

(1969) 02 CAL CK 0021

In the Calcutta High Court

Case No : Income-tax Referred Case No. 164 of 1963

Commissioner of Income Tax

APPELLANT

Vs

Sinclair Murray and Co. (P.) Ltd.

RESPONDENT

Date of Decision : 10-02-1969

Acts Referred:

Constitution of India, 1950 — Article 286(2)
Income Tax Act, 1922 — Section 66(1)

Citation : (1970) 75 ITR 494 : (1970) 25 STC 233

Hon'ble Judges : Sankar Prasad Mitra, J;P. Chatterjee, J

Bench : Division Bench

Advocate : Balai Pal, for the Appellant; Sampath Iyengar, for the Respondent

Judgement

P. Chatterjee, J.—This is a reference u/s 66(1) of the Indian Income-tax Act, 1922. The Commissioner of Income Tax is the applicant. The assessment relates to the year 1953-54. The corresponding accounting year ended on the 30th June, 1952.

2. The assessee is a limited company. Its head office is in Calcutta. The assessee purchases and sells jute in the State of Orissa. The assessee is a registered dealer under the Orissa Sales Tax Act. During the accounting year the assessee sold jute to Messrs. McLeod & Co. Ltd.; the said company purchased the said jute for being used in two jute mills under its management, namely, Chitavatsah and Nellimarla Jute Mills. These jute mills are in Andhra Pradesh. The assessee used to charge sales tax at the rate of one anna per rupee on the value of the goods. Such sales tax was charged under a separate head in the bill in the following manner : "Sales tax, buyer's account... at the rate of one anna per rupee to be paid to the Orissa Government ". In the balance-sheet of the assessee as on the 30th June, 1952, under the head "Liability for expenses" a sum of Rs. 16,54,455 was shown on account of sales tax. The said sum was not actually paid to the Orissa Government during the year in question.

3. Hence the question arose as to whether the sum of Rs. 16,54,455 should be

included in the total income of the assessee.

4. According to the assessee, sales tax realised from the purchaser did not form part of the sale price and therefore the amount received by the assessee as sales tax was not a part of the sale price. Hence the balance-sheet of the company showed the correct state of affairs according to the assessee. The Income Tax Officer found that the said sum was received as part of the price and therefore added the said sum to the total income of the assessee.

5. The assessee filed an appeal before the Appellate Assistant Commissioner. He found that the actual amount received as sales tax during the relevant period was Rs. 7,41,962. The assessee during the relevant year paid a sum of Rs. 27,564 to the Orissa Government. Hence the Appellate Assistant Commissioner found that a sum of Rs. 7,14,398 should be the sum which would be added to the assessee's total income. He rejected the argument that sales tax did not form any part of the price. The Income Tax Officer decided the case on the 31st August, 1957, and the Appellate Assistant Commissioner decided the case on January 2, 1961. An appeal was then filed against the decision of the Appellate Assistant Commissioner before the Tribunal. The Tribunal decided the matter on the 13th November, 1962. In the meantime a judgment of the Supreme Court dated March 24, 1961, in the case of *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, .

6. Jute was purchased in Orissa and sold in Andhra Pradesh. Therefore, under Article 286(2) of the Constitution, as it stood then, no sales tax would be payable to the Orissa Government with regard to such inter-State sales. According to the assessee he realised sales tax on the "buyer's account" and showed that money separately as a "sort of suspense account". According to the assessee, if tax was not exigible at all, it would refund the same to the purchaser, or he was in duty bound, under the provision of Section 9B(2) of the Orissa Sales Tax Act, to deposit the same with the Government. If tax was exigible, it would have to pay the same to the Government. In either case the assessee claimed to have beneficial interest in the same sums. According to the assessee the nature of the receipts was therefore money received in trust and it was not trading receipt. Therefore, it would not have been included within the income of the assessee.

7. The Tribunal considered the argument. The Tribunal also considered the decision of the Supreme Court in the *Orient Paper Mills* case. The Tribunal came to the conclusion that the amounts so realised would not on a construction of the various sections of the Orissa Sales Tax Act, be trading receipt but would merely be a deposit for the purpose of paying the same either to the State Government or to the purchaser (by way of refund). The Tribunal, therefore, allowed the appeal. Against that decision the Commissioner of Income Tax applied for reference to this High Court the following question :

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 7,14,398 was liable to be included in the total income of the assessee under the

Income Tax Act, 1922 ? "

8. This application of the Commissioner was opposed by the assessee on the ground that " the identical question under the identical Orissa Sales Tax Act was the subject-matter of a decision of the Supreme Court in the Orient Paper Mills case in 1961 and the Tribunal merely followed the decision." The Tribunal, however, referred the aforesaid question to this court.

