Sinclaire Murray & Co. (P) Ltd.

Vs

The Commissioner of Income Tax, Calcutta

Civil Appeal No. 1357 of 1970

(A . C. Gupta, H. R. Khanna JJ)

06.11.1974

JUDGMENT

KHANNA, J. -

1. This appeal on certificate is directed against the judgment of the Calcutta High Court whereby that Court answered the following question referred to it under Section 66(1) of the Indian Income-tax Act, 1922 against the assessee-appellant and in favour of the Revenue :

Whether, on the facts and in the circumstances of the case, the sum of Rs. 7,14,398 was liable to be included in the total income of the assessee under the Indian Income-tax Act, 1922 ?

2. The matter relates to the assessment year 1953-54, the corresponding accounting period for which ended on June 30, 1952. The assessee is a limited company with its head office at Calcutta. One of its activities was the purchase and sale of jute in the State of Orissa and for this purpose the assessee was a registered dealer under the Orissa Sales Tax Act, 1947. During the accounting year the assessee sold jute to M/s. McLeod & Co. Ltd. for being used in two jute mills situated in Andhra Pradesh under the management of the purchaser company. The assessee used to charge from the purchaser sales tax on the purchase of goods at the rate of one anna per rupee of the value of the goods. The sales tax was charged under a separate head in the bill. The words used in the bill in this respect were "Sales tax buyers' account . . . . . . at the rate of -/1/- per rupee to be paid to Orissa Government". The total amount shown as "Liabilities for expenses" in the balance sheet as on June 30, 1952 included a sum of Rs. 16,54,455 on account of sales tax. The said sum was, however, not paid to the State Government as the sale by the assessee to the purchaser company was stated to be inter-State sale. The assessee contended before the Income-tax Officer that the sales tax realised from the purchaser did not form part of the sale price of the jute and as such did not constitute receipt in jute business. This contention was rejected by the Income-tax Officer who held that the sales tax formed a part of the consideration for the sales and, therefore, the accumulation on that account represented the assessee's income. The Income-tax Officer accordingly added the aforesaid sum of Rs. 16,54,455 to the assessee's total income.

3. On appeal by the assessee the Appellate Assistant Commissioner found that the actual amount received as sales tax during the relevant period amounted to only Rs. 7,41,962, out of which Rs. 27,564 had been paid to the Orissa Government. He, therefore, held that the amount which was to be added to the assessee's total income was Rs. 7,14,398. The contention of the assessee that the sales tax realised was not part of the taxable receipt of the assessee was rejected.

4. The assessee preferred second appeal before the Tribunal and submitted that the purchaser paid

the sales tax and the price of goods to the assessee on the understanding that if ultimately no sales tax was exigible on those sales, the amount collected as sales tax would be refunded to the purchaser. The amount collected as sales tax, according to the assessee-company, could not belong to it but belonged to the purchaser and as such could not be treated as income of the assessee. The Tribunal held that where a dealer collects sales tax under the provisions of Section 9B of the Orissa Sales Tax Act, the amount of the tax does not form part of the sale price and the dealer does not acquire any beneficial interest in that amount. According to the Tribunal, if at the time of the collection the amount was collected as sales tax the subsequent failure of the assessee to deposit the amount in the Orissa Treasury could not transform the character of that amount. The Tribunal consequently came to the conclusion that the Appellate Assistant Commissioner had erred in treating Rs. 7,14,398 as part of the total income of the assessee.

5. On the application of the Commissioner of Income-tax the Tribunal referred the question reproduced above to the High Court.

