

CASE NO.:
Appeal (civil) 2809 of 2004

PETITIONER:
M/s Parle Biscuits (P) Ltd.

RESPONDENT:
The State of Bihar & Ors.

DATE OF JUDGMENT: 15/12/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Appellant (hereinafter referred to as 'dealer') calls in question legality of the judgment rendered by Division Bench of the Patna High Court holding that notification S.O. 154, dated 28.1.1985 issued under proviso to Section 13(1) of the Bihar Finance Act, 1981 (in short the 'Act') in relation to sale and purchase of packing materials, is applicable to the appellant, and Section 13(1)(e) of the Act inserted by Bihar Finance Amendment Act, 1985 (in short 'Amendment Act') w.e.f. 1.8.1985 did not render it inapplicable.

The background facts necessary for disposal of the appeal essentially are as follows:

Appellant is a company registered under the Companies Act, 1956 (in short the 'Companies Act') and is a dealer registered under the Act and the Central Sales Tax Act, 1956 (in short the 'Central Act').

It is a manufacturer of biscuits and started its manufacturing operation in the State of Bihar w.e.f. 1.4.2002. According to it, Parle Products Limited was its predecessor who was given benefit of concessional rate of sale tax of 4% on purchase of C.B. Boxes (also known as cardboard box or corrugated box) used for packing. The benefit of the concessional rate was given under Section 13(1) of the Act. However, it has been denied the benefit and has been asked to pay sales tax @ 10% on purchase of C.B. Boxes used for packing. The appellant had also applied to the Deputy Commissioner, Commercial Tax, Patna city, Patna praying for inclusion of packing materials made out of paper in column 13 of the Registration Certificate. The same was denied by the Deputy Commissioner by order dated 7.4.2003. Earlier packing material were exempted from sales tax as its sale price was not included in the "taxable turnover" as defined under Section 21(1)(c) of the Act. The said provision was amended w.e.f. 1.8.1985 and the provision with regard to non-inclusion of sale price on account of sale of packing materials in the taxable turnover was deleted. Section 13(1) of the Act was amended by adding Clause (e) which provided for concessional rate of tax with regard to sale and purchase by registered dealer of goods specified in the registration certificate issued under Section 14 of the Act, as required by him in or for packing of goods which he sells. As noted above, appellant applied for inclusion of all kinds of packing materials including packing materials made out of paper in the registration certificate against column no.13. The Deputy Commissioner by order dated 31.3.2002 accepted the prayer so far as it relates to packing materials such as plastics and polybags, gunny bags, gum tapes and adhesives, complaint slips, tin containers and pouches

but rejected the prayer for including packing materials made out of paper, such as cartons, corrugated boxes etc. Appellant thereafter filed application for inclusion of said items which was rejected, as noted above, by order dated 7.4.2003. It was indicated in the order that in view of the notification dated 28.1.1985 paper of all kinds is excluded from the operation of Section 13 of the Act. Appellant filed writ petition before the Patna High Court highlighting that its predecessor was granted concession. The notification dated 28.1.1985 cannot have any operation to rule out operation of Section 13(1)(e) of the Act. In any event, what the appellant wanted to include was "card board box" and what is excluded is "card board". Reference was made to an earlier decision of the High Court in Card Board Products vs. State of Bihar (1989 (73) STC 438) where it was held that "card board boxes" are different from "card board". It was also submitted that the expression 'carton' used in the notification also would not include the "card board boxes" as was held in the said case. Both the notification and Section 13(1) have to be read harmoniously and, therefore, the authorities were not correct in their view. Stand of the learned counsel for the respondents was that Section 13 of the Act provides for concessional rate of tax. Proviso to Section 13(1) indicates that the State Government may exclude any goods or class or description of goods from the operation of the Section. Accordingly, notification dated 28.1.1985 amending earlier notification dated 26.12.1977 was issued. By the said notification paper and other materials made out of paper were excluded from the operation of Section 13 of the Act. While other packing materials continued to enjoy the benefit of concessional rates as provided under Section 13(1)(e) of the Act, the same is not the case with those articles which are covered by the notification. Even if clause (e) in sub-section (1) of Section 13 is inserted subsequently i.e. on 1.8.1985, it will not supersede or affect the earlier notification. Reference was made to Section 21 of the Act which deals with taxable turnover and though sale of packing material for packing of goods used by the dealer prior to 1.8.1985 was exempted from payment of sales tax, the position was altered after 1.8.1985.

