

## CIVIL MISCELLANEOUS

Before A. N. Grover, J.

DR. DIWAN CHAND AGGARWAL,—Petitioner

*versus*

COMMISSIONER OF SALES-TAX, DELHI AND  
OTHERS,—Respondents.

Civil Writ No. 82-D of 1961.

*Bengal Finance (Sales Tax) Act, 1941 as extended to Delhi—S. 5 and First Schedule—Item 6—X-ray apparatus and the films used therewith—Rate of sales tax payable thereon stated—Constitution of India (1950)—Article 226—Petition for writ against the Sales Tax authorities not to realize sales tax at a higher rate from the dealer—Whether maintainable by the purchaser of goods.*

1962

April, 6th

*Held*, that X-ray apparatus and the films, etc., which are used therewith cannot fall within item No. 6 of the First Schedule of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi. They would fall under clause (c) of section 5(1) of the Act for which the rate would be 4 naye paise in the rupee. Item No. 6 relates only to photographic and other cameras and other goods which form part of or are required for making use of those cameras. Apparatus used for producing the X-ray with which photographs of the inside of the body can be taken for the purpose of medical diagnosis and for treatment of maladies of certain nature, e.g., cancer, cannot possibly be regarded to be photographic and other cameras, nor can the films used for the purpose of taking photographs with such an apparatus be deemed to be an accessory required for use therewith.

*Held*, that the incidence of sales tax falls ultimately on the purchaser of goods, though directly he is not liable to pay that tax and it is the dealer who has to make the payment. If the dealer does not avail of the procedure prescribed by the Act because he suffers no prejudice or loss, the purchaser of goods, who has to bear the burden

of that taxation, will be entitled to file a petition for appropriate writ under Article 226 of the Constitution as he has no other remedy available to him under the Act.

*Petition under Articles 226 and 227 of the Constitution of India praying that this Hon'ble Court may be pleased to issue such appropriate writ, order or directions calling upon the respondents to forbear from collecting 7 per cent sales tax on the sale or purchase of X-ray machines and the apparatus under Section 5(1) (a) of the Act.*

(b) to declare that X-ray machines and apparatus is not covered by its number of the First Schedule to the Bengal Finance (Sales Tax) Act as extended to Delhi, i.e., the item relating to cinematographic, photographic and other cameras item;

(c) to declare that X-ray films are not photographic films and are used for diagnostic purposes alone;

(d) to declare that the collection of sales tax from the petitioner at the rate of 7 per cent is ultra vires and that the respondents are liable to refund the excess sales tax charged from the petitioner and that the proper sales tax payable is at 4 per cent under Section 5(1) (c) of the Act for the X-ray apparatus and machines and X-ray films;

(e) to issue such further writ, order or direction as this Hon'ble Court may deem fit and proper.

GURBACHAN SINGH and YOGESHWAR DAYAL, for the Petitioners.

S. N. SHANKAR and T. R. BHASIN, for the Respondents.

#### JUDGMENT

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GROVER, J.—This is a petition under Articles 226 and 227 of the Constitution in which the facts may be stated.

The petitioner is a doctor and carries on practice as a specialist in Radiology, i.e., Diagnosis and treatment of diseases with the help of X-ray appliances, etc. Respondent No. 3 the East Asiatic Company (India), Private, Ltd., supplied to the petitioner X-ray equipment consisting of—

- (a) high tension generator (which raises the voltage from 200 volts to 1,25,000 volts);
- (b) a control which regulates the voltage and amperage to the X-ray tube;
- (c) X-ray tube itself which generates X-ray;
- (d) stand to hold the tube; and
- (e) one X-ray couch with which a 2nd X-ray tube is fitted and with which examination of different parts of inside of human body is made.

The total cost of this equipment is stated to be Rs. 1,60,000. The petitioner claims that the said appliances could be used only for the purpose of diagnosis as well as treatment of the patients and has been imported for that purpose alone. X-ray films on which an image of the inside body is received are used only for the aforesaid purpose and are not used for taking ordinary photographs.

