

(1990) 12 DEL CK 0001

In the Delhi High Court

Case No : Civil Writ Appeal No. 1094 of 1990

Seagull Laboratories (I) Pvt. Ltd.

APPELLANT

Vs

Delhi Administration and Others

RESPONDENT

Date of Decision : 17-12-1990

Acts Referred:

Constitution of India, 1950 — Article 301
Delhi Sales Tax Act, 1975 — Section 4(2)

Citation : (1991) 44 DLT 3 : (1991) ILR Delhi 290 : (1991) 81 STC 90

Hon'ble Judges : S. Duggal, J; B.N. Kirpal, J

Bench : Division Bench

Advocate : Raja Ram Aggarwal, Manoj Saxena, S.K. Mishra and R.C. Chawla, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The challenge in this writ petition is, inter alia, to the provisions of section 4(2)(a)(v) 3rd proviso of the Delhi Sales Tax Act 1975 (hereinafter referred to as the "Act") in so far as the said provision includes in the turnover of the petitioner the value of the goods which had been purchased by it on the basis of its registration certificate, and which goods were not utilised as per the said registration certificate.

(2) Briefly stated, the facts are that the petitioner is a company registered at Delhi, both under the State Act as well as under the Central Sales Tax Act, which has branches outside Delhi, and it carries on business of manufacture of medicines in a factory situated at Delhi. On the strength of its registration certificate, the petitioner has been purchasing the raw material locally against the statutory forms St 1/ST 35 and also from outside Delhi against declaration form "C" under the Central Sales-tax Act. According to the petitioner, it manufactured medicines in Delhi by using the said raw materials which it had purchased without paying the tax and, thereafter the medicines which were so manufactured were transferred to its branches outside Delhi. According to the

petitioner, these transfers took place against form "F" which had been issued under the relevant provisions of the Central Sales-tax Act and that no chargeable event, according to the petitioner, had accounted because no sale was involved in such transfer of goods.

(3) The Sales-tax Officer vide his assessment order dated 15th February 1990 observed that the petitioner had purchased the raw material on the basis of its registration certificate. Undoubtedly, the petitioner had transferred its manufactured medicines to its branches outside Delhi, but according to the said officer the provisions of the aforesaid 3rd proviso to section 4(2)(a)(v) of the Ret were clearly attracted. Invoking, the said provisions, the Sales-tax Officer added to the petitioner's turnover the value of the raw material which the petitioner had originally purchased. Without payment of tax and sales tax was thereby levied on this.

(4) In this writ petition, the challenge is, as already observed, to the said provisions of the Act. It is contended by the learned counsel for the petitioner that the said provision is ultra virus because it is in conflict with a charging section. According to Mr. Aggarwal, the Act does not contemplate levy of purchase tax by virtue of the said proviso on the purchases made by the petitioner. It is further submitted that no sale has, in fact, taken place of the goods manufactured by the petitioner and, Therefore, no sales-tax could be levied. Lastly, it was submitted that the Parliament has no jurisdiction to impose tax which has the effect of taking the transfer of goods on consignment basis from Delhi.

(5) In order to appreciate the aforesaid contention, it is necessary to refer to the relevant provisions of the Act.

(6) The Delhi Sales-tax Act, 1975 was preceded by Bengal Finance Sales-tax Act as extended to the Union Territory of Delhi. The present Act was enacted in 1975 with a view to consolidate and confine the liability relating to levy of tax on sale of goods in the Union Territory of Delhi. Section 3 of the said Act provides that every dealer whose turnover exceeds in any year, then the same shall be liable to pay tax on all sales effected by him. Turnover" is defined in section 2(0) of the Act as meaning the aggregate of the amount of sale price received or receivable by the dealer after deducting the amount of sale price, refunded by the dealer to the purchaser. Section 4 specifies the rate of tax which is payable by a dealer under the Act.

