

(2011) 11 MAD CK 0153

In the Madras High Court

Case No : T.C. (Revision) No. 1101 of 2006

Sri Velur Devasthanam Vaitheeswaran Koil Dharmapuram
Adhinam, Dharmapuram Mayiladuthurai

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 12-11-2011

Acts Referred:

Contract Act, 1872 — Section 176

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 2(11), 2(5A)

Central Provinces and Berar Sales Tax Act, 1947 — Section 2

Citation : (2011) 11 MAD CK 0153

Hon'ble Judges : P.P.S. Janarthana Raja, J; P. Jyothimani, J

Bench : Division Bench

Advocate : N.A. Nissar Ahmed, for the Appellant; R. Sivaraman Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P. Jyothimani, J.—The assessee has preferred this revision against the order of the Sales Tax Appellate Tribunal (Main Bench), Chennai dated 17.5.2001 passed in S.T.A.No.55 of 2000, by which the Tribunal has set aside the order of the Appellate Assistant Commissioner and held that the auction sale conducted by the assessee in respect of the gold bullion offered by the devotees to the assessee/ Devasthanam is assessable to sales tax. The revision was admitted on the following questions of law:

1. Whether the Appellate Tribunal erred in reversing the well considered order of the Appellate Assistant Commissioner (CT) in A.P.No.607/97, dated 29.9.1998?
2. Whether the Appellate Tribunal is right in applying Karnataka Pawn Brokers Association v. State of Karnataka, (1998) 111 STC 752?
3. Whether the Appellate Tribunal erred in not seeing that the appellant is a religious institution?

2.1. The assessee - Sri Velur Devasthanam of Dharmapuram Adhinam, Nagapattinam District has sold gold bullion offered by the devotees by public auction to the value of Rs. 11,88,150/-. A notice issued by the Department under the Tamil Nadu General Sales Tax Act, 1959 (for short, "the Act") was objected to by the assessee on the basis that the assessee was not carrying on any business and it is not a dealer and it is a Devasthanam. However, the Assessing Officer has made assessment on the turnover of Rs. 11,88,150/-, in addition to the additional sales tax.

2.2. Aggrieved by the said order, the assessee filed an appeal before the Appellate Assistant Commissioner, who, by relying upon the judgment in *Arulmigu Dhandayuthapani Swami Thirukkoil v. Commercial Tax Officer-II, Palani*, (1998) 108 STC 114 in respect of a temple offering prasadam to devotees, having found that the dominant activity of the assessee is religious and charitable in nature and not business, has set aside the order of the Assessing Officer.

2.3. Being aggrieved, the State has filed an appeal to the Tribunal. The Tribunal, while setting aside the order of the Appellate Assistant Commissioner, has confirmed the order of the Assessing Officer. A reference to the impugned order of the Tribunal shows that the Tribunal has considered the assessee as a dealer u/s 2(g) of the Act in respect of the auction conducted for the sale of the above said offerings to come to a conclusion that even though it is a solitary transaction, it amounts to business and the assessee should be treated as a dealer. The Tribunal relied upon the judgment of the Apex Court in *Karnataka Pawn Brokers Association v. State of Karnataka*, (1998) 111 STC 752, wherein it was held that activity of pawn brokers in selling the pledged goods by auction should be treated as a business and they should be treated as dealer and accordingly, tax is liable to be paid. Hence, the assessee has preferred this revision on the above said questions of law.

3. It is the contention of the learned counsel for the assessee that the Devasthanam was constituted as per the scheme framed by the Civil Court with the object of maintaining the temple and, therefore, the sale of offerings made by the devotees is not a commercial activity and it is only incidental to the object, which is religious and charitable. He would also rely upon the judgment in *Tirumala Tirupati Devasthanam, Tirupati v. The State of Madras* and another, (1972) 29 STC 266 (Madras), which has also been referred to by the Apex Court in *Commissioner of Sales Tax Vs. Sai Publication Fund*, , and therefore, according to him, the finding of the Tribunal as if the assessee has been carrying on business or as if the assessee is a dealer under the Act is not valid in law.

4. On the other hand, the learned Special Government Pleader would submit that it is well settled law that during the course of business even a solitary transaction can be deemed to be a business transaction and the assessee should be treated as a dealer as per Section 2(g) of the Act liable for payment of sales tax. He relied on the decisions in *Federal Bank Ltd. and Others Vs. State of Kerala* and

Others, and State of Tamil Nadu v. Parle Products (P) Ltd., (1993) 91 STC 470 to substantiate his contention.

