(2012) INDSC 0079

SUPREME COURT OF INDIA

Hotel Ashoka (Indian Tour.Dev.Cor.Ltd.)

Vs.

Assistant Commissioner of Commercial Taxes

C.A.No.2560 of 2010

(D.K. Jain and Anil R. Dave J.)

03.02.2012

JUDGMENT

ANIL R. DAVE, J.

CIVIL APPEAL NO. 2560 OF 2010

1. In this appeal, an order dated 9th June, 2009 passed by the High Court of Karnataka, in Writ Appeal No. 881 of 2009 (T-CST) is challenged by the appellant, who is an assessee and registered as a dealer under the provisions of the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as `the Act'). Facts giving rise to the present litigation in a nutshell are as under:

2. The appellant, M/s Hotel Ashoka, is managed by India Tourism Development Corporation Limited (hereinafter referred to as `the Corporation'). The Corporation is having its duty free shops at all major International Airports in India. At the said duty free shops, the appellant sells several articles including liquor to foreigners and also to Indians, who are going abroad or coming to India by air. We are concerned with a duty free shops situated at an International Airport at Bengaluru. The appellant is registered as a dealer under the Act as well as under the Central Sales Tax Act, 1956 (hereinafter referred to as `the Central Act'). In the return filed under the Act as well as under the Central Act for the relevant period, the appellant had stated that though liquor, cigarettes, perfumes and food articles were sold at the duty free shops at the Bengaluru International Airport, no tax was payable by the appellant as the goods which had been sold at the duty free shops were sold directly to the passengers and even the delivery of goods at the duty free shops was

made before importing the goods or before the goods had crossed the customs frontiers of India.

3. According to the appellant, no tax can be levied under the Act or under the Central Act when the goods are sold in the course of import or before the goods have crossed the customs frontier of India as per the provisions of Section 5 of the Central Act and so far as the Act is concerned, no tax can be levied, if the sale takes place before the goods crosses the customs frontiers of India as no State can tax the sale or purchase of goods which are outside the concerned State i.e. the State of Karnataka in the instant case, as per the provisions of Article 286 of the Constitution of India. In spite of the above stand of the appellant, the Assistant Commissioner of Commercial Taxes (Transition -12) Bengaluru, by an assessment order dated 28th May, 2008 directed the appellant to pay a sum of Rs.4,20,70,900/- by way of sales tax.

4. Being aggrieved by the assessment order passed by the Assistant Commissioner of Commercial Taxes Bengaluru, the appellant filed W.P.(C) No. 10989 of 2008 in the High Court of Karnataka which was rejected on 11th February, 2009, on the ground that the appellant had not exhausted equally efficacious alternative remedy available to it under the provisions of the Act. The learned Single Judge did not consider merits of the case for the aforestated reason.

5. Being aggrieved by the view expressed by the learned Single Judge, the appellant preferred Writ Appeal No. 881 of 2009(T-CST) before the Division Bench of the High Court which was also dismissed on 9th June, 2009 as the Division Bench found substance in the observations made by the learned Single Judge, hence the appellant has filed this appeal before this Court.

6. Learned counsel appearing for the appellant drew our attention to the provisions of Article 286 of the Constitution and Section 5 of the Central Act. He submitted that the Constitution does not permit any State to impose tax on sale or purchase of goods where such sale or purchase takes place outside the State or in the course of the import of the goods into or export of the goods out of the territory of India.

7. He further submitted that in the instant case, all sales had taken place at the duty free shops of the appellant before the goods had crossed the customs frontiers of India. He stated that the goods, which are the subject matter of the present litigation were brought in India and had been kept at bonded warehouses and thereafter they were transported to duty free shops which were outside the customs frontiers of India.

8. He further submitted that till the goods cross the customs frontiers of India, technically the goods are considered to have remained outside India and once the sale or purchase of the goods which takes place in the course of import or export or outside the concerned State, according to the provisions of Article 286 of the Constitution, no State can impose any tax on such a sale or purchase. As the duty free shops of the appellant are outside the customs frontiers of India, as per legal fiction, the sale of goods cannot be said to be in any State but technically such a sale would be considered to be in the course of import of the goods and, therefore, the sale effected at the duty free shops of the appellant cannot be taxed under the Act.

9. He further submitted that all the duty free shops of the appellant are in customs area as defined under Section 2(11) of the Customs Act, 1962 (in short the `Customs Act'). According to the said definition, `customs area' is the area of a customs station and it includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities. According to him, the goods can be said to have been imported only after sale of the goods at duty free shop to a passenger, if the passenger brings the goods in India, after crossing the customs frontiers of India and not before that, because import means bringing of goods into India from a place outside India and as the duty free shops are in customs area, and as the goods are sold before clearance of Customs Authorities, it cannot be said that the goods sold by the duty free shops were sold after they were imported or in Karnataka State.

