

(1987) 01 MAD CK 0043

In the Madras High Court

Case No : Tax Case No's. 694 to 699 of 1978 and 501 of 1979

Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore

APPELLANT

Vs

South India Viscose Limited

RESPONDENT

Date of Decision : 21-01-1987

Acts Referred:

Central Sales Tax Act, 1956 — Section 2

Tamil Nadu General Sales Tax Act, 1959 — Section 2

Citation : (1987) 01 MAD CK 0043

Hon'ble Judges : Swamikkannu, J; Bhaskaran, J

Bench : Division Bench

Advocate : Additional Government Pleader I, for the Appellant; C. Inbarajan, For C.S. Chandrasekaran Sastry, C. Venkatraman and C. Natarajan, for the Respondent

Judgement

Swamikkannu, J.—The Revenue has filed the tax revision case Nos. 694 to 699 of 1978 and 501 of 1979, against the orders of the

Appellate Assistant Commissioner (C.T.), Coimbatore, dated 27th September, 1977, passed in C.T. As Nos. 429 to 430 and 431 to 435 of

1976. All these revisions involve one and the same point to be discussed, and as such they were heard together, and a common judgment is being

delivered.

2. The assessment involved in these revisions is with respect to the years, 1968-69 to 1974-75. The Tribunal held that the inter-State sales of

rayon waste and staple fiber waste were only sales of miscellaneous articles by the dealers, were incidental to their business of the manufacture and

sale of rayon yarn and staple fiber yarn and that these two items are not liable to be taxed under the Central Sales Tax Act, 1956, because the

decision of the Supreme Court in *State of Tamil Nadu v. Burmah Shell Co. Ltd.* [1973] 31 STC 426, turned on the amended definition of the

respective expression for the word "business" under the Tamil Nadu General Sales Tax Act which had not been incorporated in the Central Sales

Tax Act at the material time.

3. It is contended on behalf of the Revenue by the learned Additional Government Pleader that in so far as the order of the Tribunal, it related to

sales of staple fiber waste and rayon yarn waste and the same is contrary to law and unsustainable; that the Tribunal having observed that

factually it is not disputed that rayon waste and staple fiber waste are subsidiary or by-product turned out in the course of manufacture and the

sale of such product are incidental to the business of the manufacture and sale of rayon yarn and staple fiber yarn

should have that the sales of these products are exigible to tax under the Central Sales Tax Act; that the order of the Tribunal is unsustainable and

contrary to the decision of the Supreme Court reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, ;and that the principle laid

down by the Supreme Court in the judgment reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, , were not brought to the

notice of this Court when this Court rendered the judgment reported in [1977] 40 STC 442 (*Deputy Commissioner v. South India Viscose Ltd.*).

4. The respondent in all these revisions is M/s. South India Viscose Limited, Coimbatore-18. The appeals were filed before Tribunal against the

order of the Appellate Assistant Commissioner (C.T.), Coimbatore, in Appeal Nos. 63/74, 149/74, 3/75, 207/74, 148/74, 139/75 and 13/76

respectively and they relate to the assessments made under the Central Sales Tax Act, 1956, for the assessment years 1968-69, 1969-70, 1970-

71, and 1971-72 passed by the Additional Deputy Commercial Tax Office, Coimbatore, and for the years 1972/73, 1973-74 and 1974-75 by

the Joint Commercial Tax Officer, Coimbatore. There are two items of dispute in all these seven appeals that were preferred before the Tribunal.

The first is in respect of the exigibility of tax on the sale of rayon yarn waste and staple fiber waste in the first five appeals. The second item of

dispute is in respect of the amount given as rebate on the sale of rayon yarn in all the appeals that were preferred before the Tribunal. The

contention of the respondent herein was not accepted both by the assessing officer and the Appellate Assistant Commissioner. So, all these second

appeals were filed by the respondent herein before the Tribunal. On the point whether there are ground to interfere with orders of the Appellate

Assistant Commissioner, the Tribunal inter alia, held that the decision of the Tribunal that these two items are not liable to be taxed is correct, and

that in coming to that conclusion it has only adopted the decision of this Court, namely, State of Tamil Nadu Vs. Burmah Shell Oil Storage and

Distributing Co. of India Ltd. and Another, and Deputy Commissioner (C.T.) v. South India Viscose Ltd. [1977] 40 STC 422 (Mad.) and gave a

finding that the sale of these two items for the years under reference are not also liable to be taxed, and accordingly set aside the order of the

Appellate Assistant Commissioner.

