

Anand Commercial Agencies

Vs

Commercial Tax Officer

(S. P. Bharucha, Suhas C. Sen JJ)

06.11.1997

JUDGMENT

SEN, J.

1. The appellant, M/s. Anand Commercial Agencies, is a partnership firm. It is regularly assessed under the Andhra Pradesh General Sales Tax Act. The dispute in this case arose in the course of assessment for the assessment year 1977-78. Under Entry 24(b) of the First Schedule to the Act, tax is payable on groundnut oil at the rate of 2-1/2 paise per rupee of the sale price. Under Entry 24(a), tax is payable on groundnut oil or refined oil obtained from groundnut which has not borne any tax under the A.P. Act at the rate of 6-1/2 paise per rupee of the sale price. The assessee at the relevant period had a total turnover of Rs. 31,35,000/ out of which Rs. 14,76,000/ was on account of sale of groundnut oil and refined oil obtained from groundnut which had not borne tax under the A.P. Act because the oil was imported into Andhra Pradesh from the State of Karnataka.

2. The case of the appellant is that the oil had been extracted out of groundnuts which had borne tax under the Karnataka Sales Tax Act. The levy of tax on the oil imported from Karnataka into Andhra Pradesh at a rate higher than the rate at which the oil manufactured in Andhra Pradesh is taxed is discriminatory and violative of the appellant's right of freedom of trade and commerce throughout India.

3. This contention of the assessee was rejected by the Sales Tax Officer and also by the Assistant Commissioner (C.T.), Appeals, Secunderabad.

4. The assessee thereafter challenged the decision of the Assistant Commissioner by filing a writ petition in the Andhra Pradesh High Court challenging the constitutional validity of the levy. There was a difference of opinion between the two Judges who heard the matter. The case was referred to a third Judge who was of the view that the writ petition was without any merit and should be dismissed.

5. The assessee has appealed to this Court.

6. To appreciate the controversy, it is necessary to set out Entry 24 of the First Schedule to the Andhra Pradesh General Sales Tax Act:

Description of goods Point of levy Rate of tax (1)(2)(3)

24. Groundnut oil or refined oil: (1024)

(a) Groundnut oil or At the point of 6-1/2 paise refined oil not first sale in in the

covered by the State.rupee.sub-item (b) below (b) Groundnut oil or At the point of 2-1/2 paise refined oil obtained first sale in in the from groundnut that the State.rupee.has met tax under the Act.

7.Entry 6 of the Third Schedule which relates to declared goods:

Description of Point of levy Rate of tax the goods

(1)(2)(3)6.Groundnut or When purchased by a 4 paise in peanut miller other than a the rupee.(Arachis decorticating millerHypogaea) in the State, at the(3006) point of purchase by such miller and in all other cases at the point of purchase by the last dealer who buys in the State.

8.It is clear from these entries that groundnut oil or refined oil is liable to be taxed at the rate of 6-1/2 paise in the rupee at the point of first sale in the State but under Entry 24(b) it is liable to be taxed at the rate of 2-1/2 paise in the rupee if the oil is obtained from groundnut which has already suffered tax under the A.P.Act.Under Entry 6 groundnut is liable to be taxed at the point of purchase by the last dealer in the State at the rate of 4 paise in the rupee.

9.On behalf of the appellant, it has been contended that on oil obtained from groundnut purchased locally the rate of tax is 2-1/2 paise in the rupee whereas in the case of oil imported from other States, the rate of tax on local sales is higher, namely, 6-1/2 paise in the rupee. Entry 24(a) is discriminatory and violative of Articles 301 and 304 of the Constitution of India inasmuch as imported oil has to bear a higher rate of tax than locally produced oil.

10.On behalf of the State of Andhra Pradesh, it has been contended that there was no discrimination in the rate of tax on oil indigenously produced within the State and imported oil.It has to be borne in mind that there was a tax on sale of groundnut at the rate of 4 paise in the rupee under item 6 of the Third Schedule to the A.P.Act.If this is taken into account, a further levy of 4 paise in the rupee in effect amounts to a total levy of 6-1/2 paise per rupee which is levied to the tax imposed on the imported oil.