The High Court on consideration of rival submissions came to hold that clause (e) of sub-section (1) of Section 13 of the Act did not take away the effect of the notification issued earlier. There was nothing in Section 13(1)(e) of the Act which provided specifically that earlier notification shall not cover clause (e) of sub-section (1) of Section 13. Provisions of the notification are not inconsistent with the amending provision and there was nothing to show that the earlier notification was superseded. It was, therefore, held that the view taken by the authorities not to include packing materials made out of paper was correct.

In support of the appeal, Mr. S. Ganesh, learned senior counsel submitted that the High Court has failed to notice the distinction between "cardboard" and "cardboard boxes" which was clearly noted in Card Board Products case (supra). The entry which was considered in that case was identical to the one under consideration. The State having not questioned the correctness of the judgment made an impermissible departure in case of the appellant, particularly when several other dealers have been granted the benefit. It was submitted that the stand of the State presently taken that "cardboard boxes" would also be included in 'carton' has also been dealt with in Card Board Products case (supra) and the same has been negated.

The stand of the State that the entry at serial no.12 relates to "paper of all kinds" and cardboard boxes being made out of paper are also covered by the exclusion is not correct, because serial no.12 of the notification deals with paper of all kinds and paper products of the enumerated category. Stand of the State that papers of all kinds is included cannot be correct for the simple reason that had same been the intention, there was no necessity for enumerating various paper

products. The notification No.154 dated 28.1.1985 cannot be pressed into service to take out the effect of Section 13(1)(e) of the Act which was inserted subsequently.

Learned counsel for the State additionally submitted that the entry in the notification is intended to include paper of all descriptions and kinds. The definition is an inclusive one and that cannot mean that only paper products of the enumerated category were covered and not other products. No evidence was led to show that in common parlance "cardboard" and "cardboard boxes" are different commodities. No evidence relating to common parlance or understanding was filed before any authority. Words of the notification have to be understood taking into account the object for which the same was issued. The reasons for inclusion have been spelt out in the counter affidavit. Concessional rate of tax was never intended to be extended to paper and its products. Since policy is to protect trees, plants and forests, there was no intention to extend the benefits as claimed. Object is to encourage use of substitutes of paper as packing materials. Reliance on Card Board Products case (supra) does not further the petitioners' case because the points were not considered in the earlier case. Even if for the sake of argument it is accepted that "cardboard" and "cardboard boxes" are different commodities, "cardboard box" is clearly covered by the entry 'carton'. The decision in Card Board Products case (supra) was concerned with the cardboard boxes used for storage of explosives. With reference to Explosive Rules 1940, Explosive Rules 1983 and various other provisions on the fact of that case it was held that cardboard boxes are not covered by the expression "cartons". In the instant case, the cardboard boxes are used for packing biscuits. Therefore, the factual position is entirely different.

In order to appreciate the rival submission, a few provisions of the Act and the notification need to be noted. Sections 13 and 21 as originally enacted read as follows:

"Section 13. Special rate of tax on certain sales or purchases:-

(1) Notwithstanding anything contained in this part but subject to such conditions and restrictions as may be prescribed \026

(a) Sale of goods, for purpose other than re-sale or for use in manufacture of goods for sale, to State Government or Central Government or to a company, corporation or undertaking owned, financed or controlled wholly by such Government;

(b) Sales to or purchases by a registered dealer of goods required by him directly for use in the manufacture or processing of any goods for sale in Bihar or in the course of inter-State trade or commerce;

(c) sale of goods to a registered dealer required directly for use in mining, or to a person, company or undertaking holding registration certificate under the Bihar Electricity Duty Act, 1948 (Bihar Act XXXVI of 1948) required directly for use in the generation or distribution of electricity; and

(d) sales of machineries, tools, plants and

accessories thereof to a person firm, company, corporation or concern intending to establish a business in Bihar for the purpose of manufacturing goods for sale and in whose case the likely sale proceeds of such manufactured goods in expected to exceed the quantum specified in sub-section (1) of section 3 or for mining or generation and distribution of electricity;

and in respect of which the purchaser has been granted a certificate by the prescribed authority in the prescribed manner and for prescribed period shall unless the goods are taxable at a lower rate under Section 12 be subject to sub-section (2), leviable to tax at such rate as may be notified by the State Government in this behalf not exceeding 4 percentum:

Provided that the State Government may, from time to time by notification in Official Gazette, exclude any goods or class or description of goods from the operation of this Section.

