

(1997) 09 MAD CK 0085

In the Madras High Court

Case No : Tax Cases (R) No's. 375 and 376 of 1988

Kerala State Small Industries Development and Employment
Corporation Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:

Central Sales Tax Act, 1956 — Section 3(a), 6A

Citation : (1997) 09 MAD CK 0085

Hon'ble Judges : R. Jayasimha Babu, J;B. Akbar Basha Khadiri, J

Bench : Division Bench

Judgement

R. Jayasimha Babu, J.—For the assessment years 1982-83 and 1983-84, the petitioner has been assessed to Central sales tax on the cement transported by it from the Port of Tuticorin to the premises of the petitioner's customers in the State of Kerala. The petitioner being aggrieved by the order of the Tribunal, which has upheld that levy, has come up in revisions.

2. Petitioner is an undertaking owned by the State of Kerala and as its name certifies it as a Corporation established for the purpose of promoting small industries development and employment therein in the State of Kerala. It admittedly did not have a regular place of business in the State of Tamil Nadu. The activities of the petitioner which led to the present proceedings arose out of the import of cement by the petitioner between 1982 and December, 1983. According to the respondent, the petitioner established a place of business at Ramaiah lodge in Tuticorin where its Liaison Officer was staying and had used the port as a place of storage of cement and had effected inter-State sales therefrom.

3. It is not in dispute that the cement transported from the Port of Tuticorin to the premises of the customers of the petitioner in the State of Kerala had been imported into India under an import licence granted to the petitioner. The import licence was for the import of 2,50,000 metric tonnes of cement. One of the conditions subject to which licence was granted was that "the quantity of cement

imported under the licence shall adjustable against the requirement of Kerala State as may be assessed by the Ministry of Industry, Government of India, New Delhi, for the years 1982-83 and 1983-84". The fact that the cement came to be unloaded at the Port of Tuticorin is not in serious dispute, was purely a fortuitous circumstance. In the normal course, cement would have been unloaded at anyone of the ports in the State of Kerala. The ship had to, according to the petitioner, unload at Tuticorin Port as at that point of time, the Port of Cochin was congested and there would have been considerable delay and additional expense if the ship had to wait for a berth at that port. Tuticorin being the nearest other port to Kerala, the ship had called at that port and the cement was unloaded there for the purpose of being transported over land from that port to the State of Kerala. That the ultimate destination of the imported cement was Kerala was not in doubt at any point of time. The quantity imported was meant for the users in Kerala, and this quantity was to be set-off against the total requirements of that State as assessed by the Government of India.

4. It is also not in dispute that the petitioner had received request for allotment of cement by those in need of the same in the State of Kerala and that such request had been received even before the ship called at the Port of Tuticorin. Along with the request made by those customers of the petitioner, the value of the cement was also paid as advance. Copies of the documents pertaining to one such transaction has been placed before us. It had also been produced by the assessee before the authorities below. These documents show that the Orthodox Syrian Church of India had on January 14, 1983 sought allotment of 1,000 bags of cement for use in the construction of a building at Markuriakose in Mylapara in Kerala. Along with that request for allotment, a sum of Rs. 13,000 was paid towards the cost of 200 bags. A receipt dated January 15, 1983 was issued by the Corporation acknowledging the payment. The amount was received as advance cost of cement. A delivery order was issued thereafter by the petitioner on January 15, 1983. That delivery order is addressed to the officer-in-charge of the petitioner at the Port of Tuticorin. It directed him to deliver to the customer 10 tonnes of cement at Rs. 1,300 per tonne. The amount of Rs. 13,000 has been received by the petitioner in Kerala on January 15, 1983. The goods were thereafter moved by the petitioner's transport contractor. The document under which the transport was effected is captioned as "Material Transfer Note". It shows that the goods were delivered to the customer at Quilon. Another document captioned as "Truck Chit & C.R.C." sets out the registration number of the truck, number of bags loaded, name of the consignee, name of the ship and bears the signature of the consignee. It is dated January 23, 1983. Yet another document - the invoice prepared by the Raw Material Division of the petitioner at Cochin which is dated April 22, 1983 mentions the trip sheet number, the truck number and the customer's name as the person to whom goods were delivered, the goods delivered being imported cement of 10 tonnes, the value of which is Rs. 13,000.

