RAJ STEEL & ORS. ETC. ETC. A

v.

STATE OF A.P. & ANR. ETC. ETC.

MAY 16, 1989

[R.S. PATHAK, CJ. AND M.H. KANIA, J.] B

Andhra Pradesh General Sales Tax Act, 1957/Andhra Pradesh General Sales Tax Rules. Sections 2, 5, 6 and First Schedule Item 157/ Rule 6—Assessees—Manufacturers of beer/cement—Goods—Beer sold in bottles packed in cartons and cement in gunny bags—Assessment to sales tax made on the turnover of packing material—Whether valid. C

The appellants in some of the appeals are manufacturers of or dealers in beer, the appellants in the other appeals are manufacturers of or dealers in cement.

The appellants filed writ petitions in the Andhra Pradesh High Court challenging the assessment made under the Andhra Pradesh General Sales Tax Act, 1957 on the turnover of packing material employed either by way of bottles for containing beer or by way of gunny bags for packing cement. The appellants challenged the application of such rate in assessments made in relation to the period before 8 July, 1983. The appellants also challenged the application of that rate proposed pursuant to s. 6C in show cause notices issued by the concerned authority. Section 6C was inserted in the Act with effect from 8 July, 1983. D E

The High Court while dismissing the writ petitions, proceeded on the basis that, having regard to the nature of the goods and to the trade practice in respect of beer and cement, the containers were necessary concomitants in the transactions, and the transfer of property in the containers was incidental or unavoidable, that the sale transactions had to be regarded as composite and integrated sales of the containers and their contents and what was really sold was the bottled beer or the cement packed in gunny bags. The learned Judges expressed the view that the consideration paid by the purchaser to the dealer consisted not only of the price of the contents, namely, beer or cement, but also included the price of the containers, that is, the bottles and the cartons in the case of beer and gunnies in the case of cement. F G

While allowing the appeals and remanding the cases to the High H

A Court, and in the case of the writ petitions, while directing the assessing authority to determine the matters after allowing the dealers to show cause, this Court,

HELD: (1) A transaction of sale may consist of a sale of the product and a separate sale of the container housing the product with B respective sale considerations for the product and the container separately; or it may consist of a sale of the product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction; or what may yet be of a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefor. The question in every case will be a question of fact as to the nature and ingredients of the sale. It is not right in C law to pick on one ingredient only to the exclusion of the others and deduce from it the character of the transaction. In every case, the assessing authority is obliged to ascertain the true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction. [310C-E; H; 311A]

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Hyderabad Deccan Cigarette Factory v. *The State of A.P.*, [1966] 17 STC 624, referred to.

(2) There can be as many different kinds of transactions as the circumstances of the case may require either by reason of prevailing E trade practice or market conditions or personal convenience, and as human ingenuity may devise for *bonafide* reducing the burden of tax. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors. [312E]

(3) The issue as to whether the packing material has been sold or F merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packG ing material as well as the contents are sold independently. The sale of the packing material is liable to tax independently. [313E-G]

Commissioner of Taxes, Assam v. *Prabhat Marketing Co. Ltd.*, [1967] 19 STC 84; *The State of Karnataka* v. *Shaw Wellace & Company Ltd.*, [1981] 48 STC 169; *Arlem Breweries Ltd.* v. *The Assistant Com*H *missioner of Sales Tax, Panaji,* [1983] 53 STC 172; *M/s. Jamana Flour*

Mill (P) Ltd. v. *State of Bihar,* **AIR 1987 SC 1207 and** *Punjab Distilling Industries Ltd.* v. *The Commissioner of Income Tax, Simla,* **[1959] Supp. 1 SCR 683, referred to.** A

4. Section 6C seems to envisage a case where it is the goods which are sold there is no actual sale of the packing material. The section provides by legal fiction that the packing material shall be deemed to B have been sold alongwith the goods. In that event, the tax will be leviable on such deemed sale of the packing material at the rate of tax applicable to the sale of the goods themselves. It is difficult to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation, which merely explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods C themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves. [314D-E; 315A-B]

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(5) It is difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under s. 6C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated. In the circumstances, no question arises of s. 6C being constitutionally E discriminatory, and therefore invalid. [315B-C]

(6) The High Court has proceeded on the assumption that what is charged is the price of the bottled beer or of cement packed in gunny bags. No attempt was made by the tax authorities to ascertain the facts of each case and to determine what were the actual ingredients of the F contract and the intention of the parties. Assumptions had been made when what was required was a detailed investigation into the facts. Because of the lack of adequate and clear factual material, the High Court also was compelled to proceed on the basis of generalised statements and broad assumptions. [315C-E]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1868-75 of 1986.

