

Malik Traders Vs. State of Maharashtra

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Court : Mumbai

Decided On : Jan-19-1990

Reported in : [1990]77STC411(Bom)

Judge : Sujata V. Manohar and;T.D. Sugla, JJ.

Acts : Bombay Sales Tax Act, 1959 - Sections 12 and 14

Appeal No. : Sales Tax Reference No. 21 of 1981

Appellant : Malik Traders

Respondent : State of Maharashtra

Advocate for Def. : G.C. Jetley and;Miss G. R. Bharwani

Advocate for Pet/Ap. : B.C. Joshi and;P.C. Joshi, Advs.

Judgement :

T.D. Sugla, J.

1. The Sales Tax Tribunal has referred to this Court the following two questions of law for opinion. The questions read thus :

'1. Whether, in the facts and circumstances of the case, the Tribunal was correct in law in holding that there was no implied sale of the packing materials purchased on declaration in form 14, to the foreign buyer

2. If the answer to the above question is in the negative, whether in the facts and circumstances of the case, the Tribunal was right in confirming the levy of purchase tax under section 14 of the Act ?'

2. It is evident that the real question of law to be answered is the first question, the second question being consequential. The assessee is an exporter of footwear. Its purchases are from registered dealers to whom it furnishes undertaking in form 14. The certificate in form 14 is also given when the assessee purchases packing material which is used for packing the footwear for export. The departmental authorities took the view that the packing material for which the assessee had given undertaking in form 14 in terms of section 12 of the Bombay Sales Tax Act, 1959 (for short 'the Act'), was not resold by the assessee in the course of export out of the territory of India. The assessee's case was hit by the provisions of section 14 of the Act and the assessee was liable to pay full purchase tax.

3. The Sales Tax Tribunal referred to the Supreme Court decisions in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 STC 624 and *State of Madras v. Cement Allocation and Co-ordinating Organisation* 1972 29 STC 114 and to its own decision in *M/s. Crescent Exporters v. State of Maharashtra* (Second Appeal Nos. 1494 and 1495 of 1973 decided on 25th July, 1974). It stated that there could not be hard and fast rule as to whether the packing materials could or could not be said to have been resold in the course of export out of the territory of India. If the packing material was of routine type and not complicated and its cost was insignificant, it might not be a case of sale of packing material even by implication. On the other hand, if the packing material used was costly and the assessee was specifically required to use special type of packing, it might be a case of sale of packing material.

In the present case, finding that the instructions given regarding packing were of routine type and the cost of packing was less than 10 per cent, i.e., from 8.84 per cent to 9.29 per cent, the Tribunal held that the packing material could not be said to have been resold by the assessee in the course of export out of the territory of India. Accordingly the assessee, it was held, had violated the undertaking given by it in form 14 and was liable to pay the difference between full purchase tax payable

and concessional purchase tax paid by it on its purchases of packing material.

4. Shri Jetley, the learned counsel for the department, stated that the first., i.e., the main question of law referred to this Court in this case involved a finding of fact and that this Court, therefore, should not answer the question. For this purpose he placed reliance on the following observations of the Supreme Court in its decision in Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 ST 624 :

'.... Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fictions ...'

Therefore, where there is no formal agreement of sale and the question is whether there is an implied agreement of sale of packing material, the question would ordinarily be a question of fact. In the present case, however, the Tribunal applied certain principles for coming to its conclusion. Moreover the counsel have placed before us at least 4 Supreme Court and 20 High Court decisions where such a question was considered by way of reference or in revision. The Tribunal itself has considered the question to be a question of law. In the above view of the matter we do not think that it will be proper in this case not to answer the question on the ground that the question is a question of fact.

On merits, there seems to be no dispute that there is no formal agreement of sale between the assessee and its foreign buyers, as regards the packing material. However, the foreign buyers had given instructions about the nature of packing they would like the assessee to do while exporting footwear. This fact is noted in paragraph 6 of the Tribunal's order. The instructions were :

'Each odd pair in polythene bags, and each pair in a cardboard box and boxes in cartons. Cartons strapped with rayon tape.'

The cost of packing material works out of about 8.84 per cent to 9.29 per cent of the assessee's export turnover. We are required to answer the question referred to us on these facts.

5. The first decision which throws light on the subject is that of the Supreme Court in the case of Hyderabad Deccan Cigarette Factory 1966 17 STC 624 It was held :

'(i) that whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay upon the Commercial Tax Officer to prove that a turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied. To ascertain these facts he could rely upon oral statements, accounts and other documents, personal enquiry and other relevant circumstances such as the nature and purchase of the packing materials used;

(ii) that in order to constitute a sale it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it should be supported by money consideration and that as a result of the transaction, property should actually pass in the goods. Unless all these elements were present there could be no sale;

(iii) that what the sales tax authorities had to do was to ask and answer the question whether the parties, having regard to the circumstances of the case, intended to sell or buy the packing materials or whether the subject-matter of the contracts of sale was only cigarettes, and packing materials did not form part of the bargain at all, but were used by the sellers as a convenient and cheap vehicle of transport.