(7) Section 4(2)(v) 3rd proviso, which is relevant for the present case, reads as under :

"4. Rate of tax.-(1) The tax payable by a dealer under this Act shall be levied
(a)..... (b)
(c) (d)
(2)..... (a).....
(i):.. (ii)

(iii) (iv) (v) sale to a registered dealer-

(A) of goods of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him as raw materials in the manufacture in Delhi of any goods, other than goods specified in the Third Schedule or newspapers,-

(1) for sale by him inside Delhi; or

(2) for sale by him in the course of inter State trade or commerce, being a sale occasioning, or effected by transfer of documents of title to such goods during the movement of such goods from Delhi; or

(3) for sale by him in the course of export outside India being a sale occasioning the movements of such goods from Delhi, or a sale effected by transfer of documents of title to such goods effected during the movement of such goods from Delhi, to a place outside India and after the goods have crossed the customs frontiers of India; or

(B) of goods of the class or classes specified in the certificate of registration of such dealer as being intended for resale by him in Delhi, or for sale by him in the course of Inter State trade or commerce or in the course of export outside India in the manner specified in sub item (2) or sub item (3) of item (A), as the case may be; and

(C) of containers or other materials, used for the packing of goods, of the class or classes specified in the certificate of registration of such dealer other than goods specified in the Third Schedule, intended for sale or resale ;

(vi).....

Provided also that where any goods are purchased by a registered dealer for any of the purposes mentioned in sub-clause (v), but are not so utilised by him, the price of the goods so purchased shall be allowed to be deducted from the turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer".

(8) Before considering the rival contentions, it would be appropriate to understand the full import and effect of the said third proviso. When a dealer seeks registration under the Act, he is required under the relevant provisions of the Act and the rules framed there under to indicate the raw materials which are required by him for purchase. He is also obliged to specify the goods which are to be manufactured by him. On the strength of this registration certificate he can make purchases of raw material. According to the provisions of section 3 of the Act, there is a liability on every dealer selling the goods in Delhi to pay sales-tax. This liability can, however, be avoided if sales are made to another registered dealer against ST-1 and ST-35 Forms issued by the purchaser. This is the concession which is contained in practically all the sales-tax laws of India.

(9) The selling dealer ordinarily has to accept the ST-1 and ST-35 Forms given to him by the purchaser. The moment the selling dealer receives those forms, he is obliged to sell the goods to the purchaser against the said forms without Realizing any sales-tax.

(10) In order that the purchasing dealer does not misuse the registration certificate and ST-I and ST-35 Forms, the provisions of clause (v) and the 3rd proviso have been inserted in Section 4(2) of the Act. Section 4(2)(v) stipulates as to what type of sales can be regarded as free of tax. As we read the said provisions, it is only those sales are covered by it which are (a) to a registered dealer who purchases the goods for use as a raw material in the manufacture in Delhi, and (b) thereafter the said sub-section enjoins upon the said manufacturer to sell the manufactured goods in Delhi or to sell the same in the course of Inter State trade or commerce from Delhi or sell in the course of export outside India with the sale occasioning movements of such goods from Delhi. In other words, the emphasis of the said provision is that after the raw materials have been purchased free of tax, manufacture should take place in Delhi and thereafter the manufactured goods sold locally or by Inter State sale or in the course of export. We may here notice that the corresponding provision under the Bengal Finance Sales-tax Act to section 4(2)(v) of the present Act was section (2) (a) (ii) of the said Bengal Finance Sales-tax Act. There was, however, one difference. In the second proviso to section 5(2) of Bengal Finance Sales-tax Act, the word "in Delhi" were missing prior to 1972 and it had been held by judicial pronouncements that it was not incumbent upon the purchasing dealer, under those circumstances, to manufacture in Delhi or to sell the goods in Delhi or from Delhi.

(11) In order to penalise the miss-utilization of the certificate and the ST-1 and ST-35 Forms, the third proviso to section (4)(2)(a)(v) of the Act was inserted. The language of the said provision is very clear and unambiguous. It clearly states that where the goods are purchased for the purpose mentioned in sub clause (v), namely, for manufacture in Delhi, and thereafter sale in Delhi or from Delhi, but the goods so purchased are not utilised in any manner, then the price of the goods purchased shall be included in the taxable turnover of the purchasing dealer even though it is allowable to be deducted from the turnover of the selling dealer. To give an example, as in the present case, the raw material was purchased in Delhi. After the raw material had not been utilised in the manner indicated in the registration certificate ,then the taxable event would have occurred. The words "not so utilised by him" in the said proviso would clearly mean miss-utilization by the purchasing dealer. Such non-utilization or miss-utilization would occur when the raw materials purchased for manufacture are, in fact, not used for manufacture but are sold. Such a sale, even if takes place in Delhi, would attract the provisions of the 3rd proviso and the turnover of the purchasing dealer would be increased by the value of the raw material. Furthermore, even if the raw material is used in manufacture of medicines, but those medicines are not sold in Delhi or from Delhi, it would mean that there has

been a violation of the provisions of section 4(2)(a)(v) of the Act. This is another occasion when a taxable event would occur.