From the Judgment and Order dated 28.2.1986 of the Andhra Pradesh High Court in W.P. Nos. 10181 of 1983, 11830, 4677, 4763, 4778 of 1985, 4926, 4935 and 4948 of 1986. H

A.K. Ganguli, A.K. Sen, Shanti Bhushan, Harish N. Salve, S. Krishnan, J.B. Dada Chanji, Mrs. A.K. Verma, Joel Pares, R. Dave, A. Subba Rao, Sunil Kumar Jain, Vijay Hansaria, K. Srinivasa Murti, Kailash Vasudev, Nauni Lal, A.T.M. Sampath, R. Karanjawala, Mrs. M. Karanjawala and H.S. Anand for the Appellants.

M.K. Banerjee, Solicitor General, B. Datta, Additional Solicitor General, T.V.S.N. Chari, Ms. Sunita and Ms. Vrinda Grover for the Respondents.

The Judgment of the Court was delivered by

PATHAK, CJ. These appeals are directed against the judgment of the High Court of Andhra Pradesh dismissing several writ petitions filed by the appellants challenging assessments made under the Andhra Pradesh General Sales Tax Act 1957 on the value of packing material at the rate applicable to goods packed therein.

The appellants in some of the appeals are manufacturers of or dealers in beer, the appellants in the other appeals are manufacturers of or dealers in cement. The beer is sold in bottles packed in cartons. The cement is sold in gunnies. Section 5 of the Andhra Pradesh General Sales Tax Act (hereinafter referred to as 'the Act') provides for the levy of sales tax on the turnover of goods at the rates specified in that provision. In the case of goods mentioned in the First Schedule to the Act tax is leviable at the rates, and at the point of sale, specified therein. In the case of goods mentioned in the Sixth Schedule, likewise tax is leviable at the rates and at the points specified therein. Item 19 of the First Schedule speaks of 'Containers other than gunnies and bottles'. These goods are subject to tax at the rate of 5 paise in the rupee at the point of first sale in the State. Item 123 of the First Schedule enumerates 'glass and glassware', which is subject to sales tax at 9 paise in the rupee at the point of first sale in the State. In respect of cement tax is leviable by reference to item 18 of the First Schedule at the rate of 10 paise in the rupee at the point of first sale in the State, while gunnies, formerly mentioned under item 67 of the First Schedule, and now included in item 157 of that Schedule, are subject to tax at the point of first sale in the State. And beer is covered by item 1 of the Sixth Schedule under the category 'Country Liquor' taxable at the rate of 10 paise in the rupee at every point of sale other than at the point of last sale, at which point the rate is 5 paise per rupee.

Clause (s) of Section 2 of the Act defines 'turnover' to mean the total amount set out in the bill of sale (or if there is no bill of sale, the total amount charged) as the consideration for the sale or purchase of goods (whether such consideration be cash, deferred payment or any other thing of value) including any sums charged by the dealer for anything done in respect of goods sold at the time of or before the delivery of the goods and any other sums charged by the dealer, whatever be the description, name or object thereof; or the aggregate of amounts charged under section 5-C.

With effect from 8 July, 1983, section 6C was inserted in the Act by Andhra Pradesh Act No. 11 of 1984, and it provides:

> 'Notwithstanding anything in sections 5 and 6-A, where goods packed in any materials are sold or purchased, the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax, if any, as applicable to the sale, or, as the case may be, purchase of goods themselves.'

The net turnover of a dealer assessable to tax is determined under rule 6 of the Andhra Pradesh General Sales Tax Rules, after deducting the amount specified in clauses (a) to (l) of that rule from the total turnover. Of these clauses, clause (g) speaks of:

> 'Amounts relating to charges for services rendered in connection with the packing of goods when specified and charged for by the dealer separately, without including them in the price of goods sold.'

