
(1971) 08 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 72 of 1968

Commissioner of Income Tax

APPELLANT

Vs

Bijoy Kumar Das

RESPONDENT

Date of Decision : 25-08-1971

Acts Referred:

Income Tax Act, 1922 — Section 10(2)

Citation : (1972) 84 ITR 351

Hon'ble Judges : G.K. Misra, C.J.; B.K. Patra, J

Bench : Division Bench

Advocate : A.B. Misra, for the Appellant; S.C. Mahapatra, (amicus curiae), for the Respondent

Judgement

G.K. Misra, C.J.—The following question has been referred by the Income Tax Appellate Tribunal (hereinafter to be referred to as "the Tribunal") u/s 66(1) of the Indian Income Tax Act, 1922 (11 of 1922) (hereinafter to be referred to as "the Act"):

"Whether, on the facts and circumstances of the case, the inclusion of the amount of sales tax debited by the assessee to the purchase account and in view of the admission made by the assessee regarding the true nature of the sum of Rs. 18,592, the Tribunal was justified in not considering the amounts as part of the sale proceeds ?"

2. The question has not been properly expressed to bring out the controversy in issue as would be indicated hereafter.

3. Facts have been very clearly put in the statement of the case drawn up by the Tribunal. They may be stated in short.

4. The assessee is an individual and during the relevant period was an unregistered dealer. The assessment year is 1959-60, for the accounting year ending with March 31, 1959. During the accounting year the assessee had obtained selling agency of Messrs. Hindusthan Motors Ltd. for sale of cars and

spare parts at Berhampur in the district of Ganjam. He had realised a sum of Rs. 18,592 from his customers. The sales tax so realised was credited to a separate account and was shown on the liabilities side of the balance-sheet at the end of the year. Admittedly, there was no payment of sales tax to the State of Orissa in the accounting year.

5. The stand of the assessee before the Income Tax Officer was that as he was an unregistered dealer he had to pay sales tax on the purchases made and the same was debited by him to the purchase account. The Income Tax Officer in the assessment order remarked that no regular account had been maintained by the assessee. He accordingly made an addition of Rs. 18,592 to the gross profit shown by the assessee. An appeal by the assessee before the Appellate Assistant Commissioner (hereinafter to be referred to as "the Commissioner") was dismissed. The Commissioner held that the assessee did not pay the sales tax in the accounting year.

6. In second appeal, the Tribunal recorded the following finding :

"The recovery of sales tax is a tax within the meaning of the sales tax laws of Orissa and it cannot, in any way, be a part of the profit of the assessee nor the assessee is the absolute owner of it. On the contrary, he is merely a collecting agent of the Government and thus it is a clear liability."

7. It is on this question of law arising out of the Tribunal's order that the reference has been made.

8. The sole question for consideration in this case is whether the sum of Rs. 18,592 realised by the assessee as sales tax constitutes a trading receipt to be included within the total income of the assessee during the relevant accounting year and whether the same should be debited in determining the taxable income despite non-payment of the tax during the accounting year.

9. A correct answer to the aforesaid question of law necessitates an examination of the following points :

(i) Is sales tax an integral component of the sale price ?

(ii) Is sales tax a trading receipt ?

(iii) Is the character of sales tax as a trading receipt altered if it is shown separately in the transaction of sale ?

(iv) If not, does the liability of the assessee to pay sales tax to the State or to refund money to the purchasers affect its initial and intrinsic character as a trading receipt ?

(v) Is sales tax deductible as business expenditure from the total income to determine the taxable income when in fact it has not been paid to the State or refunded to the purchasers in the accounting year ?

Point No. (i) :

The relevant accounting year ended with March 31, 1959. The definition of "sale price", "turnover" and "taxable turnover", as it stood then, may be extracted :

"2. (h) "Sale price" means amount payable to a dealer as valuable consideration for-

(i) the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including Any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged; or.....

2. (i) "Turnover " means the aggregate of the amounts of sale prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract effected or made during a given period.

5. (2)(A) In this Act, the expression " taxable turnover " means that part of a dealer's gross turnover during any period which remains after deducting therefrom--.....

