

(1975) 11 MAD CK 0043

In the Madras High Court

Case No : Tax Cases No's. 461 to 465 of 1970 and 52 of 1972

Krishnados Kikani

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 19-11-1975

Acts Referred:

Central Sales Tax Act, 1956 — Section 5

Citation : (1976) ILR (Mad) 21 : (1976) 38 STC 223

Hon'ble Judges : V. Ramaswami, J;Sethuraman, J

Bench : Division Bench

Advocate : K. Srinivasan, R. Gangadharan and K.C. Rajappa, for the Appellant;
K. Venkataswami, Additional Government Pleader I, for the Respondent

Judgement

V. Ramaswami, J.—The assesseees in this batch of cases are dealers in cloth, cotton yarn, dyes and chemicals carrying on business at Coimbatore. They are also exporters and importers of cotton, cotton yarn, dyes and chemicals, In the returns for the assessment years 1960-61 to 1965-66 in respect of a portion of turnover relating to sales of dyes and chemicals they contended that the sales are exempt as import sales. They contended that the sales were effected on forward or afloat basis, that the importation of those goods were made by the Radha Dyeing Factory, hereinafter called as the purchasers, by paying the value of the goods including customs duty and that the assesseees acted only as the agents of the purchasers to whom the goods were sold. In this connection, they relied on a preliminary agreement between them and the purchasers as evidenced by their letter dated 15th March, 1960, and later a formal agreement dated 7th April, 1961. The facts relating to these turnovers as evidenced by this letter and the agreement are as follows:

2. In respect of their export of cotton yarn and cotton textiles under the Cotton Textile Export Promotion Incentive Scheme, the assesseees were granted import licences for the importation of textile chemicals, dyes and gums. These licences however were not transferable. M/s. Radha Dyeing Factory agreed to purchase

from the assesseees imported dyes and chemicals. The terms and conditions of such sale and purchase between the assesseees and the purchasers are evidenced by the letter dated 15th March, 1960, and the formal agreement dated 7th April, 1961. Under this agreement, the assesseees agreed to sell to the purchasers on monopoly basis the imported goods on forward, afloat or c. i. f. basis. The prices for each transaction will have to be settled by agreement between the parties. Towards the sale price, the purchasers have to pay to the sellers a premium at a certain percentage or a fixed amount as may be settled, which would be the margin of profit of the assesseees in full or a portion of the sale price. On receipt of this money, the assesseees would credit the sum in his books to the account of the purchasers treating the same as part of the sale proceeds received. As soon as the purchasers pay the premium or part of the price, the assesseees agreed to handover the licence or licences so as to enable the purchasers to take steps to import the goods in the name of the assesseees. The assesseees would place an order with the foreign sellers suggested by the purchasers for the quantity of goods required by the purchasers. They would also open a letter of credit through a bank or otherwise. All the import documents would have to be in the name of the assesseees and the assesseees agreed to subscribe their signatures to all the papers and documents so as to make the importation possible. But the purchasers would have to pay the amount as per the invoices of the foreign sellers and also the customs and excise dues, wharf charges, clearing and forwarding charges and all such other dues including sales tax, if any, payable. Even the bank charges for the opening of the letters of credit will have to be met by the purchasers. The assesseees also had to subscribe their signatures to all the documents to enable the purchasers to get delivery of the goods from the port through customs and the forwarding agents of the assesseees and also render all possible help to fulfil the terms of the agreement. If, after receiving the premium or part of the price, as referred to above, the purchasers fail to take necessary steps for importation of the goods in the name of the assesseees within the time allowed according to the licence or fail to utilise the licence or licences or cause the validity to expire, the advance amount received by the assesseees as part of the sale price is liable for forfeiture. The agreement also provided that the assesseees were at liberty after an advance information to the purchasers to make sales of imported goods to others or deliver the licence or licences at their option to anybody else, if the assesseees were not able to get a fair profit from the purchasers.

3. On these facts, the assessing and appellate authorities held that there were two sales, one by the foreign sellers to the assesseees, which was an import sale, and another, a sale by the assesseees to the purchasers, which was a local sale, and that the turnovers relating to the local sale were liable to be assessed under the Tamil Nadu General Sales Tax Act. The assessment orders relating to the assessment years 1960-61, 1961-62 and 1963-64 to 1965-66 were taken in appeal to the Sales Tax Appellate Tribunal, Coimbatore, while the assessment order relating to the assessment year 1962-63 was taken in appeal to the Sales