Section 21. Taxable turnover:

(1) For the purpose of this part the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom \026

(a) sale price on account of sales exempted under Section 7.

(b) amount of sales tax actually collected as such, if any, along with the sale prices received or receivable in respect of sales of goods.

(c) sale prices on account of sales to a registered dealer other than a dealer liable to any tax under sub-section (4) of Section 11 and specified in his registration certificate as being required for resale by him inside Bihar or in course of inter-State trade or commerce for use in the packing of goods which he sells inside Bihar or in the course of inter-State trade or commerce.

Provided in that in the case of such sales a declaration in the prescribed form duly filled up and signed by the registered dealer to whom the goods are sold, or by his manager declared under Section 15 is furnished in the prescribed manner by the selling dealer.

(d) sale price at the subsequent stages of sales of such goods as are specified by a notification issued under sub-section (1) of Section 11 as being subject to tax at the first point of sale in Bihar, if

necessary evidence as required by sub-section (2) of Section 11, are produced in the prescribed manner before the prescribed authority."

By the 1985 amendment, Sections 13 and 21 were amended and the relevant amendments are as follows:

"Amendment of Section 13 of Bihar Act 5, 1981: In Section 13 of the said Act \026

(1) In sub-section (i) to clause (b) of sub-section (1) the words "in Bihar or in course of inter-State trade or commerce" shall be deleted.

(2) After clause (d) to sub-section (1) the following new clause shall be inserted, namely:-

"(e) Sales to or purchases by a registered dealer of goods specified in his registration certificate issued under Section 14 as required by him in the or for packing of goods which he sells."

"Amendment of Section 21 of Bihar Act 5, 1981: In the said Act, sub-section (1) of Section 21 -

(1) Clause "a)" shall be re-numbered as clause "(a)(ii)" and before this a new sub-clause shall be inserted as follows namely:-

"(a)(i) In case of works contract the amount of labour charges in the manner or to the extent prescribed."

(ii) In clause (c), after the words "trade or commerce" the comma "(,)" shall be substituted by a semi-colon " (;)" and the words "or for" use in packing of goods which he sells inside Bihar or in course of inter-State trade or commerce shall be deleted."

Entry 12 of the Notification No.S.O.154 dated 28.1.1985 reads as follows:

"12 \026 Paper (of all kinds) including Paste Board, Mill Board, Straw Board, Card Board, Blotting Paper, Cartridge Paper, Paper bags, packing paper, cartons, cards and Blank registers, Note books, Exercise books, Envelops labels, Letter pads, Writing tablets and flat files made out of paper."

Description of the goods as indicted in serial no.12 relates to "paper (of all kinds)" and inclusive definition in clear terms refers to certain paper products. Those which are relevant for our purpose are "cardboard" and "cartons". Had it been the intention to cover paper products of all kinds in the expression 'paper' there was no necessity for including definite paper products. At this juncture, it would be proper to note what the article "paper" means:

Dictionary meaning of "Paper" as given in various dictionaries is as follows:

Chamber's Dictionary \026 A material made in thin sheets as an aqueous deposit from linen rags esparto woods pulp other form of cellulose, used for writing and printing, wrapping and other purposes; sometimes extended to similar materials not so made, as papyrus, rice-paper; to the substance of which some wasps built their nests, to card board and even to tin foil, a piece of paper.

Oxford Dictionary \026 Substance used for writing, printing, drawing, wrapping up parcels etc. made of interlaced fibers of rags, straw, wood etc.

Webster's Dictionary \026 Paper. (ME Papire an Egyptian reed from the inner bark of which a kind of writing paper was made in ancient Egypt) A thin flexible material made in leaves or sheets from the pulp of rags, straw, wood or other fibrous material and used for writing or printing upon or for wrapping and various other purposes. A single piece, sheet or leaf of such material, smaller wrapper or card of paper usually including its contents; as a paper of pins; any material like paper, as papyrus.

