(1984) 10 OHC CK 0005

In the Orissa High Court

Case No : Original Jurisdiction Case No. 343 of 1978

Una Subbarao APPELLANT

Vs

State of Orissa and Another RESPONDENT

Date of Decision : 31-10-1984

Acts Referred:

Central Sales Tax Act, 1956 — Section 14
Constitution of India, 1950 — Article 226
Orissa Sales Tax Act, 1947 — Section 2, 5(1), 6

Citation : (1987) 11 ECC 19 : (1987) 30 ELT 105

Hon'ble Judges : J.K. Mohanty, J;B.N. Misra, J

Bench : Division Bench

Advocate : R. Mohanty, R. Sharma and A.C. Mohanty, for the Appellant; J.K. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Mohanty, J.—The petitioner is a dealer in sugar- candy and allied articles having his place of business in the town of Berham pur in the District of Ganjam within the State of Orissa. According to him, the Sales Tax Officer (opposite party No. 2), Ganjam I Circle, Berhampur, tried to collect tax on sugar-candy treating the same as an article other than sugar and levied tax illegally on the said item. By way of amendment under the powers conferred u/s 6 of the Orissa Sales Tax Act (hereinafter called the "Act") the State Government published a list of articles in the Onssa Gazette (Extraordinary Gazette dated 23rd April, 1976) inter alia stating in entry No. 37 (in List A, i.e., List of goods exempted from Orissa sales tax) "sugar" as defined in Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944, was exempted from Orissa sales tax. In another notification issued by the State Government in Item No. 78 of List C, i.e., List of goods subject to sales tax, "sugar-candy" was notified as a goods taxable at the rate of 4 per cent. This was effective from 1st May, 1976. Subsequently by another notification dated 29th December, 1977, published in the Orissa Gazette (Extraordinary) this item was included as entry No. 86 of the said list, and this was effective for the period from 1st January, 1978, to 31st March, 1982, which is relevant for the purpose of this case. The petitioner being confused by the aforesaid misleading entries, made queries to the Commissioner of Sales Tax as to whether "sugar-candy" is a taxable or tax-free goods as "Sugar" includes within its ambit all forms of sugar, that is to say, sugar of any shape or texture, colour or density and by whatever name it is called. Copy of that letter is annexed to this petition as Annexure I. As the petitioner did not receive any reply, he approached this Court for injuncting opposite parties from realising sales tax on "sugar- candy". In the meantime opposite party No. 2 has assessed the petitioner and imposed sales tax at the rate of 4 per cent on sugar-candy, for the assessment years 1978-79 and 1979-80 vide. Annexures 2 and 3 respectively. The petitioner amended the writ petition and has also prayed for quashing Annexures 2 and 3. The petitioner''s contention is that in spite of the decision of this Court in the case of State of Orissa v. Satyabadi Sahu & Sons reported in (1982) 51 STC 75 relying on the decision of the Supreme Court reported in (1967) 19 STC 24(SC) (State of Gujarat v. Sakarwala Brothers) which held that misri (sugar-candy) comes within the meaning of sugar and, therefore, is a tax-free article coming within entry No. 34 of the list of exempted goods issued under the Orissa sales tax, opposite party No. 2 has illegally levied tax on him.

2. Opposite parties Nos. 1 and 2, i.e., the State of Orissa represented by the Commissioner of Sales Tax, Orissa, and the Sales Tax Officer, Ganjam I Circle, Berhampur, respectively, in their counter have taken the plea that all "goods" are taxable if it comes within the definition of Section 2(d) of the Act, and u/s 5(1) of the Act the State Government has a right to prescribe the rate of tax for different goods depending on various factors including the factor of consumption and other economic factors. In short, after examining the social and economic conditions the State Government has prescribed a rate with regard to different types of goods. In the present context, "sugar" and "sugar-candy" have been made clearly two different goods and the former has been declared tax-free and the latter has been made taxable at the rate of 4 per cent. It has been further contended that as alternative remedy is available under the statute, the writ petition under Article 226 of the Constitution is not competent, maintainable and should be dismissed.

3. There is no dispute that during the relevant period "sugar-candy" was included in item No. 86 in List C, i.e., List of goods subject to sales tax which was effective from 1st January, 1978, up to 31st March, 1982. It is argued on behalf of the petitioner that "sugar" includes "sugar-candy" and since "sugar" is exempted from payment of sales tax vide entry No. 37 of List A, i.e., List of goods exempted from Orissa sales tax, "sugar- candy" is also exempted from payment of sales tax, Entry No. 37 of List A reads as follows :-

"37. Sugar as defined in Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944."

Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944, reads as follows :-

"Sugar, produced in a factory ordinarily using power in the course of production of sugar - ''sugar'' means any form of sugar in which the sucrose content, if expressed as a percentage or the material dried to constant weight at 105? centigrade, would be more than ninety."

