

M/S. CHOWRINGHEE SALES BUREAU (P) LTD.

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v.

C.I.T., WEST BENGAL

October 10, 1972

[K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

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Bengal Finance (Sales Tax) Act, 1941—Whether "Auctioneer" covered by expression "Dealer" in explanation 2 of Sec. 2(c)—Definition of the word "Dealer" whether ultra vires the power of the State legislature under Entry 48, List II, Schedule VII of Govt. of India Act, 1935—Assessee company acting as auctioneer—Amount realised as sales tax in auction sales and credited separately under Sales Tax Collection Account, whether part of appellant's income.

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The appellant assessee is a private limited Company dealing in furniture and also acts as an auctioneer. In respect of the sales effected by the appellant as auctioneer, it realised, during the year in question, in addition to the commission, Rs. 32,986/- as sales tax. This amount was credited separately in the books under the Sales Tax Collection Account. This sum was neither paid over to the ex-chequer nor was it refunded to the persons from it had been collected. For the year in question, the I.T.O. held that the sum of Rs. 32,986/- was a part of the appellant's income of the same nature as the commission received by it on the auction sales. The appellant relying on the decision of the Calcutta High Court, [1961] 12 S.T.C. 535 contended that as the State Government had legislative competence to include "auctioneer" in the definition of "dealer" in the Bengal Finance (Sales Tax) Act, 1941, the amount in question was not a trade receipt liable to tax under Income Tax Act.

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The Appellate Asstt. Commissioner and the Appellate Tribunal held in favour of the appellant. However, a reference under Sec. 66(1) of the Indian Income Tax Act, was answered by the High Court against the appellant. Two questions were posed before this Court : (1) Whether the decision of the Calcutta High Court in [1961] 12 S.T.C. 535 was correct and (2) whether the answer to the reference by the High Court was right?

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HELD : An auction sale in view of the provisions of Sec. 4 read with 64 of the Sale of Goods Act would have to be considered to be a sale for the purpose of Sale of Goods Act. There is nothing in Entry 48 of List II of Schedule VII of the Government of India Act (corresponding to Entry 54 of List II of the Seventh Schedule of the Constitution) which restricts the power of the Legislature in the matter of the imposition of the Sales Tax to the levy of such tax on the owner of the goods on whose behalf they are sold or the purchaser where the transaction is one of sale of goods. In view of the wide amplitude of the power of the State or provincial legislature to impose tax on transactions of sale of goods, it would be impermissible to read a restriction in entry 48 on the power of the State legislature as would prevent the State legislature from imposing tax on an auctioneer who carries on the business of selling of goods and who has in customary course of business authority to sell goods belonging to the people. What is sought to be taxed is the transaction of the sale of goods. If there is a close and direct connection between the transaction of sale and the person made liable for the payment of tax as in the present case, the statutory provision providing for such levy on sales tax would not

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A offend entry 48. As such, the definition of the word "Dealer" in explanation 2 of S. 2(c) of the Bengal Act cannot be deemed to be *ultra vires*. It was within the competence of the provincial legislature to include within the definition of the word "dealer" an auctioneer who carries on the business of selling of goods and who has in the customary course of business authority to sell goods belonging to the principal. [622H]

B *J. K. Jute Mills Co. Ltd. v. State of Uttar Pradesh*, [1961] 12 S.T.C. 535, overruled. -

State of Madras v. Cannon Dunkerley & Co. (Madras) Ltd. [1958] 9 S.T.C. 353, *K. L. Johar & Co. v. Dy. Commercial Tax Officer*, [1965] 16 S.T.C. 213, *J. K. Jute Mills Co. Ltd. v. The State of Uttar Pradesh*, [1961] 12 S.T.C. 429, followed.

C *Zakria Sons P. Ltd. v. State of Madras*, [1965] 16 S.T.C. 136, referred to.

D As the amount of sales tax was received by the appellant in its character as an auctioneer, the amount should be held to form part of its trading or business receipts. The appellant would, of course, be entitled to claim deduction of the amount as and when it pays to State Government. The fact that the appellant credited the amount received as sales tax under the head "Sales Tax Collection Account" would not make any material difference. It is the nature and the quality of the receipt and not the head under which it is entered in the account books that is decisive. [624B]

Punjab Distilling Industries Ltd. v. C.I.T., Simla 1959, 35 I.T.R., followed :

E CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 168 (NT) of 1969.

Appeal by special leave from the judgment and order dated June 18, 1968 of the Calcutta High Court in Income-tax Reference No. 77 of 1966.

