State of Tamil Nadu

Vs

M/S. Burmah Shell Oil Storage and Distributing Co. Of India Ltd. and Another

Civil Appeals Nos. 2119 And 2120 Of 1969

(K. S. Hegde, P. Jagmohan Reddy, H. R. Khanna JJ)

10.10.1972

JUDGMENT

JAGANMOHAN REDDY, J. -

1. These are two appeals by special leave against the judgment of the Madras High Court. In Appeal No. 2119/69 the chargeability to sales tax under the Madras General Sales Tax Act, 1959 (hereinafter called the 'Act') as amended by Acts of 1961 and 1964 in respect of (1) advertisement materials, (2) canteen sales (3) sales of scrap and (4) penalty have to be considered, while in Appeal No. 2120/1969 only the sales tax levied in respect of sale of scrap and penalty has been challenged. The respondent are oil companies and it appears in the first of the appeals the respondent under the Factories Act had to supply tea and edibles to its workmen for the canteen established by it. It also supplies to its agents at cost price or less than the cost price advertisement materials such as calendars, purses and key-chains. Both the respondents also sell as scrap periodically unserviceable oil drums, rubber hoses, jerry cans, rims, unserviceable pipe fittings and old furniture. The amount of turnover in respect of each of the items in the respective appeals is not relevant, but what is relevant is that in both the appeals the year 1964-65 for which assessment is made on the turnover of sales is divided into two parts (i) April 1 to August 31, 1964 and (ii) September 1, 1964, to March 31, 1965 the first part being governed by the 1959 Act while the second part is chargeable under the Act after its amendment in 1964. The definition of business, casual trader and dealer before and after the amendment is different and the question is, whether under the amended definition of the said terms on and after 1964 Act attracts sales tax on the above transactions. In the High Court it was contended that the Tribunal was wrong in holding that sales of publicity materials were chargeable to sales tax on the ground that (a) there was no sale at all by the assessee in the true sense and (b) even if there was, it was not as a dealer. The High Court dealt with the latter aspect holding that the object of the respondent is not shown to be to engage itself in trade or commerce of publicity materials, and though it may be that the distribution of the publicity materials to the distributors is connected with the business of the assessee that will not be sufficient to make it a trade or an activity in a commercial sense. In this view it held that it was not a dealer not is it its business carried on as a dealer. The High Court also held that the sale of scrap and canteen sales were not liable to tax following its earlier judgment in Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore v. Sri Thirumagal Mills Limited. (20 STC 287).

2. It may be mentioned that in the original Act viz. The Madras Sales Tax Act, 1939, 'dealer' was defined as meaning any person who carried on the business of buying and selling goods. In that Act there was no definition of a casual dealer nor of business. The 1959 Act defined these terms for the first time and by the Amending Act of 1964 the definition of business was substituted so as to do away with motive for making profit or the making of profit as elements in determining what

constitutes a business. Even the definition of casual trader in the 1959 Act was substituted by the Amending Act in 1961. These definitions are given below one against the other for facility of comparison :

1959 Act After the 1961 and 1964 Amendment Act Section 2(d). - "Business" Section 2(d). - "Business" includes - includes - (i) any trade, commerce or (i) any trade, commerce or manufacture or any manufacture or any adventure or concern adventure or concern in the nature of trade, in the nature of trade, commerce or manufacture, commerce or manufacture whether or not any whether or not such trade, profit accrues from commerce, manufacture, such trade, commerce, adventure or concern is manufactures, adventure carried on with a motive or concern. to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern, and (ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;(e) "Casual trader" means a (e) "Casual trader" means a person who has, whether person who has, whether as principal, agent, or in as principal, agent, or any other capacity, any other capacity occasional occasional transactions of a transactions of a business nature involving business nature involving cash, or for deferred the buying, selling, payment, or for supply or distribution of commission, remuneration goods in the State, or other valuable whether for cash, or for consideration; deferred payment or for commission, remuneration or other valuable consideration, and who does not reside or has no fixed place of business within the State; X X X X X X(g) "dealer" means any (g) "dealer" means any person person who carries who carries on the on the business of business of buying, selling, buying, selling, supplying or distributing supplying or goods, directly or distributing goods, - otherwise, whether for cash, directly or otherwise, or for deferred payment, or whether for cash, or for for commission, deferred payment, or for remuneration or other valuable commission, remuneration consideration, and or other valuable includes consideration, and includes (i) X X (i) X X (ii) a casual trader; (ii) a casual trader;##