(12) As we read the said provision, it is clear that the taxable event under the 3rd proviso to section 4(2)(a)(v) is not the export of manufactured goods from Delhi. Taxable event occurs when any of the two conditions laid down in section 4(2)(a)(v) is violated. The taxable event is when the raw material is not used according to the terms of the registration certificate or is used in violation of the provisions of section 4(2)(a)(v) of the Act. It is to be borne in mind that ST-1 or ST-35 Forms is a declaration that the petitioner will use those goods in terms of his registration certificate. The two conditions specified are-one, manufacture in Delhi and secondly, sale either in Delhi or in the course of inter State trade or in the course of export. It so happens that in the present case, the taxable event has occurred when the manufactured goods were exported from Delhi though the raw material was used for manufacture in Delhi.

(13) The aforesaid proviso viewed from this angle clearly implies that it is not a purchase tax which is sought to be levied. Ordinarily, sales made to the purchasing dealer, as already observed, would have been liable to tax, but for the furnishing of the ST-1 and ST-35 Forms by the purchasing dealer. When the purchasing dealer has, in a sense, mis-utilized the ST-1 and ST-35 Forms, a question would obviously arise as to levy of tax on the sale by which the purchasing dealer had bought the raw material which is misutilised. It would be clearly unjust and unfair to tax the selling dealer for the wrong committed by the purchasing dealer. Therefore, the third proviso was inserted in order to tax the sale of raw material but not in the hands of the seller but in the hands of the purchaser. It is true that under the Delhi Sales-tax Act, there is no tax on the purchases but the 3rd proviso does not, in effect, tax the purchases. It taxes the sale but in the hands of the purchaser when the purchaser has breached the provisions of the certificate issued by him and the provisions of section 4(2)(a)(v) of the Act.

(14) Strong reliance was placed by the learned counsel turn the petitioner on a decision of the Supreme Court in the case of Goodyear India Ltd. vs. State of Haryana and another (1990) 76 Stc 71. (1) In our opinion the said decision is of no assistance to the petitioner.

(15) The Supreme Court in that case was concerned with the provisions of section 9 of the Haryana Sales-tax Act. In that case the petitioner had manufactured goods in the State of Haryana but had transferred them outside the State on consignment basis. Tax was sought to be levied on the value of the raw material so purchased. It was contended by the petitioners that the State Legislature had no power or jurisdiction to levy tax on consignments transferred. The question which arose there was that of legislative competence of State Legislature to tax such sales. That is not the question here at all. As we will presently see the Parliament has validly enacted the said provision. We may, however, note that the Supreme Court in Good Year's case at page 95 had

observed that the tax was not on the purchase of goods but had arisen as a result of the transfer of those goods from the State of Haryana.

(16) We may note that in *Good year's case* (supra) section 9 of the Haryana Sales Tax Act contained no provision which made it obligatory for the purchasing dealer to furnish any declaration at the time when he purchased the raw-material. This is unlike section 4(2)(a)(v) of the Delhi Act. Furthermore, there is no provision in the Haryana Sales Tax Act. in section 9 in particular, which corresponds to the third proviso to section 4(2)(a)(v). As we have already noted, the present provision is similar to the provisions of section 5(2)(a)(ii), second proviso, of the Bengal Finance (Sales Tax) Act after it was amended in 1972 and was applicable in Delhi.