The petitioner was informed by respondent No. 3 by means of a letter dated 27th November, 1959, that the X-ray equipment being electro-medical equipment was to be taxed at 4 per cent of the turnover for the purpose of sales tax but respondents 1 and 2, namely, the Commissioner of Sales Tax and the Assistant Commissioner of Sales Tax had issued a circular letter to the effect that X-ray equipment did not fall under the category of electro-medical equipment but it was included in the category of photo goods which being luxury items were being taxed at the rate of 7 per cent. According the X-ray equipment was also proposed to be taxed at 7 per cent under the Bengal Finance Sales Tax Act, 1941, as extended to Delhi

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(hereinafter to be referred to as the Act). It was suggested in the aforesaid letter that the petitioner should approach respondent No. 1 to persuade him to impose the tax at the rate of 4 per cent and not 7 per cent. The petitioner was buying films also for taking X-ray photographs and he was being charged the tax by the sellers at the rate of 7 per cent for those films,— *vide* Annexures 'C', 'D' and 'E'. It appears that the Commissioner of Sales Tax paid a visit to the clinic of the petitioner for seeing his apparatus and the X-ray films and thereafter the petitioner addressed a letter on 2nd December, 1959 (Annexure 'F') in which he enclosed various letters and documents showing that for the purpose of import the Government Red Book showed that X-ray apparatus was included under the head Electro-medical Apparatus in Part V, Item 79 of that book and whereas the duty on photo equipments was 40 per cent from U. K. and 50 per cent from Dollar Area, the duty on X-ray equipment was only 20 per cent. Similar data were furnished with regard to the films. It was mentioned in the representation that the X-ray and electro-medical apparatus were meant only for diagnostic and treatment purposes and the sales tax should be charged accordingly. On 28th June, 1960, the petitioner addressed another letter to the Commissioner of Sales Tax saying that as respondent No. 3 had to submit returns of sales tax for the quarter ending 30th June, it may be authorised to charged 4 per cent on X-ray equipment sold to the petitioner. The petitioner undertook to deposit the excess with respondent No. 3 in case the sales tax was not reduced to 4 per cent in spite of the representations which had been made by him to the Commissioner of Sales Tax. A reply was received (Annexure 'I') from the Commissioner of Sales Tax in the following words:—

“\* \* \* \* \*

There is no objection to Messrs. East Asiatic Co., charging sales tax @ 4 per cent on X-ray equipment sold to you and paying the same to the Government along with the return or the quarter ending 30th June,

1960, provided you give an undertaking to the Company that you will pay the balance to them in case it is decided to levy sales tax on X-ray apparatus at 7 per cent."

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On 29th December, 1960, the Assistant Commissioner of Sales Tax addressed a letter to the petitioner in connection with the rate of sales tax on X-ray equipment sold to him by respondent No. 3. It was stated that the petitioner's representation dated 2nd December, 1959, had been duly weighed "and it is found that X-ray apparatus with which radiographs are taken or which project images of bones, etc. on screens and glass plates and the films used in such apparatus will be covered by item No. 6 of the schedule of luxury goods appended to the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi and will attract sales tax at 7 per cent." The present petition was filed immediately afterwards.

Section 5 of the Act provides for the rate of tax payable by a dealer thus—

- “(a) in the case of taxable turnover in respect of the goods specified in the first Schedule, at the rate of seven naye paise in the rupee;
- (b) in the case of taxable turnover in respect of the goods specified in the Third Schedule, at the rate of two naye paise in the rupee;
- (c) in the case of taxable turnover in respect of any other goods, at the rate of four naye paise in the rupee;

\* \* \* \* \*

The First Schedule contains the following 15 items:—

- “1. Motor vehicles, including chassis of motor vehicles, motor tyres and tubes and spare parts of motor vehicles.