9. Mr. Balai Pal for the department urges that sales tax is always included within the trading receipt of the vendor. The reason is that the total money which a dealer received from his purchaser is employed in his business as if the sum of money received on account of price simpliciter and the sum of money received on account of sales tax were the seller's own money. The trader used that sum in his business and when tax is to be paid, he pays tax not from any earmarked fund. Mr. Pal refers to Jay's the Jewellers v. Inland Revenue Commissioners. That decision itself relies on another decision in MORLEY (INSPECTOR OF TAXES) Vs. TATTERSALL, . In the latter case it was held that unclaimed balances received by the auctioneer could not, by the terms of partnership deed or by the method of preparation of account, become trading receipt. Hence the quality and nature of a receipt for Income Tax purposes is fixed once and for all when it is received. In the case of Jay's the Jewellers v. Inland Revenue Commissioners [1947] 2 All E.R. 762 : [1947] 29 T.C. 274 (K.B.) a certain pawn broker advanced loans on pledge ; subsequently the goods pledged were sold and some balance was left with the pawn broker. The question was whether this balance was assessable to Income Tax. It was held that at the time when the auction was made, the money did not belong to the pawn broker but after the claim of his client became barred by limitation, it became a part of the trading receipt of the pawn broker in the year in which such claim of the client of the pawn broker became barred by limitation. This latter case shows that money received as deposit may subsequently become trading receipt. The proposition laid down by the Supreme Court in the case of The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar, was that sales tax was a liability upon the seller whether he realised his price by including it in the sale price or not. Sale price is what the trader realised from his purchaser. This sum may include the sales tax and such tax would constitute part of the consideration paid by the purchaser. This matter was further considered in the case of Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, and in the case of George Oakes (P.) Ltd. Vs. State of Madras, , George Oakes (Private) Ltd., Addison and Co. (Private) Ltd. and Rane (Madras) Ltd. Vs. State of Madras, . It was decided in the latter case by the Supreme Court when the seller passes on the tax and the buyer agrees to pay sales tax in addition to price, the tax is really part of the entire consideration and the distinction between the two amounts, tax and price, lose all significance. It was further held "nor does it mean that, in law, the tax as imposed by Government is a tax on the buyer making the dealer a mere collecting agency, so that the tax must always remain outside the sale price". In the next case George Oakes (Private) Ltd., Addison and Co. (Private) Ltd. and Rane (Madras) Ltd. Vs. State of Madras,

between the same parties reported in the same volume at page 1352 the Supreme Court held as follows :

"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."

10. It is not necessary for us to refer to any further decision on this point. The proposition is that if tax is validly exigible and is realised by a trader from his customer, and is then utilised in his business, the tax so realised cannot but form part of the sale price. It must, therefore, be included in the trading receipt of the dealer, and it would become income for the purpose of the Income Tax Act, for the simple reason that the money realised from the purchaser on account of tax is employed by the trader for the purpose of making profit and tax is not separated from price simpliciter.

11. The question now is :--Did the assessee, a dealer, mix up the money received as sales tax with other amounts and employed it in his business for the purpose of earning profit or did the dealer treat the amount of money received as tax, as deposits for the purpose of paying it to the Government or for refunding it to the purchaser, as the case may be ?

12. It would be seen from pages 22 and 24 of the paper book that the sale price simpliciter have been noted in the bills. Thereafter sales tax has been noted. The two have been summed up ; this indicates the two receipts were not treated as of different character ; a deposit and a trading receipt could not be summed up without the risk of mixing them. Out of that total amount, an amount which was already received was deducted and it was deducted with reference to the character in which the sum of money was received. After that deduction the vendor had to pay certain incidental expenses for the sale. These expenses were not incidental to sales tax but were on account of the sale transaction and these were paid by the buyer for the seller. The total amount payable was thus reduced by such amount as was payable by the seller. Hence amount payable by the seller was paid by the buyer and that amount was deducted from a sum which included sales tax. Hence, the first stage the sales tax was mixed up with the sale price and then, from the total sum, the sum payable by the seller on account of incidental expenses was deducted. The assessee thus did not, as he could, earmark the amount realised as sales tax ; it did not put it on a different account and did not deposit it with the Government as and when realised. If it had done all these things what the position in law would have been is not for us to consider and we express no opinion on that. But, on the facts before us, we cannot but say that this sum realised as sales tax was received with the other amount and was treated as his own money by the dealer. Hence, factually this should form part of the trading receipt of the dealer and should be included within his total income.

