(2012) 06 MAD CK 0201

Madras High Court

Case No: Writ Petition No''s. 13264 and 13268 of 2001

State of Tamil Nadu		APPELLANT
	Vs	
Steel Authority of India Ltd. and Another		RESPONDENT

Date of Decision: June 21, 2012

Acts Referred:

- Central Sales Tax Act, 1956 - Section 2(dd), 2(g), 3, 5, 5(2)
- Constitution of India, 1950 - Article 286, 286(1), 286(1)(b)

Citation: (2012) 56 VST 441

Hon'ble Judges: M. Venugopal, J; Elipe Dharma Rao, J

Bench: Division Bench

Advocate: Sivaraman, Special Government Pleader Tax, for the Appellant; K.J. Chandran for M/s. Chandran and Karuppiah, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Elipe Dharma Rao, J.
The State, represented by the Deputy Commissioner (CT), has come with the present writ petitions against the common order passed by the second respondent, viz., Tamil Nadu Sales Tax Appellate Tribunal (in short, "the Tribunal"), dated February 26, 1999 in T.A. Nos. 460 and 491 of 1998. Since the issues involved in these writ petitions are one and the same and both are intrinsically inter-connected, with the consent of the counsel, they were heard together and disposed of by this common order.

2. The facts leading to filing of the writ petitions are as follows:

The first respondent Tvl. Steel Authority of India Limited (in short, "the SAIL") is a Government of India Enterprises, engaged in the manufacturing of stainless steel

articles. For the assessment year 1989-90, the first respondent reported a total and taxable turnover of Rs. 2,24,67,16,635 and Rs. 12,28,02,597, respectively under the Central Sales Tax Act, 1956 (in short, "the Act"). The assessment authority by order dated March 31, 1995, determined the total and taxable turnover at Rs. 2,24,03,18,934 and Rs. 12,46,02,780, respectively. As against the said order, the first respondent preferred an appeal before the Appellate Assistant Commissioner disputing (a) disallowance of exemption on high sea sales relating to coin blank sales turnover to an extent of Rs. 18,00,183, (b) levy of tax on a turnover at enhanced rate at eight per cent in the absence of C forms to a tune of Rs. 9,83,388 and (c) levy of penalty u/s 9(2A) of the Act to a tune of Rs. 2,70,027.

3. Similarly, for the assessment year 1991-92, the first respondent reported a total and taxable turnover of Rs. 3,02,74,59,790.61 and Rs. 18,07,15,779.56, respectively. The assessing authority by order dated March 31, 1997, determined the total and taxable turnover at Rs. 3,02,79,15,963 and Rs. 45,13,88,752, respectively. As against the said order, the first respondent preferred an appeal before the Appellate Assistant Commissioner disputing the following items:

4. In the appeal, the Appellate Assistant Commissioner, by a common order dated September 18, 1997 in A.P. No. 320/95, which relates to the assessment year 1989-90, sustained the disallowance of exemption on high sea sales relating to sales turnover of coin blanks of Rs. 18,00,183 and confirmed the levy of tax for want of C forms on a turnover of Rs. 9,85,338. However, with respect to levy of penalty, though the appellate authority accepted the levy of penalty, reduced the quantum from 150 per cent to 50 per cent of the tax dues and refixed the same.

5. So far as the assessment year 1991-92 is concerned, disallowance of exemption on high sea sales and levy of tax at the enhanced rate for want of C forms were confirmed. The dispute relating to disallowance of exemption on stock transfer was remitted for passing appropriate orders and the levy of penalty was sustained. Aggrieved by the aforesaid common order passed by the Appellate Assistant Commissioner, the petitioner preferred further appeal before the second respondent, the Tamil Nadu Sales Tax Appellate Tribunal in T.A. Nos. 460 and 491 of 1998. The Tribunal under the impugned order, reversed the finding of the appellate authority with respect to disallowance of exemption on high sea sales relating to sales turnover of coin blanks and levy of penalty, though it was reduced to 150 per cent to 50 per cent, and confirmed the finding in respect of the taxable amount due to absence of C forms. Aggrieved by the aforesaid common order of the Tribunal, the State has come with the present writ petitions.

