
(1963) 03 AHC CK 0005
In the Allahabad High Court
Case No : Sales Tax Reference No. 237 of 1955

Kanpur Development Board	Vs	APPELLANT
Commissioner, Sales Tax		RESPONDENT

Date of Decision : 19-03-1963

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1963) 14 STC 493

Hon'ble Judges : M.C. Desai, C.J.; K.B. Asthana, J

Bench : Division Bench

Advocate : N.D. Pant, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

M.C. Desai, C.J.—The Judge (Revisions), Sales Tax, U. P., has, at the instance of an assessee, referred to this Court this statement of the case inviting its opinion on the following questions:

Whether on the admitted facts of this case, the Kanpur Development Board can be said to be a "dealer" within the meaning of Section 2(c) of the U. P. Sales Tax Act, and whether it can be assessed to payment of sales tax on the value of the materials supplied by it to its contractors ?

2. The assessee, the Kanpur Development Board, was constituted for certain specific purposes such as provision of water supply and public drains, development and maintenance of streets, regulation of traffic, town planning, organization of transport, river trading, adequate housing, location of markets and provisions of sites for hawkers and peddlers. It had to make constructions to carry out these objects and it entrusted the work to contractors. In order to avoid delay and also to secure the use of satisfactory materials in all constructions it arranged to supply the contractors with certain materials required by them in the constructions from its own stores on certain prices. The terms of the contracts with the contractors included the following :-

(1) The contractor shall be supplied with such material and stores as are required from time to time to be used by him for the purpose of contract only.

(2) The value of the full quantity of the materials and stores so supplied at the rates specified in the said schedule of the memorandum may be set-off or deducted from any sums due or thereafter to become due to the contractor under the contract or otherwise.

(3) All materials supplied to the contractor are the property of the contractor but shall not on any account be removed from the site of the work except with the permission of the Assistant City Engineer or under the orders of the Assistant Engineer and shall at all times be open to inspection by the Engineer in charge.

(4) Any materials unused and in perfectly good condition at the time of the completion or determination of the contract may by special arrangement be taken over by the Kanpur Development Board at the prevailing market rates if required for use for other works in progress provided that the price allowed shall not exceed the amount charged to the contractor.

3. In accordance with these terms the Board supplied materials from its stores to the contractors and realized their price from them. It has been assessed to sales tax by the Sales Tax Officer on the ground that it is a dealer within the meaning of the Sales Tax Act and is liable to be assessed on the turnover of the sales made to the contractors. The Judge (Appeals), Sales Tax, set aside the assessment order, he being of the view that the Board did not carry on any business by selling materials to the contractors and was, therefore, not a dealer. The Judge (Revisions) noted the facts that all materials supplied to the contractors became their property, that the contractors had to pay their price through adjustment of their claims under the contracts and that the Board had a right to repurchase unused materials at the prevailing market price and held that the transaction amounted to sale. Then he noted the fact that the prices of the materials were worked out from the cost price including insurance, freight, cartage, octroi, sales tax, producers' tax, etc. and an allowance for normal price fluctuations and the fact that materials could be repurchased by the Board at the prevailing market prices provided that they were lower than the prices at which they were sold and concluded that this meant nothing but profit from the sales. In the result he held that the Board was a dealer and restored the assessment order of the Sales Tax Officer.

4. I find that the order passed by the Judge (Revisions) on the assessee's application u/s 11(1) is itself the statement of the case. u/s 11(1) he is not required to write out an order granting an application for reference ; if he decides to grant the application he is only required to draw up a statement of the case and refer it to the High Court. Even if he writes out an order containing his decision, it is obvious that it must be distinct from the statement of the case which alone is to be referred to this Court. This Court is only concerned with the statement of the case and not with the reasons given by him for deciding to refer

the case. As the Judge (Revisions) has combined in one document his order referring the case and the statement of the case, it has become more than a statement of the case ; it contains irrelevant matter and discussion of questions of law. I am surprised to find a statement of the case containing so much irrelevant material.

5. It is clear from the statement of the case that the Board issued materials to the contractors from its stores and transferred property in them for deferred payment. "Sale" is defined in Section 2(h) to mean transfer of property in goods for cash or deferred payment. The restrictions on the contractors' power to remove the materials from the site and the requirement that they will always be open to inspection by the Board's engineers do not detract from the term that the property in the materials was transferred to the contractors. The contractors had to pay for the property transferred to them though not in cash. When they submitted their bills for the work done by them the price of the materials supplied to them was deducted from the amounts of their bills and the balance was paid to them. So property in the materials was transferred to them for deferred payment and the transaction amounted to sale. The term regarding repurchase confirms, rather than disproves, that there was sale; repurchase of unused materials means retransfer of the property in them by the contractors to the Board. There could not be a second sale unless there was an earlier sale.

