

(1983) 02 MAD CK 0048

In the Madras High Court

Case No : T.C. No's. 1397 of 1977 and 196 of 1978 (Appeal No. 99 of 1977 and Revision No. 35 of 1978 respectively)

Blue Star Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 21-02-1983

Acts Referred:

Central Sales Tax Act, 1956 — Section 4, 4(2), 5(1), 5(2), 5(3)

Citation : (1984) 56 STC 172

Hon'ble Judges : P. Shanmugam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : K.J. Chandran, for Subbaraya Aiyar, Padmanabhan and Ramamani, for the Appellant; K.S. Bakthavatsalam, Additional Government Pleader, for the Respondent

Judgement

Shanmukham, J.—The question involved in both the tax cases is the same relating to the same assessee in respect of two assessment years, viz., 1970-71 and 1973-74 respectively, hence, a common judgment.

2. T.C. No. 1397 of 1977 : This is an appeal against the order of the Board of Revenue which exercising suo motu power u/s 34, set aside the order of the Appellate Assistant Commissioner who allowed exemption in respect of turnover for Rs. 1,18,865 holding that the same represented sales in the course of import and restored the order of the assessing officer. The appeal is thus directed against the inclusion of Rs. 1,18,865 as taxable turnover on rejection of the assessee's claim for exemption on the ground that they are sales in the course of import.

3. The Board of Revenue reached its conclusion on the following facts as culled out from its order : (1) In all the five cases in respect of which exemption is claimed, the goods were imported from Germany by the assessee and then sold to the local buyers, though the goods were imported after orders were obtained by the assessee from local buyers. (2)(a) There is no stipulation in the contracts

with the local buyers that the goods should be imported from the foreign country. (2)(b) One of the local buyers in his letter dated 30th July, 1969, requested the assessee to supply them with one Brusting Strength Tester DP. 30 with usual accompaniments and in that letter, there is no stipulation that the supply should be made only from any foreign country. (2)(c) In the letter dated 28th August, 1969, the assessee had written to the manufacturers in Berlin referring to the order placed already indicating at the bottom of the said letter the local buyer, viz., Madras paper Converters Industry. (3)(a) The foreign exporter has raised the invoice in the name of the assessee. (3)(b) So far as Hydraulics Limited, they had specifically stated that they do not have any licence and that the assessee shall arrange to get the machine and supply it to them. (4) In all these cases, the assessee did not possess any import licence and the import licence stood in the name of Project Equipment Corporation of India. (5) The contract for import was between the assessee and the foreign seller in Germany and it is this contract which had occasioned the import; consequently, there were two sales based on two separate contracts.

4. T.C. No. 196 of 1978 : This is a revision by the assessee aggrieved against the order of the Tamil Nadu Sales Tax Appellate Tribunal, which negated the assessee's contention that the sales in respect of seven transactions aggregating to Rs. 1,36,005 are those held in the course of import, but held that they were local sales exigible to sales tax. It must be pointed out here that besides the above exemption, the assessee claimed exemption in respect of a sum of Rs. 2,346 on the ground that the latter related to sales returns relating to the assessment year 1972-73 but claimed in the assessment year 1973-74; but this point was not pressed by the learned counsel for the assessee. Therefore, the only disputed turnover before us is Rs. 1,36,005.

5. The facts relied on by the Tribunal are : (1)(a) It cannot be said that the machine supplied to the customer is the one specifically ordered for him in the purchase order. (1)(b) The transactions would not fall within the ambit of K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, Subsequent decision in the case of Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, would apply to all these transactions, and therefore, they were not eligible for exemption. (2) In almost all these cases, the goods had been imported not against the actual user's licence held by the customers, but only on the basis of the recommendatory certificates issued by the Project Equipment Corporation of India which is a wing of State Trading Corporation of India. (3) The goods had been imported after the actual users' orders, but not by the actual users' licences. (4)(a) There was no privity of contract between the local buyers and the foreign seller and the movement of the goods from the foreign country was not occasioned on account of the actual user's licence, but only against the orders placed by the assessment with the foreign seller. (4)(b) In the case of Amaravathi Sri Venkateswara Paper Mills, the documents show that the assessee had sold the machinery from out of the stock held by it after import and as such, it is not a sale in the course of import, but only a sale from out of the stock held

by the assessee. It is necessary to state here that this factual basis is disputed by the assessee (see ground No. 10).

