

Hyderabad Deccan Cigarette Factory

v.

State of Andhra Pradesh

(Supreme Court Of India)

HON'BLE JUSTICE K. SUBBA RAO HON'BLE JUSTICE J. C. SHAH
HON'BLE JUSTICE S. M. SIKRI

Civil Appeal No. 326 Of 1965 | 13-01-1966

SUBBA RAO, J.

1. This appeal by certificate granted by the High Court of Andhra Pradesh is preferred against the judgment dated April 8, 1964, of the said Court in Tax Revision Case No. 48 of 1963.

2. The appellant, Messrs Hyderabad Deccan Cigarette Factory, hereinafter called the assessee, is a manufacturer of and dealer in cigarettes. The cigarettes are sold both within and outside the State of Andhra Pradesh. The appellant was assessed under the Andhra Pradesh General Sales Tax Act, 1957, hereinafter called the Act, to sales tax on its turnover of Rs. 1, 77, 363.01 for the period October 1, 1957, to December 13, 1957. As by a notification dated December 13, 1957, issued by the State Government, sales or purchases of tobacco and all its products were exempted from sales tax with effect from December 14, 1957, the turnover in respect of the sales of tobacco was excluded from the total turnover. But, on the ground that the exemption did not apply to containers and the packing materials, which consisted of cardboard and dealwood, the Commercial Tax Officer issued a notice to the appellant on March 22, 1962, proposing to assess the escaped turnover in respect of the said materials. The assessee, inter alia, contended that there was no sale of packing materials at all and that it sold only cigarettes at Rs. 8.75 per thousand without charging anything extra for the packing materials and that the price was the same to whatever place they were sent. In other words, the contention of the appellant was that the packing materials were not part of the agreements of sale between itself and its customers. The Commercial Tax Officer, by his order dated March 29, 1962, held that in the circumstances of the case the assessee must be deemed to have sold the packing materials with the cigarettes and charged a

consolidated price for the same. The appeal filed against that order to the Assistant Commissioner of Commercial Taxes, Hyderabad, was dismissed. The further appeal to the Sales Tax Appellate Tribunal was also dismissed. The assessee preferred a revision against the order of the Sales Tax Appellate Tribunal to the High Court of Andhra Pradesh. A Division Bench of the said High Court held, agreeing with the Sales Tax Appellate Tribunal, that a contract to sell the packing materials and the packets was implicit in the contracts of sale of the goods and that, therefore, sales tax was exigible in respect of the price of the said packing materials. Hence the appeal. Mr. Palkhivala, learned counsel for the assessee-appellant, raised before us the following points : (1) Neither the Sales Tax Authorities nor the High Court had given a definite finding on the crucial and important question, namely, whether in fact the assessee, as it had contended all through, sold the cigarettes at the same rate, whether it sold them in cardboard or wooden cases and whether in or outside the State of Andhra Pradesh; if that fact was held in favour of the assessee, the argument proceeded, it would be decisive of the question whether the packing materials were the subject-matter of the agreements of sale between the assessee and its customers. (2) The question whether the packing materials were the subject of the agreements of sale between the assessee and its customers was pure question of fact depending upon the nature of the goods sold and the nature of the packing materials and the purpose for which the said materials were used. In the present case, it was said, the packing materials, namely, cardboard and dealwood boxes, were the minimum materials necessary to give or send the cigarettes to the customers and that it could not have been possibly the intention of the seller to sell or the buyer to buy the said materials which had no intrinsic worth apart from the cigarettes they contained. And (3) under the Act, the turnover of the sale transactions was exigible to sales tax; and the definition of "turnover" included the packing materials : that is to say, sales tax was payable on the sale of the cigarettes which included the packing materials. Under section 9(1) of the Act, read with the notification issued thereunder by the State Government, the assessee was exempted from paying the said tax and, therefore, the scope of the exemption was co-extensive with that of the tax payable on the sale transactions. Further, the excise duty imposed by the Central Government under the Central Excises and Salt Act, 1944, was really a tax imposed and collected by the Central Government in substitution of the sales tax payable to the States. The exemption under the Act was given to prevent double taxation and, therefore, the exemption must cover the entire field of the excise duty. If the Central Government collected the excise duty on cigarettes, including the packing materials and the State imposes sales tax on the packing materials in effect the State would be collecting a part of the tax over again. Mr.

