(1987) 01 KL CK 0021

High Court Of Kerala

Case No: T.R.C. No. 90 of 1986

Government Wood Works	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision: Jan. 14, 1987

Acts Referred:

- Sales of Goods Act, 1930 - Section 4

Citation: (1986) 2 ILR (Ker) 112 : (1988) 69 STC 62

Hon'ble Judges: T.L. Viswanatha Iyer, J; K.S. Paripoornan, J

Bench: Division Bench

Advocate: M.A. Manhu, for the Appellant; T. Karunakaran Nambiar, Sr. Government Pleader, for the Respondent

Final Decision: Allowed

Judgement

T.L. Viswanatha Iyer, J.

This revision petition u/s 41 of the Kerala General Sales Tax Act, 1963 (hereinafter "the Act") is by the assessee and relates to the assessment year 1979-80. Assessment was originally completed on the petitioner on 25th September, 1980. This order of assessment was reopened by the Deputy Commissioner of Agricultural Income Tax and Sales Tax, Kozhikode, in exercise of his powers u/s 35 of the Act, by his order dated 3rd September, 1984, which was communicated to the assessee on 28th November, 1984. Thereby the matter was remitted back to the assessing authority for fresh disposal in the light of the observations made by the Deputy Commissioner.

2. Assessee is the Government Wood Workshop and Common Service Centre, Calicut. It is a unit owned by the Kerala, State Small Industries Development and Employment Corporation Ltd. (hereinafter referred to as the SIDECO), which is a company Wholly owned by the Government of Kerala. The petitioner-unit is engaged in the manufacture of furniture at Calicut. SIDECO has other units also. The

petitioner-unit is registered as a dealer under the Act. During the assessment year in question the petitioner-unit had transferred to other units of SIDECO, furniture of the value of Rs. 1,60,746. It appears that the other units of SIDECO to whom the furniture was transferred, have also been separately registered as dealers under the Act. In making the original assessment on 25th September, 1980, the assessing authority did not impose tax on the value of the furniture so supplied to the other units of SIDECO. The Deputy Commissioner who set aside the assessment u/s 35 was of the view that these other units to which the furniture was transferred were not "branches" of the petitioner inasmuch as the petitioner had paid only Rs. 10 towards renewal fee of its dealership registration certificate and had not paid any amount for "branch certificate renewal fee" for the other units, and therefore, the amount of Rs. 1,60,746 represented nothing but sales of furniture by the assessee to the other units and hence taxable.

3. The assessee had collected an amount of Rs. 1,60,464.97 from its customers to whom it had sold furniture as recoupment of excise duty paid by them. This amount was not treated as part of the assessable turnover by the assessing authority in his order of assessment dated 25th September, 1980. The Deputy Commissioner held that this amount was taxable in the assessee''s hands and set aside the assessment to bring this amount also to tax in the hands of the petitioner.

4. The petitioner took up the matter in appeal to the Tribunal, where apart from the merits relating to the assessability or otherwise of the aforesaid amounts, a further contention was raised that the order u/s 35 was "not valid or legally sustainable" as it had been communicated to the petitioner only on 28th November, 1984 after the expiry of the period of four years specified in Section 35 of the Act. The Tribunal did not accept any of the contentions of the petitioner and dismissed the appeal. The assessee is in revision before us.

5. Counsel for the assessee, Mr. M. A. Manhu, has contended before us that the first items of turnover mentioned above was not liable to tax in the petitioner''s hands, and that, in any case the .order u/s 35 passed by the Deputy Commissioner was barred by limitation.

6. It was the contention of the counsel that in order to enable an assessment under the Act, there should be sale of the furniture, which in turn implies the existence of a seller and a buyer. In this case, there was no such seller and buyer inasmuch as the furniture was transferred only from one unit of SIDECO to its other units. The fact that the other units were also registered separately under the Act was not such as to bring about a sale, when otherwise there was none such in law.

7. On the second point regarding the exigibility to tax of the amount of excise duty, counsel was prepared to concede that having regard to the recent decision of the Supreme Court in McDowell & Co. Ltd. v. Commercial Tax, Officer [1985] 59 STC 277 the amount was taxable. However, he would submit that the order of the Deputy

Commissioner being barred by limitation, there was no question of bringing to tax any of these amounts, whatever be the view we take on the merits. Counsel went to the extent of contending that a perusal of the files of the Deputy Commissioner will even disclose that the order was really passed only well beyond 25th September, 1984, i.e., beyond four years from the date of the original assessment. He complained that the Tribunal had not chosen to peruse the original files to ascertain this fact, though requested for.

8. Counsel for the Revenue would, on the other hand, contend that when the different units of SIDECO were separately registered under the Act, the position was that they should be treated as different dealers for the purposes of the Act and transfer of goods from one unit to another should be treated as a sale. Counsel further submitted that the order of the Deputy Commissioner was not barred by limitation as contended by Mr. Manhu, for the reason that the said order had been passed on 3rd September, 1984, though communicated beyond the period of four years.

