

(1981) 07 MAD CK 0054

In the Madras High Court

Case No : Tax Case No. 500 of 1977 (Revision No. 122 of 1977)

The State of Tamil Nadu

APPELLANT

Vs

A. Rafeeq Ahmed and Co.

RESPONDENT

Date of Decision : 16-07-1981

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2

Citation : (1983) 52 STC 281

Hon'ble Judges : S. Ratnavel Pandian, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : K.S. Bakthavatsalam, Additional Government Pleader, for the Appellant; N. Inbarajan, for C.S. Chandrasekara Sastri, C. Venkataraman and C. Natarajan, for the Respondent

Judgement

Balasubrahmanyam, J.—This is a revision by the State Government against an order of the Sales Tax Appellate Tribunal. The assessee in this case is a partnership firm called Rafeeq Ahmed and Company. They were dealers in skins. They entered into certain transactions of export of hides and skins, putting them through a concern called Abdul Shukoor and Company. They contended that the turnover of Rs. 89,59,712 handled by Abdul Shukoor and Company constituted sales in the course of export and those sales were their own sales effected by Abdul Shukoor and Company as their commission agents. The assessing authority did not accept this contention, but held that the assessee had sold these goods to Abdul Shukoor and Company, who, in turn, sold them to the foreign buyers. In that view, the assessing authority brought the sales to tax. The matter was taken in appeal, where the Tribunal ultimately held, agreeing with the assessee's contention, that the turnover in question constituted sales in the course of export and hence not liable for sales tax. The matter was then taken up by the State Government in revision before this Court. There, a Bench of this Court, after some consideration, remanded the case to the Tribunal for a fuller investigation in the facts, with particular reference to the question whether Abdul Shukoor and Company really acted as the agent of the assessee in the

transactions of sale to the foreign buyers or whether the transactions were export sales of the assessee's own concern. After remand, the Tribunal went into the question in greater detail. They have since rendered their findings. On the basis of those findings, the Tribunal have come to the conclusion that the turnover in question represented sales, not of Abdul Shukoor and Company, but only of the assessee and those sales were in the course of export to various foreign buyers. In this view, they have held once again that the transactions were not liable to be brought in for sales tax. Undeterred by the findings of the Tribunal for the second time, the State Government have come up in revision before us.

2. The order of the Tribunal sets out the findings in great detail with reference to the materials before them. A reference is made, in the first place, to an agreement duly executed as between the assessee on the one hand, and Abdul Shukoor and Company on the other. From the terms of the agreement it is quite clear that there was a standing agency contract between the assessee and Abdul Shukoor and Company for sales of tanned skins to buyers in the foreign markets in which the latter should act as the assessee's agents. The agency was to last for a period of three years from 3rd April, 1965. A renewal to the agency agreement for a fresh term of three years is evidenced by a subsequent agreement in writing executed by both the parties on 11th April, 1969. It may be observed that the turnover in question in the present case relates to the year 1968-69, a period during which the agency agreement between the assessee and Abdul Shukoor was in full force.

3. The order of the Tribunal further shows that in accordance with the terms of the agency agreement, Abdul Shukoor and Company obtained prior approval of the assessee for accepting the foreign contracts for export sales of tanned skins on the assessee's behalf. Abdul Shukoor and Company also informed the assessee of the terms of the sale with the foreign buyers after the finalisation of the contract. This procedure, again, was in fulfilment of the terms of the agency agreement, under which Abdul Shukoor and Company was under an obligation to convey such information. The Tribunal further noticed that this relationship between the parties as principal and agent was further facilitated by the fact that both in the assessee-firm and in the firm of Abdul Shukoor and Company there were common partners.

4. The Tribunal also had an opportunity to go into the accounts, both of the assessee and of Abdul Shukoor and Company. Apart from the fact that Abdul Shukoor and Company were informing the assessee then and there of the various transactions of export sales on their behalf, there were periodical statements of account rendered by Abdul Shukoor and Company to the assessee. Those statements of account disclosed the gross receipts obtained by Abdul Shukoor and Company from the sales abroad. They also carried entries of deduction of commission paid by the foreign buyers as well as the commissioner payable by the assessee to Abdul Shukoor and Company. The statements of

accounts also showed expenses such as labour charges, packing charges, harbour dues, shipping and carriage expenses, etc., all of which were debited by Abdul Shukoor and Company to the assessee's account. It was further found that even liabilities arising on account of exchange differences, port trust penalties and the like were borne by the assessee.

