
(2013) 07 MAD CK 0268

In the Madras High Court

Case No : Tax Case Revision No"s. 158 to 162 of 2011

M/s. Prakash Impex

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Central Sales Tax Act, 1956 — Section 2(b)

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 2(d), 2(g)

Citation : (2013) 07 MAD CK 0268

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Judgement

Chitra Venkataraman, J.—The assessee has preferred these revisions as against the order of the Tribunal, relating to the assessment years 2001-2002 (TNGST), 2001-2002 (CST), 1999-2000 (CST), 2000-2001 (CST) and 1999-2000 (TNGST). The facts in all these tax cases are one and the same. The Tribunal considered the issue under a common order and rejected the case of the assessee. The present revisions are at the instance of the assessee.

2. It is seen from the facts narrated herein that the assessee is a dealer in finished leather. The assessee effected sale of DEPB licence in the course of the trade or commerce and sold them locally during the assessment years 1999-2000 and 2000-2001. The assessee claimed that the sale of DEPB licence was not liable to be included in the turnover, there being no "business" carried on in that line. The assessee further pointed out that there was no sale of goods; consequently, the same was not assessable under the provisions of the Act. The Assessing Officer, however, rejected the contention of the assessee, following the decision reported in *Vikas Sales Corporation* and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc., holding that DEPB licences were "goods" for the purposes of the Act; consequently, assessable under the provisions of the Act.

3. The assessments were made both under the Tamil Nadu General Sales Tax Act

as well as the Central Sales Tax Act. Aggrieved by this, the assessee preferred appeals before the Appellate Assistant Commissioner. Following the decision of the Apex Court referred to above, the Appellate Authority rejected the appeals. Aggrieved by this, the assessee went on appeal before the Sales Tax Appellate Tribunal. The Tribunal pointed out that the assessee was a regular exporter of dressed hides and skins. The place of business of the assessee was inspected on 08.12.2002, which revealed that the assessee had sold DEPB licences locally as well as on inter-State basis and the turnover were not reported in the respective returns to pay taxes.

4. Pointing out to the amendment to the definition of "dealer" u/s 2(g) of the Tamil Nadu General Sales Tax Act and Section 2(b) of the Central Sales Tax Act, the Tribunal pointed out to the decision of the Supreme Court in *Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.*,) holding that DEPB licence were goods and hence, their sales was exigible to sales tax. It also pointed out that even though the assessee's main activity was in the export of finished hides and skins, still the grant of DEPB licence to the assessee necessarily formed part of the related business activity. Thus, the assessee was exigible to sales tax. In the circumstances, the Tribunal held that the transfer of DEPB licence, being incidental to its main business, was assessable to sales tax. Referring to the reliance placed on the decision reported in *Board of Revenue and Others Vs. A.M. Ansari and Others*, the Tribunal pointed out that the decision of the Apex Court dated 17.03.1976 would not be of any assistance, considering the amendment to the definition of "business" as well as "dealer". Thus, the appeals were dismissed. Aggrieved by this, the present revisions are filed by the assessee.

5. Learned counsel appearing for the assessee took us through the definition of "business" u/s 2(d) of the Tamil Nadu General Sales Tax Act and placed reliance on the decisions of the Supreme Court reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, *State of Madras Vs. K.C.P. Ltd.*, *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd.* and *Another, , Board of Revenue and Others Vs. A.M. Ansari and Others*, as well as *Commissioner of Sales Tax Vs. Sai Publication Fund, ,* in support of his contention that the transaction of sale of DEPB licence would not fall within the meaning of "business"; the Revenue must show that the activity of sale of DEPB licence was a business, to attract the liability. Laying emphasis on the definition of "business" as given under the decision reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, that there must be an intention to do business in DEPB licence and that there must be frequency, continuity and volume therein, in the absence of any material to show that there was frequency and continuity in dealing with DEPB licence as business carried on, the liability to tax is not attracted on the facts of this case; consequently, the order of the Tribunal is liable to be set aside.

6. Heard learned counsel appearing on either side and considered the material placed on record.

7. We do not agree with the line of reasoning of the learned counsel appearing for the petitioner. "Business" as defined u/s 2(d) of the Tamil Nadu General Sales Tax Act, reads as follows:

2(d)-"Business" includes:-

(i) any trade, or commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;

8. In the context of the decisions of the Apex Court referred to by the learned counsel that in order that an activity of a dealer may come within the meaning of "business", there must be an intention to carry on business in the sense of it being a business in commerce, manufacture or engaged in any activity in the nature of trade, commerce or manufacture; that the course of activity must show regularity, frequency and continuity. In the absence of any such intention to carry on an activity having regularity, frequency and continuity, with certainty and volume, any activity could not fall for consideration within the meaning of "business". Sub clause (ii) of the Section 2(d) of the Tamil Nadu General Sales Tax Act, however, shows a contrast to the substantive part of sub clause (i), that "any transaction" in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern would also be included within the meaning of the definition "business". Thus, irrespective of regularity, frequency, continuity and volume as inclusive of main business and in contradistinction to the main part, any transaction which is incidental or ancillary to such trade, commerce, manufacture, adventure or concern, would also be "business". So too, a transaction in connection with such trade, commerce, manufacture, adventure or concern, would also be considered as "business" to attract the liability under the provisions of the Act. Evidently, the decision of the Apex Court reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, was rendered with reference to the unamended provision. The question therein related to the expression of "business". The Apex Court pointed out that being a word of indefinite import, the same has to be 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. The Supreme Court observed that, 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.

