

(1991) 10 MAD CK 0086

In the Madras High Court

Case No : T.C. No. 683 of 1981 (Appeal No. 28 of 1981)

Century Flour Mills Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2

Citation : (1991) 10 MAD CK 0086

Hon'ble Judges : Mishra, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : V.P.A. Abdul Hakkim, for the Appellant; R. Karuppan and D. Srinivasan, Additional Government Pleaders (Taxes), for the Respondent

Judgement

Mishra, J.—We concluded hearing of this case on February 7, 1991, i.e., on a Thursday, on which day we constituted a tax Bench and ordered to list the case for judgment to be delivered in court on February 11, 1991, i.e., Monday. The change of the portfolio of the judges of the court, however, separated us and thus we could assemble only today.

We have accordingly afforded a further hearing to the learned counsel for the parties and proceeded to deliver our judgment in court.

2. The assessees, who were assessed to tax under the Tamil Nadu General Sales Tax Act (1 of 1959), hereinafter referred to as "the Act", have moved in appeal against the order of the Commissioner for Land Revenue and Commercial Taxes, who exercised the suo motu revisional power of the Board of Revenue (at the relevant time this power was preserved with the Board of Revenue; the law has, however, since been amended and the power has been given to the Commissioner, Commercial Taxes) reversed the order of the Appellate Assistant Commissioner and held with respect to sales of wheat bran and other wheat products during the assessment year 1973-74 that they are liable to tax.

3. With respect to wheat bran and other wheat produce, the commodity

concerned, the assessee's case has been that they had no saleable interest in the goods as per the agreement with the Tamil Nadu Civil Supplies Corporation, hereinafter referred to as "the Corporation", under which agreement, inter alia, they only acted as custodian of the goods, the sale transaction being between the Corporation and the dealers to procure such products on permits issued by the Corporation. It will be useful, however to extract the agreement in full to appreciate whether the appellants acted as a seller and thus were dealers liable to tax under the Act. The agreement reads as follows :

"Letter of agreement by flour mills.

We agree to function as an agent of the Tamil Nadu Civil Supplies Corporation for the sale of wheat bran subject to the following terms and conditions :

I. (1) We will hold the stocks taken over by the Tamil Nadu Civil Supplies Corporation on their behalf. We shall be responsible for the stock.

(2) We shall sell the stocks specifically authorised for sale on behalf of the Tamil Nadu Civil Supplies Corporation to traders in cattle-feed at Rs. 48 per quintal inclusive of sales tax and surcharge on sales tax or such prices as may be specified from time to time.

(3) We agree to receive a service charge of Re. 1 (rupee one only) per quintal of bran from the Tamil Nadu Civil Supplies Corporation in respect of these sales.

(4) We shall not sell more than seven tonnes to a dealer out of the present release. We shall sell bran only to cattle-feed dealers who possess registration certificate under the Tamil Nadu General Sales Tax Act.

(5) We shall note down in the bills the registration certificate number under the Tamil Nadu General Sales Tax Act and the full name and address of the dealer to whom bran is sold.

(6) We shall also obtain the acknowledgement of the dealer for the stocks sold. If the dealer does not personally acknowledge, we will deliver to his representative, only on production of proper authorisation from the dealer.

(7) We shall remit to the Tamil Nadu Civil Supplies Corporation the sale price of Rs. 48 per quintal less the service charge of Re. 1 only. This remittance shall be made once a week by means of bank draft in favour of the Tamil Nadu Civil Supplies Corporation with a statement of account showing the sales during the week ending Saturday.

II. (1) We shall deliver to holders of permits issued by the Commissioner of Civil Supplies/City Supply Officer, Deputy City Supply Officers/District Supply Officers (duly endorsed by the Tamil Nadu Civil Supplies Corporation for delivery from our mills) on collection of costs with reference to the issue price specified in the permit and remit the amount to the Tamil Nadu Civil Supplies Corporation.

(2) We agree to receive a service charge of rupee one per quintal in respect of

these sales.

(3) We shall deliver the quantity of bran/flakes specified in the permit. We shall note down in the bills the number and date of the permit and the designation of the authority issuing the permit. We shall also write down the name and full address of the permit holder to whom bran is sold, in the bills.