13. Let us now refer to the findings of the authorities below. The Income Tax

Officer thought that the money was shown separately "as a sort of suspense account", but if it is included in the balance-sheet as his "Liability expenses" it was definitely included in one character. It could not be treated as a sum which was temporarily entered in the books of account and the proper place of which had still to be determined. The proper place was determined by the assessee as the balance-sheet shows ; it was "Liability for expenses", though the liability was not entirely incurred during that year. Before the Appellate Assistant Commissioner arguments were made to show that the character of this receipt under the terms of the Orissa Sales Tax Act and the Rules thereof was that of a deposit. The Appellate Assistant Commissioner did not find that the sales tax realised by the dealer was not mixed up with his own fund and not used in his business and that this amount was marked for the purpose of depositing with the Government. When the matter came up before the Tribunal, the assessee strongly relied upon the decision of the Supreme Court in *State of Orissa v. Orient Paper Mills*. It was contended that the character of the receipt because of the law in Orissa is the character of a deposit and therefore it could not form part of trading receipt. Mr, Sampath Iyengar has strongly relied on the following passage in the order of the Tribunal to show that the character was not that of a trading receipt at the time when the money was received : "As at that time the position regarding the inter-State sale was not clear, the assessee asked the purchaser to pay the sales tax agreeing to refund the sum if ultimately found not payable." This sentence does not mean that the assessee did not mix up the money received as sales tax with sale price simpliciter nor does it mean that it did not turn the amount received as sales tax, over in his trade. A person who realises money as trading receipt may be compelled to refund the sum and if he does so, at the time when he makes the refund, the amount refunded would be deducted from his income. Mr. Sampath Iyengar has also referred to the following passage in the judgment of the Tribunal :

"The Supreme Court decision in the *Orient Paper Mills* case is certainly an authority for the proposition that where the dealer collects sales tax under the provision of Section 9B(3) and pays it to the State Government the amount of tax never forms part of sale price and the dealer never acquires any beneficial interest in the same amount. The subsequent failure to deposit the amount in Orissa treasury would not transform these amounts which were not originally part of the sale consideration into trading receipt."

14. The Tribunal did not find as a matter of fact that the assessee never used the amount received as sales tax for the purpose of his business. On the other hand the evidence before us is clear that he received that amount as sales tax and then mixed it up with his own fund, treated the same amount as his own money for the purpose of payment to the buyer and turned it over because if we look into the bills at pages 22 and 24 the expenses which the dealer incurred on behalf of the buyer were paid out of the total consideration which included sales tax. Hence we cannot but say that the amount of sales tax was received originally as a trading receipt.

15. The next question is whether, because of the construction of the different provisions of Orissa Sales Tax Act, the money received as sales tax would not be treated as trading receipt. The Tribunal was of opinion that in the case of Orient Paper Mills, the Supreme Court held that a dealer had no beneficial interest in the tax. The Tribunal held that at the date of the receipt the sum received as sales tax had not the character of a trading receipt. On such construction of the Orissa Sales Tax Act, the Tribunal observed that the failure to deposit the sales tax, which was not trading receipt according to the decision of the Supreme Court, would not matter in the least. Mr. Sampath Iyengar referred to another decision of the Supreme Court in *State of Mysore v. Mysore Spinning and Manufacturing Co* [1960] 11 S.T.C. 734 (S.C.). 1438, 1440. In Mysore there was a provision in Section 11(2) of the Mysore Sales Tax Act similar to Section 9B(3) of the Orissa Sales Tax Act. The Supreme Court observed as follows :

"Where the assessee, a registered dealer, received certain amounts from its constituents merely by way of deposits on the express understanding or undertaking that the moneys would be refunded to the constituents if the assessee was held not liable to include the relevant sales in its taxable turnover the assessee held the moneys as a mere custodian, and on the fulfilment of the condition became a trustee for the depositors."

