

(1977) 06 KL CK 0019

In the High Court Of Kerala

Case No : T.R.C. No"s. 13, 14 and 15 of 1975

Manager, Pulpally Devaswom

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 28-06-1977

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 17(3), 2(viii)

Citation : (1977) 2 ILR (Ker) 208 : (1977) 40 STC 350

Hon'ble Judges : V. Balakrishna Eradi, J;T. Kochu Thommen, J

Bench : Division Bench

Advocate : P.C.B. Menon, V.P. Mohankumar and Sumathy Dandapani, for the Appellant; The Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

T. Kochu Thommen, J.—The assessee is the same in all the three tax revision cases the question of law arising for our consideration is also the same. In T.R.C. Nos. 14 and 15 relating to the years 1967-68 and 1968-69 respectively, the assessee challenges a common order of the Kerala Sales Tax Appellate Tribunal. Following the said order, a separate order was passed by the Tribunal in respect of the year 1970-71 and this order is challenged in T.R.C. No. 13 of 1975. We propose to deal with these cases together and dispose of the same by a common judgment.

2. The only point arising for our consideration is whether the petitioner-devaswom is a dealer within the meaning of Section 2(viii) of the Kerala General Sales Tax Act, 1963 (hereinafter called the Act).

3. The devaswom owned extensive private forests. On the strength of permits issued to it by the District Collector, Kozhikode, the devaswom felled trees which had grown spontaneously in its forests. These trees were dressed by the devaswom and sold as timber. The Sales Tax Officer initiated assessment proceedings and issued notice u/s 17(3) of the Act, stating as follows :

On enquiries conducted by me it is understood that you have been conducting a business of selling timber (as the manager of Sree Pulpally Devaswom), which has been extracted from the forest lands owned by the devaswom in accordance with the clear-felling permits obtained from the District Collector, Kozhikode, under the M.P.P.F. Act since 1967-68 onwards. The trees from the forest lands owned by the devaswom had been cut and felled by the devaswom and they had been dressed and processed into timber logs and obtained property mark registration in the name of the devaswom. Then they had been stored in the stock-yard set apart for the purpose from where they had been sold in separate and distinct specie-war auctions conducted by you as the manager of the devaswom to the highest bidder and they had been delivered to the purchaser or the purchasers lot by lot on receipt of the price thereof.

The devaswom will, therefore, fall in the definition of "dealer" as defined in the K.G.S.T. Act, 1963, as any person who carries on the business of buying, selling, supplying or distributing goods and all the accepted principles of a business, namely, periodicity, continuity and profit-motive are present in the activities carried on by it.

This notice was answered by the devaswom as follows :

The devaswom is not a dealer as defined in the K.G.S.T. Act and is not, therefore, liable to be assessed under the Act. The devaswom owns private forests and the only mode of enjoyment of the private forests is by sales of the trees of spontaneous growth and the trees are cut as per the permission granted by the Collector of the District under the M.P.P.F. Act. In the sale of trees of spontaneous growth available from the private forests of the devaswom, there is no process of manufacture and the Act does not apply to the sale in question. There is neither any process of agriculture or horticulture involved and the devaswom cannot be held to be a dealer in timber and liable to assessment.

Rejecting this contention, the Sales Tax Officer held that the devaswom was a dealer and was liable to be assessed under the Act. Appeals filed by the devaswom before the Appellate Assistant Commissioner and the Appellate Tribunal were both unsuccessful. Hence the present revision cases.

4. The Tribunal held :

Since the appellant has sold the timber after cutting and converting standing trees into timber, we have to hold that it has produced the goods sold by it and that hence by the sale of such goods the appellant will come within the meaning of the definition of "dealer" in the Act. Hence, we are of the view that the appellate authority is justified in rejecting the appellant's contention.

It is not contended that, apart from the sale of trees (after felling and dressing the same), the devaswom had carried on any business. Although the expressions "dressed" and "processed" had been used in the notice of the Sales Tax Officer, there is no finding or evidence to suggest that any processing apart from

dressing, had been done to the trees by the devaswom. It is not contended before us that the felled trees were subjected to any other method of dressing than chopping off the branches. Would these activities be sufficient to ascribe to the devaswom the status of a dealer so as to make it liable to be taxed under the Act in respect of its sales turnover of timber trees ?

