

(1957) 01 BOM CK 0005
In the Bombay High Court
Case No : Civil Reference No. 21 of 1956

The State of Bombay

APPELLANT

Vs

Sista's Ltd.

RESPONDENT

Date of Decision : 11-01-1957

Acts Referred:

Bombay Sales Tax Act, 1946 — Section 11, 2
Bombay Sales Tax Act, 1953 — Section 2(6), 34

Citation : (1957) 8 STC 593

Hon'ble Judges : Shah, J;B.N. Gokhale, J

Bench : Division Bench

Advocate : J.P. Shroff and instructed by Little and Co, for the Appellant; M.L. Manekshaw, D.P. Madon and instructed by . Divecha and Thakore, for the Respondent

Judgement

Shah, J.—The Bombay Sales Tax Tribunal have referred to us u/s 34 of the Bombay Sales Tax Act, 1953, the question "whether the respondent-company (Messrs. Sista's Ltd.) is a "dealer" within the meaning of section 2(c) of the Bombay Sales Tax Act, 1946, and/or of section 2(6) of the Bombay Sales Tax Act, 1953."

2. We may briefly mention the facts which give rise to this reference. Messrs. Sista's Ltd., whom we will hereafter refer to as "the assesseees", are a limited company registered under the Indian Companies Act, having their registered office in Bombay. On 1st December, 1954, the assesseees were served with a notice, dated 30th November, 1954, u/s 11 of the Bombay Sales Tax Act, 1946, informing them that they were liable to pay tax under the Bombay Sales Tax Act, 1946, for the period between 1st April, 1951, and 31st October, 1952, and that the assesseees had failed to apply for registration u/s 8 of the Act, and directing them to attend before the Sales Tax Officer, Enforcement Branch, on 15th December, 1954, and to show cause why they should not be assessed to tax and penalty for the said period and to produce on that date all books of accounts for the said period. Another notice was also served upon the assesseees u/s 14 of the

Bombay Sales Tax Act, 1953, in which it was alleged that the assesseees were liable to pay tax under the Bombay Sales Tax Act, 1953, for the period between 1st November, 1952, and 31st March, 1954, and that the assesseees had failed to apply under that Act for registration or licence. That notice also required to assesseees to attend before the Sales Tax Officer, Enforcement Branch, on 15th December, 1954. The assesseees appeared before the Sales Tax Officer and applied for adjournment to enable them to make an application to the Collector of Sales Tax to determine the question whether they were "dealers". Thereafter on 21st December, 1954, an application was addressed to the Collector of Sales Tax, Bombay, by the assesseees for determination of the questions whether the assesseees were "dealers" within the meaning of the term as defined in section 2(c) of the Bombay Sales Tax Act, 1946, or section 2(6) of the Bombay Sales Tax Act, 1953, whether any part of the business carried on by the assesseees constituted a sale or supply or purchase of goods under the Acts referred to therein or either of them, whether the assesseees were liable to pay tax under the said Acts and whether they were liable to be registered under the Acts or either of them. The assesseees in paragraphs 3, 4 and 5 of the application set out their case about the modus of their business. The assesseees admitted that they were carrying on business, and stated that the modus of their business was that a contract in the form annexed to the application was obtained from an advertiser who desired to advertise his goods, wares, products or services and by that contract the assesseees undertook to secure space in newspapers or magazines or other journals for advertising the advertiser's products and to prepare and release advertisements in the newspapers, journals or magazines and to carry on advertisement companies in respect of the products; that pursuant to the contract the assesseees entered into contracts with newspapers on behalf of the advertiser; that the assesseees then prepared layouts and designs and also got blocks prepared from block-makers by placing orders on behalf of the advertiser with the block-makers and engraving studios; and that the orders placed with the block-makers and the engraving studios were on the printed form of the assesseees showing the names of the advertiser on whose behalf the orders were placed. It was then averred in the application :

"In respect of the preparation of such blocks by the block-makers the petitioners (assesseees) render to the block-makers various services and technical assistance including furnishing to the block-makers the finished art-work of design from which the block is to be prepared, giving necessary technical instructions as to the type of screen required for each particular type of advertisement with reference to the particular journal or magazine in which such advertisement is to be released depending upon the type of paper and the newsprint used by such journal or newspaper, and other necessary technical instructions of making a coloured block from a black and white design and vice versa and with respect to the layout and get-up of such blocks".