Munikannaiah, learned counsel for the State of Andhra Pradesh, contended that throughout all the stages of the proceedings the only question raised was whether the consolidated price for which the packed cigarettes were sold represented in part the sale price of the packing materials and that the Sales Tax Appellate Tribunal and the High Court, having regard to the circumstances of the case, inferred an agreement to sell the packing materials for a price imbedded in the consolidated price for which the packed cigarettes were sold. Though the assessee raised a plea before the Commercial Tax Officer that it sold the cigarettes packed in cardboard or dealwood boxes, as the case may be, in or outside the State of Andhra Pradesh, at the same rate per thousand, neither any material had been placed before the said authority nor any serious argument was made in that regard before the appellate authorities or even before the High Court. Answering the third contention of the assessee, he would say that the scope of the exemption was not coterminous with the scope of the tax. While sales tax could be imposed under the Act on the turnover of sale of cigarettes, which included the packing charges, the exemption was confined only to the cigarettes and, therefore, the assessee could only claim exemption if it established that under the agreements to sell the packing materials were also agreed to be sold for a price.

3. The first two contentions of the learned counsel for the assessee may be dealt with together. The law on the subject is well settled. In the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. ([1959] S.C.R. 379, 397-398; 9 S.T.C. 353 at p. 365), 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 v. Guntur Tobaccos Ltd. ([1965] 16 S.T.C. 240). The contract of sale may be expressed or implied.

4. 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. In the present case, if we may say so with respect, all the authorities, including the High Court, dealt with the question as a question of law without considering the relevant factors which would sustain or negative any such agreement. Even at the inception of the assessment proceedings the assessee contended that it had not separately charged for the packing materials and that the sale price of the cigarettes was the same with or without the packing cases. That argument was rejected by the Commercial Tax Officer thus:

"The dealer's contention is that there is no sale of packing materials at all. It will be seen that the assessee purchased packing materials of considerable value and it cannot be said that they have given away these packing materials free of cost. The assessee has not produced the manufacturing accounts to prove their case that the cost of the packing material is not included in the cost of finished cigarettes. It is a practice with all cigarette manufacturers to include the price of packing materials also in the cost of cigarettes. In view of the inadequate information furnished by the assessee is not considered that they have also followed the procedure of other cigarette manufacturers and the assessee were deemed to have sold the packing materials with cigarettes (sic) includes the cost of packing materials also."

5. It will be seen from the said remarks that the Commercial Tax Officer did not consider any relevant material, but based his finding on the alleged procedure followed by other manufacturers in the same field. The Assistant Commissioner of Commercial Taxes pursued a different line altogether and held that the packed cigarettes were finished products which by themselves had commercial value and, therefore, the packing materials were subject of sale for a price in the course of business. He also did not consider the crucial question in the case. When the same argument was repeated before the Sales Tax Appellate Tribunal, it disposed of it in the following manner:

"The other contention urged on behalf of the appellants is that the rate at which the cigarettes are sold is the same either with or without the packing cases and that indicates that there was no consideration and hence no sale of packing materials. This position has not been examined by the authorities below. There is only a submission made to that effect. However, it is submitted by Sri D. V. Sastry, Advocate for the appellants, that at the end of the year the account relating to packing material (cardboard and wrapping paper) has been transferred to manufacturing account and that the account relating to the dealwood boxes has been transferred to trading account. This would indicate that in determining the price of cigarettes the appellants have taken into consideration the price of the packing material also. When in fixing the price of the cigarettes, price of the packing material has been taken into consideration, the contention that the rate at which the cigarettes are sold is the same either with or without the packing cases is not much assistance to the appellants."

6. This passage indicates that the Tribunal rejected the contention on the ground that the value of the packing materials must have been taken into consideration in fixing the price of the cigarettes. But that reasoning does not answer the contention that howsoever the price was fixed, the cigarettes were sold, whether packed in cardboards or wooden boxes, in or outside the State of Andhra Pradesh, at the same rate. The High Court also held that though there was no express contract to sell the packing materials and the packets separately, such a contract was implicit in the contract for the sale of the goods. This implied agreement was based on the fact that the packed cigarettes were sold at a price and on the surmise that in fixing the price the assessee might have taken into consideration the cost of all the materials used in the packing. The High Court also ignored the aforesaid contention of the assessee. It also did not consider the relevant material to come to the conclusion that the assessee agreed to sell the

packing materials to the customers. A perusal of the orders of the various authorities and the High Court shows that a simple question of fact has been sidetracked by copious citations. Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fictions or surmises. That is what has happened in this case. The Commercial Tax Officer invoked a fiction; the Assistant Commissioner of Commercial Taxes relied upon the doctrine of "finished product"; the Appellate Tribunal relied upon surmises; and the High Court, on the principle of implied agreement. But, none has tackled the real question. 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.

