

(2014) 07 DEL CK 0263

In the Delhi High Court

Case No : St. Ref. 1/2013

Remari India (P) Ltd.

APPELLANT

Vs

Commissioner Sales Tax

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 4, 5, 5(1), 5(3)
Constitution of India, 1950 — Article 286, 286(1)(b), 366
Delhi Sales Tax Act, 1975 — Section 45(1), 8

Citation : (2015) 213 DLT 583 : (2014) 309 ELT 632 : (2015) 79 VST 251

Hon'ble Judges : V. Kameswar Rao, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : A.K. Babbar and Surendra Kumar, Advocate for the Appellant; H.C. Bhatia, Advocate for the Respondent

Judgement

Sanjiv Khanna, J.—Appellate Tribunal, Value Added Tax (Tribunal, for short) vide order dated 25th April, 2008 in Appeal No. 49/STT/04-05 relating to assessment year 2000-01 (Local), has referred the following question of law to this Court u/s 45(1) of the Delhi Sales Tax Act, 1975 (for short, Act):-

Whether in the facts and circumstances of the case, the appellant Appellate Tribunal VAT was correct in holding that the transfer of property in the goods from the appellant company to M/s Hyaat, Katmandu (Nepal) took place after and not before the goods were cleared for export out of India?

2. The Appeal No. 49/STT/04-05 filed by the petitioner assessee was disposed of by Tribunal vide order dated 24th October, 2005, recording the following findings:-

We have carefully considered the arguments advanced. We note that unlike the Max India Ltd. case referred to by the Ld. Counsel for the appellant company, the goods receipts brought on record in this case do not show the appellant company as a consignee. It is, therefore, necessary for the appellant company to bring on record further evidence to show that the transfer of title to the buyer was

preceded by and not followed by the clearance of the goods in question for export out of India.

In this case, therefore, though the appellant company has brought on record material to show that there was a sale of goods to the named buyer and that there was an import of such goods into Nepal, it has not been shown that the transfer of property in the goods from the appellant company to the buyer named above took place after and not before the goods were cleared for export out of India.

3. Reading of the first paragraph of the aforesaid findings would indicate that the petitioner assessee had relied upon decision of the Tribunal in Max India Ltd., but the same was distinguished on the ground that in the case in question the petitioner assessee was not shown as a consignee in the goods receipt brought on record. We are afraid that the said ratio or reasoning cannot be a ground to reject the appeal of the assessee.

4. The petitioner assessee, was a company registered under the local and central sales tax Act. In respect of assessment year 2000-01, the assessing authority made an additional demand of Rs. 1,05,827/- on the ground that the assessee had not been able to show and prove that they had exported consignments covered by Invoice No. 171 dated 22nd August, 2000 and No. 209 dated 28th September, 2000 for Rs. 5,85,600/- and Rs. 4,81,240/-, respectively. The reason given was that the assessee had failed to furnish requisite certificates of the Indian Customs authorities for clearing the goods for export to Nepal. The aforesaid finding was affirmed in the first appeal, compelling the assessee to file second appeal before the Tribunal.

5. Article 286 of the Constitution lays restrictions on imposition of tax on sales and purchase of good by the States and stipulates:-

286. Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to

in sub clause (b), sub clause (c) or sub clause (d) of clause 29 A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

6. In view of the constitutional mandate, Section 8 of the Delhi Sales Tax, 1975 Act, which was applicable, had provided as under:-

8. Certain sales and purchases not liable to tax Nothing in this Act or the rules made thereunder shall be deemed to impose, or authorise the imposition of a tax on any sale or purchase of any goods when such sale or purchase takes place-

(i) In the course of inter-state trade or commerce, or

(ii) Outside Delhi, or

(iii) In the course of the import of the goods into, or export of the goods out of, the territory of India

Explanation- Section 3, 4 and 5 of the Central Sales Tax Act, 1956 (74 of 1956) shall apply for determining whether or not a particular sale or purchase takes place in the manner indicated in clause (i), clause (ii) or clause (iii) of this section.

7. It is clear from the reading of the aforesaid Article and Section 8 of the Act that sales tax cannot be imposed and levied on sale or purchase of goods in the course of the import of the goods into or export of goods outside, the territory of India. The expression "in the course of" was elucidated and explained by the Supreme Court way back in the year 1964 in Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, , where question arose regarding taxability on auction of tea chests to the bidder who was an agent of a foreign buyer, under Travancore-Cochin General Sales Tax Act, 1125 and it was held:-

23. As preliminary to the discussion of the question involved, we shall put aside certain types of transactions as regards which there is no dispute that they clearly fall on one side of the line or the other. On the one side of the line would be the case where a seller in pursuance of a contract of sale with a foreign buyer puts the goods sold on board a ship bound for a foreign destination. Such a sale would be an "export sale" which would undoubtedly be within the constitutional protection of Article 286(1)(b). In regard to this type, however, we would make this observation. In such a case we consider that it would be immaterial whether or not with reference to the provisions of the Sale of Goods Act, read in conjunction with the terms and stipulations of any particular contract, the property in the goods passes to buyer on the Indian side of the customs frontier or beyond it. In either event the sale would have occasioned the export, for the sale and the export form one continuous series of transactions, the one leading to the other--not merely in point of time but integrated by reason of a common intention which is given effect to. In such a case it would be seen that there is but one sale--to the foreign buyer "which occasions the export", and which is

implemented in accordance with the terms of the contract by an actual export which is the sine qua non of "a sale in the course of export"...

