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STATE OF ORISSA AND ANR.

v.

M/S ASIATIC GASES LTD.

MAY 16, 2007

B

[S.H. KAPADIA AND B. SUDERSHAN REDDY, JJ.]

*Orissa Sales Tax Act, 1947; Ss. 2 (d) (h) 2 (g) (iv):*

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*Sale of Medical Oxygen and industrial gases by filling in cylinders—Sale price—Inclusion of charges for over retention of Cylinders—Correctness of—Held: Property in the commodity in question, viz., medical oxygen/ industrial gases could not pass to customers without containers—Thus, container/cylinder with its contents constitute goods—When goods were given on loan to customer, right to use the goods comes into existence—Such loan was free from payment of charges for 14 days—Over retention charges levied thereafter—Such levy was on transfer of the right to use the goods for consideration—Hence, in terms of s. 2(g) (iv) of the Act over retention charges includible in the sale price as defined w/s 2(h) of the Act for the purpose of levy of Sales Tax—Constitution of India, 1950—Article 366 (29-A)(d).*

E

Assessee carried on business in manufacture and sale of medical oxygen and industrial gases by filling in cylinders. The assessee collected certain amount from its customers during the assessment year 1986-87 for over-retention of gas cylinders. The question which arose for determination before this Court was as to whether the said amount was includible in the sale price as defined under Section 2(h) of the Orissa Sales Tax Act.

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Allowing the appeal, the Court

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**HELD: 1.1.** In the present case the commodity in question is medical-oxygen/industrial gases. The said commodity requires a container and it cannot be sold without the containers. The property in goods (oxygen/gas) cannot pass to the customers without such containers. Therefore, containers constitute an integral part of the commodity in question.

[Para 4] [1185-B, C]

H

1.2. The cylinders together with its content namely gas/oxygen constitute 'goods'. Under the contract between the assessee and the customer, it was open to the customer to buy the gas cylinder or to borrow it on loan from the assessee. For the first 14 days the loan was free from payment of any charges. However, thereafter a fixed amount was levied by the assessee as a charge for over-retention. According to the impugned judgment the said charge for over-retention was in the nature of penalty imposed on the customer in order to dissuade the customer from retaining the cylinders. The assessee required empty cylinders to be returned so that the said cylinders could be refilled and sold/transferred by way of loan.

[Para 4] [1185-D, E, F]

1.3. When the goods (cylinder containing medical oxygen) were given on loan to the customer the transfer of the right to use the said goods came into existence. It may be that for the first 14 days the said loan is free from payment of any charges. However, exemption from payment would not militate against the concept of transfer of the right to use the goods.

[Para 4] [1185-F, G]

1.4. The High Court has failed to notice the provisions of Section 2(g)(iv) of the Orissa Sales Tax Act which states that the sale shall mean any transfer of property in goods for cash or defer payment or for any other valuable consideration and that it shall include transfer of the right to use such goods for any purpose, whether or not for specified period for cash, deferred payment or any other valuable consideration. It is important to bear in mind that Section 2(g)(iv) was placed on the statute in terms of Article 366(29A)(d) of the Constitution. [Para 4] [1185-G, H; 1186-A]

2. The cylinders in question filled with medical oxygen/industrial gas were loaned to the customers. The loan was free from payment of charges for 14 days. The over-retention charges were levied after 14 days. In the circumstances the levy was on the transfer of the right to use the goods for consideration. [Para 4] [1186-C]

*Aggarwal Brothers v. State of Haryana and Anr.*, [1999] 9 SCC 182, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6482 of 2001.

From the final Judgment and Order dated 21.09.2000 of the High Court of Orissa at Cuttack in S.J.C. No. 157 of 1996.

A Altaf Ahmed, A.S.G., Jana Kalyan Das and Avijeet Bhujabal for the Appellants.

Yashbant Das, Sr. Adv., Arvind Tiwary and Subhash Sharma for the Respondent.

B The Judgment of the Court was delivered by

C **KAPADIA, J.** (1) This civil appeal is directed against the judgment and order dated 21.9.2000 passed by the Orissa High Court in SJC No. 157 of 1996 holding that the consideration received by the manufacturer for over-retention of gas cylinders did not constitute 'sale price' as defined under Section 2(h) of the Orissa Sales Tax Act, 1947. According to the impugned judgment there was no transfer of right to use the cylinders and that the charge levied by the respondent-assessee for over-retention of the gas cylinders was in the nature of penalty, and therefore, the same did not form part of the sale price as defined in Section 2(h) of the 1947 Act. The impugned judgment has been D challenged by the Department.

