

# CALCUTTA HIGH COURT

Serajuddin and Company

Vs

Commercial Tax Officer

(D Basu, J.)

21.01.1969

## JUDGMENT

### **D. Basu, J.**

1. By the assessment order at annexure N to the petition, respondent 1 has disallowed the claim of the petitioner for deduction from its gross turnover for taxation under the Bengal (Finance) Sales Tax Act, 1941 (hereinafter referred to as "the Act"), on the ground that the three items at page 95 of the petition do not constitute sales in the course of export within the meaning of Article 286(1) (b) of the Constitution, as contended by the petitioner. Though the petition comprised relief against all the three items amounting to Rs. 26,23,067.15, at the hearing, Dr. Debi Pal on behalf of the petitioner has confined his case to two items only, namely, item 1 amounting to Rs. 9,47,940.62 and item 3 relating to Rs. 12,04,097.20.

2. The question of law involved in this case has been fully examined, with reference to all authorities then available, in the Division Bench case of *S.K. Roy v. Board of Revenue*<sup>1</sup> to which I was a party. The two propositions formulated therein may be reiterated :

(a) Where a local or internal sale is made "for the purpose of export" or as "preparatory to export", it cannot come within the exemption under Article 286(1) (b).

(b) But it would be exempted if the export or the movement of the goods out of the territory of India takes place as a result of the covenant or contract between the seller and the purchaser, so that the sale and the resultant export are parts of the same transaction and they cannot be dissociated from each other.

(c) The mere fact that there is no contract between the seller and the foreign buyer does not conclusively establish that a transaction cannot be one "in the course of export". It may still be held to be such a transaction provided that the contract between the seller and a third party occasions the export.

3. The learned Government Pleader seeks to distinguish the Division Bench decision on the facts of the instant case. We are, therefore, led to examine the facts relating to items 1 and 3 at page 95 of the petition relating to the impugned order.

(a) The first item relates to contract No. 21403/13-4-60. It may be pointed out that on the face of

the very recitals of the order relating to this item it is evident that it is a sale in the course of export as explained in the cited decision. The order says :

The dealer made a contract 21403 with the foreign buyer, Messrs Associated Metals Corpn. of New York for supply of the minerals. But according to arrangement with S.T.C. the goods were despatched by S.T.C. In the bill of lading S.T.C. was the shipper. As such it is clear that these are sales of the dealer to the S.T.C. who exported them outside.

4. The contract upon which the sale to the foreign buyer took place was between the petitioner and the foreign buyer himself. It is only by an arrangement for the shipping of the goods to the foreign buyer that the petitioner delivered the goods through the State Trading Corporation. There was thus no separate or independent sale by the petitioner to the State Trading Corporation. The contract and arrangement referred to in the order, form one integrated transaction of a sale to a foreign buyer and the movement of the goods outside the customs frontiers of India also took place in pursuance of the contract No. 21403. On the face of the order, therefore, it was a sale in the course of export which the Sales Tax Officer had no jurisdiction to tax in view of Article 286(1)(b) of the Constitution. How the State Trading Corporation came in between the petitioner-company and their foreign buyer will be evident from the Government orders etc. at annexures A-G. To control the export business, the sole exporting and shipping authority was given to the State Trading Corporation, so that all exporters were obliged to ship the goods through the State Trading Corporation (vide page 24 of the petition).

5. By such Governmental control, the Corporation could by no means become a "buyer" of the goods, even though the term "seller" or the like might have been used in these papers. The Corporation was to receive only a "discount" on the sale price stipulated between the petitioner and the foreign buyer. Even the delivery of the goods for shipment was to take place at the Calcutta port, i.e., beyond the customs frontiers.

6. I have not the least doubt that the transaction sought to be taxed is one in the course of export and that the respondents have no jurisdiction to impose sales tax on it. This is an instance of patent caprice on the part of respondents.