(b) any amount by way of tax realised by the dealer." Sales tax is not excluded from the definition of "sale price". What is excluded is specifically given in the definition. Sales tax passes from the purchaser to the dealer as a part of the consideration. "Sale" in the Sales Tax Act is to be construed in the same sense as in the Indian Sale of Goods Act (see *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* [1968] 9 S.T.C. 353:[1959] S.C.R. 379)."Consideration" has not been defined either in the Sales Tax Act or in the Sale of Goods Act. In Section 2(10) of the Sale of Goods Act "price" means the money consideration for a sale of goods. Section 2(15) of that Act says that expressions used but not defined in that Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in the Contract Act. When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise (section 2(d) of the Contract Act). Sales tax is a part of the consideration paid by the purchaser to the dealer in the transaction of sale and is part of the sale price.

10. Mr. Mohapatra places strong reliance on the definition of turnover" and contends that as "turnover" means the aggregate of the amounts of sale prices and tax, sales tax is not included in the sale price and does not constitute a part of the consideration.

11. The definition of "turnover" prior to its amendment by the Orissa Sales Tax (Amendment) Act, 1950, (Orissa Act 24 of 1950), stood thus:

" "Turnover" means the aggregate of the amounts of sale prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract, effected or made during a given period."

12. The expression "and tax, if any" was added by the amendment Act of 1950. If turnover means the aggregate of sale prices which includes sales tax within its ambit, the expression "and tax, if any" is redundant and the legislature should take the earliest opportunity of deleting those words. The original definition is perfectly in consonance with the definition of sale price. This expression does not occur in the definition of "turnover" in any other State in India excepting Orissa.

13. Thus sales tax which is a part of the sale price is included in the gross turnover and is deductible from the same to determine the taxable turnover.

14. On a purely elementary analysis of the aforesaid statutory definitions there is no escape from the conclusion that sales tax is included within the sale price.

15. This view is also concluded by high authorities. In *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, their Lordships of the Supreme Court observed thus:

"From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the sale of goods. The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which by the express provisions of the law is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise."

16. The aforesaid passage clearly shows the character of sales tax as an impost and how the responsibility to pay the same is of the seller which he might pass on to the buyer.

17. It was held in *George Oakes (P.) Ltd. Vs. State of Madras*, that sales tax is a part of sale price :

"Under the definition of turnover the aggregate amount for which goods are bought or sold is taxable. This aggregate amount includes the tax as part of the

price paid by the buyer. The amount goes into the common till of the dealer till he pays the tax. It is money which he keeps using for his business till he pays it over to Government. Indeed, he may turn it over again and again till he finally hands it to Government. There is thus nothing anomalous in the law treating it as part of the amount on which tax must be paid by him. This conception of a turnover is not new. It is found in England and America and there is no reason to think that when the legislatures in India defined "turnover" to include tax also, they were striking out into something quite unknown and unheard of before." (page 488).

18. The same view was reiterated in *George Oakes (Private) Ltd., Addison and Co. (Private) Ltd. and Rane (Madras) Ltd. Vs. State of Madras*, , in the following language :

"The word "price", in so far as the purchaser is concerned, includes the tax also, and that in laws dealing with sales tax, turnover has, in England and America also, been held to include the tax. The reason for such inclusion is stated to be that the dealer who realises the tax does not hand it over forthwith to Government but keeps it with him, and turns it over in his business before he parts with it. Thus, the tax becomes, for the time being, a part of the circulating capital of the tradesman, and is turned over in his business. Again, it was said that the price paid by the purchaser was not so much money for the article plus tax but a composite sum. Therefore, in calculating the total turnover, there is nothing wrong in treating the tax as part of the turnover, because " turnover " means the amount of money which is turned over in the business."

19. Apart from an elementary analysis arising out of the statutory definition, the aforesaid Supreme Court decisions are conclusive that sales tax is included in the sale price. It is an integral part of the consideration paid. The dealer does not in usual course of business part with the goods unless the price inclusive of the sales tax is paid. On receipt of sales tax as part pf the price, it becomes a part of the trading capital of the dealer which is turned over in the business again and again until the same is paid.

20. Mr. Mohapatra places strong reliance on *Commissioner of Income Tax Vs. Shiv Nath Prasad*, in support of his contention that sales tax does not constitute a part of the sale price. This case is wholly distinguishable on facts. Therein it had been conceded on behalf of the department before the Tribunal that the amount of sales tax when collected by a dealer did not become his income liable to tax immediately on receipt thereof and became his taxable income only when the dealer did not make payment thereof to the Government in the relevant accounting year. The question as to whether the amount of sales tax when received by the assessee was liable to tax or not was never agitated before the Tribunal and was not allowed by the High Court to be canvassed as it was not a point of law arising out of the appellate order. This case establishes no principle contrary to our view.