6. The High Court held that if tax, which is validly exigible, is realised by a trader from his customer, and is then utilised in his business, the tax so realised cannot but form part of the sales price. According to the High Court, the tax would be included in the trading receipt of the dealer and would become part of his income as they money realised from the purchaser on account of tax was employed by the dealer for the purpose of making profit and was not separated from price simpliciter. The High Court in this context referred to the fact that the assessee did not earmark the amount realised as sales tax and did not put it in a different account or deposit it with the Government. It was further found that the assessee had treated the amount of sales tax as his own money. Reference was made in the High Court to sub-section (3) of Section 9B of the Orissa Sales Tax Act which reads as under :

> (3) The amount realised by any person as tax, on sale of any goods, shall, notwithstanding anything contained in any other provision of this Act, be deposited by him in a Government treasury within such period as may be prescribed, if the amount so realised exceeds the amount payable as tax in respect of that sale or if no tax is payable in respect thereof.

The High Court in the above context observed :

There is no finding that the trader did not use that money for his trading purpose, and because of the fact that money was not deposited in terms of Section 9B(3). In such circumstances simply because the trader had a duty to refund, we cannot say it would not constitute trading receipt. If a trader received money as trading receipt and employs that money as his own fund and is then called upon to refund the money, even then it is trading receipt of the trader but when he pays back that money the amount refunded may be considered for deduction at the time when it is refunded.

7. In appeal before us Mr. Pal on behalf of the assessee-appellant has contended that the amount received as sales tax retained its character as such and could not be considered to be a part of trading receipt. As against the above, Mr. Sen on behalf of the Revenue submits that the amount in question constituted trading receipt. According to Mr. Sen, the matter is concluded by a decision of this Court in the case of Chowringhee Sales Bureau P. Ltd. v. C. I. T. ((1973) 87 ITR 542 : (1973) 1 SCC 46 : 1973 SCC (Tax) 163) The submission of Mr. Sen, in our opinion, is well-founded.

8. In the case of Chowringhee Sales Bureau P. Ltd. (supra) the appellant company was a dealer in

furniture and also acted as an auctioneer. In respect of sales effected by the appellant as auctioneer, it realised during the year in question in addition to the commission, Rs. 32,986 as sales tax. This amount was credited separately in its account books under the head "sales tax collection account". The appellant did not pay the amount of sales tax to the actual owner of the goods nor did it deposit the amount realised by it as sales tax in the State exchequer because it took the position that statutory provision creating that liability upon it was not valid. The appellant also did not refund the amount to persons from whom it had been collected. In the cash memos issued by the appellant to the purchasers in the auction sales the appellant was shown as the seller. This Court held that the sum of Rs. 32,986 realised as sales tax by the appellant company in its character as an auctioneer formed part of the trading or business receipts. The fact that the appellant credited the amount received as sales tax under the head "sales tax collection account" did not make any material difference. According to this Court, it is the true nature and quality of the receipt and not the head under which it is entered in the account books as would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt. The Court further observed that the appellant company would be entitled to claim deduction of the amount as and when it paid it to the State Government.

9. The above decision, in our opinion, fully applies to this case and in view of it, there is no escape from the conclusion that the amount of Rs. 7,14,398 should be treated as trading receipt.

10. Dr. Pal has tried to distinguish the decision of this Court in the case of Chowringhee Sales Bureau P. Ltd. (supra) on the ground that there was no provision in the Bengal Finance (Sales Tax) Act, 1941 under which the sales tax was realised by the appellant in that case corresponding to sub-section (3) of Section 9B of the Orissa Sales Tax Act, 1947. This circumstance, in our opinion, hardly constitutes a sufficient ground for not applying the dictum laid down in the case of Chowringhee Sales Bureau P. Ltd. to the present case. The provisions of sub-section (3) of Section 9B of the Orissa Sales Tax Act have already been reproduced above. It is not necessary for the purpose of the present case to express an opinion on the point as to whether in view of the decisions of this Court in the cases of R. Abdul Quader & Co. v. S. T. O. ((1964) 15 STC 403 : (1964) 6 SCR 867 : AIR 1964 SC 922), Ashoka Marketing Ltd. v. State of Bihar ((1970) 26 STC 254 : (1970) 1 SCC 354 : (1970) 3 SCR 455) and State of U. P. v. Annapurna Biscuit Manufacturing Co. ((1973) 32 STC 1 : (1974) 3 SCC 121 : 1973 SCC (Tax) 463) the State legislature was competent to enact that provision and whether the same was constitutionally valid. Assuming that the said provision is valid, that fact would not prevent the applicability of the dictum laid down in Chowringhee Sales Bureau P. Ltd. The aforesaid decision did take into account the possibility of the appellant in that case being compelled to deposit the amount of sales tax in the State exchequer. It was accordingly observed that the appellant company would be entitled to claim deduction of the amount as and when it paid the amount to the State Government. Likewise, we would like to make it clear in the present case that if and when the appellant pays the sum of Rs. 7,14,398 or any part thereof either to the State Government or to the purchaser, the appellant would be entitled to claim deduction of the sum so paid.

