

(1960) 09 MP CK 0029
In the Madhya Pradesh High Court
Case No : M.C.C. No. 174 of 1960

State of M.P.

APPELLANT

Vs

Bengal Nagpur Cotton Mills Ltd.

RESPONDENT

Date of Decision : 10-09-1960

Acts Referred:

Central Provinces and Berar Sales Tax Act, 1947 — Section 23(1), 4

Citation : (1961) J LJ 12 : (1961) 6 MPLJ 129 : (1960) 12 STC 333

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : R.J. Bhawe, Additional Government Advocate, for the Appellant; A.R. Choube, for the Respondent

Judgement

P.V. Dixit, C.J.

This is a reference u/s 23 (1) of the Central Provinces and Berar Sales Tax Act, 1947, by the Board of Revenue, and the questions presented for decision are :-

(1) Whether the assessee-company who purchased during the course of two assessment periods building materials (iron and cement) on several occasions and sold the said materials from time to time to contractors, who were constructing buildings for the assessee-dealer, is a dealer within the meaning of Section 4 of the C.P. and Berar Sales Tax Act ?

(2) Whether the assessee is liable to pay sales tax on such sales ?

(3) Whether the Board of Revenue could take oral submissions on question of fact into consideration when there was a clear finding of the Sales Tax Commissioner regarding frequency of sales and profits made by the assessee on the sales in question?

The questions arise in the following circumstances. The Bengal Nagpur Cotton Mills Ltd., Rajnandgaon, gave a contract for the construction of some buildings to J. K. Mitra & Co. The mills obtained steel and cement required for the

constructional work and handed over the material to their contractors. The price of the material was debited to the contractors' account. The supply of the material by the mills to the contractors was from time to time till the completion of the buildings. During the assessment periods from 1st April, 1949, to 31st December, 1949, and from 1st January, 1950, to 31st December, 1950, the total price of the material supplied was Rs. 66,396-7-3. The Sales Tax Authority regarded the supply of material to the contractors as sale transactions taxable under the Act and accordingly assessed the mills to sales tax on these transactions. The assessee unsuccessfully appealed to the Sales Tax Commissioner. Thereupon a revision petition was preferred before the Board of Revenue by the assessee which was allowed and it was held that the assessee was not liable to pay any sales tax on the price of the material supplied to the contractors. The present reference is at the instance of the Sales Tax Commissioner,

The material provisions of the Act which require consideration are the definitions of "dealer" and "sale". Section 2(c) of the Act defines "dealer", thus-

"dealer" means any person who, whether as principal or agent, carries on in Madhya Pradesh the business of selling or supplying goods, whether for commission, remuneration or otherwise and includes a firm, a partnership, a Hindu undivided family and the Central or a State Government or any of their departments and includes also a society, club

or association selling or supplying goods to its members ;

* * * *

"Sale" is defined by Section 2(g) as under-

"sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge; and the word "purchase" shall be construed accordingly.

* * * *

Under Section 5 of the Act sales tax is payable by a dealer on his taxable turnover of the goods specified in the schedule as liable to tax. The Sales Tax Act does not impose sales tax on all goods but only on those goods specified in Schedules I and II. It does not again impose the tax on the mere sale or purchase of the goods specified in the schedules. What is taxable under the Act is the sale of these goods which are effected by a dealer. The definition of "dealer" shows clearly that every seller of a commodity is not a dealer. In order to constitute a person a dealer he must be engaged, whether as principal or agent, in the business of selling or supplying goods. The definition of "dealer" read with the definition of "sale" makes it clear that the transfer of property in the goods by one person to another should be in the course of the business of

selling or supplying the goods. It follows from this that the sale of a commodity specified in the schedules is not subject to tax under the Act unless the sale is by a person carrying on the business of selling or supplying that commodity. For the imposition of tax under the Act on the sale transaction of a commodity, it is not sufficient that the sale is by a dealer carrying on the business of selling or supplying some commodity. The business of the dealer must be of selling or supplying the particular commodity sought to be taxed. Otherwise he cannot be regarded as a dealer in relation to that commodity, and if he is not so regarded, he is not liable to be taxed under the Act for any sale of the commodity effected by him.

