
(1975) 09 OHC CK 0019

In the Orissa High Court

Case No : Special Jurisdiction Case No"s. 103 to 106 of 1973

State of Orissa

APPELLANT

Vs

Joharimal Gajananda

RESPONDENT

Date of Decision : 17-09-1975

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 4

Citation : (1976) 37 STC 157

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : B.D. Agarwalla, for the Respondent

Judgement

R.N. Misra, J.—These are four references made by the Member, Sales Tax Tribunal, Orissa, u/s 24(1) of the Orissa Sales Tax Act at the instance of the Commissioner of Sales Tax. The following question has been referred for opinion of the court:

Whether, on the facts and in the circumstances of the case, the Member, Sales Tax Tribunal, is correct in holding that even sales in the course of inter-State trade and commerce can be sales inside the State if the goods are inside the State of Orissa, and whether his interpretation of the definition of "sale" as given in Section 2(g) of the Orissa Sales Tax Act, 1947, and the explanation attached to the definition of "sale" is correct?

2. The assessee is a registered dealer under the Orissa Sales Tax Act (hereinafter referred to as the "Act"). For the quarters ending 30th June, 1961 to 31st March, 1962, assessments were completed u/s 12(8) of the Act and additional tax together with penalty under that sub-section were demanded from the assessee. The assessing officer was of the view that certain purchases of cereals made free of tax on the strength of the certificate of registration for resale in Orissa were converted into dal and, therefore, the declarations were violated and the assessee became liable under the proviso to Section 5(2)(A)(a)(ii) of the Act.

The purchase price of those goods so utilised was added to the taxable turnover of the assessee. The assessee had also purchased certain other goods on the basis of declarations furnished by him for resale in Orissa, but subsequently those were sold in the course of inter-State trade. The purchase price of those articles was also added on the same basis to its taxable turnover.

3. The first appeals were dismissed. The Tribunal relying on a decision of this Court in the case of *Ram Chandra Badrinarayan v. State of Orissa* [1974] 33 S.T.C. 83. (S. J. C. No. 326 of 1969 disposed of on 22nd August, 1972), held that there was no contravention when cereals purchased on the basis of declarations were converted into dal. The demand on that score was thus vacated. In regard to the other contention, the Tribunal held:

...In this regard it is contended that the appellant made purchase from the registered dealers as well as unregistered dealers and the charge of contravention cannot succeed unless it is proved that goods purchased from registered dealers only were outside. It is further contended that as there is no proof that sale had taken place outside Orissa, there can be no contravention. The contention as above has enough force. It is for the department to prove the charge of contravention and, therefore, it must be shown that only those goods purchased from registered dealers free of tax had been sold in the course of inter-State trade. The orders of the forums below do not contain any specific finding. The Additional State Representative was asked to scrutinise the accounts and it is reported that in the case of kulthi, black gram and ragi there were purchases both from registered and unregistered dealers and in case of biri dal only there was no purchase from unregistered dealers. In the circumstances, in the case of goods where there were purchases from registered and unregistered dealers, in the absence of any evidence or finding that goods purchased from registered dealers only were sold in the course of inter-State trade, the charge of contravention cannot stand. The charge of contravention can be available in the case of biri dal which only had been purchased from registered dealers and sold in the course of inter-State trade...

Dealing with the contention in regard to biri dal, the Tribunal further stated:

The allegation is that sales were made in the course of inter-State trade. There is no finding as to the situs of sale. The definition of the term "sale" in the O.S.T. Act contains a proviso explaining when sales would be inside the State of Orissa. It provides that if the goods are inside the State when the contract takes place, the sales would be inside the State. Thus even in sales in the course of inter-State trade, if the goods are inside the State when the contract of sale takes place, such sales would be inside the State of Orissa, and there can be no contravention of the proviso to Section 5(2)(A)(a)(ii) merely because sales are in the course of inter-State trade. In the instant case, there is no evidence when exactly the sales took place or if the goods were outside the State when the contract of sales was made. In regard to the contention of the appellant in this respect, the learned Assistant Commissioner has observed that the appellant

failed to produce any evidence. The onus in this regard is not on the appellant but on the department which makes the charge. Hence the contravention can be established only if the department had placed evidence that all those sales took place outside the State, that is to say, that the goods were not within the State of Orissa when the sales took place. There being no evidence, the charge of contravention in this respect also fails.