9. As already pointed out, the said decision was rendered with reference to the provisions of the Bombay Sales Tax Act, 1952, where the definition of "business" was similar to the unamended provision of the Tamil Nadu General Sales Tax Act

as it stood prior to 1964. The second decision which was cited by the learned counsel appearing for the petitioner is the decision reported in *State of Madras Vs. K.C.P. Ltd.*, Even therein, the transaction related to the unamended provision. There, the respondent carried on the business in the manufacture and sale of machinery and parts of machinery and accessories. The assessee sold the furnaces which were unsuitable for the purpose for which they were purchased. On the question of liability, the Apex Court pointed out that there was no doubt that the assessee was a dealer. However, the question whether the sale of furnaces had a reasonable connection with the normal course of business was to be seen. In that context, the Apex Court referred to the decision reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, and pointed out that there was no material to show that the furnaces were manufactured or sold by it, or were part of its business or ingrained therein. In that context, the Apex Court referred to the definition of "dealer" which means a person carrying on business of selling goods and thus, applying the decision reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, with reference to the definition of "dealer" as well as "business" and held that the transactions were not liable to sales tax. The third decision cited by the learned counsel viz., the decision of the Apex Court reported in *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd.* and Another, however, stands on a different footing. It is evident from a reading of the said decision of the Apex Court that the assessment therein related to the assessment year 1964-65. The turnover was divided into two parts. The first part related to the period 1st April 1964 to 31st August 1964 and the second part related to the period 1st September 1964 to 31st March, 1965. The first part was governed by the Madras General Sales Tax Act, 1959, and the second part was governed by the Act after its amendment in 1964. Thus, referring to the definition of "business" in Section 2(d) and "dealer" in Section 2(g), the Supreme Court held that in respect of the transaction after the amendment of the Section, the sale of scrap were certainly connected with the business of the company and hence, the sale was liable to tax. The Supreme Court pointed out that the sale of scrap being incidental to the business of manufacture, the liability was certainly attracted under the provisions of the Act. Referring to the decision of the Supreme Court reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, , the Apex Court pointed out that the sale of cans, boxes, cotton ropes, rags etc., were held to be not incidental to the manufacturing or selling textiles. The said decision was rendered in consideration of the provisions of the Bombay Sales Tax Act, which was similar to that in the Madras General Sales Tax Act, prior to the amendment in 1964; that the sale of scrap would not necessarily lead to an inference that the business which was an element in determining the liability of the dealer for the turnover in such goods, was intended to be carried on in those goods. Thus, explaining the decision of the Apex Court reported in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, the Supreme Court held that after the amendment in 1964, the sale of scrap being incidental to the business of the assessee, the same was liable to be taxed. The fourth decision cited by the learned counsel appearing for the

assessee is reported in Board of Revenue and Others Vs. A.M. Ansari and Others, . Learned counsel appearing for the petitioner places reliance on the said decision primarily based on the observation of the Apex Court that in the absence of an element of purchase as one of the necessary ingredients of business, the question of holding a person carrying on the business in buying or selling as not a dealer, would not arise. He pointed out that the case on hand being one of selling DEPB licence, which itself was given after the export of goods, the decision of the Apex Court would apply. Thus there being no purchase price to it, the assessee could not be held as engaged in the business of buying and selling DEPB licence.

10. We do not find that the reasoning of the learned counsel appearing for the assessee could be accepted based on the decision reported in Board of Revenue and Others Vs. A.M. Ansari and Others, The facts in the said decision were that the Forest Department of the Government of Andhra Pradesh held an auction in respect of various items of forest produce such as timber, fuel, bamboo, minor forest produce, beedi leaves, tanning barks, parks mohwa etc. On the question as to whether sales tax was leviable on the bid, the Apex Court pointed out that in view of the amendment introduced in 1966 to the definition of "business" u/s 2(1)(bbb) of the Andhra Pradesh General Sales Tax Act, even though profit motive could not be regarded as an essential ingredient of the term "business", other ingredients of the said term viz., volume, frequency, continuity and regularity of transactions of sale and purchase must be satisfied in order that a person could be said to be carrying on the business of selling goods. The auction was done only annually and not at frequent intervals. Therefore, the element of frequency was lacking in that case and that the Government of Andhra Pradesh could not be said to be carrying on the business of selling forest produce. In that context, the Apex Court pointed out to the decision reported in Ramakrishna Deo Vs. The Collector of Sales Tax, where the Maharaja of Jeypore had sold the sal trees from his forest for preparing sleepers, wherein, it was held that he was not a dealer within the meaning of the Orissa Act, but he was not carrying on the business of selling or supplying the goods, for the reason that the element of purchase, viz., one of the necessary ingredients of the business, was absent. Having pointed out to the said decision, the Supreme Court held that the auction of the forest produce not being done frequently and there being no business motive in the context of the definition of "business" as decided in the various decisions of Courts, there was no liability on the sale of forest produce and therefore, the Government of Andhra Pradesh could not be said to be carrying on business in goods. We do not find that the said decision of the Supreme Court would be of any assistance to the assessee herein on the line of reasoning projected by the assessee that there being no price paid by him on the allotment of DEPB licence, there could be no transaction of business.