Here, the business of the assessee is not of selling or supplying steel and cement in a commercial sense. Admittedly the assessee carries on the business of manufacture of textiles. The supply of steel and cement by the mills to their contractors was in no sense a "sale" by the mills as a "dealer". The price of the material, if debited to the account of the contractors, would at the most show that the transaction of the supply of material was a transaction of sale. But that cannot lead to the conclusion that the sale was by the mills as a dealer carrying on the business of selling or supplying steel and cement. The object of the supply of the material by the mills to the contractors was the use of the material in the construction of their own buildings which the contractors had undertaken. The object was not the sale of the material simpliciter. If the mills had not supplied the material, the contractors would have purchased it and included its price in their bill for the construction of the buildings and submitted it to the mills for purposes of payment. Instead of this the mills chose to supply the material themselves and the contractors were debited with the cost of the material supplied to them. This form of accounting did not make the supply of the material to the contractors a sale by a dealer or the mills a dealer carrying on the business of selling or supplying steel and cement.

Learned Additional Government Advocate, however laid stress on the fact that the supply of the material by the mills to the contractors was continuous and repeated and that, therefore, it was a business activity. We do not agree. Merely because an activity is continuous or repeated it does not follow that it is a business activity as understood in a commercial sense. The expression "carries on the business of selling or supplying goods" in the definition of "dealer" must be construed in its commercial sense. So construed, it means the carrying on of continuous trading operations with a view to earn profit. A person engaged in continuous trading operations may not actually obtain profit. He may incur a loss. But if he engages himself in those operations with the object of earning profit, then he is carrying on a business. The test is, therefore, the object with which the activity is carried on, and not whether he actually gets profit or loss, which is material. In the present case, there is nothing to show that when the mills secured steel and cement it was with the object of selling them to anyone at profit. The material was obtained by the mills for their own use. Before the Board of Revenue, the department relied on the circumstance that the

assessee's accounts revealed that in some cases the amount debited to the contractors for the material supplied to them was slightly in excess of the price actually paid by the mills and thus the mills earned a profit in the supply of the material to the contractors. The assessee explained this by saying that this was due to the inclusion of the cost of transport. This circumstance does not in any way indicate that the mills carried on the business of selling and supplying steel and cement with a view to earn profit. As already stated, the test for determining whether the mills carried on the business of selling or supplying steel and cement is not whether they actually earned any profit in the supply of material to their contractors, but it is whether they carried on the operations with a view to earn profit. On the facts of this case, it is clear that the mills never carried on the business of selling or supplying steel and cement.

The view we have taken is supported by several decisions. In *Commissioner of Sales Tax v. Mohanlal Ramkisan Nathani* [1955] 6 S.T.C. 136 it has been held that a person can be regarded as a dealer within the meaning of Section 2(c) of the Act only in relation to the goods which it is his business to sell or supply; and so, where a person, though a dealer in respect of certain commodities, effects a sale of a commodity which it is not his business to sell, he is not liable to be taxed under the Act. The same view was taken in *Girdharilal v. Assistant Commissioner of Sales Tax* 1957 N.L.J. 307. In *State of Bombay v. Ahmedabad Education Society* AIR 1946 Bom. 673 the Bombay High Court construed the definition of "dealer" in Section 2(c) of the Bombay Sales Tax Act and of "sale" given in that Act. So far as this reference is concerned, there is no material difference in the definitions given in the Bombay Act and in the C.P. and Berar Sales Tax Act. In that case, Chagla, C.J., said-

It is clear from the definition of a dealer that it is not merely the act of selling as defined in the Act which constitutes a person a dealer. The activity which the person must indulge in is not merely the activity of selling in the sense of transferring property in goods, but it must be the activity of carrying on the business of selling or supplying goods. What the Legislature has emphasised is not the act or the activity of selling but the act or activity of carrying on the business.

It must be noted that the Bombay case was on facts somewhat similar to the one before us. In that case the Ahmedabad Education Society, which had as its object the spread of education in all its branches, gave a contract for the construction of some buildings to a contractor. The society set up a brick factory of their own for the purpose of preparing bricks required for the construction of the buildings and imported steel. The cost of the bricks and steel supplied was debited to the contractor. The society also disposed of at cost price the surplus material which they no longer required after completion of their own buildings. On these facts, the learned Chief Justice held that the society did not carry on the business of selling or supplying bricks and steel. The learned Chief Justice no doubt left open the question whether the profit-making motive was an essential ingredient in

order that an activity should constitute a business. But he emphasised the fact that there was absence of any intention on the part of the society to sell the goods at the time when the bricks were manufactured or steel was imported ; and that the question with regard to the profit-motive would only fall to be determined in a case where the assessee either buys or manufactures goods with intention of selling them and sells them without making any profit.

For these reasons, our answer to the first two questions is in the negative. The third question, which is not very intelligible, does not call for any answer when there is no finding that the assessee bought the steel and cement with the intention of trading in them with a view to earn profit.

There will be no order as to costs of this reference.