
(1978) 04 BOM CK 0021
In the Bombay High Court
Case No : S.T.R. No. 153 of 1976

Commissioner of Sales Tax

APPELLANT

Vs

Joy Ice Cream

RESPONDENT

Date of Decision : 03-04-1978

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 11, 14, 2, 5, 61(1)

Citation : (1978) 42 STC 14

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

Bench : Division Bench

Advocate : M.S. Sanghvi, for the Appellant;

Judgement

Kania, J.—This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959 (hereinafter referred to as "the said Act"), made at the instance of the Commissioner of Sales Tax. The question referred to us for our determination is as follows :

"Whether, on the true and proper interpretation of section 14 read with section 11(1A)(b) and 2(33) of the Bombay Sales Tax Act, 1959, the Tribunal was correct in law in holding that there was no contravention of the recitals of the certificates issued in form 15 under 11(1A) in respect of raw materials purchased and used in the manufacture of ice-cream on the sale of which, amounting to Rs. 2,07,790, no tax was payable under the Act ?"

2. The facts giving rise to this reference are as follows : The respondents are registered as a dealer and hold a recognition certificate under the said Act. The respondents manufacture ice-cream on a large scale. In the assessment of the respondents for the period 1st April, 1964, to 31st March, 1965, it appears that the respondents claimed that sales of ice-cream amounting to Rs. 2,07,790 were free from tax as being sales of ice-cream sold within the premises of the respondents at less than Re. 1 per person. It may be noticed that the actual exemption at the relevant time was in respect of ice-cream sold at not more than

Re. 1-50 per person. This contention was not accepted by the Sales Tax Officer as he was of the view that ice-cream was covered by entry 31 of Schedule C to the said Act and not entry 14 of Schedule A thereof. The Assistant Commissioner of Sales Tax accepted the contention of the respondents that sales of ice-cream effected by the respondents within their premises at less than Re. 1 per person were covered by entry 14 of Schedule A to the said Act and were thus exempt from the levy of sales tax. The Assistant Commissioner, however, held that the respondents had contravened the recitals of the certificate in form 15 on the strength of which they had made purchases of certain raw materials like milk powder, dry fruits, fresh cream, etc., which were used in the manufacture of ice-cream the sales of which amounting to Rs. 2,07,790 were allowed by him as exempt from the levy of tax and, accordingly, purchase tax u/s 14 of the said Act amounting to Rs. 3,636.91 was levied by him on the respondents. The respondents preferred an appeals against this decision to the Deputy Commissioner of Sales Tax but without success. The respondents then went by way of revision to the Tribunal. The Tribunal observed that it failed to understand as to how it could be said that when 81.5 per cent of the sales of ice-cream made by the respondents were subjects to tax, ice-cream could be held to be a tax-free item to the extent of about 19 per cent where no tax was leviable. The Tribunal held that it was not the sale aspect of certain goods which was to be taken into consideration to find out as to whether there was any contravention of the recitals of the aforesaid certificate. Ice-cream as such is not in any of the entries in Schedule A to the said Act and hence it must be held to be a taxable commodity. The Tribunal upheld the contention of the respondent and directed that purchase tax levied u/s 14 of the said Act should be deleted and if recovered from the respondents should be refunded to them. The present reference arise out of this decision of the Tribunal.

3. In order to appreciate the contentions raised before us, it is useful to take note of certain provisions of the said Act at this stage. The material portion of section 11 of the said Act, as it stood at the relevant time, read thus :

"Where any dealer liable to pay tax under this Act, sells any taxable goods

(1A) to a recognised dealer who certifies in the prescribed form -

(a) that the goods are of the class specified in his recognition, and

(b) that they are purchased by him for use by him within the State in the manufacture of taxable goods for sale by him or in the packing of the goods so manufactured

then, notwithstanding anything in section 7, 8, 9 or 10, on such sale of goods, the dealer shall be liable to pay a sales tax -

(i) if such sale falls under clause (1) or (2), at the rate of 2 paise in the rupee, and

(ii) if it falls under clause (1A) or (3), at the rate of 1 paise in the rupee."

Clause (33) of section 2 of the said Act reads as follows :

"taxable goods" means goods other than those on the sale or purchase of which no tax is payable u/s 5."

4. The material recitals in the certificate in form 15 to be issued by the recognised dealer purchasing goods for a purpose referred to in sub-section (1A) of section 11 are to the effect that the goods purchased will be used in the manufacture of taxable goods for sale and that such sale shall not take place outside the State of Maharashtra.

