KERALA HIGH COURT

Yusuf Shabeer

Vs

State of Kerala

(P Govindan Nair, C.J. G Vadakkel, J.)

22.06.1973

JUDGMENT

P. Govindan Nair, Ag. C.J.

1. These writ appeals arise from the judgment of Subramonian Poti, J., dismissing a batch of original petitions. The decision is Malabar Fruit Products Company v. Sales Tax Officer, Palai and Ors. 1972 K.L.T. 246.

2. The question that arose for decision was the validity of Section 5A of the Kerala General Sales Tax Act, 1963, for short the Act. This Section was inserted by an amendment effected to the Act by Section 3 of Act 14 of 1970, which came into operation on 1st April, 1970. Section 5A(1), the relevant provision which has to be construed, is in these terms:

5A. Levy of purchase tax.-(1) Every dealer who in the course of his business purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable Under Section 5 and either-

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce.

3. Several arguments were urged before the learned single Judge and those may be grouped under five heads:

(i) The object sought to be achieved by the introduction of Section 5A of the Act had not been accomplished because the Section is vague.

(ii) Assuming that the Section is clear enough and can be treated a charging Section, the Section imposes a tax not on the sale or purchase of goods but on its use or consumption. The State Legislature has no competency to impose tax on the use or consumption of goods and so the Section is ineffective.

(iii) The provision in Section 5A infringes the guarantee under Article 301 of the Constitution that commerce and intercourse throughout the territory of India should be free.

(iv) As far as the appellant in Writ Appeal No. 51 of 1972 (petitioner in O. P. No. 145 of 1971) is concerned no tax could be imposed on him because none of the conditions under Sub-section (1) of Section 5A had been satisfied.

(v) The goods that the appellant in Writ Appeal No. 51 of 1972 purchased were not taxable as they were exempt under item 10 of the Third Schedule to the Act read with Section 9 thereof.

4. These arguments were repeated before us. We shall deal with these contentions seriatim. Now turning to the first of these contentions, it seems to us the matter is concluded by the decision of the Supreme Court in *Ganesh Prasad Dixit v. Commissioner of Sales Tax, Madhya Pradesh*[1] The Supreme Court dealt with a similar contention which arose from a challenge of Section 7 of the Madhya Pradesh General Sales Tax Act. That Section is in these terms Every dealer who in the course of his business purchases any taxable goods, in circumstances in which no tax Under Section 6 is payable on the sale price of such goods and either consumes such goods in the manufacture of other goods for sale or otherwise or disposes of such goods in any manner other than by way of sale in the State or despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods Under Section 6.

5. Counsel for the appellant in Writ Appeal No. 51 of 1972, who led the arguments in this batch of cases contended that such a view was possible on the Sections of the Madhya Pradesh General Sales Tax Act, but that the same view cannot be taken on the provisions of the Act. The reasons for this is said to be that under the Madhya Pradesh General Sales Tax Act there are two Sections, Sections 4 and 6, which provided separately for the incidence and levy of tax respectively whereas under the Act incidence and levy have been clubbed together and embodied in a single Section, Section 5 of the Act, which we may read:

5. Levy of tax on sale or purchase of goods.-(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for an year is not less than twenty thousand rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the

year, shall pay tax on his taxable turnover for that year,-

(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules; and

(ii) in the case of other goods, at the rate of three per cent at all points of sale:

Provided that every dealer in cooked food including coffee, tea and like articles served in a hotel, restaurant or any other place, whose total turnover in respect of such food is not less than one lakh rupees shall pay tax at the rate of four per cent on his taxable turnover.

(2) Every dealer other than a dealer referred to in Sub-section (1) whose total turnover for a year in respect of the goods specified in the First or Second Schedule is not less than two thousand five hundred rupees shall pay tax at the rate and only at the point specified against the goods in the First or Second Schedule, as the case may be, on his taxable turnover in that year relating to such goods : Provided that where a tax has been levied under Sub-section (1) or Sub-section (2) of this Section or Under Section 5A in respect of the sale or purchase of goods specified in the Second Schedule and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be prescribed.

