Government Medical Store Depot, Gauhati

Vs

Superintendent of Taxes Gauhati and Others

Civil Appeal Nos. 1748-1757 of 1973

(V. D. tulzapurkar, Sabyasachi Mukharji Ranganath Misra JJ)

29.08.1985

JUDGMENT

RANGANATH MISRA, J. –

1. The short point raised in these appeals by special leave directed against the judgment of the Gauhati High Court is as to whether the assessee-appellant is liable to be taxed under the Assam Finance (Sales Tax) Act, 1956 ('State Act' for short), and the Central Sales Tax Act, 1956 (Central Act). When assessments were completed under the two Acts in spite of the resistance of the assessee which took the stand that it was not a dealer and therefore was not liable to tax write petitions were filed before the High Court challenging the demands by contending that the appellant was not a dealer and the certificate of registration issued to it without any application on its benefit should be cancelled and the demands should be quashed. The appellant contended that the Central Government in the Ministry of Health, Family, Planning and Urban Development had set up a Medical Store Depot at Gauhati for the purpose of procuring and supplying medical stores to the Government institutions, both Central and State as also the Railway establishments located in Assam, North Eastern Frontier Areas, Nagaland, Manipur, Tripura and other neighbouring places on the payment. The Depot had been set up with a view to facilitating supply of medical stores to the Government institutions and the motive in locating the Depot was to function as a distributing centre for the purpose of supply of medical stores. The appellant contended inter alia before the High Court :

> That your petitioner does not carry on any business in medical stores namely medicine, drugs, surgical instrument and appliances, dressings and hospital equipments but merely supplies the said goods to the institutions mentioned earlier on "no profit - no loss" basis. Your petitioner in recovering the value of the above mentioned medical stores from the institutions mentioned earlier adds 10% of the purchase prices of such medical stores as Departmental charges to meet the administrative costs only.

That the supply of medical stores by the petitioner is neither its avocation nor profession and there is no element or object of profit making in all its dealing with the institutions mentioned earlier. The transactions carried on by the petitioner Depot are not of commercial nature and the Depot functions only as distribution centre with the sole object of insuring the supply pure drugs and medicines at lesser prices than available in the market to the Central and State Government institutions within the state of Assam and other neighbouring places

2. The appellant did not apply for registration in view of its stand but the superintendent of the taxes

got the appellant registered under Section 7(1) of the State Act with the effect from December 1, 1965 and also treated it to be a dealer under the Central Act. Assessments followed under both the Acts overruling appellant's stand whereupon the write petitions as indicated were field.

3. Before the High Court the appellant reiterated its stand that as it was not a deader within the meaning of Section 2(b) of the Act, the action of the taxing authority in compulsorily registering it was bad and the assessment were illegal. Before the High Court appellant procedure a letter written by it to the Superintendent of Taxes dated September 30, 1966, wherein it had been stated :

> The supply price is fixed on the basis of cost of acquisition plus departmental charges consistent with the overheads fixed absolutely on the principles of "no loss - no profit". The formula of rate fixation and the levy of departmental charges are approved by the Government of India who also watch and if required revise such fictions annually to enforce the ruling principles of "no loss - no profit".

It had been consistent stand of the appellant from the very beginning that the transactions were without any motive and on the basis of "no loss - no profit", and therefore unless the respondent found that the transaction had been carried on with a view to making profit it would not continue business and the appellant cannot be held to be a dealer liable to tax under the two Acts. The High Court referred to the definition of dealer in Section 2(b) which requires business of buying or selling of goods to be carried on. Certain decisions of this Court were placed before the High Court in support of the appellants stand that without profit motive the transactions would not continue business even if there was frequency volume, certainty and regularity. This High Court, however held :

> It is difficult to hold that the Government of India in this case is absolutely regardless of the question of possibility of profit rather than loss. The very formula "no profit - no loss" clearly points to earning of some profit and certainly not incurring of loss in the course of the transactions which are organised, systematic and regular. The very fact the Government keeps a watch and if required revises the formula of rate fixation and the levy of departmental charges would also go to show that the Government never intended not to earn minimum of profit in these transactions of sales,

and proceeded to dismiss the writ petitions by saying :

> Be that as it may, for the reasons given by us and in view of the principles of law settled by the Supreme Court, we are clearly of the opinion that the petitioner Depot is a 'dealer' within the meaning of Section 2(b) of the Act and, therefore, the Superintendent of Taxes had jurisdiction to register it and also to pass the impugned order of assessment. We are also clearly of the opinion that the petitioner carrying on the business of selling goods. Both the submissions of the learned for the petitioner, therefore, fail.

4. In State of Gujarat v. Raipur Manufacturing Co. Ltd. ((1967) 19 STC 1 : AIR 1967 SC 1066), this Court held :

> Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale

> in a class of goods and the transactions must ordinarily be entered into with a profit-motive. By the use of the expression "profit-motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity ....