6. The learned Special Government Pleader for the petitioner submitted that the movement of goods after conversion into coin blanks from the foreign party to the first respondent cannot be construed as importation of goods inasmuch as the first respondent had dispatched the stainless steel strips to foreign country for effecting conversion and the same is dispatched in turn as converted goods and in such

process the title to the goods is retained throughout by the first respondent and, therefore, the said transaction cannot in law and in commercial parlance be designated as import. It is also submitted by him that in the transaction of the first respondent the ownership over the goods before its dispatch and after its return is retained by the first respondent until they are sold to Government of India and, therefore, there is no element of sale or purchase involved and the claim of the first respondent as sale in the course of import becomes untenable. It is further submitted by him that the agreement entered into by the first respondent with the Government of India for supply of coin blanks and the subsequent agreement with the foreign party constitute a separate and distinct contract and there is no privity of contract between the Government of India and the foreign party for importation of any goods. According to him, the exemption u/s 5(2) of the Act should not be granted to the first respondent. In support of the aforesaid contentions, the learned Special Government Pleader has placed reliance upon the decision of the Supreme Court in K. Gopinathan Nair and etc. Vs. State of Kerala, and decisions of this court in Indian Photographic Company Ltd., (Previously Kodak Limited), Madras Vs. The State of Tamil Nadu, and State of Tamil Nadu Vs. Voltas Limited,).

7. The learned counsel for the first respondent, supporting the order passed by the Tribunal, has contended that the transaction effected by the first respondent was in course of import and by way of transfer of documents of title and, therefore, they are entitled for exemption as contemplated u/s 5(2) of the Act. He drew support from a recent decision of the Supreme Court in The Indure Ltd. and Another Vs. Commercial Tax Officer and Others,

8. The point for consideration is as to whether the Tribunal was right in holding that the first respondent is eligible for the claim of exemption u/s 5(2) of the Central Sales Tax Act ?

9. The point:

The issue involved in these writ petitions arise under the Central Sales Tax Act, 1956. This Act has been enacted to formulate principles for determining when a sale or purchase of goods take place in the course of the inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce. Before going into the contentions raised, it would be profitable to note down some of the relevant provisions of the Act.

10. As per section 2(dd) "place of business" includes-

(i) in any case where a dealer carries on business through an agent (by whatever name called), the place of business of such agent;

(ii) a warehouse, godown or other place where a dealer stores his goods; and

(iii) a place where a dealer keeps his books of account.

11. According to section 2(g) of the Central Sales Tax Act "sale" means

any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods.

12. Section 3, which is similar to section 5 of the Act, reads as under:

3. A sale or purchase of goods shall be deemed to take place in 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.

13. Section 5 deals with sale or purchase of goods taken place in course of import or export and clause (2) of section 5 being relevant, it is extracted hereunder:

5. (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

14. Article 286(1)(b) of the Constitution, provides:

286. (1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place,--

(a)...

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

15. Article 286(1) states that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of the import of the goods into, or export of goods out of, the territory of India. Prior to the Constitution Sixth Amendment Act, 1956 there was an Explanation for the purpose of sub-clause (a) of article 286(1). There was no definition of the expression "in the course of import" or "in the course of export" before the Constitution Sixth Amendment Act, 1956. By the Constitution Sixth Amendment Act, 1956, Parliament was given power to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of article 286. Section 5 of the Central Sales Tax Act has given a legislative meaning to the expression "in the course of export" and "in the course of import".

16. Coming to the facts, so far as W.P. No. 13264 of 2001 is concerned, a contract for conversion of ferritic stainless steel strips into coin blanks was entered into between the SAIL, viz., the first respondent and Verres s.r.l., a company at Italy on May 24, 1990 at Verres Aosta, Italy. In the said contract the first respondent was described as purchaser, whereas the foreign company was described as conversion agent. Under clause 1.4.2 it was indicated that "the property and title in the strips shall continue to vest with the PURCHASER". With regard to scope of work, it was mentioned that the conversion agent should arrange for the conversion of the strips into coin blanks of 50 paise and 25 paise denominations with minimum guaranteed yield of 73 per cent and, if it is lower than the minimum guarantee yield, the conversion agent should make up the shortfall at its costs. Inspection of the officials of the first respondent at every stage of manufacture and cancellation of the contract, in case the samples do not conform to the standard prescribed by the Indian Government Mint, were also contemplated under the contract. The contract price fixed under the agreement was IT Lira 1.060.000 (Italian Lira one million sixty thousand only) per MT. As per clause 8 of the contract, the conversion and delivery should be completed within a period of six weeks from the date of arrival of the strips. The payment was guaranteed under the letter of credit through Indian Bank which would cover 100 per cent value of the contract price. This contract is purely a commercial agreement entered into between the first respondent and the foreign company for a valid consideration. In the said agreement, there is no liability for the Government of India with the foreign company or the foreign company with the Government of India. The Government has no role to play in the contract and it remains as a mere spectator. Even in the contract, the first respondent has not stated about the supply of cold rolled ferritic stainless strips by the Government to it. The agreement is silent with regard to supply of steels strips by the Government. Moreover, the first respondent alone has been described as the purchaser and not the Government of India. Therefore, even a normal person who come across the above contract would come to a conclusion that it is a commercial arrangement entered between the parties for a valid sale consideration.