5. In the present case, we find that during the relevant assessment period the respondents sold ice-cream of the value of Rs. 2,07,790 in their premises at less than Re. 1.50 per person. These sales were exempt from the levy of tax under entry 14 of Schedule A to the said Act as it stood at the relevant time. On proportionate basis it was found that raw materials of the value of Rs. 76,122 had gone into the making of the ice-cream, the sales of which were not liable to tax as aforesaid. The recital in form 15, to which we have already referred, is to the effect that the materials purchased will be used in the manufacture of taxable goods for sale by the recognised dealer. In view of this, it seems to us that there is considerable force in the contention of Mr. Sanghvi, the learned Advocate for the applicant, that the respondents have contravened the aforesaid recital to the extent of their purchases of raw materials amounting to Rs. 76,122 and hence are liable to the levy of purchase tax on that amount. The contention of Mr. Patil, the learned Advocate for the respondents, is that the stage at which we must consider whether the goods are taxable or not is not when the sale takes place but prior to that, when the goods are manufactured. It was contended by him that ice-cream as such was not exempt from the levy of tax by reason of any of the entries in Schedule A to the said Act. Hence, it was urged by him that ice-cream as such was a taxable commodity, and when the raw materials purchased were used by the respondents in the manufacture of ice-cream it could not be said that there was any contravention of the aforesaid recital in the certificate issued in form 15. In our view, this contention must be rejected. The very definition of the expression "taxable goods" contained in clause (33) of section 2 of the said Act shows that sale or purchase has been taken into account in the very definition of that expression. The heading of Schedule A to the said Act reads : "Goods, the sale or purchase of which is free from all taxes." The headings of the other schedules also show that there is a clear reference to the sale or purchase in determining the liability of goods to the levy of sales tax or general sales tax or purchase tax. In view of this, it appears to us that it cannot be said that ice-cream as such is either taxable or not taxable under the said Act. What can be said is that at the relevant time ice-cream sold for consumption in the premises at a rate of less than Re. 1.50 per person was not subject to the levy of tax by reason of entry 14 of Schedule A, as it stood then. Ice-cream sold at a higher rate was liable to the levy of tax. Hence ice-cream sold by the respondents of the value of Rs. 2,07,790 was exempt from

the levy of tax by reason of the said entry and in respect of the raw materials which had gone into the manufacture of the same there was contravention of the aforesaid recital in the certificate issued in form 15.

6. Mr. Patil drew our attention to the decision of the Gujarat High Court in *Ruby Laboratories v. Commissioner of Sales Tax* [1971] 27 S.T.C. 326 . This decision is based on completely different facts and, in our opinion, no useful purpose would be served by discussing the same. The question there related to the supply of certain manufactured goods as samples free of charge by the dealer to aid his sales and the distribution of such samples was found to form an integral part of the process of sale. It was also found that the sale of rest of the articles which were supplied on price was generally dependent upon such distribution of free samples. In these circumstances, it was held that it could not be said that the goods which were utilised in manufacturing free samples were not used for manufacturing articles "for sale". This distribution of free samples can in no way be compared with the sales of ice-cream at the rate of Re. 1 per person to the extent of 19 per cent of the total sales as has been done by the respondents in the present case. Mr. Patil next drew out attention to the decision to the Supreme Court in *The State of Tamil Nadu Vs. M.K. Kandaswami and Others*, . This case also is not of much help to Mr. Patil. The Supreme Court there was dealing with an altogether different provision, viz., section 7-A(1) of the Madras General Sales Tax Act, 1959, the scheme of which is different from that of the said Act, namely, the Bombay Sales Tax Act, 1959. It has been held there that the words "the sale or purchase of which is liable to tax under the Act" used in section 7-A of the said Madras Act qualify the term "goods", and exclude by necessary implication goods, the sale or purchase of which is totally exempted from tax at all points u/s 8 or section 17(1) of the Madras General Sales Tax Act. We are unable to see how this can support the contention that only goods the sale or purchases of which is completely exempt from tax can be said to be excluded from the levy of tax under the said Act, viz., the Bombay Sales Tax Act, 1959. In fact, the observations in this judgment of the Supreme Court clearly show that the event on which the sales tax or purchase tax is imposed is the sale or purchase of goods.

7. In the result, we must answer the question referred to us in the negative. The respondents must pay to the applicant the costs of this reference fixed at Rs. 300.

8. Reference answered in the negative.