Tata Aircraft Limited Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: April 25, 1978

Citation: (1979) 44 STC 146

Hon'ble Judges: Dipak Kumar Sen, J; C.K. Banerji, J

Bench: Division Bench

Advocate: Somen Bose and Bhagawati Banerjee, for the Appellant; Sanjay Bhattacharya and A.B. Chatterjee, for the Respondent

Judgement

Dipak Kumar Sen, J.
This is a reference u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Act), at the

instance of Tata Aircraft Ltd., the applicant. The facts found and/or admitted in the proceedings are shortly as follows: Tata Aircraft Ltd. was

registered as a dealer under the Act on 19th November, 1946. The accounting year followed by it was from 1st April to 31st March. For the

assessment periods, respectively, from 19th November, 1946, till 31st March, 1947; 1st April, 1949, till 31st March, 1950; and 1st April, 1950,

to 31st March, 1951, the applicant failed to submit return of sales tax within the time as prescribed under the Act. In answer to the notices served

by the successive Commercial Tax Officers, 24-Parganas, the applicant claimed that no sales tax was payable by it as it was not a dealer within the

meaning of Section 2(c) of the Act. The applicant claimed further that it was engaged in disposing of surplus stores of the Government of India

pursuant to and in terms of an agreement entered into by it with the Government. The Commercial Tax Officers concerned rejected the above

contentions and completed the assessments for the said periods on the turnover of sales of such surplus stores of the Government of India effected

by the applicant and the sales tax was levied accordingly.

2. The applicant preferred appeals against the assessments before the Assistant Commissioner of Commercial Taxes, who upheld the orders of the

Commercial Tax Officers. Thereafter, the petitions of revision filed before the Commissioner of Commercial Taxes, West Bengal, were rejected

and the orders of the Assistant Commissioner were upheld. Ultimately, revision petitions were filed before the Board of Revenue. By its order

dated 22nd December, 1954, the Board rejected the contentions of the applicant and held that it was a dealer within the meaning of the said Act.

At the instance of the applicant, the following question has been referred by the Board to this Court as a question of law arising out of its order:

Whether, on the facts and in the circumstances of the case, the petitioner carried on the business of selling goods in West Bengal and was therefore

a dealer as defined in Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941.

3. Mr. Bhagawati Banerjee, the Learned Counsel for the applicant, contended at the hearing that Tata Aircraft Ltd. was not engaged in the

business of selling or supplying goods at the relevant time and, therefore, it was not a dealer within the meaning of the said Act. He submitted that

under the agreement dated 29th May, 1947, entered into by and between the applicant and the Government of India, the former acted as the agent

of the Government and, in the course of such agency, took part in the disposal of surplus stores belonging to the Government of India. This activity

of the dealer was not a business activity of selling or supplying goods. In support of his contentions, Mr. Banerjee cited a decision of the Supreme

Court in Director of Supplies and Disposals, Calcutta v. Member, Board of Revenue, West Bengal, Calcutta AIR 1967 S.C. 1826. The facts in

this case were, inter alia, that the Government of India set up an organisation known as the Directorate of Disposals (United States Transfer

Directorate) to dispose of war equipments taken over from the American forces after the Second World War. A part of such equipments was

appropriated by the Government itself for their own use. Some equipments were sold to the State Governments and other autonomous bodies and

the balance was sold to the public. The authorities under the Bengal Finance (Sales Tax) Act, 1941, held that the Directorate was a dealer within

the meaning of the Act. On a reference, this Court upheld the finding of the sales tax authorities. The matter finally went up to the Supreme Court

on appeal. The Supreme Court took due note of the following facts: (a) The Government of India had paid no consideration for acquiring the

equipments but had merely set up an organisation to dispose of the equipments. (b) The sales effected by the Government through the Directorate

were not casual, but had been spread over a number of years. (c) The equipments disposed of included diverse types of goods and they were so

disposed of after frequent advertisements.

4. In spite of the aforesaid, the Supreme Court concluded that, in disposing of the surplus war materials, the Government had not been carrying on

a business of selling goods and that the transactions were not liable to be taxed under the provisions of the Act. It was further held that the surplus

goods were not being sold for profit but were merely being disposed of by way of realisation of capital. The Supreme Court noted with approval a

decision of the Privy Council in Commissioner of Taxes v. British Australian Wool Realization Association Ltd. [1931] A.C. 224 (P.C.) In that

case, the respondent-company was incorporated in Australia pursuant to an agreement between the Imperial and Commonwealth Governments for

the purpose of selling the surplus of the stocks of wool acquired during the Great War. The question arose whether it was carrying on a trade or

whether it was realising its capital assets. The Privy Council held that the surplus resulted merely from the realisation of capital assets and no part of

it was income chargeable to tax.

5. Mr. Sanjay Bhattacharya, the Learned Counsel for the Board, has contended, on the other hand, that Tata Aircraft Ltd. was admittedly carrying

on a business for profit. The activities of this business consisted of selling goods on behalf of the Government of India and the transactions in this

business were clearly exigible to sales tax. Mr. Bhattacharya submitted that there was no finding in the instant case that the dealer was realising any

surplus capital. The realisation of capital, if any, was being made by the Government of India. But, so far as the dealer was concerned, it was

carrying on its own business for profits realised by way of service charges and selling fees.

