

Sales Tax Officer, Special Circle Vs. Phipson and Co. Ltd.

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Court : Kerala

Decided On : Dec-20-1968

Reported in : [1968]24STC542(Ker)

Judge : T.S. Krishnamoorthy Iyer and; K. Sadasivan, JJ.

Appeal No. : Writ Appeal No. 29 of 1967

Appellant : Sales Tax Officer, Special Circle

Respondent : Phipson and Co. Ltd.

Advocate for Def. : S.A. Nagendran, Adv.

Advocate for Pet/Ap. : Government Pleader

Disposition : Appeal dismissed

Judgement :

Krishnamoorthy Iyer, J.

1. This appeal arises out of a petition filed by the respondent M/s. Phipson & Co. Ltd., Ernakulam, who is a registered dealer, hereinafter referred to as the assessee, under Article 226 of the Constitution to quash exhibits P3 and P4 assessing them to sales tax for the years 1962-63 and 1963-64. Exhibits P3 and P4 were passed after overruling the claim of the assessee for exemption from tax of the turnover relating to the sales of two brands of beer, namely, U.B. Light Lager Beer and U.B. Sun Lager Beer manufactured by the United Breweries Ltd., Bangalore. The assessment for 1962-63 was under the General Sales Tax Act, 1125, while the assessment for 1963-64 was under the Kerala General Sales Tax Act, 1963. Wines and liquors other than toddy are included in the First Schedule to both these Acts. It is agreed between the parties that beer is included in the term 'liquors' in Schedule I of the Acts.

2. Under Section 5(vii) of the General Sales Tax Act, 1125, the sale of goods specified in column (2) of Schedule I shall be liable to tax only at such single point in the series of sales by successive dealers as may be specified by the Government by notification in the Gazette ; and, where the taxable point so specified is a point of sale, the seller shall be liable for the tax on the turnover for which the goods are sold by him at such point. By the notification dated 28th of September, 1957, the taxable point in respect of wines and liquors other than toddy was specified as the first sale in the State by a dealer who is not exempted from taxation under Section 3(3) of the General Sales Tax Act, 1125. There is no case that the assessee was exempt from taxation under Section 3(3) of the Act. It is agreed that even under the Kerala General Sales Tax Act, 1963,

liquors and wines are taxable at the point of first sale in the State by a dealer who is not exempt under Section 5, the charging section in that enactment.

3. The United Breweries Ltd., Bangalore, are the manufacturers of U.B. Light Lager Beer and U.B. Sun Lager Beer. McDowell & Co. Ltd., Shertallai, was appointed by the United Breweries Ltd., Bangalore, as the sole distributors for Kerala in respect of the two brands of beer referred to and anybody in Kerala can purchase these goods only from M/s. McDowell & Co. Ltd., Shertallai. Exhibit P1 is the agreement between McDowell & Co. Ltd., Shertallai, and the assessee appointing the latter as the sub-distributors of the Shertallai branch of McDowell & Co. Ltd. for the two brands of beer, viz., U.B. Sun Lager Beer and U.B. Light Lager Beer manufactured by the United Breweries Ltd., Bangalore, for distribution in the Kerala State on terms and conditions mentioned therein. The terms and conditions embodied in exhibit P1 are extracted below :

1. All supplies of the said two brands of beer will be effected in Kerala to you by our Shertallai branch and the payment for such supplies should be made by you or your head office.

2. We will supply you with Sun Lager as well as U.B. Light Beer at a flat rate of Rs. 12.00 per dozen quarts and Rs. 6.25 per dozen pints respectively delivered ex your godown, plus sales tax as applicable and deposit for empty bottles at Rs. 4.80 per dozen quart bottles and Rs. 3.60 per dozen pint bottles.

3. The above-mentioned rates are exclusive of duty and hence the duty payable by our Shertallai branch must be remitted by you on our branch's behalf and you should take out duty-paid transport permits for consignments of beer to be supplied by our branch. Thereafter you should forward your indents to our Shertallai branch along with the aforesaid duty-paid transport permits, when our Shertallai branch will place orders with the brewery with instructions to despatch direct to Ernakulam on our branch's account. We have suggested that you should remit the excise duty on our branch's behalf so as to facilitate the quick movement of the beer from Bangalore to Ernakulam, failing which consignments would have to go to Shertallai first and be re-despatched from there to Ernakulam involving waste of time and money.

4. Invoices for all supplies of beer will be made out and forwarded to you by our Shertallai branch, immediately they receive the relative invoices from the brewery. If at any time there is a slight delay in the preparation of invoices by our Shertallai branch and consignments arrive at Ernakulam in the meanwhile you should take delivery of the consignments on behalf of our Shertallai branch and hold the goods as their stock until receipt of the concerned invoices.

5. We will not sell the aforesaid brands of beer to anyone in Kerala State except through you.

6. This appointment shall be for a period of five years from the date hereof and will be renewed for a further period by mutual consent. It may, however, be terminated by you or by us by giving three months notice in writing.