6. The common question to be determined is whether in the circumstances of the case, the sales for Rs. 1,36,005 and Rs. 1,18,865 were sales in the course of import falling within the ambit of section 5(2) of the Central Sales Tax Act or not. Section 5(1) and (2) runs thus :

"5. (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

Sub-section (3) is not relevant for our purpose, because it was inserted by Act No. 103 of 1976 and came into effect from 1st April, 1976.

7. This provision was subject to judicial interpretations and it is therefore useful to take note of the principles laid down therein. It is in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, that the Supreme Court laid down the ratio thus :

"The phrase 'sale in the course of export' comprises in itself three essentials : (i) that there must be a sale, (ii) that goods must actually be exported, and (iii) the sale must be a part and parcel of the export. Therefore either the sale must take place when the goods are already in the process of being exported which is established by their having already crossed the customs frontiers, or the sale must occasion the export. The word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. Read in this way the sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export. The export results from the sale and is bound up with it. The word 'course' in the expression 'in the course of' means 'progress or process of', or shortly 'during'. The phrase expanded with this meaning reads 'in the progress or process of export' or 'during export'. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two, for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export for the export begins from the intermediary and ends with the importer."

It is useful to remember that practically, there is no difference between sub-

section (1) and sub-section (2) as to their effect that the former concerns the export, while the latter the import, and therefore the principles laid down by their Lordships of the Supreme Court in the above case are applicable to sub-section (2) as well.

8. The above principle was reiterated by the Supreme Court in *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, and it is noteworthy to notice the facts in that case, (a) There was no privity of contract between DGS & D and the foreign sellers. (b) The foreign sellers did not enter into any contract by themselves or through the agency of the petitioner to DGS & D. (c) The movement of goods from foreign countries was not occasioned on account of the sales by the petitioner to DGS & D. (d) Though under the contract DGS & D undertook to provide all facilities for the import of the goods for fulfilling the contract including an import recommendation certificate, there was no absolute obligation on DGS & D to procure these facilities. (e) It was the obligation of the petitioner to obtain the import licence. (f) The movement of the goods in the course of import was occasioned by the contracts of sale by the petitioner with DGS & D.

9. A Full Bench of this Court in which the leading judgment was rendered by one of us in *Deputy Commissioner of Commercial Taxes v. Vasantha Mills Ltd.* [1976] 38 STC 366 had only followed the ratio of the Supreme Court in *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, and reiterated that there is no question of two sales coming within the scope of section 5(1) and is only an export sale, i.e., a sale between an exporter and the foreign buyer that will come under the definition of "sale" in the course of import and all other sales even if inter-connected or integrated with the export cannot be treated as sales in the course of import. We have already pointed out that the principles governing the export do apply *mutatis mutandis* to sales in the course of import. Incidentally, it is necessary to notice that the decision of this Court reported in *State of Tamil Nadu v. Cauvery Spinning and Weaving Mills Ltd.* [1974] 33 STC 506 was overruled by the Full Bench cited *supra* and that the decision of this Court in *State of Tamil Nadu v. Roy Amin and Company Private Ltd.* [1974] 33 STC 586 to which one of us was a party, must be treated as impliedly overruled, because the sale by the assessee to the local buyers of the same consignment of chemicals imported by the assessee from the foreign seller on the orders placed with the assessee by the local buyers, was held to be a sale in the course of import. It is pertinent to notice that no particular reasoning was indicated in that decision.

10. Indeed, in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, it was found as a fact that the importer was the agent of the foreign seller at Belgium. It was on that finding, it was held in that case that the sale was in the course of import. So too, in the recent decision of a Division Bench of this Court in *Minerals and Metals Trading Corporation of India Ltd. v. State of Tamil Nadu* [1983] 52 STC 85, the sale was held to be in the course of import on the finding that the MMTC only played the part of an agent for import and that there

was no sale or resale by the MMTC of the goods to the allottees. This Division Bench had noticed another decision of the Supreme Court in *Murarilal Sarawagi and Others Vs. The State of Andhra Pradesh*, where the Supreme Court from the facts on record held that there was a sale by the assessee of the minerals to the MMTC and that the MMTC in turn exported the commodity to the foreign purchaser; in that view, the court treated the MMTC as the last purchaser in that State and that the assessee before them was not the last purchaser.

11. From the foregoing precedents, we find, two principles are well settled : (1) Where two sales are involved in the integrated transactions resulting in the import, section 5(2) of the Central Sales Tax Act will never be attracted and (2) Unless the intermediary who actually imports, is held to be the agent of either the actual users or the foreign seller, there can be no privity of contract between the actual users and the foreign seller. In either case, it is not possible to hold that the sale or purchase occasioned the import. Indeed, the learned counsel for the assessee, conscious of the legal position, submitted that in the circumstances of the case, the assessee only acted as agent of the actual users. Here, we add that the learned counsel for the assessee conceded that the assessee is neither an agent of the foreign seller nor that of PEC.