21. We would close up the discussion on the first point by saying that sales tax is included in the sale price.

22. Point No. (ii):

The next question is whether sales tax is a trading receipt. A receipt is a trading receipt and income if it is earned or received by the assessee in course of business or trade.

23. It was contended by Mr. Mohapatra that the tax realised is either to be paid to the State or to be refunded to the purchasers if sales tax is not exigible in law and as such it does not constitute a trading receipt or income. Reliance is placed on MORLEY (INSPECTOR OF TAXES) Vs. TATTERSALL, in which the Court of Appeal made the following observations:

"I invited the junior counsel to point to any authority which in any way supported the proposition that a receipt which at the time of its receipt was not a trading receipt could, by some subsequent operation, ex post facto be turned into a trading receipt, not, be it observed, as at the date of receipt, but as at the date of the subsequent operation. It seems to me, with all respect to that argument, that it is based on a complete misapprehension of what is meant by a trading receipt in Income Tax law. No case has been cited to us in which anything like that proposition appears. It seems to me that the quality and nature of a receipt for Income Tax purposes is fixed once and for all when it is received."

24. The facts of that case are that the profits of a firm of auctioneers mainly consisted of commissions on the sales of horses. One of the conditions of sale was : "No money paid, or remittance sent by post, without a written order." During a long period, owing to the fact that several sellers of horses failed to claim the balances of purchase moneys due to them, large unpaid balances had been accumulated by the firm. By a clause in the articles of the existing partnership deed it was provided that all unclaimed balances existing on December 31 in the year of account as first arose six years previously should be transferred to the credit of the partners in the proportions to which on December 31 in the year of account they were entitled. By another clause it was provided that, notwithstanding any transfer of such unclaimed balances, all liability subsisting in reference to the balances should continue to be borne by the partnership. By an additional assessment, the firm was assessed to Income Tax in respect of the unclaimed balances transferred to the current account of the partnership in a particular year. The firm contended that the unclaimed balances did not at any time become profits or trading receipts, but were always to be considered as liabilities, for the statute of limitations did not apply to the case.

25. It was in those facts and circumstances it was held that the unclaimed balances were not trading receipts. The unclaimed balances were held by the firm of auctioneers on behalf of the sellers of horses. The amount was held by way of trust and, in whatever way the same may be entered in account, they cannot be construed as trading receipts in the hands of the assessee.

26. Reliance is also placed by Mr. Mohapatra on *Bijli Cotton Mill (P.) Ltd. Vs. Commissioner of Income Tax*, There the assessee was a manufacturer of yarn. Under the then existing arrangements governing the supply of yarn to the market, a number of dealers were selected and were granted a specific quota of yarn to be supplied by the manufacturers which they sold in the market. These dealers came to be known as "quota-holders". Subsequently, the arrangement was modified. The manufacturers were now required to sell their stocks directly to wholesale dealers with the result that the quota holders were excluded altogether. In order to prevent the hardship thus caused to the quota holders an order dated 13th September, 1945, was made by the Textile Commissioner requiring the manufacturer to recover from the wholesale dealer the wholesale price of the yarn at the controlled rate and to pay to the quota-holders, to whom it would have originally sold the yarn, that part of the sum which represented the excess over the ex-mill price, the sale being "for this purpose deemed to have been made by the manufacturer on behalf of the quota-holders". The amounts representing the margin of profits due to the quota-holders were credited to an account called the "quota-holders margin account". Whenever amounts from this account were paid to the quota-holders, they were debited to the said account. At the end of 1951, the assessee's account showed a balance of Rs. 36,318. On 21st of December, 1952, the assessee transferred this balance of Rs. 36,318 to the credit of its profit and loss account for the year 1952. In the assessment proceedings for the assessment year 1953-54, the Income Tax Officer treated this amount of Rs. 36,318 as the income of the assessee liable to tax. Their Lordships held that the income was not liable to tax and for good reasons. If at the inception a part of the price belonged to the quota-holders the subsequent circumstance that the quota-holders had long since dissolved and none of them were forthcoming to claim that amount due to them, would not alter the character of the money received by the assessee. From the very moment of receipt, that part never belonged to the assessee and always belonged to the quota-holders. From the very outset, the excess over the ex-mill price to which the quota-holders were entitled was impressed with the character of trust money to be held by the assessee on behalf of the quota-holders. This was not a trading receipt to be included in the total income.