5. We have heard the learned counsel for the petitioner as well as the respondent and referred to the impugned order of the Tribunal and other records, including the scheme framed in respect of the assessee/ Devasthanam.

6. On a reference to the scheme framed in respect of the Devasthanam, which has been ultimately settled by the Supreme Court in Sri La Sri Subramanya Desiga Gnanasambada Pandarasannadhi v. State of Madras, AIR 1865 SC 1683, it is seen that the object of framing of the scheme is for maintenance of the main temple, the shrines and minor temples attached thereto, and charities and endowments thereof, which are all comprised in Velur Devasthanam. The scheme also enables the trustee with the permission of the Commissioner of Hindu Religious and Charitable Endowments Department to sell in public auction the jewels and ornaments - gold and silver coins not in circulation and other metallic objects in the hundials, except current coins and any other offerings.

7. By dint of the scheme settled by the Apex Court, we have no doubt that the activity of the assessee is religious in nature. The conduct of sale of the offerings is incidental to the object which is totally religious. That has also been the finding given by the authorities below.

8. The reliance placed on by the Tribunal on the judgment of the Apex Court in Karnataka Pawn Brokers Association v. State of Karnataka, (1998) 111 STC 752 is not applicable to the facts of the present case. That was a case where pawn brokers, whose business is commercial in nature, in the course of their business dealings sold pledged jewels and ornaments in respect of which the amounts were not repaid by public auction. It was in those circumstances, taking into consideration that the object of the pawn brokers in selling by public auction is during the course of their business, the Apex Court has held that the same is liable to tax.

9. On a reference to Section 2(g) of the Act, which is as follows:

Section 2(g) "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-

(i) A local authority, company, Hindu undivided family, firm or other association of persons which carries on such business;

(ii) a factor, a broker, a commission agent or arhati, a del credere agent or an auctioneer, or any other mercantile agent by whatever name called, and whether of the same description as hereinbefore or not, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, or through whom the goods are bought, sold, supplied or distributed;

(iii) a commission agent, a broker or a del credere agent, or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;

(iv) every local branch of a firm or company situated outside the State;

(v) a person engaged in the business of transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(vi) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vii) a person engaged in the business of delivery of goods on hire purchase or any system of payment by instalments;

(viii) a person engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(ix) a person engaged in the business of supplying by way of, or as part of, any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

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 any 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;

it is very clear that to treat a person as a dealer, the activity he carries on must be in the course of the business. The term "business", which is defined u/s 2(d) of the Act as follows:

Section 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;

also makes it very clear that it relates to the trade and commerce and any transaction incidental thereto. Therefore, by a bare application of the definition of the above said terms which are the basis for the purpose of imposing tax under the Act, to the facts of the present case, we have no hesitation to hold that there is absolutely no business or trading activity by the assessee/Devasthanam.

10. The judgment relied upon by the learned Special Government Pleader in Federal Bank Ltd. and Others Vs. State of Kerala and Others, again relates to a case where the bank in the course of its banking business sells the pledged ornaments in respect of which the repayment was not made acting u/s 176 of the Contract Act, which enables the pledgee to sell the goods after following certain procedure. It was in those circumstances, the Apex Court, by considering that it is forming part of the banking business in respect of a bank and, therefore, it is commercial in nature, has held that such sale would attract tax. Therefore, the said judgment is not applicable to the facts of the present case.

11. The other judgment relied upon by the learned Special Government Pleader is the decision of the Division Bench of this Court in State of Tamil Nadu v. Parle Products (P) Ltd., (1993) 91 STC 470, which relates to a company engaged in the manufacture and sale of biscuits and also selling the yearly calendars at half price and it was in those circumstances held that the supply of calendars at 50% of the cost even though may not be with a profit motive or with intention for accrual of profit, still it constitutes business, since it is for the purpose of the business of the company such supply of calendars for half rate was made. Certainly, the said judgment has no application to the facts of the present case.

