

CASE NO.:
Appeal (civil) 7488-7492 of 2001

PETITIONER:
Commissioner of Central Excise, Lucknow

RESPONDENT:
M/s Chhata Sugar Co. Ltd.

DATE OF JUDGMENT: 27/02/2004

BENCH:
S.B. Sinha.

JUDGMENT:
J U D G M E N T

W I T H

CIVIL APPEAL NOS. 7494-7499 OF 2001,
999 OF 2000, 1974 OF 2000, 7493 OF
2001, 6807 OF 1999 & 7500-7514 OF 2001

S.B. SINHA, J :

'Taxation' is defined in clause (28) of Article 366 of the Constitution of India to mean :

"taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;"

The Constitution of India postulates either a tax or a fee. However, the use of expression 'tax' or 'fee' in a statute is not decisive; as on a proper construction thereof and having regard to its scope and purport, 'fee' may also be held to be a tax.

The definition of 'tax' in terms of Clause (28) of Article 366 of the Constitution is wide in nature. The said definition may be for the purpose of the Constitution; but it must be borne in mind that the legislative competence conferred upon the State Legislature or the Parliament to impose 'tax' or 'fee' having been enumerated in different entries in the three lists contained in the Seventh Schedule of the Constitution of India, the same meaning of the expression "tax" unless the context otherwise requires, should be assigned.

Having regard to the fact that different legislative entries have been made providing for imposition of 'tax' and 'fee' separately, indisputably the said expressions do not carry the same meaning. Thus, a distinction between a tax and fee exists and the same while interpreting a statute has to be borne in mind.

A distinction must furthermore be borne in mind as regard the sovereign power of the State as understood in India and the doctrine of Police Power as prevailing in the United States of America. In some jurisdictions a distinction may exist between a police power and a power to tax but as in the Constitution of India, the word 'tax' is defined, it has to be interpreted accordingly.

The expression 'regulatory fee' is not defined. Fee, therefore, may be held to be a tax if no service is rendered. While imposing a regulatory fee, although the element of quid pro quo, as understood in common parlance, may not exist but it is trite that regulatory fee may be in effect and substance a tax. [See The Corporation of Calcutta and Another vs. Liberty Cinema, AIR 1965 SC 1107].

In Municipal Corporation, Amritsar vs. The Senior Superintendent of Post Offices, Amritsar Division and Anr. [JT 2004 (1) SC 561], it was held :

"The question, whether the demand so made was by way of 'service charge' or 'tax' need not detain us any longer. The demand so made was with regard to the services rendered to the respondents' department, like water supply, street lighting, drainage and approach roads to the land and buildings. In the counter, the respondents averred that they are paying for the services rendered by the appellant-Corporation by way of water and sewerage charges and power charges separately. It is also categorically averred that no other specific services are being provided to the respondents for which the tax in the shape of service charges can be levied and realized from the respondents. There is no provision in the Municipal Corporation Act for levying services charges. The only provision is by way of tax. Undisputedly, the appellant-Corporation is collecting the tax from general public for water supply, street lighting and approach roads etc. Thus, the 'tax' was sought to be imposed in the garb of 'service charges..."

We may furthermore notice that a seven-Judge Bench of this Court in Synthetics and Chemicals Ltd. and Others vs. State of U.P. and Others [(1990) 1 SCC 109], while considering the question as to whether the levy on industrial alcohol by the State is justifiable, inter alia, held that when revenue earned out of the impost is substantial, the same would not be justifiable as fee.

In Liberty Cinema (supra), this Court, while interpreting Section 548 of the Calcutta Municipal Act providing for grant of a licence, observed :

"...The reference to the heading of Part V can at most indicate that the provisions in it were for conferring benefit on the public at large. The cinema house owners paying the levy would not as such owners be getting that benefit. We are not concerned with the benefit, if any, received by them as members of the public for that is not special benefit meant for them. We are

clear in our mind that if looking at the terms of the provision authorising the levy, it appears that it is not for special services rendered to the person on whom the levy is imposed, it cannot be a fee wherever it may be placed in the statute. A consideration of where Ss. 443 and 548 are placed in the Act is irrelevant for determining whether the levy imposed by them is a fee or a tax."