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2. Motor cycles and cycle combinations, motor scooter, *motorettes* and tyres, tubes and spare part of motor cycles, motor scooters, motorettes.
3. Refrigerators and air-conditioning plants and component parts thereof;
4. Wireless reception instruments and apparatus, radios, and radio gramophones, electrical valves, accumulators, amplifiers and loud-speakers and spare-parts and accessories thereof;
5. Cinematographic equipment including cameras, projectors and sound recording and reproducing equipment; lenses, films and parts and accessories required for use therewith.
6. Photographic and other cameras and enlargers, lenses, films and plates, paper and cloth and other parts and accessories required for use therewith.
7. All clocks, time-pieces and watches and thereof;
8. Iron and Steel safes and almirahs;
9. All arms including rifles, revolvers, pistols, and ammunition for the same;
10. Cigarette cases and lighters.
11. Dictaphone and other similar apparatus for recording sound and spare-parts thereof;
12. Sound transmitting equipment including telephones and loud-speakers and spare parts thereof;
13. Typewriters, tabulating machines, calculating machines and duplicating machines and parts thereof;

14. Binoculars, telescopes and opera glasses.
15. Gramophones and component parts thereof and records."

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The case of the petitioner is that all the items in the First Schedule show that they relate to what may be called luxury goods and indeed that phraseology has been used by the Sales Tax Department itself in the correspondence to which reference has been made. Item No. 6 relates only to photographic and other cameras and other goods which form part of or are required for making use of those cameras. Apparatus used for producing the X-ray with which photographs of the inside of the body can be taken for the purpose of medical diagnosis and for treatment of maladies of certain nature, e.g., cancer cannot possibly be regarded to be photographic and other cameras, nor can the films used for the purpose of taking photographs with such an apparatus be deemed to be an accessory required for use therewith. A similar matter engaged the attention of the Sales Tax Tribunal in *International Radio Company v. The State of Bombay* (1). A good deal of evidence had been produced of the medical experts there with regard to the functions of the X-ray apparatus. The Tribunal pointed out some of the distinctions between ordinary photographic cameras and X-ray apparatus which were as follows:—

- "(1) a photographic camera has a dark chamber or box into which the image of external objects may be projected by means of a lens or other image-forming device, while the machines in question have neither a dark chamber nor a lens or other image-forming device;
- (2) a photographic camera uses visible light, i.e., sunlight or other artificial light visible to the eye, while the rays used in the machines in question are invisible rays;

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(1) (1956) 7 S.T.C. 210.

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- (3) in photographic cameras light is reflected from the object to be photographed, while the radiographic image is recorded on a sensitive plate after X-rays have passed through the body in question, such rays having been stopped wholly or partially by certain parts of the body;
- (4) the X-ray tube essential to these machines and the generators of the special kind of light rays are absent in case of ordinary photographic cameras; and
- (5) the machines in question, though they are capable of taking radiographs may be and generally are used for other purposes also, for instance, fluoroscopic, i.e., for viewing internal organs or parts of the human bodies, and therapeutic, i.e., for purposes of effecting therapy in cases of certain illnesses of the human body by the exposure of certain parts thereof to X-rays which penetrate deeply into the body or produce salutary results on the surface of the skin."

The learned counsel for respondents 1 and 2 has not been able to show that these distinctions do not in fact exist or that there is any inaccuracy in the comparison which has been made by the Tribunal between the ordinary photographic cameras and X-ray apparatus. In paragraph 11 of the petition reference was made to some of these distinctions and the only reply that has been given in the affidavit of Shri V. R. Bapat on these matters is that the contents of paragraph 11 of the petition were not admitted. In paragraph 2 of the petition it has been stated that the X-ray apparatus can be used only for the purpose of diagnosis as well as treatment of the patients and has been imported for that purpose. X-ray films on which an image of the inside body is received are used only for the aforesaid purpose and not for taking photographs. These photographs cannot be interpreted or understood by non-medical persons. The reply in Mr. Bapat's affidavit is—

"Regarding the second part of paragraph 2 of the petition concerning the purposes of



the user of the apparatus, I submit that notwithstanding the purpose of the X-ray apparatus, the X-ray films on which the image of the inside body is received, serve the same purpose as the photographic films. \* \* \* \* \*