The appellants filed the writ petitions, out of which the present appeals arise, in the High Court at Hyderabad challenging the assessments to sales tax made on the turnover of packing material employed either by way of bottles for containing beer or by way of gunny bags for packing cement. The appellants challenged the application of such rate in assessments made in relation to the period before 8 July, 1983. The appellants also challenged the application of that rate proposed pursuant to s. 6C in show cause notices issued by the concerned authority. While dismissing the writ petitions, the High Court has proceeded on the basis that having regard to the nature of the goods and to the trade practice in respect of beer and cement the containers were necessary concomitants in the transactions, and the transfer of

property in the containers was incidental or unavoidable, that the sale transactions had to be regarded as composite and integrated sales of the containers and their contents and what was really sold was the bottled beer or the cement packed in gunny bags. The learned Judges observed further that even where money was paid to the dealer as security deposit refundable on the return of the bottles the sale of the bottle could not be treated as an independent transaction different and distinct from the transaction of sale of the beer. So also was the case in the sale of cement contained in gunnies. The learned Judges expressed the view that the consideration paid by the purchaser to the dealer consists not only of the price of the contents, namely, beer or cement, but also includes the price of the containers, that is the bottles and the cartons in the case of beer and gunnies in the case of cement.

It is commonly accepted that a transaction of sale may consist of a sale of the product and a separate sale of the container housing the product with respective sale considerations for the product and the container separately; or it may consist of a sale of the product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction; or, what may yet be a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefor. The question in every case will be a question of fact as to what are the nature and ingredients of the sale. It is not right in law to pick on one ingredient only to the exclusion of the others and deduce from it the character of the transaction. For example, the circumstance that the price of the product and the price of the container are shown separately may be evidence that two separate transactions are envisaged, but that circumstance alone cannot be conclusive of the true character of the transaction. It is not unknown that traders may, for the advantage of their trade, show what is essentially a single sale transaction of product and container, or a transaction of a sale of the product only with no consideration for the transfer of the container, as divisible into two separate transactions, one of sale of the product, and the other a sale of the container, with a distinct price shown against each. Similarly where a deposit is made by the purchaser with the dealer, the deposit may be pursuant to a transaction where there is no sale of the container and its return is contemplated, and in the event of its not being returned the security is liable to forfeiture. Alternatively, it may be a case where the container is sold and the deposit represents the consideration for the sale, and in the event of the container being returned to the dealer the deposit is returned by way of consideration for the re-sale. In every case, the assessing authority is obliged to ascertain the

true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction. That the problem almost always requires factual investigation into the nature and ingredients of the transaction has been repeatedly emphasised by this Court. In *Hyderabad Deccan Cigarette Factory* v. *The State of Andhra Pradesh,* [1966] 17 STC 624 this Court said:

> "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. . . . . .
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> 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 an 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."

A Again, in *Commissioner of Taxes, Assam* v. *Prabhat Marketing Co., Ltd.,* [1967] 19 STC 84 this Court accepted as well-founded submission that the parties may have intended in the circumstances to sell hydrogenated oil apart from the containers, and the mere fact that the price of the containers was not separately fixed would make no difference in the assessment of sales tax, and went on to observe:

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> "It is well-established that 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, the agreement must be supported by money consideration, and that as a result of the transaction the property should actually pass in the goods. Unless all the ingredients are present in the transaction there could be no sale of goods and sales tax cannot be imposed *State of Madras* v. *Gannon Dunkerley and Co. (Madras) Ltd.,* [1959] S.C.R. 379
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> The question as to whether there is an agreement to sell packing material is a pure question of fact depending upon the circumstances found in each case."

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There can be as many different kinds of transactions as the circumstances of the case may require either by reason of prevailing E trade practice or market conditions or personal convenience, and as human ingenuity may devise for *bona fide* reducing the burden of tax. In *The State of Karnataka* v. *Shaw Wallace and Company Ltd.,* [1981] 48 STC 169 the High Court of Karnataka pointed out that there was an agreement to sell the bottles and crates in which the liquor was conveyed and there was also an agreement in regard to the price of those F containers, and therefore the turnover in regard to those items had to be determined and the appropriate rate of sales tax had to be charged as provided in the Karnataka Sales Tax Act. Reference was made to the requirement in the Karnataka Excise Act, 1966 that the liquor had to be sold in sealed containers but that, the High Court said, did not automatically lead to the conclusion that the same rate of sales tax was G applicable to containers also. It was observed that such a presumption could not be made, specially when separate rates were specified in the Sales Tax Act in regard to the containers and the contents. In *Arlem Breweries Ltd.* v. *The Assistant Commissioner of Sales Tax, Panaji,* [1983] 53 STC 172 the Panaji Bench of the High Court of Bombay noted that item 22 of the First Schedule to the Goa, Daman and Diu H Sales Tax Act, 1964, which spoke of the item "foreign liquor and