5. Mr. K. S. Bakthavatsalam, learned Additional Government Pleader for the Revenue, submitted that the Central Sales Tax Act was amended

only in 1976 with respect to the definition of the word ""business"", and before the amendment, no definition was available in the Central Sales Tax

Act relating to the word ""business"". The concept of ""business"" had been added as section 2(aa) in 1976 in the Central Sales Tax Act (74 of 1956).

The Central Sales Tax Act, 1956, in section 2 containing the definitions only dealt with the ""dealer"" in section 2(b), and not defined ""business"".

6. Section 2(b) of the Central Sales Tax Act, 1956, as it stood during the relevant time, reads as follows :

2. Definitions. - In this Act, unless the context otherwise requires, -

(a)

(b) "dealer" means any person who carries on the business of buying or selling goods and includes a Government which carries on such business.

7. Section 2(aa) of the Central Sales Tax Act inserted by Act No. 103/76 (the definition of word ""business""), reads as follows :

2. (aa) "business" includes -

(i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade,

commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues

from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

8. The learned Additional Government Pleader for the Revenue also brought to our notice the provisions of section 2(d) of Tamil Nadu General

Sales Tax Act, 1959 (Act No. 1 of 1959), which reads as follows :

2. Definitions. - In this Act, unless the context otherwise requires, -

(a) to (c)

(d) "business" includes -

(i) any trade, or commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such

trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from

such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;

9. Section 2(d) was substituted by Act No. 15 of 1964 to the Tamil Nadu Act. The learned additional Government Pleader also referred to the

decision in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , in which it was held that under the

Madras General Sales Tax Act, 1959, sales of advertisement materials and scrap and canteen sales during the period April 1, 1964 to August 31,

1964, were not liable to sales tax. Under the Madras General Sales Tax Act, 1959, before its amendment in 1964, transactions which were

incidental or ancillary to trade or commerce where there was no profit-motive were not liable to tax; and that, however, sales after August 31,

1964, of advertisement materials and scrap and canteen sales, in view of the amendment of the definition of ""business"" in 1964 in section 2(d) of

the Madras General Sales Tax Act, 1959, were liable to sales tax. The learned Additional Government Pleader also brought to our notice that the

Supreme Court observed at page 429 in the above cited decision as follows :

At the outset, the learned Advocate for the appellant did not press the contention in respect of the penalty having regard to the decision of this

Court in State of Madras v. Jayaraj Nadar & Sons [1971] 28 STC 700. In so far as the business turnover for the first part of the assessable year,

1964-65 is concerned, it is not denied that the Act of 1959, prior to its amendment in 1964, is applicable. The contention that the 1964

amendment has retrospective operation was negated in *State of Tamil Nadu v. Thirumagal Mills Ltd.* [1972] 29 STC (SC), but before this

judgment was rendered the Sales Tax Tribunal had held that that part of the assessment is also covered by the 1964 amendment. But the learned

Advocate for the appellant none the less submits that even under the 1959 Act before its amendment the transactions which are incidental or

ancillary to trade or commerce, whether or not profit has been made, are liable to tax.

10. He also brought to our notice the observations of the Supreme Court in the decision in *State of Tamil Nadu v. Burmah Shell Co. Ltd.* [1973]

31 STC 426, wherein their Lordships have dealt with the position that the decision in *Deputy Commissioner of Commercial Taxes, Coimbatore*

Division Vs. Sri Thirumagal Mills Limited, , had not been taken note of the word ""such"" in the second sub-clause, which, in their Lordships' view,

imports by reference the definition in sub-clause (i) into that of sub-clause (ii).

11. The learned Additional Government Pleader also pointed out to us the following observations of their Lordships in *State of Tamil Nadu Vs.*

Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , which runs as follows :

... The sale of scrap in these appeals, which as we have said earlier, consisted of spoiled drums, hose pipes, etc., were all held to be connected

with the business of the company. This finding is a finding of fact but even otherwise the very nature of the particular scrap, prima facie, would

indicate that they are connected with the business of the company. The assessee being an oil company has to use oil drums, hose pipes, jerry cans,

etc., as part of its trading activity and any sale of these unserviceable goods as scrap is a transaction connected with its trade or commerce. It is

contended by the respondent that in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, , this Court had observed at page 9 that the

miscellaneous, old and discarded items such as stores machinery, iron scrap, cans, boxes, cotton ropes, rags, etc., were held to be not part of or

incidental to the main business of selling textiles. This contention, in our view, does not take into account the context in which that finding had been

given. In that case, as already pointed out, what was held under the analogous Bombay Sales tax act, which was similar to that under the Madras

