

(2004) 09 CAL CK 0047

Calcutta High Court

Case No: W.P.T.T. No. 504 of 2004

Special Officer and Additional
Commissioner of Commercial
Taxes and Others

APPELLANT

Vs

Sri Jai Prakash Tulsian and
Others

RESPONDENT

Date of Decision: Sept. 10, 2004

Acts Referred:

- West Bengal Sales Tax Act, 1994 - Section 10, 11, 12, 13, 14
- West Bengal Taxation Tribunal Act, 1987 - Section 8

Citation: (2005) 3 CHN 621 : (2005) 140 STC 89

Hon'ble Judges: Sankar Prasad Mitra, J; Alope Chakrabarti, J

Bench: Division Bench

Advocate: Seba Roy, for the Appellant; L.K. Gupta and Sumit Ghosh, for the Respondent

Judgement

Sankar Prasad Mitra, J.

This writ petition has been filed by the petitioners challenging the judgment dated December 24, 2003 passed by the West Bengal Taxation Tribunal in Case No. R.N. 489 of 2001*. By the said judgment the Tribunal held that the seizure dated January 17, 2001 of the books of accounts and documents of respondent No. 1 by the Assistant Commissioner of Commercial Taxes, Bureau of Investigation was bad in law. However, the respondent-authority, the petitioners herein were given liberty to take steps u/s 30(3) of the West Bengal Sales Tax Act, 1994 (hereinafter referred to as "the Act 1994") on the basis of the materials disclosed by the documents and records seized.

2. The petitioner's case is that the respondent No. 1 a dealer using the veil of a "broker" being proprietor of M/s, Shri Ranisati and Company, 30, Maharshi Debendra Road, Kolkata 700 007 had delivered oil cake and de-oiled cake in all

forms, an item taxable at the rate of 4 per cent as per serial No, 213 under Schedule IV of the Act 1994. The respondent No. 1 in spite of his liability to pay tax and to obtain compulsory registration under the Act, 1994 did nothing in this regard and he intentionally avoided the payment of taxes. As such pursuant to Section 66 of the Act a raid was conducted in the business premises of respondent No. 1 and in course of raid relevant documents, books of accounts were seized by the raiding party. Pursuant to raid conducted a notice dated November 19, 2001 was issued to the respondent No. 1 by the Assistant Commissioner of Commercial Taxes, Bureau of Investigation calling upon him for hearing along with relevant books of accounts and records. The respondent No. 1 against this move filed an application u/s 8 of Act 1994 registered as case No. 489 of 2001 challenging the validity of seizure as well as notice dated November 19, 2001.

3. After hearing both sides in connection with Case No, 489 of 2001 the learned Tribunal Judge allowed the application filed by the respondent No. 1 giving an option to the petitioners to take steps u/s 30(3) of the Act 1994. The learned Tribunal Judge while dealing with the said application found that the question of payment of tax arises only after assessment and prior to that there is no liability on the part of a dealer to pay anything because tax at that point of time cannot be termed as due. According to him tax becomes due when assessment is made and a notice is issued by the department demanding payment from the dealer. According to learned Judge before taking any steps u/s 66 of the Act, the liability of the dealer should be assessed at first and demand for payment should be made and in that event the tax becomes due and non-payment thereof should be called evasion of tax by a dealer. According to him unless any amount is found due after assessment, it cannot be said that the dealer has evaded payment of tax justifying action to be taken u/s 66 of the Act 1994. It has been observed by the learned Judge as no tax was due from respondent No. 1 the question of evasion did not arise and, therefore, seizure of books of accounts from the premises of respondent No. 1 by the petitioners and issuance of notice dated November 19, 2001 were not valid in the eye of law. As such, he was pleased to declare the seizure as bad in law giving opportunity to the taxing authority to take appropriate steps u/s 30(3) of the Act.

4. "Dealer" has been defined u/s 2, Sub-section (10) of the Act which means any person who carries on the business of selling or purchasing goods in West Bengal or any person making sales u/s 15, and includes a factor, a broker, etc.

5. Section 2, Sub-section (35) of the Act defines "tax" which means the tax payable under this Act, and includes surcharge payable u/s 16, additional surcharge charge payable u/s 16A, turnover tax payable u/s 16B and additional sales tax payable u/s ISA. Charging sections fixing liability to pay sales tax under the Act 1994 will be found under sections 9, 10, 11, 12, 13, 14 and 15.

6. Section 9(1) of the Act defines the liability to pay tax under the Act on all sales other than those referred to in Section 15 in respect of every dealer including

registered dealer. Sub-section (2) of the said Section prescribes the liability of a dealer other than registered dealer to pay sales tax when gross turnover of sales calculated from the commencement of any year exceeds the taxable quantum at any time within such year.

7. Section 10 of the Act prescribes special liability of a dealer to pay tax from the day on which he effects his first sale of such goods specified in Schedule IV of the Act. Section 26 of the Act speaks about compulsory registration of dealers. Under this Section no dealer shall, while being liable to pay tax u/s 9, Section 10, Section 12 or Section 15, carry on business as a dealer unless he has been registered and possesses a certificate of registration.