5. A perusal of the account books of the assessee showed that actual financial entries in regard to these sales were passed in the assessee's accounts only on receipt of the statements of account furnished from time to time by Abdul Shukoor and Company. When the transactions were so recorded, they reflected the sales to the foreign buyers not as sales of Abdul Shukoor and Company, but as the assessee's own sales. The commissioner paid to Abdul Shukoor and Company alone figures in the accounts in addition to the direct transactions with the foreign buyers.

6. The account books of Abdul Shukoor and Company were also examined by the Tribunal and they showed appropriate contra entries in their books in regard to these transactions, which clearly showed that they were carried out by Abdul Shukoor and Company only as agents acting on behalf of the assessee, and not on their own.

7. The Tribunal, however, noticed that in so far as the foreign buyers were concerned, all the transactions of sales were put through, in form, as emanating from Abdul Shukoor and Company. In the invoices, purchase orders and other documents, Abdul Shukoor and Company were not described as agents of the assessee. The Tribunal found from the documents that in so far as the foreign buyers were concerned, they were only looking to Abdul Shukoor and Company as the party with whom they were contracting for purchasing the goods. Even the brand name of the goods dealt with by Abdul Shukoor and Company in these transactions bore the initials "A.A.S." apparently representing "A. Abdul Shukoor and Company". The Tribunal found one or two forms, described as contract forms in which Abdul Shukoor and Company was shown as having purchased the skins from the assessee. The accounts, however, did not make any distinction even in respect of these transactions. They were also dealt with in the accounts as agency transactions. The Tribunal, accordingly, recorded the finding that the so-called contract forms must be dismissed as occasional lapses on the part of the assessee and the agent from adhering to the form of their real jural relationship of principal and agent.

8. Having regard to the several findings and the basic materials, which we have narrated above, the Tribunal ultimately entered their conclusion that the amount of Rs. 89,59,712 represented only agency transaction between the assessee and Abdul Shukoor and Company and they did not represent and sale by the assessee to Abdul Shukoor and Company. The Tribunal held that the said amount represented the sale value of direct exports by the assessee to the foreign buyers, but put through in the name of their agent, Abdul Shukoor and Company. The Tribunal observed that the mere fact that the foreign buyers only

looked to Abdul Shukoor and Company as the other contracting party and they did not know that the goods were really those of the assessee and that Abdul Shukoor and Company were acting as agents of the assessee, will not detract from the fact that the export sales were carried out only by the assessee. The Tribunal referred to sections 231 and 232 of the Indian Contract Act, 1872, and observed that the exports by Abdul Shukoor and Company must be regarded as transactions effected by them as agents for an undisclosed principal. The Tribunal accordingly held that notwithstanding the form in which those transactions were put through by Abdul Shukoor and Company they were really the transactions belonging to the assessee and must be adjudged as such.

9. The learned Government Pleader urged before us that the Tribunal's conclusion is not in accordance with the law. He submitted that when the documents relating to the actual sales in which the foreign buyers were involved were scrutinised, it was seen that the assessee was nowhere in the picture. This, according to the Government Pleader, showed that the transactions must be regarded as (i) sales to Abdul Shukoor and Company for resale by them as export sales, and (ii) export sales by Abdul Shukoor and Company, after they had acquired the goods, by purchase, from the assessee. The next step in the argument of the learned Government Pleader was to urge that if the sales in the course of export were really those of Abdul Shukoor and Company, then the turnover in question must be brought to tax as representing the sales turnover of the assessee in favour of Abdul Shukoor and Company and taxable as such.