3. In paragraph 4, the custom of the business, which it was alleged was governed by the rules and regulations of the Indian and Eastern Newspaper

Society, was set out and that custom, it was alleged, was that the remuneration to the assesseees was paid by the newspapers or journals in which the advertisements were released and that the assesseees billed the advertiser for getting the layouts and designs prepared in respect of the advertisements to be released; and that the assesseees also billed the advertiser for the amount which they had to pay to the block-makers and engraving studios for preparing the blocks. It was then stated in paragraph 5 :

"In respect of the technical service and assistance rendered by the petitioners (assesseees) to the block-makers as aforesaid the block-makers give to the petitioners remuneration at the rate of 15 per cent. on the amounts billed by the block-makers".

4. These averments made in the application by the assesseees to the Collector of Sales Tax were substantially admitted by the Sales Tax Department. The Collector by his order, dated 4th July, 1955, held after setting out the facts that it was obvious from the documentary evidence produced by the assesseees that the estimate form of contract passed between the assesseees and the advertiser, the form of indent on order placed by the assesseees with the engravers and the form of bill passed by the engravers to the assesseees and finally the bill issued by the assesseees to the advertiser showed that the assesseees dealt with the block-makers as principal to principal and the private of contract for the manufacture and sale of the materials was entirely between the block-makers and the assesseees. In the view of the Collector, for breach of such a contract the assesseees and not the advertising agent would be liable to sue or be sued. The Collector, on that view, held that the assesseees were carrying on business of buying and selling blocks and other advertising materials and were dealers within the meaning of section 2(6) of the Bombay Sales Tax Act, 1953.

5. Against that order an appeal was preferred to the Sales Tax Tribunal. The Sales Tax Tribunal held that the assesseees were receiving a commission of 15 per cent. on the bill from the block-makers merely as agents' brokerage and could not be held to be purchasers and vendors of blocks in question. The Tribunal observed that the advertiser makes no payment to the assesseees for the work undertaken by him apart from the commission received from the block-maker and that the blocks in question could not be sold by the assesseees in the market to a customer as the designs for the blocks were approved by the advertiser exclusively for his own purpose and would be useless to another person. In the view of the Tribunal, the assesseees had not such dominion over the blocks after they were received from the custody of the block-makers as a purchaser would have, and, therefore, the blocks could not be regarded as purchased on their own account but must be regarded as purchased on account of their constituent. The Tribunal on that view set aside the order passed by the Collector. An application was submitted by the Collector of Sales Tax for a reference to this Court u/s 34 of the Sales Tax Act, 1953, of three questions which it was contended arose from the judgment of the Tribunal. On that application, the

Tribunal has referred only the third question folding that the first two questions are involved in the third question.

6. A dealer is defined in section 2(6) of the Bombay Sales Tax Act, 1953, as meaning,

"any person who carries on the business of selling or buying goods in the State of Bombay, whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells goods to, or buys goods from, its members."

7. There is an explanation and an exception to that definition with which we are not concerned in this reference. It is evident from the definition that a person in order to be a dealer must carry on the business of selling or buying goods in the State of Bombay. Whether that business is carried on his behalf or as a commission agent for another is immaterial for the purpose of the definition. The question which arises for determination is whether on the facts found by the Sales Tax Tribunal the assesseees can be regarded as dealers within the meaning of section 2(6) of the Act. As we have pointed out, the Sales Tax Tribunal found that the assesseees were merely acting on behalf of their principals when they got prepared blocks from the block-makers for advertising the goods of their principals. The Tribunal has also observed that the commission received from the block-makers is commission which is in the nature of brokerage.