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28. But the question is, do not these sales also "occasion the export" and in that sense sales "in the course of export" The test which has been laid down by this Court for determining the proximity of the connection between the sale and the export so as to bring the sale within the constitutional exemption in Article 286(1) (b) is the integrality of the two events--the sale and the export. The question to be answered is therefore whether the sales now under consideration do not form part and parcel of a single integrated transaction with the export or are they distinct, distant and mediate, the sale and the export being related to each other only in the sense of one leading to the other or the one succeeding the other merely in point of time. If the former, the sales are within Article 286(1)(b), but if the connection between the two is as described latter, they are outside the exemption...

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33. When learned counsel says that there was no term in the contract between the seller and the buyer that the goods purchased were not to be sold locally but have to be exported, he is right only in the sense that it is not any express term of the contract. But could it be said that that was not the implicit common understanding on which the entire transaction was concluded. The buyer was not interested in the purchase except on terms of the export quota rights being transferred to him and that was why the transfer of the export right was affected or contracted to be effected as part and parcel of the sale of the goods. Again, the buyer was an agent, who as we have stated earlier was not free to deal with the tea purchased by effecting a local sale, but was under an obligation to his foreign principal to export the goods purchased to a foreign destination. It was with such a buyer that the assessee entered into the transaction of sale. On these facts we are satisfied that it was part of the understanding between the seller and the buyer, inferable from all the circumstances attendant on the transaction that the buyer was bound to export. Pausing here, we would add that, we understand that importance is attached in this context to the need of a term in the sale contract laying an obligation on the part of the buyer to export only for the purpose of demonstrating the intimate connection between the sale and the support for establishing that it was the sale that occasioned the export. If we are right, then what is of significance is the real and common intention of the two parties to the transaction--whether they contemplated the goods purchased being sold locally, or whether they intended the goods sold being only exported and not whether there is such a term in the contract between the parties.

8. We also have a Division Bench's decision of Delhi High Court in the case of Sita Juneja and Associates and Others Vs. The Commissioner of Sales Tax and

Others , wherein it has been observed:-

13. The expression "in the course of export or import" as referred to in Article 286 means any sale or purchase which itself occasions the export or import of the goods, as the case may be, out of or into the territory of India. A sale by way of export involves a series of integrated activities commencing from the agreement of sale with the foreign buyer, ending in the delivery of goods to any carrier for transport out of the country by land or sea and resulting in transfer of title in the goods beyond the borders. Such kind of sale cannot be disassociated from the export without which it cannot be effectuated and the sale and the resultant export form part of a single transaction. The liability to tax flows from the charging section of the taxing statute. The export sale of commodities to foreign buyer on CIF or FOB basis fall within the scope of the exemption.

9. Similarly, in Commissioner of Sales Tax Vs. Aero Traders (P) Ltd., , reference was made to Section 5(1) of the Central Sales Tax Act, 1956, which reads as under:-

5. When is a sale or purchase of goods said to take place in the course of import or export,--(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

Thereafter, it has been observed as under:-

A reading of Section 5(1) clearly suggests that the export of goods, for the purposes of the Act shall be deemed to take place if the sale or purchase of the goods either occasions such export or is effected by a transfer of documents of title to the goods after they have crossed the custom frontiers. Insofar as the present case is concerned, the facts on record show that the sale of the goods by the assessed (sic) through STC had taken place after the goods had crossed the custom frontiers both by ship as well as by aircraft.

Thus in either case i.e. when the sale or purchase either occasions such export or secondly when transfer of documents of title of the goods is after they have crossed the customs frontiers, it is treated as export of goods.

10. Section 5(3) of the Central Sales Tax Act, 1956 is relevant and reads as under:-

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

Decision of Supreme Court in Monga Rice Mill etc. Vs. State of Haryana and

Another, , is pertinent in context of Section 5(3) of Central Sales Tax Act, 1956, wherein it has been held:-

5. In these civil appeals, we are not concerned with imports and, therefore, in the course of our judgment we have only emphasised the concept of sale or purchase in the course of export. Section 5 of the 1956 Act lays down principles for determining as to when a sale or purchase takes place in the course of export. It defines constitutional inhibition of Article 286(1)(b), namely, that no law of a State shall impose tax on sale or purchase which takes place in the course of import of goods into or export of goods out of India. Section 5(1) covers direct export sale, whereas Section 5(3) applies to penultimate sale or purchase, which is deemed to be sale or purchase in the course of export and consequently falls u/s 5(1) of the 1956 Act. Therefore, in cases where a sale is not directly connected with exports and where between the seller and the ultimate buyer, intermediaries are involved, such a sale, if not covered u/s 5(3), cannot occasion any export and, therefore, such transaction would not fall u/s 5(1). There is a difference between sale for export and sale which occasions export. When the assessee buys paddy and converts it into rice which is sold to the exporter, although purchase of paddy is a transaction for export, such transaction does not occasion export and consequently it does not fall within Section 5(3). u/s 5(3), a penultimate local sale is deemed to be an export sale u/s 5(1) only if such local sale occasions export.