Sales Tax Act, prior to its amendment in 1964, the sale of scrap does not necessarily lead to an inference that business which was an element in

determining the liability of the dealer for the turnover in such goods was intended to be carried on in those goods. This Court had observed, it

cannot be presumed that when the goods were acquired, there was an intention to carry on business in those discarded materials nor are the

discarded goods by-products or subsidiary products or are produced in the course of manufacturing process; that they are either fixed assets of

the company or are goods which are incidental to the acquisition or use of stores or commodities consumed in the factory and that when these go

into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, the disposal of

those goods on the account cannot be said to be part of or incidental to the main business of selling textiles. As the scrap in that case was not held

to be incidental to the acquisition or use of stores or commodities consumed in the factory, the turnover was not included but in the case of caustic

liquor which is regularly and continuously accumulated in the tanks in the process of mercerisation of cloth, this Court held that that being a waste

material it has still a market amongst other manufacture or launderers as by-products or subsidiary products in the course of manufacture, and the

sale thereof is incidental to the business of the company.

In the view we hold the scrap is certainly connected with the business if the company and the turnover in respect of this commodity is liable to tax.

12. So far as the instant revisions are concerned, the learned Additional Government Pleader that the facts are not in dispute that rayon yarn waste

and staple fiber waste are subsidiary or by-products turned out in the course of manufacture and sale of such product are incidental to the business

of the manufacture and sale of rayon yarn and staple fiber yarn. The respondents herein are dealers in rayon yarn and staple fiber yarn. It is pointed

out by the learned Additional Government Pleader that section 2(d)(ii) available in the Tamil Nadu General Sales Tax Act, regarding the definition

of the word "business" had been utilised in construing the word "business" when that definition was not available in the Central Sales Tax Act during

the relented time. In this regard, the order of the Additional Deputy Commercial Tax Officer, Coimbatore, is brought to our notice, and it is

pointed out that the said order of the assessing authority does not touch the word ""business"". It is also pointed out by the learned Government

Pleader that the Appellate Assistant Commissioner has observed in his order at paragraph 3 as follows :

3. From the perusal of the assessment records and on hearing the arguments of the authorised representative for the appellants and the

departmental representative for the Revenue, it is seen that there is no force in the arguments of the authorised representative. Regarding the sales

of rayon yarn waste and staple fibre waste, they are subsidiary or by-products turned out in the course of manufacture and the sale of such

products are incidental to the business of the manufacture and sale of rayon yarn and staple fibre yarn. The appellants are also dealers in rayon

yarn and staple fibre yarn, and rayon waste and staple fibre waste are only subsidiary products of rayon yarn and staple fibre obtained during the

course of manufacture and sale of such products are incidental to the business. The appellants have effected sales of staple fibre yarn waste to

customers every month. Further in the decision of the Supreme Court of India reported in State of Gujarat Vs. Raipur Manufacturing Company

Ltd., their Lordships have observed as follows :

"But when a subsidiary product is turned out in the factory of the assessee regularly and continuously and it is being sold from time to time an

intention to carry on business in such product may be reasonably attributed to the assessee".

13. The Appellate Assistant Commissioner confirmed the orders of the assessing officer and dismissed the appeals referred by the respondents

herein.

14. The learned Government Pleader has also brought to our notice the following observation of the Tribunal at pages 4 and 5, which runs as

follows :

..... So it is clear that rayon yarn waste and staple fibre yarn waste are the by-products obtained during the course of manufacture, The word

"business" defined under the Tamil Nadu General Sales Tax Act has been amended and section 2(d)(ii) runs as follows :

"Business includes any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern".

Under the Tamil Nadu General Sales Tax Act prior to the amendment of 1964, such products obtained incidentally in the course of manufacture

were not liable to be taxed. In order to enable the State to levy tax on such products also, the Tamil Nadu General Sales Tax Act has been

amended in 1964. But there is no definition of the word "business" under the Central sales Tax Act and consequences of the amendment of the

Tamil Nadu General Sales Tax Act as mentioned above, has not been incorporated by bringing about the amendment of the Central Sales Tax Act

or bringing in a definition of the word "business". Subsequent to the amendment of the Tamil Nadu General Sales Tax Act, the Supreme Court has

given a decision reported in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , holding that under

the Madras General Sales Tax Act, 1959, sales of advertisement materials and scraps and canteen sales during the period 1st April, 1964 to 31st

August, 1964, were not liable to sales tax. Under the Madras General Sales Tax Act, 1959, before its amendment in 1964, transactions which

were incidental or ancillary to trade or commerce where there was no profit motive were not liable to tax. It was held, that, however, sales after