According to the petitioner, in view of this definition, "sugar" also includes "sugar-candy". This contention of the petitioner is supported by the decisions reported in (1982) 51 STC 75 (State of Orissa v. Satyabadi Sahu & Sons) and (1967) 19 STC 24 (State of Gujarat v. Sakarwala Brothers). There are also series of decisions on this point reported in (1970) 25 STC 34 (Paro & Co. v. State of Andhra Pradesh) (1971) CWN 623(Madanlal Khaitan v. Commercial Tax Officer, Siliguri (1976) 37 STC 576 (Dulal Chandra Bhar v. Commercial Tax Officer) and (1981) 48 STC 277 (Commissioner of Sales Tax, Delhi v. Nangumal Ram Kishore). On the other hand it is contended on behalf of the opposite parties that "sugar" and "sugar-candy" are separately mentioned in different schedules of the Sales Tax Act, i.e., in List A (List of goods exempted from Orissa sales tax) and in List C (List of goods subject to sales tax), which indicates that the legislature intended to treat them and treated them differently, subjecting the one to tax and exempting the other from tax. This contention is supported by the two recent decisions of the Andhra Pradesh High Court and the Madras High Court reported in (1977) 40 STC 192 (Surana and Company v. State of A.P.) and (1984) 55 STC 47 (Nemichand Parasmal and Company v. Deputy Commercial Tax Officer) respectively.

4. In the decision reported in (1982) 51 STC 75 (State of Orissa v. Satyabadi Sahu & Sons) this Court which followed the decision of the Supreme Court reported in (1967) 19 STC 24 (SC) (State of Gujarat v. Sakarwala Brothers) held :

"We accordingly follow the ratio of the decision of the Supreme Court and hold that sugar-candy would come within the meaning of sugar and since admittedly sugar is a tax-free article, sugar-candy at the relevant time being included in the sugar would also have the advantage of being treated as a tax-free article."

As it appears, during the relevant time "sugar-candy" was not included in List C, i.e., List of goods subject to sales tax, as in the present case. It is, however, contended by the learned counsel for the petitioner that in view of the definition in Item No. 1 of the First Schedule to the Central Excises and Salt Act, 1944, "sugar" means any form of sugar in which the sucrose content, if expressed as a percentage of the material derived to constant weight at 10,5? centigrade, would be more than ninety. According to this definition, "sugar" also includes "sugar-candy". As "sugar" is an exempted item and finds place in List A, i.e., List of goods exempted from sales tax, "sugar-candy", which satisfies the definition of "sugar", is also exempted from tax. Reliance was placed on the decisions reported in (1970) 25 STC 34 (Paro & Co. v. State of Andhra Pradesh) (1976) 37

STC 576 (Dulal Chandra Bhar v. Commercial Tax Officer) and (1981) 48 STC 277 (Commissioner of Sales Tax v. Nangumal Ram Kishore). Learned Counsel for the opposite parties placed reliance on the recent decision of the Andhra Pradesh High Court reported in (1977) 40 STC 192 (Surana and Company v. State of A.P.) which was a case exactly of the same nature as the present case. In the case the question for consideration was whether a dealer in sugar-candy has to pay sales tax under the Andhra Pradesh General Sales Tax Act, 1957. u/s 6 of the Andhra Pradesh General Sales Tax Act, 1957, sales or purchases of declared goods by a dealer shall be liable to tax at the rate and only at the point of sale or purchase, specified against each in the Third Schedule on his turn- over of such sales or purchases for each year. Item 12 of the Third Schedule was "sugar-candy" and it was to be taxed at the point of first sale in the State. Thus reading Section 6 along with entry 12 in the Third Schedule, the dealer was liable to pay sales tax on "sugar-candy". But it was argued with reference to the definition of "sugar" that "sugar" includes "sugar- candy" and since "sugar" is exempted from the payment of sales tax u/s 8 read with entry 6 in the Fourth Schedule, "sugar-candy" also is exempted from the payment of salex tax. It was held :

"... though the only component of ''sugar-candy'' in ''sugar'' in common parlance the expressions ''sugar'' and ''sugar-candy'' are used to denote substances identifiable as distinct substances and if the expressions ''sugar'' and ''sugar-candy'' are understood as they are understood in common parlance and as they were apparently meant to be understood by the legislature, there would be no in- consistency whatever."

It was further observed :

"It is the duty of the court to so interpret statutes as to avoid inconsistencies, if possible."