10. We do not accept the submissions of the learned Government Pleader as well-founded either on facts or as a matter of legal inference. The Tribunal had rendered a clear finding of fact to the effect that the assessee and Abdul Shukoor and Company have tied themselves up with a contract of agency which was in force for nearly six years, which included the assessment year in question. It might be that Abdul Shukoor and Company had their own independent export sales of the goods which they had obtained from the assessee, or, for that matter, from other merchants. But, in so far as the handling of the goods of the assessee were concerned, which figure in this revision, it cannot be suggested that they were governed by any terms other than those of the agency agreement dated 3rd April, 1965, renewed by the subsequent agreement dated 11th April, 1969. The evidence of account books and statements of account also fully support the finding of the Tribunal that Abdul Shukoor and Company had been carrying on these transactions, not of their own accord and on their own account, but only as the agents of the assessee for sale. It is quite true that while putting through these transactions for and on behalf of the assessee, Abdul Shukoor and Company did not divulge that they were not acting as agents of the assessee and even made it appear to the foreign buyers that they were owners of the goods and they were entering into the export sales on their own individual account and responsibility. In other words, the foreign buyers were completely in the dark about the real jural relationship between Abdul Shukoor and Company, who were their consignor, and the assessee. But, the legal position does not get altered,

merely because to the foreign buyers the assessee's real position as principal of Abdul Shukoor and Company was not disclosed. It does not make any difference to the position either of the assessee or of Abdul Shukoor and Company or of the real character of the transactions put through by Abdul Shukoor and Company on behalf of the assessee.

11. Section 231 of the Contract Act provides that where an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is merely an agent, then, so far as the undisclosed principal is concerned, he might require the agent to perform any contract entered into by the agent on his behalf. So far as the other contracting party is concerned, the section enacts that he would have as against the principal the same rights that he would have against the agent, if the agent had been dealing on his own. In other words, the non-disclosure of the principal does not have any effect whatever in the real nature of the contract between the agent and the other contracting party. Section 232 of the Contract Act further provides that where an agent contracts with another party without disclosing his own principal's name, the principal can obtain performance of the contract by the other party only through the agent and subject to the rights and obligation which subsisted between the agent and the other party to the contract. This provision is meant to save the mutual rights and obligations that might be entered into by the agent of the undisclosed principal and the other party to the contract without, at the same time, any detriment to the principal's rights.

12. These being the attributes of the contractual relationship between two parties, one of whom is represented by an agent, who does not disclose his principal's name to the other party there can be no difficulty whatever in applying the law to the facts of the present case. Abdul Shukoor and Company was, no doubt, acting directly with the foreign buyers, but, since he was acting only as an agent, the fact that he did not disclose his principal's name, does not detract from the transactions being what they were, namely, transactions put through by Abdul Shukoor and Company not on their own account, but only as agents of the assessee. In this view, therefore, the Tribunal's decision must be upheld as correct both on the facts and as a matter of drawing a legitimate legal inference from those facts.

13. Three Bench decisions of this Court were cited in the course of argument. They are : [1979] 44 STC 263 (State of Tamil Nadu v. A. Shafeeq Ahmed and Co.), [1979] 44 STC 261 (Hajee Abdul Khaliq Sahib and Co. v. State of Tamil Nadu) and [1981] 47 STC 62 (Akhtar & Co. v. State of Tamil Nadu). The principle laid down in these decisions is that where an assessee enters into an export sale through the medium of an agent and this mode of transaction is evidenced by the record, the fact that the foreign buyers are unaware of this circumstance would not detract from the fact that the sales are really those of the assessee. It is further laid down in these cases that it is a question for examination of the facts of each case, whether the person who figures in the assessee's accounts as

the exporting agent is really an agent acting as such for the assessee's transactions with the foreign buyers.

14. What we have stated above are the broad principles which we are able to deduce from the above decisions. The learned Government Pleader, however, submitted that there is yet another doctrine which these decisions have laid down. He prefaced his submission by saying that cases where the evidence on record on the assessee's side supports the claim of agency sales present no difficulty. But where the authorities reject the assessee's claim and hold that the person who exports the goods to the foreign buyers is not the assessee's agent, what is to happen ? According to the learned Government Pleader, it is open to the sales tax authorities in such cases to "deem" the export sales turnover as local sales effected by the assessee to his so-called agent. This idea, according to learned Government Pleader, is the keynote of the three decisions earlier cited.