11. Dr. Pal points out that the appellant may have to refund the amount realised by it as sales tax to the purchaser. So far as this aspect is concerned, we have already mentioned above that if and when the appellant refunds any part of the amount of sales tax to the purchaser, the appellant would be entitled to claim deduction on that account.

12. Lastly, reference has been made by Dr. Pal to the case of Morley (H. M. Inspector of Taxes) v.

Messrs. Tattersall (22 TC 51 : 18 CWN 428), and it is submitted that once an amount was received as sales tax by the appellant it could never be treated as trading receipt. We find it difficult to accede to the above submission because the case of Chowringhee Sales Bureau P. Ltd. (supra) is a direct authority for the proposition that an amount even though realised as sales tax can in a case like the present be treated as trading receipt. It would be pertinent in this context to refer to the finding of the High Court that the assessee-appellant in the present case did not separately earmark the amount realised as sales tax, or put it in a different account. The assessee also did not deposit the amount with the Government as and when realised nor did the assessee refund it to the purchaser from whom the amount had been realised. The High Court has further found that the assessee company mixed up the amount of sales tax with its own funds and treated the same as its own money. Nothing cogent has been brought to our notice to justify interference with the above findings.

13. In the case of Messrs. George Oakes (Private) Ltd. v. State of Madras ((1961) 12 STC 476 : (1962) 2 SCR 570 : AIR 1962 SC 1037) the Constitution Bench of this Court held that the Madras General Sales Tax (Definition of Turnover and Validation of Assessments) Act, 1954 was not bad on the ground of legislative incompetence. In that context this Court observed that when the seller passes on the tax and the buyer agrees to pay sales tax in addition to the price, the tax is really part of the entire consideration and the distinction between the two amounts - tax and price - loses all significance. This Court in that case relied upon the following observation of Lawrence, J. in Paprika Ltd. v. Board of Trade ((1944) 1 All ER 372) :

Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does not cease to be the price which the buyer has to pay even if the price is expressed as (+) plus purchase tax.

Reliance was also placed upon the following observation of Goddard, L.J. in Love v. Norman Wright (Builders) Ltd. ((1944) 1 All ER 618) :

Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

After referring to these observations S. K. Das, J. speaking for the Constitution Bench of this Court observed :

We think that these observations are apposite even in the context of the provisions of the Acts we are considering now, and there is nothing in those provisions which would indicate that when the dealer collects any amount by way of tax, that cannot be part of the sale price. So far as the purchaser is concerned, he pays for the goods what the seller demands, viz., price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover.

14. We are, therefore, of the view that the submission which has been made by Dr. Pal that the sales tax should not be treated to be a part of the price realised by the assessee from the purchaser is not well-founded. The case of Tattersall (supra) can be of no help to the appellant because the amount

with which the court was concerned in that case was never received by the assessee as income or trading receipt. In any case, as already observed, the question with which we are concerned stands concluded by the case of Chowringhee Sales Bureau P. Ltd. (supra).

15. As a result of the above, we dismiss the appeal with costs.

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