
(1965) 12 AHC CK 0014

In the Allahabad High Court

Case No : Sales Tax Reference No's. 74, 75, 76, 77, 78 and 79 of 1963

Commissioner of Sales Tax

APPELLANT

Vs

Jiwan Das

RESPONDENT

Date of Decision : 03-12-1965

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11(1)
Uttar Pradesh Trade Tax Act, 1948 — Section 2(h)

Citation : (1966) 18 STC 264

Hon'ble Judges : M.C. Desai, C.J;S.C. Manchanda, J

Bench : Division Bench

Advocate : Iqbal Ahmad, for the Respondent

Final Decision : Allowed

Judgement

M.C. Desai, C.J.—This statement, has been submitted to this Court u/s 11(1) of the U.P. Sales Tax Act by the Judge (Revisions) Sales Tax at the assessee's instance. The connected references are of identical statements of cases in respect of the same assessment year but of different assessees and raise the same questions.

2. We are called upon to answer the following two questions :-

(1) Whether or not in view of the conditions of the agreement entered into between the Government and the opposite party, the transactions between the Government and opposite party amounted to sale within the meaning of U.P. Sales Tax Act.

(2) If the answer to question No. 1 be in the affirmative, whether in view of the conditions of the aforesaid agreement the sales of food-grains by the opposite party will be treated to have been made in his own account as dealer.

3. All the assessees sold foodgrains during the assessment year 1958-59 under agreements entered into by them with the Government. They were assessed to

sales tax as dealers on the turnover of the sale of foodgrains by them to their customers during the assessment year. The orders passed by the Sales Tax Officer were confirmed by the Judge (Appeals) Sales Tax. The assessee applied to the Judge (Revisions) to revise the orders of the Judge (Appeals) contending that they were not dealers and that the transactions entered into by them with their customers did not amount to sale. The Judge (Revisions) allowed the applications holding that the assessee was an agent on behalf of the Government and that sales of the foodgrains by them to their customers were sales on behalf of the Government and they could not be made liable to pay sales tax on their turnover. In the statement he writes that he has not held the assessee to be not a dealer and that he only held that the transactions between them and the Government by which they received the foodgrains sold to their customers were not sales because the property in them remained in the Government, that they sold them as agents of the Government and that consequently they were not liable to pay sales tax.

4. "Sale" is defined in Section 2(h) of the Sales Tax Act to mean "any transfer of property in goods for cash or deferred payment or other valuable consideration" and to exclude mortgage, hypothecation, charge or pledge. As was pointed out by us in *Brij Behari Lal Agarwal v. Commissioner, Sales Tax* Civil Misc. Case No. 4 of 1957 decided on 21-8-1963 if a person does an act which has the effect of transferring property in certain goods it amounts to his selling them regardless of whether the property, before the transfer, vested in him or another person. The definition does not require that the act amounting to sale must be done by the owner of the property, i.e., that the transfer must be of own property in the goods. "Dealer" is defined in Section 2(c) to mean any person carrying on the business of buying or selling goods in Uttar Pradesh whether for commission, remuneration or otherwise. The nature of the goods is immaterial and so long as the business consists of buying or selling them it is immaterial that the business is subject to certain restrictions and not at the absolute discretion of the person doing the business. It is an act of buying or selling goods even though the buying or selling is done under certain restrictions and not freely. It is also immaterial what the goods are-whether they are foodgrains or controlled foodgrains or not. Sales tax is payable u/s 3 on the turnover of a dealer in the assessment year and "turnover" means the aggregate amount for which goods are supplied or distributed by way of sale or bought or sold by a dealer either directly or through another, or on his account or on account of others, whether for cash or deferred payment or other valuable consideration. Turnover of certain goods is exempt from payment of sales tax u/s 4 ; though a person may not have to pay the sales tax on the turnover of the exempted goods he remains a dealer all the same.

5. Question No. 1 is not properly framed ; the Government are not being charged sales tax on the sale of foodgrains by them to the assessee and the question whether the transactions by which the assessee obtained foodgrains from the Government are sales as defined in the Act or not does not arise at all. The question before us is whether the assessee is a dealer when selling foodgrains

to their own customers; if they are dealers and if the transactions between them and their customers amount to sales they are liable to pay the sales tax on the turnover of the sales. It is immaterial to their liability how they obtain the foodgrains. If they are dealers we are not concerned with the question whether the transactions between them and the Government are sales or not. Whether they are sales or not may have to be considered when deciding whether they are dealers or not but the real question is whether they are dealers or not and that is the question that should have been framed.