On the above analysis it has been held that "sugar-candy" is liable to payment of sales tax. In the decision reported in (1984) 55 STC 47 (Nemichand Parasmal and Company v. Deputy Commercial Tax Officer) of the Madras High Court, the assessing authorities wanted to impose tax for the sale of "diamond sugar", which is a form of "sugar-candy". The assessee questioned the amendment to Item 9 of the Second Schedule and Item 5 of the Third Schedule to the Tamil Nadu General Sales Tax Act, 1959, wherein the items like bura sugar, sugar-candy and sugar-candy honey had been excluded from the main item "sugar" with effect from 7th July, 1975. The contention of the assessee was that in view of the decision reported in (1963) 14 STC 696 (Vasantha & Co. v. State of Madras) "sugar" should be taken to include "sugar-candy" and therefore the "sugar-candy" which had been sold by him should be taken as nothing but sugar and that as sugar had been exempted from the levy of sales tax under the provisions of the Act, sugar-candy also should be exempted from the levy of tax. The relevant entries in the Second and Third Schedules to the Tamil Nadu General Sales Tax Act, 1959, as amended, are quoted below for convenience :

"(2) in the -Second Schedule, after Item 8, the following item and entries shall be added, namely :-

''9. Bura sugar, sugar-candy and sugar- At the point of first 3. candy honey drained from raw sugar. sale in the State, and

(3) in the Third Schedule, for Item 5 and the entries relating thereto, the following item and entries shall be substituted, namely:-

''5. Sugar excluding sugar-candy, sugar-candy honey drained from raw sugar and bura sugar''."

Thus from the above it is seen that sugar-candy, sugar-candy honey and bura sugar have been excluded from the main item of "sugar" and the above excluded items have been made taxable at the rate of 3 per cent. The High Court held :

"Having regard to Item 5 of the Third Schedule to the Act it is not possible to say that the expression ''sugar'' will include either sugar-candy or diamond sugar. Diamond sugar is not normally treated in common parlance as sugar. Though diamond sugar is made out of sugar, it is the result of a different process other than the one involved in the manufacture of sugar. Though item 9 of the Second Schedule to the Act does not refer to diamond sugar, as long as diamond sugar is sold in the market as a separate commodity apart from sugar, it can be taken as a separate commodity other than sugar for the purpose of levy of sales tax.

So long as the legislature has got the power to classify articles for the purposes of taxation, the court cannot question the power of the legislature to give a restricted definition of ''sugar'' for the purpose of sales tax, and to restrict the exemption only to pure sugar."

According to the opposite parties, the above cases of the Andhra Pradesh and the Madras High Courts fully support their contention. The learned counsel for the petitioner tried to distinguish the decision of the Madras High Court and submitted that in the definition of "sugar" itself "sugar-candy, etc." have been excluded, which is not so in the present case.

5. As already indicated, "sugar-candy" was not previously included in List C, i.e., List of goods subject to sales tax, which was done only after 1st May, 1976, in entry No. 78 and subsequently in entry No. 86 from 1st January, 1978, to 31st March, 1982 (now entry No. 88 from 1st April, 1982). "Sugar" was always in List A, i.e., List of goods exempted from Orissa sales tax. The decision reported in (1982) 51 STC 75 (State of Orissa v. Satyabadi Sahu & Sons), which was before the above amendment, has no application, to the present case. It is common knowledge that though "sugar-candy" (misri in this part) is made out of sugar, it is the result of a different process other than the one involved in the manufacture of sugar. The legislature can always pick and choose articles for taxation and say that it will tax sugar-candy, but will not tax sugar.x So long as the competence of the legislature to tax sugar-candy which is commercially a different product from sugar is accepted, it cannot be said that the sales tax

authorities are wrong in treating sugar-candy as one different from sugar and bringing it within the net of taxation by amendment of List C and including the same within the list of taxable goods. As long as sugar-candy is sold in the market as a separate commodity apart from sugar, it cannot (sic) be taken as a separate commodity other than sugar for the purpose of levy of tax. It is the common knowledge that "sugar-candy (misri)" is not normally treated as "sugar" and a customer who comes to a shop and asks for sugar will not accept if he is supplied with sugar-candy. The fact that "sugar" and "sugar-candy" are separately mentioned in different schedules of the Sales Tax Act indicates that the legislature intended to treat them and treated them differently subjecting one to tax and exempting the other from tax. The decision of the Andhra Pradesh High Court reported in (1977) STC 192 (Surana and Company v. State of A.P.) fully supports the above view and is directly on the point. The analysis of the legal position made in the decision of the Madras High Court reported in (1984) 55 STC 47 (Nemichand Parasmal and Company v. Deputy Commercial Tax Officer) also supports the contention of the learned counsel appearing for the opposite parties. The decisions of the High Courts of Calcutta, Delhi and Orissa and the Supreme Court relied on by the petitioner are on the basis that "sugar" is an exempted item and "sugar-candy" is included in the definition of "sugar as containing 90 per cent of sucrose". The effect of inclusion of "sugar-candy" as a separate and distinct item in the List of Taxable Goods, as in the present case, was not for consideration in those cases. The learned counsel for the opposite parties also cited a decision of the Supreme Court reported in (1976) 37 STC 319 (State of Tamil Nadu v. Pyare Lal Malhotra) which may be usefully referred to. It will throw some light regarding the matter in controversy in this case. In that case the State of Tamil Nadu was aggrieved by the decision of the Madras High Court holding that the manufactured goods, said to consist of "steel rounds, flats, angles, plates, bars" or similar goods in other forms and shapes, could not be taxed again if the material out of which they were made had already been subjected to sales tax once as iron and steel scrap as both were "iron and steel". The Supreme Court held :