15. The learned Government Pleader relied on the following passage in the judgment of V. Ramaswami, J., in the first of the three cases, namely. *State of Tamil Nadu v. Shafeeq Ahmed and Co.* [1979] 44 STC 263 (Appendix) :

"If the contention of the assessees is that they were the exporters in fact and any other person was acting only as their agent, the privity of contract between the assessees and the foreign exporter would be established and the assessees themselves could become an exporter. But if the facts were to be that the contract was entered into by the agent on his own right and not as an agent of the assessees, there shall be deemed to be a sale by the assessees to the agent and there would be no privity of contract between the assessees and the foreign buyer and it would amount to a case of sale for export to a local agent."

16. Having regard to the findings of the Tribunal to which we have made reference earlier in this judgment, we think the present case must be brought within the first part of the dictum of Ramaswami, J., namely, that even in cases where there is interposition of an agent of export between the assessee and the foreign buyer, the transactions must be regarded as export sales exempt from tax, if the evidence shows that the intermediary was no more than the assessee's agent. For the reasons we have earlier rendered, we have no doubt that the present case comes within this proposition. We do not, therefore, have to go into the further inquiry as to what is to happen where the claim of agency as put forward by the assessee happens to be rejected. But that sort of concern is precisely the one which Ramaswami, J., has dealt with in the latter part of the passage from his judgment extracted above. According to the learned Judge, where the assessing authority rejects an assessee's claim that he has exported the goods through an agent, it would be open to that authority to proceed further and treat or "deem" the export turnover in the assessee's books as local sales effected by the assessee to an independent local buyer, miscalled an agent.

17. We are not sure that Ramaswami, J., meant to lay down, in the above passage, any substantive rule of law or even a special rule of evidence

universally applicable to all such cases. The learned Judge's proposition, when analysed invokes a double fiction. We are asked, first, to imagine a local sale as if effected by the assessee to the so-called agent, and then, on top of it, to imagine a subsequent sale as if effected by the agent to the foreign buyer. It is needless to remind ourselves that sales tax under the statute attaches to actual sales, that is to say, sales which have taken place, and not to sales which have not taken place. We do not doubt that always it is a matter for evidence whether or not a sale has taken place, and how it has taken place, if it has taken place at all. It may be that it is open to the assessing authorities to "infer" sales under certain circumstances. But even for inferences of this kind, there must be some modicum of material to serve as a basis. Inferences must have some roots. Without basis, the authorities cannot record a finding of taxable sales, from thin air, as it were. Take this very case. The assessee's books of account show a stock of goods. The account show that from this stock goods of a certain quantity are accounted for as export sales. The books record the price at which the foreign buyers purchase the goods. The accounts also show that the export sales have been put through by an agent. In this situation, let us assume that the interposition of the agency can be rejected by the assessing authorities as unreal. Does it automatically follow therefrom that the assessee must be held to have effected an out and out sale to the person who figures in the accounts as agent ? What is more, can we extend the inference farther and hold that the agent, in turn, had effected sales of the same goods in the course of export to the foreign buyers ? We think not. At any rate, not in every case. If the role of the agent in the transaction is discredited, that may not, in our judgment, necessarily lead to a legitimate inference in all cases that the agent is an independent individual and the relation between him and the assessee is that of principal, to principal or that of buyer and seller. Denial of agency and ruling it out does not rule out other inferences. It is, for instance, equally possible to draw quite a different inference to the effect that the so-called agent is a mere stooge or a dummy of the assessee, and he has been interposed just to camouflage a direct sale by the assessee to the foreign buyers under the garb of an agency transaction. The impelling motive behind the interposition of an intermediary, such as a commission agent for export, might well be to gain a tax advantage in the assessee's Income Tax assessment on the basis of a claim for deduction, based on book entries, showing commission payments to the agent. At all events, in cases where the commercial tax authorities accept the book figure of the turnover in export sales (as further evidenced by the invoices, bills of lading and the like), it may not be reasonable to regard that very figure of turnover as representing a penultimate local sale by the assessee to the so-called agent. Unless the revenue's supposition be that the intermediary must be "deemed" (which would add one more fiction to the existing two) to have bought and sold the goods at the price paid by the foreign buyers, without allowing himself and profit margin. We wonder whether it would not be too tall an inference, in the circumstances, first to assume that the agent is a dealer in his own right, and at the same time, imagine that he would prefer to resell the

goods to the foreign buyers without so much as a single pie towards his own profit or resale.