It was further observed :

"19. The last argument in this connection which we have to notice was based on Ss. 126 and 127 of the Act. Section 126 deals with the preparation by the Chief Executive Officer of the Corporation called Commissioner, of the annual budget. The budget has to include an estimate of receipts from all sources. These receipts would obviously include taxes, fees, licence fees and rents. Under S. 127(3) the Corporation has to pass this budget and to determine, subject to Part IV of the Act, the levy of consolidated rates and taxes at such rates as are necessary to provide for the purposes mentioned in sub-section (4). Sub-section (4) requires the Corporation to make adequate and suitable provision for such services as may be required for the fulfillment of the several duties imposed by the Act and for certain other things to which it is not necessary to refer. The first point made was that these sections showed that the Act made a distinction between fees and taxes. It does not seem to us that anything turns on this as the only question now is whether the levy under S. 548 is a fee. The other point was that clauses (3) and (4) of Section 127 showed that the Corporation could fix the consolidated rates and taxes and that the determination of rates for these had to be in accordance with the needs for carrying out the Corporation's duties under the Act. It was said that as the licence fee leviable under Section 548 did not relate to any duty of the Corporation under the Act, it being optional for the Corporation to impose terms for grant of licences for cinema houses, the rate for that fee was not to be fixed in reference to anything except rendering of services. We are unable to accept this argument and it is enough to say in regard to it that it is not right that Section 443 does not impose a duty on the Corporation. We think it does so, though in what manner and when it will

be exercised it is for the Corporation to decide. It is impossible to call it a power, as the respondent wants to do, for it is not given to the Corporation for its own benefit. The Corporation has been set up only to perform municipal duties and its powers are for enabling it to perform those duties. Furthermore there is no doubt that an estimate of the licence fee has to be included in the budget and therefore the word 'tax' in Section 127(3) must be deemed to include the levy under Section 548. The words "subject to the provisions of Part IV" in Section 127(3) must be read with the addition of the words "where applicable"...

20. The conclusion to which we then arrive is that the levy under S. 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed. The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licensee is not a service to him. No question here arises of correlating the amount of the levy to the costs of any service. The levy is a tax. It is not disputed, it may be stated, that if the levy is not a fee, it must be a tax."

A regulatory statute may also contain taxing provisions.

The decisions of this Court point out towards the need of existence of the element of quid pro quo for imposition of fee; be it to the person concerned or be it to a group to which he belongs; irrespective of the fact as to whether the benefit of such service is received directly or indirectly.

The point at issue is required to be considered keeping in view the aforementioned legal position.

By reason of the provisions of the U.P. Sheera Niyantaran Adhinyam, 1964 (hereinafter referred to as 'the UP Act'), the trade carried out by the respondents is sought to be regulated.

Some service, therefore, was required to be rendered by the State or the statutory authority to the owners of the factory producing molasses or the molasses industries generally if an impost by way of 'fee' was to be levied.

A Constitution Bench of this Court in The State of West Bengal vs. Kesoram Industries Ltd. and Ors. [2004 (1) SCALE 425] referring to Synthetics and Chemicals (supra), observed :

"It may be seen that the power to levy sales tax on industrial alcohol was available to the State but for the

provisions of the Ethyl Alcohol (Price Control) Orders on account of which the State could not charge sales tax on industrial alcohol. The State could levy any fee based on quid pro quo..."

[Emphasis supplied]

In the aforementioned case, it was observed by one of us :

"In ascertaining the subject matter, or the scope or purpose of the legislation, the Court is entitled to give due regard to its economic effect. (See The King Vs. Barger (1908) 6 CLR 41 and Attorney-General for Alberta Vs. Attorney General for Canada (1939) AC at pp. 130-132) The aforementioned decisions have been referred to in The State of South Australia and Another Vs. the Commonwealth and Another, [(1942) 65 C.L.R. 373].