16. The observation aforesaid may support the arguments of Mr. Iyengar but the facts of the case now before us have nothing to do with the law laid down in the aforesaid case. Where money on account of tax is received as a deposit and not mixed up with other funds and deposited in the treasury, the money thus realised as sales tax would be considered to have been received by way of deposit. But the facts of this case show that money was not received as deposit. It might have been the duty of the assessee to receive the money as deposit and it might have been his duty to earmark that fund and to deposit it in treasury but he did not do any of these things. Therefore, for the purpose of the Income Tax Act, we have to decide whether money that the assessee received was used in his business for the purpose of profit and, in the circumstances of this case, there is unmistakable evidence as considered aforesaid that the money was so used. We may again refer to the case of *State of Orissa v. Orient Paper Mills*¹. The Supreme Court, in that case, observed as follows :

" u/s 9B, Clause (3) of the Act as it stood at the material time, the amounts realised by any person as tax on sale of any goods shall, notwithstanding anything contained in any other provision of the Act, be deposited by him in a Government Treasury within such period as may be prescribed if the amount so realised exceeded the amount payable as tax in respect of that sale or if no tax is payable in respect thereof. As the tax collected by the assesseees was not exigible in respect of the sales from the purchasers, a statutory obligation arose to deposit it with the State and by paying that tax under the assessment, the assesseees must be deemed to have complied with this requirement. But the amount of tax remained u/s 9B of the Act with the Government of Orissa as a

deposit. "

17. The Supreme Court held that u/s 9B(3), the dealer had a duty to keep the money separate and further duty to deposit it in treasury and, in case the dealer performs that duty, he would be considered, in law, to have no beneficial interest on this amount and he could not be considered to have made any profit out of that money. The question in the aforesaid case was whether the money deposited by the dealer could be withdrawn by the dealer and it was held that the dealer had no right to withdraw it because the dealer had no beneficial interest in the money. In the circumstances of the case now before us, we find that the money was not kept separately, but mixed up with the other sums. Therefore, on the facts before us, we find nothing on which we can say that the amount realised as sales tax was treated as a deposit. There is no finding of the Tribunal that the amount of sales tax was treated to be in deposit with the assessee. There is no finding that the amount of sales tax realised was not employed by the assessee in his business. On the other hand, the evidence on the matter has already been considered to show that the trader took the money as part of his trading receipt. It may be that he had a liability to refund. But the character of the money at the date of receipt was not of a deposit and has not been found to be that of a deposit by any of the authorities below.

18. The next point urged by Mr. Pal is that the decision in the case of Orient Paper Mills case and the decision in the case of State of Mysore v. Mysore Spinning & Manufacturing Co., if concerned to be based merely on an interpretation of Section 9B(3) of the Orissa Act and Section 11(2) of the Mysore Act, that basis has now been shaken by the decision of the Supreme Court in the case of R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, in which case the said section has been found to be ultra vires. The Supreme Court observed in that case as follows :

"If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. "

19. The Supreme Court held that Section 11(2) of the Mysore Sales Tax Act, similar to Section 9B(3) of the Orissa Sales Tax Act, was not a valid legislation. Orient Paper Mills v. State of Orissa was considered by the Supreme Court and it was found that that case had no application. Their Lordships clarify the distinction by observing as follows :

" The situation in our opinion is entirely different from the situation in the Orient Paper Mills case. "

20. It is not necessary for us to express any further opinion on this matter, particularly because in this case, there is no finding that the money was received as deposit by the dealer; there is no finding that the trader did not use that

money for trading purpose, and because of the fact that money was not deposited in terms of Section 9B(3). In such circumstances, simply because the trader had a duty to refund, we cannot say it would not constitute trading receipt. If a trader received money as trading receipt and employs that money as his own fund and is then called upon to refund the money, even then it is trading receipt of the trader but when he pays back that money the amounts refunded may be considered for deduction at the time when it is refunded.