August 31, 1964, of advertisement materials and scraps and canteen sales in view of the amendment of the definition of "business" in 1964 u/s 2(d)

of the Madras General Sales Tax Act, 1959, were liable to sales tax. In a batch of cases in T.C. 87 to 89/74 in respect of the assessment for later

periods in respect of the same appellant, namely, South India Viscose Limited, our High Court has referred to the decision of the Supreme Court

reported in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, and has held that in respect of the

Tamil Nadu General Sales Tax Act, the assessment of these items, namely, sale of rayon and staple fibre waste by the sales tax authorities was

proper. It was also held that coming to the assessments under the Central Sales Tax Act, 1956, the position in regard to the assessment of

turnover relating to rayon and staple fibre waste and miscellaneous article would be different because the decision of the Supreme Court in State of

Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, turned on the amended definition of the respective

expression under the Tamil Nadu General Sales Tax Act which had not been incorporated in the Central sales Tax Act at the material time. In this

view the decision of the Tribunal that these two items are not liable to be taxed is correct. We have only to simply adopt the decision of our High

Court referred to above and give a finding that the sale of these two items for the years under reference are not also liable to be taxed and the

order of the Appellate Assistant Commissioner on this point has to be set aside.

15. The learned Government Pleader submitted that the decision in State of Gujarat Vs. Raipur Manufacturing Company Ltd., , has not been

considered fully or independently in the decision in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and

Another, . In this regard, the definition of ""dealer"" dealt with in State of Gujarat Vs. Raipur Manufacturing Company Ltd., are relied on by the

learned Government Pleader, and the same read as follows :

To regard an activity as business there be a course of dealings, either actually continued or contemplated to be continued with a profit-motive, and

not for sport or pleasure. Whether a persons carries on business in a particular commodity must depend upon the volume, frequency, continuity

and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive. By

the use of the expression "profit-motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make

some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series to transactions

effected by the person in the course of his activity. In actual practice, the profit-motive may be easily discernible in some transactions : in others it

would have to be inferred from a review of the circumstance attendant upon the transaction. For instance, where a person purchases a commodity

in bulk and sells it in retail it may be readily inferred that he has a profit-motive in entering into the series of transactions of purchased and sale. A

similar inference may be raised where a person manufactures finished goods from raw materials belonging to him or purchased by him, and sells

them. But where a person comes to own in the course of his business of manufacturing or selling a commodity, some other commodity which is not

a by-product or a subsidiary product of that business and he sells that

commodity, cogent evidence that he has intention to carry on business of selling that commodity would be required. Where a person in the course of carrying on a business is required to dispose of what may be called his fixed assets or his discarded goods acquired in the course of the business, an inference that he desired to carry on the business of selling his fixed assets or discarded goods would not ordinarily arise. To infer from a course of transactions that it is intended thereby to carry on business ordinarily the characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transactions must exist. But no test is decisive of the intention to carry on the business : in the light of all the circumstance an inference that a persons desires to carry on the business of selling goods may be raised.

16. ""We may now consider whether the turnover from the goods sold by the company was taxable. The goods sold broadly fall, as already observed, under three heads, viz., old discarded machinery, stores and scrap and miscellaneous goods; coal; and by-products and subsidiary products such as "kolsi" and waste caustic liquor, though not usable by the factory, are goods regularly and continuously produced in its manufacturing processes. We are unable to hold that in disposing of miscellaneous old and discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags, etc., the company was carruing on business of selling those items of goods. These sales were frequent and the volume was large, but it cannot be presumed that when the goods were acquired there was an intention to carry on the business in those discarded materials; nor are the discarded goods, by-products or subsidiary products of or arising in the course of the manufacturing process. They are either fixed assets of the company or are goods which are incidental to the acquisition or use of stores or commodities consumed in the factory. Those goods are sold by the company for a price which goes into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, but on that account disposal of those goods cannot be said to become part of or an incident of the main business of selling textiles. In order that receipts from sale of a commodity may be included in the taxable turnover, it must be established that the assessee was carrying on business in that particular commodity, and to prove

that fact it must be established that the assessee had an intention to carry on business in that commodity. A person who sells goods which are unserviceable or unsuitable for his business does not on that account

become a dealer in those goods, unless he has an intention to carry on the business of selling those goods.