Excise duty is considered to be an indirect tax. The Supreme Court of United States in Hylton, Plaintiff in Error vs. The United States [US SCR 1 Law. Ed. Dallas 169] observed :

"The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect. Although the latter term is not to be found in the constitution, yet the former necessarily implies it. Indirect stands opposed to direct. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises, in such case it will be comprised under the general denomination of taxes. For the term tax is the genus, and includes,

1. Direct taxes.
2. Duties, imposts, and excises.
3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads."

We may notice that the validity of U.P. Act came to be considered by a Full Bench of the Allahabad High Court in M/s. Shriram Industrial Enterprises Ltd. Vs. The Union of India and others [AIR 1996 (Allahabad) 135], wherein one of us V.N. Khare, J (as the Hon'ble Chief Justice of India then was) speaking for the Bench upheld the vires thereof, inter alia, on the ground that the same has been enacted in terms of Entry 33, List III of the Constitution of India. The said Act is, therefore, held to be regulatory in nature.

When a statute deals with an essential commodity in

terms whereof the price of a commodity is fixed thereunder, the sale price must be determined having regard to the price fixed under the statute and any other sum. [See *Neyvelilignite Corporation Ltd. vs. Commercial Tax Officer, Cuddalore and Another*, (2001) 9 SCC 648 and *Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd.*, (2002) 3 SCC 547]. The administrative charges payable by the buyer under the U.P. Act, thus, being in addition to the sale price, the same cannot be a fee.

Furthermore, one of the tests for determining as to whether the impost is a 'tax' or 'fee' would, in my opinion, be whether the burden can be passed to the end user. Under the State Act, the same is permissible. A 'fee' in a situation of this nature cannot be passed on to the end user, a 'tax' can be.

In any event regulatory fee imposed for the purpose of regulating the industry producing molasses, in my opinion, cannot be passed on to the buyers as they are not subjected to any regulation under the Act. The nature of impost is such that burden thereof is to be borne by the buyers and the respondents herein are merely the agents for collecting the same on behalf of the State. The impost, therefore, cannot be termed as a 'fee' so as to deprive the respondents of the benefit of deduction of the tax for the purpose of Section 4(4)(d)(ii) of the Central Excise Act, 1944.

We may also notice that in terms of rule Rule 23 of the UP Sheera Niyantaran Niyamawali, 1974, the occupier of a sugar factory is obligated to deposit the administrative charges even prior to delivery of molasses and recovery thereof from the buyers.

The impost levied in terms of the said Act must, thus, be held to be a special tax applicable to a section of the people, namely, buyers of molasses.

In this Case, this Court is not concerned with the validity or otherwise of the impost, in which event only the question as to whether the same has sufficient constitutional protection or not whether viewed as a tax or fee or either; was required to be considered as was the case in *Gasket Radiators Pvt. Ltd. vs. Employees' State Insurance Corporation and Another* [1985] 2 SCC 68].

We may also notice a decision of this Court in *Tata Iron and Steel Co. Ltd. vs. Collector of Central Excise, Jamshedpur* [(2002) 8 SCC 338], wherein a Bench of this Court distinguished *C.C.E. vs. Kisan Sahakari Chinni Mills Ltd.* [(2001) 6 SCC 697] holding that the impost impugned therein did not have a backing of a statutory provision and, thus, would not be a tax. But it was clearly held that the same would be so if the levy is imposed by any central or State legislature or any statutory authority. The principles enunciated in *Kisan Sahakari Chinni Mills Ltd.* (supra) was, therefore, not deviated from.

Therefore, in agreement with the judgment and order proposed to be delivered by Brother Kapadia, J., I am also of the opinion that *Kisan Sahakari Chinni Mills Ltd.* (supra) lays down the correct law.