6. The other and difficult question is whether the Board is a dealer. "Dealer" is defined in the Act to mean "an association of persons carrying on the business of...selling goods." The first question is whether the Board is an association of persons and the second question, which would arise if it is answered in the affirmative, is whether it carries on the business of selling goods. The Board was constituted under the Kanpur Urban Area Development Act (No. VI of 1945), and consists of certain persons enumerated in Section 6 of the Act. It is, therefore, an association of persons and it was not contended before us that it is not.

7. The next question is whether the Board carries on the business of selling goods. It has certainly sold the goods but it would not be liable to pay sales tax unless it did so as an association of persons carrying on the business of selling. "Business" has (1) a broad, generic meaning which is the primary meaning of right or occasion of making oneself busy, that which busies or occupies the time, attention or labour of one as his principal concern, regardless of any idea for gain or profit and (2) a narrower or restricted meaning which is the commercial, legal or trade meaning of occupation for livelihood or profit such as a commercial or industrial establishment or enterprise. In the narrower sense it applies only to that in which one engages for the purpose of livelihood, profit or the like. In stressing the purpose of livelihood or the profit motive it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued though it is enough if there is a bona fide intention to earn a livelihood or make a profit. The word has been held to imply the idea of permanence, more than an isolated act or two, something more than a single undertaking. (See

Corpus Juris Secundum, Vol. XII, "business" pp. 761 etc). Whether the word is used in its broad sense or in its narrow sense depends upon the context, and in a statute and particularly one dealing with commerce or trade it is understood not in any abstract sense but in a highly practical signification, as having reference to an occupation for livelihood or profit. "When one speaks of business, the mind naturally contemplates a commercial or industrial establishment or enterprise"; (ditto p. 765) and this is all the more true when the Sales Tax Act speaks of the business of selling goods. In Words and Phrases, Vol. I, by Burrows, it is said that one meaning of business is any particular matter or affairs of serious importance (as used in "goes to see him on business") and that the other meaning is an active occupation or profession continuously carried on and that it is in this sense that the word is used in Finance (No. 2) Act, 1915, Sections 38 and 39. In Income Tax Commissioner v. Shaw Wallace and Co. I.L.R.(1932) Cal. 1343, the Judicial Committee observed at page 1351 that the fundamental idea of the continuous exercise of an activity underlies the word "business". In Deputy Commercial Tax Officer v. Cosmopolitan Club [1955] 6 S.T.C. 1, Balakrishna Ayyar and Rajagopala Ayyangar, JJ., held that a club which sells refreshments at standard rates to its members does not carry on the business of selling goods within the meaning of the Madras General Sales Tax Act which also defines "dealer" as a person who carries on the business of buying or selling goods. The learned Judges observed that the underlying idea is that the transaction is commercial in its nature and relied upon Graham v. Lewis (1888) 22 Q.B.D. 1, in which Fry, L.J., said that "carry on business" is not ordinarily used in the sense of a person being busy or doing business merely and that it has the narrow meaning of having control and direction over an activity carried on for some pecuniary gain. In Trustees of the Port of Madras v. State of Madras [1960] 11 S.T.C. 224, Rajagopalan and Ramachandra Iyer, JJ., found that when the Madras Port Trust sold water to ships calling at the port it did not carry on a business but only discharged its statutory duty. In Gannon Dunkerley and Co. v. State of Madras [1954] 5 S.T.C. 216, a contractor supplied food-grains to his employees and recovered their price by debiting it against the wages earned by them and was held not to carry on the business of selling food-grains because he had no intention of making profit from the scheme. The Court held that the word "business" used in the definition of "dealer" was used in the commercial sense of carrying on an activity in order to earn a profit. The Madhya Pradesh High Court gave the same meaning to the word in State of M.P. v. Bengal Nagpur Cotton Mills [1961] 12 S.T.C. 333. A person was held to be not a dealer if he had no motive to make a profit from the activity in Sree Meenakshi Mills Ltd. v. State of Madras [1954] 5 S.T.C. 291. In In re a Debtor [1927] 1 Ch. D. 97 at p. 104, an artist was held to be carrying on a business because he had a motive to make a profit.