3. At the outset the learned advocate for the appellant did not press the contention in respect of the penalty having regard to the decision of this Court in State of Madras v. Jayaraj Nadar & Sons. ([1972] 3 SCC 300 : 28 STC 700). In so far as the business turnover for the first part of the assessable year 1964-65 is concerned it is not denied that the Act of 1959 prior to its amendment in 1964 is applicable. The contention that the 1964 amendment has retrospective operation was negatived in State of Tamil Nadu v. Thirumagal Mills Ltd., ([1972] 1 SCC 176 : 29 STC 290) but before this judgment was rendered the Sales Tax Tribunal had held that the part of the assessment is also covered by the 1964 amendment. But the learned advocate for the appellant nonetheless submits that even under the 1959 Act before its amendment to transaction which are incidental or ancillary to trade or commerce whether or not profit has been made, are liable to tax. This contention was clearly negatived in State of Gujarat v. Raipur Manufacturing Co. Ltd. ([1967] 1 SCR 618 : 19 STC 1 : AIR 1967 SC 1066). In this case which was under the Bombay Sales Tax Act, 1953 where the definition of a dealer under Section 2(6) is in pari materia with Section 2(3), the disposal by a company carrying on the business of manufacturing and selling cotton textiles of its miscellaneous old and discarded items such as cans, boxes, cotton ropes, rags etc., was held by this Court not to be carrying on the business of selling these items of goods. It further stated that from the fact that the sales of these items were frequent and their volume was large it cannot be presumed that when the goods were acquired there was an intention to carry on the business in those discarded materials, nor are the discarded goods, byproducts or subsidiary products of or arising in

the course of manufacturing process. Shah, J., who spoke for the Court observed at pages 7-8 :

> "But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly from the frequency, volume, continuity and regularity of transactions carried on with a profit-motive, an inference that it was intended to carry on business in the commodity may arise. But it does not arise merely because the price received by sale of discarded goods enters the accounts of the trader and may on an overall view enhance his total profit, or indirectly reduce the costs of production of goods in the business of selling in which he is engaged. An attempt to realize price by sale of surplus unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to inference that business is intended to be carried on in selling those goods."

4. The contention on behalf of the State in respect of the first part of the turnover for 1964-65 therefore fails.

5. With respect to the second part of the turnover, the question whether the amendments in 1964 to the definition of "business" and "casual trader" are directly applicable has to be considered. It will be observed that under the definition of "business" even commercial transactions carried on without a motive to make gain or profit, or whether or not any profit accrues from such activity are included in that definition. The amended sub-clause (ii) also includes with that definition transaction in connection with or incidental or ancillary to such trade, manufacture or adventure or concern. The question is, whether the word "such" in sub-clause (ii) of clause (d) of Section 2 refers to the trade, etc., defined in sub-clause (i). It was contended before the Madras High Court that it is not so and that incidental or ancillary activity must partake the nature of business in its generic sense. In Dy. Commr. of Commercial Taxes v. Thirumagal Mills Ltd. (supra), a Bench is that Court had held that notwithstanding the amendment the presence or absence of profit will not make any difference. According to it what has to be considered is that the activity should be of a commercial character and in the course of trade or commerce and accordingly the definition of 'business' in the second clause was still one invested with commercial character inasmuch as the reference was to "any transaction in connection with or incidental or ancillary to any trade, commerce, manufacture, adventure or concern". It was observed that unless the transaction is connected with trade that is to say, it has something to do with trade or has the incidence or elements of trade or commerce it will not come within the definition. The Court observed :

> "The words 'in connection with or incidental or ancillary to' in the second part of the definition of 'business' in our opinion, still preserve or retain the requisite that the transaction should be in the course of business understood in a commercial sense. The intention of Madras Act 15 of 1964 does not appear to be to bring into the tax net a transaction of sale or purchase which is not of a commercial character."

