

Mahadayal Premchandra

Vs

Commercial Tax Officer Calcutta & Another

Civil Appeal No. 344 of 1957

(K. Subha Rao, B. P. Sinha, Syed Jafar Imam JJ)

15.04.1958

JUDGMENT

BHAGWATI J. -

This appeal with Special Leave is directed against the order dated January 15, 1955, passed by the Commercial Tax Officer, Canning Street (District I) Charge, Calcutta, assessing the appellants to sales-tax in respect of transactions valued at Rs. 6,21,369-10-3 and assessing sales-tax thereon at 9 pies in the rupee at Rs. 27,816, under the provisions of the Bengal Finance (Sales-tax) Act (Ben. VI of 1941) hereinafter referred to as "the Act".

The appellants carry on the business of (1) selling goods or of dealers, partly in wholesale and partly retail, of woollen and cotton fabrics and other products, (2) as well as of commission agents of woollen and cotton fabrics and in their latter capacity are and have been the agents or representatives of the British India Corporation Ltd., Proprietor, The Kanpur Woollen Mills, both at Kanpur in Uttar Pradesh, for the territory comprising West Bengal and Assam and parts of Bihar and Orissa under the terms of an agreement between themselves and their principals dated June 2, 1952, supplemented by a letter dated July 7, 1952, addressed to them by the principals.

The appellants are duly registered as "dealers" in West Bengal under the provisions of the Act with respect to their aforesaid business of wholesale and retail distribution or sale of goods and their certificate of Registration is numbered O.S. 1/1630A. On or about December 15, 1952, the appellants submitted to the 1st respondent their return for sales-tax in the prescribed form for the return period ending Dewali 2009 Sambat corresponding to October 17, 1952 (i.e., for the year 1951-52).

The gross turnover in the said return was calculated at Rs. 1,25,24,883-14-3 and after allowing therefrom the permissible exemptions and deductions the taxable turnover amounted to Rs. 2,42,480-10-3 on which sales-tax 9 pies in the rupee under the provisions of section 5(1) of the Act amounting to Rs. 11,366-5 was duly paid by the appellants.

It appears that in the course of examination of books of account and Purchase Vouchers of M/s. Khubiram Dhansiram of Calcutta, an unregistered dealer, it came to the notice of the Assistant Commissioner, (C.S.) that the said dealer had purchased woollen goods worth Rs. 59,530-13 during the period from November 20, 1952, to December 18, 1952, from M/s. British India Corporation Ltd., Kanpur Woollen Mills Branch. Invoices, copies of which were enclosed therewith, had been drawn by the British India Corporation Ltd., for Kanpur Woollen Mills from Kanpur and the goods in question were reported to have been dispatched to M/s. Khubiram Dhansiram from Kanpur.

Orders Nos. quoted in the invoices were the Nos. - of orders placed to Kanpur Woolen Mills by their sole agents in West Bengal, the appellants herein, and the Assistant Commissioner (C.S.) was of the opinion that under Explanation 2 of section 2(g) of the Act, the sales of Kanpur Woollen Mills from Kanpur as referred to above should be deemed to have taken place in West Bengal and under Explanation 3 of section 2(c) of the Act the appellants should be deemed to be the dealer in West Bengal on account of the sales of Kanpur Woollen Mills and as such were liable to pay the tax at that end. The Assistant Commissioner (C.S.), therefore, asked the first respondent by his letter dated January 21, 1953, to verify as to whether the appellants had accounted for those transactions in their books of account and had paid the taxes due by them.

On February 3, 1953, the first respondent issued a notice under sections 11 and 14(1) of the Act stating that he was not satisfied that the return filed by the appellants for the year ending October 17, 1952, was correct and complete and asked the appellants to produce before him their books of account.

The representatives of the appellants had an interview with the first respondent on the said date and on February 16, 1953, the appellants submitted to the first respondent a statement in connection with their agency transactions with the Kanpur Woollen Mills, Kanpur which showed that there were three types of transactions entered into by them as selling agents of the Mills, viz.,

(1) The appellants booked orders on behalf of and subject to acceptance by the Mills and were entitled to get commission on the value of the invoices made out in the name of the party who placed the order, such invoices with other customary documents being sent direct to the parties by the Mills through their Bankers.

(2) Orders were placed direct by the parties resident in the territories in which the appellants were selling agents and the goods were supplied directly by the Mills to those parties. There also the appellants were entitled to their commission.