(4) We shall also obtain the acknowledgment of the permit holder or his representative for the stocks sold. If the permit holder does not personally take delivery but deposes a representative we shall effect delivery to the representative only on production of an authorisation from the permit holder to deliver stocks to the representative.

(5) We shall remit to the Tamil Nadu Civil Supplies Corporation once a week ending Saturday the amount due to the Tamil Nadu Civil Supplies Corporation.

III. We agree to receive payment for the stocks taken over by the Tamil Nadu Civil Supplies Corporation by adjustment against the remittance of sale proceeds.

IV. We shall abide by any directions that will be issued by the Commissioner of Civil Supplies or the Tamil Nadu Civil Supplies Corporation including modification of the terms and conditions indicated in this letter. The Tamil Nadu Civil Supplies Corporation will be free to modify the terms of the agreement or terminate it with fifteen days' notice."

4. The assessing officer noticed the case of the appellants in this behalf in these words :

"In the same way the dealers produced the copy of the agreement with the Tamil Nadu Civil Supplies Corporation on the proceedings of the Commissioner of Civil Supplies, Chepauk, Madras, in his RC. No. E2/777072/72CS dated May 25, 1973, according to which the entire sales of bran was sold only on account of and on behalf of the Tamil Nadu Civil Supplies Corporation and the dealers received only service charges of Re. 1. There was no transfer of property involved between the Tamil Nadu Civil Supplies Corporation and the Century Flour Mills Ltd. Hence this sales of Rs. 17,90,857.20 will also be exempt from tax."

5. While exercising suo motu revisional power, the Board observed :

"On scrutinising the assessment record, it was observed by the Board that the assessing officer has allowed deduction of a turnover of Rs. 17,90,857.20 as relating to sales of wheat products said to have been made by the assessee on behalf of the Tamil Nadu Civil Supplies Corporation Limited. The assessing officer has observed in his order dated October 15, 1975, that according to an agreement entered into by the mill with the Tamil Nadu Civil Supplies Corporation Limited the mill acted only as an agent of the Corporation. He has further observed that according to the proceedings issued by the Commissioner of Civil Supplies in R.C. No. E2/777072/72CS dated May 25, 1973, the entire sales were effected only on behalf of the Corporation and that the mill received

Re. 1 per quintal, as service charges. In this view, the assessing officer concluded that there was no transfer of property from the Corporation to the mill and that therefore the turnover of Rs. 17,90,857.20 has to be deducted. It was, however, observed from the record that the mill had not adduced any proof to establish that there was no transfer of property in the wheat products from the Corporation to the mill and how it was not liable even if it had acted as agent. Apart from that, admittedly it was the mill that had effected the sales to the wholesale dealers and had collected the sale proceeds. Even if the mill had acted as an agent of the Corporation yet according to the provisions of the Act it was liable to pay tax on the sales. The entire sale proceeds realised by the mill were remitted to the Corporation in accordance with the agreement entered into. According to the definition of the term "dealer" in section 2(g) of the Act, an agent of the principal is also a dealer liable to pay tax. The only requirement is that the same turnover should not be taxed at the hands of the principal and the agent. The Board therefore was provisionally of the view that the Joint Commercial Tax Officer, Rattan Bazaar Assessment Circle, was not correct in allowing deduction on the turnover of Rs. 17,90,857.20."

The Board accordingly issued notice to the assessee and after giving an opportunity of being heard, concluded :

"For the purpose of liability under the Tamil Nadu General Sales Tax Act both the principal and the agent are considered as dealer and are liable to tax. Accordingly to the definition of the term "dealer" in section 2(g) of the Act, it includes the agent also. The agent is liable to pay the tax as far as the department is concerned even in respect of the turnover relatable to the principal. Such principal-agent relationship are quite common in respect of a large number of goods where a manufacturer appoints one or two dealers as sole selling agents and such agents effected sales on behalf of the principal and rendered accounts to the principal. In all such cases, the agents are liable to pay tax and the turnover will be eligible for deduction at the hands of the principal. Even commission agents selling goods on behalf of agriculturists are liable to pay tax on the sales of the goods effected on behalf of the agriculturists, even though the products if sold by the agriculturists would be exempted from tax. This is by virtue of the inclusive definition of the term "dealer" in section 2(g) of the Act. The agreement between the parties, i.e., Corporation and the mill, by which the Corporation undertook to pay the tax is not germane or relevant for the purpose of liability of the mill itself. As far as the department is concerned, the turnover at the hands of the mill even though it might have acted as an agent of the Corporation is liable to tax. The assessing officer, was therefore not correct in excluding the turnover from the taxable turnover."