8. Proviso to Section 26 provided that a dealer liable to pay tax u/s 9, Section 10, Section 12 or Section 15 shall be allowed two months" time from the date which he is first liable to pay such tax to get himself registered. Section 29 contains provision for imposition of penalty upon a dealer for his failure to get registered.

9. Section 30 refers to periodical returns and payment of tax. u/s 30(1) of the Act tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed. Under Sub-section (2) of this Section every registered dealer shall, in the prescribed manner, furnish such returns by such dates to such authority as may be prescribed. Under Sub-section (3) of Section 30 any dealer, other than a registered dealer referred to in Sub-section (2), shall, if so required by the Commissioner by a notice served in the prescribed manner, furnish returns in accordance with the provisions of Sub-section (2). According to Sub-section (4) of Section 30 of the Act before any dealer furnishes a return required by Sub-section (2) or Sub-section (3), he shall, in the prescribed manner, pay into a Government treasury or the Reserve Bank of India the full amount of tax due from him under this Act according to such return, and shall furnish along with such return a receipt from the treasury or bank showing the payment of such amount. Section 45 of the Act speaks about the procedure to be adopted for assessment of tax payable by a registered dealer while Section 46 of the said Act prescribed the procedure for assessment of tax payable by dealers other than registered dealers.

10. Learned counsel Ms. Seva Roy appearing for the petitioners drawing our attention to the relevant provisions of law submitted that it is a part of the general scheme of all sales tax laws that taxes become due the moment a dealer makes either purchases or sales which are subject to taxation and the obligation to pay the tax arises. Although the tax liability, which comes into existence, cannot be enforced till the quantification is effected by assessment proceedings the liability for payment of tax is independent of the assessment. In this connection Ms. Roy relied upon a decision reported in [State of Madhya Pradesh and Others Vs. Shyama Charan Shukla](#), It is further submitted by Ms. Roy that under the provisions of Act 1994 and Bengal Finance (Sales Tax) Act, 1941 and the Rules framed thereunder, there is an obligation on the part of every registered dealer to pay tax on all sales in certain

specified manner. The liability to pay sales tax is not dependent upon assessment or demand but it is an obligation to pay tax either annually, quarterly or monthly as the case may be under the particular Rule guiding the particular dealer and in this connection she relied upon a decision reported in [1970] 25 STC 243 (Commissioner of Income Tax, West Bengal) (II) v. Royal Boot House). It is further submitted by Ms. Roy that the tax as defined in Section 2(35) means tax payable under the Act 1994. According to Ms. Roy a registered dealer or any other dealer is bound to pay sales tax and file returns on the basis of self-assessment at pre-assessment stage. However, any other dealer other than registered dealer who on the day on which he effects his first sale of goods specified in Schedule IV of Section 10 of the Act shall pay sales tax on the basis of self-assessment at the pre-assessed stage, file return and apply for registration. So liability to pay tax starts at pre-assessed stage and in that pre-assessed stage the amount of tax due calculated under the self-assessment has to be paid by the dealer because he is under obligation to do so and this is independent of assessment to be made by C.T.O. According to her this liability to pay tax continues till assessment is made and demand is raised by the C.T.O. for payment of assessed tax. So the liability to pay tax starts from initial stage when there is obligation to do so. It does not depend upon the assessment of tax to be made by the C.T.O in future. It is, therefore, submitted by the learned counsel Ms. Roy that the finding of the learned Tribunal Judge to the effect that the tax becomes due and payable by a dealer only after the assessment is made by the C.T.O and prior to that a dealer has no liability to pay tax is a misconception in view of a scheme framed by the Act 1994. It is further submitted by Ms. Roy that Section 66 of the Act 1994 contains provision against tax evaders who do not discharge their statutory duty by voluntary compliance of legal provisions relating to the State's legitimate revenue. The provisions of Section 66 are not at all meant for fixation of the date of liability to pay tax, quantification of tax due or for enforcement of payment of any tax due from the dealer. So the observation of learned Tribunal Judge to the effect that since there was no assessment of tax of the dealer (respondent No. 1), no tax due and payable under the Act came into existence and therefore the question of its evasion by respondent No. 1 did not arise. This observation of the learned Tribunal Judge according to Ms. Roy suffers from misconception because Section 66 of the Act does not contain any such provision for assessment and determination of tax payable by a dealer evading payment of tax prior to search and seizure. Therefore, the decision arrived at by the learned Trial Judge holding the seizure as bad in law should not be sustained by this Court. Learned counsel Ms. Roy also cited two decisions reported in [State of Rajasthan and Others Vs. Ghasilal](#), and [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#), submitted that considering the facts and circumstances, the judgment dated December 24, 2003 passed by the learned Tribunal Judge should be set aside by this Court.

