

(1977) 09 MAD CK 0016

In the Madras High Court

Case No : T.C. No's. 475 to 482 of 1975, Rev. No's. 82 to 89 of 1975

STATE OF TAMIL NADU

APPELLANT

Vs

CHILLIES EXPORT HOUSE LTD. and Others

RESPONDENT

Date of Decision : 27-09-1977

Acts Referred:

Central Sales Tax Act, 1956 — Section 5(1)

Citation : (1978) 7 CTR 177

Hon'ble Judges : P. Govindan Nair, C.J

Bench : Division Bench

Judgement

P. Govindan Nair, C.J. - The question arising in the Tax Revision Cases under S. 38 of the General Sales Tax Act, directed against the order of the Sales Tax Appellate Tribunal turns on the construction of S. 5(1) of the Central Sales Tax Act, 1956. We shall immediately read S. 5(1) which is as follow :

"(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India".

Before S. 5(1) came into existence, Art. 286(1) has been the subject matter of interpretation by many a constitution Bench of the Supreme Court and it had been succinctly stated-established by almost ancient decisions, the Travancore-Cochin first and second cases, namely. State of Travancore-Cochin vs. Bombay Co. Ltd., and State of Travancore-Cochin vs. Shanmugha Vilas Cashewnut Factory, that there could be a sale in the course of export even when there are more than one sale involved which occasions the export of the goods. All that was required was that the sales must be so linked or so inextricably connected with each other to form a single transaction which causes the export and which causes the movement of the goods to make the sale in the course of export. Reference has been made to the property passing in the goods by transfer of documents of title to determine whether the sale was in the course of export or

not. All this has become ancient history now for we are now governed by the Section which we have extracted notwithstanding the observations in the number of decision of the Supreme Court, most of which had been notice recently by the Supreme Court in the decision in *Mod. Serajuddin vs. State of Orissa*, wherein the assessee had sold material ore to State trading Corporation and the State Trading Corporation and exported the goods to the foreign buyer. Before the sale by the assessee to the State Trading Corporation the assessee had negotiated the terms of the contract for sale to the foreign buyer himself and they were settled as the terms of contract of sale to the foreign buyer. The terms of so settled were the same as those accepted by the State Trading Corporation when it entered into the contract with the foreign buyer. All that the State Trading Corporation was entitled to was 1 per cent commission . Notwithstanding these features, the contention that was advanced before the Court that the sale was in the course of export was negated by the Supreme Court. We are in agreement with the argument on behalf of the assesseees-respondents that the Supreme Court has purposed to deal with only the first limb of sub-S. (1) of S. 5 in that case because it appears that only the question arising on that limb was argued before the Supreme Court. Nevertheless. There are the following observations at page 149 of the said decision :

"..... The crucial words in the section are that a sale or purchase of goods shall be deemed to take place in the course of export of the goods only in the sale or purchase occasions such export. The various decisions to which reference has been made illustrate the ascertainment of the pre-eminent question as to which is the sale or purchase which occasions the export. *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, as well as the case of *Binani Bros 1947 1 SCC. 459* clearly indicates that the distinction between the sales for export and sales in the course of export is never to be lost sight of. The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale within the ruling of the *Coffee Board* case and *Binani Bros.* case are these. The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There was no privity of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the Foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods. All relevant documents were in the name of the Corporations whose contract of sale was the occasion of the export. The expression "occasions" in S. 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by

the contract of sale between the Corporation and the appellant".

It is clear from the above passage that the Supreme Court has considered that the sale by the assessee to the State Trading Corporation was a distinct and separate sale which had no link or connection with the export effected by the State Trading Corporation. The facts of this case as stated in paragraphs 2 and 3 of the order of the Tribunal are as follows :-

".... The Appellant Tvl. Chillies Export House Ltd., is a private limited company, while the other two appellants are partnership firms. The main issue relates to the following turnovers :

T.A.H. & assessment year

Name of the appellant

Turnover involved

Name of the local buyer.

