The State of Tamil Nadu Vs. I.B.M. World Trade Corporation

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Court : Chennai

Decided On : Apr-10-1984

Reported in : [1985]60STC118(Mad)

Judge : G. Ramanujam and ;Ratnam, JJ.

Acts : Tamil Nadu General Sales Tax Act, 1959; Central Sales Tax Act - Sections 5(2)

Appeal No. : T.C. Nos. 253 to 255 of 1978 (Revision Nos. 69 to 71 of 1978 respectively)

Appellant : The State of Tamil Nadu

Respondent : i.B.M. World Trade Corporation

Advocate for Def. : K. Srinivasan, Adv. for King and Partridge

Advocate for Pet/Ap. : K.S. Bakthavatsalam, Additional Government Pleader

Judgement :

Ramanujam, J.

1. Since all these tax revision cases are interconnected and they raise the same question, they are dealt with together.

2. The assessees in these cases are IBM World Trade Corporation who have been registered as dealers under the Tamil Nadu General Sales Tax Act, 1959. For the assessment year 1973-74 the assessee returned a total and taxable turnover of Rs. 1,82,32,991 and Rs. 3,53,048 respectively. The assessing officer however determined the total and taxable turnover at Rs. 2,82,99,836 and Rs. 1,53,26,659 respectively. The assessee had claimed exemption on the following turnover :

(a) Data service charges 29,72,807.51(b) Sales to foreign embassies 53.68(c) Sales of books (manuals) 316.00(d) Sales in the course of import 150,06,766.75----------179,79,943.94----------

3. The assessing officer allowed the claim for exemption on the first three items but rejected the claim as regards the last item, on the ground that the sales of IBM Computer System Type No. 370/155 with complete unit of data processing machines to the Indian Institute of Technology, Madras, are not in the course of import and therefore, those sales are to be taxed as local sales. The assessee took the matter in appeal to the Appellate Assistant Commissioner against the levy of sales tax, additional tax and surcharge imposed on the last item of the turnover of Rs. 1,50,06,766.75. The Appellate Assistant Commissioner had confirmed the assessment order and dismissed all the appeals. The matter was then taken by the assessee to the Sales Tax Appellate Tribunal inter alia questioning the assessment of the said turnover of Rs. 1,50,06,766.75. The Tribunal after considering the terms of the agreement of sale and the other documents held that the said disputed turnover represents sales in the course of import and therefore it is to be exempted from tax. Aggrieved by the decision of the Tribunal, the Revenue has come up before this Court by way of these tax

revision petitions.

4. The only question that arises for consideration before this Court is whether the turnover of Rs. 1,50,06,766 represents sales in the course of import as has been held by the Tribunal.

5. According to the Tribunal the facts of this case attract the principle laid down by the Supreme Court in Deputy Commissioner of Agricultural Income-tax and Sales Tax, Central Zone, Ernakulam v. Kotak & Co. : [1973]3SCR883 and that the principle laid down by this Court in Krishnados Kikani v. State of Tamil Nadu [1976] 38 STC 223 cannot be applied. The case of the Revenue however is that the facts of this case will attract the principle laid down in Krishnados Kikani v. State of Tamil Nadu [1976] 38 STC 223 and not the principle laid down in Kotak's case : [1973]3SCR883 as has been held by the Tribunal.

6. The facts are not much in dispute. The Indian Institute of Technology, Madras, invited tenders in or about 1971 for the supply of a computer system. The assessee submitted a tender in February, 1972. After some negotiation and discussion an agreement was entered into between the Indian Institute of Technology, Madras, and the assessees on 30th July, 1972 for supply of IBM System 370, Model 155 and certain other machines. The agreement envisaged either the assessees or the Indian Institution of Technology obtaining the import licence. However, the Indian Institute of Technology applied for the obtained the import licence. Thereafter, it obtained a letter of authority in favour of the assessee. On the basis of the said letter of authority and the import licence referred to, the assessees imported the goods and supplied the same to the Indian Institute of Technology. The import licence and the letter of authority clearly prohibited the disposal of the goods by the assessees to anyone else except to the Indian Institute of Technology, Madras. Thus, the assessees were precluded from selling the goods to anyone else. Under the terms of the agreement the Indian Institute of Technology has undertaken the transit insurance liability. The agreement dated 30th July, 1972 also provided for prices f.o.b., supplying factories abroad, all charges for casing and packing, costs, transportation insurance, rigging and dryage and importation including customs duties and import taxes from factories to the places of installation specified by the purchaser in addition to the agreed f.o.b. price. The agreement also provides that the machines purchased under the agreement will be installed and placed in good working condition by IBM without additional charge and the purchaser shall make available a suitable place of installation with all facilities as specified in IBM's specification. The purchaser shall furnish all labour required for unpacking and placing each machine in the desired location. So far as title to the goods is concerned, it is stipulated in the agreement that the title should remain with the assessees until the full purchase price and transportation and importation charges and taxes are paid and the failure to pay the said price and charges would give the assessees the right without liability, to repossess the goods with or without notice. The question is whether having regard to the terms of the agreement the sale by IBM to Indian Institute of Technology of the various machines referred to in the agreement can be considered as sales in the course of import as has been held by the Tribunal.

