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**(1977) 11 BOM CK 0033**

**In the Bombay High Court**

**Case No : S.T.R. No"s. 57, 58 and 59 of 1976**

Commissioner of Sales Tax

APPELLANT

Vs

G.M. Apte and Sons

RESPONDENT

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**Date of Decision : 17-11-1977**

**Acts Referred:**

Bombay Sales Tax Act, 1959 — Section 2(11), 22, 22(5A), 3, 61(1)

**Citation :** (1978) 7 CTR 367 : (1978) 41 STC 137

**Hon'ble Judges :** M.H. Kania, J;D.P. Madon, J

**Bench :** Division Bench

**Advocate :** G.S. Jetly, for the Appellant; P.C. Joshi and B.C. Joshi, for the Respondent

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**Judgement**

Kania, J.—These are three references u/s 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act").

2. Sales Tax Reference No. 57 of 1976 pertains to the assessment period 1st January, 1960, to 31st May, 1962, Sales Tax Reference No. 58 of 1976 pertains to the assessment period 1st June, 1962, to 31st December, 1962, and Sales Tax Reference No. 59 of 1976 pertains to the assessment period 1st January, 1963, to 31st December, 1963. All these references have been made at the instance of the Commissioner of Sales Tax. In all these references two common questions have been referred to us and these are as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal has erred in holding that the opponent is not a "dealer" within the contemplation of section 2(11) of the Bombay Sales Tax Act, 1959, and other provisions of that Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal has erred in holding that the purchases of material made by the opponent for construction of buildings were not purchases made in the course of its business as a dealer under the sales tax law ?"

3. A third question, which we propose to refer as question No. (3), has been referred for our determination in Sales Tax References Nos. 58 and 59 of 1976 and that question runs as follows :

"(3) Whether, on the facts and in the circumstances of the case, the Tribunal has erred in holding that the provisions of sub-section (5A) of section 22 of the Bombay Sales Tax Act, 1959, were not applicable to the opponent on the ground that the opponent was not a dealer as contemplated by the Bombay Sales Tax Act, 1959, even though the opponent on its own application dated 1st June, 1962, was registered as a dealer and got a registration certificate with effect from 1st June, 1962 ?"

4. As there is very little controversy in these matters, the facts giving rise to these references can be very briefly stated : The respondents are building contractors who construct houses on payment of stipulated amounts. During the course of their business the respondents purchased building materials including scaffolding materials sometimes from unregistered dealers. The Sales Tax Officer assessed the respondents as unregistered dealers for the period 1st January, 1960, to 31st May, 1962, under the said Act. The respondents applied for registration and on their own application were registered as a dealer under the said Act from 1st June, 1962. The respondents were accordingly assessed to tax as a registered dealer for the assessment periods 1st June, 1962, to 31st December, 1962, and 1st January, 1963, to 31st December, 1963. The Sales Tax Officer assessing the respondents included all the purchases made by the respondents in their turnover of purchases including the purchases of scaffolding materials made by the respondents. The respondents filed appeals against these orders before the Assistant Sales Tax Commissioner, inter alia, contending that the purchases of scaffolding materials were not purchases made by the respondents in the course of business of the respondents, because the said scaffolding materials were capital assets. The Assistant Commissioner negatived that contention and dismissed the appeals. The respondents then preferred second appeals before the Sales Tax Tribunal. The Tribunal following an earlier decision held that the respondents were not dealers within the contemplation of section 2(11) of the said Act and allowed all the three appeals. The questions referred to us arise from this decision of the Tribunal.

5. As far as question No. (1) is concerned, both Mr. Jetly and Mr. P. C. Joshi agree that in view of our decision in Commissioner of Sales Tax v. D. V. Save [1975] 36 S.T.C. 47, the said question will have to be answered in the affirmative. In that case, we have held that where the respondents purchased building materials in the course of their business as building contractors and consumed them in the construction of buildings or in carrying out repairs to buildings, they would be dealers within the meaning of that term as defined in clause (11) of section 2 of the said Act.

6. As far as question No. (2) is concerned, it is again agreed between Mr. Jetly and Mr. P. C. Joshi that except for scaffolding materials the said question must be

answered in the affirmative in view of our aforesaid decision in *Save's case* [1975] 36 S.T.C. 47, we have held that purchases of all goods by a dealer which the needs for his business would not necessary be purchases made in the course of his business of buying goods. The goods purchased must be such as are indispensable for carrying on the particular business activity of the purchaser and must be goods without which such business activity would not exist. They must not be goods which are adjuncts to the carrying on of the business or goods which form part of the capital assets of the dealer. In *Famous Cine Laboratory and Studio Ltd. v. State of Maharashtra* [1975] 36 S.T.C. 104, we have reaffirmed the aforesaid principle. We find that in the present case the respondents had specifically taken up the contention before the Assistant Commissioner that, as far as the purchases of scaffolding materials were concerned, they were not purchases made by the respondents in the course of their business because the scaffolding materials constituted assets of a capital nature or capital goods as far as the respondents were concerned. This contention was rejected by the Assistant Commissioner. This contention has also been taken by the respondents before the Tribunal as is apparent from the statement of facts submitted by the Tribunal. The Tribunal, however, did not decide this question at all, because the Tribunal took the view that the respondents were not dealers at all within the contemplation of section 2(11) of the said Act. We may make it clear that the question as to whether the scaffolding materials constitute capital assets of the respondents or goods of a capital nature has not been gone into by the Tribunal at all and the Tribunal will have to consider this question when the case goes back to the Tribunal for disposal according to our judgment.

7. As far as question No. (3) is concerned, we find that in the view which we have taken, this question does not arise at all before us and it is not necessary to determine the same. Section 22 of the said Act deals with registration of dealers. Sub-section (5A) of section 22 of the said Act runs as follows :

"If any person upon an application made by him has been registered as a dealer under this section, and thereafter it is found that he ought not to have been so registered under the provisions of this section, he shall be liable to pay tax on his sales or purchases made from the date on which his registration certificate took effect until it is cancelled - notwithstanding that he may not be liable to pay tax u/s 3."

8. This sub-section was inserted in section 22 with effect from 15th July, 1962. This sub-section deals with a situation where a person has been registered as a dealer on his own application and thereafter it is found that he ought not to have been so registered. As we are of the view that the respondents are dealers within the meaning of the said expression in clause (11) of section 2 of the said Act, it must follow that they were rightly registered and sub-section (5A) of section 22 does not come into play at all.

9. In the result, we answer the questions referred to us as follows :

Question No. (1) : In the affirmative.

Question No. (2) : In the affirmative so far as purchases of materials other than scaffolding materials are concerned.

Question No. (3) : Does not arise.

10. Looking to all the facts and circumstances of the case, there will be no order as to costs and the parties will bear and pay their own costs.

11. Reference answered accordingly.