(1988) 02 AP CK 0014

In the Andhra Pradesh High Court

Case No : T.R.C. No. 80 of 1984 and 139 of 1985

State of Andhra Pradesh APPELLANT

Vs

Andhra Pradesh Housing Board RESPONDENT

Date of Decision : 17-02-1988

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 2(1)
Andhra Pradesh Housing Board Act, 1956 — Section 21

Citation : (1988) 70 STC 203

Hon'ble Judges : Y.V. Anjaneyulu, J;G. Ramanujulu Naidu, J

Bench : Division Bench

Advocate : A. Venkataramana, Government Pleader for Commercial Taxes, for the Appellant; E. Raja Rao, for the Respondent

Judgement

Y.V. Anjaneyulu, J.—These two tax revision cases are filed by the State and they relate to the assessment years 1973-74 and 1975-76. The A.P. Housing Board is the respondent. It appears the Commercial Tax Officer, VI Circle, Hyderabad, gathered information that the respondent had effected sales of unused application forms, iron scrap, etc. The Commercial Tax Officer was of the view that the sales so effected by the respondent were liable to be taxed under the A.P. General Sales Tax Act ("the Act", for short) and that the respondent could be regarded as a "dealer" for the purpose of section 2(1)(e) of the Act. The Commercial Tax Officer initiated assessment proceedings and assessed the respondent, inter alia, for the assessment years 1973-74 and 1975-76 on the following items :

-- Particulars Assessment year Assessment year 1973-74 1975-76 -- Rs. Rs. 1. Sale of application forms. 56,500-00 1,60,336-00 2. Sale of tender forms. 6,400-00 24,441-00 3. Cost of registration plans. 4,600-00 6,353-00 4. Sales of dismantled material. 67,200-00 4,212-00 5. Sale of empty cement bags.

43,400-00 60,506-00 ----------- ----------- 1,78,100-00 2,55,848-00 ----------- -----------

2. The Commercial Tax Officer, accordingly levied a tax of Rs. 5,495 and Rs. 9,629 respectively for the assessment years 1973-74 and 1975-76. We may at this stage indicate that the assessment orders are brief and do not contain any reasons for regarding the respondent as a "dealer" under the Act and taxing the aforesaid sales in the hands of the respondent. All that is stated in the assessment order is :

"According to the annual account it is found that Andhra Pradesh Housing Board has effected sale of scrap, etc., besides sales of house construction by the Board. The sales of scrap, etc., is liable to tax as per the Supreme Court judgment in the case of District Controller of Stores, Northern Railway, Jodhpur v. Assistant Commercial Taxation Officer [1976] 37 STC 423."

3. Aggrieved by the aforesaid orders the respondent filed appeals before the Assistant Commissioner (CT) (Appeals), Hyderabad-1 Division. The first appellate authority found that the respondent sold "old, unused forms and papers and they were disposed of in order to create more office accommodation". The first appellate authority then referred to the decision of the Supreme Court in District Controller of Stores, Northern Railway v. Assistant Commercial Taxation Officer, Jodhpur [1976] 37 STC 423 and held that the Supreme Court decision supported the assessments made on the respondent. He accordingly held that the assessments were rightly made and dismissed the appeals. The respondent filed second appeals before the Sales Tax Appellate Tribunal. The Tribunal observed that the turnovers disputed in the appeals related to the sales effected by the respondent of "old, unused forms and papers and unserviceable material". After examining exhaustively the facts and the law bearing on the point, the Tribunal came to the conclusion that the respondent cannot be regarded as a "dealer" under the Act, and the respondent does not also carry on business in old, unused forms, papers and other unserviceable material. In that view, the Tribunal allowed the appeals and quashed the assessments made by the Commercial Tax Officer. The State is, therefore, in revision against the order of the Tribunal.