5. It is on the basis of documents such as these that the petitioner has been

assessed to Central sales tax. The assessing authority as also the Tribunal having taken the view that these documents establish an inter-State sale of the imported cement from its place of storage in the wharf at Tuticorin to the petitioner's customers at Kerala. The authorities were also of the view that the petitioner had to camouflage these transactions as transfer of stocks to depots as in the Material Transfer Note. It is mentioned that the stock is transferred to the petitioner's depot in Kerala and in the body of the document, it is mentioned that the goods were delivered to the customer of the petitioner at Kerala. The Tribunal by its common order has upheld the view of the assessing officer and the appellate authority that the petitioner had a place of business at Tuticorin, that it was required to register itself as a dealer, but had failed to do so and that it had violated the provisions of the Act by failing to produce the requisite forms in relation to these inter-State sales and had also failed to pay the tax payable thereon.

6. Learned counsel for the petitioner-assessee submitted that the assessment so made and upheld is wholly illegal and is liable to be set aside. Learned Special Government Pleader supported the order of the Tribunal.

7. Learned counsel for the petitioner submitted that what is taxable under the Central Sales Tax Act, 1956, is only a concluded transaction of sale, that mere agreement to sell is not taxable, that all movement across the borders of States cannot necessarily lead to the inference that such movement was the result of, or was occasioned by an inter-State sales; that it is only when such movement is expressly or impliedly contemplated in the contract of sale, the transaction can be regarded as inter-State sales; that the burden of proof for establishing that the transaction is an inter-State sales is squarely on the Revenue; that the facts established before the authorities would clearly show that the movement of the goods from Tuticorin was entirely a fortuitous circumstance and was necessitated by the fact that the ship had to unload its cargo at Tuticorin rather than at Cochin, and the goods so unloaded have necessarily to be transported over land into Kerala which was the destination contemplated by the petitioner and as permitted by the Government of India at all relevant times; that the impugned orders have been made without affording reasonable opportunity to the petitioner to effectively answer the claims made against it, inasmuch as the order is based upon the statements made by the transporter and the records obtained from the office of the transporter and those statements and records had not been made available to the petitioner despite a request for the same having been made; that the petitioner did not carry on business in the State of Tamil Nadu, that it had no place of business in Tuticorin as all that it had in Tuticorin was its Liaison Officer who had to maintain a stock register to keep account of the goods stored in the wharf and the stock remaining from day-to-day.

8. Counsel submitted that the burden of proof of showing that an inter-State sale has taken place is on the Revenue and for this proposition, placed reliance on the decision of the apex Court in *Tata Iron and Steel Co. Limited v. S. R. Sarkar*

[1960] 11 STC 655. It was held therein that a sale being by the definition, transfer of property, becomes taxable u/s 3(a) if the movement of goods from one State to another is under a covenant or incident of the contract of sale, and the property in the goods passes to the purchaser otherwise than by transfer of documents of title when the goods are in movement from one State to another. It was also held that a mere contract of sale which does not result in transfer of property occasioning movement of goods from one State to another does not fall within the terms of section 3(a) of the Central Sales Tax Act.

9. Counsel also relied upon the decision of the Supreme Court in *Commissioner of Sales Tax, U.P., Lucknow v. Suresh Chand Jain* [1988] 70 STC 45. That was a decision rendered by a two-Judge Bench of the apex Court in the context of a claim by an assessee that he had only effected local sales and that the movement of the goods thereafter was effected by his purchaser. In that context the court observed that the onus lies on the Revenue to disprove the contention of the appellant, and that the Tribunal had not found any material to do so. The apex Court, therefore, declined to interfere with that order of the Tribunal.