9. We have carefully considered the rival contentions. We are of the opinion that the value of the furniture transferred from the petitioner-unit of SIDECO to its other units is not liable to tax. All the units in question are owned by SIDECO. An essential ingredient of a transaction of sale is the transfer of property in goods from one person (called the seller) to another person (called the purchaser) (vide Section 4 of the Sale of Goods Act, 1930). Under the Act, sale means every transfer of property in goods by one person to another for cash or for deferred payment or other valuable consideration [section 2(xxi)]. A "person" is defined to include an individual, a joint family, a company, a firm, an association of persons, whether incorporated or not, the Central Government or the Government of Kerala or the Government of any other State or Union Territory in India, a local authority and every artificial juridical person not falling under any of the preceding categories. The existence of two entities, different from each other, capable of: transferring property in goods from one to the other is therefore the desideratum of a transaction of sale. SIDECO is a corporate entity, wholly owned by the State of Kerala. It has different units in different parts of the State, carrying on various activities. These units are parts of the same legal entity, namely, the SIDECO. They do not have any separate existence apart from SIDECO. They carry out the objects of SIDECO, carry on the business -of SIDECO and their receipts are pooled into the tills of SIDECO. When goods are transferred from one unit to another, there is no passing of property from one person to another. There is no seller and there is no buyer as goods are passed only between the same entity. There is therefore no sale of the goods at all.

10. The Tribunal seems to have thought that if the other units to which the furniture was supplied were not "branches" of the petitioner, a sale has to be postulated. The Tribunal has in fact mentioned that the other units are not registered as branch units of the petitioner and that the petitioner has not paid renewal fee for

registration, for the branches, and has on the other hand, paid renewal fee of Rs. 10 only for itself. Logically, an inference of sale has been drawn. We do not agree with this proposition. The effect of registration is only to enable a dealer to collect the tax payable by him from the purchaser. It does not have the effect of carving out an independent existence for the registered unit or to delink it from the other units, for purposes of the Act. Therefore, when furniture manufactured in the petitioner-unit was transferred to other units of SIDECO, there was no transfer of property in goods from one person to another and hence no sale liable to tax under the Act. The turnover of Rs. 1,60,746 was therefore, rightly excluded in the original assessment and was wrongly brought to assessment by the order of the Deputy Commissioner.

11. We may in this connection refer to the decision of the Allahabad High Court in U. P. State Cement Corporation Ltd. v. Commissioner of Sales Tax, U.P. [1979] 43 STC 476. That was a case where the Churk Cement Factory owned by the State of Uttar Pradesh supplied cement for construction of the Dalla Cement Factory, a newly established cement factory, also owned by the same State. The supplies were brought to assessment under the U. P. Sales Tax Act as if there were sales. One of the contentions urged by the Revenue in support of this plea was that both the cement factories had been separately registered as dealers under the Sales Tax Act and hence they should be treated as separate entities for purposes of the Act. Overruling the contentions of the Revenue it was held :

''Sale'' is defined in Section 2(h) in the following manner :

''(h) "Sale" means within its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration....''

It will be seen that before a transaction can be taxed and included in the turnover of a dealer, it has to be a sale. Although the word ''sale'' as defined in Section 2(h) does not specifically mention that the transaction must be between the two entities, but inasmuch as it contemplates transfer of property, it is obvious that before a transaction can amount to a sale, there must be two entities involved in the transaction, so that there may be a transfer of property in the goods sold. It would be anomalous to hold that a person can sell goods to himself...the registration of the Dalla Cement Factory as a dealer will entitle the department only to tax the turnover of Dalla Cement Factory separately; but will not clothe it with a separate juristic personality for the purposes of Section 2(h), inasmuch as both the units continued to be owned by the State Government. "

We agree with the above observation.

12. In view of the concession rightly made by Mr. Manhu that the excise duty element was taxable, the only other point which requires examination is whether the order of the Deputy Commissioner was barred by limitation. The Tribunal held that the order had been passed within the period of four years and that the

communication thereof beyond the said period does not affect its validity. The Tribunal followed the decisions of the Madras High Court in RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, and of the Bombay High Court in Laxmidas and Co. Vs. Commissioner of Income Tax, Bombay, . Those two cases arose u/s 34 of the Income Tax Act, 1922. It was held that the time-limit prescribed was the period within which the Income Tax Officer had to complete one stage of the proceedings, that is assessment of the income and the determination of the tax payable. That stage had to be completed by the Income Tax Officer within the period but it was not further necessary that the order of reassessment should also be communicated within that period.