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There can be no doubt, and it is a matter of common knowledge, that the X-ray photograph, radiograph or skiagram cannot be taken without the use of the particular rays which are called X-rays and these rays have to be generated by the apparatus itself. It is equally well-known that it is because of these rays that thick matter can be penetrated. Surely an apparatus of this kind cannot be like a photographic or other camera covered by item No. 6. Moreover, it is not possible to ignore the fact that in the Government Red Book itself, which can indisputably be referred to, X-ray apparatus is included under the head electro-medical apparatus as pointed out in the letter sent by the petitioner, on 2nd December, 1959 (Annexure 'F'). The Government had deliberately imposed less duty on X-ray equipment than what had been levied on photo equipments or photographic goods. The reason is obvious. These goods which are used for medical purposes are allowed to be imported in larger quantities and the duty also has to be less on them so that it may be possible to avail of their use in the interest of the health and well-being of the citizens of this country; whereas photographic goods like cameras, etc., are by no means essential for medical or other reasons and naturally more duty is imposed on them and the quantity, on which import is allowed, is also more restricted. I am satisfied, therefore, that X-ray apparatus and the films, etc., which are used therewith cannot fall within item No. 6 of the First Schedule of the Act. They would fall under clause (c) of section 5(1) for which the rate would be 4 naye paise in the rupee and that is the rate which, according to the petitioner, was the correct rate at which sales tax was payable on these goods.

The main hurdle which is sought to be raised in the nature of relief being granted to the petitioner is

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that the sales tax is levied on a dealer and is payable by him and the petitioner being a purchaser or a consumer cannot maintain the present petition under Article 226. It is further maintained that even if the dealer had filed the present petition, it would have been liable to dismissal on the ground that the alternative remedies provided by the Act have not been exhausted. It is said that it is not every dealer as defined by section 2(c) who is liable to pay the sales tax but that the incidence of taxation only falls on these dealers whose gross turnover exceeds a particular taxable quantum who are liable to pay the tax on the sales effected by them. Section 10 provides for the payment of tax and making of returns. Every registered dealer has to furnish returns by such dates and to such authority as may be prescribed. Before he furnishes the returns he has to pay into a Government treasury or the Reserve Bank of India the full amount of tax due from him under the Act according to such returns. Section 10A is to the effect that no person who is not a registered dealer shall collect in respect of any sale by him of goods in the Union territory of Delhi any amount by way of tax under the Act, and no registered dealer may be made to collect such tax except in accordance with the Act and the rules made thereunder. According to the learned counsel for respondents 1 and 2 the petitioner does not come into the picture at all so far as the scheme of taxation under the Act is concerned and, therefore, he cannot be regarded to be an aggrieved party. My attention has been invited in particular to *Charanjit Lal Chowdhury v. The Union of India* (2), where Fazl Ali, J., in his judgment considered the question whether a shareholder of a company could maintain a petition under Article 32 of the Constitution when the allegation was that property belonging to the company had been taken possession of without compensation or the right enjoyed by the company under Article 19(1)(f) of the Constitution had been infringed. Fazl Ali, J., was addressing himself to the question whether the petitioner there had succeeded in showing that there had been an infringement of his rights as a shareholder under Articles 31 and 19(1)(f) of

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(2) A.I.R. 1951 S.C. 41.

the Constitution. He agreed with the conclusions of Mukerjee, J., (as he then was) without committing himself to the acceptance of all his reasonings. Mukerjee, J. (as he then was), after nothing the distinction between a corporation who has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members, expressed the view that it was not competent to one person to seek to enforce the rights of another except where the law allowed him to do so. The following observations at page 53 may be referred to—

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“It is settled law that in order to redress a wrong done to the Company, the action should *prima facie* be brought by the Company itself. It cannot be said that this course is not possible in the circumstances of the present case. As the law is alleged to be unconstitutional, it is open to the old Directors of the Company who have been ousted from their position by reason of the enactment to maintain that they are Directors still in the eye of law, and on that footing the majority of shareholders can also assert the rights of the company as such.”