17. After entering into contract with the foreign company, subsequently, the first respondent entered into an agreement with the Government of India on June 11, 1990 for the manufacture and supply of twenty five and fifty paise stainless steel coin blanks. In this agreement, the first respondent was described as the supplier, whereas the Indian Government mint was described as the purchaser. As per the agreement, the purchaser has to pay the supplier at US $ 3307 per MT for 25 paise blanks and US $ 3203 per MT for 50 paise blanks. It is seen that the payments to the supplier for the supply of coin blanks would be made through irrevocable letter of credit to be opened by the purchaser through State Bank of India, Noida, in favour of the supplier. As per the terms and conditions of the agreement, the supplier has to ensure that the coin blanks are manufactured strictly in accordance with the specifications detailed in clause 1.1 of the agreement. The supplier has to arrange

all facilities free of cost for four inspections of the coin blanks manufactured under the agreement. The termination of the agreement as has been in the previous agreement finds a place.

18. A conjunct reading of both the agreements would make it clear that these two agreements are independent to one another and are different entities. They are in no way connected with one another. The first agreement was entered into by the first respondent SAIL as a purchaser with the foreign company for conversion of steel strips into coin blanks and the second agreement was entered into by it as a supplier with the Indian Government mint for supply of steel strips. The first respondent in the first agreement acted in the capacity of a supplier for a valid consideration and in the second agreement it acted as the purchaser to the conversion agent for a valid consideration. In fine, it should be said in the commercial parlance that the first respondent entered into these agreements for its own purpose as an entity for a valid consideration and there is no privity of contract between the local purchaser, namely, the Government and the foreign seller.

19. So far as W.P. No. 13268 of 2001 is concerned, the first respondent has entered into similar contracts, one with the foreign conversion agent at West Germany for conversion of steel strips into coin blanks and another with the Indian Government mint for supply of steel strips and the terms and conditions are similar to that of the two earlier contracts.

20. In the aforesaid background, one has to see the issue involved and the decisions relied on by either side. The crux of the contentions raised by the petitioner is that there is no privity of contract between the Government of India and the foreign party for importation of any goods and that, in the absence of any sale in the course of import, the finding of the Tribunal that the transaction in question continued to be in pursuance of the earlier contract made by the Government of India, Mint, Noida with the first respondent and, therefore, there existed a privity of contract, is liable to be interfered with. In support of the aforesaid contention, the learned counsel, among other decisions cited supra, mainly relied on the Division Bench decision of this court in Indian Photographic Company Ltd., (Previously Kodak Limited), Madras Vs. The State of Tamil Nadu,

21. In Indian Photographic Company Ltd., (Previously Kodak Limited), Madras Vs. The State of Tamil Nadu, the decisions of the Supreme Court relied on by the petitioner had been referred to. It would be appropriate to deal with the said decision in detail.

22. In the aforesaid case, the assessee was a dealer in photography films and equipments. The assessee imported the photography goods on the basis of actual users licence, sold the same to the actual buyer and claimed the sales to be in the course of import. The assessing authority rejected the claim of the assessee on the ground that there was no privity of contract between actual buyer and foreign seller

and treated the sales as inter-State sales liable to be taxed under the Central Sales Tax Act. The assessee preferred an appeal to the Appellate Assistant Commissioner, who held that the assessee had acted only as an agent to import the goods on behalf of the actual user licence holders. However, the Joint Commissioner, in exercise of the suo motu power revised the order of Appellate Assistant Commissioner, held that it was the assessee who had sold the goods to the actual user licence holders and restored the order of the assessing authority. On appeal, the assessee contended that it had acted only as an agent of the licence holder, that the property always remained with the licence holder and that there was a sale in the course of import within the meaning of section 5(2) of the Central Sales Tax Act, 1956. It was the further contention of the assessee that there was privity of contract between the foreign seller and the actual licence holder.