(3) Notwithstanding anything contained in Sub-section (1) or Sub-section (2), the tax payable by a dealer in respect of any sale of the goods mentioned in the First Schedule by such dealer to another for use by the latter as component part of any other goods mentioned in the said schedule, which he intends to manufacture inside the State for sale, shall be at the rate of only one per cent on the taxable turnover relating to such sale: Provided that the provisions of the Sub-section shall not apply to any sale unless the dealer selling the goods furnishes to the assessing authority in the prescribed manner a declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form.

(4) Notwithstanding anything contained in Sub-section (1), every dealer registered under Sub-section (3) of Section 7 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), shall, whatever be the quantum of his total turnover, pay tax for each year in respect of the sale of the goods with reference to the purchase of which he has furnished a declaration under Sub-section (4) of Section 8 of the aforesaid Central Act at the rate of three per cent of his taxable turnover in respect of the goods other than those specified in the First or Second Schedule: Provided that this Sub-section shall not apply to any dealer in respect of the sale of the goods the purchase of which is liable to tax under Sub-section (1).

(5) Notwithstanding anything contained in Sub-section (1) or Sub-section (2), but subject to Sub-section (6), where goods sold are contained in containers or are packed in any packing materials, the rate of tax and the point of levy applicable to such containers or packing materials, as the case may be, shall, whether the price of the containers or the packing materials is charged separately or not, be the same as those applicable to goods contained or packed and in determining the turnover of the goods, the turnover in respect of the containers or packing materials shall be included therein.

(6) Where the sale or purchase of goods contained in any containers or packed in any packing materials is exempt from tax, then, the sale or purchase of such containers or packing materials shall also be exempt from tax. Explanation.-In Sub-section (5) and Sub-section (6), the word 'containers' includes gunny bags, tins, bottles or any other containers. It was argued that any tax can be imposed under the Act only if Section 5 is satisfied. This was so before Section 5A was introduced. Under this Section sales of certain goods regarding which no tax was payable before the introduction of the Section though the sale or purchase of such goods were generally taxable under the Act, were also made taxable in the hands of the dealer purchasing those goods provided the conditions of the Section were satisfied. It is not possible to accept the argument that Section 5A is subject to Section 5. So what has to be ascertained is whether the sales of the particular goods are generally taxable under the Act and not whether the particular sales of those goods are taxable. The question to be posed is whether the Act imposes a tax on the sale or purchase of the goods which have been purchased by a dealer. If the Act purported to tax the sale or purchase of such goods, the further question may arise whether in given circumstances such sales could or could not be taxed. Our attention was drawn to the decision of the Madras High Court in *M. K. Kandaswami and Ors. v. The State of Tamil Nadu and Ors*[2]. With very great respect to the learned Judges we have to say that the decision has failed to give due weight to the words of the Section "goods, the sale or purchase of which is liable to tax under the Act, in circumstances in which no tax is payable under the Act". Though the sale of the particular kind of goods are taxable, when the sale of the same goods is effected by a particular dealer, that particular sale by him may not be taxable. It is in those circumstances that Section 5A would be attracted. The distinction between the sale of the particular goods being taxable under the Act and the particular sale of the same goods not being taxable has not been emphasised by the Madras High Court is clear from the following passage: But, instead, the circumstances have been related by the Section to sales or purchases which are liable to tax under the Act, but for some reason no tax is payable in respect of them.

6. Having said so, the learned Judge proceeded to say :

It appears to be a contradiction in terms and we are unable to visualise the circumstances except

what we have noticed above in which Section 7-A could be applied. In fact, we are unable to visualise the circumstances in which the twofold requirement of the sale being liable to tax but for some reason no tax is payable Under Section 3, 4 or 5 can arise, except in cases of exemptions. With great respect we are unable to agree with the view expressed by the Madras High Court.

7. The matter is concluded by the Supreme Court decision in *Ganesh Prasad Dixit v. Commissioner of Sales Tax, Madhya Pradesh*[3] We reject this contention.

