
(1990) 10 KAR CK 0024

In the Karnataka High Court

Case No : Sales Tax Revision Petitions No's. 23, 53, 54, 55, 56, 57 and 58 of 1985

Dattaram Advertising Private Ltd. and another

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 11-10-1990

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 A (1), 23 (3)

Citation : (1991) 81 STC 394

Hon'ble Judges : M.P. Chandrakantaraj Urs, J;K.B. Navadgi, J

Bench : Division Bench

Advocate : K.P. Kumarfor M/s King and Partridge, for the Appellant; H.L. Dattu, High Court Government Pleader, for the Respondent

Judgement

M.P. Chandrakantharaj Urs, J.—There petitions are disposed of by this common order, as all of them raise the same questions of law which are required to be decided by us u/s 23(3) of the Karnataka Sales Tax Act, 1957.

2. Though the assesseees and the assessment years vary, for purposes of convenience, the facts stated in S.T.R.P. No. 23 of 1985 are narrated in order to answer the questions which are common to all, except that in S.T.R.P. No. 23 of 1985 an additional question regarding limitation also falls for consideration by us.

3. The facts leading to these petitions may be stated briefly and they are as follows :

The petitioner, Dattaram Advertising Private Ltd., is a company incorporated under the Companies Act, inter alia, carries on the business of running an advertising and consulting agency covering a variety of media for effective publicity depending on the customers and their advertising requirements. The petitioner-company prepares designs for advertisement in newspapers, magazines, periodicals and also undertakes to get blocks manufactured in that behalf from the block-markers.

The company was carrying 10,000 copies of brochures to Hindustan Aeronautics Ltd., and the same was checked by the Check-post Officer. The matter was referred to the intelligence Wing for needful action. The company got printed 10,000 copies of booklets for an amount of Rs. 57,750 from M/s. B.N.K. Press, Madras, and the same had been sold to Hindustan Aeronautics Ltd. for a sum of Rs. 63,000. As such activities involved the element of "purchase" and "sale" by the petitioner-company, the assessing authority issued notice to produce the books of accounts for the previous years i.e., from 1969-70 to 1974-75. On verification of such books of accounts which were produced, the assessing authority, namely, the Commercial Tax Officer, IV Circle, Bangalore-9, noticed that the company was doing the business of selling printed materials and blocks and bills raised clearly showed that the contract for art and design was distinct from the contract for sale of printed materials and blocks. The assessing authority, therefore, proposed to assess the turnovers for the assessment years 1969-70 to 1974-75 in various sums determined on the basis of the books. Such determination in tabular form was as follows :

-----	Year	Taxable
turnover		assessed
-----	1969-70	Rs.
2,03,799.99 Rs. 6,114.00	1970-71	Rs. 1,37,445.52 Rs. 4,123.37
1,74,526.94 Rs. 5,235.80	1971-72	Rs. 1,74,526.94 Rs. 5,235.80
1,74,526.94 Rs. 5,235.80	1972-73	Rs. 97,245.90 Rs. 3,281.14
2,65,124.71 Rs. 9,279.36	1973-74	Rs. 2,65,124.71 Rs. 9,279.36
-----	1974-75	Rs. 1,95,672.85 Rs. 6,848.55

4. However, the assessee before the assessing authority contended as is evident from the reply issued to the show cause notice, dated November 12, 1975, through its lawyers that the company was only preparing art work, booking the space in various newspapers, periodicals, getting estimates from various agents and block makers and such acts were done on behalf of the advertiser-customer and absolutely there was no element of sale in the business. However, having regard to the decision of the High Court of Bombay in the case of Commissioner of Sales Tax v. Durga Khote Productions [1975] 36 STC 77 and the decision of the Madras High Court in the case of State of Madras v. Bomas Limited [1965] 16 STC 819, the assessee authority came to the conclusion that the business carried on by the assessee though appeared to be on the face of it a works contract, in reality it involved sales and as such the turnover was liable to tax. In the result, the proceeding commenced u/s 12-A(1) of the Karnataka Sales Tax Act were concluded in respect of all the years in question and the escaped turnover brought to tax. Aggrieved by the assessment orders in question, appeals were filed before the Additional Deputy Commissioner of Commercial Taxes (Appeals), Bangalore, in Appeals Nos. AP/621, 622, 623, 624, 625 and 626/75-76. By a common order dated January 10, 1979, the Additional Deputy Commissioner of Commercial Taxes dismissed the appeals upholding the assessments. Thereafter, further appeals were preferred to the Karnataka Appellate Tribunal in Sales Tax Appeals Nos. 152 to 157 of 1979. The Tribunal by its common order dated

September 12, 1984, dismissed the appeals. Therefore, the present petitions.