10. It is not possible to agree with this submission of learned counsel that the onus lies on the Revenue to establish that the sale is an inter-State sale. It is for the purpose of obviating any such claim that Parliament enacted section 6A of the Act which was introduced into the Act by the amending Act No.61 of 1972 with effect from April 1, 1973. Section 6A deals with burden of proof in case of transfer of goods claimed to be otherwise than by way of sale : The burden under that provision is cast upon the dealer to show that the movement of the goods from one State to another was not occasioned by a sale, but was occasioned by reason of the transfer of the goods by him to any other place of his business or to his agent or principal as the case may be.

11. The notes on clauses accompanying the Statement of Objects and Reasons for the incorporation of section 6A in the Act reads as under :

"This clause seeks to insert a new section 6A in the principal Act for the purpose of providing that the burden of proving that any movement of goods from one State to another was occasioned otherwise than by way of sale shall be on the dealer making such claim. For the purpose of discharging this burden, the dealer may produce a declaration in the prescribed form from the person in the other State to whom the goods have been sent along with evidence of such despatch of goods."

12. Once the movement of goods is admitted, then it is for the dealer who has moved those goods to establish that such movement had not been occasioned by an inter-State sale.

13. That it is not movement for sale that is to be taxed, but, it is movement occasioned by the inter-State sale which renders such sale taxable under the Act is beyond dispute. It is also not in dispute that what is taxable is the transaction of sale and not a mere agreement to sell. The movement of the goods must have

been occasioned by or be incidental to the transaction of sale.

14. Counsel for the petitioner also placed reliance on the decision of the Supreme Court in *Ben Gorm Nilgiri Plantations Co. v. Sales Tax Officer* [1964] 15 STC 753. That was not a case concerning an inter-State sale. What was considered in that case was as to when a sale of the course of export can be said to take place. It was in that context the court held that the chain of events must be continuous and complete without any interruption, for sale to be regarded as a sale in the course of export. The actual export must be a direct consequence of the sale. The transaction should be such that any severance at any point in that chain would result in breach of contract and that a sale of export is distinct and different from sale in the course of export. These observations of the court made in the context of export sales do not directly apply to transactions which are in the nature of inter-State sales. That there Should be a direct link between the sale and the movement across the State borders is clear from the section itself. The sale must have occasioned the movement or such movement must have been incidental to the sale. It is also worthy to note that the apex Court in numerous decisions rendered by it while considering transactions of inter-State sales, has not considered it necessary at any time to rely upon or advert to the law laid down by it in the context of and in relation to export sale for the purpose of elucidating the parameters of the provisions concerning inter-State sales. Decisions rendered with regard to export sales cannot be read as if they were the decision rendered in relation to inter-State sales.

15. Counsel also referred to several other decisions rendered by the apex Court mainly for the purpose of distinguishing the same. Counsel referred to the case of *English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others*, wherein the court reiterated what has been said in the case of *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, that the movement of goods from one State to another should be an incident of the contract of sale, if the sale is to be regarded as inter-State sales. The court also reiterated the principle that the inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It was further pointed out that it is not necessary that the sale must precede the inter-State movement and it was equally not necessary that the covenant regarding inter-State movement must be specified in the contract itself. It would suffice if the movement is in pursuance of and incidental to, the contract of sale. On the facts of that case, the court held that when a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to despatch the goods direct to the buyer and the goods are sent to the buyer under those circumstances, it would not be a sale between the factory and its branch, but, would be a sale between the factory and the customer who had placed the order with the branch.