(2) The short question which arises for determination in this civil appeal is whether there was transfer of the right to use the goods for consideration under the extended definition of the word 'sale' under Section 2(g) (iv) of the said 1947 Act which incorporates the concept of transfer of the right to use E any goods from Article 366 (29A)(d).

(3) The assessee was a registered dealer during the assessment year 1986-87. During that year it carried on business in manufacture and sale of medical oxygen and industrial gases by filling in cylinders. The assessee collected Rs.42,500 (approximately) from its customers during the aforesaid F year for over-retention of gas cylinders. The question before us is whether the said amount was includible in the sale price as defined under Section 2(h) of the said Act. In this connection we have examined the contract between the assessee and its customers. In clause 3 of the contract it was provided that the assessee shall deliver cylinders containing medical oxygen and collect G empty cylinders from the buyers after specified period of two weeks. Clause (iv) of the contract stipulated that the consumer/buyer (customer) shall deposit by way of security certain amount which would be refunded on termination of the contract. The said clause further stated that the return of the security deposited was subject to the customer returning the cylinder in good condition. Clause (v) of the contract provided that the cylinder was the property of the H assessee; that it was given on loan for 14 days free from payment of any

charges; that if the customers retained the said cylinders beyond the period of 14 days then the customer was liable to pay 0.50 paise per day in respect of each cylinder for certain number of days and thereafter Rs.2 per day. In the event of loss or damage of the cylinder the customer was required to compensate the assessee such loss in terms of the schedule mentioned in the contract. In terms of the said contract be stated above the assessee collected Rs.42,500 (approx.) during the year 1986-87 as charges for over-retention from its customers.

(4) We find merit in this civil appeal filed by the Department. Firstly, in the present case the commodity in question is medical-oxygen/industrial gases. The said commodity requires a container. The said commodity cannot be sold without the containers. The property in goods (oxygen/gas) cannot pass to the customers without such containers. Therefore, containers constitute an integral part of the commodity in question. The word 'goods' has been defined in Section 2(d) to mean all kinds of moveable property other than the actionable claims shares, security and stocks and include goods used in words "whether as goods or in some other form". Therefore goods do have what is called 'composite personality'. In the present case the said cylinders together with its content namely gas/oxygen constitute 'goods'. Secondly, it is not in dispute that under the contract in the present case it was open to the customer to buy the gas cylinder or to borrow it on loan from the assessee. For the first 14 days the loan was free from payment of any charges. However, thereafter a fixed amount was levied by the assessee as a charge for over-retention. According to the impugned judgment the said charge for over-retention was in the nature of penalty imposed on the customer in order to dissuade the customer from retaining the cylinders. The assessee required empty cylinders to be returned so that the said cylinders could be refilled and sold/transferred by way of loan. In our view when the said goods (cylinder containing medical oxygen) were given on loan to the customer the transfer of the right to use the said goods came into existence. It may be that for the first 14 days the said loan is free from payment of any charges. However, exemption from payment would not militate against the concept of transfer of the right to use the goods. Thirdly, in the impugned judgment the High Court has failed to notice the provisions of Section 2(g)(iv) which states that the sale shall mean any transfer of property in goods for cash or defer payment or for any other valuable consideration and that it shall include transfer of the right to use such goods for any purpose, whether or not for specified period for cash, deferred payment or any other valuable consideration. Lastly, it is important to bear in mind that Section 2(g)(iv) was placed on the statute

- A in terms of Article 366(29A)(d) of the Constitution. In the case of *Aggarwal Brothers v. State of Haryana and Anr.*, [1999] 9 SCC 182 a Division Bench of this Court has held that the provision under Section 2(1)(iv) of Haryana General Sales Tax Act, 1973 (which was similar to Section 2(g)(iv) of this Act) expressly spoke of “transfer of the right to use goods’ and not ‘transfer of goods’. In that matter it was argued on behalf of the assessee that in the case
- B of a deemed sale within the meaning of Section 2(1)(iv) there must be a legal transfer of goods. This arguments was rejected by this Court stating that the levy of tax was not on transfer of the goods itself but the levy was on the transfer of the right to use such goods for consideration. In our view, the judgment of this Court in *Aggarwal* case (supra) would squarely apply to the
- C present case. In the present case as stated above the cylinders filled with medical oxygen/industrial gas were loaned to the customers. The loan was free from payment of charges for 14 days. The over-retention charges were levied after 14 days. In the circumstances the levy was on the transfer of the right to use the goods for consideration.
- D (5) For the aforestated reasons, we set aside the impugned judgment and hereby allow the appeal with no order as to costs.

S.K.S.

Appeal allowed.