5. We shall now read the definition of a "dealer" under the Act:

2. Definitions.-In this Act, unless the context otherwise requires,-...

(viii) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes-....

(b) a casual trader;....

(e) a person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise.

Explanation (1).- A society (including a co-operative society), club or firm or an association which, whether or not in the course of business, buys, sells, supplies, or distributes goods from or to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;

Explanation (2).-The Central Government or a State Government, which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act.

(italics supplied).

6. A dealer is a person who carries on the business of buying, selling, supplying or distributing goods. Only a person who carries on the "business" of the type mentioned is treated as a dealer. If he merely buys, sells, supplies or distributes goods without such activities being in the course of business, he would not be regarded as a dealer. The definition ropes in even a casual trader and also a person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise. Yet, the sine qua non to make any such person a dealer for the purpose of the definition is the carrying on of a business. A casual trader would also be a dealer, if, as the term implies, he trades. His occasional transactions make him a dealer provided they are of a business nature. It is not every transaction that makes a person a dealer, but only transactions of a business nature. As this court stated in *Deputy Commissioner of Agricultural Income Tax and Sales Tax v. Tirumbadi Rubber Co. Ltd.* ILR [1975] Ker. 550

In determining what, are the transactions of a business nature, though those transactions are only occasional transactions, the definition of the term

"business" will also come into play and this will drag in the words "adventure in the nature of trade or commerce" contained in the definition of the term "business".

The definition of "casual trader" u/s 2(vii) reads as follows ;

(vii) "casual trader means a person who has, whether as principal, agent or in any other capacity, occasional transactions of a business nature involving the buying, selling, supply or distribution of goods in the State, whether for cash or for deferred payment, or for commission, remuneration, or other valuable consideration

(italics supplied).

The legislature has thus emphasised the business aspect of the transaction. In this connection, we may also refer to the definition of "sale" appearing u/s 2(xxi), which reads :

"sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge

(italics supplied).

Here again, the business aspect is emphasised :

7. However, in explanations (1) and (2) to Clause (viii) defining a "dealer" and explanations (I), (1A) and (2) to Clause (xxi) defining a "sale", the business concept is specifically excluded. We have already read explanations (I) and (2) to Clause (viii). These explanations provide that a society or an association or Government which buys, sells, supplies or distributes goods for valuable consideration would be deemed to be a dealer even if such transactions were not in the course of business. We shall now read explanation (1) to Clause (xxi) :

A transfer of the property in the following goods, namely, tea, coffee, rubber, cardamom or timber, whether in the course of trade or business or otherwise, for cash or for deferred payment or other valuable consideration, by a person who produces the same, shall be deemed to be a sale for the purposes of this Act

(italics supplied).

It is only when property in these specified commodities is transferred by a person who has produced them, has the legislature excluded the business concept from the definition of "sale". Consequently, if property in timber (or any other specified commodity) is transferred by a person who has produced the same, such transaction, even if not in the course of trade or business, is treated as a sale. Similar exclusion of the business concept applies to transfer of property in any goods by a Government or a society or an association mentioned under explanations (1A) and (2) to Clause (xxi). Such specific exclusion in the

explanations to Clauses (viii) and (xxi) emphasises that in all other cases the legislative intent is to treat only such transactions which are in the course of trade or business as sufficient to bring a person within the definition of "dealer" or a transfer of property in goods within the definition of "sale".

8. Before we consider the expression "produced" appearing in Sub- Clause (e) of Clause (viii) of Section 2, we may examine the term "business" as defined u/s 2(vi) (as it stood at the relevant time and before it was amended with effect from 1st July, 1974, by Act 22 of 1974), which reads as follows ;

(vi) "business" includes any trade, commerce or manufacture or any adventure, or concern in the nature of trade, commerce or manufacture, with or without profit-motive in such trade, commerce, manufacture, adventure or concern

(italics supplied).