B. Sen and *B. P. Maheshwari*, for the appellant.

F *F. S. Nariman*, Additional Solicitor-General, *T. R. Ramachandran*, *B. D. Sharma* and *R. N. Sachthey*, for the respondent.

Gobinda Mukhoty, *G. S. Chatterjee*, for Intervener, (for the State of West Bengal & Advocate-General West Bengal).

The Judgment of the Court was delivered by

G KHANNA, J.—This appeal by special leave is directed against the judgment of Calcutta High Court whereby that court answered the following question referred to it under section 66(1) of the Indian Income Tax Act, 1922 in the negative and against the assessee appellant :

H "Whether on the facts and in the circumstances of the case the sum of Rs. 32,986 had been validly excluded from the assessee's business income for the relevant assessment year?"

The matter relates to the assessment year 1960-61 for which the relevant previous year ended on March 31, 1960. The appellant assessee is a private limited company dealing in furniture. It also acts as an auctioneer. In respect of the sales effected by the appellant as auctioneer, it realised during the year in question, in addition to the commission, Rs. 32,986 as sales tax. This amount was credited separately in the books under the sales tax collection account. The total balance standing to the credit of this account since 1946 up to the end of the relevant previous year stood at Rs. 2,71,698. This sum was neither paid over to the exchequer nor was it refunded to the persons from whom it had been collected. In the earlier years these collections were not added to the appellant's income. For the year in question, however, the Income Tax Officer held that the said sum was in reality a portion of the sale price itself because the sales tax was not the liability of the purchasers of the goods but was the liability of the sellers of the goods only. The owners of the goods who sent them to the appellant for being auctioned had received only their sale price less the amount charged by the appellant as sales tax from the purchasers. The Income Tax Officer held that the sum of Rs. 32,986 was a part of the appellant's income of the same nature as was the commission received by it on the auction sales. The said sum was accordingly added to the appellant's income.

The appellant preferred appeal to the Appellate Assistant Commissioner who took note of the fact that the appellant had not treated the amount as part of its income. The Appellate Assistant Commissioner referred to a decision of a single judge of the Calcutta High Court in a writ petition filed by the appellant against the State of West Bengal. The decision in that case is reported in (1961) 12 S.T.C. 535. It was held by the High Court that where an auctioneer is selling specific chattel or goods for an unknown or a disclosed principal and where the buyer knows that the auctioneer is not the owner, the auctioneer cannot be considered as the seller and there is no contract of sale between him and the buyer. In such a case the auctioneer, according to the High Court, is not even a party to the sale and cannot be made liable for payment of sales tax. The definition of the word "dealer" in Explanation 2 of section 2(c) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Bengal Act) was held to be *ultra vires* in so far as it included an auctioneer.

As an appeal was pending against the above decision of the learned single judge in the Calcutta High Court, the Appellate Assistant Commissioner observed that it was only when the matter was finally decided by the High Court or when the assessee itself treated the said sales tax receipt as income that the said sum could be included in the assessee's total income and only in the

A year in which that event came to pass. The amount of Rs. 32,986 was accordingly excluded from the assessee's income.

B On further appeal the decision of the Appellate Assistant Commissioner was affirmed by the Income Tax Appellate Tribunal. The question reproduced above was thereafter referred to the High Court. The High Court, as already stated, answered the question against the assessee appellant.

C When the appeal came up for hearing before us on September 21, 1972 Dr. Pal on behalf of the appellant assailed the correctness of the answer given by the High Court and in this connection relied upon the dictum laid down in the appellant's case reported in (1961) 12 S.T.C. 535. As against that the learned Additional Solicitor General on behalf of the respondent questioned the correctness of that decision. As the said decision related to the vires of the provisions of section 2(c) of the Bengal Act we directed that notice be issued to the State of West Bengal as well as its Advocate General. Arguments have thereafter been addressed before us by Mr. Sen on behalf of the appellant and the Additional Solicitor General on behalf of the respondent. Mr. Mukhoty on behalf of the State of West Bengal has adopted the arguments of the Additional Solicitor General.

E Before dealing with other matters, it would be convenient to examine the correctness of the view taken by the Calcutta High Court that the definition of the word "dealer" in Explanation 2 of section 2(c) of the Bengal Act was *ultra vires* in so far as it included an auctioneer. The Bengal Act was enacted by the Bengal Legislature in 1941 in pursuance of the powers conferred by entry 48 of List II of Schedule VII of the Government of India Act, 1935. The said entry relates to "taxes on the sale of goods and on advertisements". The entry in so far as it relates to taxes on sale of goods corresponds to entry 54 in List II of the Seventh Schedule of the Constitution. The words "sale of goods" in entry 48 in List II of Schedule VII of the Government of India Act, 1935 were the subject matter of judicial interpretation by this Court in the case of *The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*⁽¹⁾. It was held that those words cannot be construed in the popular sense but must be interpreted in the legal sense and should be given the same meaning which they had in the Sale of Goods Act, 1930. In arriving at this conclusion the Court acted on the principle that words having known legal import should be construed in the sense which they had at the time of the enactment. Another dictum which was laid down in that case was that "a power to enact a law with respect to tax on sale of goods under entry 48 must, to be *intra vires*, be one relating in fact to sale of goods and, accordingly, the Provincial

(1) [1958] 9 S. T. C. 353.

