

(1971) 08 DEL CK 0030

In the Delhi High Court

Case No : Civil Writ Appeal No. 162D of 1966

K.G. Khosla and Co. Pvt. Ltd.

APPELLANT

Vs

Chief Commissioner, Delhi and Others

RESPONDENT

Date of Decision : 02-08-1971

Acts Referred:

Citation : (1971) ILR Delhi 340 : (1972) 30 STC 13

Hon'ble Judges : V.S. Deshpande, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : Ved Vyas, K.K. Jain, Bishambar Lal, B. Kirpal, D.C. Dass, S.S. Chadha, R. Dayal, D.K. Kapur and Rishikesh, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The petitioner is a private limited company with its registered office and the head office in the Union territory of Delhi but its factory for making air compressors and garage equipments at Faridabad in the State of Haryana. The business of the petitioner in its own words is carried on as stated in paragraphs 3 and 27 of the writ petition namely:-

"3.Orders for the supply of goods from various parties are received by the petitioner company at its head office in Delhi. The head office draw(s) out a production programme and advises the factory to manufacture the goods in accordance therewith. After the goods are so manufactured in the factory, the goods are collected by the head office and brought to its head office in Delhi. From its head office the goods are dispatched to various customers whether outside Delhi or in Delhi. The price of goods is also received at the head office. In short, the position is that excepting the manufacture of goods at the factory, all other activities including that of booking of orders, sales, dispatching and billing and receiving of sale price are being carried out from the head office in Delhi. 27. The goods manufactured in the factory are the future goods within the meaning of the Sale of Goods Act and the dispute does not relate to any ready goods."

(2) For the purposes of sales-tax, the petitioner is registered as a dealer both in the Union territory of Delhi and in the State of Haryana. The petitioner filed returns of sales-tax with the Sales-Tax authorities at Delhi inasmuch as the sale of goods manufactured in the factory was being effected from Delhi by the head office of the petitioner at Delhi. The sales-tax was also paid by the petitioner under the Bengal Finance (Sales Tax) Act, 1941 as extended to Delhi as if the sales effected by the petitioner were intra state sales effected within the Union territory of Delhi. On 24-11-1965, however, the Sales-Tax Assessing authority at Gurgaon in the then State of Punjab subsequently becoming the State of Haryana from 1-11-1966 under the Punjab Reorganisation Act, 1966, sent a notice to the petitioner under sections 11 and 14 of the East Punjab Central Sales Tax, 1948 and rule 33 made there under that in respect of the period commencing on 1-4-1961 and ending in the year 1964-65, the sales made by the petitioner were liable to assessment. Therefore, the petitioner paid sales-tax to the Sales-Tax authorities at Delhi only up to 30-9-1965. Sales-tax thereafter has not been paid by the petitioner pending the decision of the rival claims of the Sales-Tax authorities at Faridabad and Delhi to assess the petitioner to sales-tax. The first assessment of inter state sales-tax was made by the Assessing authority at Faridabad against the petitioner on 24-11-1965 as per Annexure to the written petition. The petitioner filed an appeal against this order. The Deputy Excise and Taxation Commissioner of Ambala thereupon quashed the said order on 20-4-1966 as per Annexure R-A and remanded the case for trial on merits to the Assessing authority. Accordingly an assessment on merits was made by the Assessing authority at Faridabad on 30th March 1968 on the basis that the sales effected by the petitioner were inter state sales liable to be assessed to sales-tax under the Central Sale Tax, 1956, as per the Annexure at page 178 of the paper-book. An appeal against this order by the petitioner is said to be pending.

(3) The case of the petitioner before the Assessing authority at Faridabad as stated in paragraph 6 at page 3 of the written statement prior to the order dated 24-11-1965, was also that "in the case of this company the goods are future goods because the goods are manufactured only when there are orders received from the buyers and it has to be manufactured according to the specifications intimated by them."

(4) In this writ petition, the petitioner prays that the controversy between the Sales-Tax authorities of Haryana and the Union territory of Delhi may be resolved by this Court and till then both these authorities should be asked not to recover sales-tax from the petitioner. The Chief Commissioner and the Assessing authority at Delhi are Respondents 1 and 2, the State of Punjab now the State of Haryana and the Assessing authority at Faridabad are Respondents 3 and 4 and the Union of India is Respondent No. 5.

(5) The contention of the State of Haryana and the Assessing authorities in that State is that on the facts stated by the petitioner, the movement of the goods from Faridabad to Delhi and onwards is caused as a necessary incident of the

contracts of sale made by the petitioner. The sales are, Therefore, deemed to take place in the course of inter-State trade within the meaning of section 3(a) of the Central Sales Tax Act, 1956 (hereinafter called the Act). Further the goods are manufactured by the petitioner at Faridabad in pursuance of contracts of sale with outside purchasers and these goods are appropriated to the various contracts of sale in the State of Haryana within the meaning of section 4(2)(b) of the Act.

