RAJASTHAN HIGH COURT

Shree Rajasthan Syntex Ltd.

Vs.

Jaipur Vidyut Vitaran Nigam Ltd

S.B.C.W.P. No. 839 of 2002
(R.S. Chauhan, J.)

24.04.2009

ORDER

R.S. Chauhan, J.

1. Aggrieved by the notification dated 31-12-1994 whereby the inspection charges have suddenly been increased by the State Government, aggrieved by the demand notice directing the petitioner to pay a sum of Rs. 69,360/- as inspection charges for the years 2000-2001 and 2001-2002, the petitioner has challenged the same before this Court.

2. In a nutshell, the facts of the case are that Shree Shyam Filaments is a division of Shree Rajasthan Syntex Ltd., a company registered under the provisions of the Indian Companies Act, 1956 ('the Act' for short). On 1-5- 2001, Shri Shyam Filaments entered into an agreement with *Jaipur Vidyut Vitaran Nigam Ltd.*, ('the Nigam' for short), respondent No. 1, for supply of electricity to it. In the agreement, Sri Shyam Filaments was described as 'the consumer'. According to the said agreement, the Nigam was responsible for supply of electricity at one point or more for industrial purpose up to maximum demands of 800 KVA. According to clause No. 9 of the agreement, the employees of the Nigam were entitled to enter into the premises of the consumer for the purpose of inspecting and testing its installations and for reading the electricity meter, and for inspecting and testing any of the apparatus, belonging to the Nigam, or for doing all things necessary or incidental to the proper giving or maintaining supply to the consumer.

3. Under Section 37 of the Indian Electricity Act, 1910 ('the Act' for short), the Central Electricity Board is empowered to regulate the levy of fees for testing or inspecting and generally for the service of the electrical Inspector appointed under the said Act.

In exercise of the powers conferred by Section 37 of the Act, the Central Electricity Board has promulgated the Indian Electricity Rules 1956 ('the Rules' for short). Rule 46 of the Rules provides for periodical inspection and testing of consumer's installations. Sub-clause (2)(a) of Rule 46 further provides that the fee for such an inspection and testing shall be determined by Central or the State Government, as the case may be, in case of each class of consumer. The fee shall be payable by the consumer in advance. Invoking its power under Rule 46 of the Rules, the State Government initially issued a notification on 25th August, 1959. Subsequently, the said notification was superseded by the notification dated 16-6-1977. Furthermore, the notification dated 16-6-1977 was superseded by the notification dated 31-12-1994 - the impugned notification before this Court. In furtherance of the said notification, a demand notice was issued by the Nigam to the petitioner for inspection charges to be paid for the years 2000-2001 and 2001-2002. According to the demand notice, the petitioner was required to pay Rs. 34,680/- for each year. Thus, the petitioner was required to pay a total of Rs. 69360/-. Since the petitioner is aggrieved by both the notification dated 31-12-1994, and by the demand notice, it has knocked on the doors of this Court.

4. Mr. Ghanshyam Singh Sisodia, the learned counsel for the petitioner, has contended that Article 265 of the Constitution of India clearly states that no tax shall be levied or collected except by authority by law. Tax also includes the levying of fee. But such a power has to be utilized in a just, reasonable and fair manner. Rule 46 of the Rules empowers the State Government to levy fee for inspecting and testing all the electrical instruments. However, the said power cannot be utilized for levying a tax. For, neither the Act, nor the Rules permit the State Government to impose a tax. Rule 46 of the Rules permits merely the imposition of a fee. According to the learned counsel, a distinction has to be maintained between "a tax" and "a fee".

5. Secondly, while notification of 1959 permitted a maximum charge of only Rs. 450/- , through the notification dated 31-12-1995, the charges have been increased many a fold e.g. for inspection, examination or test done for each motor or other apparatus exceeding 100 KW, but not exceeding 100 KW the charges are Rs. 1,000/-. Similarly for testing each generator, transformer and associated sub-station, the fee has been increased to Rs. 2,500/-. Since the fee is with regard to each apparatus, the amount to be paid has increased phenomenally. The phenomenal increase in the charges are inexplicable as the installations to be inspected or tested are the same which were inspected and tested under the 1977 notification. Moreover, the service being rendered

by the Nigam continues to be exactly the same. Thus, there is no change in the service provided by the Nigam, and yet the charges have been increased tremendously. Hence, there is lack of quid pro quo between the fee being levied and the service being rendered. Thus, in fact, the State Government is levying "a tax" in the garb of "a fee". Therefore , the notification tantamounts to colourable exercise of power. Hence, the notification is untenable. In order to buttress this contention he has relied upon the cases of the *Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1] *Nagar Mahapalika, Varanasi v. Durga Das Bhattacharya and others* [2] *Kewal Krishan Puri and another v. State of Punjab and another* [3] and *Krishi Upaj Mandi Samiti and others v. Orient Paper and Industries Ltd.* [4]

6. Thirdly, the learned counsel has contended that the notification 1977 was challenged before this Court in the case of *National Engineering Industries Ltd., Jaipur v. The Electrical Inspector, Rajasthan, Jaipur and others. (D. B. Civil Writ Petition No. 334/1978)* decided by a Division Bench on 29th July 1988. While dealing with the notification 1977, the learned Division Bench had quashed the said notification on the ground of lack of quid pro quo between the fee being levied and the service being rendered by respondent No. 1. According to the learned counsel, the present case is squarely covered by the said case.