17. But in dealing with the liability to pay tax on the price for sale of "kolsi" and "waste caustic liquor" different considerations arise. As found by

the High Court "kolsi" (cinders) are small pieces of coal which are not fully burnt. It appears that "kolsi" is not capable of "extreme fuel potency

required in the furnaces" of the appellant-company, but it is still capable of being used in "lighter furnaces". This "kolsi" is discharged from the

furnaces regularly and continuously day after day. The company collects that "kolsi" and sells it to intending purchasers in bulk. "Kolsi" would be

appropriately regarded as a subsidiary product in the course of manufacture. "Kolsi" results from coal which remains unburnt : it is on that account

a subsidiary product. When such subsidiary product is turned out in the factory regularly and continuously and is being sold from time to time, an

intention to carry on business in "kolsi" may be reasonably attributed to the company. In this connection, the principle in the judgment of the

Bombay High Court in *Aryodaya Spinning and Weaving Company Ltd. v. State of Bombay* [1960] 11 STC 141, would apply. In that case a

textile manufacture company produced "cotton waste, in the course of its manufacture of cloth and yarn. The cotton waste which was not required

for use in the factory was disposed of regularly and the Bombay High Court regarded that as a subsidiary product or incident of the business of the

assessee. The normal business of the assessee in that case was the business of manufacturing and selling cotton textiles and cotton yarn, but it could

still be regarded as an allied or incidental to business activity. The same principle in our judgment, applies to the disposal of "kolsi" which was

discharged continuously and regularly out of the furnaces of the appellant-company." (Pages 9 and 10.)

18. The learned Additional Government Pleader also brought to our notice that so far as the rayon waste and staple fiber waste are concerned,

claim of deduction considered together and had been valued at Rs. 2,57,979.80 and that rayon yarn waste alone was Rs. 2,39,943.69. As an

illustration, the learned Additional Government Pleader also brought to our notice that so far as the rayon yarn waste and staple fiber waste are

concerned which was considered as a claim of deduction, a value of Rs. 2,57,979.80 was given for the same, and that the rayon yarn waste alone

was valued at Rs. 2,39,943.69 and this is for the assessment year 1968-69. It is also submitted that in Deputy Commissioner (C.T.), Coimbatore

Division Vs. South India Viscose Ltd., , though the decision in State of Gujarat Vs. Raipur Manufacturing Company Ltd., , is not referred, the

decision in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , had been referred to, which in turn

had considered the decision in State of Gujarat Vs. Raipur Manufacturing Company Ltd., . We find that though the decision in State of Gujarat Vs.

Raipur Manufacturing Company Ltd., , is not independently referred and discussed in the decision in Deputy Commissioner (C.T.) v. South India

Viscose Ltd. [1977] 40 STC 422 (Mad.), yet we find that the decision in Deputy Commissioner (C.T.) v. South India Viscose Ltd. [1977] 40

STC 422 (Mad.), has discussed the decision in State of Gujarat Vs. Raipur Manufacturing Company Ltd., , while referring the decision in State of

Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, . In these circumstance, we are unable to uphold the

contention raised on behalf of the Revenue that decision in State of Gujarat Vs. Raipur Manufacturing Company Ltd., , has not been independently

considered in Deputy Commissioner (C.T.) v. South India Viscose Ltd. [1977] 40 STC 422 (Mad.).

19. Mr. Inbarajan, learned counsel appearing for the respondents, refers the decision in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of

Maharashtra, , wherein it has been held that there is no provision in the Central Sales Tax Act, 1956, for imposition of penalty for delay default in

payment for non-payment of tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of Tax

payable under the Central Act. Consequently, it is not permissible for the authorities to invoke the provisions section 16(4) of the Bombay Sales

Tax Act, 1953, for imposing penalty for failure by the dealer to pay sales tax payable under the Central Act within the prescribed time. Penalty is

not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in

addition to tax and is a liability under the Act. Penalty is within the assessment proceedings just as tax is within assessment proceedings when the relevant Act by substantive charging provision levies tax as well as penalty. The Central Act contains specific provisions for penalty. These are the only provisions for penalty available against the dealers under the Central Act. The learned counsel for the respondents submitted that the decision arrived at by the Tribunal is correct and require any reconsideration.

20. On a careful anxious scrutiny of the entire facts of the revision cases before us together with the arguments advanced by either side in these revisions, we are inclined to hold that the tribunal is correct in its decision regarding rayon yarn waste and staple fiber waste are not liable to be taxed under the Central Sales Tax Act, especially when there is no definition of the word "business" available in the Central Sales Tax Act during the relevant time. According, these tax revision cases are dismissed with costs (one set). Counsel's fee Rs. 500.

21. Petitions dismissed.