8. In this reference the learned Advocate-General has submitted two contentions : (1) that the Tribunal was in error in holding that the assesseees were not purchasers of the blocks in the course of their business and were merely agents on behalf of their principals, and (2) that even assuming that the assesseees are agents, they must be regarded as commission agents carrying on the business of selling or buying goods and therefore are dealers within the definition of that expression in the Sales Tax Act, 1953. In support of the first contention, the learned Advocate-General has invited our attention to four documents which were annexed to the application submitted by the assesseees before the Collector. The first document, which is Exhibit A, purports to be a form of contract between the advertiser and the assesseees authorising the assesseees to secure advertisement of certain matter in diverse newspapers in Bombay, Delhi, Calcutta, Madras and other places. The form gives an estimate of the charges which the advertiser has to pay for advertising his products in newspapers circulating in the specified areas having circulation mentioned therein, and the size and space of the advertising matter. At the foot of the contract it is stated inter alia that the rates mentioned were subject to change. It is then stated that the quotations given therein unless particularly specified did not cover the cost of type-setting, art-work, blocks, stereos, mats, packing, postage, etc., and they were also subject to the rules and regulations of the Indian and Eastern Newspaper Society. At the foot of this endorsement is a further note meant for recording the acceptance by the advertiser of the estimate and giving authority to the assesseees to contract and release for

advertisement on behalf of the advertiser the advertisement material. The estimates in the body of the contract were stated to be expressly exclusive of production charges.

9. The next document on which reliance was sought to be placed is Exhibit B annexed to the application, purporting to be a letter from the assesseees to a newspaper giving an order for advertisement of certain matters on behalf of an advertiser. The letter sets out the rate, the commission and the period of contract.

10. The third document, Exhibit C, purports to be a form of a bill made out for ordering the preparation of blocks by the assesseees to a firm of engravers, setting out the description of the blocks. It also mentions the name of the advertiser for whom the block is to be prepared.

11. The last document is Exhibit D, which purports to be a bill sent by the assesseees to an advertiser for expenses incurred in the advertisement for the cost of preparation of art-work with photoprints and the headline and typing of the name and address and also for the expenses of blocks supplied to certain newspapers.

12. Now, the document Exhibit A merely gives estimates of the charges which the advertiser has to pay for advertisement of his products. This is admittedly exclusive of the production charges, and the contract expressly authorises the assesseees to contract and release advertisements on behalf of the advertiser. This document shows that the assesseees are acting as agents of behalf of the advertiser in the matter of securing and publishing the advertisements of the advertiser. It is undisputed that the estimates given in the document are not inclusive of the expenses of type-setting, art-work and blocks, stereos, etc. On the question whether the blocks were being purchased by the assesseees, this document has no relevance whatever. The document Exhibit B is an order by the assesseees to a newspaper on behalf of the advertiser giving intimation for advertisement of advertising matter. That document also does not appear to have any direct bearing on the question whether the blocks, which were prepared at the instance of the assesseees from the block-makers, were being prepared on their behalf or on behalf of the advertiser. The document Exhibit C is the form of an order given to the engraver ordering out the preparation of certain blocks. That document mentions the name of the advertiser. It may be that relying upon this form of order the engraver may be entitled to call upon the assesseees to pay the price of the block, but it cannot be said that this document is inconsistent with the assesseees being agents of the advertiser whose name is disclosed to the block-maker. The document Exhibit D is a bill supplied to the advertiser. It is pertinent to note that the bill includes the payment of sales tax on material charged by suppliers of blocks on the bill for the blocks supplied.

13. Strong reliance was sought to be placed upon the contents of Exhibit D in support of the contention that this bill was consistent with the assesseees being purchasers of the blocks from the block-makers and not being merely agents

acting on behalf of the advertisers in getting prepared the blocks. Now, it is true that in the first item it was stated : "14 Line and halftone zinc blocks of the above in various screens supplied to the following publications" and the names of the various publications are set out, but from this statement it is difficult to infer that the blocks supplied were claimed to be of the ownership of the assesseees. The statement is in a commercial document and may not be expected to contain matters which were of common understanding and acceptance within the parties. The fact that it is stated that certain zinc blocks were supplied to the newspapers by the assesseees does not lead to the inference that they were supplied by the assesseees as owners and not for and on behalf of the advertiser. In our view, there is nothing in these documents which definitely indicates that the blocks which were to be got prepared by the assesseees were to be of the ownership of the assesseees as purchasers from the block-makers and were to be utilized in the work of advertising only for the advertiser. At best, the recitals in the documents are consistent with the assesseees being either purchasers of the blocks from the block-makers or agents of the advertiser for preparing the blocks in the business of advertising for and on behalf of the advertisers.

