

PATNA HIGH COURT

Asoka Marketing Co. Ltd

Vs

State of Bihar

Misc. Judl. Case No. 303 of 1956

(V. Ramaswami, C.J. and R.K. Choudhary, J.)

06.08.1958

JUDGMENT

V. Ramaswami, C.J.

1. In this case the assessee is Messrs. Asoka Marketing Company Limited, who is a registered dealer under the Bihar Sales Tax Act. For the period 1949-50 an assessment of Sales Tax was made upon the assessee by the Sales-tax Officer on 15-6-1951. While determining the gross turnover the assessing officer included the amount of sales tax realised by the assessee from the purchasers, holding that the amount of sales tax formed part of the sale price and the assessee was liable to be taxed thereon. The assessee moved the Deputy Commissioner of Sales Tax in appeal.

One of the objections taken by the assessee was that the amount of sales tax should not have been included in the gross turnover of the assessee, but the objection was overruled by the Deputy Commissioner of Sales Tax. The assessee thereupon moved the Board of Revenue, Bihar in revision. The Board of Revenue also held that the amount of sales tax was validly included in the gross turnover of the assessee and rejected the revision application of this point. As requested by the assessee, the Board of Revenue has stated a case under Section 25 (1) of the Bihar Sales Tax upon the following question of law :

"Whether, in the circumstances of the case, the sales tax could be legally included in the taxable turnover ?"

2. On behalf of the assessee learned counsel made the submission that the amount collected by the registered dealer from the customers as sales tax for being paid over to the Government cannot be treated as part of the sale price under Section 2(h) of the Bihar Sales Tax Act and it does not constitute part of the taxable turnover of the registered dealer. Reference was made to Section 2(h) of the Bihar Sales Tax Act, which defines "sale-price" to mean

"the amount payable to a dealer as valuable consideration for (i) the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but

including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged."

Learned counsel on behalf of the assessee also referred to Section 2(1) of the Act, which defines "turnover" to mean

"the aggregate of the amounts of sale-prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract, effected or made during a given period, or, where the amount of turnover is determined in the prescribed manner, the amount so determined;". It was also pointed out that Section 14A of the Act provides that

"no dealer who is not a registered dealer shall realise any amount by way of tax on sale of goods from purchasers, nor shall any registered dealer make any collection of such tax except, in accordance with such restrictions and conditions as may be prescribed".

It was also submitted that Section 14(6) of the Act made a provision that the amount of sales tax together with the penalty, if any, which remains unpaid on the date specified in the notice issued under Section 14, Sub-Section (4). shall be recoverable as an arrear of land revenue. Learned counsel also relied upon the decision of this High Court in *Tata Iron and Steel Co., Ltd. v. State of Bihar*¹, where this question of law has been expressly dealt with and it has been held that the sales-tax authorities are not legally entitled to include sales-tax in the taxable turnover of the assessee.

3. On behalf of the State of Bihar the Government Advocate said that the legal position has been changed on promulgation of the Bihar Sales-tax (Definition of Turnover and Validation of Assessments) Act, 1958 (Act 13 of 1958), which came into force "30-5-1958, Section 2 of the Act provides as follows :

"2. SALES-TAX COLLECTIONS BY DEALERS TO BE DEEMED PART OF TURNOVER - In the case of sales made by a dealer before 1-4-1956 amount collected by him by way of tax under the Bihar Sales-tax Act, 1947 (Bihar Act 19 of 1947) (hereinafter referred to as the said Act), shall be deemed to have formed part of the turnover."

Section 3(1) of the Act is in the following terms :

"3. VALIDATION OF CERTAIN ASSESSMENT AND COLLECTIONS. - (1) All assessments and collections made, all orders passed, and all action taken by the authorities appointed under Section 3 of the said Act in exercise or purported exercise of jurisdiction or powers conferred by the said Act, and all judgments, decrees or orders pronounced by any Tribunal or Court in exercise of its jurisdiction or powers with respect to matters in the said Act, on the basis that amounts collected by a dealer by way of tax

under the said Act before 1-4-1956, formed part of the turnover of the dealer are hereby declared to have been validly made, passed, taken or pronounced, as the case may be,, and any finding recorded by any authority, Tribunal or Court to a contrary effect and any order, judgment or decree in so far as such order, judgment or decree embodies or is based on any such finding and does not relate merely to the costs of the proceeding which results in the judgment, decree or order shall be void and of no effect; and within four years of the coming into force of this Act a fresh assessment shall be made in respect thereof on the basis that amounts collected by the dealers by way of tax under the said Act in respect of sales which took place before 1-4-1956, formed part of the turnover of the dealer."