(6) On the contrary, it is maintained by the Union of India, Chief Commissioner, Delhi and the Assessing authorities at Delhi that the goods are brought from Faridabad to Delhi by the petitioner and thereafter they are sold by the petitioner to the various purchasers outside Delhi by way of intra-State sales under the Bengal Finance (Sales Tax) Act as extended to Delhi.

(7) Question for decision is whether the sales made by the petitioner are in the course of inter-State trade or whether they are intra-State sales. To answer the question, we must determine the legal nature of the movement of the petitioner's goods from Faridabad to Delhi. It is already admitted by the petitioner that these goods were manufactured according to the specifications received from the purchasers prior to the manufacture. These goods were, Therefore, "future goods" within the meaning of section 3(6) of the Sale of Goods Act meaning goods to be manufactured, produced or acquired by the seller after the making of the contract of sale. A contract of sale is to be distinguished from a contract for sale. On the petitioner's admission. Therefore, completed contracts of sale existed before the goods were manufactured by the petitioner. The goods were transported from Faridabad to Delhi for the purpose of being sent to the purchasers from Delhi. Can it then be said that this movement of goods was occasioned or caused by the contract of sale within the meaning of section 3(a) of the Act?

(8) In *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, . Shah J. speaking for the majority interpreted section 3(a) in the following words:-

"CLAUSE(a) of section 3 covers sales, other than those included in clause (b). in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

(9) It is at times loosely thought that the contract of sale itself must provide for and cause the movement of goods or that the movement of goods must specifically be in accordance with the term of contract or sale. In *Burmah Shell Oil Storage and Distributing Company Ltd. v. State of Madras*. (1966) 18 S.T.C. 379 , the agreement between the company and the State of Madras did not provide as to from which place the oil was to be supplied to the State Transport Department inside Madras State. The company carried the oil from Trivandrum in Kerala State to Kanyakumari in Madras State in its own vehicles. It was held, Therefore, that it cannot be posited in the present case that the sale itself

accessioned the transport of the motor spirit to Kanyakumari. The contract can be fulfilled by supplying motor spirit from the stocks of the company from any place. The choice was left to the company as to the place from which it could transport the motor spirit. It is immaterial to the Madras State Transport Department wherefrom the stocks came." With respect, this decision seems to be based on the view that the contract of sale itself must cause the movement of goods from a particular place before such a sale could be said to be in the course of interstate trade within the meaning of section 3(a) of the Act. But there is a vital distinction between the movement of goods caused by a covenant in the contract itself and the movement of goods caused as a necessary incident of the contract of sale. It is not necessary, Therefore, that in the present case the contracts of sale themselves should have provided that the goods should be supplied from Faridabad. It may be immaterial for the purchasers from which place the petitioner supplies the goods to them. But the contracts of sale refer to goods of particular specifications. These goods are manufactured by the petitioner at Faridabad and this is the only reason why the place Faridabad becomes important. The only Explanation for the movement of goods from Faridabad by the petitioner is that the contracts of sale entered into by the petitioner with outside purchasers is for the sale of the goods of these specifications. These contracts of sale can, Therefore, be performed by the petitioner in these circumstances only in one way, namely, by the movement of these goods from Faridabad with the intention of delivering them to the outside purchasers. When the contracts of sale cannot be performed otherwise than by the movement of these goods from Faridabad, it follows that the movement is occasioned by the contracts of sale. The movement, Therefore, is a necessary incident of the contract of sale. It fulfills the test laid down by Shah J. in the Tata Iron & Steel Company's case referred to above. In fact, this very petitioner in K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, , took the stand that goods purchased by it from abroad and brought to India should be deemed to be a purchase taking place in the course of the import of the goods into the territory of India within the meaning of section 5(2) of the Act because the movement of the goods was caused as an incident of the contract. Learned counsel for the respondent in that case invited the Court to reconsider the observation of Shah J. in Tata Iron & Steel Company's case. but the Court unanimously refused to do so and re-affirmed the said test.