4. The learned Government Pleader contended that the assessments made on the respondent were proper. Inviting our attention to the expressions, "business" and "dealer", occurring in section 2(1)(bbb) and section 2(1)(e) respectively in the Act, learned Government Pleader submitted that the respondent fulfilled the requirements for being regarded as a "dealer" under the Act. It is also urged that in terms of the definition of the expression, "business", the respondent must be held to be carrying on business. Learned Government Pleader heavily relied on the decision of the Supreme Court in District Controller of Stores v. Assistant Commercial Taxation Officer [1976] 37 STC 423 and the decision of the Rajasthan High Court in Commercial Taxes Officer, Survey & Investigation, Jodhpur v. Divisional Superintendent, Northern Railway, Jodhpur [1980] 45 STC 18. Learned Government Pleader also invited our attention to the Madras High

Court judgment in State of Tamil Nadu v. The Hindu [1978] 41 STC 105 in support of the proposition that the respondent must be held to be carrying on business when the respondent sold old, unused and unserviceable materials. Learned Government Pleader also relied on the decision of the Madras High Court in Commissioner of Commercial Taxes v. Evangelical Literature Service, Madras [1974] 33 STC 325. Our attention has also been invited to the unreported judgment of a Division Bench of this Court in T.R.C. Nos. 76 and 77 of 1975 dated 25th March, 1976 and to yet another unreported decision of a Division Bench of this Court disposing of W.P. Nos. 5189, 5190 and 5191 of 1977 and batch dated 9th December, 1980.

5. Learned Government Pleader sought to urge that what was sold by the respondent was not "old and unserviceable forms". According to the learned Government Pleader the respondent sold application forms for allotment of houses, tender forms, registration plans, etc., and realised money on the sales of those forms and these sales were subjected to tax. Learned Government Pleader also pointed out that the sale of dismantled materials pertain to the housing construction. We may straightaway point out that the above submissions of the learned Government Pleader are not borne out by the record and were put in that form for the first time before this Court. In the first place the assessment order does not describe the nature of the sales. The assessment orders passed were scrappy and do not contain relevant details. It was the first appellate authority who went into the matter at considerable length and secured all the particulars and dealt with the same. The first appellate authority has clearly mentioned in his order that what was sold by the respondent was "old, unused forms and papers and they were disposed of in order to create more office accommodation". The Tribunal mentions in its order that the items sold by the respondent were "old, unused forms and papers and unserviceable materials". In the teeth of these findings, it is not open to the learned Government Pleader to make out altogether a new case before this Court by stating that the sales subjected to tax were not the sales of old, unused forms and papers and unserviceable material, but sales of application forms, tenders and registration plans. The exigibility to tax of these sales will have to be determined on the basis of the facts found by the first appellate authority and also the Appellate Tribunal.

6. Sri E. Raja Rao, learned counsel representing the Housing Board, on the other hand contends that the Housing Board cannot be regarded as a dealer within the meaning of section 2(1)(e) of the Act. Learned counsel submits that the disposal of unserviceable articles is an integral part of the activities of the respondent-Board and cannot be regarded as independent activities within the purview of the Act. Learned counsel relied on two Bench decisions of this Court reported in Board of Trustees of the Visakhapatnam Port Trust v. Commercial Tax Officer [1979] 43 STC 36 and Base Repair Organisation v. State of A.P. [1983] 53 STC 223. It is submitted that on the authority of these two judgments the Board cannot be subjected to tax in respect of the disposal of unserviceable materials, etc.

7. We have considered the submissions of the counsel for both sides. We may at the outset indicate that the A.P. Housing Board is a corporation statutorily established by the State Government. It is wholly controlled by the State Government. According to section 21 of the A.P. Housing Board Act. Subject to the control of the Government, the Board undertakes works for the framing and execution of housing schemes considered necessary from time to time or may be entrusted to it by the Government. There is no provision in the Act which would warrant a finding that the Housing Board is engaged in trade or commerce as is generally understood. Inasmuch as the Government, in the course of its activities, finds it necessary to promote a number of housing schemes, as a welfare measure or otherwise, the Housing Board is established to act as a convenient medium through which the works are executed.

8. In order to render the Board of Trustees liable, it must be a "dealer" carrying on business of buying, selling, supplying or distributing goods. It should also be possible to say that the Board is carrying on business satisfying the requirements of section 2(1)(bbb) of the Act. Unless it is possible to say that the Housing Board is a "dealer" within the meaning of the Act, and is carrying on business, no tax can be levied on the Housing Board. We may notice the definition of "dealer" in section 2(1)(e) of the Act :

"''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) the Central Government, a State Government, local authority, a company, a Hindu undivided family or any society (including a co-operative society), club, firm or association, which carries on such business;

(ii) a society (including a co-operative society), club, firm or association which buys goods from, or sells, supplies or distribute goods to its members;

(iii) a casual trader, as hereinbefore defined;

(iv) a commission agent, a broker, a del credere agent, 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 or principals."

