

(2001) 07 KAR CK 0104

In the Karnataka High Court

Case No : Writ Petition No's. 2809 and 22718 of 2000

Lakshmi Audio Visual Inc. and Another

APPELLANT

Vs

Assistant Commissioner of Commercial Taxes and Another

RESPONDENT

Date of Decision : 23-07-2001

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 5 C

Citation : (2001) 4 KCCR 214 SN : (2001) 124 STC 426

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : K.M. Shivayogiswamy, for the Appellant; G.K. Bhat, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

R.V. Raveendran, J.—The petitioners are carrying on the business of hiring audio visual and multimedia equipments. They claim that they have purchased public address systems (mikes, speakers cassette./disc players, amplifiers, etc.) video camera and equipment, LCD projectors, lighting and other equipments and have also engaged several technicians, for their said business.

2. The procedure adopted by each petitioner for conducting their business is stated to be as follows :

(i) A customer contacts the petitioner for providing audio/visual service for his programme or event. After assessing the need and availability of the equipment and suitable operator/technician to operate them on the specified dates, the petitioner accepts the order. The engagement is for short durations ranging from few hours to few days.

(ii) The stores department of petitioner release the necessary equipment under a gate pass showing the name of the technician/ operator who will be in-charge of such equipment, the mode of transport and the time, date and venue of the programme/event.

(iii) The equipment is transported to the venue of the programme under the supervision of the petitioner's employee. At site the audio/visual equipments are handled, arranged, installed and operated by petitioners' technicians/operators to meet the requirements of the programme/event. At no time the equipment is given to the possession or control of the customer, nor operated by the customer.

(iv) After conclusion of the programme/event, the petitioner's technician/operator dismantles the equipment/system and brings them back to the petitioner's stores.

(v) The entire risk in regard to the equipment during transit as well as during the programme remains with the petitioner. Petitioner takes out insurance for all its equipments to cover transit and the programme periods.

(vi) The billing is done by the petitioner either in advance or after the programme, as per the agreed rates for all the services, without any bifurcation.

3. Petitioners contend they are not "dealers" within the meaning of that expression in the Karnataka Sales Tax Act, 1957 ("the Act" for short) nor is their turnover exigible to sales tax under any provision of the Act. But, the first respondent has served on the petitioners, notices dated November 25, 1999 and June 5, 2000 (annexure A in the respective petitions) u/s 12(3) of the Act proposing to subject the charges collected for hiring their audio/ visual equipments to tax, u/s 5-C of the Act. It is alleged in the said notices that as the petitioner's customers had the benefit of the use of equipment for a specified period, the transaction between the petitioner and its customer would amount to "sale" and exigible to tax u/s 5-C, even if the petitioners are responsible for transportation and technical arrangements.

4. Feeling aggrieved, petitioners have filed these petitions for quashing the said notices issued u/s 12(3) of the Act and seeking a direction to the first respondent not to proceed further in pursuance of such notices issued to them. They have also sought a declaration that they are not liable to pay tax u/s 5-C of the Act on hiring transactions relating to audio-visual and multimedia equipments. The petitioners contend that possession and control of the equipment always remains with them and what is offered to the customer is a package service which includes assessing the requirements of the customer, transportation of the equipment to and fro to the site, deployment and use of equipment through their own technicians to give the desired audio or visual results/effects for the benefit of the customer.

5. In their statement of objections the respondents have not specifically denied the description of the transaction or the procedure adopted by the petitioners in hiring audio visual equipments, but have contended that the transactions relating to audio visual equipment are transfers of the right to use such equipment and therefore exigible to tax u/s 5-C. The question that therefore arises for consideration is whether the business of hiring audio visual and multimedia equipment carried on by the petitioners attracts liability to sales tax u/s 5-C.

6. Section 5-C of the Act providing for levy of tax on transfer of the right to use goods, reads as follows :

"Levy of tax on the transfer of the right to use any goods.-- Notwithstanding anything contained in Sub-section (1) or Sub-section (3) of Section 5, but subject to Sub-sections (5) and (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover in respect of the transfer of the right to use any goods mentioned in column (2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said Schedule."

7. The provisions of the said section discloses that the sine quo non for exigibility to tax u/s 5-C, is the transfer of the right to use any goods. The transfer of the right to use the goods, which may be by way of leasing, letting or hiring, involves the transferor permitting the transferee (lessee/hirer) to use his goods. To constitute such transfer, there should be delivery of possession of the goods by the transferor to the transferee, that is transfer of the effective and general control of the goods with the right to use the goods, as distinct from a mere custody of the goods, from the transferor to the transferee. But, such transfer need not be a "legal transfer of the goods" nor have all trappings of a "lease". The question whether there is such transfer or not is essentially a question of fact which has to be determined with reference to the terms of the contract governing the transfer of the right to use goods. The nomenclature of the agreement may not be relevant. Even if the agreement used the title ""License agreement" but the terms provided for transfer of effective control to the customer, then the transaction will be a transfer of the right to use the goods and thus a deemed sale falling u/s 5-C. This position is also evident from the decisions of the Supreme Court in Aggarwal Brothers Vs. State of Haryana and Another, and the decision of the division Bench of the Punjab and Haryana High Court in Harbans Lal and Another Vs. State of Haryana, . In 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, the Supreme Court while clarifying that the taxable event regarding transfer of the right to use goods occurs when a contract for such transfer is executed between the transferor and transferee and the sites of such deemed sale would be the place where the contract is executed and not the place of actual delivery of goods, held that though delivery of goods is not the condition precedent for a contract of transfer of right to use the goods, the delivery of goods is one of the elements of the transfer of the right to use.

8. I may now refer to a few decisions to clarify as to when there is a transfer of the right to use and when there is not.