27. In the case before us sales tax was received by the dealer as a part of the consideration. He did not hold the same either on behalf of the purchasers or the State. Even without collection of sales tax the dealer was liable to pay sales tax. The receipt of sales tax as an integral part of the sale price was in the course of trading or business. The amount constitutes a part of the price relatable to the contract. The receipt is directly and intimately connected with the sale transaction. Sales tax is levied on sales and purchases made by the traders and not on profits or gains made by them from business. It is payable irrespective of any profits being earned and without such payment the business of buying and selling cannot be carried on. Thus, it is a trading receipt and is incidental to and integrally connected with trading activity.

28. As a trading receipt it would be included in the total income and as a liability it would constitute a part of the trading expenditure deductible from the total profits or income.

29. As far as we have been able to see there is no dissentient voice on this question (See Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, ; BADRI NARAYAN BALAKISHAN Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH., ; BADRI NARAYAN BALAKISHAN Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH., ; Travancore Titanium Products Ltd. Vs. Commissioner of Income Tax, Kerala, ; CHHATRASINHJI KESARISINHJI THAKORE Vs. COMMISSIONER OF Income Tax, BOMBAY CITY II., IKRAHNANDI COAL CO. Vs. COMMISSIONER OF Income Tax, CALCUTTA., , COMMISSIONER OF Income Tax WEST BENGAL Vs. CHOWRINGHEE SALES BUREAU P. LTD., and Commissioner of Income Tax Vs. Royal Boot House, .

30. Some of these cases may be noticed. The facts in Punjab Distilling Industries Ltd. v. Commissioner of Income Tax may be stated in short. The assessee's trade consisted in selling bottled liquor produced in its distillery to wholesalers. The sale was made on these terms : In each transaction of sale the assessee took from the wholesaler in addition to the price of the liquor, a certain sum fixed by the Government as price of the bottles in which the liquor was supplied and a further sum described as security deposit for the return of the bottles. The moneys taken as price of the bottles were returned as and when the bottles were returned. The moneys described as security deposits were also returned as and when the bottles were returned with only this difference that in this case the entire sum taken in one transaction was refunded when 90 per cent. of the bottles covered by it had been returned, though the remaining 10 per cent. had not been returned. The object of demanding and taking additional sums as security deposits was obviously to provide additional inducement for the return of the bottles to the distiller so that its trade in selling the produce of its distillery might not be hampered for want of bottles. No time limit had been fixed within which the bottles had to be returned in order to entitle a wholesaler to the refund, nor had a refund ever been refused.

31. On these facts their Lordships held that the amounts paid to the assessee and described as "empty bottles return security deposit" were trading receipts and, therefore, income of the assessee, assessable to tax. In realising these amounts the company was really charging an extra price for the bottles. The trade consisted of bottled liquor and the consideration for the sale was constituted by several amounts, respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the assessee would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and, therefore, a part of the price of what was sold. They were part of the transactions of sale of liquor which produced the profit and therefore had a profit making quality.

32. In Chhatrasinhji Kesarisinhji Thakore v. Commissioner of Income Tax, the

facts were these. Under the Bombay Local Boards Act 6 of 1923, the State Government was authorised to levy, on the conditions and in the manner described, a cess at the rate of three annas on every rupee. A holder of alienated land had therefore in addition to the land revenue to pay a local fund cess at the rate of three annas on the land revenue assessed on the land. Under the terms of the lease with the syndicate it was stipulated that the syndicate shall pay all taxes, rates, assessments and impositions of a public nature. The effect of the covenant was that the syndicate would reimburse the assessee for local fund cess and other taxes paid by him. The local fund cess paid for the two villages demised by the assessee was Rs. 270.45 being $\frac{3}{16}$ th of Rs. 1,222.92, the amount of land revenue assessed on the lands. But, the amounts paid by the syndicate for the two years in question considerably exceeded the local fund cess payable in respect of the lands. The syndicate believed that it was liable to pay to the assessee under the indenture of lease cess computed at the rate of three annas on a rupee of the amount of rent and royalty.

33. On those facts their Lordships held that the rent and royalty under the mining lease were income taxable under the Act, and an amount which was paid under a covenant which directly related to the payment of rent and royalty would also be taxable income. The assessee did not purport to collect the local fund cess on behalf of the State Government, nor did the syndicate pay the amount to him as an agent of the Government. The assessee had received certain amount under a contract with the syndicate, and if that amount was income, the fact that the person who paid it might claim refund would not deprive it of its character of income in the year in which it was received. It could not be said that the receipt was produced by chance or was accidental, fortuitous or from unforeseen sources of income. Assuming that the amounts sought to be included as income were paid as a result of some mistake on the part of the syndicate, they had not the characteristic of casualness, nor was it suggested that they were nonrecurring.