21. But Mr. Sampath Iyengar urges that as questions of fact are involved we should send the matter to the Tribunal for determining the facts. The question whether such money was trading receipt or not is not a pure question of fact because there are legal principles which determine as to what constitutes a trading receipt. We have been referred to a large number of cases which lay down the law. Therefore, we have to determine a question which is a mixed question of law and fact and evidence on the matter is before us. In fact the reference itself is "whether, on the facts and in the circumstances of the case, the sum of Rs. 7,14,398 was liable to be included in the total income of the assessee". If, however, we had to determine a pure question of fact, we might have agreed to adopt the procedure suggested by Mr. Sampath Iyengar but we have to decide a mixed question of fact and law on the facts and in the circumstances of the case. There is nothing in law which would not authorise us to determine a question of fact and law but there may be a mixed question of fact and law when the factual portion of the finding may be separately found, independent of the question of law. In such cases the matter may be sent to the Tribunal for finding such facts as may be independent of the questions of law, but there may be other cases where the appreciation of facts involve determination of the legal problem. In this case for determining whether tax was received as a trading receipt, the bills at pages 22 and 24 of the paper book have to be appreciated. It is the result of such appreciation which determines the legal character of the receipt. Hence we are authorised by law to look into the bills for the purpose of determining whether the receipt was a trading receipt or not. We, therefore, do not think that it is either proper or desirable to send the matter back to the Tribunal apart from the question that this assessment is now 15 years old.

22. Mr. Sampath Iyengar's next point is that the tax was received by mistake of law, namely, the sum of money was not receivable under the Constitution as sales tax. Therefore, that money is refundable u/s 94 of the Indian Contract Act. That proposition is not disputed. Mr. Balai Pal, for the department, agrees that as and when the assessee would refund the money to the purchaser, the sums refunded would be deducted from the total income. But a right to refund does not mean that money received was not received as a trading receipt. Money may be received as trading receipt and yet it may ultimately be found that it should not have been received and should be refunded. The question is : Whether tax was received as trading receipt or not. We have to see how the trader treated the money, when he received it and if he treated the money as his own money,

whether he did it by mistake of fact or by mistake of law, it would none the less be treated as his trading receipt; if it was later found that the said sum of money was not receivable as such, his duty would be to refund the money and if refunded the same would be deducted from his total income. If, as in Orient Paper Mills case, the trader placed the money with the Government, and put it beyond his own reach, it could not have been considered to be his trading receipt.

23. Mr. Iyengar refers to the case of States of Orissa Vs. Utkal Distributors (P) Ltd., . It was held by the Supreme Court as follows :

" The Central sales tax paid by the assessee at the time of purchase (of controlled goods) and realised from the customers under the provisions of the notification did not form part of the price paid by the customers to the assessee, as the valuable consideration for the sale was only the price fixed by the Government, Nor did the Central sales tax realised by the assessee fall within the expression " any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof. Such Central sales tax realised by the assessee from its customers could not therefore be included in the taxable turnover for the purposes of sales tax under the Orissa Sales Tax Act, 1947."

24. We have found that the Supreme Court has decided in a good number of cases that sales tax is included within the price but all these decisions were between a buyer who was free to purchase and a seller who was free to sell at any price. The same considerations do not apply to a case where goods sold are controlled and the maximum price has been fixed. Under the law the dealer cannot realise anything more than the maximum price in cases of controlled goods; therefore, if sales tax is included within the sale price then the dealer would charge the controlled price and the sales tax, the total of which would be higher than the maximum price. This is not authorised by law. If in a case where a controlled price has been fixed and there is a further direction for payment of sales tax by the customer, it could not but be understood that the law itself provided that in such a case the sales tax would not be included in the price. The seller in such circumstances, was not authorised to demand anything higher than the controlled price, he demands the controlled price, and he would ordinarily be entitled to realise sales tax not as a part of the price but in addition to such controlled price. Therefore, a specific notification was made that the buyer would pay sales tax apart from the controlled price. So the considerations which applied to the case of a free buyer and a free seller, do not apply to a case where the transaction is controlled by law. We have therefore to take into account the facts and circumstances and the law relating to each-matter ; we shall then be able correctly to decide the character of a receipt whether it is a trading receipt or not ; this is not a pure point of law but a mixed question of fact and law. We are of opinion, on the facts and circumstances of this case and on the law applicable to the facts and circumstances, of this case that the receipt in question is income under the Indian Income Tax Act, 1922, and we answer the question in the affirmative. The assessee will pay the costs of the Commissioner.

Sankar Prasad Mitra , J.

25. I agree.

Question answered in the affirmative.