23. The Division Bench of this court applying the tests laid down by the Supreme Court in the decision in K. Gopinathan Nair and etc. Vs. State of Kerala, observed as follows (pages 439 and 441 in 128 STC):

10. Applying the tests laid down by the Supreme Court in the abovesaid decision, we find that the assessee has not produced any material to show that there was a connection or a link between the first sale after import and the import of the goods in order that the sale can be treated as a sale in the course of import. The assessee in the present case has not established that there was any term or condition prohibiting the diversion of the goods after the import. In other words, the assessee has not established that there was an integral connection or link between the transaction of the sale and the actual import making sale in the course of import. Mr. N. Inbarajan, learned counsel for the assessee strongly relied on the decision of the Supreme Court in The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., In the case before the Supreme Court, the assessee had imported cotton on the strength of actual user''s import licence issued to the mills and sold the goods to the mills. It was found on the facts of the case that the assessee was precluded from selling to anybody other than the mill to whom the actual users import licence had been granted and the goods could not be diverted from its destination, namely, the mills. The Supreme Court, therefore, held that the sales in questions were the sales in the course of import within the meaning of section 5(2) of the CST Act. We are of the view that the decision in The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., is distinguishable as the assessee has not established the inextricable link between the import and the subsequent sale to the local buyer.

Ultimately, the Division Bench held as follows:

13. We find on the facts of the present case, that the assessee has not established that there was any contract between the foreign seller and the local buyer. It was found that there was privity of contract between the assessee and the foreign seller.

It is only in pursuance of the purchase order made by the assessee the goods actually moved from the foreign country to Chennai. The assessee has not established that he had acted as an agent of the local buyer and he has not established the terms in the contract prohibiting diversion of the goods after import. In the absence of any material to support the case of the assessee that it had acted as an agent of the local buyer and in the absence of any evidence to show that there was an inextricable link between the import of the goods and sale to the local buyer, we hold that the Joint Commissioner was correct in holding that the goods moved from the foreign seller to the assessee in pursuance of the contract of sale between the assessee and the foreign seller. Thereafter, the assessee sold the goods to the local buyer and therefore, it was treated and rightly so as inter-State sales liable to be taxed under the Central Sales Tax Act...

24. Coming to the facts of the present case, the assessee has entered into contracts with the foreign seller for conversion of steel strips into coin blanks for valid consideration. Under the CST Act, 1956, tax is leviable on the sale of goods and not because of the movement of the goods. The movement of the goods is only material for the purpose of deciding whether the sale took place in the course of inter-State trade or commerce or whether such sale was purely an intra-State transaction. The name given to a transaction by the parties concerned does not decide the nature of the transaction. In order to make a transaction taxable under the CST Act, 1956, the transaction must be a "sale" as defined in section 2(g). To claim exemption u/s 5(2) of the Act, the sale or purchase of goods should be deemed to take place in the course of the import of the goods into the territory of India. As per the definition, "sale" means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration.

25. In K. Gopinathan Nair and etc. Vs. State of Kerala, , the Supreme Court formulated the following three essential conditions to come to a conclusion whether the sale can be said to be in the course of import to claim exemption u/s 5(2) of the CST Act or not:

(1) There must be a sale.

(2) Goods must actually be imported.

(3) Sale must occasion the import.

26. Applying the aforesaid tests laid down by the Supreme Court to the present case, we find that the assessee has not established that there was any term or condition prohibiting the diversion of the goods after the import, i.e., the inextricable link between the transaction of the sale and the actual import making sale in the course of import. Moreover, in order to qualify for the exemption, the goods must move from the foreign country to India in pursuance of the conditions in the contract of sale between the foreign seller and the local purchaser, but, in the present case, the goods were imported from the foreign country to India in pursuance of the contract

entered into between the foreign seller and the first respondent, who was not the local purchaser. Therefore, we can safely arrive at a conclusion that the sale contemplated u/s 5(2) of the Central Sales Tax Act, 1956 is not applicable to the case on hand.

27. The learned Tribunal had arrived at a wrong conclusion by proceeding on the wrong footing that the sales had occasioned during the course of import. The transaction took place between the parties had amply made it clear that the sale contemplated u/s 5(2) had not taken place and, moreover, even assuming that there was an import of goods from Italy, such import was not occasioned as a result of sale by a dealer in Italy. The dealer was prevented from selling the goods to any person other than to whom the import licence had been granted, i.e., to be sold only to the Mint Government of India by the dealer. Therefore, the conclusion arrived at by the learned Tribunal has necessarily to be interfered with.

28. Though various decisions had been relied on by the learned counsel for the respondents in support of their contention, they are not applicable to the present case, in view of our aforesaid conclusion on facts. For the aforesaid reasons, the writ petitions are allowed and the impugned order passed by the learned Tribunal, dated February 26, 1999, is set aside. There would be no order as to costs.