(17) We would, at this stage, like to refer to another decision of the Supreme Court in the case of *Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another*, which dealt with the provisions of the second proviso to section 5(2)(a)(ii) of the Bengal Finance (Sales Tax) Act. As already noted, prior to 1972 the said provision did not contain the words "inside the Union Territory of Delhi". The question arose whether the said section 5(2)(a)(ii) permitted said to take place even outside Delhi or not. The Supreme Court held that in the absence of the said words limiting the sale inside the Union Territory of Delhi, the raw-material which was purchased by a dealer could be used in the manufacture of goods and the goods could be transferred from Delhi without attracting any tax. Nevertheless it was observed by the Supreme Court as follows :

"But if the goods are utilised by the purchasing dealer for some other purpose contrary to the intention expressed by him in the declaration, the object and purpose of giving deduction to the selling dealer would be defeated. Even so, it would not be right to withdraw the deduction granted to the selling dealer because that would be penalising the selling dealer for a breach of faith committed by the purchasing dealer. The legislative wrath should in all fairness fall on the purchasing dealer and that is why the second proviso has been introduced in the Act by Delhi Amendment Act 20 of 1959. The object of the second proviso is to ensure that the intention expressed by the purchasing dealer in the declaration given by him is carried out and he acts in conformity with that intention. Where the purchasing dealer gives a declaration of intention to resell the goods purchased or to use them as raw materials in the manufacture of goods for sale, he must act in accordance with that intention, because it is on the basis of that intention that deduction is allowed to the selling dealer and if he does not carry out that intention and utilises the goods for any other purpose, it stands to reason that the tax which is lost to the revenue by reason of deduction granted to the selling dealer should be recoverable from him, that is, the purchasing dealer. If no deduction were granted to the selling dealer, he would be liable to pay tax on the sale made by him and ultimately the incidence of that tax would be passed on to the purchasing dealer, but by reason of deduction allowed to the selling dealer, the purchasing dealer escapes this incidence of tax and,

Therefore, the second proviso enacts that where the purchasing dealer acts contrary to the intention declared by him, the selling dealer shall not be penalised for the sin of the purchasing dealer and he shall continue to have his deduction, but the price of the goods purchased shall be included in the taxable turnover of the purchasing dealer. The second proviso is thus intended to provide the consequence of the purchasing dealer not complying with the statement of intention expressed in the declaration given by him to the selling dealer under the first proviso. This is broadly, the scheme and intendment of section 5(2) (a) (ii) and its two provisos read in the context of the other provisions of the Act."

(18) As we have already noticed, an amendment took place in 1972 when the words "in the Union Territory of Delhi" were added to section 5(2)(a)(ii) of the Bengal Finance (Sal's Tax) Act. Dealing with this, the Supreme Court in Polestar's. case (supra) observed as follows :

"The subsequent history of the Act also supports the construction which we are inclined to place on section 5(2)(a)(ii) and the second proviso. Section 5(2)(a)(ii) was amended with effect from 28th May, 1972, by the Finance Act, 1972, and the words "in the Union Territory of Delhi" were added after the word "manufacture" so as to provide that manufacture should be inside the territory of Delhi. It was also provided by the amendment that the sale of manufactured goods should be inside Delhi or in the course of inter-State trade or commerce or in the course of export outside India. This amendment clearly excluded manufacture of goods as also sale of manufactured goods outside Delhi."

(19) The aforesaid ratio of the Supreme Court in Polestar's case would be clearly applicable to the provision of section 4(2)(a)(v) read with the third proviso. The position existing under the 1975 Act is clearly the same which existed in Bengal Finance (Sales Tax) Act after its amendment in 1972 when the words "in the Union Territory of Delhi" were added. In view of this decision, the question of any reliance being placed on Good year's case does not and cannot arise.

(20) Confronted with the aforesaid decision, the learned counsel for the petitioner sought to contend that being a Union Territory, the Parliament was undoubtedly competent to legislate. He, However, contended that when there is a specific entry in any of the three lists then the Parliament cannot invoke the provisions of Entry 97 of List I in order to legislate in respect thereto. The submission of the learned counsel was that Sales Tax can be imposed by virtue of the relevant entry in List 2. He, however, submitted that what was sought to be taxed by virtue of the third proviso to section 4(2)(a)(v) was to tax a transaction which was not a sale. The Parliament could not, it was submitted, regard something as a sale which in fact was not a sale prior to the 46th amendment of the Constitution, In other words, the submission of the learned counsel was that transfer on consignment basis could not be subjected to tax as the same was not sale and such transfer could not be deemed to be sale.