8. I am of the opinion that "carries on business" means carries on a continuous activity in order to earn a livelihood or to make a profit and does not mean simply remaining occupied with something. The word is used in the narrow, that

is, the commercial or legislative sense in the phrase used in the definition of "dealer" in the Act and not in the general or broad sense. The ordinary meaning of a dealer is a person carrying on a business of buying and selling goods with a view to make a profit or to earn a livelihood and though the word has been defined in the Act and the definition meaning must be given to it, in getting at the definition meaning one cannot lose sight of its popular meaning. The Legislature could have used another word and defined it as "an association of persons carrying on the business of...selling goods"; but it chose the word "dealer". It must have done so with the knowledge of the fact that in interpreting the word "business" used in the definition the mind would at once go to the idea of earning a livelihood or making a profit. The Legislature did not use the word merely to indicate that the activity must be a continuous one because then it would have used some other word such as "practice", "activity" or "system". The idea of continuity was already there in the words "carrying on", and the word "business" was not required to indicate it; if it was used when the idea of continuity was already there it must have been used only to convey the idea of profit-making.

9. Our attention was drawn to the words "whether for commission, remuneration or otherwise" qualifying the words "carrying on the business" and it was argued that the definition of "dealer" includes a person carrying on the business otherwise, i.e., without any intention of making a profit. I see no force in the argument. The word "otherwise" means "other than for commission or remuneration". If a business is carried on for profit it cannot be said to be carried on for commission or remuneration and must be held to be carried on for something other than commission or remuneration. Commission and remuneration do not include profit and, therefore, "otherwise" covers profit.

10. Income resulting from an activity carried on without any intention of making a profit may be taxable under the Income Tax Act but it does not follow that "business" within the meaning of the Sales Tax Act includes an activity carried on without any intention of making a profit. We are not concerned with the meaning of "income" at all in this case.

11. It appears from the statement of the case that the Board had no intention whatsoever of making a profit out of the sale of goods to contractors ; the only reasons behind the activity were (1) avoidance of delay in the performance of the contracts, and (2) securing the use of proper materials in the constructions. A particular stipulation regarding repurchase of goods by the Board does not mean that the sale itself was with the idea of making a profit. The repurchase may be with the idea of making a profit but we are concerned with the question of sale and not of purchase. Goods were sold at the rates specified in the schedule but it is not known whether the rates included any profit or not. Contractors were not obliged to buy the goods from the Board ; under the contract they were given only a right to demand them from the Board. If they could get them elsewhere at a less price they would naturally get them

elsewhere. The Board did not exhibit the goods and did not sell them to anybody wanting to buy them. If its intention was to make a profit it would have opened a regular shop or would have sold to anybody who wanted to purchase them and would have displayed them to encourage prospective buyers. Though goods were sold and became the property of the contractors there were conditions imposed upon them ; they could not remove them from the site without permission; they had to remain open to inspection by the Board's engineer and the Board had a right to repurchase them at the prevalent market rates and (sic) exceeding the rates at which they were sold. These onerous conditions are inconsistent with the idea of making profit. No contractor would be expected to purchase goods from the Board on the onerous conditions if he had to pay as much to the Board as to a person carrying on the business of selling goods at a profit. Carrying on a business for a profit is not one of the duties of the Board ; it is expected to raise money needed by it through taxation. It is clear from these facts that the Board had no intention to make a profit out of the sale of goods to contractors.

12. Even in the broad sense, the Board could not be said to have remained busy with selling goods to contractors; having regard to its statutory duties one can say that its being occupied in the sale of goods was so negligible in comparison to its being occupied with the performance of statutory duties that it could hardly be said to have remained busy with sale of goods. Even if it enters into this kind of contract with every contractor it is not known how many contractors take advantage of the facility offered to them by the Board and to what extent. Whether it remains busy with selling goods or not would depend upon the extent to which its contractors apply to it for sale of goods.

13. Sri Shanti Bhushan argued that the narrow meaning of the word "business" offends against Article 14 of the Constitution. I do not understand how it would but even if it would the effect would be that the Board will not be liable to pay sales tax and not otherwise. The argument based on unconstitutionality is not open to the Commissioner of Sales Tax who wants to enforce the provision ; it is open only to one who would be aggrieved by the enforcement of it. If the correct interpretation of a provision would render it unconstitutional the Court will have to strike it down and cannot give a forced interpretation with a view to save it.

14. I would, therefore, hold that the Board did not sell goods to contractors as a dealer and was not liable to pay sales tax on the turnover of the sale.

15. In the result my answer to the question is "no".

16. Copies of the judgment may be sent under the seal of the Court and the signature of the Registrar to the Judge (Revisions), Sales Tax, and the Commissioner of Sales Tax, U.P., as required u/s 11(6) of the Sales Tax Act and the applicant may recover its costs of this reference, assessed at Rs. 100, from the Commissioner of Sales Tax, U. P. Counsel's fee may be assessed at Rs. 100.

K.B. Asthana, J.

17. I agree and have nothing to add.