(3) The goods were ordered and invoiced in the name of the appellants and dealt with by them as dealers either in wholesale or retail. The appellants would be entitled to commission on the invoice value of goods. In regard to the two former categories, the appellants did not come in the picture except for their commission and consequently no entry was made in their books of account for the value of those goods. As to the last category the value of the invoice was accounted for in their books of account to the debit of goods account and the sale proceeds were credited as and when the goods were sold by the appellants. The appellants contended that it was only in respect of the goods of the last category that they were "dealer" within the meaning of that term as defined in the Act and they were therefore liable to pay sales tax only in regard to the same.

This letter was endorsed by the first respondent on March 6, 1953, as under :

"Copy forwarded to A.C. (Central Section) for information with reference to his memo. No. 385/3R-40/52 dated 21st January 1953 and soliciting further instructions in the matter."

After completing the examination of the books of account produced by the appellants, the first respondent made an entry in the Order-Sheet dated May 26, 1953, asking that the following further

details may be sent to the Assist. Commissioner (C.S.) to elicit his opinion in the matter :

"The dealer appeared with books of account on January 21, 1953. On examination it was found that the dealer made entries only of commission received from Messrs. Kanpur Woollen Mills, Kanpur for goods supplied to his customers in West Bengal from Kanpur. In this connection I may point out that the dealer is a commission agent of the Kanpur Woollen Mills for the State of West Bengal earning a commission on all sales of goods effected by the Mills within the territorial limits assigned to the dealer. In most cases the dealer secures orders from parties and forwards the same to the Kanpur Mills who supply the goods to the respective parties direct, a percentage of commission on the value of the goods so supplied being credited to the dealer.

The goods being delivered in West Bengal for consumption, no doubt satisfy the requirements of the Explanation to clause (1) of Article 286 of the Constitution of India. It is, therefore, conceded that the sale took place in West Bengal. But the fact remains that the seller in such circumstances would obviously be the Kanpur Mills and not the dealer. The privity of contract is resting with the Kanpur Mills on the one hand and the purchaser on the other. The position of the Kanpur Mills is that of a named and disclosed principal. In view of the above observations, I feel that the dealer incurs no liability under the B.P. (S.T.) Act of 1941 in respect of the goods supplied to his customers in West Bengal direct from Kanpur by Messrs. Kanpur Woollen Mills."

This memorandum was submitted by the first respondent to the Assistant Commissioner (C.S.) for his opinion.

On August 29, 1953, the Assistant Commissioner (C.S.) made a note that the first respondent should not have made a direct reference to him. He recorded his opinion that the appellants were accountable for all sales in respect of which the goods were delivered in West Bengal and that they were commission agents who received commission on all sales made in West Bengal by the Kanpur Woollen Mills, Kanpur and being the commission agents of the Kanpur Mills were accountable for the transactions. He, therefore, ordered the first respondent to do the needful. The first respondent made an entry in the order sheet on September 2, 1953, stating that action was being taken accordingly. He also ordered the appellants to appear with books of account for further examination, and to produce their Agency Contract with Kanpur Mills and a list of the dealers in Calcutta who received goods direct from Kanpur.

On November 21, 1952, the representative of the appellants submitted a statement to the first respondent clarifying the whole position. It was pointed out that the appellants acted as agents of M/s. Lalimli Mills of Kanpur and got a commission once at the end of every year on all the sales effected by the Mills in the State of West Bengal. The orders were placed directly by the customers of the Mills with the Mills; the Mills executed the orders and consigned the goods direct to those customers; recording the said customers as the consignees; the said customers negotiated bills through the banks, cleared the goods from the carriers and sold them as they liked. The Mills only maintained a personal account of the appellants in which the commission at the end of a year was credited. The Mills never debited the appellants with the value of the goods; neither did the appellants credit the Mills with the value of the goods nor debited their goods account. At no stage of these transactions was the property in the goods either transferred to or acquired by the appellants, and nobody could transfer any goods which he did not acquire or possess. Besides, the accounts of the said customers of the Mills did not indicate any transactions at all with the appellants in the State of West Bengal. It was therefore submitted that the appellants could not be

deemed or held in law or in fact to be the dealer qua those sales in West Bengal much less liable to pay any sales tax on those sales. It was also pointed out that the appellants had earned the maximum commission of 2.4% which was less than even the sales tax which worked out to about 4.2% and this could never have been intended by the law.