6. Since "sale" means transfer of property we have to decide here whether the transactions that the assessee entered into with their customers involve transfer of property in the foodgrains to the customers or not. There cannot be any doubt about the answer ; the customers become the owners of the foodgrains delivered to them by the assessee. The property in the goods is undoubtedly transferred to them, whether from the assessee or from the Government. So long as the property is transferred to them they are sales regardless of whether it is their property or the Government's property that is transferred. The question whether the assessee sold on their own account or as dealers is irrelevant. The definitions of "sale" and "turnover" do not require that sales tax is payable only when a dealer transfers his own property in the goods to another. It has been held by this Court in *Sarju Prasad Prilam Lal v. Judge (Revisions) Sales Tax Civil Misc. Case No. 77 of 1955*, decided on 21-12-1962 ; [1963] 14 S.T.C. 884 that there is a sale when a commission agent does an act involving transfer of his principal's property in the goods to another for cash. The assessee obtained the foodgrains from the Government; previously the property in the foodgrains vested in the Government. If the transactions by which they obtained the foodgrains from the Government do not involve transfer of the property to them the property remains in the Government and it is the property that is transferred to the customers when the assessee transferred the foodgrains for cash to them. After the foodgrains have been transferred to the customers the property no longer remains in the Government. If when the assessee obtained the foodgrains from the Government the property in them is transferred to them, that property is retransferred to the customers when the foodgrains are transferred to them for cash. These propositions hold good in all circumstances. Therefore, the transactions by which the assessee transferred the foodgrains to their customers amounted to sales for the purposes of the Sales Tax Act and question No. 2 is answered in the affirmative.

7. As we pointed out, question No. 1 is badly framed and we reframe it as follows :

(1) Whether in view of the provisions of the agreement entered into between the Government and the assessee, the assessee is a dealer carrying on the business of buying or selling foodgrains ?

8. The assessee is undoubtedly a dealer. The transactions between them and the Government are sales because the property in the food-grains is transferred

to them by the Government through the transactions and they become owners of the foodgrains. Whether the property is transferred to them or not depends upon the intention of the Government in delivering the foodgrains to them and that intention is to be gathered from the agreements entered into between the two. The description given to the transactions by the parties is not decisive at all; the assesseees do not become agents merely because they are described as "handling agents" in the agreements if the intention is to transfer the property to them. On the other hand, they may be described as buyers or purchasers but if the intention is not to transfer the property to them they will be agents and not buyers. It is stated in 46 American Jurisprudence, "Sales", paragraph 17 :

The primary test of whether a particular contract or transaction whereby goods are delivered or shipped by one party to another for sale by the latter creates the relation of buyer and seller or only a relation of principal and agent is the intention of the parties to be gathered from the whole scope and effect of the language used and mere verbal formulas, if inconsistent with the real intention, are to be disregarded. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names and within to see the real nature of the agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision, its legal character and effect.

9. In *Hafiz Din Mohammad Haji Abdulla v. State of Maharashtra* [1962] 13 S.T.C. 292 Shah, J., speaking for the Court said at page 293 :

The relation between the parties has manifestly to be ascertained in the light of the terms incorporated in the letter and the attendant circumstances. The designation which a party chooses to give to the relation, especially in cases of liability to pay tax, is of little consequence. The Court has in each case, having regard to the terms and the attendant circumstances, to ascertain the true relation between the parties without giving undue importance to the special expressions used by them.

10. Lord Phillimore said in AIR 1925 161 (Privy Council) :

In many trades...the so-called agent is merely a favoured and favouring buyer, one who under an overriding contract undertakes to do his best to find a market for the, manufacturer's stock, who is given some special advantages...; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless...he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

11. In the case of *Hafiz Din Mohammad Haji Abdulla* [1962] 13 S.T.C. 292 Shah, J., had these observations in mind when he observed at page 294 that "often the so-called agent is merely a buyer who has been given favourable terms in a particular area to sell the manufacturer's or supplier's goods."