7. Lastly, the petitioner has paid Rs. 1,73,400/- as the fees from 1995-2000; it has also paid Rs. 34,680/- as per the demand notice. However, the payment has been made under a notification which is unsustainable in law. Thus, the Nigam should refund Rs. 2,08,080/- to the petitioner.

8. Although the notices were issued and were received by the Nigam as far back as 18-4-2002, no one has appeared on their behalf to assist this Court. Similarly, despite the service of notice on respondent Nos. 2 and 3, no one has appeared on their behalf. Thus, this Court does not have the benefit of any assistance from the respondents. Hence, this Court has no other option, but to proceed *ex parte* against the respondents.

9. The distinction between "a tax" and "a fee" has taxed the imagination of the Hon'ble Supreme Court for over six decades. The Constitutional Bench in the case of Sri Lakshmindra Thirtha Swamiar (AIR 1954 Supreme Court 282) (supra) had grappled with this issue as far back as 1954. The series of decisions pronounced by the Hon'ble Supreme Court, however, were finally summarized in the case of Orient Paper and Industries Ltd. (1994 AIR SCW 5156) (supra). It would certainly be helpful to quote

the entire summary given in the case of Orient Paper and Industries Ltd. (supra). Para 21 of the Report is as under :-

> "21. Thus what emerges from the conspectus of the aforesaid decisions is as follows :
> (1) Though levying of fee is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fee under a separate category for purposes of legislation. At the end of each one of the three Legislative Lists, it has given power to the particular legislature to legislate on the imposition of fee in respect of every one of the items dealt with in the list itself, except fees taken in Court.
> (2) The tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. There is no quid pro quo between the taxpayer and the public authority. It is a part of the common burden and the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.
> (3) Fee is a charge for a special service rendered to individuals or a class by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service though in some cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.
> (4) The element of compulsion or coerciveness is present in all kinds of impositions though in different degrees and it is not totally absent in fees. Hence it cannot be the sole or even a material criterion for distinguishing a tax from fee. Compulsion lies in the fact that payment is enforceable by law against an individual in spite of his unwillingness or want of consent and this element is present in taxes as well as in fees.
> (5) The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which is conferred and accruing which is the reason for imposition of the levy. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. A fee is a sort of return or

consideration for services rendered and hence it is primarily necessary that the levy of fee should on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110(2) of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. The first is of grant of permission or privilege and the second for services rendered. In the first class of cases, the cost incurred by the Government for granting of permission or privilege may be very small and the amount of imposition levied is based not necessarily upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, the tax element is predominant. If the money paid by privilege-holders goes entirely for the expenses of matters of general public as a tax. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered.

(6) There is really no generic difference between tax and fee and the taxing power of the State may manifest itself in three different forms, viz., special assessments, fees and taxes. Whether a cess is tax or fee, would depend upon the facts of each case. If in the guise of fee, the legislature imposes a tax it is for the Court on a scrutiny of the scheme of the levy, to determine its real character. In determining whether the levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specific area or classes. It is of no consequence that the State may ultimately and indirectly be benefited by it. The amount of the levy must depend upon the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a tax. Nor can the method prescribed by the legislature for recovering the levy by itself alter its character. The method is a matter of convenience and though relevant, has to be tested in the light of other relevant circumstances.

(7) It is not a postulate of a fee that it must have relation to the actual service rendered. However, the rendering of service has to be established. The service further, cannot be remote. The test of quid pro quo is not to be satisfied with close or proximate relationship in all kinds of fees. A good and substantial portion of the fee must, however, be shown to be expended for the purpose for which the fee is levied. It is not necessary to confer the whole of the benefit on the payers of the fee but some special benefit must be conferred on them which has a direct and reasonable correlation to the fee. While conferring some special

benefits on the payers of the fees, it is permissible to render service in the general interest of all concerned. The element of quid pro quo is not possible or even necessary to be established with arithmetical exactitude. But it must be established broadly and reasonably that the amount is being spent for rendering services to those on whom the burden of the fee falls. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authorities to each individual to obtain the benefit of the services. The element of quid pro quo in the strict sense is not always a *sine qua non* for a fee. The element of quid pro quo is not necessarily absent in every tax. It is enough if there is a broad, reasonable and general correlation ship between the levy and the resultant benefit to the class of people on which the fee is levied though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees.

(8) Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax. The legislature has power to enact appropriate retrospective legislation declaring levies as fees by denuding them of the characteristics of tax.

