
(16) Firstly, it is well settled that the presumption is in favour of constitutionality. The burden of proving discrimination lies on the person who levels this charge. The petitioners have produced nothing on record to show that they are similarly situated as the persons providing shamiana services.

(17) Secondly, it has not been shown as to what exactly are the activities of the petitioners. In paragraph 1, the averments made by the petitioners are that they are "engaged in the business of supplying Mandap-keeper (marriage places) etc." In paragraph 2, it has been stated that they are "engaged in the business of tent house." Are the petitioners providing both kinds of services? Are they engaged in only one of the two? Nothing is clear on the record. In this situation, it is clear that complete facts are not available. Thus, it cannot be said that two persons who are similarly situate are being differently treated.

(18) Lastly, it also deserves mention that the petitioners have rushed to the court at a state when only show cause notices have been issued. By the impugned show cause notice, one of the petitioners has been given an opportunity to explain the factual position. It appears that similar notices may have been given to even the other petitioners. That being so, the facts have yet to be found. The petitioners are only being called upon to disclose facts whereupon the authority has to consider the matter and record a finding. They have rushed to impugn the show cause notices with all kinds of allegations in the petition. Unless facts are really established, the charge of discrimination cannot even be appropriately examined.

(19) No other point has been raised.

(20) In view of the above, we find no merit in this writ petition. It is, consequently, dismissed in limine.

S.C.K.

Before Jawahar Lal Gupta & N.K. Agrawal, JJ

M/S INDIAN OIL CORPORATION LTD.,—Petitioner

versus

**THE EXCISE AND TAXATION OFFICER, AMBALA CANTT.
AND OTHERS,—Respondents**

CWP No. 4394 of 1999

5th May, 1999

*Haryana General Sales Tax Act, 1973—S. 2(1) (iv)—Sale—
Meaning of -LPG cylinders provided to consumers on furnishing*

security—Such security refundable—Whether a sale of cylinder to the consumer.

Held that, 'sale' normally means a transfer of property in goods. By a fiction of law, even delivery of goods on hire purchase has been included in the definition of 'sale'. Still later, even the transfer of the right to use any goods for valuable consideration, has been fictionally treated as a 'sale'.

(Para 9)

Further held, that the cylinders are only a mode for carrying the gas. It is the admitted position that the petitioner is collecting only refundable security which has to be returned in full as and when the consumer returns the cylinders. The amount charged by way of security is not even alleged to be more than the cost price. There is no gain. No collection of money on which even some interest may be said to have accrued. Such a transaction cannot be termed as a 'sale'. This is not the intention of the statute nor would it be just and fair to place such an interpretation on the provision.

(Para 11)

Randhir Chawla, Sr. Advocate with Renu Sehgal, Advocate *for the Petitioner*

Parmod Goyal, DAG, Haryana *for the Respondent.*

JUDGMENT

JAWAHAR LAL GUPTA, J. (ORAL)

(1) Does the Indian Oil Corporation sell Cylinders to the consumers when its dealers accept refundable deposits by way of security? This is the primary question that arises for consideration in this writ petition. A few facts may be noticed.

(2) The petitioner is providing liquefied petroleum gas to consumers through its own distributors. This supply is made in specially designed cylinders. At the time of sanction of a connection, the dealer collects a refundable security from the consumer. The ownership of the cylinder does not get transferred to the consumer.

(3) On 25th March, 1998, the assessing authority imposed a levy of Rs. 14,06,173 in respect of the assessment year 1994-95 on the petitioner on the assumption that it sold the cylinders to the consumers

when it accepted security desposits totalling Rs. 159,77,515. A copy of this order has been produced as Annexure P.1 with the writ petition Aggrieved by the order, the petitioner filled an appeal. Alongwith the appeal, the petitioner submitted an application with a prayer that the appeal be heard without insisting upon the deposit of the tax. The petitioner's application was rejected by the Joint Excise and Taxation Commissioner (Appeals), Ambala, *vide* his order dated 15th May, 1998. This order is on record as Annexure P.2. The petitioner approached the Tribunal. *Vide* order dated 8th February, 1999, the tribunal has also rejected the petitioner's request. Hence this petition.

(4) The petitioner alleges that there is no sale of cylinders to the consumers. The security deposit accepted by the dealer is not a valuable consideration and that no property in the goods is transferred to the consumer. It is only a mode of supplying the gas for use. On these premises, the petitioner prays that the levy of Rs. 14,06,173 as imposed by the assessing authority, be quashed. It also prays that the orders passed by the appellate and the revisional authorities be set aside.

(5) A detailed written statement has been filed on behalf of the respondents viz. the State of Haryana, the Commissioner of Excise and Taxation, the Joint Excise and Taxation Commisssioner, the Excise and Taxation Officer as also the Sales Tax Tribunal, Haryana. In this written statement, it has been *inter alia* averred that the supply of gas cylinders is a 'sale' and not bailment. The petitioner has purchased cylinders "on the strength of R.C. against, C forms under Section 8(3) of the Central Sales Tax Act, 1956 for the purpose of sale *ab-initio*". The respondents maintain that the transaction amounts to 'sale' within the meaning of Section 2(1)(iv) of the Haryana General Sales Tax Act, 1973.