It might be that for the purchase of excise duty the packing materials were not separated from the cigarettes, but that could not possibly preclude the sales tax authorities from taxing the packing materials if they were the subject-matter of the agreements to sell.'

This view was reiterated by the Supreme Court in its subsequent decisions in Commissioner of Taxes, Assam v. Prabhat Marketing Co., Ltd. [1967] 19 STC 84, Jamana Flour & Oil Mill (P.) Ltd. v. State of Bihar [1987] 65 STC 462 and

Commissioner of Sales Tax, U.P. v. Rai Bharat Das & Bros. [1988] 71 STC 277. The ratio of the aforesaid decisions appears to be that in a case where there is no formal contract of sale of packing materials, the contract of sale will be implied provided that the packing material used is not of a routine type and is also not of insignificant value. The packing material which is merely a cheap and convenient vehicle for transporting the goods sold will not imply a contract of sale. This will be the test for deciding whether in a given case there is an implied contract of sale of packing materials. A number of decisions of different High Courts were cited before us by the two sides. Each case was and had to be decided on its own facts. Obviously there could not be any hard and fast rule.

As regards the present case it has to be borne in mind that the foreign buyer had given specific instructions as to the nature and manner of packing the footwear it was buying. The instructions have been referred to in the earlier paragraph of the judgment. When there are instructions about the packing, ordinarily there would be justification for implying that the packing was a part of the contract of sale. That the packing was not of routine type can be spelt out from the fact that the amount spent on the packing materials worked out to about 9 per cent of the value of footwear sold. The Supreme Court had, in terms, held that if the value of the packing materials was very insignificant, it could be held that the packing material was not a part of the contract of sale. Though the converse of a proposition may not always hold good, the cost of packing material being about 9 per cent of the sale price cannot certainly be treated as insignificant and a finding that the packing was merely a cheap and convenient vehicle for the transport of the goods would certainly be not justified.

Referring to its decision in the case of Crescent Exporters, the Tribunal observed that in that case it had concluded that there was implied contract of sale in respect of packing materials. But the case was distinguished on two grounds, namely, (i) packing instructions in that case were more elaborate and detailed and not of routine type as in this case; and (ii) cost of packing material was more than 10 per cent as against about 9 per cent in the present case. In our judgment, the question whether the packing instructions are more detailed or less detailed is not of much consequence. What is pertinent is whether packing had to be done according to

the specific instructions given by the buyer and whether the cost of that packing was so insignificant that the packing could be treated as a cheap and convenient vehicle for transport of goods. Having regard to above discussion, we are of the view that the conclusion of the Tribunal that there was no implied contract of sale as regards packing material was not correct.

Amongst the decisions relied upon by Shri Jetley, the main decision was that of Orissa High Court in *Shamsuddin Akbar Khan & Co. v. State of Orissa* (1970) 26 STC 280. In other decisions which were of the same and/or of Madhya Pradesh High Court, this decision was followed. It will, therefore, be sufficient to refer to the said decision only. The question in that case was whether the containers used for the gudaku could be said to have been sold by tobacco dealer so as to attract the sales tax. The assessee in that case was not charging for the container separately and even when gudaku was sold loose the same price was charged. It was on these facts that placing reliance on the Supreme Court decisions in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 STC 624 and *Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd.* (1967) 19 STC 84, the court held that there was no sale of container and assessee was, therefore, not liable to sales tax. We fail to appreciate how does this decision support the case of the department.

Shri Jetley's main argument was that the burden was on the assessee to prove that there was implied sale of packing material. It may be so, However, when all relevant facts are on record, the question of burden of proof loses all its significance. In the present case, all relevant facts are on record and there is no dispute about them. It is common ground that there is no formal agreement as regards the sale of packing material; that there are packing instructions by the foreign buyer; that packing material is neither shown separately nor separately charged; and that its cost to the assessee was about 9 per cent of the sale price. It was also urged that unless the packing material was of some use to the buyer, he could not be deemed to have purchased it. This, to our mind, again is not of much consequence. What is of consequence is whether the packing material was used according to the instructions of the foreign buyer and whether it had cost the assessee an amount which could not be treated insignificant.

6. In the result, the first question is answered in the negative and in favour of the assessee.

The question No. 2 is consequential. The same is also answered in the negative and in favour of the assessee.

7. No order as to costs.

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