12. It is possible to have in an agreement a mixture of provisions suggesting that the relation between the parties is that of buyer and seller and of provisions suggesting that it is of principal and agent. Whether a transaction under which goods are delivered by one party to the other is a sale or creates the relation of principal and agent becomes perplexing because it includes some provisions peculiar to a contract of sale and others peculiar to a contract of agency. "However, the question is ultimately one of intention, and if the contract contains, among others, a provision that the contract is for the purchase and sale of personal property, which purpose is also manifested by the other contract provisions, the contract is one of sale, and title passes upon delivery": see 46 American Jurisprudence, "Sales", paragraph 16.

13. So we proceed to examine the terms of the agreement. It is stated in the agreements that the assesseees were appointed handling agents (retail) for sale of Government controlled foodgrains ; this does not necessarily make them agents.

14. Under Clause 2 the assesseees are required to establish a retail shop in a certain place and display a notice that Government controlled foodgrains are sold there at such and such rates. Under Clause 3 they are required to obtain foodgrains from the Government and to sell them to the public at prices fixed by the authorities and according to their instructions. The conditions that they should display a notice and sell at a certain price do not necessarily make them agents; they do not prevent the transfer of property in the foodgrains to them. There is nothing in these clauses to suggest that they were to sell the foodgrains as agents, or on behalf of the Government and not as their own property.

15. By Clause 4 they are required to obtain foodgrains from the Government and deposit their price at the rates fixed by the authorities from time to time ; the payment of the price at the time of obtaining foodgrains shows that they are buying them and not taking delivery of them as agents. It is stated in 46 American Jurisprudence, "Sales", paragraph 18 :

One of the most material considerations in determining whether a particular transaction is a sale or a consignment for sale on account of the consignor seems to be whether there arises at the time of the consignment the relation of creditor and debtor between the consignor and consignee...if a liability to pay a fixed price for the goods...arises at the time of the consignment, the transaction is usually regarded as a sale, transferring the title to the consignee.

16. Under Clause 5 the foodgrains are not returnable to the authorities for any reason and in any circumstance. This necessarily means that the property in them has been transferred to the assesseees. If the property had remained in the Government this clause would not have found place in the agreement. It would have been useless for the Government to retain the property while the custody remained with the assesseees. "When the receiver of property is under no obligation to return the specific article, and is at liberty to return another thing of

value, he becomes a debtor to make the return, and the title to the property is changed ; the transaction is a sale": see 46 American Jurisprudence, "Sales", paragraph 17. Here in addition the assessee being under no obligation they are forbidden to return the foodgrains. In *Goverdhan Hathibhai & Co, v. Appellate Assistant Commissioner of Agricultural Income Tax and Sales Tax* [1961] 12 S.T.C. 464 Ansari, C.J., and Raghavan, J., held an agreement between a kerosene oil company and a dealer in kerosene oil to be one creating the relation of principal and agent because one of the clauses there required the dealer to return the unsold oil on termination of the agreement.

17. Under clauses 7, 8, 9 and 10 the assesseees are required to maintain accounts and stock registers and to send daily reports to certain authorities. These conditions, like those mentioned in clauses 2 and 3, did not prevent the transfer of property in foodgrains to them and did not necessarily make them agents.

18. Under Clause 12 the rates fixed for the sale of foodgrains to customers are exclusive of the sales tax payable by the assesseees and the liability for payment of the sales tax has been expressly imposed upon them. Further, they are expressly permitted to charge the appropriate sales tax from the customers. This provision makes it clear beyond doubt that the assesseees buy the foodgrains from the Government and become their owners and are liable to pay sales tax when they sell them to their customers.

19. By Clause 15 the assesseees are forbidden to sell any other food-grains ; this does not make them agents as such a restriction is quite consistent with the relation of buyer and seller.

20. By Clause 18 the assesseees are forbidden to sublet or assign the benefit of the agreement. By Clause 19 they have to give security. By Clause 20 the agreement is made liable to be terminated for any breach by them of its terms and conditions. These provisions are also of a neutral nature.

21. Clause 21 is to the effect that the assesseees would be liable to be prosecuted for criminal breach of trust under the Penal Code for short not mixing inferior foodgrains, charging higher prices from customers, showing fictitious sales in their registers and refusing to sell foodgrains. The offence of criminal breach of trust is committed when a person is entrusted with dominion over a property. It is not committed by the owner of the property. So it was argued vehemently that the assesseees by being made liable for criminal breach of trust were assigned the status of agents and did not become owners. But this was only a threat by the Government and not a finding by a criminal court that they became guilty of criminal breach of trust for doing any of these acts. The threat may be an empty threat and in any case is not better than the Government's own interpretation of the agreement which is not binding either upon the sales tax authorities or upon this Court. It is for the sales tax authorities and this Court to determine the true nature of the agreement and they are not bound by the interpretation placed by

the Government. The interpretation cannot necessarily lead to the inference that the intention behind the agreement was to create the relation of principal and agent and not that of buyer and seller.