4. The assessee's claim for exemption is because of the plea that the sales to their customers are not first sales in the State to attract liability to tax. According to the revenue the sale of the two brands of beer to the assessee is by the United Breweries

Ltd., Bangalore, and the assessee is therefore the first seller in the State.

5. The question to be decided is whether the sales by the assessee of the two brands of beer are the first sales in the State. The learned Single Judge held that the movement of goods from Bangalore to Ernakulam had been occasioned by the sales by the United Breweries Ltd., Bangalore, to McDowell & Co. Ltd., Shertalai, and the movement took place in pursuance of such sales.

6. According to Clause 3 of exhibit P1 the assessee has to pay the duty payable by the Shertalai branch of McDowell & Co. Ltd., on their behalf and take out duty-paid transport permits for consignments of beer to be supplied to the assessee by McDowell & Co. Ltd., Shertalai. Then the assessee should forward the indents to the Shertalai branch of McDowell & Co. Ltd., who will place orders with the brewery at Bangalore with instructions to despatch the goods directly to Ernakulam on account of McDowell & Co. Ltd., Shertalai. It has been specifically stated in exhibit P1 that the remittances of excise duty by the assessee on behalf of McDowell & Co., Ltd., is to facilitate quick movement of goods from Bangalore to Ernakulam and thus prevent the delay that may happen in sending the goods from Bangalore to Shertalai and then to Ernakulam. The relative invoices are drawn by the brewery in the name of McDowell & Co. Ltd., Shertalai, and after the receipt of those invoices McDowell & Co. Ltd. will make out invoices in the name of the assessee and forward the same to the latter. According to the terms of exhibit P1 if at any time there is a delay in the preparation of invoices by the Shertalai branch of McDowell & Co. Ltd., and consignments reach Ernakulam in the meanwhile assessee should take delivery of the goods on behalf of McDowell & Co.; Ltd., Shertalai, and hold the goods as their stock until the receipt of the said invoice.

7. The reason given in exhibit P3 for disallowing the exemption claimed by the assessee is stated below:

The goods moved from Messrs United Breweries Ltd., Bangalore, to Messrs Phipson & Co. Ltd., Ernakulam, on the strength of the import and export permits obtained in the name of the assessee. The property in goods also passes from Messrs United Breweries Ltd., Bangalore, to Messrs Phipson & Co. The entry of the goods into the Kerala State and the movement of the goods from Bangalore to Ernakulam are on the strength of the excise permits obtained in the name of the assessee. Messrs McDowell & Co. Ltd., Shertalai, have no possession of the property at any time during the transactions. In these transactions Messrs McDowell & Co. Ltd., Shertalai, acts only as an agent for placing orders with the suppliers and collections of the proceeds. Obviously therefore these are inter-State sales by Messrs United Breweries Ltd., Bangalore, to the assessee, and therefore the assessee becomes the first seller in the State liable to tax.

8. Section 3 of the Central Sales Tax Act which defines an inter-State sale is in these terms :

A sale or purchase of goods shall be deemed to take place on the course of inter-State trade or commerce if the sale or purchase-

(a) occasions the movement of goods from one State to another ; or

(b) is effected by a transfer of documents of title to the goods during their movement

from one State to another.

Explanation 1.-Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of Clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2-Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

9. The principle is well-settled by the decisions of the Supreme Court that a sale occasions the movement of goods from one State to another within the meaning of Section 3(a) of the Central Sales Tax Act, when the movement is the result of a covenant or incident of the contract of sale.

10. Shah, J., pointed out in *Tata Iron and Steel Co. Ltd., Bombay v. S.R. Sarkar* [1960] 11S.T.C. 655:

In our view, therefore, within Clause (b) of Section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto: Clause (a) of Section 3 covers sales, other than those included in Clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State.

11. In *K.G. Khosla and Co. (P.) Ltd. v. Deputy Commissioner of Commercial Taxes* [1966] 17 S.T.C. 473., Sikri, J., speaking for the Constitution Bench approved the above decision and observed :

It seems to us that the expression 'occasions the movement of goods' occurring in Section 3(a) and Section 5(2) must have the same meaning. In *Tata Iron and Steel Co. Ltd., Bombay v. S.R. Sarkar* [1960] 11 S.T.C. 655, Shah, J., speaking for the majority, interpreted Section 3 as follows:

In our view, therefore, within Clause (b) of Section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto: Clause (a) of Section 3 covers sales, other than those included in Clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State....

12. The learned counsel for the respondent, Mr. A. Ranganatham Chetty, invited us to hold that the observations of Shah, J., in *Tata Iron and Steel Co. case* [1960] 11.S.T.C. 655 were obiter, and to consider the question afresh. We are unable to reopen the question at this stage. Shah, J., was interpreting Section 3 of the Act, and although the court was principally concerned with the interpretation of Section 3(b), it was necessary to consider the interpretation of Section 3(a) in order to arrive at the correct interpretation of Section 3(b). Further these observations were approved in *Cement Marketing Co. of India v. The State of Mysore* [1963] 14S.T.C. 175, *State Trading Corporation of India v. The State of Mysore* [1963] 14S.T.C. 188 and

Singareni Collieries Co. v. Commissioner of Commercial Taxes, Hyderabad [1966] 17S.T.C. 197. In the State Trading Corporation case [1963] 14 S.T.C. 188 in so far as the assessment for the assessment year 1957-58 was concerned, this court applied the principles laid down in 'Tata Iron and Steel Co. case [1960] 11 S.T.C. 655. Accordingly we hold that the High Court was wrong in holding that before a sale could be said to have occasioned the import it is necessary that the sale should have preceded the import.