8. The contention that the tax imposed by Section 5A is a tax not on the purchase but on the use or consumption is equally unacceptable. Reference was made to the passages from the judgments of the Federal Court in In re C. P. Motor Spirit Act A.I.R. 1939 F.C. 1 and The *Province of Madras v. Boddu Paidanna & Sons*[4] These passages deal with the distinction between an excise duty and a duty on use or consumption. These passages are not of much help in considering the question arising Under Section 5A. The distinction between an excise duty and a sales tax is dealt with by the Supreme Court in *J. K. Jute Mills Co. Ltd. v. State of Uttar Pradesh and Anr*[5].. We shall extract a passage from that judgment: But it is urged on the strength of certain observations in Province of Madras v. Boddu Paidanna and Sons A.I.R. 1942 F.C. 33(SUPRA) that a sales tax is a tax on the occasion of sale and that therefore it could not be imposed with retrospective operation. This contention is, in our judgment, wholly without substance. Now, the point for decision in that case was whether a tax imposed by a Provincial Legislature on the sale of oil by a person who manufactured it was bad on the ground that it was in essence an excise duty. While a sales tax could be imposed by a Provincial Legislature, an excise duty could be imposed only by the Federal Legislature. In holding that the tax in question was a sales tax and not an excise duty, the court observed as follows: The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to the Central Provinces case A.I.R. 1939 F.C. 1. (In the matter of Central Provinces and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938), duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. In the context, the words, 'on the occasion of the sale', have reference to the character of the transaction and not the point of time at which the duty becomes leviable and they have no bearing on the question as to when such a tax could be imposed. The decision of the Supreme Court in *Andhra Sugars Ltd. and Anr. v. State of Andhra Pradesh and Ors*[6].. contains a clear answer to the argument that the impost Under Section 5A is in the nature of excise duty and not

of sales tax. A similar argument was negatived in that case. We shall extract a passage from page 607 of the report:

Mr. Chatterjee submitted that the tax levied Under Section 21 was a use tax and referred to *McLeod v. Dilworth and Co*[7]*. and C. Govindarajulu Naidu and Co. v. State of Madras*[8]. He argued that the State Legislature could not levy a use tax which was essentially different from a purchase tax. The assumption of counsel that Section 21 levies a use tax is not well-founded. The taxable event Under Section 21 is the purchase of goods and not the use or enjoyment of what is purchased. The constitutional implication of a use tax in American law is entirely irrelevant. The observation in the Madras case (C. Govindarajulu Naidu and Co. v. State of Madras A.I.R. 1953 Mad. 116 at 127-128) that the explanation to Article 286(1)(a) of the Constitution conferred a power on the State Legislature to levy a use tax is erroneous. The explanation fixed the situs of certain sales. It did not confer upon the Legislature any power to levy a use tax.

9. From the wording of the Section there can be no doubt that what is taxed is the purchase and not the use or consumption.

10. The third contention cannot also be accepted. Though at one time it was thought that a levy of tax will never have the effect of interfering with the right guaranteed under Article 301 of the Constitution, long years ago it has been established that a levy of tax can also in given circumstances interfere with the right guaranteed under Article 301 of the Constitution. But it is not every form of tax which can be said to infringe the right guaranteed under Article 301. It is only discriminatory tax by which the sales or purchases of goods of the State imposing the tax are dealt with one way and similar transactions of goods from another State are dealt with in a different way, that will attract the article. These propositions were established by the decisions of the Supreme Court in *Atiabari Tea Co. Ltd. v. The State of Assam and Ors*[9]*. Firm A. T. B. Mehtab Majid and Co. v. State of Madras and Anr*[10]*.. and Andhra Sugars Ltd. and Anr. v. State of Andhra Pradesh and Ors*[11]*.. In Firm A. T. B. Mehtab Majid and Co. v. State of Madras and Anr..*[12] *,* the tax imposed was said to be discriminatory and, therefore, violative of Article 301 of the Constitution whereas the decision in *Andhra Sugars Ltd. and Anr. v. State of Andhra Pradesh and Ors*[13]*..* held that there was no discrimination. Under Section 5A of the Act no distinction is made between the goods inside the State and goods that came from outside the State. So the tax imposed is not discriminatory and Article 301 is not attracted.