In the later decision in *Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co., Ltd.* (3), it was pointed out that in the earlier decision the Court was influenced considerably by the fact that a solitary shareholder was trying to enforce the company's fundamental right in the exercise of its jurisdiction under Article 32 and that he could not do so unless his own fundamental right under Article 31 (2) had been infringed. A further distinction was sought to be made by Mahajan, J., (as he then was) in his judgment that not only the shareholders would lose their shares and be deprived of them, but they would also be forced to pay large sums of money and all this would be in exercise of powers conferred on the

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(3) A.I.R. 1954 S.C. 119,

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directors appointed by the State by the Ordinance in question, and for that reason the preliminary objection was not sustained. The aforesaid judgments of their Lordships do not support the contention that has been advanced as the facts of the present case are quite different and distinguishable. My attention was also invited to *Radha Shyam Datta v. Patna Municipal Corporation* (4), *Pratap Mal v. The Income Tax Officer* (5), and *Ex parte Stoott* (6), but the view expressed in each one of these cases was based on its own peculiar facts.

One of the significant and distinguishing features of the present case is that respondents 1 and 2 themselves recognised the petitioner's status in the matter and that he would be directly affected by the imposition of the sales tax under item No. 6 of the First schedule when it cannot be levied under that item. The correspondence which took place between these respondents and the petitioner shows quite clearly that it was the petitioner who had to pay the tax at the rate of 7 per cent instead of 4 per cent on the X-ray equipment and films and the petitioner was even asked to give an undertaking to respondent No. 3 that he would pay the balance to it in case it was decided to levy sales tax at the rate of 7 per cent. That undertaking was actually furnished by him. The Commissioner of Sales Tax himself paid a visit to the petitioner's clinic for seeing his apparatus and X-ray films and all the correspondence which was exchanged subsequently is sufficient to establish that the incidence of taxation was to fall ultimately on the petitioner, though directly he was not liable to pay that tax and it was the dealer who had to make the payment. There is a good deal of force in the argument of the learned counsel for the petitioner that if in a case of this nature, the dealer does not avail of the procedure prescribed by the Act because he suffers no prejudice or loss can it be said that the purchaser who has to bear the burden of that taxation has no remedy whatsoever. It is further pointed out that the scheme of the Act is such that the dealer is

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(4) A.I.R. 1956 Pat. 182.

(5) A.I.R. 1961 Rajasthan 150.

(6) (1916) 1 K.B. 7.

more or less a collecting agent from the purchaser as would be implicit in the language employed in section 10-A. Be that as it may the fact remains that in the present case the Sales Tax Authorities recognised the fact that the party who would be directly affected and consequently aggrieved would be the petitioner who would have to pay the tax from his own pocket and not the dealer who has been made responsible for payment of the tax under the Act. In this view of the matter it cannot but be held that the petitioner is aggrieved by being forced to make payment in respect of a tax at rate at which that tax cannot be legally levied. As he cannot resort to any other remedy, there is no reason or justification for declining to afford him relief in exercise of the extraordinary powers conferred by article 226 of the Constitution. In *Kavalapora Kottarathil Kochunni v. State of Madras* (7), it has been observed by S. R. Das, C.J., that it appears to be well established that the Supreme Court's powers under Article 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party. In that case a declaration as to the invalidity of the impugned Act together with the consequential relief by way of an injunction restraining the respondents from asserting any rights under the enactment so declared void were considered to be the only appropriate relief which the petitioners were held entitled to get.

For the reasons given above, I hold that the imposition of sales tax under item No. 6 of the First Schedule on the articles in question is altogether illegal, with the result that the petition is allowed and an appropriate writ or order shall be issued directing respondents 1 and 2 not to realise sales tax at the rate of 7 per cent from the dealers concerned in respect of the sales effected in favour of the petitioner. In view of the nature of the points involved, the parties are left to bear their own costs.

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