On June 19, 1954, the representative of the appellants submitted a further statement to the first respondent. He pointed out that at no stage whatever did the appellants have physical possession or control over the goods in question and also drew the attention of the first respondent to several sales tax cases in support of the position taken up by the appellants. He also repeated that all through the appellants had been working as mere commission agents at 2.4% for the transactions effected by them between their principals on the one hand and different customers on the other. Now, the department wanted to levy tax at 4.2% on the total transactions, which meant an addition of 1.8% from their own pocket to the total commission earned which he felt could never be the intention of the law.

On August 12, 1954, the first respondent recorded a note wherein he stated that on the materials placed before him he was doubtful whether the appellants could be considered as the sole agent of M/s. Kanpur Woollen Mills as per provision of Explanation 3 of section 2(c) of the Act. He requested the Assistant Commissioner (C.S.) to reconsider the matter in the context of the facts mentioned and give his "valued opinion".

On September 23, 1954, the then Assistant Commissioner (C.S.) wrote that his predecessor had already advised the first respondent on this matter and if the appellants were aggrieved they might prefer a regular revision or appeal petition before the competent authority as provided under the law. The first respondent made an entry on September 30, 1954, stating that he had seen the notes and that action was being taken accordingly.

The first respondent ultimately on January 15, 1955, made the assessment order assessing these disputed transactions to sales tax on the following ground :-

"On inspection of the books of account, I found that the dealer was a commission agent of the Cawnpore Woollen Mills for the State of West Bengal earning commission on all sales made in West Bengal by the Cawnpore Woollen Mills, Cawnpore. Though the principal is at Cawnpore, the dealer, being the commission agent of the Cawnpore Woollen Mills, is definitely accountable for the transactions or sales within the State of West Bengal. The dealer denied this liability on various grounds, vide his letters dated 21st November, 1953 and 19th June, 1954, which appear to be not at all satisfactory. I hold the dealer liable for all such sales, made by M/s. Cawnpore, in Woollen Mills, Cawnpore, in West Bengal. The statement of such sales filed by the dealer shows that sales of such nature, effected in West Bengal amounts to Rs. 6,21,369-10-3 which were found to have not been entered in books of account. As such, I now include this amount in G.T. and add the same to Balance A. So G.T. is finally assessed at Rs. 13,146,255-8-4."

The appellants obtained Special Leave from this Court under Art. 136 of the Constitution to appeal against this order of the first respondent.

From the detailed narration of the facts regarding this particular assessment it is quite clear that the first respondent did not exercise his own judgment in the matter of the assessment in question. Even

though he was convinced to the contrary, he asked for the instructions of the Assistant Commissioner (C.S.) and followed the same and assessed the appellants to sales-tax in respect of the disputed transactions. The order which he ultimately passed on January 15, 1955, further showed that he was merely voicing the opinion of the Assistant Commissioner (C.S.) without any conviction of his own and the only thing he had to say in regard to the various grounds mentioned in the letters dated November 21, 1953, and June 19, 1954, was that they appeared to him to be "not at all satisfactory". This was hardly a satisfactory way of dealing with the matter. If the Assistant Commissioner (C.S.) had been dealing with the same he could have by all means given in the assessment order which he made his reasons for doing so and these reasons would have been open to scrutiny in further proceedings taken by the appellants either by way of appeal or otherwise. The Assistant Commissioner (C.S.) however, had delegated this work of assessment to the first respondent and then it was the duty of the first respondent to make the assessment order giving his own reasons for doing so. The file of the assessee, however, shows that even though the 1st respondent was satisfied on the materials placed by the appellants and their representative before him that the appellants were not liable to pay sales-tax in regard to these transactions, he referred the matter first for instructions and then for obtaining the "valued opinion" of his superior, the Assistant Commissioner (C.S.) and the latter expressed his opinion that the appellants were liable in respect of these transactions. All this was done behind the back of the appellants and the appellants had no opportunity of meeting the point of view which had been adopted by the Assistant Commissioner (C.S.) and the first respondent quietly followed these instructions and advice of the Assistant Commissioner (C.S.)

We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales-tax Department concerned. We would, have, simply on this ground, set aside the assessment order made by the first respondent and remanded the matter back to him for his due consideration in accordance with law; but as the matter is old and a remand would lead to unnecessary harassment of the appellants, we have preferred to deal with the appeal on merits.

The determination of this appeal turns on the construction of the definition of the terms "dealer" and "Turnover" given in section 2 of the Act, the relevant portions of which run as under :

Section 2 :- In this Act, unless there is anything repugnant in the subject or context,

(c) "Dealer" means any person who carries on the business of selling goods in the State of West Bengal and includes the Government.....

