

(1955) 04 OHC CK 0014
In the Orissa High Court
Case No : O.J.C. No. 60 of 1952

B.C. Patel and Co.

APPELLANT

Vs

Sales Tax Officer and Another

RESPONDENT

Date of Decision : 12-04-1955

Acts Referred:

Constitution of India, 1950 — Article 286
Orissa Sales Tax Act, 1947 — Section 4, 4(1), 4(2)

Citation : AIR 1955 Ori 172 : (1955) 21 CLT 339 : (1956) 7 STC 221

Hon'ble Judges : Panigrahi, C.J.;Narasimham, J

Bench : Division Bench

Advocate : Mohanti and M.N. Das, for the Appellant; S.B. Mohapatra and G. Dhal, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, J.—This is a petition under Article 226 of the Constitution by a dealer in kendu leaves against the orders of the Sales Tax Authorities assessing him to sales tax in respect of sales which took place for the five quarters ending on 30-9-49, 31-12-49, 30-6-1950, 30-9-50 and 31-12-50.

2. The petitioner's business headquarters is admittedly at Pallahara which was formerly one of the feudatory States of Orissa which merged with the Province of Orissa by the well-known Merger Agreement on 1-1-48. The facts found were that the petitioner sent kendu leaves to various merchants of Calcutta, Madras and other places on receipt of orders from them and that the goods were sent either F. O. R. Calcutta and sale prices realised by sending the bills to the purchasers for payment. Admittedly, the goods were delivered for consumption at various places outside the State of Orissa.

3. Of the five quarters for which sales tax was assessed, two quarters ending on 30-9-49 and 31-12-49 relate to the period prior to the commencement of the Constitution and the remaining three quarters relate to the period after the commencement of the Constitution. In view of the restrictions imposed by Article

286 of the Constitution on the power of a State to levy sales tax on transactions or sale involving inter-State elements, the two periods will be discussed separately.

4. Pre-Constitution period: The Orissa Sales Tax Act (hereinafter referred to as the Act) was passed by the Legislature in 1947 and came into force in the "old Province of Orissa" sometime during that year. After the merger of Pallahara State with Orissa, the Government of Orissa as the delegated authority of the Central Government and exercising powers u/s 4, Extra Provincial Jurisdiction Act applied the Orissa Sales Tax Act, 1947 to the former Orissa States including Pallahara State by Notification No. 20306/States dated 14-12-1948.

The only modification in the Act that was made while so applying the Act to Orissa States was to substitute the words "Orissa States" for the words "Province of Orissa" wherever they occurred in the Act. The commencement clause (Section 1(3)) of the Act is as follows:

"This section shall come into force at once and the rest of this Act shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint."

Hence, by merely applying the Act to Orissa States all the sections of the Act would not at once come into force in Orissa States and for that purpose a separate notification was necessary. Consequently, the Government of Orissa issued a fresh notification in Finance Department No. 2267-F. dated 1-3-1949 to the following effect:

"In exercise of the powers conferred by Sub-section (3) of Section 1, Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947) as applied to Orissa States, the Government of Orissa are pleased to appoint the 1st day of March 1949 as the date on which Sections 2 to 29 of the said Act shall come into force."

Hence, though Section 1 of the Act came into force in Pallahara State on 14-12-1948 the remaining sections of the Act came into force only on 1-3-1949. Those sections alone deal with the liability of a dealer to pay sales tax, the machinery for collection of the tax, and all other ancillary matters. Unless those sections come into force the Act cannot be made operative at all and hence the date of the commencement of the Act in Pallahara State should "be held to be 1-3-1949 and not 14-12-1948 bearing in mind the definition of the expression "commencement" as given in Section 2(8), Orissa General Clauses Act, 1937 (Orissa Act I of 1937).

5. The charging section of the Act is Section 4 and Sub-sections (1) and (2) of that section which are relevant for the present discussion may be quoted in full.

"4(1). Subject to the provisions of Sections 5, 6, 7 and 8 with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after, the date of the said notification, every dealer whose gross turnover during the year immediately preceding the

commencement of this Act exceeded Rs. 5,000, shall be liable to pay tax under the Act on sales" effected after the date so notified.

(2) Every dealer to whom Sub-section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000."

The expression "year" has been defined in Section 2(j) of the Act as meaning "financial year" i.e. 1st April to 31st March of the next year. The scheme of the Act was to tax certain classes of dealers in respect of transactions of sale which took place after the commencement of the Act, But in determining the class of dealers liable to pay sales tax their gross turnover during the year preceding the year of assessment was taken into consideration.

Thus in the old Province of Orissa the Act came into force sometime in August 1947. But the liability for payment of sales tax did not arise immediately after that date. For that purpose a separate notification under Sub-section (1) of Section 4 was necessary. By the express provisions of that sub-section at least thirty days" interval should elapse between the date of the commencement of the Act and the date from which transactions of sale would be liable to assessment.