(b) The third item at page 95 of the petition appears as follows in the order of the respondent: The dealer made contract No. 78/1961 with S.T.C. for sale of goods. These are therefore local sales. The S.T.C. had separate contract No. 85/61 with the foreign buyer M/s. Associated Metals & Minerals Corpn., New York. From the bill of lading it is seen that the S.T.C. was the shipper.

7. In this case it is true that the contract for sale with the foreign buyer was between the Corporation and the foreign buyer (annexure H, page 31), under which the Corporation was to deliver the goods on board the ship at the Calcutta port. The contract was entered into by the Corporation because the export of manganese from India under this contract was in the nature of a barter deal, in lieu of cotton received from the United States. The State Trading Corporation purchased this manganese from the petitioner-company which were to deliver the goods on the ship specified at the Calcutta port (annexure H, page 26). It is to be noticed that the two\* agreements were executed on the same date and it is the identical goods sought to be exported, which were to be purchased from the petitioner on "F.O.B." terms, and in para. 3 of the contract between the Corporation and the petitioner, the former's contract with the foreign buyer is

expressly referred to. The reason why the State Trading Corporation had, in the instant case, to enter into the contract with the foreign buyer is evident from item (vi) of the Press Note at page 25, according to which "all barter transactions will be handled only by the S.T.C." The sole object, as explained by the Press Note, was to control the export business for earning more foreign exchange, through the Government controlled Trading Corporation.

8. There is, therefore, no doubt that though there were two separate contracts and the petitioner was no party to the contract with the foreign buyer, the two contracts formed one integrated transaction for the export of the goods and that the movement of the goods beyond the customs frontiers also took place in terms of the contract between the petitioner and the Corporation. There was therefore no separate "sale" to the Corporation which could be called a "local sale". The averments in the petition as to the joint marketing arrangement (paras 10-12) are not effectively contradicted in the counter-affidavit of respondents Nos. 1 and 2.

9. Whatever might have been the law on this point prior to 1956, we have got a legislative indication in the Central Sales Tax Act, 1956, Section 5(1) of which says that any sale or purchase which "occasions" export of the goods is a sale "in the course of export". The Supreme Court has accepted this interpretation also for the purposes of Article 286 (1)(b) : *Burmah-Shell Co. v. Commercial Tax Officer*<sup>2</sup>. , *Ben Gorm Nilgiri Plantations v. Sales Tax Officer*<sup>3</sup>R. In the latter case it was clearly stated that the essence of the transaction referred to by the expression "in the course of export" was the obligation to export. If such obligation arose even by "mutual understanding between the parties" and the goods moved beyond the customs frontier in pursuance of that obligation, it was a transaction "in the course of export". In my opinion, the instant case fell under that category.

10. It appears that under the scheme of governmental control the State Trading Corporation either came in between a seller and a foreign buyer as in the first item before me or itself secured a foreign contract and then entered into a contract with a seller who would be obliged to sell the goods to be despatched to the foreign buyer so secured by the State Trading Corporation by delivering the goods on the ship assigned for the purpose. In essence, the two arrangements were the same and in both the cases, there was an integrated transaction of "export sale" as explained in Ben Gorm's case A.I.R. 1964 S.C. 1752.

11. Learned Government Pleader contended that the petitioner could not succeed without impleading the State Trading Corporation because nobody knew for what purpose they had purchased the goods from the petitioner. This is, however, not acceptable, because the purpose and all the incidents of the transactions are evident from the papers on the records.

12. In my opinion, the Rule should succeed in part, in respect of items (1) and (3) at page 95 of the petition and the Rule is made absolute to that extent. Parties will bear their own costs. Let the demand notice at annexure P be cancelled and respondents 1-3 be restrained from giving effect to the impugned assessment order at annexure N, without deducting from the turnover the amounts of the transactions referred to in items (1) and (3) at page 95 of the petition.

13. The operation of this order is stayed for a period of six weeks from this date.

Cases Referred.

1A.I.R. 1967 Cal. 338  
21961 S.C. 315, para 27  
31964 S.C. 1752, para 8