10. For the aforestated reasons, according to him, the assessment order passed by the Assistant Commissioner of Commercial Taxes, Bengaluru dated 28th May, 2008 is bad in law. According to the learned counsel, the said officer had committed a grave error by treating the sale at duty free shops as sale after import of the goods in the State of Karnataka.

11. He further submitted that the learned Single Judge as well as the Division Bench of the High Court ought not to have passed orders against the appellant as the appellant had not exhausted equally efficacious alternative statutory remedy. He submitted that the issue involved in the litigation had already been decided by this Court and other High Courts and the legal position was so clear that the appellant ought not to have been asked to exhaust alternative statutory remedy. He submitted that when facts were not in dispute and the law had been settled by this Court in several other cases, it was not proper on the part of the learned Single Judge to dispose of the petition only on the ground that the alternative remedy had

not been exhausted. He also submitted that the Division Bench also committed an error by confirming the order passed by the learned Single Judge of the High Court. So as to substantiate his submission, the learned counsel relied upon several judgments including the judgments delivered in the cases of State of Travancore-Cochin and others v. Bombay Company Ltd. Alleppey [AIR 1952 SC 366], State of Travancore-Cochin and others v. Shanmugha Vilas Cashewnut Factory Quilon [AIR 1953 SC 333], J.V. Gokal Co. (Private) Ltd. v. Assistant Collector of Sales Tax (Inspection) and Others [AIR 1960 SC 595] and in Kiran Spinning Mills v. Collector of Customs [AIR 2000 SC 3448].

12. On the other hand, learned senior counsel Shri Bhat and Shri Sharma, assisted by learned counsel Shri Qadri appearing for the respondent-State, mainly submitted that the orders passed by the learned Single Judge as well as by the Division Bench of the High Court are just and proper. They submitted that the High Court rightly did not entertain the petition as the appellant had not challenged the validity of the order before the appellate authority appointed under the Act. They submitted that the Act has set up appellate authorities and according to the provisions of the Act, an order passed by the assessing officer should be first challenged before the first appellate authority and only after all the remedies under the Act are exhausted, the appellant should have approached the High Court. As the statutory remedies had not been exhausted by the appellant, according to the learned counsel, the High Court had rightly dismissed the appeal by confirming the order passed by the learned Single Judge.

13. On merits they submitted that purchase of the goods at the duty free shops of the appellant would be taxable under the provisions of the Act. They submitted that after purchase of the goods at the duty free shops, passengers enter the country by crossing the customs frontiers. The goods were actually delivered to the customers and sales were not effected by transfer of documents of title to the goods and, therefore, it can not be said that no tax could have been levied on the sales effected at the duty free shops. According to them, crossing of customs frontiers had no significance because once the goods are brought into our country and especially in the State of Karnataka, all sales effected in the State of Karnataka would be subject to tax as per the provisions of the Act. The duty free shops situated at Bengaluru International Airport are situated in the State of Karnataka and, therefore, sales effected at the said shops would be taxable under the provisions of the Act.

14. They further submitted that according to Section 5 of the Central Act, the sales which caused import or which occasioned import would not be subject to tax under the Act. According to them, all these transactions referred to in the assessment

order had not taken place in the course of import or they had not caused or occasioned import, and, therefore, they would be subject to tax under the Act. They further submitted that the goods had not been sold by transferring the documents of title to the goods. According to them, before the goods had crossed the customs frontiers, they ought to have been transferred by transfer of documents of title to the goods, but as it was not done so, it cannot be said that the sales had taken place in the course of import of the goods before crossing the customs frontiers of our country. So as to substantiate the aforestated submissions, they relied upon the judgments in K. Gopinathan Nair and Others v. State of Kerala [(1997) 10 SCC 1], Binani Bros. (P) Ltd. v. Union of India and Others [(1974) 1 SCC 459], Mohd. Serajuddin Ors. v. State of Orissa [(1975) 2 SCC 47].

15. In the circumstances, they submitted that the appeal be dismissed with costs and the stay granted by this Court be vacated.

16. We heard the learned counsel at length and considered the impugned order of assessment as well as the orders passed by the High Court of Karnataka and the judgments referred to by the learned counsel.

17. In our opinion, the facts stated by the counsel are not much in dispute.

18. It is an admitted fact that the goods which had been brought from foreign countries by the appellant had been kept in bonded warehouses and they were transferred to duty free shops situated at International Airport of Bengaluru as and when the stock of goods lying at the duty free shops was exhausted. It is also an admitted fact that the appellant had executed bonds and the goods, which had been brought from foreign countries, had been kept in bonded warehouses by the appellant. When the goods are kept in the bonded warehouses, it cannot be said that the said goods had crossed the customs frontiers. The goods are not cleared from the customs till they are brought in India by crossing the customs frontiers. When the goods are lying in the bonded warehouses, they are deemed to have been kept outside the customs frontiers of the country and as stated by the learned senior counsel appearing for the appellant, the appellant was selling the goods from the duty free shops owned by it at Bengaluru International Airport before the said goods had crossed the customs frontiers.