Consequently, the Government issued a notification (Finance Department No. 6378-C. T. -41/47-F. dated 30-8-1947) to the following effect:

"In exercise of the powers conferred by Sub-section (1) of Section 4, Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947) and in supersession of the notification of the Government of Orissa in Finance Department No. 5599-F. dated 28-7-1947, the Governor of Orissa is pleased to appoint 30-9-1947 as the date with effect from which every dealer whose gross turnover during the year ending 31-3-1947, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date."

Hence, so far as the old Province of Orissa was concerned, by virtue of the aforesaid notification transactions of sale after 30-9-1947 were liable to sales tax and in determining what classes of dealers were liable to such assessment, their turnover for the previous financial year i.e. 1-4-1946 to 31-3-1947 was taken as the relevant factor and if the turnover for that period exceeded Rs. 5,000 those dealers were liable to pay sales tax.

It is true that during the period from 1-4-1946 to 31-3-1947 the Act was not in force in the Province of Orissa; but this is immaterial. The transaction of sale that was being taxed was the transaction which took place after the commencement of the Act and if for the purpose of determining the class of dealers liable to assessment the turnover for a period prior to the commencement of the Act was taken as a guide it would not make the Act retrospective so as to affect its validity.

Thus transactions of sale from 30-9-1947 to 31-3-1948 would be assessable by

virtue of Sub-section (1) of Section 4.

6. Sub-section (2) of that section, however, would come into play if it is found that the gross turnover, of a dealer during the year 1-4-1946 to 31-3-1947 is below Rs. 5,000. Such a dealer would not be liable to pay any sales tax in respect of transactions of sale from 30-9-1947 to 31-3-1948 because during the preceding financial year his turnover did not exceed the prescribed limit.

But if during the financial year 1-4-1947 to 31-3-1948 his gross turnover exceeded Rs. 5,000 he would be liable to pay sales tax for transactions of sale effected in the next year, i.e. from 1-4-1948 to 31-3-1949 by virtue of Sub-section (2) of Section 4. It will thus be seen that the two sub-sections are mutually exclusive and a person who is liable to pay tax under Sub-section (1) of Section 4 cannot be assessed under Sub-section (2) of that section.

7. In, applying the aforesaid reasoning's to the present case some difficulty arises chiefly because the commencement of the Act for the purpose of Pallahara should be held to be 1-3-1949. A dealer of Pallahara was not liable to pay sales tax in respect of transactions of sale effected immediately after that date. That liability arose only from such date as may be prescribed in the notification issued under Sub-section (1) of that section and the Act required a minimum interval of thirty days.

Consequently, the Government of Orissa issued the following Notification No. 2269-F. dated 1-3-1949.

"In exercise of the powers conferred by Sub-section (1) of Section 4, Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947) as applied to Orissa States, the Government of Orissa are pleased to appoint 31-3-1949, as the date with effect from which every dealer whose gross turnover during the year ending 31-3-1949 exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date."

This notification fixed 31-3-1949 as the date from which sales tax shall be assessed in Pallahara. This date unfortunately happened to be the end of the financial year 1947-48. The result is that the dealers' liability for assessment arose only in respect of transactions of sale effected during the financial year 1949-50.

But in determining whether a particular dealer came under the class liable to pay assessment or not, Sub-section (1) of Section 4 expressly stated that his gross turnover during the year "immediately preceding the commencement of the Act" should atones be taken into account. The commencement of the Act in Pallahara was 1-3-1949 and financial year "immediately preceding that date" would be the period from 1-4-1947 to 31-3-1948.

Hence, though a dealer of Pallahara was liable to pay assessment in respect of transactions of sale effected after 1-4-1949, yet in determining whether he came under that class of dealers who were liable to pay sales tax, his gross turnover

for 1947-48 alone was required to be considered. His turnover for 1948-49, namely 1-4-1948 to 31-3-1949 could not be taken into account because that period was not the year "immediately preceding the commencement of the Act" within the meaning of Sub-section (1) of Section 4.

8. Mr. Mohanty on behalf of the petitioner contended that for the period from 1-4-1949 till the commencement of the Constitution on 26-1-1950, the petitioner would have been liable to pay sales tax provided a valid notification had issued under Sub-section (1) of Section 4. He, however, urged that the Notification No. 2267-F. dated 1-3-1949 was, invalid inasmuch as it referred to the year ending on 31-3-1949 as the year immediately preceding the commencement of the Act.

It has already been shown that the said year would be the financial year ending on 31-3-1948 and not the 31-3-1949. This argument seems to be sound. The notification is clearly defective and does not conform strictly to the requirements of Sub-section (1) of Section 4.

Though it is dated 1-3-1949 which was undoubtedly the date of the commencement of the Act, yet it referred to the year ending 31-3-1949 as the year "immediately preceding the commencement of the Act" which is obviously absurd.

Hence I must hold that the said notification is ultra vires the powers conferred on the Government by Sub-section (1) of Section 4 and invalid. As the petitioner's liability for assessment arose only after the issue of a valid notification under Sub-section (1) of Section 4 it is obvious that he cannot be held liable to sales tax in respect of transactions of sale which took place from 1-4-1949.