We may also notice the definition of "business" according to section 2(1)(bbb) of the Act :

"''business'' includes :-

(i) any trade, 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 or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and

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

9. In the present case it is said that the respondent-Housing Board is carrying on business in the sale of old, unused forms and papers and unserviceable material. It is explained that the sale of application forms, tender forms, and registration plans, which are subjected to levy of tax under the Act, were old, obsolete and unused materials and in order to reduce the pressure on the space occupied by these obsolete forms, they were sold out. Although the assessment orders do not contain the details of dismantled material, it is said that they are unserviceable materials piled up in the course of construction and inasmuch as they were useless they were sold out. Finally, the empty cement bags were also sold. These are the items identified by the assessing authority for the purpose of laying claim to payment of tax on sales.

10. The definition of the expression "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, etc., is carried on or undertaken with a profit-motive.

11. The Government Pleader invited our attention to the decision of the Supreme Court in District Controller of Stores v. Assistant Commercial Taxation Officer [1976] 37 STC 423. Reliance is placed by the Government Pleader on the following observations of Mathew, J. :

"We think that the activity of the appellant in the selling of unserviceable material and scrap-iron, etc., would be ''business'' within clause (i) of the definition of the word ''business'' introduced by the amending Act. The word ''business'' according to clause (i) of that definition would include any trade, commerce, or manufacture whether or any adventure or concern in the nature of trade, commerce or manufacture whether or not it is carried on with a motive to make gain or profit. So even if it be assumed that the activity involved in selling unserviceable material and scrap-iron, etc., would not amount to carrying on business in the normal connotation of that terms, it would be ''business'' within clause (i) of that sub-clause as introduced by the amending Act."

12. An identical question arose in Board of Trustees of the Visakhapatnam Port Trust Vs. Commercial Tax Officer and Another, wherein the aforesaid decision of the Supreme Court had been relied upon and the above passage occurring in the Supreme Court judgment was specially pressed for consideration. The case before the Supreme Court arose under the Rajasthan Sales Tax Act and this Court noticed that the definitions of the expressions "dealer" and "business" were pari materia. Even so, this Court felt that in the case of railway engaged in the trade of transportation the Supreme Court must have felt that there was an element of trade and commerce especially in view of the decision in United States of America v. Dan Hill 63 L Ed 337. Reference was also made to the

decision in Monodu v. New York, New Haven & Hartford Railroad Co. 56 L Ed 327 and this Court observed that it was not unlikely that Mathew, J., when he spoke for the Supreme Court in the Railway case [1976] 37 STC 423, had this interpretation of the word "commerce" in view while observing that the railway, since it is concerned in the activity of transportation, is engaged in commerce. We are in respectful agreement with the above observations of Divan, C.J., speaking for the Division Bench of this Court. We find that in two earlier decisions of the Supreme Court, the question relating to the sale of scrap material had been dealt with and neither of those decisions had been referred to by the Supreme Court in the District Controller of Stores v. Assistant Commercial Taxation Officer [1976] 37 STC 423; nor were earlier cases distinguished or set aside, by the decision of the Supreme Court. We may refer to the decision in State of Gujarat v. Raipur Manufacturing Co. Ltd. [1967] 19 STC 1 wherein it was held by the Supreme Court that where a company carrying on the business of manufacturing and selling cotton, textiles, disposes of discarded items such as stores, machinery, iron scrap, etc., it cannot be said to carry on the business of selling those items of goods. This decision of the Supreme Court was followed and accepted by the subsequent decision of the Supreme Court in State of Tamil Nadu v. Burmah Shell Co. Ltd. [1973] 31 STC 426. In the subsequent decision of the Supreme Court in the Burmah Shell case [1973] 31 STC 426, at page 432 of the Report, Jaganmohan Reddy, J., speaking for the Supreme Court, observed :

"In that case, as already pointed out, what was held under the analogous Bombay Sales Tax Act, which was similar to that under the Madras Sales Tax Act, prior to its amendment in 1964, the sale of scrap does not necessarily lead to an inference that 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. This court had observed, it cannot be presumed that when the goods were acquired, there was an intention to carry on business in those discarded materials nor are the discarded goods, by-products or subsidiary products or are produced in the course of manufacturing process; that they are either fixed assets of the company or are goods which are incidental to the acquisition or use of stores or commodities consumed in the factory and that when these go into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, the disposal of those goods on the account cannot be said to be part of or incidental to the main business of selling textiles. As the scrap in that case was not held to be incidental to the acquisition or use of stores or commodities consumed in the factory, the turnover was not included but in the case of caustic liquor which is regularly and continuously accumulated in the tanks in the process of mercerisation of cloth, this court held that that being a waste material it has still a market amongst other manufacturers or launderers as by-products or subsidiary products in the course of manufacture, and the sale thereof is incidental to the business of the company."