In this view it held that the fair price shop which the assessee, a spinning mill manufacturing cotton yarn, had opened to make available to its workmen sale of commodities at fair prices could not be said to be carrying on the business of selling commodities in the fair price shop in a trade or commercial sense even if profit accrued to it and it was therefore with reference to the fair price shop, not a dealer within the meaning of the Act. This decision does not take note of words "such" in the second sub-clause which in our view imports by reference the definition in sub-clause (i) into

that of sub-clause (ii). A similar question came up for consideration before the Andhra Pradesh High Court on the analogous provisions of the Andhra Pradesh General Sales Tax Act in Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh. (30 STC 26). In that case the assessee-company maintained a canteen for the use of workers in compliance with the provisions of the Factories Act, 1948 and the rules made thereunder. The question was, whether the turnover relating to the supplies of food and drink to the workers at the canteen could be charged to sales tax under the Andhra Pradesh General Sales Tax Act, 1957. The assessee contended that it was compelled by statute to provide and maintain a canteen for use of workers, that the canteen was not run with a profit motive, as such it could not be said that there were any sales when food and drink were supplied to the workers at the canteen and that even if profit motive was not an ingredient of 'business' it must be established that the assessee intended to do business in food and drink before it could be subjected to the levy of sales tax. The court held that in view of the definition of "business" as amended by the Amendment Act of 1966, proof of profit motive is unnecessary to constitute business and that the transaction of supply of food and drink to the workmen in the canteen maintained by the assessee, in pursuance of the Factories Act and the Rules, were sales and constituted business for the purpose of the Act. Dealing with the case of Dy. Commissioner of Commercial Taxes v. Thirumagal Mills Limited (supra), the learned Judges said that they were unable to agree with that case as the Madras High Court had not paid sufficient attention to the word "such" occurring in the second part of the definition which according to them obviously referred to the "trade, commerce, manufacture, adventure or concern" mentioned in the first part of the definition, that it to say, "trade, commerce, manufacture, adventure or concern" of which a motive to make gain or profit is not an essential requisite, nor was it permissible to hold that there was no "business" in the commercial sense of 'business' with a motive to make profit, when such motive has been expressly declared unnecessary by the Legislature. In their view under both parts of the definition profit-motive is now immaterial and the concept of business in respect of matters falling under Section 2(d)(ii) in the commercial sense put forward and accepted in the earlier cases must be abandoned. We think the view adopted by the Andhra Pradesh High Court is in a consonance with our own reading of the section which we have indicated earlier.

6. The learned advocate for the respondent in the second of the appeals contended that the very two learned Judges of the Andhra Pradesh High Court had earlier rendered a decision in A.P. State Road Transport Corpn. v. Commercial Tax Officer, (27 STC 42) which is in conflict with the Hyderabad Asbestos Cement Products Ltd. case (supra) and in the latter case the former case was neither referred to nor distinguished by them. We think that this comment is the result of an insufficient appreciation of what was decided in the former case because therein the assessee was not a dealer and consequently a seller of scrapped vehicles and other scrap was not liable to be assessed. It was pointed out at the very outset that in view of the pronouncements of the Supreme Court, the A.P. State Road Transport Corporation which is primarily constituted to provide an efficient, adequate, economical and properly co-ordinate system of road transport service could not be held to be a dealer carrying on the business in old and scrapped vehicles and other scrap and it could not be assessed to sales tax. The Commercial Tax Officer was not, therefore, right in holding that the assessee-corporation was a dealer. The chargeable section, viz., Section 3 makes every dealer liable to pay tax in respect of the turnover for the year and consequently the assessee not being a dealer cannot be assessed to tax under the Act. The sale of scrap in these appeals which as we have said earlier, consisted of spoiled drums, hose pipes, etc., were all held to be connected with the business of the company. This finding is a finding of fact but even otherwise the very nature of the particular scrap prima facie would indicate that they are connected with the business of the company. The assessee being an oil company has to use oil drums, hose pipes, jerry cans, etc., as part of its trading