22. These are all the material terms of the agreements and they are more consistent with the relationship of buyer and seller than with that of principal and agent. The retention by an owner of the title to the proceeds of sale by the other party is inconsistent with sale and evidences rather an agency contract (46 American Jurisprudence, "Sales", paragraph 17) and here the Government have not retained any title to the proceeds of sales by the assesseees to their customers. On the other hand, they have realised the price of the foodgrains at the time of delivering them to the assesseees.

23. Sri Iqbal Ahmad relied upon the case of Hafiz Din Mohammad Haji Abdulla [1962] 13 S.T.C. 292 in which the agreement was construed by the Supreme Court to be one creating the relation of principal and agent and not of buyer and seller. The agreement there was quite different. The sale price was to be remitted when the goods were sold to customers and not at the time of obtaining delivery; the agreement contained a provision for payment of commission and referred to the goods as those belonging to the owner and the owner retained the right to increase and decrease the prices at which the goods were to be sold. In *L.Ed. v. Ewing* 35 L.Ed. 882, an agreement between a manufacturer and a contractor was held to create agency because the contractor was to be the exclusive vendor of the manufacturer's produce in a certain territory. The manufacturer was to sell the produce at a certain discount to the contractor and the contractor was to pay the price within a month. The manufacturer reserved to itself the right to sell the produce at any place outside the reserved area, the contractor was to maintain the established retail prices of the manufacturer and was to see that its own sub-vendors and agents were to do likewise, it was not to solicit trade in the territory of other contractors and was to purchase produce worth at least a certain amount, the benefit of the agreement was not salable or transferable by the contractor and the contractor was to devote its time, attention and abilities primarily to the interest of the manufacturer. None of these material circumstances exists in the instant case. The *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 S.T.C. 353 simply distinguished between a contract of sale and a contract of work and is irrelevant. In *Cement Ltd. v. The State of Orissa* [1961] 12 S.T.C. 205 Ori Narasimham, C.J., and Das, J., merely followed the case of *Gannon Dunkerley & Co.* [1958] 9 S.T.C. 353. In *Goverdhan Hathibhai & Company's* case [1961] 12 S.T.C. 464 the agreement was with a fair-price shopkeeper and it was held to be an agreement of agency. That agreement was different from the instant agreements. The learned Judges dissented from *Rohtas Industries Ltd. v. State of Bihar* [1958] 9 S.T.C. 248 but the Supreme Court in 12 S.T.C. 615 affirmed *Rohtas Industries Ltd.* [1958] 9 S.T.C. 248. They observed that "where vesting of ownership in the agent is to sell the goods of the principal, the earlier transfer would be incidental to the main purpose of making the person an agent, and would not convert the

transaction into one of sale" (page 474). With great respect we disagree. This observation is against the definition of "sale". The Supreme Court observed in Rohtas Industries Ltd. [1961] 12 S.T.C. 615, at page 618 that "if property in the cement passed to the marketing company in return for price and the marketing company sold the cement on its own, then sales tax must be paid by the manufacturing companies." Here the assesseees paid the price of the foodgrains and sold them as their own. The Supreme Court also observed that the appointment of the company under the agreement to be the sole and exclusive sales manager of the manufacturing company for sale of cement did not indicate an intention to constitute it an agent of the manufacturing company.

24. On consideration of the relevant clauses of the agreements we hold that they created the relationship of buyer and seller and not of principal and agent and that the assesseees became buyers of the food-grains obtained by them from the Government. They were, therefore, dealers and when they transferred the property in them to their customers on payment of the price, they sold them and became liable to pay sales tax on the turnover of the sales. Question No. 1 as redrafted by us is, therefore, answered in the affirmative.

25. We direct that copies of this judgment shall be sent under the seal of the Court and the signature of the Registrar to the Judge (Revisions) Sales Tax, U.P., and the Commissioner, Sales Tax, U.P., as required by Section 11(6) of the U.P. Sales Tax Act. The Commissioner, Sales Tax, is entitled to his costs of the reference assessed at Rs. 50. Counsel's fee is assessed at Rs. 200.