7. The clause in the agreement relating to price throws some light upon the nature of the sale. Clause (A)(ii) provides that the assessee or purchaser as the case may be obtaining the import licences for imports of complete machines from abroad and the price agreed to has been set out in annexures I and II. The prices are f.o.b. supplying factories and all packing, transportation insurance, rigging and dryage and importation including customs duties and import taxes payable from the factories to the place of installation specified by the buyer will be added to the said f.o.b. price. The above clause read along with the clause relating to risk of loss and warranty which provides that during the period the machines are in transit or in possession of the purchaser up to and including the date of installation the assessees and their insurers relieve the purchaser of responsibility for all risks and loss or damage to the machines and that after the date of installation the risk of loss or damage shall be on the purchaser. In accordance with the terms of the agreement, the I.I.T., obtained import licence on 4th December, 1972. The licence is issued in the name of the I.I.T., and it is declared to be non-transferable. Under the licence, the I.I.T. has been permitted to import the machinaries from all the importers abroad excluding certain specified countries. In the schedule, the items of goods that are mentioned in the schedule to the agreement have been mentioned with total c.i.f. value of Rs. 30,80,000.

Clause (ii)(a) of the licence provides that where an irrevocable letter of credit is opened by the holder of the licence to finance the import of any goods covered thereby, then the authorised dealer in foreign exchange through whom the credit is opened, shall be deemed to be a joint holder of this licence to the extent of the goods covered by the credit. Clause (ii)(c) of the licence provides that all items imported under the licence shall be used only in the licence holder's factory and no portion thereof will be utilised by the licensee for a unit or purpose other than the one for which the licence in question is issued or will be sold or permitted to be utilised by any other party. The said clause also provides that the licensee shall maintain proper accounts of consumption and untilisation of the goods imported against the licence and produce such account to the licensing authority or sponsoring authority or any other authority concerned when called upon to do so. Clause (iii) of the licence provides that the goods for the import of which this licence has been granted shall be the property of the licensee at the time of import and thereafter up to the time of clearance through customs. Clause (iv) provides that the licensee shall also be subject to the conditions applicable to the class of importer concerned as contained in the relevant Import Trade Control Hand Book of Rules and Procedure in force on the date of the issue of the licence. Thus as per the terms of the import licence granted to the I.I.T. the goods imported thereunder shall be the property of the licensee at the time of the import as well as at the time of the clearance through customs. No doubt, in this case the import has actually been made by the IBM on the basis of a letter of authority issued in favour of IBM. In these circumstances the IBM has to be taken as having acted only as the agent of the I.I.T. for the import of the goods. On more or less similar facts, the Supreme Court in Deputy Commissioner of Agricultural Income-tax and Sales Tax v. Kotak & Co. : [1973]3SCR883 had held that the actual importer should be taken to be an agent of the purchaser as the import licence is in the name of the purchaser and the actual importer has been precluded from selling the goods to anyone other than the party to whom the import licence had been granted and the goods could not be diverted elsewhere. Therefore, the sales in that case were held to be sales in the course of import within the meaning of section 5(2) of the Central Sales Tax Act. The facts in that case were as follows : Pursuant to contracts entered into with certain textile mills, Kotak & Co. imported cotton on the basis of the licence issued to the mills and letter of authority issued by the Government. In the contract the quantity of cotton to be supplied, its quality and the place from where they are to be imported were specified. The prices were fixed c.i.f. Cochin and payment was to be made by the mills against documents. The contract was irrevocable and the sale was subject to import licence. On these facts the Supreme Court held that under the Import Control Regulations the importer was the mills and the import licence and the letter of authority were issued to the mills only, that the assessee had imported the goods on the basis of the letter of authority, the mills being liable as importers, that the letter of authority provided that the importer will act purely as agent of the licensee and the goods imported will be the property of the licence-holder both at the time of the clearance through customs and subsequent thereto, and that the licence-holder will have to ensure that the goods on importation will be sold to him and shall not be disposed of otherwise. The licensee shall not cause or permit the holder of the letter of authority to dispose of the goods. The facts of that case are in pari materia with the facts of the present case and, therefore, the decision in that case will squarely apply to this case. It has therefore to be held that the sale of computer equipment in favour of I.I.T., Madras, is in the course of import and therefore, it has to be exempted from the levy of sales tax under section 5(2) of the Central Sales Tax Act. Since IBM has acted only as agent for the import of the goods, there is only one sale from the foreign seller, to the I.I.T. through the assessees as importing agents.