4. Counsel on behalf of the assessee however, put forward the argument that Bihar Act 13 of 1958 is not constitutionally valid and that the Bihar Legislature is not competent to enact such a legislation under Entry 54 of the State List. It was submitted on behalf of the assessee that the impugned Act empowered the State authorities to impose tax not upon the sale of goods but upon the amount of sales-tax collected, and in substance the tax was "a tax on sales-tax" and such an item was not the subject-matter of the State List and so the new legislation is ultra vires of the Bihar Legislature. The argument was put forward that the amount collected by the assessee retained the character of tax and was not part of the sale-price. It was also pointed out that the sales-tax is collected by the dealer for and on behalf of the State and the dealer is also under the obligation to make over the amount so collected to the State.

5. In my opinion, the argument addressed by learned counsel on behalf of the assessee' is untenable and must be rejected. I hold that the impugned statute, namely, Bihar Act 13 of 1958 falls within Entry 54 of the State List and does not fall under any of the items of the Union List. The question at issue in the true character and nature of the tax, and the question must be answered, by a reference to the charging Section of the Statute. Section 4 of Bihar Act 19 of 1947 is the charging section and is in the following terms ;

"4. INCIDENCE OF TAXATION - (1) Subject to the provisions of Sections 5, 8, 7 and 8 and with effect from the commencement of this Act, every dealer whose gross turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000/- shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement :

Provided that the tax shall not be payable on sales involved in the execution of a contract which is shown to the satisfaction of the Commissioner to have been entered into by the dealer concerned on or before the 1st day of October, 1944.

(2) Subject as aforesaid every dealer to whom Sub-Section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the quarter immediately following a period not exceeding twelve months during which his gross turnover, on sales which have taken place both in and outside Bihar first exceeded Rs. 10,000/-.

x x x x"

Section 4 clearly provides that tax shall be payable only upon sales which have taken place in Bihar. The identity of the subject-matter of taxation is, therefore, fixed by the charging Section. I also consider that the power to determine the quantum of the tax is included in and is a necessary adjunct of the power to tax sales of goods Section 5 of the statute fixes the measure or the yardstick of taxation. Section 5 states as follows :

"5. RATE OF TAX - The tax payable by a dealer under this Act shall be levied at the rate of six pies in the rupee on his taxable turnover :

Provided that the State Government may, from time to time, by notification in the Official Gazette, and subject to such conditions as it may impose, fix a higher rate of tax not exceeding one anna in the rupee or any lower rate of tax, payable under this Act, on account of the sale of any goods or class of goods specified in such notification :

Provided further that the State Government may permit dealers in such circumstances and under such condition as may be prescribed, to compound for the tax assessable on their taxable turnover under the provisions of this Act by paying, in lieu thereof, a fee fixed in such manner as may be prescribed :

Provided further that in respect of goods declared to be essential for the life of the community under Section 3 of the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1952 (III of 1952), the rate or rates of tax shall not exceed the rate or rates levied immediately before the commencement of the Bihar Sales-tax (Amendment) Act, 1953.

Provided further that in respect of the period commencing on the 1st day of October 1948, and ending with 31-3-1949, every dealer shall pay tax at the rate or rates specified in the Schedule."

6. I think that it is constitutionally open to the Legislature to say that the taxable turnover of a dealer shall include the amount of sales-tax paid by the customers under the provisions of Section 5 of the Act. It cannot be argued that the nature of tax has changed because of such a provision with regard to 4ie quantitative measure of taxation. The reason is that the tax imposed upon the dealer is still a tax on the sale of goods. The identity and character of the tax is not changed, it would still be a tax on the sale of goods within the meaning of Entry 54 of the State List of the Seventh Schedule of the Constitution. In a matter of this description in deciding the question of constitutional validity of a tax, importance must be given to the language of the taxing Section of the statute. In *Provincial Treasurer of Alberta v. C.E. Kerr*², the question at issue was the constitutional validity of the taxes assessed under Section 7 of the Succession Duties Act of Alberta. In pronouncing the opinion of the Judicial Committee Lord Thankerton stated as follows at page 720 :