5. The questions formulated in S.T.R.P. No. 23 of 1985 read as follows :

"Whether, on the facts and in the circumstances of the case -

(a) the petitioner's supply of blocks and printed materials to its advertisers amounted to sales ?

(b) the petitioner was a dealer u/s 2(k) of the Act so as to be liable to tax ? and

(c) in any case, the assessment was not bad in law because the proceedings to assess commenced after the expiry of the statutory period of five years from the close of the year under issue ?

6. It is convenient to take up question (b) for decision first.

7. u/s 2(k) of the Act a "dealer" is defined to include :

"any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes -

(i) an industrial, commercial or trading undertaking of the Government of Karnataka, the Central Government, a State Government of any State other than the State of Karnataka, a local authority, company, a Hindu undivided family, an Aliyasanthana family, a firm, a society, a club or an association which carries on such business;

(ii) a casual trader;

(iii) a commission agent, a broker or del credere agent or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;

(iv) a non-resident dealer or an agent of a non-resident dealer, a local branch of a firm or company or association situated outside the State;

(v) a person who sells goods produced by him by manufacture or otherwise;

(vi) a miller who carries on such business.

Explanation 1. - A society (including a co-operative society), club or firm or an association which, whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash, or for deferred payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;

Explanation 2. - The Central Government or a State Government which whether or not, in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or deferred payment or for commission, remuneration or

other valuable consideration shall be deemed to be a dealer for the purposes of this Act."

8. From the above, it is seen that it is not the mere act of purchase or sale which denotes a dealer besides buying and selling, even supplying or distribution of goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, the activity will fall within the definition. Therefore, there is no doubt whatsoever, having regard to the all pervasive and inclusive definition and the language employed in defining the term "dealer" under the Act that the petitioner before us is a dealer.

9. We must now revert to the first question at (a) to see whether the activities carried on by the petitioner supplying blocks and printed materials to its advertisers would amount to sales.

10. Mr. K. P. Kumar, appearing for M/s. King and Partridge, counsel for the petitioners, took as through the specimen contract in S.T.R.P. No. 23 of 1985. That particular contract was in respect of certain material required by the New Government Electric Factory in Bangalore. It required 1,000/2,000 copies of booklets in size A4 of 60 lbs., D/Cr illustrative cote are paper in two colours throughout containing 8 pages. As per the quotation offered by the petitioner therein, namely, Dattaram Advertising Private Ltd., the printing charge was Rs. 2,950 and Rs. 4,250 for 1,000/2000 copies, respectively subject to escalation of the supply price of market fluctuation of stocks of paper and other materials came about. After the quotation was accepted by the customer client, it placed orders on printer, M/s. B.N.K. Press Private Limited, Madras, and secured the same at a net cost of Rs. 2,845.70. But from M/s. New Government Electric Factory Limited, it realised a sum of Rs. 3,200 which included their original quotation of Rs. 2,950 for 1,000 booklets plus Central sales tax at Rs. 250.75. In fact, the last mentioned document at page 45 of the Paper Book itself indicates that the transaction between the petitioner and the New Government Electric Factory was considered to be an inter-State sale and tax thereon was charged and collected from the customer. Having regard to these undisputed facts which appeared to be more or less the same in the other petitions, the question is, whether the work carried out in the relevant assessment years was only a works contract or execution of works contract by the petitioner or supply of blocks and booklets to its advertisers amounting to sale.