13. A Division Bench of this Court, consisting of Subramonian Potti, Ag. C. J. and Chandrasekhara Menon, J., had occasion to deal with a similar question in Malayil Mills v. State of Kerala (T.R.C. Nos. 15 and 16 of 1981), the judgment in which was delivered on 7th June, 1982. The assessee in that case had purchased copra during the years 1961-62 and 1962-63. The law, as it then stood, did not serve the purpose of bringing to tax the purchases of copra. The Kerala State Legislature, therefore enacted the Kerala Sales Tax (Levy and Validation) Act, 1965 to validate the levy of tax on copra during the said two years, among others and to enable assessments to be made where non-existed. Section 3 of the Act, which was to operate retrospectively from 1st April, 1958, imposed a liability on every dealer to pay tax on his turnover relating to purchase of copra. Section 4(1)(iv) which operated from 27th September, 1965, enabled assessments to be made within three years (extended by subsequent amendment to five years) of the date of publication of the Validation Act in cases where the tax payable on the purchase of copra had not been assessed under the General Sales Tax Act. By virtue of this provision, as amended, the assessing authority could assess the tax due on the purchases of copra within five years from 27th September, 1965, i.e., before 27th September, 1970. The assessments in question for the two years 1961-62 and 1962-63 were made on 23rd September, 1968; but the orders were served on the assessee only on 4th February, 1972. The assessee challenged the said orders before this Court, inter alia, on the ground that the orders were barred by limitation as they had been made only long after the prescribed period of five years. The matter was dealt with in detail by this Court. Relying on the decisions in Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, , Bachhittar Singh Vs. The State of Punjab, , State of Punjab Vs. Khemi Ram, , B.J. Shelat v. State of Gujarat AIR 1978 SC 1109 and the earlier decision of this Court in T. R. C. No. 6 of 1981, to which the Acting Chief Justice was a party, it was stated :

Any authority on which power is conferred, the exercise of which power would affect the rights of parties, is to communicate its order to the party against whom the order would operate. The mere preparation of an order or even keeping the order signed in the files of the office would not render it an effective order, an order which is operative. The exceptions are cases where there is requirement of pronouncing

the orders and they are pronounced on notified dates. Then irrespective of the actual presence or otherwise of the parties, notice to the parties is assumed. In other cases, if the authority making the order fails to communicate the order, the order could not be said to have been made, for communication of such order is an essential part of making such order. This is naturally so, for any authority who writes out an order and signs it is free to change it at any time before it is communicated. It is not final at all, for the authority may become wiser on information supplied to it or otherwise and may choose to change the order at any time before it is despatched to the party against whom it operates."

* * *

9. In the circumstances, we have no hesitation to find that the order of the Sales Tax Officer, assuming that it was made, signed and kept in the files, was not effective and complete until it was issued to the party which was done only in 1972. By that time the five years period had expired. Action would be barred and the order could not have been passed.

14. The order of any authority cannot be said to be passed unless it is in some way pronounced or published or the party affected has the means of knowing it. It is not enough if the order is made, signed, and kept in the file, because such order may be liable to change at the hands of the authority who may modify it or even destroy it, before it is made known, based on subsequent information, thinking or change of opinion. To make the order complete and effective, it should be issued, so as to be beyond the control of the authority concerned, for any possible change or modification therein. This should be done within the prescribed period, though the actual service of the order may be beyond that period. This aspect of the matter had not come up for consideration in the cases of RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, and Laxmidas and Co. Vs. Commissioner of Income Tax, Bombay, where the only question dealt with was whether service of the order after the prescribed period rendered it invalid. Unless, therefore, the order of the Deputy Commissioner in this case had been so issued from his office within the period prescribed, it has to be held that the proceedings are barred by limitation. This question has not been considered by the Tribunal. The Tribunal, which passed the order, apparently did not have the benefit of the decision in Malayil Mills case (T. R. C. Nos. 15 and 16 of 1981 decided on 7th June, 1982-Kerala High Court) which, so far as we could see, remains, unreported. The matter has therefore to go back to the Tribunal for an examination of the records to ascertain whether the order of the Deputy Commissioner had been issued from his office within the period of four years prescribed in Section 35(2) of the Act. The Tribunal will adjudicate the matter in the light of the observations contained herein and in the judgment in the case of Malayil Mills (T. R. C. Nos. 15 and 16 of 1981 decided on 7th June, 1982-Kerala High Court) extracted earlier.

15. The tax revision case is allowed and the order of the Tribunal set aside with the following directions :

(a) The amount of Rs. 1,60,746 representing the value of supplies of furniture by the petitioner to other units of SIDECO is not taxable;

(b) The matter is remitted back to the Tribunal for consideration of the question whether the order of the Deputy Commissioner u/s 35 had been passed within the time prescribed in Section 35(2)(c) of the Act, and to pass consequential orders in the light of this rinding, regarding the turnover of Rs. 1,60,464.97.

There will be no order as to costs.