(6) This matter was posted for hearing before the Bench yesterday. On behalf for the petitioner, it was urged that if the appellate authority considers the appeal without insisting on the deposit of tax, the petitioner shall not press for a decision on merits. The case was adjourned to enable Mr. Goyal, counsel for the respondents to obtain instructions. He has obtained the instructions. Mr. Goyal states that the case should be heard and decided on merits. We have, consequently, heard the counsel on the merits of the case. Both sides have referred to the provisions of the Act and even cited decisions. While we were dicating the order, Mr. Goyal submitted that the State cannot accept the petitioner's request for entertaining the appeal without deposit of tax as its financial position is sound. Therefore, the court should only consider the limited question and not pronounce upon the merits.

(7) Since we have heard counsel for the parties on merits, we do not consider it appropriate to now confine ourselves to the limited question which was posed by the counsel yesterday. We are, thus, proceeding to decide the controversy on merits.

(8) Section 2(1) defines 'sale'. According to the counsel for the respondents, whenever "there is transfer of the right to use any goods" for cash or deferred payment or other valuable consideration, the ingredients of 'sale' as defined in section 2(1) are satisfied. Thus, the transaction becomes exigible to the levy of sales tax. The question that arises for consideration is —Does the Corporation transfer the right to use cylinders for a valuable consideration when it accepts security from the consumer ?

(9) On a perusal of the provision, we find that 'sale' normally means a transfer of property in goods. By a fiction of law, even delivery of goods on hire purchase has been included in the definition of 'sale'. Still later, even the transfer of the right to use any goods for valuable consideration, has been fictionally treated as a 'sale'. To illustrate : when a person takes a video cassette from a Library and pays a nominal sum of say Rs. 5, he is using the goods for a valuable consideration and the Video Library may be held liable to pay sales tax therefor. Similarly, as was held by their Lordships of the Supreme Court in *Aggarwal Brothers vs. State of Haryana*, Civil Appeal No. 78 of 1996, the transfer of right to use shuttering for consideration by builders was 'sale' within the meaning of Section 2 (1) of the Haryana General Sales Tax Act. However, when a person goes to a Library to borrow books, he gets a right to use the books. Normally, the member has to furnish some amount by way of security to the Library. Despite that, the borrowing of books will not fall within the definition of 'sale' as contemplated under the provisions of section 2(1) (iv).

(10) In the present case, we find that the cylinders are only a mode for carrying the gas. The consumer pays the security when he takes the cylinder. The amount of security is less than the cost price. We are informed that the petitioner paid Rs. 510 per cylinder. However, the security was Rs. 450. The consumer can come back the next day and ask for a refund of the full amount. The dealer shall have no right to deduct any amount therefrom. However, if the contention of the respondents is accepted, the result would be that the dealer shall suffer a loss of almost Rs. 50 in every case. Such is not the intention of the Statute nor would it be just and fair to place such an interpretation on the provision.

(11) Mr. Goyal has referred to the decision in *Industrial Oxygen Company Pvt. Limited vs. State of Andhra Pradesh, (1)*. This was a case where the manufacturer of Industrial gases was collecting hire charges for use of cylinders. It was held by their Lordships that “the charges collected by the petitioner were.....for the use of the cylinders by its customers who were given full possession of the cylinders. There was transfer of the right to use the cylinders as containers of the gases purchased by the customers. Therefore, all the requirements of Section 5-E are satisfied.....and the hire charges were validly subjected to tax.” In the present case, it is the admitted position that not a penny has been collected by the petitioner by way of any hire charges. There is no document on record which may even remotely suggest that any hire charges were being collected. In fact, there is not even a suggestion that the consumer was hiring the cylinder. Even the assessing authority has not found so. It is the admitted position that the petitioner is collecting only refundable security which has to be returned in full as and when the consumer returns the cylinder. The amount charged by way of security is not even alleged to be more than the cost price. There is no gain. No collection of money on which even some interest may be said to have accrued. Thus, the respondents can derive no advantage from the decision in the case of *Industrial Oxygen Company Private Limited (Supra)*.

(12) It was then contended that the petitioner having purchased cylinders on the strength of C forms, it should be presumed that it was selling the containers and not merely using these as packing material.

(13) The contention is misconceived. A perusal of Section 8 of the Central Sales Tax Act, 1956 shows that whenever the goods are “containers or other materials used for the packing of any goods or classes of goods specified in the certificate of registrationor for the packing of any containers or other materials specified in the certificate of registration.....” the transaction shall be subjected to the concessional rate of tax. This is precisely what has been done in the present case. The cylinders are used as containers for the supply of gas.

(14) In view of the above and particularly the fact that a written statement has already been filed on behalf of the appellate authority and the Tribunal that the transaction amounts to “sale”, we think no useful purpose would be served by relegating the petitioner to the remedy of appeal. Still further, on merits, we find that the claim made on behalf of the respondents is not tenable. Thus, we allow the writ petition and set aside the order of assessment, a copy of which has

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been produced as Annexure P.1 with the writ petition. As a result, the orders at Annexure P.2 and P.3 become redundant. In the circumstances, we make no order as to costs.

S.C.K.