34. These two decisions firmly establish the proposition that if a receipt is made as relatable to the business activity, even though paid by mistake, it is a part of the trading receipt and constitutes income. It is not necessary to discuss in detail other decisions referred to which fully support our conclusion that sales tax constitutes a trading receipt and is liable to be included in the income of the assessee.

35. Point No. (iii):

The character of sales tax as a trading receipt is not in any way altered merely because the sales tax collected is shown separately in the course of the transaction of sale. Whether the sale price charged is a lump sum or the sales tax is separately noted is wholly irrelevant to the concept that it was received as part of the consideration without payment of which the seller would not part with his goods. Either way, it is a trading receipt.

36. Point No. (iv):

It was clearly laid down in Chhatrasinhji Kesarisinhji Thakore v. Commissioner of Income Tax that the liability of the assessee to pay sales tax to the State or to refund the money to the purchaser if sales tax is not payable does not affect the intrinsic character of the receipt being a trading receipt.

37. Point No. (v):

The answer to this point would depend upon the system of accounting maintained by the assessee. In Keshav Mills Ltd. Vs. Commissioner of Income Tax, Bombay, Bose J. indicated the essential difference between the mercantile and the cash basis systems of accounting thus :

"The essential difference between the mercantile and the cash basis system is that in the latter actual receipts and disbursements are taken into account. In the former, sums which are due to the business are entered on the credit side immediately they are legally due and before they are actually received and expenditures are entered the moment a legal liability to pay arose and before the actual disbursements. The profit or loss at the end of the accounting year is therefore based, not on a difference between what was actually received and what was actually paid out, but on the difference between the right to receive and the liability to pay."

38. As has been clarified in narrating the facts, no regular accounts were maintained by the assessee and at any stage before the assessing authorities he does not appear to have claimed that the accounts were maintained on the mercantile system. In the absence of any assertion that the mercantile system of accounting was maintained, his case has to be examined on the cash basis system. In such a system the taxable income would be determined by deducting from the gross income all deductible expenditure under Sections 10(1) and 10(2) (xv) of the Indian Income Tax Act. Those sections, so far as relevant, run thus :

"10. (1) The tax shall be payable by an assessee under the head "profits and gains of business, profession or vocation" in respect of the profits and gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :--...

(xv) any expenditure, (not being an allowance of the nature described in any of the Clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

39. If the accounts are maintained on the cash basis system, then clearly sales tax paid in the accounting year must be deducted as they were expended wholly and, exclusively for the purpose of the business.

40. Admittedly, in this case no sales tax had been paid in the accounting year and, consequently, the impugned amount of Rs. 18,592 is not deductible.

41. It is not necessary to express any view as to whether the amount is deductible under the mercantile system.

42. We would sum up our conclusions thus:

(i) Sales tax constitutes an integral part of the sale price,

(ii) Sales tax is a trading receipt.

(iii) The fact that the assessee had ultimate liability to pay sales tax to the State or to refund the same to the purchasers does not alter its true character of being a trading receipt.

(iv) On the cash basis system sales tax is deductible from the total income as being laid out or expended wholly and exclusively for the purpose of such business if paid during the accounting year.

(v) The accounts of the assessee which were not properly maintained were on cash basis system and as no sales tax was paid during the accounting year the same is not deductible from the total income.

43. The view taken by the Appellate Tribunal is contrary to law.

44. The question framed by the Tribunal which has already been extracted is involved. The following questions should have been framed on the points of law arising out of the Tribunal's appellate order :

"1. Whether, on the facts and circumstances of the case, the sum of Rs. 18,592 collected as sales tax was a trading receipt to be included in the total income of the assessee ?

2. Whether, under the cash basis system of accounting maintained by the assessee, the aforesaid amount is deductible from the total gross profits as having been laid out or expended wholly and exclusively for the purpose of business even though the amount had not been paid to the State in the accounting year ?"

45. On our analysis of the legal position we would answer the question framed by the Tribunal thus:

The sum of Rs. 18,592 collected by way of sales tax would be included in the total income of the assessee and the same is not deductible for determination of the taxable income in the accounting year.

46. In the result, the reference is accepted with costs. Hearing fee of Rs. 200. We place on record our appreciation of the able assistance given by the learned advocates on either side.

Patra, J.

47. I agree.