12. In the course of argument, the learned counsel for the assessee filed a typed set containing two agreements. One dated 19th November, 1973, while the other dated 3rd October, 1975. It is relevant to notice that the agreement was placed before the Appellate Tribunal as can be seen from the following reference in paragraph No. 7 of its order :

"Hence, it was submitted that the copy of the agreement between the State Trading Corporation of India of which the Project Equipment Corporation is a wing and the appellant-company had indicated that the licence obtained from the Project and Equipment Corporation of India should be used to import the equipment and the goods so imported should be delivered to the actual users to whom release orders had been issued by the Project and Equipment Corporation of India."

In our view, the covenants contained therein, far from supporting the assessee, do emphasise that the contract between the assessee and the foreign seller has nothing to do with the assessee's contract in turn with the actual consumers. Therefore, besides the facts found by the authorities whose respective orders are challenged, we have taken into consideration some of the clauses contained in the agreement dated 19th November, 1973 : the clauses in the second agreement are almost identical to those in the first agreement. According to clause 2(i), the Project and Equipment Corporation of India (hereinafter referred to as PEC) will obtain the necessary import licence for the import of the goods from the licensing authorities in its own name with letters of authority in favour of the assessee to enable the assessee to import the goods from the assessee's principals in GDR. Clause 2(iii) provided that PEC will as far as possible inform the various essentially certifying authorities about the goods to be IMPORTED BY

THE ASSESSEE and wherever possible will give the assessee necessary trade introductions to enable the assessee to sell the goods to actual users and that PEC reserves the right to nominate users to whom the assessee will give priority in selling the goods. Clause 2(iv) stipulates that PEC will, if called upon to do so, assist the assessee in securing expeditious delivery to ensure the smooth fulfilment of the assessee's contract with its foreign suppliers. Again, in clause 3, sub-clause (i), there are the following covenants, viz., (a) to facilitate the expeditious import, the assessee will conclude the contract with its foreign buyers direct and settled terms of payment and schedule of delivery and that the contract of the foreign suppliers will be finalised by the assessee only after receipt of intimation from PEC that import licences had been issued by the licensing authority for the goods; (b) according to clause 3, sub-clause (iii), to facilitate sales to actual users, the assessee will put one advertisement every quarter from the date of receipt of import licence of minimum 6 x 2 column inches in at least three leading English and vernacular newspapers at the assessee's cost and the advertisement shall indicate the items which the assessee is importing and the ceiling selling margins allowed to the assessee by PEC on the ex-godown port prices, as also the fact that the goods are available only to actual users. It is also provided in clause 3 that the goods imported under this contract will be sold to the actual users whose requirements have been certified essential by the competent authorities and after obtaining release orders in writing from PEC and also such release orders will be issued by PEC as soon as possible after an application in writing is made. There are also the following covenants :

"If the assessee is required by the actual user to install and erect the machine, the assessee will settle the charges directly with the actual user and will indicate these charges in the quotations to him in advance. Similarly, if the actual user requires delivery f.o.r. destination, charges for transportation, transit insurance, etc., from the port of disembarkation to destination at actuals can be levied in addition. Sales tax and other local taxes, if applicable, can be charged extra

Show room facilities will be provided by the assessee. The assessee will also guarantee for a period of one year satisfactory performance of the goods supplied by the assessee to the actual users. This guarantee will cover only latent and patent defects due to manufacturing faults, bad workmanship or the use of poor or wrong material.

The responsibility for the sale of the goods will be entirely yours as also for their storage and custody. For this purpose the assessee will ensure that the goods shall be the assessee's responsibility, the assessee will also ensure that the goods being imported are much as will present no difficulty in expeditious disposal in the Indian Market. The PEC will not be responsible in any manner if the goods, for any reason whatsoever, remain unsold for any length of time."

