K. G. Khosla & Co.

Vs

Deputy Commissioner of Commercial Taxes

Civil Appeal No. 143 and 144 of 1965

(J. C. Shah, S. M. Sikri, V. Ramaswami I JJ)

18.01.1968

JUDGMENT

SIKRI, J. -

These two appeals by special leave are directed against the judgment of the Madras High Court in Tax Cases Nos. 100, 219, 220 and 225 of 1962, and involve the interpretation of s. 5(2) of the Central Sales Tax Act (64 of 1956) - hereinafter referred to as the Act. The relevant facts are these. The appellant K. G. Khosla and Co., hereinafter referred to as the assessee entered into a contract with the Director-General of Supplies and Disposal, New Delhi, for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium, and the D.G.I.S.D., London, or his representative, was to inspect the goods at the works of the manufacturers. He was to issue an inspection certificate. Another inspection by the Deputy Director of Inspections, Ministry of W.H. & S., Madras, was provided for in the contract. It was his duty to issue inspection notes on Form No. WSB. 65 on receipt of the copy of the Inspection Certificate from the D.G.I.S.D. London and after verification and visual inspection. The goods were to be manufactured according to specifications by M/s La Brugeoies. ET. Nivelles, Belgium.

The assessee was entitled to be paid 90% after inspection and delivery of the stores to the consignee and the balance of 10% was payable on final acceptance by the consignee. In the case of deliveries on F. O. R. basis, the assessee was entitled to 90% payment after inspection on proof of dispatch and balance 10% after receipt of stores by the consignees in good condition. The date of delivery was "in 8 months ex-your principal's works from the date of receipt of order and the approved working drawings, i.e. delivery in India by 31-7-1957, or earlier." The assessee was entirely responsible for the execution of the contract. Clause 17(1) of the Contract provides :

> "The Contractor is entirely responsible for the execution of" the contract in all respects in accordance with the terms and conditions as specified in the A/T and the schedule annexed thereto. Any approval which the Inspector may have given in respect of the stores, materials or other particulars and the work or workmanship involved in the contract (whether with or without test carried out by the contractor's Inspector) shall not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector, it shall be lawful for the consignee of the stores on behalf of the Purchaser to reject the stores on arrival at the destination, if it is found that the stores supplied by the contractor are not in conformity with the terms and conditions of the Contract in all respects."

Further, the assessee was responsible for the safe arrival of the goods at the destination. By an

endorsement the D.G.I.S.D., London, was requested to issue pre-inspection delay reports regularly to all concerned, including the Railway Liaison Officer, C/o D.G.S. & D. Shahjahan Road, New Delhi. He was also requested to endorse copies of Inspection Certificates to the Director of Inspection, Ministry of W.H. & S. Bombay. It is further found by the Sales Tax Appellate Tribunal that "the Belgian manufacturers, after manufacture, consigned the goods to the appellants by ship under bills of lading in which the consignee was the appellants themselves. The goods were consigned to Madras Harbour, cleared by the appellant's own clearing agents and despatched for delivery to the buyers thereafter."

In pursuance of this contract, the assessee supplied axle-box bodies of the value of Rs. 1,74,029.50 to Southern Railway at Perambur Works and of the value of Rs. 1,32,987.75 to Southern Railway, Mysore. The Joint Commercial Tax Officer held that the former sales were liable to tax under the Madras General Sales Tax Act and the latter under the Central Sales Tax Act. He rejected the contention of the assessee that the sales were in the course of import. He held that "there was no privity of contract between the foreign seller and Government for the goods. The goods were shipped only as the goods of the seller and intended for them. They were cleared as their own and delivered after clearance. The transaction is therefore one of intra-state sales and not one in the course of import. The sale is completed only when the goods are delivered in this state and so it is not occasioning the import. It is also seen from the contract of sale that the terms of delivery are F.O.R. Madras. Again Cl.(1) of the contract says that any approval where the Inspector may have given in respect of stores materials or other particulars and the work or workmanship involved in the contract shall not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector it shall be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at the destination. It will be seen from the words underlined by me that the purchaser has reserved the right to reject the goods even though an inspection of the goods might have been made. So there is no force in the argument of the dealer that the goods were appropriated to the contract of sale."

The assessee filed two appeals but the Appellate Assistant Commissioner, agreeing with the Joint Commercial Tax Officer, rejected the appeals. The Appellate Tribunal on appeal held that the property in the goods had not passed on to the buyers even while the goods were with the Belgian manufacturers and the sale by the appellants had not occasioned the imports. The Tribunal, however, accepted the contention of the assessee that sales to the extent of Rs. 22,983.75 and Rs. 10,987.50 had taken place in the course of import as the goods had been appropriated to the contract while the goods were on the high seas.

The assessee then filed two revisions before the High Court and the Deputy Commissioner of Commercial Taxes, Madras, filed two revisions challenging the deductions of the two sums of Rs. 22,983.75 and Rs. 10,987.50. The High Court allowed the petitions filed by the State and dismissed the petitions filed by the assessee. It rejected the contention of the assessee that property in the goods must be deemed to have passed at the stage when the goods were approved by the representative in the factory of the manufacturers at Belgium. The High Court further rejected the contention of the assessee that the sale by the assessee to the Government Department had occasioned the import on the ground that "before a sale can be said to have occasioned the import, it is necessary that the sale should have preceded the import", and as the sale had not taken place at Belgium there was no question of the sale occasioning the import of the goods.