6. Since this case has been admitted to hearing and has been heard by us at length we are required to go into the contentions. Otherwise the findings aforequoted, if not found incorrect it is difficult to find any escape from the conclusion as above, on the facts, as we have already noticed, as well as the law

that has since been amended from time to time. The definition of the word "dealer" at the relevant time in section 2(g) of the Act read :

"2. Definition. - In this Act, unless the context otherwise

requires, - (g) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes -

(i)

(ii) a casual trader;

(iii) a commission agent, a broker or a del credere agent, or an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal."

The terms and conditions of the agreement extracted above show that (1) the Corporation appointed the appellants as agents to function as agents for the sale of wheat products; (2) the appellants agreed to sell the stocks specifically authorised for sale on behalf of the Corporation to traders in cattle-feed at a specified rate per quintal inclusive of sales tax and surcharge on sales tax or such prices as may be specified from time to time; (3) for the above the appellants agreed to receive service charge of Re. 1 per quintal from the Corporation in respect of these sales; and (4) the appellants shall remit to the Corporation the sale price per quintal less the service charge.

7. There is no other agreement on the record except for wheat bran. It, however, has to be presumed that there were similar conditions for other products also otherwise the appellants would have brought evidence on the record to show that they had no such agency as contemplated in the agreement aforequoted with respect to other wheat products. The conditions above lead to only one conclusion that the appellants acted as commission agent of the Corporation. Thus as a dealer the appellants became liable to tax on goods sold to other persons.

8. This Court, however, while considering as to whether a commission agent would be a dealer liable to tax said in the case of Tiruchengode Co-operative Marketing Society Limited v. State of Tamil Nadu [1978] 41 STC 212 that unless it is found that the assessee had the authority to transfer the property in the goods and which show that he had dominion over the goods, the assessee would not be liable to tax. The above observations, however, were made in a case in which the following facts were established :

"The stock was received by the co-operative marketing society from its members and placed for auction. The sale was knocked down in favour of the highest bidder and when only agreed upon by the seller, i.e., the agriculturist, the sale was declared. The auction was conducted only in the presence of the agriculturist

(member) and the buyer. The commodity tendered was weighed or measured and sales chit was prepared which contained details of tenderer, his address, quantity tendered for sale, name of the buyer, rate of sale, total amount of sale proceeds, deductions such as advances, commission towards handling and other charges, if any, and the net amount due to the agriculturist-member. A copy of this chit was handed over to him at the time of payment. The receipt issued by the co-operative marketing society (assessee) at the time of the receipt of the agricultural produce contained a condition that the assessee had no authority to sell the goods without the consent of the member and that the goods are sold only when the agriculturist-member accepted the price offered."

On somewhat similar facts, the Madhya Pradesh High Court in *Karelal Kundanlal Trust v. Commissioner of Sales Tax* [1980] 46 STC 202 observed :

"..... it is difficult to hold that the assessee was carrying on the business of buying, selling, supplying or distributing the goods on behalf of the cultivators. The assessee made available his fad to the cultivators for stocking their goods. The assessee helped them with his technical knowledge of the market. The assessee had no dominion over or custody of the goods. The sale was by the cultivators themselves who accepted the bids of the buyers. The goods were removed by the buyers from the fad. The assessee recovered the price from the buyers and paid over the same to the cultivators after retaining the commission. These facts do not bring the assessee within the definition of "dealer"."