9. Mr. Dhal on behalf of the Department, however, urged that though Sub-section (1) may not help the Department Sub-section (2) of Section 4 would become applicable by virtue of that sub-section. He urged that by virtue of that sub-section the petitioner whose gross turnover for the year 1948-49 was admittedly above Rs. 5,000 was liable to pay tax in respect of transactions of sale effected during the year 1949-50. This argument, however, overlooks the opening words of Sub-section (2) of Section 4 which are to the following effect;

"Every dealer to whom Sub-section (1) does not apply,,,..."

Therefore, if Sub-section (1) does apply to a particular dealer, resort cannot be had to Sub-section (2) for the purpose of assessing that dealer. Sub-section (1) deals with the liability to pay tax in respect of transactions of sale effected during a financial year for the period commencing after the expiry of thirty days from the date of the commencement of the Act till the end of that financial year.

This period would for the old Province of Orissa, be the period from 1-10-1947 till 31-3-1948. But in Pallahara State this period would necessarily be in the financial year 1949-50, inasmuch as the period of thirty days required for a valid notification under Sub-section (1) of Section 4 of the Act expired at the end of the financial year during which) the Act was brought into force in that State.

Hence, the financial year after the expiry of such period of thirty days is from 1-4-1949 to 31-3-1950 and liability for sales tax for transactions, of sale effected during that period would arise only under Sub-section (1) of Section 4.

Sub-section (2) of Section 4 would apply in respect of transactions of sale effected during a period for which Sub-section (1) would not be applicable; that is to say, for the period from 1-4-1950 to 31-3-1951.

The mere fact that due to the invalidity of the notification issued under Sub-section (1) of Section 4 the petitioner was lucky to escape assessment in respect of transactions of sale effected from 1-4-1949 till 31-3-1950 would not justify the inference that for that period Sub-section (2) should be deemed to apply. As already pointed out, the period for which Sub-section (1) is meant to apply cannot be taken to be the period of which Sub-section (2) may be applied if for other reasons a dealer escapes assessment under Sub-section (1).

10. I must, therefore, uphold the contention of Mr. Mohanti that for the quarters ending on 80-9-1949 and 31-12-1949 the petitioner escapes liability due to the invalidity of the notification issued u/s 4(1) of the Act.

11. Mr. Mohanti also raised an interesting argument to the effect that during this period there was no completed sale of goods but there was only a contract for sale and that such a contract could not be, assessed to sales tax in view of the decision of the Supreme Court in -- Poppatlal Shah Vs. The State of Madras, . It is, however, unnecessary to decide in the present petition whether on the facts found there was a completed sale within the meaning of the Sales of Goods Act in pallahara or a mere contract for sale.

12. Post-Constitution Period: I now take up the liability for assessment in respect of transactions of sale which took place after the commencement of the Constitution. The Orissa Sales Tax Act, 1947 was amended by Orissa Act 24 of 1950 so as to conform to the provisions of Article 286 of the Constitution. Clause (1) of Article 286 prohibited a State from taxing a sale unless such sale took place within the State as explained in the Explanation to that clause of the Article.

Similarly Clause (2) of that Article restricted the power of a State to tax a sale which took place in the course of inter-State trade or commerce. Doubtless, by virtue of the proviso to that clause an order by the President may save taxation on such inter-State sales till 31-3-1951. The recent decision of the Supreme Court reported in -- The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, has settled the law regarding the true scope of these two clauses of the Article.

Where a transaction of sale involves interstate elements if the goods are delivered for consumption in a particular State that State alone can tax the sale by virtue of Clause (1) of that Article and by a legal fiction that sale becomes "intra-State sale". Clause (2) of Article 286 applies to those transactions of sale involving, inter-State elements which do not come within the scope of Clause (1)

of that Article. On the admitted facts of the present case Clause (1) of Article 286 would apply.

The sales involve inter-State elements inasmuch as the buyers are outside Orissa, price is paid outside Orissa and goods are delivered for consumption outside Orissa. Hence, by virtue of Clause (1) of Article 286 as explained by their Lordships of the Supreme Court, the State of Orissa is not competent to tax such transactions of sale. Clause (2) of Article 286 will not be of any help to the Department.

The President's Order under the proviso to that clause would save only those classes of sales in the course of inter-State trade or commerce which do not come within the scope of Clause (1) of that Article (see the recent decision of the Allahabad High Court reported in -- Kanpur Oil Mills Harriesganj Vs. Judge (Appeals) Sales Tax, Kanpur Range, Kanpur and Others, . Hence, it must be held that for the period after the commencement of the Constitution the petitioner was not liable to pay sales tax by virtue of Clause (1) of Article 286 of the Constitution.

13. The net result is that the assessment for the entire period must be held to be invalid. The prayer of the petitioner is therefore allowed and the assessment order cancelled. He should get costs of Rs. 150/-.

Panigrahi, C.J.

14. I agree.