
(1990) 01 BOM CK 0024

In the Bombay High Court

Case No : Sales Tax References No's. 22 and 23 of 1981

Protos Engineering Co. Pvt. Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-01-1990

Acts Referred:

Contract Act, 1872 — Section 182

Citation : (1990) 77 STC 165

Hon'ble Judges : T.D. Sugla, J; Sujata V. Manohar, J

Bench : Division Bench

Advocate : S.S. Gaitonde and B.K. Bhujle, for the Appellant; P.K. Thakore and G.R. Bharwani, for the Respondent

Judgement

T.D. Sugla, J.—The Sales Tax Tribunal has referred a common question of law to this Court opinion in these two references. The question reads thus :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the transactions were sales and not transactions in the course of agency ?"

2. The assessee-company is a dealer in electrical motors, pumps, diesel engines, heavy machine parts, etc., holding R.C. No. NIA 1385. The assessments involved are sales tax assessments both under the Bombay Sales Tax Act and the Central Sales Tax Act covering the period from 1st January, 1974 to 30th June, 1975. Exemption from payment of tax was claimed and allowed in respect of transactions amounting to Rs. 15,15,874 as sales in the course of import by the Sales Tax Officer.

Subsequently, the Deputy Commissioner of Sales Tax Administration, Bombay, issued a notice in form No. 40 seeking to revise the order of the Sales Tax Officer so as to treat the aforesaid transactions as sales not exempt and liable to tax. The transactions being of one and the same type, one set copies of documentary evidence in respect of import transactions for and on behalf of M/s. Kampli Co-

operative Sugar Factory Ltd., Mysore State, was furnished in support of the claim for exemption. Reference was made to the letter of authority issued in favour of the applicant to show that the import licence was user's licence, that machine itself could be used by the licensee only and that the assessee was obliged to act and acted as agent of the licence holders. Alternatively, it was contented that the import transactions were in the course of import. The Deputy Commissioner of Sales Tax Administration, Bombay, rejected the explanation and held that the import transactions under consideration as sale transactions liable to tax.

By order dated 3rd January, 1979, the Sales Tax Tribunal rejected the appeals. However, at the instance of the assessee, the Tribunal, as stated above, referred to this Court a common question of law.

3. Shri Gaitonde, the learned counsel for the assessee, took us through the correspondence exchanged between the assessee and the licence holder for whom the imports were made. The correspondence is at pages 41 to 52 of the paper book. The correspondence clearly indicates that the assessee agreed to import and imported machinery for the licence holders under import licences which were user's licences. The imports were made under the licences in their names. The letters of authority given to the assessee indicated that the goods to be imported belonged to and were always to belong to the licence holders. The assessee was under an obligation to deliver the goods imported to the licence holders only. Under the agreement c.i.f. value of the goods imported was to correspondingly vary on the basis of fluctuation in the exchange rate as and when it took place.

The facts herein are stated to be identical to those in the decisions in the cases of Commissioner of Sales Tax v. Hard Castle Waud & Co. Pvt. Ltd. [1976] 37 STC 479, Dean and Webber Mill Stores Company v. State of Maharashtra [1977] 39 STC 161 and Commissioner of Sales Tax v. Metal Distributors Ltd. [1977] 39 STC 212, where this Court held that the imports made by the assessee, an indenting agent, on behalf of the licence holders were imports as agent. Shri Gaitonde thus contented that the sales tax authorities and the Tribunal were not justified in holding that the transactions amounted to sale of goods by the assessee to the licence holders. Alternatively, he submitted, that assuming the transactions in this case amounted to sales liable to tax, these were in the course of imports and, therefore, exempt from sales tax. For the alternative claim he relied on the Supreme Court decision in Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam v. Indian Explosives Ltd. [1985] 60 STC 310.

4. Shri Thakore, the learned counsel for the department, on the other hand, strongly relied on the orders of the departmental authorities and the Tribunal. He submitted that whether the transactions in question were transactions of sale or not would depend upon a number of factors. The tenor of correspondence exchanged between the assessee and the licence holders would be one such factor. According to him, the tenor was consistent with the transactions of sale rather than of transactions as agent on behalf of the import licence holders. The

letter of authority merely indicated that the import was through the instrumentality of the assessee. It certainly did not clearly indicate that the assessee was the agent as contemplated u/s 182 of the Contract Act. Moreover, the letter of authority was not conclusive as to the nature of the transaction. It merely indicated that the assessee sold the goods imported by it under a letter of authority. There were as many as five facts, Shri Thakore stated, which would indicate whether the transactions herein were transactions of sale between the assessee and the licence holders or whether the transactions were of import by the assessee as agent of the import licence holders. In this context, the correspondence between the parties, according to him, showed that when the licence holder wrote to the assessee in the years 1971 or 1972, it did not have import licence. The correspondence did not indicate that the assessee was expected to import goods as indenting agent. The price fixed was not at which the goods were to be imported. It was an outright price. The facts that the price could be revised from time to time depending upon the fluctuation in exchange rate and that there was no mention of commission payable to the assessee in the correspondence indicate outright sale to the licence holders.

On the basis of the peculiar facts, as he called them, Shri Thakore stated that this Court's decisions reported in [1977] 39 STC 161 *Dean and Webber Mill Stores Company v. State of Maharashtra* [1977] 39 STC 212 *Commissioner of Sales Tax v. Metal Distributors Ltd.* and [1976] 37 STC 479 *Commissioner of Sales Tax v. Hard Castle Waud & Co. Pvt. Ltd.* were not applicable. On the other hand, the Supreme Court decisions in *State of Mysore Spinning and Manufacturing Co. Ltd.* [1958] 9 STC 188 and in *Mod. Serajuddin v. State of Orissa* [1975] 36 STC 136, were the decisions that would apply in this case. The assessees in the latter cases had exported goods through the State trading Corporation. The question was whether the State Trading Corporation was their agent or whether there were two independent contracts between the assessee and State Trading Corporation and State Trading Corporation and foreign sellers. It was held that the assesses in those cases has made independent sales to the State Trading Corporation.

5. We have considered rival contentions very carefully. In our opinion, the facts found by the Tribunal and evident from the correspondence available at pages 41 to 52 and the letter of authority at pages 53 to 55 clearly indicate that the facts in this case are similar, if not identical, to those in the cases decided by this Court. The so-called distinguishing features pointed by Shri Thakore, according to to us, are not material at all for decision in this case. The fact remains that the imports were made by the assessee under user's licence in the name of and for the licence holders under letters of authority. The letters of authority clearly indicated that the goods were and always belonged to the licence holders. The applicants could not make any other use of the goods so imported. There was no possibility of the goods being diverted by the assessee for any other purpose. Thus, at no point of time the applicants could be said to be the owners of and have control over the goods imported. In such a situation, having regard to the

decisions of this Court, we have no doubt in our mind that the assessee imported the goods as agents of the licence holders and, therefore, the Tribunal was not justified in treating the sales as not exempt or treating them as liable to sales tax. The question is accordingly answered in the negative and in favour of the assessee.

6. In view of our answer to the question in favour of the assessee, strictly speaking, it is not necessary to reframe the question so as to answer the alternative question sought to be raised on behalf of the assessee. Since, however, the Supreme Court, in *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam v. Indian Explosives Ltd.* [1985] 60 STC 310, has held that such imports will even be exempt on the ground of being in the course of imports, it may be desirable to observe that the assessee might have succeeded even on that score if the question was to be reframed to cover that aspect of the question.

7. In the result, the question is answered in the negative and in favour of the applicants. No order as to costs.

8. References answered in the negative.