"The identification of the subject-matter of the tax is naturally to be found in the charging Section of the statute, and it will only be in the case of some ambiguity in the terms of the

charging Section that recourse to other Sections is proper or necessary. In the present case, Section 7. Sub-Section (1), is the charging provision, and as amended provided as follows :

"7. (1) Save as otherwise provided, all property of the owner thereof situate within the Province, and in the case of an owner domiciled in the Province, all the personal property of the owner situate outside the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following, or by some one or more of the following considerations, as the case may be :

- (a) the net value of the property of the deceased.
- (b) the place of residence of beneficiary;
- (c) the degree of kinship or absence of kinship of the beneficiary to the deceased."

In their Lordships' opinion, the terms of this Section, which is very similar to that considered in *R. v. Lovitt*³, clearly show that the subject-matter of the taxation is the property and not the transmission of property; it is in marked contrast to the terms of the Quebec Section considered in the cases of *Lambe v. Manuel*⁴, and *Alleyn v. Barthe*⁵, It may be added that Section 9 of the Alberta Act, on which the Province sought to rely, does not modify this view, but merely provides a particular liability for payment of the tax."

7. A similar view has been taken by a Full Bench of the Bombay High Court consisting of Beaumont, C. J., Broomfield and Kania, JJ. in *Sir Byramjee Jeejeebhoy v. Province of Bombay*⁶, and it was held by the Full Bench in that case that the urban immovable property tax levied by Section 22 of the Bombay Finance Act (Act 2 of 1932) was not a tax on income or on capital value of lands and buildings and the urban immovable property tax was a valid tax and Part 6 of the Bombay Finance Act 2 of 1932 was not ultra vires the Provincial Legislature.

8. The problem in this case is a problem of characterisation of the law or classification of the law. In other words, the question at issue is - what is the subject-matter of legislation in its "Pith and substance" or in its true nature and character ? We must find out what is the primary subject dealt with in order to discover the class of subjects to which it belongs. In *Huddarat Parker v. Moorehead*⁷, Higgins, J. observed :

"Now, how are we to determine what is the subject of any law, or any legislation, when two or more things that might be subjects of legislation are mentioned in it ? The mere fact of mentioning corporations in these Sections 5 and 8 does not necessarily make them a law 'with respect to' on the subject of corporations. If a Licensing Act provides that the Licensing Court shall not transfer the license of a wife to her husband unless the husband be approved by the Court as a holder of a license, we should not call it legislation 'with respect to marriage or marital relations. If an Act provides that every marriage shall be celebrated in the presence of two witnesses of full age, and shall be registered, we should not call it legislation "with respect to' witnesses, or 'with respect to' infancy, or 'with respect to registration. The first is a law 'with respect to' dealing in intoxicating liquors; the second is a law with respect to marriage.

In the recent 'Bank Nationalisation Case' 70 Com. W.L.R. 1 Latham, C. J. said : 'it is not enough that a law should refer to the subject matter or apply to the subject-matter; for example, income-tax laws apply to clergymen and to hotel-keepers as members of the public; but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or to banking."

9. In the present case I am satisfied that Bihar Act 13 of 1958 is a legislation which falls within Entry 54 of the State List, that the tax imposed by the impugned statute is a tax on sale of goods and that the identity or character of the tax is not changed. I, therefore, reject the argument of the petitioner and hold that Bihar Act 13 of 1958 is constitutionally valid and the Bihar Legislature is competent to enact this legislation.

10. For these reasons I hold that in the circumstances of this case the sales tax may be legally included in the taxable turnover of the assessee and the question referred to the High Court by the Board of Revenue is accordingly answered in favour of the State of Bihar and against the assessee. There will be no order as to costs of the hearing of the reference.

R.K. Choudhary, J.

10. I agree.

Answer accordingly.

Cases Referred.

¹ AIR 1956 Fat 92

²1933 AC 710

³1912 AC 212

⁴1903 AC 68

⁵1922-1 AC 215

⁶ AIR 1940 Bom 65

⁷8 Com-W LR 410