11. It is not denied by the assessee that DEPB licence is given to the assessee based on the Foreign Trade Policy on the volume and value of the export. Thus the value that is fixed on the allotment of a DEPB licence has to be seen in the

context of the policy under which the same is issued. Admittedly, the allotment is not given freely to anybody or everybody. The idea behind the grant of the scheme itself is to enable free export of inputs. The policy gives the method of evaluating the licence for the purpose of allotment.

12. The fifth decision cited by the learned counsel appearing for the assessee is reported in Commissioner of Sales Tax Vs. Sai Publication Fund, . There, the assessee was a Trust created by four devotees of Saibaba of Shirdi with the object of spreading the message of Saibaba. To accomplish the object of the Trust, the Trust published books, pamphlets and other literature containing the message of Saibaba which were made available to devotees at nominal charges to meet the cost. The sale proceeds of such publications went to the Trust and formed part of the property of the Trust. While sale of books would normally attract sales tax liability, in the context of the definition of "business", the Supreme Court pointed out that in the absence of any intention to carry on business therein, the incidental activity, per se, would not come within the meaning of "business" for the purpose of attracting the liability. Referring to the definition of the term "dealer" as given u/s 2(11) of the Bombay Sales Tax Act, the Apex Court pointed out that in order to hold a person to be a dealer, he must carry on business within the meaning of the term "business" and then only he would be deemed to be carrying on business in respect of a transaction incidental thereto. Thus, when the main and dominant activity of the Trust, in furtherance of its object, itself not amounting to business, the incidental activity of spreading the message through publications would not become "business" for the purpose of the Act. The Apex Court also referred to the decision reported in State of Tamil Nadu and Another Vs. Board of Trustee of the Port of Madras, and held that the words "carrying on business" would require something more than merely selling or buying. Thus, referring to the decision reported in (1976) 3 SCC 512 : [1976] 38 STC 577 (S.C.) Board of Revenue and Others Vs. A.M. Ansari and Others,), the Supreme Court held that the liability in respect of the incidental activity would arise only when the main activity is also "business". In this context, the Supreme Court held that the assessee's case would not fall within the definition of "business". As far as this ruling of the judgment of the Apex Court referred to above by the learned counsel appearing for the assessee is concerned, in order that an activity, to attract the definition of business, there must be an intention to carry on business, as held in the decision referred to above. In order that an incidental activity would qualify itself to be brought under the definition of "business", such incidental transaction must be in connection with the main activity, trade, commerce, manufacture, adventure or concern. Thus, while for all purposes or for substantive part of the definition "business", there must be frequency, continuity and regularity in the transactions and the said activity would qualify to be termed under the definition of "business", the incidental or ancillary activity to the main business does not call for such interpretation. By use of the expression "any transaction in connection with the business", one can hold that the Act itself does not contemplate the frequency or regularity or

continuity of the transactions, as has been done in the substantive part in sub clause (1) of sub section (d) of Section 2 of the Act. In the circumstances, we do not think that this judgment, or the decision reported in State of Gujarat Vs. Raipur Manufacturing Company Ltd., , which was rendered prior to the amendment of the Section, would be of any assistance to the assessee. So too the decision reported in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, In fact, the said decision went contra to the contention of the learned counsel, in view of the amendment brought to the definition of "business". The decision reported in Board of Revenue and Others Vs. A.M. Ansari and Others, does not, in any manner, advance the cause of the assessee, it being distinguishable on facts. So too the decision reported in Commissioner of Sales Tax Vs. Sai Publication Fund, As far as the contention of the assessee that it does not purchase DEPB licence is concerned, going by the scheme of DEPB and the purpose and the background in which the same is issued and the value at which it is assigned to the petitioner, we do not find any justifiable ground to accept the case of the assessee that he is not a dealer dealing in DEPB licence. The issue raised that the assessee was carrying business in DEPB licence is raised only before this Court and not before the authorities below, where the question was whether DEPB licence would be liable to tax. In any event, it being a question of law, we reject the same.

In the result, the Tax Case Revision is dismissed and the Tribunal's order is upheld on the grounds stated above.