4. The learned standing counsel concedes that the dispute based upon conversion of cereals into dal has become final. Similarly he concedes that in regard to other items excepting biri dal, it is difficult, in the absence of clear evidence, to say that there is any contravention. In these circumstances, the only aspect surviving for examination is whether there has been any contravention of the declarations furnished by the assessee in regard to biri dal purchased from registered dealers on the basis of declarations.

Section 5(2)(A) making provision for determination of taxable turnover as far as relevant reads thus:

In this Act the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom--

(a) his turnover during that period on--

(i) the sale of any goods notified from time to time as tax-free u/s 6 and of the packing materials, if any, in respect of such goods;

(ii) sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa and on sales to a registered dealer of containers and other materials for the packing of such goods:

Provided that when such goods are used by the registered dealer for purposes other than those specified in his certificate of registration, the price of goods so utilised shall be included in his taxable turnover.

Form No. XXXIV at the relevant time was to the following effect:

Certified that the following goods ordered in our purchase order No...dated...purchased from you as per cash memo, bill No... dated... for an amount of Rs... are meant for the purpose of resale in Orissa.

I/We certify that the goods are covered by my/our Registration Certificate No... dated...

Details of goods purchased.

Signature and status of the person signing the declaration.

"Sale" is defined in Section 2(g) of the Act to mean:

...with all its grammatical variations and cognate expressions, any transfer of

property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge and the words "buy" and "purchase" shall be construed accordingly;

Explanation.--(a) A sale or purchase of goods shall be deemed to take place inside the State if the goods are within the State--

(i) in the case of specific or ascertained goods at the time the contract of sale is made; and

(ii) ...

(b) ...

In this case there is no, dispute that specific or ascertained goods were the subject-matter of sale because these goods were purchased from registered dealers. There is no material on the record to show that the goods were not within the State of Orissa when the contract of sale was made. In the facts before us normally it should be presumed that the goods were actually within the State unless the taxing department established the contrary. Therefore, in view of the definition of "sale", it must be deemed that the sale took place within the State in regard to the goods.

In the original Act of 1947, the definition of "sale" was in different terms. For convenience, it may be extracted:

"Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in Section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa.

Explanation (a)(i) appearing in the present definition of "sale" in its essence keeps up the second proviso in the previous definition. In the case of Collector of Commercial Taxes, Cuttack Vs. Bharat Sabai Grass Ltd., the scope of the second proviso in the original definition came up for consideration. Dealing with the matter, the Supreme Court pointed out:

...What the second proviso did was to fix the situs of the sale in Orissa when the goods were actually in Orissa at the time the contract of sale was made...

It can, therefore, be safely concluded that the purpose of the explanation is to fix the situs of sale where the other conditions are satisfied.

In Section 4 of the Central Sales Tax Act (hereinafter referred to as the "Central Act"), provision has been made to find out when a sale of goods is said to take place outside a State. That provision is to the following effect:

(1) Subject to the provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with Sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State--

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) ...

Explanation...

Undoubtedly, the explanation appearing in the definition of "sale" in the Act has adopted the provision in Section 4 of the Central Act referred to above by appropriate amendments under Orissa Act 28 of 1958 after the Central Act came into force. What would have otherwise been an intra-State sale, under certain circumstances indicated in the Central Act, becomes a sale in the course of inter-State trade.

Reliance has been placed on a Bench decision of the Madras High Court in the case of Madura South India Corporation P. Ltd. v. Joint Commercial Tax Officer [1968] 21 S.T.C. 163. Considering the facts of the case, Veeraswami, J., as the learned Judge then was, observed:

...Possibly it may even be argued in that case that once a sale is held to be an inside sale u/s 4 but it is also an inter-State sale u/s 3, there cannot be a subsequent sale inside the State which can be regarded as a first sale for the purpose of the local Act.