"Entry No. (iv) in Section 14 of the Central Sales Tax Act, 1956, as originally worded (prior to its amendment by Amendment Act, 61 of 1972) was meant to enumerate separately taxable goods and not just to illustrate what was just one taxable substance, viz., ''iron and steel''. Each sub-item in entry No. (iv) is a separate taxable commodity for purpose of sales tax and each of them forms a separate species for each series of sales although they may all belong to the genus, ''iron and steel''. Therefore, manufactured goods consisting of ''steel rounds, flats, angles, plates, bars'' or similar goods in other forms and shapes could be taxed again even if the material out of which they were made had already been subjected to sales tax once as iron and steel scrap.

The ordinary meaning to be assigned to a taxable item in a list of specified items is that each item so specified is considered as a separately taxable item for purposes of single point taxation in a series of sales unless the contrary is shown. The mere fact that the substance or raw material out of which it is made has also been taxed in some other form, when it was sold as a separate commercial commodity, would make no difference for purposes of the law of sales tax. The object is to tax sale of each commercial commodity and not the sale of the substance out of which they are made. Each commercial commodity becomes a separate object of taxation in a series of sales of that commercial commodity so long as it retains its identity as that commodity."

The Supreme Court further observed :

"If the object was to make iron and steel taxable as a substance, the entry could have been : ''Goods of iron and steel''. Perhaps even this would not have been clear enough. The entry, to clearly have that meaning, would have to be : ''Iron and steel irrespective of change of form or shape or character of goods made out of them''. This is the very unusual meaning which the respondents would like us to adopt. If that was the meaning, sales tax law itself would undergo a change from being a law which normally taxes sales of ''goods'' to a law which taxes sales of substances out of which goods are made. We, however, prefer the more natural and normal interpretation which follows plainly from the fact of separate specification and numbering of each item. This means that each item so specified forms a separate species for each series of sales although they may all belong to the genus : ''iron and steel''. Hence, if iron and steel ''plates'' are melted and converted into ''wire'' and then sold in the market, such wire would only be taxable once so long- us it retains its identity as commercial goods belonging to the category ''wire'' made of either iron or steel. The mere fact that the substance or raw material out of which it is made has also been taxed in some other form, when it was sold as a separate commercial commodity, would make no difference for purposes of the law of sales tax. The object appears to us to be to tax sales of goods of each variety and not the sale of the substance out of which they are made. As we all know, sales tax law is intended to tax sales of different commercial commodities and not to tax the production or manufacture: of particular substances out of which these commodities may have been made. As soon as separate commercial commodities emerge or come into existence, they become separately taxable goods or entities for purposes of sales tax. Where commercial goods, without change of their identity as such goods, are merely subjected to some processing or finishing or are merely joined together they may remain commercially the goods which cannot be taxed again, in a series of sales, so long as they retain their identity as goods of a particular type.

It is true that the question whether goods to be taxed have been subjected to a manufacturing process so as to produce a new marketable commodity, is the decisive test in determining whether an excise duty is leviable or not on certain goods. No doubt, in the law dealing with the sales tax, the taxable event is the sale and not the manufacture of goods. Nevertheless, if the question is whether a new commercial commodity has come into existence or not, so that its sale is a new taxable event, in the sales tax law, it may also become necessary to consider whether a manufacturing process, which has altered the identity of the commercial commodity, has taken place. The law of sales tax is also concerned with ''goods'' of various descriptions. It, therefore, becomes necessary to determine when they ceased to be goods of one taxable description and become those of a commercially different category and description.

It appears to us that the position has been simplified by the amendment of the law, as indicated above, so that each of the categories falling under ''iron and steel'' constitutes a new species of commercial commodity more clearly now. It follows that when one commercial commodity is transformed into another, it becomes a separate commodity for purposes of sales tax."

6. After considering the argument of both sides and the decisions cited by both the parties, especially [1977] 40 STC 192 (Surana and Company v. State of A.P.) and [1984] 55 STC 47 (Nemichand Parasmal and Company v. Deputy Commercial Tax Officer), we hold that sugar-candy is liable to levy of sales tax under entry No. 86 (during the relevant period) of List C, i.e., List of goods subject to sales tax.

7. In the result, therefore, the writ petition stands dismissed. There will be no order as to costs.