8.1 In Aggarwal Brothers Vs. State of Haryana and Another, the Supreme Court held that transfer of possession of shuttering material by the assessee to its customers for use during the construction of buildings was "transfer of right to use goods", as the customer was in effective control of the shuttering material during the period it remained in his possession.

8.2 In *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, the distinction between delivery of possession and mere custody without possession was brought out by the Andhra Pradesh High Court by giving of example of hiring a taxi cab simpliciter (that is hiring a taxi to go from one place to other) and hiring a taxi cab under a rent-a-car scheme with a chauffeur. The Andhra Pradesh High Court held as follows :

"The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession ; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference."

8.3 In *Krushna Chandra Behera v. State of Orissa* [1991] 83 STC 325 (Ori), the assessee had given its bus on hire to Orissa State Road Transport Corporation. The assessee provided the driver and was also responsible for carrying out the repairs to the bus. The assessee was also bound by orders and directions of the Corporation in regard to journey, operation timings, routes, haltage, etc. The driver provided by the assessee had to follow the directions, orders and instructions of the authorised officials of the Corporation. The Orissa High Court held that as the effective and general control of the bus had passed on to the customer (Orissa State Road Transport Corporation) and the customer was in possession, as distinguished from mere custody, the transaction was a transfer of the right to use the goods and therefore a deemed sale.

8.4 In *Bank of India Vs. Commercial Tax Officer and Others*, and in *State Bank of India and Others Vs. State of Andhra Pradesh*, the Calcutta High Court and the Andhra Pradesh High Court considered whether leasing of a bank locker amounted to transfer of the right to use the locker and thus fell within the extended definition of "sale". The question was answered in the negative. The courts held that hiring of the locker was not a mere transfer of the right to use of the locker but rendering various services in addition thereto ; that the hire charges are paid not only for the right to use the locker, but for a host of other services associated with the maintenance of lockers by the banks ; that the hire charges collected by banks from constituents represent a consolidated charge levied by the banks for a variety of services and facilities provided, of which the

use of the locker forms a small part ; and any attempt to levy tax on the hire charge would amount to levying tax on the charges collected for providing strong room, round the clock security and deployment of staff. The courts also held that the banks do not give possession of lockers to the customers but only grant a licence to use the goods without securing possession, in view the following factors : (i) banks build strong rooms and install steel cabinets with several safety lockers with double locking system ; (ii) one key is given to the customer, the other being retained by the bank ; (iii) the locker cannot be operated until and unless both the keys were used for opening the lockers ; and (iv) the customer can have access to the vaults wherein the locker is situated only when the bank permitted him and right of ingress and egress relating to lockers is always under the control of the banks.

8.5 In *Modern Decorators v. Commercial Tax Officer* [1990] 77 STC 470 (WBTT), the business carried on by a decorator was considered. The business consisted of the following : (i) constructing/erecting pandals, barricades, rostrums, etc., as per the requirements of the customers with the aid of bamboos, sal balla, ropes, tarpaulins, decorating cloth and other materials ; and after the expiry of the period specified by the customers such pandals, barricades, rostrums, etc., were dismantled by the decorator, with its own men and labour and taken back to its godown and (ii) Hiring chairs, tables and furniture. The West Bengal Taxation Tribunal held as follows :

"But, we find that the hiring of pandals erected by decorators at the instance of customers for a specified period, cannot come within the meaning of "sale" so as to be exigible to sales tax. The argument that the letting value of the different materials with which pandals are erected are "goods" in our view, makes no difference because it is not the materials that are transferred for use by the customers as such. It is the totality of the service rendered by the decorator, namely, the erection of pandals, etc., that falls for our consideration. We, however, make it clear that the various other items which decorators in course of their trade let out to their customers, such as, tables, chairs, etc., are "goods" within the meaning of the Act and they may come within the definition of "sale" as amended."

9. Thus if the transaction is one of leasing/hiring/letting simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner, time and nature of use and enjoyment, though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of "sale". On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the

extended definition of "sale". Let me now clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, .

Illustration :

(i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the "use of the lorry" for the following reasons : (i) The lorry is never in the control, let alone effective control of the customer ; (ii) the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry ; (hi) the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry ; or the carrier may unload the consignment en-route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km subject to an assured minimum, for a period of one month or one week or even one day ; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit ; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale.

10. I will now examine the nature of a business of hiring of audio, visual and multimedia equipment, in the light of the aforesaid principles. The position will be as follows :

(i) If the petitioner hires the audio/visual multimedia equipment to the customer without rendering any other service, i.e., it merely delivers the equipment to the customer on hire and leaves it to the customer to transport the equipment, installs and operate them in any manner he wants and at the end of the period of

hiring, return them to the petitioner, then the possession and the effective control is transferred to the customer. The transaction will therefore be a deemed sale, exigible to tax u/s 5C.

(ii) On the other hand, if the customer engages the petitioner for providing audio visual services for any programme or event and the petitioner does not deliver any equipment to the customer, but takes the equipment to the site of the programme, installs them, operates them and then dismantles them and brings them back after the period of hiring, in such an event the possession and effective control never leaves the petitioner and the customer never gets the right to the use of equipment. In such an event there is no deemed sale attracting tax u/s 5C.

The undisputed facts in this case disclose that the transaction of the petitioners falls under the second category and therefore, the transactions are not transfer of use of goods amounting to deemed sales exigible to tax u/s 5-C of the Act.

11. The petitions are, therefore, allowed and the impugned notices dated November 25, 1999 and June 5, 2000 (annexure A) in both the writ petitions are quashed. It is made clear that if the petitioner carries on any transaction of the nature falling under para10 (i) above, the assessing authority will be at liberty to take action to bring such transactions to tax u/s 5-C, in accordance with law.