(9) It is not necessary that the amount of fees collected by the Government should be kept separately. In view of the provisions of Article 266, all amounts received by the Governments have to be credited to the Consolidated Funds and to the public accounts of the respective Governments."

10. The following elements can be abstracted for declaring a levy as "a fee" :

(i) Fee is only a particular form of taxing power of the State; (ii) Fee is a charge for a special service rendered to individuals or a class by some governmental agency; (iii) Fee is a payment for a special benefit or privilege; (iv) A fee is a sort of return or consideration for services rendered; and (v) Thus, a quid pro quo should exist between the fees being charged and the service being rendered. However, it is not necessary to establish the quid pro quo with arithmetical exactitude. What is essential is that a close proximate relationship should be shown between the fee being charged and the service being rendered. It is further essential that a good and substantial portion of the fee should be shown to have been expended for the purpose for which the fee is levied. Thus, the quid pro quo should be established broadly and reasonably.

11. In the present case, admittedly the electrical installations which needed to be inspected and tested remained the same. Moreover, the service being rendered by the

Electrical Inspector continued to be the same. Further, there is nothing to prove that either a better service or a new service was being provided to the petitioner by the Nigam. Thus, there is nothing to demonstrate the existence of quid pro quo between the increased fee being levied and the service being rendered by respondent Nos. 1 and 2. Thus, there is no plausible explanation for the tremendous increase in the fee prescribed by the notification dated 31-12-1994. Hence, the notification dated 31-12-1994 does not meet the requirements of a legitimate fee. Thus, in fact, "a tax" is being camouflaged as "a fee". Since neither the Act, nor the Rules empower the State Government to impose a tax, the notification dated 31-12-1994 is clearly in violation of Article 265 of the Constitution of India. Hence, the notification dated 31-12-1994 is unsustainable in the eyes of law.

12. In the case of National Engineering Industries Ltd., Jaipur (supra) a Division Bench of this Court dealt with the validity of notification dated 16-6-1977 which was also issued under Rule 46 of the Rules. The learned Division Bench observed as under:-

> "The last contention of the learned counsel for the petitioner that no quid pro quo. has been shown to justify enhancement in the fees has to be accepted particularly for want of any attempt on behalf of the respondents to justify the enhancement. The increase of this fees from Rs. 900/- to Rs. 15,390/- or Rs. 20,765/- is so exorbitant particularly when the service rendered is the same and the installation remains the same, that unless there is some material produced to justify the enhancement, the vast difference in the amounts is by itself sufficient to indicate that there is no quid pro quo and the enhancement is arbitrary. An increase to this extent cannot be upheld merely on the ground of fall in money value during this period. Challenge having been made by the petitioner on the ground of absence of quid pro quo and the amount being admittedly in the nature of a fee for the work of inspection or testing, it is liable to be quashed for want of any quid pro quo. A fee should be correlated to the expenses incurred for rendering the service and, therefore, at least some correlation between the amount of fees and the service rendered must be shown when challenge is made on this ground. The respondents having failed to support the enhancement by showing any quid pro quo for it, enhancement is liable to be held invalid for this reasons alone. (See - *Om Parkash Agarwal etc. v. Giri Raj Kishori* [5] *and others* and [6] *The District Council of the Jowai Autonomous Distt; Jowai and others v. Dwet Singh Rymabi etc.)*. We hold accordingly."

13. The present case is squarely covered by the said judgment.

14. The petitioner has sought refund of Rs. 2,08,080/- ostensibly on the ground that the said amount was paid to the Nigam under a Notification which is unsustainable. However, the said contention of the petitioner is unacceptable: firstly, till a notification is declared to be invalid, the fee has to be paid according to the notification, which is operational, till it is set at naught. Therefore, the petitioner had paid Rs. 2,08,080/- under a notification which held the field. Secondly, the said amount was not paid under protest, but was voluntarily paid by the petitioner to the Nigam. Therefore, merely because the notification is now being declared as illegal, the petitioner cannot claim the refund on that basis alone. Thirdly, the petitioner would have passed off the amount of fee paid by it to the Nigam, to the consumers of filament yarns. For, the fees would have been included in the cost of the product manufactured by the petitioner. Therefore, the refund of the fee amount to the petitioner would tantamount to unjust enrichment of the petitioner. Hence, the petitioner is not entitled to refund of Rs. 2,08,080/-.

15. As a result of the above discussion, the enhancement of fees insofar as it relates to the petitioner is held to be invalid and it is declared that the petitioner is liable to pay only the initial fee as prescribed prior to the enhancement. Moreover, as the demand notice is in furtherance of the notification dated 31-12-1994, the same is also quashed and set aside.

16. With these observation, this petition is, hereby, partly allowed. There shall be no order as to costs.

Petition partly allowed.

Cases Referred.

1. (AIR 1954 SC 282)
2. (AIR 1968 SC 1119)
3. ((1980) 1 SCC 416): (AIR 1980 SC 1008)
4. ((1995) 1 SCC 655): (1994 AIR SCW 5156)
5. AIR 1986 SC 726
6. AIR 1986 SC 1930