Alwaye Agencies

Vs

Dy. Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam

Civil Appeal No. 523 (NT) of 1975

(CJI R.S. Pathak, M.H. Kania JJ)

04.05.1988

JUDGMENT

KANIA, J. -

1. This is an appeal against a judgment of a Division Bench of the High Court of Kerala under the provisions of the Kerala General Sales Tax Act, 1963 and Tax Reference Case No. 52 of 1971 filed pursuant to special leave granted by this Court. The appellant before us in M/s. Alwaye Agencies and the respondent is the Dy. Commissioner of Agricultural Income Tax and Sales Tax Ernakulam.

2. The assessee firm was appointed as Distributor by the Travancore Cochin Chemicals Ltd. (referred to hereinafter as the "said company") to effect the sale of sodium hydrosulphite manufactured by the said company in the area covered by the Kerala State under an agreement entered into on February 11, 1967. The dispute pertains to the transactions which took place between September 1, 1967 and December 20, 1968 since it is an undisputed fact that transactions up to the former date are not taxable. It is common ground that the relations between the parties were governed throughout by the said agreement and that the parties adhered to the terms of the said agreement. In view of this it would be desirable to examine that agreement at this stage. As aforesaid, the agreement is dated February 11, 1967. Under the agreement, the assessee firm was appointed as distributor for the aforesaid product manufactured by the company for the area covered by the Kerala State. Clause 2 of the agreement provides that the distributorship was on an exclusive basis giving the distributor the right of sale of the product within the aforementioned area and that supplies would be made only direct to the distributor. Sub-clause (a) of Clause 2 further provides :

However, when on the advice of the distributor bulk supplies are effected in wagon-load or lorry-load lots the company may effect supplies direct to the consumer, provided that the distributor arranges the payment as per the clause hereinafter mentioned and also takes the responsibility to bear entirely the resultant effects and risks from effecting such direct despatches.

3. Sub-clause (b) of the said clause provides that the company reserves the right to effect the sale of sodium hydrosulphite to anybody and anywhere in India direct.

4. Under Clause 4, the price which the distributor would be entitled to charge to the consumer was fixed by the company and it was provided that the distributor will sell the materials to the clients or consumers at the said price plus certain costs incurred by the distributor. Clause 6 provides that the said company would grant the distributor a rebate of 3 per cent on the ex-factory selling price, which the company was entitled to determine as aforesaid. This rebate was liable to be paid to the distributor only at the end of the month when the statement of the account would be settled. Under

Clause 7, the distributor was liable to guarantee, the minimum offtake of the said product. Clause 8 of the agreement provides for mode of payment by the assessee (distributor) to the said company, and very briefly stated, it provides that the assessee would arrange for effecting payment either in cash or by demand draft payable at par, or alternatively, would open an irrevocable letter of credit in favour of the said company negotiable against R/R or other documents of despatch of goods. It is provided that the letter of credit would cover the value of goods as well as charges of transport for booking the goods to destination station, sales tax and other expenses including cost of insurance, if any, effected at the distributor's request. As alternative mode of the payment is provided to the effect that the assessee as distributor must remit 10 per cent of the full value by demand draft and retire the documents of despatch of goods sent to the assessee through bank for collection from the bank. Clause 8 further provides if the documents sent by the said company are not retired within the stipulated time, interest would be payable by the distributor on the amount due at the rate of 12 per cent per annum. The clause also makes it clear that if the second mode of payment is adopted by the assessee, consignments would be insured by the said company against transit risk and the insurance charges would have to be borne by the assessee. It may be noted at this stage that the Tribunal has found as a fact that in respect of the said transactions from September 1, 1967 to December 20, 1968, the invoices were prepared by the said company in the names of the consumers of goods and the goods were consigned to the destinations through public carriers booked "self". The transport bills were endorsed and handed over by the said company to the assessee. From December 20, 1968, goods were consigned to the destination showing the assessee as consignor. But we are not concerned with the period from December 20, 1968. In the assessment of the assessee for the period 1967-68 under the Kerala General Sales Tax Act, 1963, the final assessment was initially completed on September 27, 1968 and a turnover of Rs. 70,952.61 as reported by the assessee was accepted and tax levied on that basis. Thereafter it was alleged by the Assessing Authority that the transactions in the aforesaid period, which had taken place in the manner set out earlier, had been wrongly excluded from the turnover reported by the assessee in the return and hence that turnover has escaped assessment. The contention of the assessee that these transactions did not constitute sales by the said company to the assessee was not accepted and hence it was held by the Assessing Officer that the said turnover was liable to be included in the taxable turnover of the assessee, as escaped turnover. An appeal preferred by the assessee to the Appellant Assistant Commissioner was dismissed. In a second appeal to the Tribunal, the Tribunal took the view, by majority that the aforesaid transactions had taken place directly between the said company and the consumers and the assessee was merely an agent of the company in respect thereof. The Tribunal allowed the appeal and directed the aforesaid transactions to be excluded from the taxable turnover of the assessee. On a revision to the High Court under Section 41 of the said Act, the Division Bench of the High Court took the view that the Tribunal was wrong in coming to the conclusion that the assessee was acting only as an agent in respect of the aforesaid transactions between the said company and the consumers and allowed the revision application.

