason given for the conclusion of the Tribunal is that in the invoices drawn in favour of the purchasers for the purchase of copra the price of packing materials has been separately shown. The Tribunal observed:

The only evidence for the sales is the invoice and accounts maintained by the appellant. In the invoice the price is separately shown for the gunny bags. So there is nothing wrong in holding that there was a contract for the sale of these materials as there was a contract for the sale of the copra itself. We therefore hold that there was a sale of gunny bags, twines and mats in these cases.

4. It is necessary to set out the relevant definitions in the Central Sales Tax Act, 1956, to appreciate the point raised. Section 2(h) defines "sale price" as meaning "the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged." Section 2(j) defines "turnover" as meaning "the aggregate of the sale prices received and receivable by him in respect of sales of any goods in the course of inter-State trade or commerce made during any prescribed period and determined in accordance with the provisions of this Act and the rules made thereunder." According to the definition the turnover of a dealer is made up of the consideration for the sale of goods and the charges made and recovered by the dealer for anything done in respect of the goods. Sales tax will be attracted, if at all, in respect of packing materials or containers as the case may be only if they have been the subject-matter of an agreement to sell either expressly or by necessary implication. The principle in such cases is no longer open to doubt in view of the decisions of the Supreme Court in Hyderabad Deccan Cigarette Factory v. State of A.P. [1966] 17 S.T.C. 624 (S.C.) Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, and Razack & Go. v. State of Madras [1967] 19 S.T.C. 135 (S.C.).

5. The case in Hyderabad Deccan Cigarette Factory v. State of A.P. [1966] 17 S.T.C. 624 (S.C.) relates to the sale of cigarette which was an exempted commodity packed in cardboard and dealwood. The plea of the assessee was that there was no sale of the packing materials as the sale was only of cigarettes at Rs. 8.50 per thousand without charging anything extra for packing materials and that no tax was payable on the value of packing materials. Subba Rao, J., speaking for the court said :

The law on the subject is well settled. In the The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., this Court restated the legal ingredients of a sale thus :

?...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, which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale.''

The same principle was reiterated by this Court in Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., The contract of sale may be expressed or implied.

In the instant case, it is not disputed that there were no express contracts of sale of the packing materials between the assessee and its customers. On the facts, could such contracts be inferred ? The authority concerned should ask and answer the question whether the parties in the instant case, 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 the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport. He may also have to consider the question whether, when a trader in cigarettes sold cigarettes priced at a particular figure for a specified number and handed them over to a customer in a cheap cardboard container of insignificant value, he intended to sell the cardboard container and the customer intended to buy the same ? It is not possible to state as a proposition of law that whenever particular goods were sold in a container the parties did not intend to sell and buy the container also. Many cases may be visualized where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied.

* * * * * The burden lies upon the Commercial Tax Officer to prove that a turnover is liable to tax. No doubt he can ask the assessee to produce the relevant material; and if he does not produce the same, he may draw adverse inference against him. But, he must decide the crucial question whether the packing materials were subject of the agreement of sale, express or implied. To ascertain the said fact he can rely upon oral statements, accounts and other documents, personal enquiry and other relevant circumstances such as the nature and the purpose of the packing materials used.

The above principle of law has been followed in Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, In Razack & Co. v. State of Madras [1967] 19 S.T.C. 135 (S.C.) , pointed out:

The value of the packing material as compared to the value of the contents of the packet is insignificant. In the circumstances, an agreement to sell packing material independently of chewing tobacco cannot under the general law be implied.

6. The mere fact that in making out the invoice the expenses incurred in the use of gunny bags for transport of copra are separately shown by itself does not

mean that there was any contract of sale, express or implied, in respect of gunny bags and other packing materials and the buyer intended to buy the same except as a vehicle for transport of the copra purchased. Further the value of the packing materials is so insignificant to the value of the contents that in view of the decision in Razack & Co. v. State of Madras [1967] 19 S.T.C. 135 (S.C.) it is not possible to imply any separate contract of sale regarding the packing materials. The decision in Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, only illustrates a case where even in spite of the fact that the price of the containers is not separately charged or fixed there can still be an express or implied agreement for the sale of such containers.

7. The inference drawn by the Tribunal from the entry in the invoice alone cannot be sustained in view of the principle of law stated by their Lordships of the Supreme Court and in view of the proportion which the value of the packing materials bears to the goods purchased. We, therefore, set aside the decision of the Tribunal in so far as it holds that there is an implied sale in respect of the packing materials, and hold that the turnover of Rs. 26,460.19 is assessable to tax only at 2 per cent. and not at 10 per cent. The revision case is allowed. But we make no order as to costs.