In Encyclopaedia Britannica [Volume 13 (15th Edition)], "paper" has been defined as basic material used for written communication and the dissemination of information. Paper, the general name for the substance commonly used for writing upon or wrapping things in.

In Unabridged Edition of the Random House Dictionary of the English Language the word "paper" has been defined as "a substance made from rags, straw, wood or other fibrous material, usually in thin sheets, used to bear writing or printing on or for wrapping things, decorating walls etc."

Oxford Advanced Learners' Dictionary (Sixth Edn. Page 917)-

For writing/wrapping: (1) (Often in compounds) the thin material that you write and draw on and that is also used for wrapping and packing things a piece/sheet of paper a package wrapped in brown paper, recycled paper.

From the above definition it is clear that in popular parlance the word "paper" is understood as meaning a substance which is used for bearing writing or printing, or for packing or for drawing on, or for decorating, or covering walls. [See State of U.P. v. Kores India Limited, (1977) 39 STC 8]

McGraw-Hill Encyclopedia of Science & Technology (Volume 13, Page 75):

Many excellent sheet materials made from synthetic polymers, derived from petroleum or natural gas, have displaced paper for many uses. Some are available for printing and writing as well as packaging, but usually such materials are substantially more costly than paper which is manufactured from renewable resources.

The largest use for paper is in sheets of varied thickness, called paperboard, for packaging, followed by printing and writing papers and sanitary tissues. Substantial quantities of paper are impregnated with asphalt for use as roofing materials while other paper products are used as decorating materials, packaging materials, stamps, resin-impregnated laminates, and structural materials.

The Encyclopedia Americana (International Edition Page 261)

Paper: A matted or felted sheet of fibers \026 usually vegetable but sometimes mineral, animal, or synthetic \026 formed on a screen from a water suspension. The term paper" is specifically limited to lighter weight, thinner, more flexible sheets formed in this manner. Sheets

that are 0.012 inch (0.3 millimeter) or more in thickness, including Bristol board, container board, box-board, wallboard, and so forth, are classified as paperboard. Paper derives its name from papyrus, a sheet of writing material made in ancient times by pasting together sections of Egyptian sedge (Cyperus papyrus), a marsh plant.

In common parlance, the meaning is not different.

That brings us to the residual question as to whether "cardboard box" is covered by the Entry "cardboard". We find that this question was elaborately dealt with in Cardboard Products case (supra). While considering almost identical provision it was found as a fact that "cardboard box" is not the same as "cardboard". It is fairly accepted by learned counsel for the State that the decision was not challenged. We find that reasoning indicated in Card Board Products case (supra) to hold that "cardboard" is not synonymous with "cardboard box", suffers from no infirmity. An article of merchandise whenever used in a taxation statute must always be understood in common parlance and must be given its popular sense, meaning that since with which people are conversant and while dealing with the articles would attribute to it. The word "cardboard box" is not the term of an art. It is a commercial article to be understood in the sense that people dealing with such an article can understand it and would attribute to it in the common parlance.

Learned counsel for the State submitted that no evidence was led about common parlance and understanding. Reference was made to decisions in Parameswar Lal Bihani v. Commercial Tax Officer and Ors. (2000 (9) SCC 259) and State of Kerala v. V. Padmanabhan (2000 (9) SCC 262) to contend that when there is no evidence, the plain language has to be adopted. There is no quarrel with this proposition. But considering an almost similar Entry the Division Bench of the High Court had observed as in Card Board Products case (supra) that "cardboard" and "cardboard box" are commercially different products. Therefore, the plea taken that cardboard and cardboard box convey the same meaning is not correct.

It was submitted by learned counsel for the State that the legislative intent while adding new clause was never to extend concessional rate of tax on paper and its products. Since paper is made out of trees and plants it was the duty of the State Government and the Central Government to protect forest which now cover barely 13% of the land. With this legislative intent, paper and paper products were excluded from operation of sub-section(1) of Section 13 of the Act. This plea is not of any assistance to the State.

It is well-established that in a taxing statute there is no room for any intendment and regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption, it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here. In this connection we may refer to the observations of Lord Watson in Salomon v. Salomon & Co. (1897 A.C. 22, 38):

"Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodies in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be

done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

It is an application of this principle that a statutory notification may not be extended so as to meet a casus omissus. As appears in the judgment of the Privy Council in *Crawford v. Spooner*, 6 Mco. P.C.C. 8:

".....we cannot aid the legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there."