5. The Division Bench of the High Court considered several cases which were cited before the Division Bench and held that the test to determine whether there is a sale or not is to find out whether there is transfer of property. It further pointed out that the question whether there has been transfer of property must necessarily depend upon an appreciation of the rights and obligations of the parties under the contract. If the property is transferred, unless there is a specific stipulation to the contrary, any risk of loss or injury to the goods would, therefore, be not in the seller but in the buyer. They further, pointed out that the delivery may be either to the distributor himself or to his nominee; the nominee could be the person whose orders are booked by the distributor. They pointed out that in the present case even when the goods were despatched by the said company to the

address of the customers, whose orders were booked by the distributor, namely the assessee, the documents of title were not delivered to the customers but handed over to the distributor on receipt of price, or the documents of title were endorsed in favour of the distributor and sent through the banks to be honoured by the distributor by payment. In such cases, where there was some time lag between the despatch of goods and the entrustment of documents of title on receiving payment through the bank, care was taken to stipulate that the risk would be covered by insurance which would be at the cost of the distributor. The Division Bench further pointed out that in the said agreement, the distributor had not been referred to as "Agent" but as "Distributor" and that this was also significant although not conclusive. It was on the basis of these conclusions that the High Court reversed the decision of the Tribunal and allowed the revision application.

6. In our opinion, since both the parties have proceeded on the footing that the transactions in question were effected pursuant to the said agreement the primary task to which we must address ourselves is to examine whether under the agreement the assessee firm was an agent of the said company or whether the assessee firm was really a purchaser of the goods which were booked by it. In this connection, it must be noticed that sub-clause (a) of Clause 2 provides that the distributor has the right of the sale of the product within the stipulated area. Bulk supplies were effected in wagon-load or lorry-load by the said company direct to the consumer but only provided that the distributor arranged the payment as per the agreement and also took the responsibility to bear entirely the resultant effects and risk from said direct despatches. It is true that the price at which the goods were to be sold to the customers was fixed by the company but that itself does not necessarily lead to the conclusion that the assessee acted merely as an agent of the said company. In fact, it is well settled that the mere fact that the manufacturer fixes the sale price, by itself cannot lead to the conclusion that the distributor is merely an agent. It is significant that under the agreement what the distributor got is described as a 'rebate' and not as "commission" as one would normally expect in an agreement of agency. This is a factor which is by no means conclusive, but to a certain extent indicative of the relationship between the said company and the assessee. What is most important is, however, that the supplies were made to the distributor against payment either immediate or deferred as provided in the agreement, and even when the goods were destined directly to the customer, it was the distributor who had to guarantee to arrange the payment. Clause 8 makes it quite clear that the arrangement for effecting payment had to be made by the distributor either in cash or by demand draft or by irrevocable letter of credit in the company's favour negotiable against R/R or other documents of despatch of goods. It is also significant that where there was some time lag between the sending of the goods and the payment, the goods were to be insured at the cost of the assessee. This circumstance, in our opinion, clearly shows that in respect of the goods despatched under orders placed by the distributors the distributors really acted as purchasers of the goods which they in turn sold to the customers and did not merely act as agents of the said company. In respect of the goods in question which were despatched through public carriers, although the invoices were prepared in the names of the consumers of the goods and the goods were consigned to the destination through public carrier booked to self, as pointed out by the Tribunal the bills were endorsed and handed over to the assessee. When considered in the light of the agreement, these circumstances clearly show that in respect of these transactions the property in the goods despatched passed to the distributor on the bills being endorsed and handed over to the distributors.

7. Our attention was drawn by Shri Krishnamurthy Iyer, learned counsel for the assessee (appellant) to the decision of this Court in Bhopal Sugar Industries LTD. v. STO ((1977) 3 SCC 147 : 1977 SCC (Tax) 401) where the question was whether the contract was one of agency or sale. This Court held that the question will have to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the document and the

surrounding circumstances and having regard to the course of dealings between the parties. While interpreting the terms of the agreement the court has to look to the substance rather than the form of it. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. We are in complete agreement with the principle laid down in this decision. We may point out that although we have referred to the assessee being described in the agreement as "distributor" and not as "agent" and to the fact that what they got was described as "rebate" and not "commission", we have not treated these circumstances as in any manner decisive. In our view, however, these descriptions considered in the light of the general tenor of the agreement and the circumstances surrounding the transactions between the parties show that the assessee was not agent, but really a purchaser from the company in respect of the goods in question.

8. Learned counsel for the appellant also drew our attention to a passage in Pollack & Mulla's Commentary on the Sale of Goods and Partnership Acts, (4th edn. at page 114) where the learned authors have cited with approval the statement of Lord Justice Cotton to the effect that when the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein. Lord Justice Cotton observed that in such cases the purchaser had no property in the goods, though he had offered to accept bills or had paid the price. These observations, however, in our view, have no application to the case before us, because in the case before us, although the goods were consigned to self, the documents relating to the despatch of goods, namely R/R or other documents of title were endorsed in favour of the assessees and handed over to them on payment or were sent to the assessees through the bank for collection.

9. We may mention that it urged by learned counsel for the respondent in the alternative that although sub-section (21) of Section 2 of the Kerala General Sales Tax Act defines sale in a manner similar to the definition of the said term under the Sale of Goods Act, Explanation 5 to sub-section (21) of Section 2 provides that two independent sales or purchases shall, for the purposes of that Act, be deemed to have taken place in the circumstances set out in that explanation. A perusal of the said explanation shows that such independent sales or purchases take place, inter alia, where the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser. It was submitted by him that in view of this explanation, even if the appellant firm was merely the agent of the said company in respect of the transactions in question there were two sales which must be deemed to have taken place in respect of each of the transactions for the purposes of the said Act; one from the said company to the appellant and the other from the appellant to the respective consumer; and that the sale from the said company to the appellant was liable to be included in the taxable turnover of the assessee. In our view, it is not necessary to consider this submission because, according to us, in view of the said agreement, considered in the light of the surrounding circumstances, the assessee as distributor was not an agent of the said company in respect of the transactions in question but was the purchaser and hence the transactions were liable to be included in the turnover of the assessee.

10. In the result, we find that there is no merit in the appeal and the appeal must stand dismissed with costs. There will be an order accordingly.

</html