Tax Appellate Tribunal, Madras. The Madras Tribunal held that there were no two sales, that the agreement between the purchasers and the assesseees and the contract of sale between the assesseees and the foreign sellers were two integrated transactions forming one import sale and that, therefore, the turnover in question was not liable for sales tax. On the other hand, the Coimbatore Tribunal held that there were two contracts for sale, one between the assesseees and the purchasers and another between the foreign sellers and the assesseees and that only the sale of the foreign sellers to the assesseees was an import sale and the sale by the assesseees to the purchasers was liable to sales tax. Against the order of the Coimbatore Tribunal, the assesseees have filed T.C. Nos. 461 to 465 of 1970 and against the order of the Madras Tribunal, the department has filed T.C. No. 52 of 1972,

4. In these petitions, the learned counsel for the assesseees strenuously contended that there was only one transaction of sale, which was an import sale, and that the assesseees were acting only as agents for their purchasers and there were no two transactions of sale. In this connection, he also relied strongly on the decisions in *Khosla & Co. (P.) Ltd. v. Deputy Commissioner of Commercial Taxes, Madras Division* [1966] 17 S.T.C. 473 and *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc.*, . On the other hand, the learned Government Pleader contended that in view of the later decisions reported in *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, . and *Mod. Serajuddin v. State of Orissa*⁴, unless there is a direct contract between the purchasers and the foreign sellers, it could not be treated as an import sale and that in this case there were two sales, one by the foreign sellers to the assesseees and another by the assesseees to the purchasers. The learned Government Pleader also relied on a decision of this court reported in *State of Tamil Nadu v. Visweswaradas Gokuldass* [1975] 36 S.T.C. 479, the facts of which are very similar with the facts of this case. In *Khosla & Co. (P.) Ltd. v. Deputy Commissioner of Commercial Taxes* [1966] 17 S.T.C. 473., the relevant facts were these. The assessee entered into a contract with the Director-General of Supplies and Disposals, New Delhi, for the supply of axle-box bodies. The goods were to be manufactured in Belgium according to the specifications. In order to fulfil the contract, the assessee entered into a contract with the manufacturer in Belgium. The goods were got manufactured and imported into India and cleared at the Madras Harbour and supplied to certain parties on the instructions of the Director-General of Supplies and Disposals. There was no privity of contract between the Belgium manufacturers and the Government departments, who ultimately received the supplies. The Supreme Court held that the movement of the goods from Belgium into India was incidental to the contract entered into by the assessee with the Director-General of Supplies and Disposals, that there was no possibility of the goods being diverted by the assessee for any other purpose and that, therefore, the sale took place in the course of import of goods within Section 5(2) of the Central Sales Tax Act and exempt from taxation. In *The Deputy Commissioner of Agricultural*

Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., ., a textile mills, which had an import licence gave a letter of authority to a firm, which was the assessee in that case, to import the goods and deliver them to it. The mills specified in the contract entered into between them and the assessee the quantity of all the imported cotton to be supplied, its quality and the place from where it was to be imported. The payment was to be made by the mills against the documents. The letter of authority provided that the firm "will act purely as an agent of the licensee (mills) and the goods imported will be the property of the licence-holder both at the time of clearance through the customs and subsequent thereto. The licence-holder will have to ensure that the goods on importation will be delivered to him and shall not be disposed of otherwise. The licensee shall not cause or permit the holder of the letter of authority to dispose of the goods". After the goods were shipped at the foreign port, the bill of lading and other documents were forwarded through bank to the firm and those documents were received by the firm after payment of their value. Upon information being given, the mills made the payment in accordance with the contract and thereafter the goods were cleared and delivered to the mills by clearing agents. The question for consideration was whether the sale of cotton effected to the mills were sales in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act. The Supreme Court held that the import licence was issued to the mills, that the assessee-firm was precluded from selling to anybody other than the mills to whom the user's import licence had been granted and that by virtue of the letter of authority given, the assessee-firm was acting purely as an agent of the licensee and the goods imported was the property of the licence-holder both at the time of clearance through customs and subsequently thereto. Accordingly, the Supreme Court held that the sales in question were sales in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act. In Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, ., the assessee was a company incorporated under the Indian Companies Act. They were importers and dealers in non-ferrous metals like zinc, lead, copper, tin, etc., and were on the approved lists of registered suppliers to the Director-General of Supplies and Disposals. Under the various control orders, sale and distribution of copper was not free, but controlled and it will have to be distributed only under the directions of the Controller of Non-Ferrous Metals to such of those licence-holders to whom such permission was given. The assessee imported and supplied certain non-ferrous metals to certain Government departments and charged sales tax. On the basis of the decision in K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, ., the amount paid as sales tax to the assessee was sought to be recovered by the concerned Government department. But the assessee was not able to satisfy the West Bengal State sales tax authorities that there was only one import sale and that, therefore, he was not liable to pay sales tax. On the other hand, the sales tax authorities took the view that there were two sales involved in that transaction, a sale to the assessee by the foreign sellers and a sale by the assessee to the various Government departments and that the sale by the assessee to the