activity and any sale of these unserviceable goods as scrap is a transaction connected with its trade or commerce. It is contended by the respondent that in State of Gujarat v. Raipur Manufacturing Co. (supra), this Court had observed at p. 9 that the miscellaneous, old and discarded items such as stores, machinery, iron scrap, cans, boxes, cotton ropes, rags etc., were held to be not part of or incidental to the main business of selling textiles. This contention in our view does not taken into account the context in which that finding had been given. In that case, as already pointed out, what was held under the analogous Bombay Sales Tax Act which was similar to that under the Madras Sales Tax Act prior to its amendment in 1964, the sale of scrap does not necessarily lead to an inference that business which was an element in determining the liability of the dealer for the turnover in such goods was intended to be carried in those goods. This Court had observed, it cannot be presumed, that when the goods were acquired there was an intention to carry on business in those discarded material nor are the discarded goods by-products or subsidiary products or are produced in the course of manufacturing process; that they are either fixed assets of the company or are goods which are incidental to the acquisition or use of stores or commodities consumed in the factory and that when these go into the profit and loss account of the business and may indirectly be said to reduce the cost of production of the principal item, the disposal of those goods on the account cannot be said to be part of or incidental to the main business of selling textiles. As the scrap in that case was not held to be incidental to the acquisition or use of stores or commodities consumed in the factory, the turnover was not included but in the case of caustic liquor which is regularly and continuously accumulated in the tanks in the process of mercirisation of cloth, this Court held that that being a waste material it has still a market amongst other manufacturers or launderers as by-products or subsidiary products in the course of manufacture, and the sale thereof is incidental to the business of the company.

7. In the view we hold the scrap sold is certainly connected with the business of the company and the turnover in respect of this commodity is liable to tax. It cannot also be said that the turnover in respect of the sale of the assessee's advertisement material at cost price or less than cost price is not connected with the business of the assessee. Calendars, wallets and key-chains are all given by the dealers to its customers for purpose of maintaining and increasing the sales of the products of the assessee and is therefore connected with the business. What the assessee is doing is to facilitate the dealers to acquire at their cost such advertising materials of a uniform type approved by the assessee-company which instead of allowing each of them to have these separately printed or manufactured, itself undertook to do so and supplied them to its dealers. The supply of such material is in our view being connected with the business liable to be included in the turnover of the assessee.

8. It is pointed out by the learned advocate for the respondent in the first of the appeals that under G.O. 2238, dated September 1, 1964 the canteen sales are exempt and notwithstanding the fact that the assessee in that appeal has complied with the terms and conditions of that G.O. the canteen sales have not been excluded. The G.O. to which reference is made is in the following terms :

"III No. 336 of 1964. - In exercise of the powers conferred by Section 17 of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959), the Governor of Madras hereby exempts, with effect on and from September 1, 1964, the tax payable under the said Act, on the sales by all canteens run by an employer or by the employees on co-operative basis on behalf of the employer, under a statutory obligation without profit motive, provided that the employer subsidises at least twenty-five per cent. of the total expenses incurred in running the canteen."

Under this G.O. what has to be established is that the assessee has subsidised at least 25% of the

total expenses in running the canteen. The Sales Tax Officer disallowed this amount because the assessee had not produced the accounts. In the memorandum of appeal to the Appellate Assistant Commissioner the assessee characterised this statement as unfair as the Commercial Tax Officer was invited to state what other records he required but he did not raise this point during the checking of the accounts. In support of this grievance a letter of the assessee's advocate to the officer was referred. In that letter it was stated that out of the turnover of Rs. 35,974.96 in respect of the canteen sales, the assessee had supplied free tea to the staff of the value of Rs. 13,740.37. It was further mentioned in that letter that the assessee bears the expenses towards salaries and amenities provided for the employees in the canteen as also the electric charges and corporation taxes. It also provides free of charge all equipment including furniture and fittings and a rent-free building for this canteen. It therefore prayed that the turnover be exempted under the aforesaid G.O. Neither the Appellate Assistant Commissioner nor the Sales Tax Tribunal considered this aspect nor did the assessee pray of producing any evidence before them. We think as the assessee had sufficiently brought to the notice of the Sales Tax Officer its claim and was willing to produce amounts it should be permitted to do so. The Sales Tax Tribunal will give an opportunity to the assessee to produce evidence to show under the terms of G.O. 2238 it is entitled to exemption from the turnover in respect of the canteen sales.

9. In the result both the appeals are dismissed in respect of levy of penalty. They are partly allowed so far as they are related to scrap in respect of the second period, September 1, 1964 to March 31, 1965 and dismissed in respect of the 1st period, April 1, 1964 to August 31, 1964. Insofar as appeal 2119 of 1969 is concerned it is also partly allowed in respect of the advertisement materials for the period, September 1, 1964 to March 31, 1965 and dismissed in respect of the 1st period, April 1, 1964 to August 31, 1964 and with respect to canteen sales the appeal dismissed in respect of the 1st period, April 1, 1964 to August 31, 1964 and allowed in respect of the second period, September 1, 1964 to March 31, 1965 and the matter remanded with the directions given above. There will be no order as to costs in both these appeals.

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