11.The majority view in the High Court was that having regard to the tax levied on groundnut in the State which was 4 paise in the rupee, the tax on imported oil and indigenously produced oil within the State was the same, i.e., 6-1/2 paise in the rupee.It was observed: "Under Entry 6 of the Third Schedule tax is levied at the rate of 4 paise in a rupee on groundnuts at the point of purchase by the last dealer. Groundnut is the material from which groundnut oil is obtained. It is in respect of oil obtained from groundnut that suffered the tax, Entry 24(b) prescribes a rate of 2-1/2 paise in the rupee on the first sale. Otherwise, groundnut oil whether imported or made from groundnut locally tax is leviable at the rate of 6-1/2 paise in the rupee.Take for instance a dealer who sells oil which had been obtained from groundnut which has not suffered tax, he having not purchased the groundnut at all as it was from his own field or grown by him. Such sale are also liable to be taxed at the rate of 6-1/2 paise in the rupee.The discrimination if at all is because of Entry 24(b).Since the groundnut from which the oil is obtained had already suffered tax which is the maximum that can be levied under the Central Sales Tax Act in the State at the rate of 4 paise in the rupee at the purchase point by the last dealer, it is subjected to lesser rate.Though groundnut oil is to be treated separate commodity from groundnuts there is a clear nexus between groundnuts and groundnut oil."

12.Raghuvir, J.in his dissenting judgment took the view that the argument that groundnut oil or

refined oil in the State of Andhra Pradesh is not taxed at the rate of 6-1/2 paise in the rupee because the groundnuts have been subjected to tax at the rate of 4 paise in the rupee is an argument without any substance. The imported groundnut oil or refined oil was taxed at 6-1/2 paise in the rupee, even when groundnuts out of which such oil was extracted had met sales tax under the local Sales Tax law of the State from which oil was imported. Raghuvir, J. was of the view that to argue that refined oil processed in the State is in effect taxed at the rate of 6-1/2 paise in the rupee is to overlook the issue that imported oil has been extracted out of the groundnuts which were also taxed under the local tax laws.

13. Articles 301, 302, 303 and 304 are relevant for the purpose of deciding this controversy:

"301. Freedom of trade, commerce and intercourse-Subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free.

302. Power of Parliament to impose restrictions on trade, commerce and intercourse-Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce-(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Restrictions on trade, commerce and intercourse among States.-Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law:

(a) impose on goods imported from other State or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest; Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

14. Freedom of trade, commerce and intercourse guaranteed by Article 301 means freedom to carry business throughout the territory of India without any obstruction and hindrance. The question whether a fiscal barrier will amount to interference with the right to carry on trade, commerce and

intercourse throughout the territory of India is not an easy question to answer. Every State has a right to impose tax on subjects which fall within its jurisdiction under List II of the Seventh Schedule to the Constitution. This includes taxes on sale or purchase of goods other than newspapers. Fiscal powers of the State can be utilised not only to collect revenue but also to regulate economic development of a State. A backward State may try to encourage development of industries within the State by grant of subsidy and also by low rate of tax on goods manufactured by local industries. If small newly set up industries in the State have to compete with big industries, small units may not survive at all. In such a case, the State is entitled to prop up the local industries by taking fiscal measures. This may be done by providing subsidies or by imposing low rate of sales tax on the goods manufactured within the State. This aspect was explained in the case of *M/s. Video Electronics Pvt. Ltd. Vs. State of Punjab*, AIR 1990 SC 820, by Sabyasachi Mukharji, C.J., in the following words:

"It is manifest that free flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of Art. 301 of the Constitution. As is manifest, Art. 304 is an exception to Art. 301 of the Constitution. The need of taking resort to exception will arise only if the tax impugned is hit by Arts. 301 and 303 of the Constitution. If it is not then Art. 304 of the Constitution will not come into picture at all."

15. But barring special circumstances, as stated hereinabove, the view of this Court has consistently been that a State is not entitled to tax locally made goods at a lower rate while taxing similar goods manufactured in other States at a higher rate.

16. In the case of *Firm A.T.B. Mehtab Majid & Co. Vs. State of Madras*, AIR 1963 SC 928, hides and skins imported from outside the State were subjected to higher rate of tax than the rate of tax imposed on hides and skins tanned and sold within the State by Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The effect of this Rule was that tanned hides or skins imported from outside the state and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State, inasmuch as sales tax on the imported hides or skins tanned outside the State was on their sale price whereas the tax on hides or skins tanned within the State was on the sale price of these hides or skins when they were purchased in the raw condition which was substantially less than the sale price of tanned hides or skins.