12. On the other hand, as submitted by the learned counsel for the petitioner, a very similar issue in respect of sale of silver by Tirumala Tirupati Devasthanam, Tirupati was decided by this Court in Tirumala Tirupati Devasthanam, Tirupati v. The State of Madras and another, (1972) 29 STC 266 (Mad). In the said decision, while referring to various definitions under the Act, including dealer and business, in the context of the Devasthanam selling the metallic objects which are realised in hundials, it was held that the same was not in the course of any business being conducted by the Devasthanam, since it is not with a profit motive. To arrive at such conclusion, this Court has relied upon an earlier judgment in Deputy Commissioner of Commercial Taxes v. Sri Thirumagal Mills Ltd., (1967) 20 STC 287. Quoting with approval the finding by the Division Bench in Sri Thirumagal Mills Ltd. case, it was held as follows:

In Deputy Commissioner of Commercial Taxes v. Sri Thirumagal Mills Ltd., (1967) 20 STC 287, a limited liability company manufacturing cotton yarn, in order to provide amenity to its workmen, had opened a fair price shop so that commodities might be made available to its workmen at fair prices. The turnover made by the company in such a transaction was sought to be brought to tax by the revenue. A Division Bench of this Court, to which I was a party, observed as follows:

Unless a transaction is connected with trade, that is to say, it has something to do with trade or has the incidence or elements of trade or commerce, it will not be within the definition of "business" in the Madras General Sales Tax Act, 1959, as amended by Act 15 of 1964. The words "in connection with or incidental or ancillary to" in the second part of the definition of "business" still preserve or retain the requisite that the transaction should be in the course of business understood in a commercial sense. The intention of Madras Act 15 of 1964 is not to bring into the tax net a transaction of sale or purchase which is not of a commercial character.

13. In fact, the said judgment in Tirumala Tirupati Devasthanam case, *supra*, came to be referred with approval impliedly by the Apex Court in Commissioner of Sales Tax Vs. Sai Publication Fund, , wherein the Apex Court elaborately has discussed about the various terms relating to the Bombay Sales Tax Act, including business, dealer, etc., and referred to a catena of judgments and held that to term a person as a dealer there must be a profit motive. It is useful to extract paragraphs (11) to (17) of the said judgment hereunder:

11. No doubt, the definition of "business" given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" presupposes the existence of trade, commerce etc. The definition of "dealer" contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer", he must "carry on business" and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to "business". Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry on as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer u/s 2(11) of the Act.

12. This Court in State of Tamil Nadu and Another Vs. Board of Trustee of the Port of Madras, after referring to various decisions in regard to "business" and "carrying on business" in paras 15 and 16 has stated thus:

15. Now the definition of "business" in Section 2(d) and in most of the sales tax statutes is an inclusive definition and includes "trade or business or manufacture etc." This itself shows that the legislature has recognized that the word "business" is wider than the words "trade, commerce or manufacture etc." The word business though extensively used is a word of indefinite import. In taxing statutes, it is normally used in the sense of an occupation, a profession - which occupies time, attention and labour of a person, normally with a profit motive and 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 State of Andhra Pradesh Vs. Abdul Bakhi and Bros., . Even if such profit motive is statutorily excluded from the definition of "business", yet the person could be doing "business".

16. The words "carrying on business" require something more than merely selling or buying etc. 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 Board of Revenue and Others Vs. A.M. Ansari and Others, . Such profit motive may, however, be statutorily excluded from the definition of "business" but still the person may be "carrying on business".

13. Further in para 30 of the same judgment, it is stated thus:

30. In our view, if the main activity was not "business", then the connected, incidental or ancillary activities of sales would not normally amount to "business" unless an independent intention to conduct "business" in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not "business" and the onus of proof of an independent intention to do "business" in these connected, incidental and ancillary sales will rest on the Department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier.

(Emphasis supplied)

14. In the case on hand, the Revenue neither contended nor proved that in sale of publications the Trust had an independent intention to do business as incidental or as an ancillary activity.

15. This Court in the aforementioned judgment further examined the cases to find out if the main activity was not "business". In para 32, reference is made to the case of the Bombay High Court in The State of Bombay Vs. The Ahmedabad Education Society, . In that case, the educational society was entrusted with the

task of founding a college and for that purpose it was to construct buildings therefor. It was held that it could not be said to be "carrying on business" merely because for the above purposes, it established a brick kiln and sold surplus bricks and scrap at cost price without intending to make profit or gain. Having regard to main activities and its objects, it was held that the educational society was not established "to carry on business" and the sale of bricks was held not excisable to sales tax. Chagla, C.J. pointed out that it was not merely the act of selling or buying etc. that constituted a person a "dealer" but the "object" of the person who carried on the activities was important. It was further stated that it was not every activity or any repeated activity resulting in sale or supply of goods that would attract sales tax. If the legislature intended to tax every sale or purchase irrespective of the object of the activities out of which the transaction arose, then it was unnecessary to state that the person must "carry on business" of selling, buying etc.