various Government departments was liable to sales tax. The question for consideration was whether in those circumstances there was only one import sale or whether there was an import sale and a local sale. The Supreme Court held that though the purchase by the assessee might be considered as one for the purpose of sale to the Government departments, there were two transactions, one a sale by the foreign seller to the assessee and another by the assessee to the Government department. Only if there is a direct privity of contract between the foreign seller and the local purchaser, the sale could be said to be in the course of import and not otherwise. On the facts, the Supreme Court held that the sale by the assessee to the Government department did not occasion the import of the goods, but it was the purchase made by them from the foreign seller which occasioned the import. The fact that under the contract the Director-General of Supplies and Disposals undertook to provide all facilities for the import of goods for fulfilling the contract including the import recommendation certificate did not make the sale to the Government departments in the course of import. The decision in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, ., was distinguished on the ground that there was only one sale and that sale was the sale by Khosla & Co. (P.) Ltd. as agent of the manufacturer in Belgium. In a later decision in *Serajuddin and Others Vs. The State of Orissa*, ., the Supreme Court again had to consider the question and after a review of all these cases held that there should be a privity of contract between the exporter and the foreign purchaser in order to make it an export sale. That decision related to an export sale. The assessee in that case pleaded that the supplies made by him under a contract entered into with the State Trading Corporation for the sale of mineral ore was an export sale. The Supreme Court considered that there were two contracts, one by the assessee with the State Trading Corporation for the sale of mineral ore and the other by the corporation in its turn with foreign buyers for the sale of the identical goods purchased by the corporation from the assessee. In that case also, the assessee entered into negotiations with foreign buyers and settled all the conditions of the contract. The State Trading Corporation thereafter entered into a f. o. b. contract with the assessee and with the foreign buyers on identical terms. This procedure was followed because the commodity could not be exported directly by the assessee in view of the restrictions imposed by law. In spite of all these facts, the Supreme Court held that the export was by the State Trading Corporation and that there were two transactions of sale and not one transaction of export sale alone. These two latter decisions are, therefore, authorities for holding that the mere fact that the sale was for export, or the import was for the purpose of fulfilling a prior contract will not make it by itself a sale in the course of export or import. A privity of contract between the foreign buyer and the exporter or the importer and a foreign seller is necessary in order to make that transaction one in the course of export or import. It is also immaterial that the local purchaser had helped the importer in the import of the goods by finding out the foreign seller or assisting him in the placing of orders or clearing the goods from the port. What is material is a privity of contract between the ultimate purchaser and

the foreign seller in order to make that transaction a sale in the course of import. We have also taken the same view in our decision reported in *State of Tamil Nadu v. Visweswaradas Gokuldass* [1975] 36 S.T.C. 479.

5. Now coming to the facts of this case, it may be seen that the import licence was in the name of the assesseees and the licence could not be transferred. The agreement between the assesseees and the purchasers only made the purchasers obliged to help the assesseees in importing the goods by paying the premium or part of the price in advance and taking all steps required for importing the goods within the time prescribed. In fact, the contract with the foreign seller was only by the assesseees and the order is placed only in the name of the assesseees and the import was also effected in the name of the assesseees. If the purchasers were holding the import licence and the assesseees had helped them in importing the goods as in the case of *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc.*, the position would have been different. But, in this case, the licensed importer is the assesseees and the purchasers had no right to import and, therefore, could not have placed an order with the foreign seller. We are, therefore, of the view that there was a sale by the assesseees to the purchasers *M/s. Radha Dyeing Factory* in respect of these transactions, which were liable to tax under the *Tamil Nadu General Sales Tax Act*. We, accordingly, confirm the order of the Tribunal, which is the subject-matter of revision in T.C. Nos. 461 to 465 of 1970, and set aside the order of the Tribunal, which is the subject-matter in T.C. No. 52 of 1972.

6. It is stated by the learned counsel for the assesseees that in respect of the assessment year 1962-63, which is the subject-matter of T.C. No. 52 of 1972, certain goods have been received at the port at Bombay and that is included in the turnover of Rs. 1,32,000, which was in dispute in that year. That question had not been gone into by the Tribunal. Accordingly, we set aside the order of the Tribunal and remand the matter to it to decide the question as to which part of the turnover was imported in the port of Madras and which part in the port of Bombay and whether any part of the turnover related to sales outside the State.

7. In the result, T.C. Nos. 461 to 465 of 1970 are dismissed. T.C. No. 52 of 1972 is allowed and the order of the Tribunal is set aside and that matter is remanded to the Madras Tribunal for deciding the question mentioned above. The department will be entitled to costs in all these petitions. Counsel's fee Rs. 150 in each.