11. The learned counsel for the petitioner placing reliance upon the decision of the Bombay High Court in the case of State of Bombay v. Sista's Ltd. [1957] 8 STC 593, contended that an advertiser or advertising agency was not a seller, but only a commission agent. Undoubtedly, on the facts of that case and having regard to the definition of a "dealer" under the Bombay Sales Tax Act, which at the relevant time was as follows :

T who carries on the business of selling or buying goods in *T* may, whether for commission, remuneration or otherwise *T* State Government which caries

on such business and any *T* society, club or association which sells goods to, or buys goods from, its *T* members."

The learned Judges of the High Court of Bombay held that they were not dealers within the meaning of the expression as defined and, therefore, not exigible to tax on the turnover under the Bombay Sales Tax Act. We have earlier in the course of the order extracted the definition under the Act in Karnataka State. It specifically includes not merely the act of buying and selling, but also supplying and distribution of goods and specifically a variety of agents and activities are encompassed within the definition by enumeration as well as illustrative definition. In the result, the reliance placed on that decision of the Bombay High Court is not of any assistance to the petitioner to support that the activities carried on by it was not exigible to tax under the Karnataka Sales Tax Act.

12. On the other hand, in the case of Commissioner of Sales Tax v. Durga Khote Productions [1975] 36 STC 77, the same High Court of Bombay held on more or less identical facts as the case of the petitioners as follows :

"(i) that, on the facts and in the circumstances of the case and on a proper interpretation of the terms of the contracts between the respondents and their customers, the Tribunal was justified in law in holding that the contracts were divisible contracts consisting of two parts, one for the contracts were divisible contracts consisting of two parts, one for the production of processed films and the other for the supply of prints and copies, and that the contracts for production of processed films were not sales and not liable to tax under the Act;

(ii) that since in the contracts the parties had clearly stipulated separately for the production cost, the language version and the supply of prints, no argument could arise about their severability."

In other words, if the contract was such which could not be separated into a pure works contract and supply of incidental material, then the resultant activity of the advertising agency would be a sale in favour of the customer. As we have set out the facts, what attracts tax is the sale of printed material and blocks made for purpose of printing the contents of the printed material. It was, however, argued with the assistance of some other decisions of the High Court of Allahabad and the High Court of Madras that the activities of advertising agency would not constitute sale exigible to sales tax. We must with utmost respect to the learned Judges of those High Courts in those cases state that those cases were decided on the facts placed before them and in the light of the provisions contained in the respective sales tax laws of those States and we personally feel they have no relevance to the facts of the cases we are dealing with.

13. It was pointed out by Mr. Kumar for King and Partridge that the block-maker's and printer's costs were no doubt paid by the petitioners as well as the material used for printing such as paper, etc., but the same was recovered from the customer and the profits made by the petitioner was the commission which the printer paid to the advertiser as made out in the specimen contract which we

considered in S.T.R.P. No. 23 of 1985 and, therefore, there could not be a sale as defined under the Act inasmuch as the title in the blocks or the printed material had never vested in the advertisers. We are unable to accept that contention. From the type of contract which we examined, there was no privity of contract between the advertisers and the printing press or the block-makers. The advertiser was not in the picture when the sale is involved. In those circumstances, the principal, so far as the printer was concerned or the block-maker was concerned, was the advertising agency or the petitioners themselves and not the customer of the advertising agencies. The test is, in case the amount is not paid to the printing press owner or the block-maker who is liable to pay the same ? It would be the petitioner who has placed the order with the printing press for the material as well as the blocks. Therefore, whether it is necessary or not, they do acquire title to the property, the end-product, namely, the printed material and the blocks used in such printed material which they transferred to the customers. When they deliver the printed material and blocks along with it, it is only then that their title in the printed material and the blocks pass on to the advertiser and not till then. Putting it in another way, in order to meet the point made by the learned counsel for the petitioner that the petitioner was only acting as a commission agent, we must point out that in all sales through commission agency, three ingredients are necessary : a buyer, a seller and an intermediary. If the intermediary only brings about the contract between the buyer and the seller, then he will be a commission agent and his earnings will be the earnings of the commission agency. But if the intermediary himself pays for the goods purchased and he is the buyer and there is no intermediary between himself and the seller, then he himself becomes the principal buyer and he cannot claim that the transaction is that of a commission agent. In any event, even if this distinction is not there in law, the definition of the term "dealer" takes care of it. Therefore, the activities of even a commission agency on behalf of the principal are liable to tax as the turnover of the commission agent himself. Therefore, the petitioner is liable to pay the tax. In the result, we must answer the question against the petitioner and hold that u/s 12-A of the Act, the escaped turnover could be brought to tax within the specified period.