18. We observed earlier that sales tax is only a tax on real sales and not on fictitious sales. It is, however, open to the legislature to work upon fictions as much as on realities, even for purposes of taxation. In such cases, the inquiry would be, not to see if there had been a real sale, but to see if the requirements of the deeming provisions are fulfilled. The Tamil Nadu General Sales Tax Act, 1959, has sought to foist sales tax liability on a few fictional sales although the charge generally is on real transactions. The fictional or deemed sales are to be found in explanation (4) to section 2(n) of the Act; Section 2(n) is an interpretation clause dealing with the definition of the expression "sale". The main part of the definition u/s 2(n) adopts the ordinary conception of sale as being a transfer of property in the goods for a price. Explanations (1) to (3) to that clause impute the characteristic of sales to certain transfers which, but for these explanations, may not be regarded as sales. Then comes explanation (4) which is relevant for the present discussion. This explanation provides that two independent sales or purchases can be "deemed" to have taken place for the purpose of the Act under certain circumstances. Those circumstances are set out in clauses (a) and (b) of explanation (4). Clause (a) deals with a situation where goods are transferred from a principal through his selling agent to the purchaser. In such a case, according to explanation (4), two independent sales or purchases shall be deemed to have taken place. It is, however, clear from this explanation that for adopting the statutory fiction of two independent sales for the purposes of the Act, there must be a transfer of goods from a principal to his selling agent, and again, another transfer from the selling agent to the purchaser. The Supreme Court had had occasion to deal with the implications of this statutory fiction in *Sri Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Tax Officer* [1968] 21 STC 312 the Supreme Court held that the real effect of the third explanation was to impose the tax only where there is a transfer of title to the goods and not where there is a mere contract of agency. The Supreme Court explained that two successive transactions of sale of the same goods can be envisaged under the explanation only if there is, in reality, a transfer of property by the principal to the agent, followed close upon its heels by another transfer of property by the agent, in his turn, to the buyer. The Supreme Court, were, in that case, interpreting a provision in the Andhra Pradesh General Sales Tax Act, 1957, carrying a statutory fiction comparable to that found in explanation (4) to section 2(n) of the Tamil Nadu General Sales Tax Act.

19. It may be observed that, apart from the fiction introduced by the legislature in explanation (4)(a) to section 2(n) of the Act, no other fiction operates as respects transactions entered into by a seller through his agent with the buyer. There are no other deeming provisions which deal with mere agency transactions as two independent sale transactions. The observations in the judgment of Ramaswami, J., which we have earlier extracted, would therefore properly fall to be understood and applied only in the light of explanation (4)(a), which,

incidentally, has not been noticed in that judgment. For it is unthinkable that a dealer can be assessed to sales tax on a non-existent sale by the mere employment of a deeming epithet. Ramaswami, J., had no doubt observed that the sale to the agent may be "deemed" to be a sale to that person, as a buyer in his own right. It is, however, clear that no one other than a sovereign legislature can lay down an operative fiction by means of a deeming device. It is well-settled that the expression "deemed" occurring in a statute can only mean "deemed under the provisions of the Act". Vide the observation of the Supreme Court to this effect in *Keshav Mills Ltd. Vs. Commissioner of Income Tax, Bombay*, . Neither the assessing authority nor any other body dealing with the question of assessability of a dealer under the Act has the power to create fictions of their own, and foist fiscal liabilities on the basis of those fictions. As we said earlier, we understand the observations of V. Ramaswami, J., only in this light.

20. The considerations which we have discussed last do not, however, directly affect the present case. As we earlier mentioned, this case turns entirely on the findings of the Tribunal to the effect that Abdul Shukoor and Company really acted as agents of the assessee in regard to the turnover in question amounting to Rs. 89,59,712 representing sales in the course of export to foreign buyers. This finding, as we have earlier shown, is amply supported by the material evidence on record. It follows, therefore, that the Tribunal's decision excluding the turnover from assessment as export sales is unexceptionable.

21. The revision filed by the State Government thus fails. It is accordingly dismissed. The assessee is entitled to its costs. Counsel's fee Rs. 250.