16. Counsel also referred to the decision of the Supreme Court in the case of *Sahney Steel and Press Works Ltd. v. Commercial Tax Officer* [1985] 60 STC 301,

wherein the court held that even if the customer placed an order with the branch office and the branch office communicated the terms and specifications of the order to registered office and the branch office itself was concerned with despatching, billing and receiving of the sale price, the order placed by the customer was an order placed with the company, and if for the purpose of fulfilling that order the manufactured goods commenced their journey from the registered office in the State to the branch outside the State for delivery, such a transaction would constitute an inter-State sale. That was a case where the goods involved were non-standard goods.

17. Counsel also referred to the case of *Union of India v. K. G. Khosla and Co. Ltd.* [1979] 43 STC 457 wherein the apex Court held that it is not necessary that the contract of sale must itself provide for, and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. It was also observed that the sale can be an inter-State sale, even if the contract of sale does not itself provide for the movement of goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract.

18. Reliance was also placed on two decisions of this Court in the cases of *Sri Ganapathy Mills Co. Ltd. v. State of Tamil Nadu* [1977] 40 STC 397 and *Deputy Commissioner (C.T.) v. Pudukkottai Textiles Limited* [1976] 37 STC 544 wherein it was held that if the parties at the time of the contract contemplated that the goods from out-of-State places should be moved and supplied to the purchaser in order to fulfil the contract, such movement would not render the transaction an inter-State sale.

19. The law governing inter-State sales is now fairly well-settled although in the application of law to individual cases difficulties continued to arise and each case will have to be decided with reference to its own special facts. That movement of the goods across the borders of State is an essential pre-condition, beyond any controversy only a transaction of sale connected with that movement can be regarded as an inter-State sales. The movement and the sale must have a reasonable direct link. Such movement can be stipulated in the contract of sale specifically or it may be contemplated by the parties as an implied term of contract. Even if the movement of the goods is not specified in the contract, and even if it cannot be regarded as an implied term, if such movement is incidental to the contract, then in such case also such transaction would be an inter-State sale. The tax that is levied is on the transaction of sale. The concept of sale itself being an intangible one, where there is no transfer of property in the goods there is no sale, and mere movement cannot be the subject-matter of the taxation, nor can a mere agreement to sell be taxed.

20. The relationship between the movement and the sale should be, very broadly put, be that of effect and cause. The sale should have occasioned the movement or the movement should have been incidental to the sale.

21. It has now to be ascertained as to whether by applying these settled principles of law, the movement of the goods by the petitioner from the Port of Tuticorin to Kerala for the purpose of delivering the same to its customers therein amounts to an inter-State sale.

22. It is necessary to keep in view the background in which the goods, viz., cement had reached the Port of Tuticorin. The cement was imported into India under import licence obtained by the petitioner. The licence so granted was for the purpose of enabling the petitioner to fulfil in part the requirements of those resident in the State of Kerala for cement. The destination in India for the cement so imported was the State of Kerala. Though the ship could have berthed at Cochin and the goods unloaded there, the unforeseen congestion in the port had led to the ship being diverted to the nearest port which was in Tamil Nadu, that port being Tuticorin. The cement was, therefore, unloaded there and was to be transported into Kerala over land. Those in the State of Kerala who needed cement had applied to the petitioner for allotment and had paid the value in advance. It was not a condition in the arrangement between the petitioner and those customers that the cement to be supplied to them should be from out of the cement, imported by the assessee from other countries in terms of its import licence. The consumer had very little concern regarding the places from which the cement to be delivered to him, would come. The choice was entirely that of the petitioner. The petitioner in the normal course should have transferred the entire stock of cement imported by it to its own godowns at Kerala wherefrom further sales should have been effected. Having regard to the factors of convenience and with a View to save time, it had directed its transporter to deliver the cement straight from the wharf to the place of business of customers in Kerala. Had these stocks been first taken to its godowns and thereafter despatched from that point to its customers, there could have been no doubt that such a transaction would not amount to an inter-State sale. The fact that the cement imported specifically for the purpose of meeting the requirements of the State of Kerala had been moved into that State over land which involved movement across the State border, in the circumstances, it cannot be regarded as a movement occasioned by an inter State sale. What was contemplated at all times as between the assessee and the customers in Kerala, was the acquisition of cement by the Assessee - the assessee not being a manufacturer - and the supply thereof to the customer. The customer was required to pay the price in advance. The customer had no concern with the point from where the movement of the goods to be supplied to the customer would commence. The price was not dependent on the distance to be covered as the price was all-inclusive price. The customer was equally unconcerned with any particular set of stocks being earmarked for him. The goods to be supplied were standard goods and were not required to be made to the specifications of the customer. The movement of the goods in this background, such movement being unavoidable having regard to the unloading at the port which was nearest to the borders of the State of Kerala cannot be regarded as being pursuant to being incidental to the sale effected by