8. The learned Government Pleader, however, placed strong reliance on the clause in the agreement which provides that the title should remain with the assessees until the full purchase price, transportation, importation and taxes shall have been paid and failure to pay the purchase price of a machine or the above-mentioned charges would give the assessees the right without liability to repossess the goods would indicate that the IBM has acted not as agent but as an independent dealer and that the title to the goods has passed from the foreign seller to IBM and there is a further passing of title from IBM to I.I.T. But it is significant to note that any stipulation deferring vesting of title or a default clause for non-payment of the price will not in any way alter the sale in the course of import into one of local sale or a local sale into a sale in the course of import. It is quite common in the commercial world to purchase goods on credit also and the right to

repossess the goods on default of payment of the price will not alter the character of the sale. As a matter of fact this aspect of the matter has been touched upon by this Court in Bengal Corporation Private Ltd. v. State of Madras [1965] 16 STC 62. In that case the argument advanced on behalf of the State was that even though the shipping documents were transferred to the buyer on payment of the price, the property in the goods did not pass in view of certain special conditions in the contract. But this was rejected on the ground that such conditions of the contract for securing the price will not prevent the passing of the property. As already pointed out, under the terms of the licence the goods imported are the property of the buyer both at the time of the import and also at the time of the clearance and the goods having been imported by IBM as an agent of the buyer and the import licence making a special mentioned that the goods cannot be diverted or used for any other purpose other than the purpose for which they are imported, the stipulation that the title should remain with the IBM till the full price is paid has to be construed only in the light of the terms of the import licence and not de hors it. The said term can only be construed in the circumstances as enabling the IBM to have a lien on the goods imported for securing the price of the goods. Therefore the provision in the agreement that the title to the machines will remain with the IBM until the full purchase price and the charges mentioned therein are paid is only a safeguard for securing the price and such a stipulation cannot be understood to mean that the IBM has acted not as an agent but as an independent dealer. It cannot be disputed that the IBM could not have imported the above machines into India but for the licence granted to the I.I.T. and the IBM could not have transferred the goods to anybody else and it cannot make use of the machines in any other manner than to instal in the campus of the I.I.T. the learned Government Pleader contends that the facts of this case attract the ruling of the Supreme Court in Binani Bros. (P.) Ltd. v. Union of India : [1974]2SCR619 , Mod. Serajuddin v. State of Orissa : AIR1975SC1564 and the decision of this Court in Krishnados Kikani v. State of Tamil Nadu [1976] 38 STC 223. In the first case it was held that the sale by the assessee to the purchaser did not occasion the import of the goods and it was the purchases made by the assessee from the foreign sellers which occasioned the import of the goods and that there was no privity of contract between the purchase and the foreign seller who did not enter into any contract by itself or through the agency of the assessee to the purchaser. In that case the purchaser did not obtain any import licence and it was the assessee who had obtained the import licence and imported the goods for the supply to the buyer. Thus the facts in that case are clearly distinguishable from the facts of the present case as in this case the purchaser obtained not only the import licence but also a letter of authority authorising the assessees to import the goods on its behalf and at the same time precluding the assessees from dealing with the goods in any other manner than to bring them and instal them in the purchaser's premises. In the second case, the assessee who had no import licence has sold the goods to the State Trading Corporation which had entered into an agreement of sale with the foreign buyer. That was a case of an export by the State Trading Corporation on the basis of the licence obtained by them. Therefore the State Trading Corporation cannot be treated as agent of the assessee who had sold the goods for export. That case also is quite distinguishable. In the third case the assessee who is a licensed importer placed an order with a foreign seller and there was no privity of contract between the foreign seller and the local purchaser. It was on those facts it was held that there was two sales one by the foreign seller to the assessee and another by the assessee to the local purchaser. But here the facts are entirely different. Here is a purchaser who had obtained on import licence and conferred specific authority on the assessees for importing the computer system as agent. Dealing with such situation as arising in this case in Kikani's case [1976] 38 STC 223 the Court has observed :

'The question for consideration was whether the sale of cotton effected to the mills were sales in the course of import within the meaning of section 5(2) of the Central Sales Tax Act. The Supreme Court held that the import licence was issued to the mills, that the assessee-firm was precluded from selling to anybody other than the mills to whom the user's import licence had been granted and that by virtue of the letter of authority given, the assessee-firm was acting purely as an agent of the licensee and the goods imported was the property of the licence-holder both at the time of clearance through customs and subsequently thereto. Accordingly, the Supreme Court held that the sales in question were sales in the course of import within the meaning of section 5(2) of the Central Sales Tax Act.'

9. Thus, the third case instead of supporting the Revenue supports the assessees' case as seen from the following observation :

'If the purchasers were holding the import licence and the assessees had helped them in importing the goods as in the case of Deputy Commissioner of Agricultural Income-tax and Sales Tax v. Kotak & Co. : [1973]3SCR883 , the position would have been different.'

10. As we are clearly of the view that the facts of this case squarely fall within the decision of the Supreme Court in Kotak's case : [1973]3SCR883 , we have to hold that the disputed turnover of Rs. 1,50,06,767 represent the turnover of sales in the course of import and as such it is exempted under section 5(2) of the Central Sales Tax Act. In this view, no interference is called for with the order of the Tribunal.

11. The tax cases are, therefore, dismissed. The Revenue will pay the costs of the assessees. Counsel's fee Rs. 500 (one set).