836/72

V.P.S. Ayyamperumal

4,98,142.66

National agricultural Co-operative Marketing Federation Ltd. Tuticorin Branch

1055/72 1970-71

V.P.S. Ayyamperumal Nadar and Sons.

6,84,288.00

-do-

307/74 307/74

-do-

3,95,000.00

-do-

834/72 1969-71

Chillies Export House Limited

5,49,035.65

-do-

1054/72 1970-71

Chillies Export House Limited

7,54,071.00

National Agricultural Co-operative Market- Tuticorin Branch

Tuticorin Branch 1971-72

-do-

26,60,000.00

-do-

85/72 1969-70

V.P.S.A. velayutha Nadar and Co.

5,50,126.75

-do-

1953/74 1970-71

-do-

7,48,640.00

-do-

2. It is the above sales which are the subject matter of dispute besides some sundry issues which are particular only for T.A. Nos. 834/72, 835/72 and 1053. In all other appeals, this is the sole issue.

3. The appellants are dealers in chillies, pulses etc. The impugned sales are of chillies made to Tvl. National Agricultural Co-operative Marketing Federation Limited, D. 44 in all the appeals. The contracts in respect of all the years are identical in material particulars (The only difference pointed out by the State Representative is that the amount receivable on presentation of the shipping documents is 100% in some cases and 95% in other). It is common ground that the sales were to a local buyer though the goods were shipped to Colombo on consignment to the Co-operative wholesale Establishment, Colombo. The facts are briefly stated here. Tvl. National Agricultural Co-operative Marketing Federation Ltd. New Delhi with branch at Tuticorin (hereinafter referred to as the local buyer) had the exclusive right for export of dried chillies to Ceylon. They had entered into prior contract with the Co-operative wholesale Establishment, Colombo, Ceylon (hereinafter referred to as the foreign importer) for supply to chillies, for supply of chillies. In pursuance of the "commitments" thereunder, the local buyer entered into contracts with the appellants for the supply of dried chillies. Every agreement for sale between the appellant and the local buyer refers to the "commitment" which the local buyer had under an agreement for supply of chillies to the foreign importer. The presence of such a pre-existing contract is not disputed by the authorities. For example, the Appellant Assistant Commissioner in App. No.295/72 dt. 16-9-1972 has reproduced this fact in the history of the case without any comment. It is clear that the local buyer was

getting 1% of the invoice price in respect of contract for assessment year 1969-70 and 1970-71. For assessment year 1971-72, the contract does not mention the rate of commission as the price for the year was not inclusive of commission as in earlier years. But it is stated on behalf of the appellant that it was about 2%. It appears that the export of chillies through its own channels to avoid out-right competition among the Indian Exporters and at the same time assure the quality of the export to the satisfaction of the Ceylon Government which was managing the foreign importer. The preamble to each contract clearly states that the contract between the appellants and the local buyer was in pursuance of the earlier commitment on agreement between the local buyer and the foreign importer. The preamble describes the appellant as "Associate Exporter" in all contracts for assessment year 1970-71 and 1971-72, though this appellation is absent in contracts for assessment year 1969-70. The preamble further states that this contract is in order to fulfil that "commitment" and that the present contract is a result the tender invited for the purpose. This narration is common for all contracts. It is always stated that the appellants shall export dry chillies to the foreign importer at Colombo in the name of the local buyer. A specific quantity is mentioned. The quality, it is required should correspond to what has been prescribed under Agricultural Produce (Grading and Marketing) Act 1937 in respect of Chillies. It has to be agmarked by the Director of Marketing and Inspection, Ministry of Agriculture, New Delhi. The price is C.I.F. Liner Terms for contracts for assessment year 1969-70 and C. & F. Liner Terms, Colombo for later two years. Packing instructions are given in the contract, but these instructions are alternative to the desire, if any by the foregin importer. Each bag shall bear identification marks of the local buyer (NAFED) as well as the name of the foregin importer (viz. C.W.E. Colombo). It is specifically stated that the appellant "shall export the goods to the Importer in Colombo for and on behalf of the Exporter on or before the from the port of Tuticorin. The shipment shall be consigned to Colombo in Ceylon. As regard payment. It was receivable by appellant against shipping documents in respect of contract at 100% in some contracts and 95% in others on shipment and balance of 5% on acceptance of the goods by the foreign importer. The appellant had to pay the amounts stipulated in the document including the buyers commission at 1%. However in respect of contract for assessment year 1971-72 the amount receivable against shipping documents from local buyer did not include buyers commission which is said to be at about 2%. In the event of a dispute, the appellant was bound by any award of Arbitrator in the Agreement between the local buyer and the foreign exporter. In the appellant had any claim, such claim was also subject to arbitration as provided in the Agreement between the local buyer and the foreign importer. Otherwise, the Agreement was subject to interpretation and arbitration of the Chairman of the local buyer. This is the summary of the provisions in the various contracts between the appellants and the local buyer. Apart from there above contracts, the appellant have filed before us a copy of the statements of sales showing the various details of invoice Nos., bill of landing number, date of documents, copies of accounts in its books etc.