13. In view of the two decisions of the Supreme Court above referred, it is

obvious that it must be first found that an assessee is carrying on business. If the assessee is selling scrap materials, the items must have been acquired with the intention of carrying on business. Applying these principles it is impossible for us to say that the respondent-Housing Board in this case acquired the unserviceable dismantled materials and empty cement bags with a view to carry on business. It is also impossible for us to hold that the respondent-Housing Board is a dealer within the meaning of section 2(1)(e) of the Andhra Pradesh General Sales Tax Act.

14. As far as unused application forms, tender forms, etc., which were sold, it is much less possible to hold that the respondent-Board has been carrying on business as a dealer in those items. We may point out that the Division Bench of this Court after carefully considering all the relevant material and the principles bearing upon the same held that the sale of surplus material or sale of scrap could not be regarded as business carried on by the Board of Trustees of the Visakhapatnam Port Trust. In the Board of Trustees of the Visakhapatnam Port Trust Vs. Commercial Tax Officer and Another, the question also fell for consideration whether the sale of documents when tenders are invited is incidental to the business of the Port Trust. This Court held that the charging of fees for the supply of tender forms and tender specifications cannot amount to carrying on business in that commodity even with the widest meaning of the terms "business". In our opinion, the decision of this Court in the Port Trust case [1979] 43 STC 36 squarely applies to the facts of the present case.

15. We may also refer to yet another Division Bench decision of this Court in Base Repair Organisation v. State of A.P. [1983] 53 STC 223. The question that arose for consideration in this case was whether the Naval Dock Yard could be regarded as a dealer carrying on business in the running of a canteen. The contention urged was that the canteen was run as an integral and inseparable part of the activity carried on by the assessee and it is not possible to isolate it from the main activity and treat it as business for the purpose of the Act. The contention was accepted by the Division Bench. Reference was made in this case also to the decision of the Supreme Court in the District Controller of Stores v. Assistant Commercial Taxation Officer [1976] 37 STC 423. The Bench, however, referred to the earlier judgment in the Board of Trustees of the Visakhapatnam Port Trust Vs. Commercial Tax Officer and Another, and held that the main thrust of the judgment is that having regard to the statutory objects for achieving which the Visakhapatnam Port Trust was established, it cannot be said to be a dealer. We have referred to the objects for which the respondent-Housing Board was established. Having regard to these objects, we are unable to say that the Board can be regarded as a dealer carrying on business within the purview of the Andhra Pradesh General Sales Tax Act.

16. In our opinion, the aforesaid two Bench decisions of this Court in the Port Trust case [1979] 43 STC 36 and Base Repair Organisation case [1983] 53 STC 223 properly explain the ratio of the decision of the Supreme Court in District

Controller of Stores v. Assistant Commercial Taxation Officer [1976] 37 STC 423. On the principles enunciated by this Court in two Bench decisions above referred, we must accept the contention of the Housing Board that it is not a dealer carrying on business within the meaning of section 2(1)(e) and section 2(1)(bbb) of the Act. We have referred to the other decisions relied on by the learned Government Pleader. We do not think it necessary to deal with the same as the decisions in those cases turned out on the particular facts of those cases. For instance, in the case of The State of Tamil Nadu Vs. The Hindu, , surely the sale of unsold newspapers fell within the terms of the business carried on by The Hindu and the sales of such unsold newspapers were rightly subjected to tax. That case does not bear any comparison to the facts of the present case. The two unreported judgments of this Court relied upon by the learned Government Pleader turn out on different facts and we do not think that these cases would govern the decision in the facts and circumstances of the present case.

17. Having regard to the above, we uphold the orders of the Sales Tax Appellate Tribunal and dismiss the tax revision cases. There shall be no order as to costs. Government Pleader''s fee Rs. 250 in each.

18. Petitions dismissed.