In *State of Gujarat v. Raipur Manufacturing Co. Ltd.* [1967] 19 S.T.C. 9 (S.C.), the Supreme Court considered the meaning of the expression "business". It stated:

The expression "business", though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business, there must be a course of dealings, either actually continued or contemplated to be continued with a profit-motive and not for sport or pleasure. Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit-motive.... In order that receipts from sale of a commodity may be included in the taxable turnover, it must be established that the assessee was carrying on business in that particular commodity and to prove that fact it must be established that the assessee had an intention to carry on business in that commodity.

Under the amended definition of "business" contained in the Act, it is not necessary that the activity should be carried on with a profit-motive. Even so, only such activities as are in the nature of trade, commerce or manufacture, qualify for the term "business". Although profit-motive is no longer relevant, the test suggested in the *Raipur case*¹ is still available. In the final analysis, the question whether these transactions are of a business character has to be determined on the basis of various factors such as the nature, volume, frequency, regularity, organisation, object, intention and the like : see *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another*, and *Board of Revenue and Others Vs. A.M. Ansari and Others*, .

9. Business is defined under the Act to include any trade, commerce or manufacture. "Trade" is not defined. Referring to the definition of "trade" in the Income Tax Act, 1952 (of England), which reads :

"trade" includes every trade, manufacture, adventure or concern in the nature of trade.

Lord Reid states :

As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage, it is sometimes used to denote any mercantile operation but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services *Ransom v. Higgs* (1974) 50 Tax Cas. 1 88 (H.L.).

As stated by Lord Wilberforce:

Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.

10. The expression "commerce" denotes trading on a large scale. It is defined in the Chambers's 20th Century Dictionary as follows :

n. interchange of merchandise on a large scale between nations or individuals extended trade or traffic.

11. In the present case, there is no finding that the devaswom was engaged in trade or commerce. The department, however, rests its case on the other limb of the definition of business, viz., manufacture. It is alleged that the devaswom produced goods by converting standing trees into logs through manufacture. Accepting this contention of the department, the Tribunal observed:

If a person is selling any goods produced by him by manufacture or agriculture or horticulture or otherwise, he will come within the ambit of the definition of the word "dealer" in the Act. In the present case, the appellant-devaswom has not been selling trees of spontaneous growth as such but before sales, the appellant has removed standing trees and converted them into logs.

To manufacture is to change the commercial identity of an article. Manufacture results in transformation.

"Manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation ; a new and different article must emerge having a distinctive name, character or use" (Permanent Edition of Words and Phrases, Vol. 26-see *Union of India (UOI) Vs. Delhi Cloth and General Mills*, . at 795. 794, para 14).

In *Commissioner of Sales Tax, U.P., Lucknow v. Harbilas Rai & Sons* [1968] 21 S.T.C. 17 (S.C), the Supreme Court stated :

In our view, the word "manufacture" has various shades of meaning and in the

context of sales tax legislation, if the goods to which some labour is applied remain essentially the same commercial article, it cannot be said that the final product is the result of manufacture.

In *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, the Supreme Court pointed out that the dictionary meaning of "manufacture" is to transform or fashion raw materials into a changed form for use. In *Union of India (UOI) Vs. Delhi Cloth and General Mills*, at 795. 794, para 14, the Supreme Court observed that "processing" cannot be equated to "manufacturing" :

The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance" however minor in consequence the change may be.

12. In *Kuttirayin & Co. v. State of Kerala* 1976 KLT 442, this court considered the meaning of the expression "manufacture" in Section 5A(1)(a) of the Act and observed :

If timber logs are cut into sizes to facilitate transport, stacking, etc., it cannot be said that commercial articles different from timber logs emerge. On the other hand, logs sized into beams, sleepers, etc., are different commercial articles which are sold and purchased as beams, sleepers, etc. and not as timber logs.

The test applied in that case was :

Are the goods the same articles of merchandise or different articles of merchandise as understood in commercial language or in common parlance, before and after the conversion or change ? If different, the products obtained on conversion are the result of manufacture and if same they are not.

Applying the above test, it cannot be stated from the facts found by the Tribunal that the devaswom had sold goods which it had manufactured. Trees which were felled and dressed for convenient carriage did not assume a distinct and different commercial identity. What emerged after the felling and dressing was not a new commodity.