A learned single Judge of this Court in *Ramasamy Goundar Sons v. Deputy Commercial Tax Officer* [1990] 77 STC 58 said :

"The facts of the case before me are identical with the facts of the cases dealt with in the aforesaid decisions. The petitioner had absolutely no hand in the sale of the goods stored in his godown by the cultivators, who themselves sold the goods to the highest bidder in the auction held in the premises of the Erode Turmeric Merchants" Association. The petitioner is not, therefore, a "dealer" within the meaning of section 2(g) of the Act and is not liable for assessment of sale tax."

9. We have no reason to take any different view than the one expressed by a Division Bench of this Court in the case of *Tiruchengode Co-operative Marketing Society Limited* [1978] 41 STC 212 or in *Karelal Kundanlal Trust* case [1980] 46 STC 202 or in the judgment of the learned single Judge of this Court in *Ramasamy Goundar Sons*" case [1990] 77 STC 58; but the difference lies in the facts of those cases and the case in hand. Those were cases in which one cannot find such allegations that could show that the assessee could be called commission agents, brokers or del credere agents or auctioneers or any other mercantile agents. They never had the authority to sell the goods. In other words, the principals, that is to say, the agriculturists themselves sold the commodities. They never treated the assessee as their commission agents, or allowed the assessee to act as commission agents. The instant case is one in

which it is not at all necessary to examine whether there was any authority to transfer the property in goods with the appellants or not for, this is not in dispute at all. They had the authority to transfer the property in goods to the buyers and that authority had been given to them by the Corporation. It is also not a case to go into any details to find out whether the assessee had the dominion over the goods or custody of the goods so as to sell the goods to the buyers. Such custody and the authority to sell to the buyers is clearly spelt out in the agreement itself. It is, therefore, clearly a case of the assessee being a commission agent of the Corporation.

10. Since during the relevant period the appellants were the commission agents of the Corporation they fully satisfied the definition of a "dealer" as in section 2(g) of the Act. They, therefore, for the purposes of realisation of the tax had the same liabilities as the principal.

11. Learned counsel for the appellants, however, has drawn our attention to a specific term of the agreement that they were required to remit to the principal (Corporation) the amount of tax realised from the buyers. In this regard our attention has also been drawn to a communication from the Commissioner, Civil Supplies, dated May 25, 1973, which stated, inter alia, that "the sales tax (at the stage of sale to traders by the flour mills on behalf of the Corporation) will be paid by the Tamil Nadu Civil Supplies Corporation to the Commercial Tax Department". This shows that there has been a mutual agreement or understanding that after sale the agent, i.e., the appellants would remit the tax collected to the principal, i.e., the Corporation and that the Corporation would pay the tax to the Commercial Tax Department. We have no information and there is no material on the record for any such inference that the Corporation has paid tax on the impugned turnover. If the Corporation has paid tax on the impugned turnover it is obvious that the Revenue cannot realise taxes twice over. Having once realised from the principal they cannot proceed to realise tax from the agent. It is, however, not possible in this case, in the absence of any material on the record, to hold that the Revenue has realised taxes on the impugned turnover both from the principal, i.e., the Corporation and the agent, i.e., appellants. The agreement aforequoted and the communication of the Commissioner (Civil Supplies) referred to above, are nothing but a sort of a contract between the appellants on the one hand and the Corporation on the other. If it is proved that the appellants had remitted the tax collected from the buyers to the Corporation and the Corporation failed to pay such taxes collected to the Revenue, the Corporation committed a breach of contract. The appellants shall be, if the facts are not otherwise, entitled to recover the amount of tax remitted in case the Revenue realised such tax from them, from the Corporation. This, however cannot mean that the Board of Revenue has committed any error in holding as above and deciding the exigibility of the goods sold by the appellants and the liability of the appellants to pay the tax upon such turnover.

12. Having found as above, we have no hesitation in dismissing the appeal. But

we have a feeling that the Revenue should have been careful in picking up the principal instead of the commission agent in the instant case for the realisation of the tax. Since upon our judgment the matter shall again be in the hands of the Revenue, we observe that it would find out whether the Corporation has realised the tax from the buyers and if it has realised the tax from the buyers and the appellants do not hold the money, it would realise the tax from the Corporation (principal) instead of the appellants.

13. With the observation as above, the appeal is dismissed. No costs.

14. Appeal dismissed.