11. The fourth point was urged by Sri C. K Viswanatha Iyer on behalf of the appellant in Writ Appeal No. 51 of 1972. The dealer therein was a purchaser of pine-apples. He sliced and canned them, also made pine-apple squash and pine-apple jam and sold the canned pine-apple slices as well as the jam and the squash. The submission that was made before us was that this did not

involve any consumption of the pineapple fruits and the manufacture of other goods for sale. The argument was elaborated by saying that there was no manufacturing process at all and so there was no consumption in the manufacture of other goods [Section 5A(1)(a)]. There was also no disposal in any way other than by way of sale in the State [Section 5A(1)(b)] and no despatch to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce [Section 5A(1)(c)]. Section 5A is therefore said to be not attracted. On the other hand, the Advocate-General has invited our attention to a number of decisions and contended on behalf of the State that there need not be a transformation of the goods and the goods need not be changed into a different article to hold that there was manufacture of other goods. He urged that it is enough if the process resulted in the production of an article commercially different from the article with which one started the process and in such cases, there will be a manufacture and there will be the creation of a new product which may be called other goods and hence Clause (a) of Section 5A(1) is attracted. It does not appear that all these decisions, numerous in number, had been quoted before Poti, J. who dealt with all the aspects in great detail. We do not think that we should go into this aspect of the case in these writ appeals for the order that has been impugned in O. P. No. 145 of 1971, which gave rise to Writ Appeal No. 51 of 1972 is a provisional order of assessment for the year 1970-71. We have not got the details as to the exact process employed and we do not think the High Court is called upon in proceedings under Article 226 of the Constitution to investigate the various facts and to come to the conclusion on the question as to what is the process adopted by the dealer. This must be left to the authorities under the statute and nothing prevents the appellant from urging these contentions before these authorities. The appellant in Writ Appeal No. 51 of 1972 may do so. If these contentions are urged before the Sales Tax Officer, he must deal with them and after considering all the relevant facts, pass a reasoned order in accordance with law. We leave the question open as far as this court is concerned.

12. The only remaining point in the case is whether pine-apple is a green vegetable, which fell under item 10 in the Third Schedule to the Act. Item 10 is in these terms:

10. Vegetables (other than green ginger), whether roots, green fruits or leaves, used for human consumption including tapioca, yam, potatoes, lime, sabola and tomatoes, except their manufactured products. The argument that was advanced before us was that pine-apples are green fruits and, therefore, they are exempted completely from the purview of the Act. An identical question arose before this court and this court in Deputy Commissioner of Agricultural Income-tax and Sales Tax v. Mammootty [1970] 26 S.T.C. 122 ruled that the pine-apple is neither a green fruit nor a vegetable. We are not convinced that this decision requires reconsideration. We reject the contention.

13. All that remains in these writ appeals is to deal with the arguments that have been advanced by Mr. T. L. Viswanatha Iyer on behalf of the appellants in Writ Appeals Nos. 27, 74 and 102 of 1972. He contended that the retrospective effect given to Section 5A for the period 1st April, 1970, to 15th May, 1970, is violative of the right guaranteed under Article 19(1)(g) of the Constitution in that it interfered with the right of the appellants to carry on their occupation, trade or business. The argument was that the dealer in question made only a profit of 1/2 per cent and that the tax imposed was much higher. He had made no provision for collection of tax on the commodities that he bought and that the introduction of the tax has resulted in loss and that he had to pay from his pocket a large sum of money. It was further contended that this would jeopardise the trade or business. It is now well-established that the passing on of tax is not a necessary incidence of sales tax. From the economic point of view the sales tax on almost all occasions will be reflected by an increase in the price at which a consumer may have to buy goods. But it is a direct tax on the sale or purchase and it can be imposed either on the seller or purchaser. The tax does not become invalid because in given circumstances it cannot be passed on. It is possible to conceive of circumstances where a tax can infringe Article 19(1)(g) of the Constitution. Though we have not seen any case where it has been held that a tax has infringed Article 19(1)(g), in fact, it appears to us to be difficult to establish that a tax has infringed Article 19(1)(g) of the Constitution. We have no material before us from which it is possible to say that there has been any infringement of Article 19(1)(g) of the Constitution.

14. We dismiss this batch of cases with costs.

Cases Referred.

1[1969] 24 S.T.C. 343 (S.C)
2[1971] 28 S.T.C. 227
3[1969] 24 S.T.C. 343 (S.C.)
4A.I.R. 1942 F.C. 33
5 AIR 1961 S.C. 1534
6 AIR 1968 S.C. 599
7 (1943) 322 U.S. 327
8AIR 1953 Mad. 116 at 127-128
9[1961] 1 S.C.R. 809
10 AIR 1963 S.C. 928
11 AIR 1968 S.C. 599
12 AIR 1963 S.C. 928
13 AIR 1968 S.C. 599