the assessee to its customers. The contract for sale was entered into in Kerala and the goods were appropriated to that contract only when they were delivered to the customer in Kerala. The fact that the lorries loaded with cement at Tuticorin were moved directly to the premises of the customer in Kerala in the background of these facts, cannot be regarded as a factor tilting the scales in favour of a finding that these were inter-State sales. The customer had not stipulated that the cement to be delivered to the buyer should be from the stock at the wharf nor had the assessee promised to effect delivery from the stock at the wharf. The delivery was to be given at the premises of the buyer and it was open to the assessee to divert any truck loaded with its imported cement to any point of its choice in the State of Kerala. The appropriation of the goods to the contract between the assessee and the buyer was to take place only at the point of delivery, viz., place of business of the buyer. Until that point, the buyer could not claim any proprietary right in the stock loaded on the lorry.

23. As observed by us earlier, each case has to be dealt with on the basis of the special facts of that case. Factors which may be regarded as crucial in the context of one set of facts may not necessarily be regarded as crucial in the context of another set of facts. The degree of importance to be attached to any given factor depends upon the totality of the facts of the case and the relative importance which each fact assumes in the context as a whole. In these cases the goods transported by the petitioner to Kerala was at all times meant for consumption in Kerala. It was imported for the specific purpose of meeting the requirements of the State of Kerala. The docking of the ship in a port outside the State of Kerala was a fortuitous circumstance, and once the goods came to be unloaded in the neighbouring State, they had necessarily to be moved over land to Kerala. The fact that such movement terminated at the place of business of the customer, without being first taken into the stock at its own godowns, and that such termini was at the sole option of the assessee who had in any case to deliver the cement at the place of business of the customer, cannot therefore be regarded as converting what was otherwise a local sale into an inter-State sale. What was contemplated by the assessee and its customer in Kerala was a local sale. The assessee was expected to have control of the goods which it had undertaken to deliver and the assessee expected the delivery to be effected at its place of business. The direction given by the assessee to its Liaison Officer at the port to instruct the transporter to carry the goods to the premises of the buyer in Kerala, therefore, cannot make the vital difference as between a local sale and an inter-State sale.

24. In a semi federal nation like India, the States are not expected to make capital out of the unforeseen arrangement required to be made by another State, and taking advantage of the diversion of ship to a port within that State lay claim for tax on alleged inter-State sale of the goods so unloaded at the port within that State, even when such goods had inevitably to move to the State for which the goods were intended.

25. Having regard to the special facts of this case we are unable to uphold the order of the Tribunal and of the authorities below. It is not necessary to go into the other pleas though we may observe that there is substance in the plea of the counsel for the petitioner that the petitioner had not been given proper opportunity to establish its case as the statements given as also the documents obtained from the transporter had not been made available to the petitioner despite its request.

26. In the result, the revisions are allowed. The assessments made on the petitioner for tax under the Central Sales Tax Act on the disputed turnover are set aside. As the levy of tax has been set aside, the penalty imposed also cannot survive. No costs.

27. Petitions allowed.