

(1978) 03 CAL CK 0042
In the Calcutta High Court
Case No : Matter No. 546 of 1975

Davy and United Engineering Co. Ltd.	APPELLANT
Vs	
Commissioner of Commercial Taxes	RESPONDENT

Date of Decision : 16-03-1978

Acts Referred:

Constitution of India, 1950 — Article 19

Citation : (1978) 42 STC 90

Hon'ble Judges : Dipak Kumar Sen, J; C.K. Banerji, J

Bench : Division Bench

Advocate : B. Dutt, for the Appellant; S. Bhattacharya, for the Respondent

Judgement

Dipak Kumar Sen, J.—This is a reference u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941, at the instance of Davy and United Engineering Co. Ltd., the assessee. The questions referred are as follows :

(1) Whether or not transfers of goods by the applicant-company to other companies of the same consortium against payment of price constituted sales within the meaning of the Indian Sale of Goods Act and the Bengal Finance (Sales Tax) Act, 1941.

(2) Whether or not sales of unserviceable goods, scraps, discarded and surplus materials were exigible to tax under the Bengal Finance (Sales Tax) Act, 1941, in view of the incorporation of the definition of "business" by an Ordinance promulgated in 1967 (since repealed and saved by West Bengal Act 25 of 1969), the retrospective operation of which was struck down by the Calcutta High Court in the case of Shew Bhagwan Goenka v. Commercial Tax Officer [1973] 32 S.T.C. 368.

2. The facts found and/or admitted are as follows : The assessee is a British company. It was engaged as a constituent of a consortium known as Incon. The consortium entered into a works contract with the Government of India in 1956 for the construction of the steel works at Durgapur. In terms of the said contract

other members of the consortium used to obtain their supplies from the assessee by placing orders with the assessee for goods which were required in the construction as also for goods required for their own consumption. The assessee used to receive payments from the other members for such supplies. Also, during the closing years, the assessee disposed of a quantity of unserviceable, reject and surplus goods including furniture, motor vehicles, office equipments, etc., to outsiders.

3. The assessee at one time was registered as a dealer under the relevant Sales Tax Act. Assessments to sales tax were made on the assessee for the following periods prior to its registration as a dealer : 30th November, 1957, to 31st March, 1958, 1st April, 1958, to 31st March, 1959, 1st April, 1959, to 31st March, 1960, 1st April, 1960, to 30th June, 1961, 1st July, 1961, to 31st August, 1962, respectively on 20th September, 12th November, 14th December and 15th December, 1962. Being aggrieved by the assessments, the assessee preferred appeals before the Assistant Commissioner of Commercial Taxes who held that the assessee was rightly held to be a dealer in respect of sales made to the other members of the consortium. So far as disposal of fixed assets were concerned, the Assistant Commissioner held that the same should not have been included in the turnover of the assessee. Disposal of surplus stores was, however, held to be part of its turnover.

4. A revision was preferred to the Additional Commissioner of Commercial Taxes, West Bengal, from the order of the Assistant Commissioner. The Additional Commissioner upheld the decision of the Commercial Tax Officer in its entirety, on the basis of the extended definition of the expression "business" in the statute with retrospective effect.

5. Being aggrieved, the assessee filed further revisions before the Member, Board of Revenue, West Bengal. The Board upheld the contentions of the authorities below. The Member considered a judgment of this court in the case of *Shew Bhagwan Goenka v. Commercial Tax Officer* [1973] 32 S.T.C. 368, where it was held that the retrospective operation of the amendment of the Act whereby the scope and ambit of the expression "business" was extended was in violation of Article 19 of the Constitution. The Member held that at the time when the Additional Commissioner passed his order, this judgment was not there and that the Commercial Tax Officer had taken the meaning of the word "business" as it stood before the amendment at the time of making of the assessment. On these grounds he rejected the contentions of the assessee.

6. From this order of the Member, Board of Revenue, the present reference is initiated.

7. Mr. Bankim Dutt, learned Advocate for the assessee, has contended before us that the assessee was not a dealer within the meaning of Section 2(c) of the Act, which defines a dealer as follows :

2. (c) "dealer" means any person who carries on the business of selling goods in

West Bengal and includes the Government.

8. Mr. Dutt contended that the assessee had not carried on business in selling goods in West Bengal, but only carried out the works contract ; therefore, he cannot be held liable to pay sales tax. This argument was made by Mr. Dutt while addressing us on question No. (1). It was pointed out to Mr. Dutt that this question though sought to be raised was not referred and it was not open to him to raise the said question within the framework of question No. (1). Mr. Dutt, however, contended that in question No. (1) the controversy which has been raised was whether the sale in question was a sale within the meaning of the Bengal Finance (Sales Tax) Act, 1941 and, therefore, he was entitled to agitate that a sale within the meaning of the Sales Tax Act must be a sale by a dealer. We are unable to agree with Mr. Dutt. Sale has been defined both in the Indian Sale of Goods Act and in the Bengal Finance (Sales Tax) Act, 1941. The definition in Section 2(g) of the Bengal Finance (Sales Tax) Act is as follows :

2. (g) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

9. Indian Sale of Goods Act defines a contract of "sale" as follows :

4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

10. The facts found in this case, in our opinion, conclusively show that the transactions by and between the assessee and the other members of the consortium amounted to sales both within the meaning of the Indian Sale of Goods Act and the Bengal Finance (Sales Tax) Act, 1941.