19. Thus, before the goods were imported in the country, they had been sold at the duty free shops of the appellant.

20. In view of the aforestated factual position and in the light of the legal position stated hereinabove, it is very clear that no tax on the sale or purchase of goods can be imposed by any State when the transaction of sale or purchase takes place in the course of import of goods into or export of the goods out of the territory of India. Thus, if any transaction of sale or purchase takes place when the goods are being imported in India or they are being exported from India, no State can impose any tax thereon.

21. Section 5 of the Central Act deals with the transaction which is said to have taken place in the course of import or export. Relevant portion of Section 5 of the Central Act reads as under:

> 5(1) xxx xxx xxx (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 goods have crossed the customs frontiers of India.

22. Upon perusal of the aforestated provision of Section 5 of the Central Act, it is clear that a sale or purchase of goods shall be deemed to take place in the course of import of the goods into the territory of India only if sale or purchase takes place before the goods have crossed the customs frontiers of India.

23. Looking to the aforestated legal position, it cannot be disputed that the goods sold at the duty free shops, owned by the appellant, would be said to have been sold before the goods crossed the customs frontiers of India, as it is not in dispute that the duty free shops of the appellant situated at the International Airport of Bengaluru are beyond the customs frontiers of India i.e. they are not within the customs frontiers of India.

24. If this is the factual and legal position, in our opinion, looking to the provisions of Article 286 of the Constitution, the State of Karnataka has no right to tax any such transaction which takes place at the duty free shops owned by the appellant which are not within the customs frontiers of India.

25. Looking to the aforestated simple and factual legal position, in our opinion, it would not be much useful to discuss the judgments which have been referred to by the learned counsel appearing for the appellant. In our opinion, the legal position is so clear that it was not necessary for the learned counsel to refer to any judgment and merely by showing the aforestated factual aspects and legal provisions to the

concerned authority, the appellant could have convinced the concerned authority that the sale effected at the duty free shops of the appellant could not have been taxed by the State of Karnataka.

26. Learned counsel appearing for the respondent-Authorities had vehemently submitted that the appellant had not exhausted equally efficacious alternative statutory remedy and, therefore, the Single Judge of the High Court had rightly not entertained the petition filed by the appellant.

27. According to them, the Division Bench had also rightly dismissed the appeal for the same reason. According to them, this Court also should not entertain this appeal.

28. It is true that the appellant had rushed to the High Court without exhausting equally efficacious alternative statutory remedy. In our opinion, the learned Single Judge of the High Court was also right when he directed the appellant to move the statutory appellate authority. In normal circumstances, even we would have expressed the same opinion but looking to the fact that the special leave petition has already been admitted and the matter pertains to the assessment year 2004-2005, it would not be in the interest of the justice to relegate the appellant to the statutory authorities especially when the legal position is very clear and the law is also in favour of the appellant.

29. The learned counsel appearing for the respondent had submitted that the sale would not be subject to tax under the Act only if it occasions in the course of import but the transactions of sale, which are subject matter of this litigation had not taken place in the course of import and, therefore, they would not be exempted under the provisions of Section 5 of the Central Act. In our opinion, the aforestated submission cannot be sustained.

30. They again submitted that `in the course of import' means `the transaction ought to have taken place beyond the territories of India and not within the geographical territory of India'. We do not agree with the said submission. When any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India. Though the transaction might take place within India but technically, looking to the provisions of Section 2(11) of the Customs Act and Article 286 of the Constitution, the said transaction would be said to have taken place outside India. In other words, it cannot be said that the goods are imported into the territory of India till the goods or the documents of title to the goods are brought into India. Admittedly, in the instant case, the goods had

not been brought into the customs frontiers of India before the transaction of sales had taken place and, therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India.

31. In our opinion, submissions with regard to sale not taking effect by transfer of documents of title to the goods are absolutely irrelevant. Transfer of documents of title to the goods is one of the methods whereby delivery of the goods is effected. Delivery may be physical also. In the instant case, at the duty free shops, which are admittedly outside the customs frontiers of our country, the goods had been sold to the customers by giving physical delivery. It is not disputed that the goods were sold by giving physical possession at the duty free shops to the customers. Simply because the sales had not been effected by transfer of documents of title to the goods and the sales were effected by giving physical possession of the goods to the customers, it would not mean that the sales were taxable under the Act. Thus, we do not agree with the aforestated submissions made by the learned counsel appearing for the Revenue.

32. Looking to the aforestated clear and settled legal position, we allow the appeal and quash the order of assessment so far as the transactions which are the subject matter of this litigation are concerned. There shall be no order as to cost.

CIVIL APPEAL NOs. 10404-10412 OF 2010

33. As issues involved in the aforestated appeals and in Civil Appeal No.2560 of 2010 are same, for the reasons recorded in the judgment rendered in Civil Appeal No. 2560 of 2010, these appeals also stand allowed and the assessment orders, so far as they pertain to the subject matter of these appeals are concerned, are quashed. There shall be no order as to costs.