Explanation 2 : A factor, a broker, a commission agent, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals is a dealer;

Explanation 3 : The manager or an agent in West Bengal of a dealer who resides outside West Bengal and carries on the business of selling goods in West Bengal shall, in respect of such business, be deemed to be a dealer.....

(i) "Turnover" : used in relation to any period means the aggregate of the sale-prices or parts of sale-prices receivable or if a dealer so elect, actually received by the dealer during such period after deducting the amounts, if any, refunded by the dealer in respect of any goods returned by the purchaser within such period."

It may be noted that under section 4 of the Act every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded the taxable quantum was liable to pay tax under the Act on all sales effected after the date so notified; and under section 5 the tax payable by a dealer under the Act was levied at the rate therein specified on his taxable turnover. Unless, therefore, the sales were effected by the dealer and the sale proceeds received by him such sales could not be included in his taxable turnover and he would not be liable to pay sales-tax thereon.

The position as it obtains in the present case is that even according to the first respondent's own showing in the assessment order the sales in question were made by the Kanpur Woollen Mills, Kanpur, in West Bengal and they were primarily the dealers in regard to such sales. The appellants were however sought to be made liable to sales-tax in respect of these sales by virtue of the expanded definition of the term "dealer" given in Explanation 3 to section 2(c) of the Act. The question, therefore, arises whether the appellants fall within the definition of "dealer" therein mentioned.

Explanation 2 to section 2(c) does not apply for the simple reason that even though the appellants were the commission agents of the Mills they had not in the customary course of business authority to sell goods belonging to the principals. As a matter of fact, Cl. 14 of the Agreement dated June 2, 1952, in terms provided that the selling agents shall under no circumstances whatsoever make or purport to make, or hold themselves out as empowered to make, on behalf of the Mills any contract or contracts for the purchase or supply of any goods manufactured by the Mills. Explanation 3 to section 2(c) was, therefore, relied upon; but that also would not apply to the appellants. The appellants were no doubt agents of the Mills which "resided outside West Bengal" but it could not be said of them that they carried on the business of selling goods in West Bengal. The Mills had neither any office in West Bengal nor had they established any business through the appellants or otherwise of selling the goods in question in West Bengal. The only thing which was done in this connection was that the appellants canvassed orders as commission agents of the Mills in West Bengal and forwarded these orders to the Mills, which accepted them and executed the same. The privity of contract was established between the customers on the one hand and the Mills on the other; but, that also could only be on the acceptance of these orders by the Mills in Kanpur. Even though a number of orders placed in this manner by the appellants with the Mills were accepted by the Mills in Kanpur, it could not be said that the Mills were carrying on business of selling goods in West Bengal. The business was, if at all, one of selling goods in Kanpur and despatching them to West Bengal for the purpose of consumption therein. These transactions were, therefore, not covered by the Explanation 3 to section 2(c) of the Act and the appellants could not in respect of such business be deemed to be a "dealer" within the meaning of that explanation. The position which was adopted by the first respondent, though under the behest of the Assistant Commissioner (C.S.) was therefore untenable.

A more formidable difficulty, however, faces the first respondent and it is that the sale price of the goods thus delivered by the Mills to the respective customers in West Bengal could not be included in the gross turnover of the appellants. The goods in question were directly supplied by the Mills to the customers, whether they were supplied in pursuance of the orders placed by the appellants with

the Mills or were supplied in pursuance of orders directly placed by the customers with them. The invoices were all made out in the names of the customers and the relevant documents were negotiated by the Mills with the customers through the Banks. The customers released those documents from the Banks on payment of the relevant drafts and the sale price of the goods was thus received by the Mills through those Banks. At no time whatever was there any handling of the goods or the receipt of the sale price thereof by the appellants in regard to the goods in question and under those circumstances the sale price thereof could to be included in the gross turnover of the appellants. If that was the true position, the appellants were not liable to sales-tax in respect of the disputed transactions, even though, perchance, they could be included within the expanded definition of "Dealer" in the Explanation 3 to section 2(c) of the Act - a contention which we have already negatived.

It, therefore, follows that in regard to the disputed transactions which were of the total value of Rs. 6,21,369-10-3, the appellants were not at all liable to pay sales tax thereupon and the first respondent was clearly in error in assessing the same to sales-tax.

The appeal will accordingly be allowed and the assessment order made by the first respondent on January 15, 1955, will be set aside. The sales-tax of Rs. 27,816 assessed by the first respondent on the appellants, if paid, will be refunded and the appellants will get from the first respondent the costs of this appeal as also the costs incurred by them in contesting the proceedings before the first respondent.

Appeal allowed.

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