13. The learned Government Pleader mainly relied on the above decision and contended that though there was a sale in favour of the assessee only after the import, the said sale occasioned the movement of goods and the sale to the assessee is therefore an inter-State sale. It is no doubt true that the learned Single Judge has distinguished Khosla's case [1966] 17 S.T.C. 473. on the ground that it was open to McDowell & Co. Ltd., Shertallai, to divert the goods for any other purpose although the goods had been consigned in the name of the assessee. According to the learned Government Pleader in view of Clause 5 in exhibit P1 the view of the learned Single Judge is not correct and therefore Khosla's case [1966] 17 S.T.C. 473 should govern this appeal.

14. In our view it is not necessary to consider this aspect of the learned Government Pleader's contention, as in our view there is no privity of contract between the assessee and the United Breweries Ltd., Bangalore. The inference as to the character of the sales to the assessee was solely drawn from exhibit P1. The order placed by McDowell & Co. Ltd., Shertallai, to the United Breweries Ltd., Bangalore, has not been filed before the sales tax authorities. There is no doubt a suggestion in exhibit P3 that McDowell & Co. Ltd., Shertallai, was only acting as the buying agent of the assessee. The terms of exhibit P1 do not support this inference and apart from exhibit P1 there are no other materials.

15. Shah, J., observed in Tata Iron and Steel and Co. Ltd. v. S.R. Sarkar [1960] 11S.T.C. 655, already cited :

A transaction of sale is subject to tax under the Central Sales Tax Act on the completion of the sale, and a mere contract of sale is not a sale within the definition of sale in Section 2(g). A sale being by the definition, transfer of property, becomes taxable under Section 3(a) if the movement of goods from one State to another is under a covenant or incident of the contract of sale, and the property in the goods passes to the purchaser otherwise than by transfer of documents of title when the goods are in movement from one State to another. In respect of an inter-State sale, the tax is leviable only once and that indicates that, the two clauses of Section 3 are mutually exclusive. A sale taxable as falling within Clause (a) of Section 3, will be excluded from the purview of Clause (b) of Section 3; otherwise certain sales may be liable to tax under both the clauses and two States may, in respect of a single sale, claim to levy the tax contrary to the plain intendment of Sections 6 and 9 of the Act.

16. There should be a passing of title in pursuance to the contract of sale which occasions the movement of goods, even though the sale need not precede the import. It is not possible to construe exhibit P1 as authorising McDowell & Co. Ltd., Shertallai, to buy the goods from the United Breweries Ltd., Bangalore, on behalf of the assessee. The true relationship of the parties has to be gathered from the nature of the contract and terms and conditions. If the movement of goods from Bangalore to Ernakulam was occasioned as an incident of the contract of sale between McDowell &

Co. Ltd., Shertallai, and the United Breweries Ltd., Bangalore, it will be an inter-State sale, even if the passing of title to McDowell & Co. Ltd., Shertallai, was at Ernakulam. But we are at a loss to understand, how any subsequent sale by McDowell & Co. Ltd., Shertallai, to the assessee even though before the receipt of the goods by the assessee can make it an inter-State sale. On the other hand, if the title to the goods passed to McDowell & Co. Ltd., Shertallai, at Bangalore and the movement of goods was occasioned as an incident to the contract of sale between McDowell & Co. Ltd., Shertallai, and the assessee or if there was a contract of sale by the United Breweries Ltd., Bangalore, to the assessee and the movement of goods was occasioned as an incident of that contract there is considerable force in the plea of the learned Government Pleader.

17. On the materials available, we do not find any reason to differ from the conclusion reached by the learned Judge that the turnover in respect of sales of the two brands of beer received by the assessee from the United Breweries Ltd., Bangalore, is not liable to sales tax.

18. The next contention of the Government Pleader was based on Rule 27(5) of the General Sales Tax Rules, 1125, and Rule 32(13) of the Kerala General Sales Tax Rules, 1963. The submission on behalf of the revenue was that the assessee did obtain the declaration forms from McDowell & Co. Ltd., Shertallai, to evidence the payment of tax and therefore the exemption cannot be allowed. In view of the decision in *State of Orissa v. M.A. Tulloch and Co., Ltd.* [1964] 15 S.T.C. 641, it has to be held that such rules are only directory and not mandatory. But even that apart this point was not taken by the authorities when the matter was heard by them and the learned Single Judge was therefore right in overruling the contention.

19. The appeal is without merit. We dismiss the same but we make no order as to costs.