11. Learned counsel for the Revenue has drawn our attention to the decision of the Supreme Court in B.K. Wadeyar Vs. Daulatram Rameshwarlal, , wherein it has been held:-

The only question for our decision in the appeal by the Sales Tax officer is whether property in the goods passed on shipment or at some point of time before shipment. The law is now well settle that if the property in the goods passes to the buyer after they have for the purpose of export to a foreign country crossed the customs frontier the sale has taken place "in course of the export" out of the territory of India. If therefore in the present sales the property in the goods passed to the buyers on shipment, that is, after they had crossed the customs frontier the sales must be held to have taken place "in the course of export" and the exemption under Art. 286(1)(b) will come into operation. The sellers' case is that these were sales on FOB contracts. Though the Learned Solicitor General appearing on behalf of the Sales Tax Officer tried to convince us that these were not really FOB contract sales, it appears that the averment in Paras. 11 and 13 of the writ petition that these sales were made on FOB basis were not denied in the counter affidavit sworn by the Sales Tax officer. It is also worth noticing that in the assessment order itself the Sales Tax officer referred to these sales as sales on FOB basis. The specimen contract produced also used the words "FOB delivered". There can be no doubt therefore that these were sales under FOB contracts. The normal rule in FOB contracts is that the property is intended to pass and does pass on the shipment of the goods. In certain

circumstances, e.g., if the seller takes the bill of lading to his own order and parts with it to a third person the property in the goods, it has been held, does not pass to the buyer even on shipment. We are not concerned here with the question whether the passing of property in the goods was postponed even after shipment. The correctness of the proposition that in the absence of special agreement the property in the goods does not pass in the case of a FOB contract until the goods are actually put on board is not disputed before us.

As has however been rightly stressed by the learned Solicitor General it is always open to the parties to come to different agreement as to when the property in the goods shall pass. The question whether there was such a different agreement has to be decided on a consideration of all the surrounding circumstances. He relies on three circumstances to convince us that the sellers and their buyers agreed in these sales that the property will pass to the buyer even before shipment. The first circumstance on which he relies is that the bill of lading was taken in the name of the buyer. Along with this fact we have to consider however the fact that the bill of lading was retained by the sellers, the contract being that payment will be made on the presentation of the bill of lading. It is not disputed that the term in the contract for "payment at Bombay against presentation of documents" means this. It was the sellers who received the bills of lading and it was on the presentation of these bills of lading along with the invoices that the buyer paid the price. When the bills of lading though made out as if the goods were shipped by the buyer, were actually obtained and retained by the sellers, that fact itself would ordinarily indicate an intention of the parties that the property in the good would not pass till after payment.

12. The observations of the Supreme Court in *B.K. Wadeyar* (supra) do not support the findings of the Tribunal that the transactions in question should be subjected to tax and were not covered by Article 286(1)(b) and Section 8 of the Act, for the reason that the petitioner assessee was not described or recorded as a consignee in the goods receipt. This is not what was indicated or stated in the aforesaid passage. In fact, what stands recorded is that the law was settled and the expression "in the course of export" was well established and understood. In the said case, it was held that the transactions in questions were covered under the expression "in the course of export" and were, therefore, exempt. The Supreme Court has recorded that when property in the goods passes to the buyer after they have crossed the customs frontier for the purpose of export to a foreign country, the sale is "in the course of export" out of the territory of India. This clarification and elucidation was required as the assessee, the exporter, in *B.K. Wadeyar*'s case (supra) was both the consignor and consignee in the FOB contract. But that does not mean that there cannot be and would not be any other case covered by the expression "in the course of export". The quoted passage relates to and deals with second part of Section 5(1) of the Central Sales Tax Act, 1956. A case may well be covered by the first part. Facts of each case have to be examined to ascertain whether the transactions in question were "in the course of export" or not. Further, actual export has to be established and

shown. Latter aspect has been dealt with in the case of Sita Juneja (supra).

13. In these circumstances, the question of law mentioned above has to be answered in favour of the petitioner assessee and against the respondent revenue. However, we pass an order or remit as in the second paragraph noted above the tribunal had made some observations in favour of the petitioner assessee, but no affirmative final conclusion, it appears, has been made. As the tribunal was unclear on the legal position, it would be proper and appropriate to find out the exact and true facts and then apply the legal ratio. We feel that the issue should be examined afresh in the light of the aforesaid decisions.

14. The reference is disposed of. No costs.