India-made foreign liquor" indicated that the tax was levied only on the liquor and not against the bottle and liquor or bottled liquor. The sale was of beer and the bottles were treated separately. It was also pointed out that the agreement by the assessee with the wholesaler did not create any obligation on the purchasers to return the bottles nor did it fix any time for their return. The payment of an amount for the bottles in advance as a term of the sale was referred to as cost of the bottles and this, the High Court said, constituted the sale price of the bottles although described as a deposit. In *M/s Jamana Flour & Oil Mill (P) Ltd.* v. *State of Bihar,* AIR 1987 SC 1207 this Court affirmed the finding that there was an implied agreement of the sale of gunny bags. It said:

> "Admittedly gunny bags are a different commodity and sale thereof is assessable to tax at 4½%. It is not disputed that the appellant bought gunny bags for packing wheat products for the purpose of sale. The control order contemplates a net weight which means that the weight of the bag is included in the price to be charged by the dealer. Under the Explanation when packing is done in cloth-bags, a higher rate is admissible. The scheme clearly suggests that the price of gunny bags is inclusive and where cloth-bag is used, a higher price over and above what has been provided for ordinary containers is permitted."

It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being:

1. The packing material is a commodity having its own identity and is separately classified in the Schedule;

2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content;

A 3. The packing is capable of being reused after the contents have been consumed;

4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;

B 5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product.

In one case, *Punjab Distilling Industries Ltd.* v. *The Commissioner of Income Tax, Simla,* [1959] Supp. 1 SCR 683 where the bottles were C sold by the assessee under a buy-back scheme, the security deposit for the return of the bottles was held to be merely in the nature of an incentive to the buyer to return the bottles.

Turning to s. 6C of the Act, it seems to envisage a case where it is the goods which are sold and there is no actual sale of the packing D material. The section provides by legal fiction that the packing material shall be deemed to have been sold along with the goods. In other words, although there is no sale of the packing material, it will be deemed that there is such a sale. In that event, the section declares, the tax will be leviable on such deemed sale of the packing material at the rate of tax applicable to the sale of the goods themselves. It is difficult E to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation. If the transaction is one of sale of the goods only, clearly all that can be taxed in fact is the sale of the goods, and the rate to be applied must be read in the case of such goods. It may be that the price of the goods is determined upon a consideration of several components, F including the value of the packing material, but nonetheless the price is the price of the goods. It is not open to anyone to say that the value of the different components which have entered into a determination of the price of the goods should be analysed and separated, in order that different rates of tax should be applied according to the character of the component (for example, packing material). What s. 6C intends G to lay down is that even upon such analysis the rate of tax to be applied to the component will be the rate applied to the goods themselves. And that is for the simple reason that it is the price of the goods alone which constitutes the transaction between the dealer and the purchaser. No matter what may be the component which enters into such price, the parties understand between them that the purchaser is pay- H ing the price of the goods. Section 6C merely clarifies and explains that

the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves. We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under s. 6C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated. In the circumstances, no question arises of s. 6C being constitutionally discriminatory, and therefore invalid.

In the appeals before us, we find that the High Court has proceeded on the assumption that the transactions are covered by trade practice and having regard to the nature of the goods it has inferred that what is charged is the price of the bottled beer or of cement packed in gunny bags, and reference has also been made to the Excise Law and the Cement Control Order requiring that the liquor or the cement, as the case may be, must be sold in bottles or in gunny bags respectively. We are constrained to observe that no attempt has been made by the tax authorities to ascertain the facts of each case and to determine what were the actual ingredients of the contract and the intention of the parties. Assumptions have been made when what was required was a detailed investigation into the facts. We have indicated earlier the several possibilities which are open in cases of this kind, and how the ultimate conclusion can be vitally affected by the tests to be applied. Because of the lack of adequate and clear factual material, the High Court also was compelled to proceed on the basis of generalised statements and broad assumptions. We are unable, in the circumstances, to hold that the cases can be regarded as disposed of finally. It is regrettable but the cases must go back for proper findings on facts to be ascertained on fuller investigation.

In the circumstances, the appeals are allowed, the impugned judgment and order of the High Court in the several cases are set aside and the cases are remanded to the High Court for further consideration and disposal in the light of the observations made by us. In the case of the writ petitions before us, the assessing authority will allow the dealer to show cause and thereafter upon evidence led before it determine the matter. There is no order as to costs.

R.S.S. Appeals allowed.