Before we deal with the merits of the appeals, we must dispose of two preliminary objections raised by Mr. Ranganadham Chetty, on behalf of the respondents. Basing himself on Management of

Hindusthan Commercial Bank Ltd. v. Bhagwan Dass ((1965) 2 S.C.R. 265.) he urged that the assessee should have filed an application for leave to appeal before the High Court before applying for special leave. We see no force in this objection. It is common ground that the Madras High Court had at the relevant time consistently taken the view that no application for leave to appeal to Supreme Court lay before the High Court in matters involving revenue. In these circumstances we dispense with the requirement of Order XIII, r. 2 of the Supreme Court Rules, and overrule the objection. The second preliminary objection raised by him was that the assessee should have filed four appeals and not two appeals because there were four revision petitions before the High Court. We see no force in this objection also. Two revisions were filed by the assessee and two by the State in respect of two assessment orders and they were disposed of by one common judgment. The subject matter of the four revisions were two assessments, one under the Madras General Sales Tax Act and the other under the Central Sales Tax Act. In our opinion, the assessee was quite right in filing two appeals before this Court.

The learned counsel for the assessee Mr. Ved Vyasa, raised two points before us : First that the sales were in the course of import within the meaning of s. 5(2) of the Act; and secondly that the property in the goods passed in Belgium and consequently the sales were outside the State within the meaning of art. 286(1)(a) of the Constitution. As we are of the opinion that the assessee must succeed on the first point it will not be necessary to deal with the second point.

Section 5(2) of the Central Sales Tax Act provides :

> "5(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

Section 3 of the Act, which deals with inter-state trade and commerce may also be set out as it employs the same terminology and has been interpreted by this Court. S. 3 reads :

> "A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase -
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> (a) occasions the movement of goods from one State to another; or
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> (b) is effected by a transfer of documents to title to the goods during their movement from one State to another."

It is not necessary to set out the two Explanations to s. 3.

It seems to us that the expression "occasions the movement of goods" occurring in s. 3(a) and s. 5(2) must have the same meaning. In Tata Iron and Steel Co. Ltd. Bombay v. S. R. Sarkar, ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) Shah, J. speaking for the majority, interpreted s. 3 as follows :

> "In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto : clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

These observations of Shah, J., were cited with approval by this Court in The Cement Marketing Co. of India v. The State of Mysore ((1963) 3 S.C.R. 777 : 14 S.T.C. 175.). This case, it is true, was not dealing with the Central Sales Tax Act, but the Court was dealing with a similar question arising under art. 286 of the Constitution, before its amendment. But the same Bench, in dealing with a case arising under the Act (The State Trading Corporation of India v. The State of Mysore ((1963) 3 S.C.R. 792 :14 S.C.T. 188.) again approved of the observations in Tata Iron and Steel Co. case ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.). Sarkar, J., observed thus :

> "The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition ? In Tata Iron and Steel Co., Ltd. v. S. R. Sarkar ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) it was held that a sale occasions the movement of goods from one State to another within section 3(a) of the Central Sales Tax Act, when the movement "is the result of a covenant or incident of the contract of sale." That the cement concerned in the disputed sales was actually moved from another State into Mysore is not denied. The respondents only contend that the moment was not the result of a covenant in or an incident of the contract of sale."

This Court then, on the facts of the case, found that the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or incident of such contract. This Court did not go into the question as to whether the property had passed before the movement of the goods or not, and this was because according to the decision in Tata Iron and Steel Co. v. S. R. Sarkar ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) it did not matter whether the property passed in one State or the other. Tata Iron & Steel Co. ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) case was again followed by this Court in Singareni Collieries Co. v. Commissioner of Commercial Taxes, Hyderabad ((1966) 2 S.C.R. 190.).

The learned counsel for the respondent, Mr. A. Ranganadham Chetty, invited us to hold that the observations of Shah, J., in Tata Iron and Steel Co. ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) case were obiter, and to consider the question afresh. We are unable to reopen the question at this stage. Shah, J., was interpreting s. 3 of the Act, and although the Court was principally concerned with interpretation of s. 3(b), it was necessary to consider the interpretation of s. 3(a) in order to arrive at the correct interpretation of s. 3(b). Further these observations were approved in The Cement Marketing Co. of India v. The State of Mysore ((1963) 3 S.C.R. 777 : 14S.T.C. 175.), The State Trading Corporation of India, v. The State of Mysore ((1963) 3 S.C.R. 792 : 14 S.T.C. 188.) and Singareni Collieries Co. v. Commissioner of Commercial Tax, Hyderabad. ((1966) 2 S.C.R. 792 : 14 S.T.C. 188.). In the State Trading Corporation ((1963) 3 S.C.R. 792 : 14 S.T.C. 188.) case, in so far as the assessment for the assessment year 1957-58 was concerned, this Court applied the principles laid down in Tata Iron and Steel Co. ((1961) 1 S.C.R. 379 : 11 S.T.C. 655.) case. Accordingly we hold that the High Court was wrong in holding that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import.

The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of covenant in the contract of sale or an incident of such contract. It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director- General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the

sales took place in the course of import of goods within s. 5(2) of the Act, and are, therefore, exempt from taxation.

In the result the appeals are allowed, the judgment of the High Court reversed and the assessment orders quashed. The appellant will have his costs here and in the High Court. One set of hearing fee.

Appeals allowed.

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