14. As we have already observed, the averments made in the application to the Collector were not denied by the department before the Sales Tax Tribunal. In the application, the assesseees have clearly alleged that they were acting as agents of the advertiser. That allegation not having been challenged and documentary evidence, on which reliance was sought to be placed, not being inconsistent with the claim made by the assesseees, it is difficult for us to hold that the Sales Tax Tribunal was in error in concluding that the assesseees were merely agents of the advertiser and not purchasers of the blocks required for purposes of advertisement of the products or services of the advertisers. If the assesseees are not purchasers of the blocks for the purpose of carrying on their business but are regarded as merely agents, *prima facie* they do not fall within the definition of "dealer" in the Bombay Sales Tax Act, 1953. But the learned Advocate-General contended that even if the assesseees were not purchasers of the blocks but were acting as agents, they were still acting as commission agents and in that capacity buying goods in the State of Bombay and, therefore, they must be regarded as dealers within the definition. It may at once be observed that this contention does not appear to have been advanced before the Collector or before the Sales Tax Tribunal. It is true that in the application for making a reference to this Court it appears to have been suggested that the assesseees were commission agents for buying goods on behalf of the advertisers and were, therefore, dealers within the meaning of the Act and liable to be so treated. It is also true that from the order passed by the Sales Tax Tribunal the question whether the assesseees are commission agents for the purpose of buying goods arises. Even though the question has not been raised before the Tribunals below, this Court is entitled to raise that question and to give its opinion. But, in our view, on the findings recorded by the Collector and the Sales Tax Tribunal and especially having regard to the admitted statement of facts, it cannot be held

that the assesseees are commission agents carrying on the business of buying goods. As we have already pointed out, the assesseees contended before the Collector that they were mere agents of the advertisers in the matter of advertising goods and in getting prepared the blocks. It is true that the assesseees have admitted that they are receiving commission from the block-makers but they have expressly contended in paragraph 5 that the remuneration which is received by them is remuneration for rendering technical service and assistance to the block-makers and not for rendering service to the advertiser. That assertion made by the assesseees does not appear to have been denied by the Collector.

15. If the assertion made by the assesseees is accepted, as it must be accepted in this case, it is difficult to hold that the assesseees can be regarded as commission agents. The assesseees on their statement appear to hold a double character : qua the advertiser, they are agents engaged in the work of advertising the products of the principals; qua the block makers, they are experts rendering technical service and assistance and advice. If the assesseees are receiving commission from the block-makers only for rendering technical service, assistance and advice, the assesseees cannot be said to be commission agents for buying or purchasing goods on behalf of the advertisers. The fact that the assesseees are agents does not render them liable as dealers under the Bombay Sales Tax Act, 1953.

16. The learned Advocate-General contended before us that in this case all the evidence which has a bearing on the status of the assesseees has not been placed before the Collector and opportunity should be given to the Sales Tax Authorities to lead all the evidence which has a bearing on the question. We are unable to accede to that request. If before the Collector of Sales Tax and before the Sales Tax Tribunal the parties were willing to have the case decided on an admitted statement of facts, it would not be open to the Sales Tax Authorities now to contend that they should be given another opportunity to lead evidence.

17. We may observe that the application u/s 27 filed before the Collector of Sales Tax was filed in so far as it related to the assessment of the assesseees for two periods : (1) between 1st April, 1951, and 31st October, 1952, and (2) between 1st November, 1952, and 31st March, 1954. So far as those two periods are concerned, no other objection having been raised, the question whether the assesseees could be regarded as dealers must be deemed to have been decided by us. If hereafter any notice is issued upon the assesseees with regard to tax payable by them for the period subsequent to 31st March, 1954, any observations made by us about the status of the assesseees will not be regarded as decisive of their status. We may also observe that we have given our opinion only on the admitted statement of facts and the legal effect of the four documents produced before the Collector and on no other statement of facts.

18. The question referred to us by the Tribunal will be answered in the negative. We hold that the assesseees or not dealers within the meaning of section 2(c) of

the Sales Tax Act, 1946, or of section 2(6) of the Sales Tax Act, 1953, for the two periods between 1st April, 1951, and 31st October, 1952, and between 1st November, 1952, and 31st March, 1954. The Collector of Sales Tax to pay the costs of this hearing.

19. Reference answered accordingly.