11. It is not disputed that the assessee transferred the goods to the other members of the consortium. It is also undisputed that the transfers were against" payment of price. This admission is implied in the question and, therefore, this question, i. e., question No. (1), must be answered in the affirmative and in favour of the sales tax authorities.

12. Mr. Dutt cited a large number of decisions in support of his contention, but in view of our finding as above, it is not necessary for us to consider the same in greater detail. We note the same :

(a) State of Andhra Pradesh Vs. Abdul Bakhi and Bros., ., (b) State of Gujarat v. Vivekanand Mills [1967] 19 S.T.C. 103 (S.C.), (c) Southern India Tea Estates Company Ltd. v. State of Kerala [1967] 20 S.T.C. 397 (d) Fort Gloster Industries Ltd. v. Member, Board of Revenue, West Bengal [1970] 26 S.T.C. 141, (e) Hindustan Steel Ltd. Vs. State of Orissa, , (f) State of Tamil Nadu v. Rambal Pvt. Ltd. [1972] 29 S.T.C. 526, (g) New India Assurance Co. Ltd. v. Deputy Commercial Tax Officer, Esplanade Division, Madras [1972] 29 S.T.C. 539, (h) Chief Commercial Superintendent, South Eastern Railway v. Member, Board of

Revenue, West Bengal [1973] 32 S.T.C. 171, (i) Board of Revenue and Others Vs. A.M. Ansari and Others, (j) The Sole Trustee, Lok Shikshana Trust Vs. The Commissioner of Income Tax, Mysore, .

13. On question No. (2), Mr. Dutt contended that in any event it has not been found that the assessee was carrying on business as a dealer of rejected and unserviceable goods, scraps and discarded materials and, therefore, could not be held to be liable to pay sales tax on such sales. In support of his contention, Mr. Dutt cited a decision of the Supreme Court in State of Madras Vs. K.C.P. Ltd.,

14. In this case, the assessee, who was carrying on business of manufacture and sale of machinery and parts thereof, imported two arc furnaces for installation in its own plant. The furnaces were found to be unsuitable and were ultimately sold. The question arose whether the sum realised on sale had to be included in the total turnover. The Supreme Court held on these facts that the arc furnaces were either fixed assets or discarded goods which had been found to be unsuitable or unserviceable and the sale proceeds could not be included in the turnover of the plant.

15. Mr. Dutt also cited another decision of the Supreme Court in State of Gujarat v. Vivekanand Mills [1967] 19 S.T.C. 103 (S.C.). The facts in this case were that the assessee carried on business of manufacturing cotton fabrics. In January, 1953, it had arranged to import 500 bales of cotton from California and expected the same to arrive after six months. Arrangements had been made to meet the assessee's immediate requirements by local purchases. The foreign consignment reached unexpectedly in April, 1953 and the same had to be accepted resulting in the blocking of considerable capital of the assessee. The assessee sold a large part of the imported cotton. The Supreme Court held on these facts that it could not be inferred that the assessee sold the cotton by way of business and no sales tax was leviable.

16. Mr. Dutt contended further that so far as the fixed assets and surplus materials are concerned, the Assistant Commissioner had granted relief to the assessee. The Additional Commissioner proceeded on the basis of the definition of "business" as introduced retrospectively in the statute and, therefore, this relief granted to the assessee was withdrawn. The retrospective operation of the definition having been struck down by this court, the Member ought not to have withheld the relief claimed. The decision of the Calcutta High Court in the case of Shew Bhagwan Goenka [1973] 32 S.T.C. 368 has been approved subsequently in another Division Bench of this Court in Bengal Paper Mill Co. Ltd. v. Commercial Tax Officer 80 C.W.N. 582. Therefore, in view of the law as it stood at the material time, the sale of these items could not have been made liable to sales tax in the absence of the extended definition of the word "business".

17. Mr. Dutt also cited another decision of the Supreme Court in State of Gujarat Vs. Raipur Manufacturing Company Ltd., . The assessee there was carrying on the business of manufacturing and selling cotton textiles. It sold a part of its coal

stocked for the purpose of lighting its furnace. The question arose whether such a sale was liable to sales tax. The Supreme Court held that a person who sells goods which are unserviceable for his business does not on that account become a dealer in those goods until he has an intention to carry on the business of selling those goods. Mere sale of a commodity which the assessee may require for the purpose of its business and which has been purchased for use in that business will not justify an inference that a business of selling that commodity was intended.

18. Mr. Sanjay Bhattacharya, learned counsel for the sales tax authorities, could not distinguish the decisions cited by Mr. Dutt. He however drew our attention to a decision of the Supreme Court in *The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another*, , where the Supreme Court held that introduction of the definition of the word "business" in Section 2 of the Rajasthan Sales Tax Act, 1954, by the Rajasthan Taxation Laws (Amendment) Act, 1965, retrospectively was proper and the legislature was competent to give such retrospective effect by the amending Act.

19. In our opinion, so far as the Bengal Finance (Sales Tax) Act, 1941, is concerned the matter is concluded by the judgments of this court and the said Act must be read and construed in the light of those judgments.

20. In the facts and circumstances, it appears to us that question No. (2) must be answered in favour of the assessee. Our answer is that the sale of unserviceable goods, reject scraps, discarded and surplus materials were not exigible to tax under the Bengal Finance (Sales Tax) Act, 1941. In the facts and circumstances, there will be no order as to costs.