7. A number of decisions have been cited at the Bar. We are not concerned in this appeal with "works contracts" and, therefore, the decisions bearing on that subject are not relevant for the present enquiry. The decisions relevant to sales turn upon the facts of each case : See Mohanlal Jogani Rice and Atta Mills v. State of Assam ([1953] 4 S.T.C. 129); Indian Leaf Tobacco Development Co Ltd. v. The State of Madras ([1954] 5 S.T.C. 354); Hanumantha Rao v. The State of Andhra ([1956] 7 S.T.C. 486); Varasuki and Co. v. Province of Madras ([1951] 2 S.T.C. 1) and Chidambara Nadar Sons & Co. v. State of Madras ([1960] 11 S.T.C. 321). The learned Judges, though they differed on the facts, accepted the principle that to attract sales tax the packing material or the container, as the case may be, should have been the subject-matter of an agreement to sell. In this case the High Court has not arrived at that finding on the consideration of the relevant material. We have, therefore, no option but to remand the case to the High Court to consider the question whether, having regard to the facts of the case and the observations made by us, there was an agreement, express or implied, between the assessee and its customers to sell the packing materials or 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. Before remanding the case, we shall consider the third argument of the learned counsel for the assessee. The relevant provisions bearing on the said question are : section 5 of the Act, item No. 24 of the Second Schedule to the Act, sections 2(s) and 9(1) of the Act, the notification dated December 13, 1957, issued by the State Government under section 9(1) of the Act and rule 6(1) of the Andhra Pradesh General Sales Tax Rules, 1957. It is not necessary to read them; it would suffice if they were summarized.

9. The gist of the said provisions may be stated thus : In the case of specified goods, sales tax is payable on the turnover of the dealer in respect of the sales of the goods at a particular rate. The total turnover of a dealer is made up of two items, namely, the consideration for the sale of goods and the charges made and recovered by the dealer for anything done in respect of the said goods. Therefore, "turnover" of a dealer includes the price of the goods and the charges for the packing materials supplied. If no charge was made for the packing materials, the inclusive definition would not come into play; on the other hand, if the dealer charged for the packing materials separately, it would be a part of the turnover. We, therefore, come back to the same position, namely, whether the packing materials were the subject-matter of the agreements to sell. To state it differently, to invoke the exemption, the first question namely whether there was an agreement to sell the packing materials also, has to be answered. That apart, the notification issued by the Government under section 9 of the Act exempts from the tax payable under the Act the sale or purchase of only tobacco and all its products. The packing materials are not tobacco or its products. Therefore, the terms of the said notification would not govern the said materials. A similar argument was advanced based upon section 4 of the Central Excises and Salt Act. Excise duty on cigarettes which was intended to be a substitute for the State's sales tax, the argument proceeded, was levied on the total turnover of the sale transactions of tobacco with the packings and that it would be unreasonable to construe the provisions of the Act in such a way as to enable the State to levy tax on a part of the turnover of the said transactions. Under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act 58 of 1957) additional excise duty of sixty naye paise in a rupee was levied on the cigarettes manufactured by the assessee. The additional duty was distributed among the States as provided in the Second Schedule to that Act. It may be that for the purpose of excise duty the packing materials are not separated from the cigarettes, but that cannot possibly preclude the Sales Tax Authorities from taxing the packing materials, if they were the subject-matter of the agreements to sell. There are no merits in the third contention.

10. In the result, the order of the High Court is set aside. The High Court may consider afresh the question whether the packing materials were the subject-matter of the agreements to sell, having regard to the relevant material and in the light of the observations made in the judgment. If in its opinion the necessary material is not on record, it can get a finding from the Sales Tax Appellate Tribunal in that regard. Cost will abide the result.

11. Case remanded.