(10) Learned counsel for the Delhi Sales-Tax authorities referred to Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of Commercial Taxes and Another, to show that the movement of the goods from Faridabad to Delhi was not an incident of the contract of sale. But that decision is distinguishable, for several reasons. Firstly, the vehicles at Jamshedpur were not manufactured according to specifications laid down by the buyers as contrasted with the goods in the present case. Secondly, the movement of the goods from Jamshedpur to the stockyards of the company in different States did not have, Therefore, to await the appropriation of the goods to the various contracts of

sale. The goods were standard ones of fixed specifications for all the buyers. Thirdly, the demand for the vehicle was in excess of the supply. This was another reason why the vehicles could be moved from Jamshedpur to the stockyards in the other States without waiting for firm orders for their purchases. In the present case, on the other hand, contracts of sale relating to goods of particular specifications had already been entered into and the goods moved from Faridabad only in performance of those contracts. Lastly, according to the system working in this Supreme Court decision, the goods were delivered to the purchasers from the stockyards in the different States and not from Jamshedpur. This was why the movement of the goods from Jamshedpur to the stockyards in the other States could not be regarded as a necessary incident of the contract of sale. This decision may usefully be contrasted with the later decision in *The State of Bihar and Another Vs. Tata Engineering and Locomotive Co. Ltd.*, in which the delivery by the purchasers had to be taken in the State of Bihar. The movement of the goods from the State of Bihar had, Therefore, to be regarded as a result of a covenant in the contract or as an incident of the contract of sale.

(11) On behalf of the Sales-Tax authorities at Delhi the following reasons were adduced against regarding the movement from Faridabad to Delhi as being an incident to the contract of sale. On scrutiny, none of these reasons are found to be tenable. Firstly, goods coming from Faridabad to Delhi are regarded as being imported into Delhi from the State of Haryana and are, Therefore, liable to pay the terminal tax under the Terminal Tax Rules, 1958 framed by the Government of India under sections 183 and 479 of the Delhi Municipal Corporation Act, 1957. An exemption from the terminal tax can be claimed when such goods are brought into Delhi for immediate export and are declared to be intended for immediate export by the petitioner. It was suggested that only those goods which may have been declared by the petitioner to have been brought into Delhi for immediate export should be regarded as being moved from Faridabad to Delhi as an incident of the contract of sale within the meaning of section 3(a) of the Act. But this test cannot be accepted as infallible. It is only when the petitioner was certain of securing booking on the Railway for the goods brought from Faridabad to Delhi within, say 24 hours, that he could declare them to be for immediate export. If he was not so sure then he would have had to pay the terminal tax even though the goods were brought into Delhi only for the purpose of being sent to the purchasers outside. Secondly, it was pointed out that the ownership of the goods continued to be with the petitioner and, Therefore, the petitioner had the right of diversion with himself even though the goods were brought from Faridabad to Delhi. It was argued that these facts went against the theory that the movement of goods from Faridabad to Delhi was an incident of the contract of sale. As would be seen later in considering section 4(b) of the Act, the passage of the ownership of the goods from the petitioner to the seller is not an essential condition for the movement of the goods from Faridabad to Delhi being regarded as an incident of the contract of sale. For instance, such a movement would fall within section 3(a) even though the seller himself may

undertake to transport goods to the buyer. Once the petitioner admits that the goods at Faridabad were manufactured according to the specifications laid down by the buyers, the possibility of the diversion of the goods by the petitioner after they were brought from Faridabad to Delhi is eliminated. In paragraph 11 of *State of Bihar v. Tata Engineering & Co. Ltd.* referred to above, it was observed that in *K. G. Khosla & Co. v. Deputy Commissioner of Commercial Taxes* also referred above, the Supreme Court held that before a sale could be said to have occasioned the import, the movement of goods must have been incidental to the contract or in pursuance of the conditions of the contract and there should be no possibility of the goods being diverted by the assessed for any other purpose, meaning thereby that there should be no possibility of diversion according to law or contract and not in breach of them. This observation applies to the present case. The petitioner could not have diverted the goods which are specifically manufactured in respect of each contract of sale after the goods were brought to Delhi except in breach of these contracts. It is not, Therefore, the physical possibility of diversion but the legal right of diversion which is to be taken into account in determining the question whether the sale was in the course of inter-State trade. In this context, movement of goods from Faridabad to Delhi could be of two kinds. Firstly, the movement could be of goods manufactured in accordance with pre-existing contracts of sale and moved from Faridabad to Delhi to perform these contracts. In such a case there was no right of diversion in the petitioner. Alternatively, goods could be manufactured at Faridabad not to meet any pre-existing orders of purchase but only in the expectation of receiving future orders of purchase. Such goods would be brought to Delhi not as an incident of any contract of sale but in the hope that in future some contract of sale might be entered into in respect of them. This alternative is not open for consideration in the present case in view of the specific pleadings of the petitioner that the goods were manufactured at Faridabad in accordance with pre-existing contracts of sale.

(12) It was further contended that in many of the contract of sale it was specifically provided that the delivery to the purchasers would be For Delhi, e.g., in supplies made under the rate contracts with the Director-General of Supplies and Disposals. The stipulation of Delhi as the place of dispatch was only a matter of convenience. Faridabad was a small station and it may be that the Railway accepted loading in a big way only at Delhi junction. This does not make any difference in the legal position. The petitioner brings the goods to Delhi Only to dispatch them to the outside purchasers. Therefore, the journey from Faridabad to Delhi is of the same legal nature as that of the journey from Faridabad to other places. We. Therefore, conclude that the movement of the goods from Faridabad to Delhi was occasioned by the contracts of sale and, Therefore, the sales of the petitioner were made in the course of inter-State trade within the meaning of section 3(a) of the Act.