17. It was held that the taxing laws can be treated as restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not compensatory or regulatory. Sales tax which had the effect of discriminating between goods of one State and goods of another might affect free flow of trade and offend Article 301 and could be saved only if it came within the terms of Article 304(a).

18. It was further held that the provisions of Rule 16(2) discriminated against the imported hides or skins which had been purchased or tanned outside the State and contravened the provisions of Article 304(a) of the Constitution. It was pointed out that the similarity contemplated by Article 304(a) is in the nature of the quality and kind of the goods and not with respect to whether they were subject of a tax already or not".

19. In *Weston Electronics & Anr. Vs. State of Gujarat & Anr. etc.* AIR 1988 SC 2038, the notification fixing lower rate of tax for local manufacturers of electronic goods was quashed. It was observed that an exception to the mandate laid down by Article 301 and the prohibition contained in Article 303(1) could be sustained on the basis of clause (a) of Article 304 only if the conditions contained therein were satisfied.

20. In the case of *Video Electronics Pvt. Ltd. & Anr. Vs. State of Punjab*, AIR 1990 SC 820, the constitutional validity of notifications issued by the Government of Uttar Pradesh was challenged by the writ petitioners who carried on the business of selling cinematographic films and other equipments like projectors, sound recording and reproducing equipment, industrial X-ray films, graphic art films, photo films etc. in the State of Uttar Pradesh and Delhi. The petitioners sold these goods after receiving them from the manufacturers from outside the State of Uttar Pradesh. They were dealers of Hindustan Photo Films Manufacturing Co. Ltd., a Government of India undertaking. In Uttar Pradesh, there was a single point levy of sales tax. The State of Uttar Pradesh had issued two notifications under the: U.P. Sales Tax Act and Central Sales Tax Act exempting new units of manufacturers as defined in the Act in respect of the various goods for different periods ranging from 3 to 7 years as the case may be, from payment of any sales tax. The benefit of the notifications could be availed of by the new industries set up in the State which were divided into two categories units with capital investment not exceeding three lakhs of rupees and (2) units with capital investment exceeding three lakhs of rupees. The period of exemption varied from 3 to 7 years in different districts.

21. The case of the writ petitioners in that case was that the dealers had become liable to pay sales tax at 12% + 10% surcharge under the U.P. Sales Tax Act on photographic and graphic art material and at the rate of 8% + 10% surcharge on medical X-ray films and minimum of 10% on their inter State turnover. But the manufacturers in the State of U.P. had no tax liability by virtue of: exemption granted under the impugned notifications. The case of the petitioners was that the goods sold by them had become costlier by 8.8% to 13.2% depending upon the items sold compared to the goods manufactured in the State of Uttar Pradesh. Apart from the challenge based on Articles 19(1)(g) and 14 of the Constitution, the petitioners based their case on the provisions of Articles 301 to 305 of Part XIII of the Constitution of India.

22. After an elaborate review of the case law, it was held :

"Where the general rate applicable to the goods locally made and on those imported from other States is the same nothing more normally and generally is to be shown by the State to dispel the argument of discrimination under Art. 304(a), even though the resultant tax amount on imported goods may be different. Here, reference may be made to *Ratan Lal'* case (AIR 1970 SSC 1742) (supra). In the instant writ petition, in the State of U.P. those producers or manufacturers who do not come within the ambit of notifications, have to pay tax on their goods at the general rate prescribed and there is no differentiation or discrimination qua the imported goods. The question naturally arises whether the power to grant exemption to specified class of manufacturers for a limited period on certain conditions as provided by S.4A of the U.P. Sales Tax Act is violative of Art. 304(a)."

23. The Court ultimately held that if the general rate of tax imposed upon the locally made goods

and the imported goods was the same, the State in order to give incentives to certain industries, could lawfully reduce the rate of tax for a limited period of time. In the facts of that case, the period of exemption from tax for certain type of goods were from three to seven years. Sabyasachi Mukharji, C.J. held that granting of such exemption for a limited period only to certain industries in the State from payment of sales tax was not violative of the provisions of Article 301 because the general rate of tax payable on these goods manufactured by other units were the same as the rate applicable to goods imported from outside the State.

