

The Commissioner of Sales Tax Vs. Gangadhar Sitaram

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Court : Mumbai

Decided On : Nov-25-1974

Reported in : [1975]35STC357(Bom)

Judge : D.P. Madon and ;M.H. Kania, JJ.

Acts : Bombay Sales Tax Act, 1953 - Sections 34(1); ;Orissa Sales Tax Act, 1947 - Sections 5(2)(A); ;Bombay Sales Tax Rules - Rule 5(1)

Appeal No. : Sales Tax Reference No. 21 of 1972

Appellant : The Commissioner of Sales Tax

Respondent : Gangadhar Sitaram

Advocate for Def. : B.C. Joshi, Adv.

Advocate for Pet/Ap. : S.B. Sukhthankar, Adv.

Judgement :

Madon, J.

1. The question which has been submitted to us in this reference under section 34(1) of the Bombay Sales Tax Act, 1953, is 'Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that even though the vendors of the respondent has claimed the impugned sales to the respondent as exempt from tax under rule 5(1)(vi) of the Bombay Sales Tax Rules, 1952, it was not for the respondent to prove that he had not purchased the said goods by issue of certificates, but the onus was on the department to prove by positive evidence that certificates were issued by the respondent while effecting the impugned purchases ?'

2. The facts which have given rise to this reference are that the respondent-firm is a dealer in bullion and in several transactions had also acted as agents for outside-State principals. The assessing authority contended in respect of the period 18th October, 1952, to 31st March, 1953, that the transactions between the respondent-firm and its outside-State principals were sales made by the respondent-firm to those outside-State principals. This contention was finally negatived by the Sales Tax Tribunal. The Tribunal held that these transactions were not sales but were merely agency transactions. Another contention of the department was that the respondent-firm had purchased bullion in order to supply it to the outside-State principals and that it has purchased such bullion by given a certificate under rule 5(1)(vi) of the Bombay Sales Tax Rules, 1952, that these goods were meant for resale and that as the assessee had not resold the goods, it had committed an infringement or a breach

of the declaration contained in the said certificates and had, therefore, become liable to have the price of the goods so purchased included in its taxable turnover. Rule 5(1) (vi) of the Bombay Sales Tax Rules, 1952, provided as follows :

'5. Deduction of certain sales in calculating taxable turnover under section 7. - (1) In calculating the taxable turnover of a dealer under section 7 the turnover in respect of the following sales may be deducted under clause (i)(b) of that section -

(vi) Sales to a registered dealer of goods specified in Schedule A hereto, where -

(a) the selling dealer has purchased the goods on or after the appointed day at a place within the State of Bombay from another registered dealer, and also

(b) it is certified by the purchasing dealer that the goods are required by him for the purpose of resale :

Provided that where any goods to which this clause applies are utilised by the purchasing dealer for a purpose other than resale, the price of the goods so purchased shall be included in the taxable turnover of the purchasing dealer under section 7.'

3. In support of its contention that the respondent-firm has purchased bullion by giving a certificate that the bullion was required for the purpose or resale the department relied upon the fact that the respondent's vendors had claimed exemption in respect of the sales made to the assessee. From this the department concluded that the certificates under rule 5(1)(iv) must have, therefore, been given by the respondent-firm to its vendors. The argument before the Tribunal was that the respondent-firm must prove that it had not given a certificate under the said rule 5(1) (vi) and that if it failed to prove this fact, it should be made liable under the proviso to the said clause. The Tribunal came to the conclusion that the burden of proving that the respondent-firm had given a certificate was on the department. A similar point came up for decision before the Orissa High Court in *Goswami Press, Cuttack v. State of Orissa* [1973] 32 S.T.C. 479. Section 5(2)(A)(a)(ii) of the Orissa Sales Tax Act, 1947, is in very similar terms to the said rule 5(1)(vi). The Orissa High Court held that the burden lay on an assessee to establish his claim under section 5(2)(A)(a)(ii) of the said Act, but when action had to be taken against an assessee under the proviso thereto, the burden lay on the department to show that there was a violation and that there was no burden on an assessee to show that there was no violation, for the negative is not to be proved by the assessee.

4. We are in respectful agreement with what has been held by the Orissa High Court and, accordingly, we answer the question submitted to us in the affirmative. The applicant will pay to the respondent the costs of this reference.

5. Reference answered in the affirmative.