The above position was illuminatingly highlighted by a Constitution Bench of this Court in *Harsraj Gobardhandas v. H.H. Dave* (1969 (2) SCR 253).

Though it has been strenuously urged by learned counsel for the appellant that the notification dated 28.1.1985 cannot affect the exemption granted in terms of clause (e) of sub-section (1) of Section 13, the plea is clearly untenable. Section 27 of the Bihar and Orissa General Clauses Act, 1917 (in short the 'Bihar General Clauses Act') corresponding to Section 24 of the General Clauses Act, 1897 (in short the 'General Clauses Act') provides for "Continuation of Orders" etc. issued under Enactments repealed and re-enacted. According to the provision unless a different intention appears from the amended or re-enacted provision, the notification issued under the earlier enactment, if not inconsistent with the re-enacted provision shall continue in force and be deemed to have been issued under the re-enacted provision, unless and until it is superseded by issuance of fresh notification. It is true the Section does not speak of an amendment. But the provision is equally applicable in case of amendment. There is no real distinction between repeal and amendment. The latter is wider in terms and includes deletion or abrogation in existing statute. When the statutory provision is amended to a limited or a small extent then it is termed as amendment, and when the provision is extensively amended then it is called repeal. In that sense, after repeal there is re-enactment of the law. The above position was illuminatingly stated in *Bhagat Ram Sharma v. Union of India and others* (AIR 1988 SC 740).

It is a matter of legislative practice to provide while enacting an amending law that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between repeal and an amendment. This was noted in *Sutherland's Statutory Construction* (3rd Edn. Volume 1). There is nothing in Section 13(1)(e) of the Act which specifically provides that the earlier notification shall not cover the said provision. The provisions of the notification are not inconsistent with the amended provision and there is nothing in the amended provision to show that the earlier notification was intended to be superseded. In that view of the matter, effect of notification dated 28.1.1985 is not taken away by Section 13(1)(e) of the Act.

It is next to be considered whether item "carton" appearing at serial 12 of the notification would include "cardboard box". It is correct that in *Cardboard Products case* (supra) the Division Bench of the Patna High Court dealt with this issue. A bare reading of the judgment goes to show that the conclusion was drawn about cardboard boxes being not carton in view of particular factual background

specifically with reference to Explosives Rules 1940 and 1983. Therefore, in Card Board Products case (supra) it was factually found with reference to said Rules that the cardboard boxes to be sold for the purpose of containing explosives were not light pasteboard or cardboard box but strong cardboard box. Therefore, a factual determination is necessary.

"Carton" has been defined in various renowned dictionaries as follows:

The New Shorter Oxford English Dictionary (Volume I Page 344)

Carton A (1)(a): A light cardboard or pasteboard; a light container of waxed cardboard, plastic, etc. in which drinks and other foodstuffs are packaged. Cardboard, pasteboard, papier mache. (2) The disc within the bull's-eye of a target; a shot that hints this.

Words & Phrases Permanent Edition Volume 6 (Page 347)

"By 'cartons' * * * we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents."

The carton in which gloves and hosiery are placed is a box or cover in which the goods are contained, within the meaning of Act March 3, 1883, § 7, 22 Stat. 523, repealing the law imposing a duty on the usual box or covering of imported goods. *Oberteuffer v. Robertson*, 6 S.Ct. 462, 470, 116 U.S. 499, 29, L.Ed. 706.

Oxford Advanced Learner's Dictionary (Sixth Edition Page 179)

(1) A light cardboard or plastic box or pot for holding goods, especially food or liquid; the contents of a carton; a milk carton/a carton of milk-picture at packaging; (2) a large container in which goods are packed in smaller containers: a carton of cigarettes.

There cannot be universal application of any rigid standard for determining the question and has to be decided on the factual background of each case. This has not been done. The type of cardboard box which was used for packing the product of the appellant has to be seen. Therefore, we think it appropriate to direct the Deputy Commissioner of Sales Tax to consider the question whether the cardboard box used by the appellant fits in with the definition of "carton" taking into account the product which is packed. For this purpose, the appellant shall be granted opportunity to substantiate its plea that the cardboard boxes used by it are not factually covered by the entry "cartons".

Appeal is disposed of accordingly. No costs.