It is true that what was being examined by the Madras High Court in that case was slightly different from what has arisen in this case, but the principle appears to have full application. The court observed:

The course of transaction as described in the affidavit and which has not been traversed in the counter-statement is that Madurai Mills pursuant to the orders placed by the petitioner put the goods on rail destined to the States of Andhra Pradesh and Kerala and the price was paid in the State of Madras. Quite apart from Section 4 of the Central Act, that will be an inside sale and also the first sale in the State. Even under the provisions of Section 4, inasmuch as the goods were in this State when the contract of inter-State sale was entered into, it will

be on that test too an inside sale, and in any case, it will be such a sale on the appropriation test.

This decision has been upheld by the Supreme Court in the case of *The State of Tamil Nadu Vs. Madurai South India Corporation (P) Ltd.*, . The court observed:

...It appears to us that when the cotton yarn was sold to the respondent in Madras as the goods were in the State of Madras when the contract of inter-State sale was entered into, it will be a first sale in the State. Once that sale has taken place and the goods were delivered in the States of Andhra Pradesh and Kerala, pursuant to that inter-State sale, there was no further sale to the respondent when it transferred to its branches those goods which have already been subject to tax in Madras nor can such sales if they were sold in Madras be subject to tax.

As we have already pointed out, what was being examined by the Madras High Court and the Supreme Court in this case was somewhat different but the principle indicated in that case lends support to the assessee's contention before us. The fact that a declared goods subject to a single point taxation under the provisions of the Central Act was in issue has no material bearing for the applicability of the principle.

Under the scheme of the Act, sales tax is leviable at a single point and a registered dealer at the point of sale is entitled to pass on the incidence of sales tax to the buyer. Where the buyer is a registered dealer, upon furnishing a declaration in terms of Section 5(2)(A)(a)(ii) of the Act he is entitled to exemption from payment of sales tax and the payment of tax is shifted and deferred to a point where the sale takes place in favour of a consumer, an unregistered dealer or is a transaction in respect of which no declaration has been furnished even when the purchasing dealer is a registered dealer. Section 5(2)(A)(a)(ii) authorises a dealer to exclude from the "gross turnover" the sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa. The proviso occurring in Section 5(2)(A)(a)(ii) requires the sale price of goods used by the purchasing dealer for the purposes other than those mentioned in his certificate of registration to be included in his taxable turnover. The assessee before us had purchased bin from registered dealers and had furnished declarations. It is not disputed that it was entitled to make such purchases free of tax on furnishing declarations. Its declarations contemplated that it would resell the goods so purchased in Orissa. As we have already found, the goods purchased by the assessee were as a fact resold in Orissa, but these sales, by application of the provisions of the Central Act, became the first sales under the Central Act. It is true that the scheme under the Act collecting Orissa sales tax at the deferred point has not worked out, but in the facts of the case, it cannot be said that the assessee used the goods purchased by it for a purpose other than that specified in its certificate of registration which alone would attract the application of the proviso under which the additional demand has been raised. If the assessee as a fact resold the goods in Orissa, but on account of some supervening law that

transaction is made taxable under some other Act and tax under the Orissa Sales Tax Act was not imposable, it would not amount to any violation of the declarations by the assessee. We agree with the contention raised on behalf of the assessee that the proviso cannot be applied to a case of this type. In our opinion, the Tribunal came to the correct conclusion in the matter. The ratio indicated by the Supreme Court in the case of *The Installment Supply Ltd. Vs. S.T.O., Ahmedabad-I and Others*, . supports this view.

5. Our answer to the question referred, therefore, is:

On the facts and in the circumstances of the case, the Member, Sales Tax Tribunal, was correct in holding that even sales in the course of inter-State trade and commerce can be sales inside the State if the goods are inside the State of Orissa and, for coming to that conclusion, the Tribunal rightly relied upon the definition of "sale" including the explanation in the definition in Section 2(g) of the Orissa Sales Tax Act.

The assessee shall be entitled to costs of these references. Hearing fee is assessed at rupees one hundred.

N.K. Das, J.

I agree.