(21) As we have already noted, the taxable event is not the transfer of the

manufactured goods. The taxable event is in fact the miss-utilization of St 1 and St 35 forms. It may so happen that this miss-utilization may be by transferring manufactured goods from Delhi. It can also be that miss-utilization takes place when raw-materials which are purchased are, without being used in manufacture, re-sold to another party either in Delhi or outside Delhi. That would also be a case of miss-utilization of St 1 and St 35 forms which would immediately attract the provisions of the third proviso to section 4(2)(a)(v). This proviso in fact seeks to levy sales tax on a sale which had occasioned at an earlier point of time but by fiction of law it is deemed to be a sale which takes place at a time when the taxable event occurs, namely, miss-utilization of the St I and St 35 forms and, furthermore, the law now permits the sales tax to be assessed and recovered not from the selling dealer but from the purchasing dealer. It is, Therefore, incorrect to suggest that what is now sought to be taxed by virtue of section 4(2)(a)(v), third proviso, is not a sale at all. The infirmity in the argument of the learned counsel occurs when he regards the third proviso as empowering tax on transfer of goods on consignment basis simpliciter. As already noted, this proviso can be attracted even when the goods are not transferred from Delhi, e.g. when the raw-material purchased is miss-utilized and instead of being used in manufacture it is re-sold in the State of Delhi itself.

(22) Looked at from another point of view, the third proviso gives a power to the State to levy sales tax on a transaction which should never have been allowed to be deducted at a time when it had originally taken place. If the purchasing dealer had not intended to sell the manufactured goods within the Union Territory of Delhi then he should not have furnished St 1 and St 35 forms to the selling dealer while purchasing raw-materials. In that event the purchasing dealer would have had to pay sales tax which would have been collected by the selling dealer and paid over to the State. By furnishing St I and St 35 forms the purchasing dealer gave an undertaking to the seller, and in turn to the State, that the raw-material purchased by him would be used for manufacture in Delhi and those goods will be subjected to sale in Delhi or would be sold in the course of inter-State trade or commerce. The effect of this would be that at one point of time tax would be levied on the price of the raw- material used in the manufacture of the goods. That tax would be levied when the manufactured goods are either sold in Delhi or the sales are made in the course of inter-State "trade or commerce from Delhi. When the purchasing dealer does not adhere to the certificate which he had furnished, then obviously the State has been wrongfully deprived of the revenue which was due to it. Instead of, at that stage, seeking to reopen the assessment of the selling dealer and taxing such a sale, what the law now permits by the third proviso is to deem that sale as to take place at the time when the miss-utilization occurs and, furthermore, deem it to be the turnover of the purchasing dealer when the purchasing dealer is himself subjected to sales tax under the local Act. In our opinion, the Parliament was clearly empowered to pass such a legislation even under Entry 97 of List I and we see no lack of jurisdiction in this connection.

(23) It was also sought to be contended by the learned counsel for the petitioner that there has been a violation of the provisions of Article 301 of the Constitution. He submits that by seeking to tax consignments sent out of Delhi on transfer, there is restriction on the free movement of goods. We, however, feel that there is no merit in this. A similar contention had been raised in *Good year's* case and at page 112 the same was repelled in the following terms :

"One has to determine : does the impugned provision amount to restriction directly and immediately on the trade or commerce movement ? As was observed by this Court in *Kalyani Stores Vs. The State of Orissa and Others*, , imposition of a duty or tax in every case was not tantamount per se to any infringement of article 301 of the Constitution. Only such restrictions or impediments which directly or immediately impede free flow of trade, commerce and intercourse fall within the prohibition imposed by article 301. A tax in certain cases may directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and its own setting of time and circumstances. Unless the court first comes to the finding on the available material whether or not there is an infringement of the guarantee under article 301, the further question as to whether the statute is saved under article 304(b) does not arise. The goods taxed do not leave the State in the shape of raw material, which change their form in the State itself and there is no question of any direct, immediate or substantial hindrance to a free flow of trade. On the evidence adduced, we are in agreement with the High Court that the challenge to the imposition in the background of article 301 cannot be sustained and, Therefore, no question whether such imposition is saved under article 304(b) of the Constitution arises."

(24) For the aforesaid reasons, we find no merit in this petition. The writ petition is accordingly dismissed with costs. Counsel's fee Rs. 1000.