Above all, in the opening part of the contract, the following is shown as the subject : "Arrangements for the import, stocking and selling of metal testing

machines from GDR to actual users only." The foregoing covenants by themselves positively suggest the following : (1) The assessee is given a special privilege of importing the goods on its own responsibility, but with a liability to sell the goods to actual users to be named by PEC. (b) Though the contracts were made by the assessee with the foreign seller after the assessee had obtained orders from the actual consumers, yet PEC had the unfettered right to nominate the actual users to whom the assessee shall give priority in selling the goods. (c) There is an obligation on the part of the assessee to maintain a show room and to keep the imported machine in the show room and to keep the imported machines till PEC named the actual users. (d) There was also a duty cast on the assessee to guarantee the goods so imported so far as the actual users are concerned. (e) PEC will not be responsible in any manner if the goods for any reason whatsoever remained unsold for any length of time. (f) The contract in general related not only to import but also to stocking and selling of metal testing machines from GDR to actual users only. All these considered with the facts set out in the opening part of our judgment in our view clearly establish that the import is necessitated only because of the contract between the assessee and the foreign seller and has nothing to do with the sales between the assessee and the actual users. To put it differently, the transactions envisage two sales : (i) between the assessee and the foreign seller and (ii) between the assessee and the actual users. Then, there can be no escape in holding that the disputed sales are not sales in the course of import as visualised u/s 5(2) of the Central Sales Tax Act. We may add, so far as the appeal is concerned, the facts referred to in paragraph No. 3 themselves will rule out the possibility of the assessee having acted as agent of the actual users.

13. However, the learned counsel for the assessee submitted that in the circumstances of the case, it has to be held that the assessee only acted as agent of the actual users. In our opinion, the circumstances extracted above would not warrant any such conclusion. By way of emphasis, we have to repeat that the circumstances that the actual users did not hold the import licence, that the assessee had to stock machineries in its godown and that the assessee shall have no claim as against PEC if such imported machines could not be sold for any length of time, do dispel the theory of agency between the assessee and the actual users. Of course, the learned counsel for the assessee emphasised on the fact that in all these cases, PEC did not exercise, its unilateral discretion embodied in clauses 2 and 3 referred to in the agreement, but then the imported machines were delivered to the actual users who placed orders with the assessee even before the assessee placed orders with the foreign seller. But, there is a fallacy in the said argument, because what is relevant is the intention of the parties as expressed in the contract, but not the events that took place subsequently. It might be that there was such a coincidence but that will not lead to the conclusion that the assessee was acting as an agent of the actual users. This disposes of the assessee's contention based on section 5(2) of the Central Sales Tax Act.

14. The other alternative contention made by the learned counsel for the assessee is that in any event, these sales shall be deemed to have taken place outside the State within the meaning of section 4 of the Central Sales Tax Act. In this context, the learned counsel for the assessee placed emphasis on the fact that pursuant to the orders placed by the actual users, the goods were appropriated by the foreign seller in Germany and such sales shall be deemed to have taken place outside the Tamil Nadu State and therefore not exigible to tax. The learned counsel called to his aid the decision of a Division Bench of this Court reported in *Bengal Corporation Private Limited v. State of Madras* [1965] 16 STC 62. We find in the circumstances of the case, there is no real basis for such a contention and we give below the reasons : (1) Notwithstanding that the assessee placed orders with the foreign seller on the strength of contracts entered into between itself and the actual users and further that in some of the assessee's contracts with the foreign seller, the names of actual users were shown at the bottom, an unilateral decision vested with PEC to call upon the assessee to deliver the goods to some other actual users. (2) There is no evidence in this case that in the contract between actual users and the assessee, the former placed any specification of the machine it indented for, nor is there any evidence that the goods supplied by the foreign seller was manufactured in accordance with such specification.

15. In such cases, there can be (no) scope for the contention that there was appropriation of the goods within the meaning of section 4 of the Central Sales Tax Act. Indeed, in the decision relied on by the learned counsel, Ramamurti, J., in his leading judgment had observed thus :

"The conditions of the contract in the instant case provide for the inspection of the materials during all the stages of the manufacture of the goods in London. The goods are to be manufactured in accordance with the specifications set out in the Schedule. The contract also provides for the cast number being stamped in each piece or in metal tags attached to each bundle. The goods shipped were specific ascertained goods answering the description and conforming to the terms and conditions of the contract and the shipment itself takes place only after those specific ascertained goods were appropriated. The test certificate must accompany each consignment and looked at from any point of view section 4(2)(a) or (b) will have no application to the instant case. The conclusion necessarily follows that the sale is an outside sale outside the State of Madras."

Those facts are totally absent in this case, and therefore, the said decision does not really support the assessee. Thus even this alternative ground fails.

16. In the result, we uphold the order of the Board of Revenue in the appeal and that of the Appellate Tribunal in the revision before us and dismiss both the tax cases. The revenue will have its costs (one set) Rs. 500.