16. In para 33 of the same judgment, this Court has referred to various decisions to consider whether one is a "dealer" or carries on "business" and the nature and object of activity. The said para reads thus:

33. In *Girdharilal Jiwanlal Vs. The Assistant Commissioner of Sales Tax (Appeals), Nagpur and Another*, , relied on for the respondent-Port Trust, the Bombay High Court held that an agriculturist did not necessarily fall within the definition of a "dealer" u/s 2(c) of the C.P. & Berar Sales Tax Act (21 of 1967), merely because he sold or supplied commodities. It must be shown that he was carrying on a business. It was held that it must be established that his primary intention in engaging himself in such activities must be to carry on the business of sale or supply of agricultural produce. This High Court held that there was

"nothing to show that the petitioner acquired these lands with a view to doing "the business of selling or supplying" agricultural produce. According to (the assessee), he (was) principally an agriculturist who also deals in cotton, coal, oilseeds and groundnuts".

(Emphasis supplied)

He was having agriculture for the purpose of earning income from the fields but there was nothing to show that he acquired the lands with the primary intention of doing business of selling or buying agricultural produce. This decision was approved by this Court in *Dy. Commr. of Agricultural Income Tax & Sales Tax v. Travancore Rubber & Tea Co.*, (1967) 20 STC 520 (SC) and it was held that where the only facts established were that the assessee converted latex tapped from rubber trees into sheets and effected a sale of those sheets to its customers, the conversion of latex into sheets being a process essential for transport and marketing of the produce, the Department had failed to prove that "the assessee was formed" with a commercial purpose. The Allahabad High Court in *Swadeshi Cotton Mills Co. Ltd. Vs. Sales Tax Officer and Another*, was dealing with a batch of cases where different bodies were running canteens. One

of the cases concerned Aligarh Muslim University which was maintaining dining halls where it was serving food and refreshments to its resident-students. It was held, referring to observations of this Court in *University of Delhi and Another Vs. Ram Nath*, that it was incongruous to call educational activities of the University as amounting to "carrying on business". The activity of serving food in the dining hall was a minor part of the overall activity of the University. Education was more a mission and avocation rather than a profession or trade or business. The aim of education was the creation of a well-educated, healthy, young generation imbued with a rational and progressive outlook of life. On this reasoning, it was held that Aligarh University was not "carrying on business" and the sale of food at the dining halls was not liable to tax. Likewise after the amendment of the definition of "business" question arose in *The Indian Institute of Technology Vs. The State of Uttar Pradesh and Another*, with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel which involved supply and sale of food was an integral part of the objects of the Institute. Nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Similarly, in the case of a research organization, in *Deputy Commissioner (C.T.) Vs. South India Textile Research Association*, which was purchasing cotton and selling the cotton yarn/cotton waste resulting from the research activities, it was held that the Institute was solely and exclusively constituted for the purposes of research and was not carrying on "business" and these sales and purchases abovementioned could not be subjected to sales tax. Likewise, in *State of T.N. v. Cement Research Institute of India*, (1992) 86 TC 124 (Mad) it was held that the Institute was an organisation, the objects of which were to promote research and other scientific work, that the laboratories and workshops were maintained by the organization for conducting experiments, and that though the cement manufactured as a result of research was sold, it could not be considered to be a trading activity within Section 2(d) of the Tamil Nadu General Sales Tax Act, 1959. Again in *Tirumala Tirupati Devasthanam v. State of Madras* the dispute arose with regard to the sales of silverware etc. which are customarily deposited in the hundis by devotees. It was held by the Madras High Court that the Devasthanam's main activities were religious in nature and these sales were not liable to tax. (No doubt, the case related to a period where the profit motive was not excluded by statute.) We are of the view that all these decisions involve the general principle that the main activity must be "business" and these rulings do support the case of the respondent-Port Trust.

(Emphasis supplied)

17. This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive

or no-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was "dealer" or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a "dealer" as its main object is to spread message of Saibaba of Shirdi as already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a "dealer" and whether he carries on "business", are the matters to be decided on facts and in the circumstances of each case.

17. By applying the said decision of the Apex Court to the facts of the present case, we are of the view that the reasoning as given by the Tribunal in the impugned order is unsustainable.

18. Accordingly, this revision stands allowed and the impugned order of the Tribunal stands set aside and the order of the Appellate Assistant Commissioner stands restored. The questions of law are answered in favour of the assessee and against the Revenue. No costs.