5. In Hindustan Steel Ltd. v. State of Orissa ((1970) 25 STC 211 : (1969) 2 SCC 627 : AIR 1970 SC 253), the same question came up for examination. Hindustan Steel Ltd., the appellant, was procuring cement, bricks and iron materials and was supplying the same from its stores to contractors working under it by recovering the cost price along with a further sum to cover handling expenses. It took the stand before the sales tax authorities that the supplies to contractors on recovery of price together with the extra sum did not constitute business. This Court referred to its earlier decision in the case of State of A. P. v. H. Abdul Bakshi & Bros. ((1964) 15 STC 644 : AIR 1965 SC 531), where it had said :

> The expression 'business' though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit-motive, and not for sport or pleasure,

and held : (SCC p. 633, para 16)

If the Company agreed to charge a fixed percentage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the company did not carry on business of supplying materials as a part of business activity with a view to making profit.

6. In State of T. N. v. Thirumagal Mills Ltd. ((1972) 29 STC 290 : (1972) 1 SCC 176 : AIR 1972 SC 1148), this Court took a similar view with reference to the pre-amended definition of 'dealer' and 'business' under the Tamil Nadu Sales Tax Act.

7. In Joint Director of Foods, Visakhapatnam v. State of A. P. ((1976) 38 STC 329 : (1976) 3 SCC 598 : 1976 SCC (Tax) 373 : AIR 1976 SC 2322), this Court again pointed out : (SCC p. 601, para 7)

> We may hasten to mention that the ordinary concept of business has the element of gain or profit whose absence negatives the character of the activity as business in Section 2(b) of the Central Act. A person becomes a dealer only if he carries on business and the Central Government can be designated as 'dealer' only if there is profit motive.

8. On the basis of these authorities the position is clear that in respect of the pre-amended period when in the definition of the term 'business' profit motive had not been omitted, in the absence of profit motive transactions though satisfying the requirement of volume, frequency, continuity and regularity, would not constitute business so as to make a person carrying on such transactions a dealer.

9. Reliance was placed by counsel for the respondents on two decisions - one of this Court and the other of the Punjab and Haryana High Court. In Deputy Commercial Tax Officer v. Enfield India

Ltd. Co-operative Canteen Ltd. ((1968) 21 STC 317 : AIR 1968 SC 838), the question for consideration was whether a members' cooperative society supplying refreshments was a 'dealer' under the Tamil Nadu Sales Tax Act. In the definition of 'dealer', the explanation specifically brought in a cooperative society and expressly provided that whether or not in the course of business if it supplied goods to its members it became a dealer. Keeping the said definition in view the decision went in favour of the Revenue. That would not be an authority relevant for our present purpose.

10. In Government Medical Store Depot v. State of Haryana ((1977) 39 STC 114) the very appellant was the assessee in respect of its Depot located at Karnal. On the facts placed before the Court, the following conclusion was reached after referring to the judgment of this Court in the case of Joint Director of Foods, Visakhapatnam ((1976) 38 STC 329 : (1976) 3 SCC 598 : 1976 SCC (Tax) 373 : AIR 1976 SC 2322).

> The aforementioned observations apply with full vigour to the instant case and we have no hesitation in holding that the petitioner-depot was a 'dealer' within Section 2(b) of the Central Sales Tax Act and also under Section 2(d) of the Act.

Obviously, this was a decision on the facts available on record and cannot be relied upon for the factual determination of the question in dispute before us.

11. In Raipur Manufacturing Co. case ((1967) 19 STC 1 : AIR 1967 SC 1066) this Court had clearly said :

It may be pointed out that the burden of proving that the Company was carrying on business of selling coal lay upon the sales tax authorities and if they made no investigation and have come to the conclusion merely because of the frequency and the volume of the sales, the inference cannot be sustained.

12. In the instant case, as already shown, the appellant had from the very beginning taken the stand that its transactions were without any profit motive. The burden lay on the Revenue to show that these transactions were carried on with profit motive, whether profit was actually earned or not being of no material importance, and no investigation had been made by the respondent into this aspect when it made the assessments. Nor was the High Court called upon to record such a finding on the basis of any material placed and the respondent remained satisfied by pleading a bare denial to the assertion in the writ petitions supported by the scheme and its terms. Mr. Ahuja for the respondent strenuously pleaded that the matters should go back and the respondents would be given an opportunity of determining the question as to whether the transactions had been carried on with any profit motive. We are concerned with the years 1965-68. About two decades have already rolled by. We may point out that at the instance of Mr. Ahuja we had called upon the appellant to produce its record and appellant's counsel on the subsequent date reported that the records were not available to be produced. In these circumstances, we do not think it proper to remand the matters to give the respondent an opportunity of determining the question of profit motive.

13. The High Court, in our view, on the materials placed before it, went wrong in dismissing the writ petitions. The legal position being settled as indicated by several decisions of this Court, the writ petitions should have been allowed and the assessments should have been quashed. We accordingly allow the appeals, and while reversing the decision of the High Court in respect of the periods specified above, quash the assessments. We make it clear that quashing of these assessments

would not operate as a bar to respondent going into the matter again in respect of any subsequent period in accordance with law and our judgment must be confined to the facts of the case as available on record for the period in question. Parties are directed to bear their respective costs throughout.

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