Invoice is invariably made out in the name of foreign importer for alleged sale made "through" the local buyer. Bill of landing shows the local buyer as the Exporter and the foreign importer as consignee. Agmark certificate and certificate of weight are in favour of the appellants. Both these certificates show that they refer to exports from Tuticorin. Shipping Agentss Bill shows that the bill is in the name of the appellant and that all the expenses have been listed in respect of the charge incurred by the shipping agent. The appellant also produced before us copies of export applications made by the shipping agent on behalf of the appellants showing that the goods were actually exported. On the strength of terms of contract mentioned in the preceding paragraph and documents, the appellants make their claim for exemption on the ground that the sale are in the course of export, even if they not export sales themselves".

4. A perusal of these paragraphs clearly indicates that the facts of these cases are indistinguishable with that dealt with by the Supreme Court. We are, therefore, obliged to follow the Supreme Court and hold that on the facts of these cases, the first limb of sub-S. (1) of S. 5 is not attracted at all.

5. Counsel on behalf of Revenue, however contended that the Supreme Court having dealt with only the first limb of sub-S. (1) of S. 5 of the Central Sakes Tax Act, the further question as to whether the second limb of sub-S. (1) of S. 5 applied or not should also be investigated before it is stated that S. 5(1) is attracted or not and that the sale is not in the course of export. He emphasised that for the application of the second limb, all that are required are (a) the property in the goods must be transferred by transfer of documents of title; and (b) that the said transfer should take place after the goods had crossed the Customs frontiers. It appears to us that counsel emphasized that if these two aspects are satisfied, the sale must be held to be a sale in the course of export. He invited our attention to that part of the contract which has been extracted in the order of the Tribunal while stating the facts that the payment was to be made on the presentation of the documents. The statement also indicates that the assessee had furnished all the details regarding the shipment and had produced accounts before the assessing authorities. The Tribunal refers to these facts. Counsel Mr. C. Natarajan contended that the aspect as to whether the payment was made the documents of title were transferred after the goods had crossed the Customs Frontiers had not been investigated and should be directed to be investigated before it is finally concluded that the assessee is liable for the tax and is not entitled to exemption in relation to the sale in the course of export. We are unable to accept the arguments. For one thing, on contention has been raised before the Tribunal based on the second limb of sub-S. (1) of S. 5. Therefore, we should not go into this question in the revisions before us. Considering the large interest involved, would have been inclined to have the matter investigated if on the rulings of the Supreme Court, there was a plausible case to be urged by the assessee before the Tribunal or before any lower authority to whom the case may be remitted. We say so by reason of that part of the judgment that we have already extracted from the decision in Serajuddin and

Others Vs. The State of Orissa, and by virtue of what has been stated in the head note of the decision in *Coffee Board vs. Joint Commercial Tax Officer*, in these terms, which correctly summarises the point decided in the case :

"..... The word "course" in the expression in the course of progress or process of, or shortly during. The phrase expanded with this meaning reads in the progress or process of export or during export. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two, for then and there are two sales, one to the intermediary and the other to the importer. The first sale is not in the course of export for the export begins from the intermediary and ends with the importer. Therefore, the tests are that there must be a single sale which itself causes the export or is in the progress or process of export. There is no room for two or more sales in the course of export".