(13) Shri B N. Kirpal, learned counsel for the Delhi SalesTax authorities also referred to the Supreme Court decision in *Coffee Board, Bangalore v. Joint*

Commercial Tax Officer, Madras, (1970) 25 S.T.C. 528. The distinction made in that case was between sales which were made for the purpose of export in the sense that the goods so sold would have to be exported within a period of three months by subsequent sales which would occasion the export and sales which were themselves in the course of export inasmuch as they themselves occasion the export. In the present case it is nobody's case that the sales by the petitioner were inter-State sales and that fresh sales were to be effected by the petitioner and these fresh sales would occasion the inter-State movement of the goods. Further, the Coffee Board decision is sufficiently explained by the Supreme Court in paragraphs 15 to 17 of their decision in *State of Bihar v. Tata Engineering & Locomotive* referred to above showing that it does not affect the principle established above that the sales by the petitioner in the case were inter-State sales.

(14) The next question to be considered is whether the Sales-Tax authorities in the State of Haryana have the right to levy and collect the central sales-tax on the inter-State sales falling u/s 3(a) of the Act effected by the petitioner. The answer is in the affirmative in view of the following provisions of the Act. u/s 8(2) (a) of the Act every dealer (including the petitioner) shall pay interstate sales-tax on his turnover insofar as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade other than those falling within subsection (1) at the applicable rate on such goods inside the appropriate State and for the purpose of making such calculation any such dealer shall be deemed to be a dealer liable to pay tax under the sales-tax law under the appropriate State. The "appropriate State" is defined by section 2(a) of the Act to mean in relation to a dealer who has one or more places of business situated in the same State that State. "Place of business" is defined by section 2(2)(b) to include a warehouse, godown or other place where a dealer stores his goods etc. Finally section 4(2)(b) of the Act states that a sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

(15) It is to be borne in mind that the term "appropriation" may be used in two senses. It may either mean simply the identification of the goods by agreement of parties as the goods to which the contract of sale relates or it may mean the passing of the property in the goods from the seller to the buyer by such means as delivery to the carrier etc. The scheme of the Act shows that the element of passing of property is not relevant in determining the situs of the sale. The question of appropriation of goods has to be decided, therefore, irrespective of the passing of property. In other words, the appropriation referred to in section 4(2)(b) connotes the setting apart of goods as specific goods to be delivered under the contract of sale and not an appropriation linked with passing of property. *The Indian Wood Products Company Ltd. v. The Sales Tax Officer, Ward No. 13, New Delhi.* (1968) 21 S.T.C. 437. Therefore, the fact that the property in

the goods moved from Faridabad to Delhi may not have passed to the buyer but may still be in the petitioner did not prevent the appropriation of the goods to the contract of sale within the meaning of section 4(2)(b) of the Act. The appropriation took place when the unascertained or future goods were manufactured in accordance with the specifications of the contract of sale and in accordance with the agreement of the parties. For the same reason, Therefore, the petitioner lost the right of diversion of these goods to any other purpose in view of the contract and the law. Diversion made contrary to the contract and the law would not be in pursuance of any right and is not, Therefore, relevant. We find, Therefore, that the right to levy the inter-State sales-tax on the sales effected by the petitioner by the movement of the goods from Faridabad to Delhi taking place as an incident of the contract of sale as contemplated by section 3(a) of the Act was in the Sales-Tax authorities at Faridabad.

(16) This writ petition by its own terms relates only to the goods manufactured by the petitioner in response to pre-existing contracts of sale. The petitioner has not stated in this writ petition if it also manufactured goods before receiving any orders for sale and only in the expectation of selling those goods after they are manufactured and after they are moved from Faridabad to Delhi. Our decision will, Therefore, have no bearing on any such local sales at Delhi. It is to be noted that the sales falling u/s 4(2)(b) are subject to section 3 and are, therefore. inter-State sales as distinguished from local sales at Delhi which are inter-State sales.

(17) The writ petition is. Therefore, allowed with the declaration that the inter-State sales of the petitioner falling u/s 3(a) of the Act causing the movement of goods from Faridabad to Delhi are liable to be assessed to interstate sales-tax by the Sales-Tax authorities at Faridabad. The amounts of tax which the petitioner has wrongly paid to the Sales-Tax authorities at Delhi on such inter-State sales during the period from 1-4-1961 to 30-9-1965 shall be transferred by the Sales-Tax authorities at Delhi to the Sales-Tax authorities at Faridabad. In the circumstances, the costs shall be borne by the parties as incurred.