11. I would like to mention that the decisions cited by the learned counsel for the petitioners reported in [State of Rajasthan and Others Vs. Ghasilal](#), and [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#), are not applicable in the present case,

12. Learned Counsel Mr. L.K. Gupta appearing on behalf of the respondents drawing our attention to the relevant provisions of the Act submits that the meaning of the words "tax due" and "tax payable" are not synonymous. According to him the tax becomes due and payable by a dealer when assessment is made by the C.T.O and prior to assessment tax payable by a dealer does not create any obligation or liability to pay tax under the Act. It is, therefore, submitted by Mr. Gupta that tax due and payable by a dealer cannot be independent of assessment. At the pre-assessment stage a dealer has no obligation to pay any tax but it is under an obligation to pay tax at the post-assessment stage. It is further submitted by the learned counsel Mr. Gupta that since the Act does not create any obligation to pay tax prior to assessment the decision arrived at by the learned Judge of Taxation Tribunal should be upheld by this Court. According to Mr. Gupta since there was no assessment of tax fixing liability of respondent No. 1 he has no obligation to pay any tax and therefore, the question of evasion of tax by him does not arise. It is further submitted by Mr. Gupta that search and seizure conducted by the department should be held to be bad in law because the respondent No. 1 had neither any obligation to pay any tax nor he evaded the payment of tax. So the search and seizure conducted by the department u/s 66 of the Act should be held illegal by this Court. In support of this contention he relied upon the decisions reported in [State of Rajasthan and Others Vs. Ghasilal](#), [State of Madhya Pradesh and Others Vs. Shyama Charan Shukla](#), and [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#),

13. Considering the contentions of the respective parties and the law cited it appears that u/s 2, Sub-section (3) of the Act tax means the tax payable under this Act and the liability to pay tax continues by a dealer under different sections of law starts from pre-assessment stage and it continues till post-assessment stage. There is no dispute as observed by the Tribunal that respondent No. 1 is an unregistered dealer and there is also no dispute that the respondent No. 1 effected his first sale of oil cake and de-oiled cake in all forms specified in Schedule IV of the Act and, therefore, in view of Section 10 of the Act he incurs special liability to pay tax on sales. But the respondent No. 1 neither applied for registration u/s 26 of the Act nor he submitted periodical returns nor he paid any tax, which he is under obligation to pay at pre-assessment stage, and his liability to pay tax does not depend upon any assessment to be made in future by the department in view of Section 30 of the Act. That apart the respondent being a dealer other than registered dealer is liable to be assessed u/s 46 of the Act. It is therefore crystal clear that it is a part of the general scheme of all sales tax laws that tax become due the moment a dealer makes either purchase or sales which are subject to taxation and the obligation to pay tax arises.

Although the tax liability, which comes into existence, cannot be enforced till the quantification is effected by assessment proceedings the liability for payment of tax is independent of assessment. Moreover the liability to pay sales tax is not dependent upon assessment or demand but it is an obligation to pay the tax either annually or quarterly or monthly as the case may be, under the particular rule guiding the particular dealer. Therefore, the decisions cited by the learned counsel for the petitioner reported in [State of Madhya Pradesh and Others Vs. Shyama Charan Shukla](#), and [Commissioner of Income Tax Vs. Royal Boot House](#), are applicable in this case to clarify the tax liability of a dealer before assessment. As we have already observed in this particular case the decisions reported in [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#), and [State of Rajasthan and Others Vs. Ghasilal](#), are not applicable. Therefore, the liability of the respondent No. 1 to pay tax started from the day on which he effected first sale of goods specified in Schedule IV of the Act, 1994 independent of assessment. It is therefore, clear that the tax became due and payable by him from the day on which he effected the first sale referred to above. Therefore, finding of the learned Tribunal Judge in this connection cannot be accepted because in that event a registered dealer will have no obligation to deposit tax along with return at the pre-assessment stage and such a situation is never contemplated in the scheme framed under the Act 1994.

14. It is admittedly clear that the respondent No. 1 did not pay any tax which he was obliged to pay under different Sections of law of Act 1944. Section 66 is a provision against tax evaders who do not discharge their statutory duty by a voluntary compliance of legal provisions relating to the State's legitimate revenue. The provisions of Section 66 are not meant for fixation of the date of liability to pay tax, quantification of tax due or for enforcement of payment of any tax due from the dealer. Therefore, before conducting a raid the department is under no obligation to make an assessment determining the liability of tax evaders to pay tax. In the circumstances, the search and seizure of books of accounts and documents relating to respondent No. 1 conducted by the petitioners pursuant to Section 66 of the Act cannot be held illegal or arbitrary. As such, the decision arrived at by the learned Tribunal Judge in case No. R.N. 489 of 2001 allowing the application preferred by the respondent No. 1 u/s 8 of the West Bengal Taxation Tribunal Act, 1987 should not be allowed to continue.

15. We, therefore, hold that the judgment dated December 24, 2003 passed by the West Bengal Taxation Tribunal in Case No. R.N. 489 of 2001 is illegal and arbitrary and accordingly it is set aside.

16. Petitioners are given liberty to take further steps against the respondent No. 1 in pursuance of the notice dated November 19, 2001 issued by the Assistant Commissioner of Commercial Taxes as early as possible.

17. The application is thus disposed of. There will be no Order as to costs.

18. I agree.