These observations too, we feel, have been made with reference to the first limb of sub-S. (1) of S. 5. But we are of the opinion that in order that the sale may be said to be in the course of export, these elements may be present even for the application of sub-S. (1) S. 5. This is because from very early times, this essential link between the sale and export had been emphasized. There cannot be a sale in the course of export without the particular sale being intimately connected with the export.

6. In the second *Travancore-Cochin* case referred to above, observations have been made and Khanna, J., in his dissenting judgment in *Mod. Serajuddin vs. State of Orissa*, has referred to the summary of that decision at page 148 in these terms :

".... A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense, to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of Statute, contract between the parties, or from mutual understanding or agreement between them or even from the nature of the transaction which links the sale export,. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export unless the sale occasions export. And to occasion export there must exist such a bond between the contract of the sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot

be called a sale in the course of export of goods out of the territory of India (see *Ben Gorm Nilgiri Plantations Co. vs. Sales Tax Officer, Special Circle, Ernakulam*). The appellants in that case were carrying on the business of growing and manufacturing tea in their estates. They sold tea to the local agents of the foreign buyers. The sales were by public auction at Fort Cochin, through brokers in accordance with the provisions of the Tea Act 1953. The purchases by the local agents of the foreign buyers were with a view to export the goods to their principals abroad and the goods were in fact exported out of India. It was held that the sales by the appellants to the agents of the foreign buyers did not come within the purview of Article 286(1)(b) of the Constitution. Dealing with the contention that the seller had knowledge that the goods purchased from them were with the intention of exporting. Shah, J. speaking for the majority observed :

But there is nothing in the transaction from which springs a bond between the sale and the intended export linking them up as part of the same transaction. Knowledge that the goods purchased are intended to be exported does not make the sale and export parts of the same transaction, nor does the sale of the quota with the sale of the goods lead to that result. There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain export licence, which he may or may not obtain. There is nothing in law or in the contract between the parties., or even in the nature of the transactions which prohibits diversion of the goods for internal consumption. The sellers have no concern with the actual export of the goods, once the goods are sold. They have no control over the goods. There is therefore no direct connections between the sale and export of the goods which would make them parts of an intergated transaction of sale in the course of export".

Our attention was drawn to a judgment of Ismail and Sethuraman, JJ. in *The State of Tamil Nadu represented by the Deputy Commissioner of Commercial Taxes, Madras Division, Madras vs. Thiru S. Mohamed Yousuff Sahib and Company*, wherein the learned Judges had observed that the decision in 36 S.T.C. 136 had not considered the aspect of the second limb of sub-S. 5. With great respect, the learned Judges are correct in their observation. But also great respect, we have to observe that the learned Judges had not noticed the passages that we have extracted from the judgments in 36 S.T.C. 136 and the *Coffee Board, case* and also the observations made in the *Second Travancore-Cochin case* referred to above. These extracts illustrate a principle which has been accepted some 25 years ago and we think that it is too late in the day to contend there could be a compliance of the second limb of sub-S. (1) of S. 5 without the export and the sale being linked intimately. The Supreme Court has held that there is no such connection. They have clearly stated in the case before them that the export was by the State Trading Corporation and the sale was by the assessee to the State Trading Corporation and the two have no connection, on facts identical to the facts of this case. We therefore, hold in these cases,

following the Supreme Court which we are bound to do that there is no connection between the sales made by the respondents assesseees to the National Agricultural Co-operative Marketing Federation Ltd. and the export by that organisation to the importers in Colombo in Ceylon.

7. In the light of the above discussion we set aside the order of the Tribunal, allow these revision petitions and hold that the assesseees are not entitled to claim to claim the sales made by them to the above mentioned Marketing Federation Ltd., as sales in the course of export. We direct the parties to bear their respective costs, the matter being one of some difficulty and as far as we can see and one of fruit experience as far as this Court is concerned.