24. This question was once again examined in the case of Shri Mahavir Oil Mills and Anr. Vs. State of Jammu & Kashmir & Ors., JT 1996 (10) S.C.837. In that case, with a view to protect local edible oil industry, Government of Jammu & Kashmir issued an order exempting goods manufactured by small scale dealers within the State from payment of sales tax for a specified period. The rate of sales tax payable for other Industries including manufacturers of the adjoining States was four per cent. A subsequent notification was issued on December 20, 1993 as a result of which the general rate of sales tax payable on edible oil became 8%. The manufacturers of edible oil from the adjoining States claimed that the exemption granted from payment of tax to the local industries was discriminatory. The exemption given by the Government of Jammu & Kashmir to the manufacturers of the edible oil was total and the period of exemption was five years which was later extended by another five years. It was held that the unconditional exemption granted to edible oil industry within the State for a period of ten years and at the same time subjecting edible oil industries from other States to Sales Tax at 8% was discriminatory and violative of Article 304(a) of the Constitution.

25. In the case before us, exemption has not been granted to a new industry or specially handicapped industry for any special reason for a limited period of time. Groundnut oil manufacturers within the State have been generally given the benefit of a lower rate of tax whereas the importers will have to pay sales tax at a higher rate. It is not even the case of the State that if imported oil was manufactured out of tax paid groundnut the rate of tax on imported oil would be lower.

26. On behalf of the State, it has been argued that if a manufacturer of oil does not purchase groundnut from the market but has his own supply of groundnut he pays tax at 6-1/2 paise in the rupee which is the rate at which imported oil is taxed. This is the rate of tax applicable to locally manufactured oil as well as on imported oil. The distinction lies only in the case of oil manufactured out of groundnut which has borne tax at the rate of 4% in A.P. In such a case, the tax is at the rate of 2-1/2 paise in the rupee so that the manufacturer pays 6-1/2 paise in the rupee as tax in all. Therefore, no discrimination is being practised by taxing the imported oil at the rate of 6-1/2 paise in the rupee.

27. This has been countered by the appellants by contending that the groundnuts sold in Karnataka also bear sales tax. When oil manufacturers purchase groundnuts in Karnataka and manufacture oil, they pay sales tax on the groundnuts first and then they pay 6-1/2 paise in the rupee as sales tax under the A.P. Act when the goods are sold in A.P.

28. We are of the view that the contention of the appellant is not without substance. What has been done by Entry 24 of the First Schedule is to impose a lower rate of duty on groundnut oil or refined oil obtained from groundnuts that have been taxed under the A.P. Act. The contention that groundnut oil manufactured in Andhra Pradesh has not generally been charged at a lower rate of tax has not been substantiated by any fact or figure. It is not the case of the State that only a small portion of the oil manufactured by local manufacturers is produced from groundnuts purchased in Andhra Pradesh. Unless that can be established, it cannot be held that groundnut oil or refined oil within the

State is generally charged at the same rate as the imported oil. The only Justification that has been made out for this discrimination is that groundnut out of which the oil is manufactured locally has already borne tax. The appellant's contention, which has not been denied by the State, is that the oil manufactured in Karnataka which was imported into Andhra Pradesh was manufactured out of groundnuts which had also borne tax under the Karnataka Sales Tax Act. Therefore, it cannot be said that oil manufacturers in Andhra Pradesh are in a disadvantageous position and had to be compensated by a lower rate of tax. The State of Andhra Pradesh has not been able to make out any special case for imposing a lower rate of tax on groundnut oil produced within the State.

29. In that view of the matter and having regard to the interpretation given to Articles 301 to 304 of the Constitution by the Courts in the various decisions referred to hereinabove, we are of the view that the appeal must succeed.

30. Clause (a) of Entry 24 of the First Schedule to the Andhra Pradesh General Sales Tax Act is declared violative of the provisions of Articles 301 to 304 insofar as it imposes a higher rate of tax on groundnut oil or refined oil which has been obtained from groundnuts that have not been taxed under the Andhra Pradesh Act. It is declared that the groundnut oil imported by the appellant from Karnataka for sale in Andhra Pradesh cannot be taxed at a rate higher than the rate prescribed in clause (b) of Entry 24 of the First Schedule to the Andhra Pradesh Act. The appeal is, therefore, allowed. The judgment and order under appeal dated 25.9.97 passed by the Andhra Pradesh High Court is set aside. Civil Appeal Nos. 8343-8344 of 1995 are also allowed. There will be no order as to costs.