14. What remains now is the question of limitation raised in S.T.R.P. No. 23 of 1985.

15. As a rule, proceedings for escaped assessment or reassessment, as the case may be, commerce with the notice required to be issued u/s 12-A(1). In the instant case, the notice was issued for the purpose of assessment on October 18, 1975, that would be some six months after the end of the previous assessment year, i.e., March 31, 1975. Therefore, the case would clearly be barred by time and it would be beyond five years provide for in the section itself. However, Mr. H. L. Dattu, learned High Court Government Pleader for the Revenue, strenuously contended that as far back as February, 1974, notice was issued to produce books of accounts for verification and, therefore, the proceedings must be deemed to have commenced in February, 1974, within the period of five years

prescribed by the statute and as such the proceedings were not barred by time. No doubt, the argument is attractive on the face of it, but on a closer examination, we have to draw a distinction between investigation of a fact and initiation of proceedings depending on the discovery of facts. Notice in February, 1974, was issued for purpose of production of books of accounts which the petitioner in S.T.R.P. No. 23 of 1985 did. It is only after the books of accounts were examined that the proposition notice calling upon the assessee to show cause was issued in October, 1975. In other words, the mind was made up to initiate the proceedings only when the notice u/s 12-A(1) of the Act was issued and not when a simple notice calling upon the assessee to produce the books of accounts. We, therefore, must uphold the contention of the petitioner in S.T.R.P. No. 23 of 1985 and hold that the proceedings commenced was beyond time.

16. However, we must also notice yet another argument advanced by Mr. Dattu, learned High Court Government Pleader. He said, the assessment clearly indicated that it was a proceeding u/s 12(1) read with rule 18 as well as section 12-A and, therefore, the court should construe the assessment as one u/s 12(1) and rule that it was within the time and that no time was prescribed u/s 12(1). In fact, he placed reliance on a decision of the Supreme Court in the well-known case of Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax [1963] 14 STC 976. The passage relied upon by the learned High Court Government Pleader reads as follows :

"The mere fact that the Sales Tax Officer cannot proceed against an unregistered dealer after the expiry of three years from the period the turnover in which was liable to tax, cannot lead to the conclusion that the Sales Tax Officer cannot take necessary steps to assess a registered dealer under sub-sections (2) and (4) of section 11 after the expiry of three years from the period whose turnover he proceeds to assess, for the reason that section 11 or any other provision of the Act does not lay down any such restriction on the Sales Tax Officer's powers under these sub-sections. Such a power in the Sales Tax Officer does not contravene the provisions of article 14 of the Constitution inasmuch as the registered dealer and the unregistered dealer belong to different classes."

17. Though what has been said above in the context of article 14 of the Constitution, we must not fail to notice in the scheme of the Karnataka Act, section 12(1) deals with the returns required to be filed by the registered dealers and it is only when they fail to file such returns that under sub-section (3) thereof, a notice is required to be issued. That notice cannot be equated with the notice which is issued u/s 12-A(1) to bring to tax the turnover which was escaped assessment or which has been under-assessed if assessed or which has been subjected to a lesser rate of tax than what really must have been charged or in case of deduction permitted which in law ought not to have been permitted. Therefore, when a specific provision is made following the earlier provision, the provision subsequently made must lead us to read the intention of the Legislature that they were aware of the provision made in the earlier section and

as against that provided u/s 12-A to cover the situations mentioned therein other than those covered by section 12(1). Otherwise, if everything is covered by section 12(3) there was no necessity to enact section 12-A. Therefore, we must reject the argument.

18. In the result, we allow S.T.R.P. No. 23 of 1985 on the ground of being barred by limitation while the remaining revision petitions are dismissed.

But in the circumstances of the cases, there will be no order as to costs.

19. Petitions except S.T.R.P. No. 23 of 1985 dismissed.