6. In support of his contentions, Mr. Bhattacharya referred to certain clauses of the agreement entered into by and between the applicant and the

Government of India, which we shall advert to later. He also cited the following decisions:

(a) Commissioners of Inland Revenue v. Incorporated Council of Law Reporting (1888) 3 Tax Cas. 105: The facts of this case were that the

Council of Law Reporting was incorporated with the object, inter alia, of preparation and publication of judicial decisions of Courts in England. Its

income and property were to be applied solely towards the promotion of its objects and no profits, dividend or bonus were to be distributed. The

question arose whether the council was carrying on a trade or business and whether it was liable to submit a return for income tax. It was

contended that the council was not a body ""chargeable"" within the meaning of the statute concerned. In determining these questions, Coleridge,

C.J., observed, inter alia, as follows:

...What is it that these gentlemen do if they do not carry on a business? They carry on something, they do something, they are very actively

engaged in something. What is it they are engaged in ? I confess I should have thought it capable of strong argument that they were carrying on a

trade, because it is not essential to the carrying on of trade that the people carrying it on should make a profit, nor is it even necessary to the

carrying on of trade that the people carrying it on should desire or wish to make a profit. The definition of trade, though it is perfectly true that

trade, it may be in ninety-nine cases out of one hundred, does as a matter of fact include the idea of profit, yet the mere word "trade" does not

necessarily mean profit to be made by the seller to the buyer, or by the buyer from the seller, not at all. But putting aside trade, how can it possibly

be denied that these gentlemen carry on a business ? They are incorporated, they have a secretary, they employ reporters, they employ printers,

they print books, they sell those books, they do all that is ordinarily done by a bookseller. It is said that though they make profit, it appears that

they cannot by their articles of association put this profit into their own pockets. Be it so. They are carrying on a business by the terms of which

they are prevented from making a profit to their own benefit.

(b) Commissioner, Sales Tax, U.P., Lucknow v. Sita Ram Agarwal [1970] 25 S.T.C. 218: Here the Allahabad High Court under the explanation

to Section 2(c) of the U.P. Sales Tax Act, 1948, held that a commission agent was to be held to be a dealer, the turnover of goods sold by him on

account of his principal was to be treated as his turnover and that he was assessable to sales tax.

(c) Food Corporation of India, Cochin v. State of [1974] 34 S.T.C. 1892: The facts in that case were that the importation and distribution of

fertilisers were taken over by the Government of India under the Fertilisers (Control) Order, 1957, and the Food Corporation of India was

nominated for the distribution of fertilisers to be effected on a no-loss-no-profit basis. The procedure adopted was that against indents of the State

Governments supplies would be effected by the Corporation. The Control Order contained provisions regarding fixation of prices, licensing of

dealers and imposition of restrictions on sale of fertilisers. The question arose whether the supply of fertilisers by the Corporation to the State

Government of Kerala or its nominees constituted sales and, therefore, attracted sales tax under the Kerala General Sales Tax Act, 1963. It was

contended by the Corporation that the Control Order ruled out any volition in the transactions and any freedom of contract and, therefore, the

transactions could not be held to be sales. On a reference, the Kerala High Court held that, as the petitioner was functioning as the agent of the

Central Government in effecting the supply and distribution of fertilisers, under explanation (2) of Section 2(viii) of the relevant Act, the

Corporation would be deemed to be a dealer for the purpose of the statute. It was found further that all the elements of a consensual contract were

present in the transactions.

7. At this stage, it will be convenient to consider the relevant clauses of the agreement dated 29th May, 1947. Under the said agreement, the

applicant was appointed the sole and exclusive agent of the Government of India for, inter alia, the following purposes and on, inter alia, the

following terms:

(a) To take over from the representatives of the U.S.A. Foreign Liquidation Commission in India and other authorised agents of the Government of

the United States or the United States Army surplus stores consisting principally of aircraft, aircraft spare parts and other stores at certain depots.

(b) To retain such stores in the applicant''s custody or control.

(c) To take care of such property on behalf of the Government of India.

(d) The applicant would be free to sell and dispose of all the said stores subject to the general sales policy to be settled in consultation with the

Government through a Consultative Committee consisting of representatives of the Government and the applicant.

(e) The applicant would assume all del credere risks in connection with the sale and disposal of the said stores.

(f) The Government would pay to the applicant remuneration by way of custody fee for services in taking over and maintaining custody of the

stores calculated at \ per cent on the total net realisations from the sale and disposal thereof subject to a minimum fee of Rs. 5 lakhs in agreed

instalments.

(g) For services in connection with sale and disposal a lump sum fee of a minimum of Rs. 10 lakhs on all sales and disposals plus an additional

selling agency fee of 5 per cent of the aggregate net realisations on all sales and disposals in excess of Rs. 5 crores, to be paid by stipulated

instalments.

8. It is clear from the aforesaid that the applicant as the agent of the Government disposed of surplus war materials. In the case of Director of

Supplies and Disposals, Calcutta v. Member, Board of Revenue, West Bengal AIR 1967 S.C. 1826 the Government of India was carrying on the

same activity through the agency of the Directorate of Supplies and Disposals and it was held that the said transactions were not effected in the

course of the business of selling goods within the meaning of the Bengal Finance (Sales Tax) Act, 1941. In our view, the controversy in this case is

covered by the aforesaid decision of the Supreme Court. If the principal, that is, the Government of India, cannot be said to carry on a business of

selling goods in disposing of its surplus material, it cannot be held that its agent, by carrying on the same activity on behalf of its principal, is carrying

on such a business.

9. In the facts and circumstances and for the reasons as aforesaid, the assessee"s contentions have to be accepted and we answer the question

referred in the negative and in favour of the assessee. There will be no order as to costs.

C.K. Banerji, J.

I agree.