13. However, relying upon the decision in *State of Madhya Pradesh v. Wasudeo* [1955] 6 S.T.C. 30, the Tribunal concluded that the devaswom had sold goods which it had produced and therefore it was a dealer. It was held in that case by the Nagpur High Court that logs or rafters into which the trees were shaped had a definite commercial value as such goods were liable to be used as beams or further shaped into finer furniture. In the instant case, however, the department does not contend that the felled trees were converted into rafters or beams. That decision of the Nagpur High Court has, in our view, no application to the present case.

14. "Dealer" is defined to include a person who sells goods produced by him [Section 2(viii)(e)]. To make a person liable on the ground that he has produced

the goods which he sold, such goods should have been produced by him by manufacture, agriculture, horticulture or otherwise and such sales should have been effected in the course of trade or business. The department has no case that the trees were planted or cultivated by the devaswom. By the sale of spontaneously grown trees, an assessee cannot be considered to have sold goods which he has produced by manufacture, agriculture, horticulture or otherwise. From the mere fact that trees were felled and shaped for convenient carriage, one cannot reach the conclusion that the assessee has produced any goods. In *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co.* [1967] 20 S.T.C. 520 (S.C.) , the Supreme Court held that if a person converted latex tapped from rubber trees into sheets to facilitate transport and marketing, it could not be concluded that he carried on the business of selling the sheets. The contention of the department that such a person was a dealer was rejected by the court. In *The Deputy Commissioner of Agricultural Income Tax Vs. Palampadam Plantations Ltd., Kottayam*, , the Supreme Court, referring to Section 2(viii)(e) of the Act, stated;

Now in order to fall within the definition of "dealer", a person must sell goods produced by him by manufacture, agriculture, horticulture or "otherwise". Such trees which have grown spontaneously and without any plantation by that person cannot possibly be regarded as having been produced by him by agriculture or horticulture. The word "otherwise" also cannot cover trees of spontaneous growth since the element of production must be present. The context in which the word produced" appeared in the definition can only mean "to bring forth, bring into being or existence-to bring (a thing) into existence from its raw materials or elements".... The intention in employing the word "produced" obviously was to introduce an element of volition and effort involving the employment of some process for bringing into existence the goods.

In that case, it was found that the assessee had neither planted nor felled the trees. The court observed that nothing was done by the assessee towards the production of the trees.

15. In the instant case, the devaswom has not only not sold any goods which it has produced, it has also not conducted any business in the commodities which it sold. As pointed out by the Bombay High Court in *Girdharilal Jiwanlal v. Assistant Commissioner of Sales Tax (Appeals), Nagpur* [1957] 8 S.T.C. 732, which decision was cited with approval by the Supreme Court in *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co.* [1967] 20 S.T.C. 520 (S.C.), a person does not become a dealer merely because he sells commodities; he becomes one when he carries on the business of selling such commodities. An owner of a property is entitled to earn income from his property. But merely because he has earned that income by the sale of the yield of his property, he cannot be regarded as a dealer. Such yield should have been produced by him by manufacture, agriculture, horticulture or otherwise and he should have sold such goods in the course of business or trade,

before he can be regarded as a dealer. The burden is upon the department to show that these two conditions are satisfied. This question can only be determined by ascertaining the nature of the activities and the intention of the assessee : Deputy Commissioner of Agricultural Income Tax and Sales Tax v. Travancore Rubber and Tea Co. [1967] 20 S.T.C. 520 The department has not discharged that burden.

16. From the facts stated by the Tribunal, we are of the view that the devaswom has not engaged itself in any transaction of a business nature. It is not established that the sale of timber was effected in the course of trade or business. The sale of spontaneously grown timber which had been felled and "dressed" by the devaswom to facilitate transport cannot be characterised as sale of goods produced by it by manufacture, agriculture, horticulture or otherwise. Whether or not the sale of timber otherwise than in the course of trade or business would make the seller a dealer by virtue of explanation (1) to Clause (xxi) of Section 2 read with Sub-clause (e) of Clause (viii) of Section 2, is unnecessary for us to decide in the present case in view of the total absence of any evidence to warrant the conclusion that the goods sold by the devaswom were also produced by it. In the circumstances and on the basis of the facts determined by the Tribunal, the petitioner-devaswom is not a dealer as defined under the Act.

17. The tax revision cases are accordingly allowed with costs. Counsel's fee Rs. 150.