

(1977) 09 MAD CK 0013

In the Madras High Court

Case No : Tax Case No. 502 of 1974 (Revision No. 244 of 1974)

Deputy Commissioner (C.T.)

APPELLANT

Vs

Salem Magnesite (P.) Ltd.

RESPONDENT

Date of Decision : 26-09-1977

Acts Referred:

Central Sales Tax Act, 1956 — Section 5

Citation : (1978) 42 STC 285

Hon'ble Judges : P. Govindan Nair, C.J.;Varadarajan, J

Bench : Division Bench

Advocate : K. Venkataswami, Additional Government Pleader, for the Appellant; S.V. Subramaniam, for Subbaraya Aiyar, Padmanabhan and Ramamani, for the Respondent

Final Decision : Dismissed

Judgement

P. Govindan Nair, C.J.—This is a tax revision case taken from the decision of the Sales Tax Appellate Tribunal, Coimbatore and the question relates to the taxability of the disputed turnover of Rs. 2,22,400. The year of assessment, with which we are concerned, is 1968-69. The claim of the assessee was that the sale in question was a sale in the course of export and, therefore, exempt from taxation. The commodity is calcined magnesite. the sale of which was taxable at multi-point. The main question is whether the sale by the assessee to Messrs. Wilson and Co. is a local sale taxable under the Tamil Nadu General Sales Tax Act, 1959, or, what we may term briefly, export sale, which cannot be taxed. The facts are the following, as are seen from the two letters dated 10th February, 1968, written by Wilson and Co. to the assessee. From those letters it is evident that Wilson and Co. was acting on behalf of their overseas principals. The price fixed was for per metric ton and it was payable "f.o.b. Madras" and the other important clause in the offer is about the title to the goods and payment. We shall extract that clause in toto :

The ownership in the goods will pass to us on your handing over the bills of

lading by negotiation through bank after the goods have left the shores of India.

2. The terms embodied in these two letters were accepted by Messrs. Salem Magnesite (Private) Limited, the assessee and it is not disputed that the question that arises for determination will have to be solved by a reference to the terms of this contract read with Section 5(1) of the Central Sales Tax Act, 1956 (74 of 1956). That section is in these terms :

5. (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

3. It is not the case of the assessee before us that the first limb of the Sub-section is attracted to the facts of this case. We, therefore, need not tarry to consider the decision of the Supreme Court in *National Tractors v. Commissioner of Commercial Taxes, Bangalore* [1971] 27 S.T.C. 271, which has been overruled on the basis of the pronouncement of the Constitution Bench of the same Court in *Mod. Serajuddin v. State of Orissa* [1975] 36 S.T.C. 136. In the decision reported in *Murarilal Sarawagi v. State of Andhra Pradesh* [1977] 39 S.T.C. 294, the only question is whether the second limb of the Sub-section is attracted. To satisfy this part of the section the sale or purchase will have to be effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. We are informed that the customs frontiers coincide with the territorial waters of India. Here we have to refer to some more facts. The bills of lading for the goods have been taken by the assessee in the name of Wilson and Co. According to the terms of the contract, they had to put the goods on board and had to bear the costs of transport as is clear from the term that the payment is on "f.o.b. Madras" and, accordingly, the bills of lading were taken in the name of Wilson and Co. The further terms referred to by the Appellate Tribunal indicated that Wilson and Co. had opened an account of the assessee and that payments were to be made from that account by the bank on presentation of the bill of lading along with the invoices. The assessee has furnished the dates on which the goods were put on ship, the dates on which the ship sailed, the dates on which invoices were drawn and the dates on which payments were made. The dates so furnished have not been challenged to be not true dates on which those transactions took place. We shall extract those dates:

4. From the dates it is clear that in all cases the payments were made only at least after four days after the ship sailed from the port. The territorial waters cannot extend beyond 15 miles. The evidence in the case indicates that a ship would normally take 1 1/2 to 2 hours to cross the territorial waters. There is no case that the ship sailed had grounded or did not move in its normal course after it left the port on the dates which we have indicated. Inevitably, we have to come to the conclusion that on the dates on which payments were made, the ship had left the territorial waters far behind. The property in the goods had then passed. In those circumstances, normally there can be no doubt or hesitation in holding

that the second limb of Sub-section (1) of Section 5 of the Central Sales Tax Act, 1956 (74 of 1956), has been satisfied. But counsel for the revenue contended that there could not be a transfer of document of title to the goods as the bill of lading had also been taken in the name of Wilson and Co. Therefore, he proceeded on the basis that title had already vested with Wilson and Co. on the bill of lading being obtained. We cannot accept this contention. By merely taking the bill of lading in the name of a person, it cannot be said that the document of title was with that person. The document of title always relates to some movable and immovable property. It is only a document which evidences the title. So, the question in the case would be in whom was the property in the goods represented by the document and who has the right to that property. The document has got no significant value. Title will pass, according to the terms of the contract, which we have extracted, only on payment being made and, therefore, on payment only will the bill of lading become a document of title as far as Wilson and Co. is concerned. Till then it will be a document of title to the goods, which admittedly remains with the assessee. Therefore, in this case, there has been a transfer of the goods by transfer of documents of title after the ship had crossed the customs frontiers.

5. Reliance was placed next on the ruling of the Kerala High Court reported in *Hindustan Cashew Products (P.) Limited v. Sales Tax Officer* [1971] 28 S.T.C. 730. It is unnecessary to deal with this judgment in detail, for one sentence in that judgment clearly indicates "that the facts were totally different from that before us. We do not think that we should refer to other passages which may cast some doubt on what we have said in this case. That sentence is in these terms:

The local producers sold the goods to the petitioner by delivering the same on board the ship as per terms of the contract.

6. Here by delivering the goods on board the vessel no sale took place because the sale must be by transfer of property in the goods, which was afterwards and, therefore, the decision cannot have any application.

7. Counsel for the revenue also invited our attention to the wording in the invoice by placing before us one of the invoices. The wording is in these terms :

By order and for account and risk of Messrs. Wilson and Co. (Private) Limited.

8. On the basis of this statement in the invoice, it was contended that the goods were put on board the vessel and thereafter the risk in the goods passed to Wilson and Co. and the passing of the risk is an important factor which normally and almost invariably indicated, when the property in the goods had passed to a particular person. Assuming there is a presumption that applies with this amount of emphasis, we do not think that we can apply it to a case where the terms of the contract have been reduced to writing, wherein it is specifically mentioned when the property in the goods would pass. It is clear from the particular clause we have extracted and so this statement in the invoice has to be read only

subject to and along with the terms of the contract to which we have made reference. So read, this can only mean that all that had to be done by the assessee had been done by the assessee for and on behalf of Wilson and Co. and in pursuance of the contract that was entered into with Wilson and Co. and that it was that position that was made clear by the words "by order and for account and risk". We cannot attach much significance to these words so as to whittle down the specific terms of the agreement between the parties.

9. The Tribunal relied on the second part of Sub-section (1) of Section. 5 of the Central Sales Tax Act, 1956 and also seems to have relied on the first part of the Sub-section. No arguments were addressed before us on the first part of the Sub-section and we are not inclined to go into that question. But we have no doubt that the Tribunal was right in applying the second part of the Sub-section and we accordingly dismiss this tax revision case with costs. Advocate's fee Rs. 250.