Legislature cannot, in the purported exercise to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales." This Court in that case dealt with a building contract which was one, entire and indivisible, and observed that in the case of such a contract there is no sale of goods and it is not within the competence of the Provincial Legislature under entry 48 to impose a tax on the supply of the material used in such a contract by treating it as a sale.

The view taken by this Court in the *Gannon Dunkerley's Case* (supra) that the word "sale" in entry 48 of List II of Schedule VII of the Government of India Act and entry 54 of List II of the Seventh Schedule of the Constitution has the same meaning as that given in the Sale of Goods Act, 1930 was reiterated by this Court in *K. L. Johar and Co. v. Deputy Commercial Tax Officer*⁽¹⁾ while dealing with a contract of hire purchase.

It cannot be disputed that sale by an auction is a sale as contemplated by the Sale of Goods Act, 1930 (3 of 1930). Section 4 of that Act provides, *inter alia*, that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. Where under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called sale. Further, according to section 64 of that Act, in the case of sale by auction where the goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale. The Calcutta High Court in holding the definition of the word "dealer" in Explanation 2 of section 2(c) of the Bengal Act to be *ultra vires* in the appellant's case reported in (1961) 12 S.T.C. 535 observed :

Entry 48 authorises the imposition of tax either on a seller or a purchase or both. If, however, the Legislature purports to levy a tax upon a person who is neither a seller nor a purchaser, the legislation must be declared *ultra vires*, because it treats an operation as a sale of goods which, according to the Sale of Goods Act, does not amount to such a sale."

We find ourselves unable to agree with the above observations. An auction sale in view of the provisions of section 4 read with section 64 of the Sale of Goods Act would have to be considered to be a sale for the purpose of the Sale of Goods Act. There is nothing in entry 48 which restricts the power of the legislature in the matter of the imposition of the sales tax to the levy of such tax on the owner of the goods on whose behalf they are sold or

(1) [1965] 16 S.T.C. 213

- A the purchaser only. Where transaction is one of sale of goods as known to law, the power of the legislature to impose a tax thereon, in our view, is plenary and unrestricted subject only to any limitation which might have been imposed by the Government of India Act or the Constitution (*See J. K. Jute Mills Co. Ltd. v. The State of Uttar Pradesh*⁽¹⁾). In view of the wide amplitude
- B of the power of the State or Provincial Legislature to impose tax on transactions of sale of goods, it would, in our opinion, be impermissible to read a restriction in entry 48 on the power of the State Legislature as would prevent the said Legislature from imposing tax on an auctioneer who carries on the business of selling goods and who has in the customary course of business, authority to sell goods belonging to the principal. What is sought to be
- C taxed is the transaction of the sale of goods. If there is a close and direct connection between the transaction of sale and the person made liable for the payment of sales tax, the statutory provision providing for such levy of sales tax would not offend entry 48. It cannot be disputed that there is a close and direct
- D connection between an auctioneer and the transaction of auction sale. As such, the definition of the word "dealer" in Explanation 2 of section 2(c) of the Bengal Act cannot be deemed to be *ultra vires* the power of the Provincial or State Legislature on the ground that the legislature purports to levy tax on a person who is neither a seller nor a purchaser. It was, in our opinion, within the competence of the Provincial Legislature to include within the definition of the word "dealer" an auctioneer who carries on the
- E business of selling goods and who has in the customary course of business authority to sell goods belonging to the principal.

We may also observe that a Division Bench of the Madras High Court in the case of *Zackria Sons Private Limited v. State of Madras*⁽²⁾ has dissented from the view taken by the Calcutta High Court in the appellant's case against the State of West Bengal.

- It is apparent from the order of the Appellate Assistant Commissioner and has not been disputed before us in the present case that in the cash memos issued by the appellant to the purchasers in the auction sales it was the appellant who was shown as the
- G seller. The amount realised by the appellant from the purchasers included sales tax. The appellant, however, did not pay the amount of sales tax to the actual owner of the goods auctioned because the statutory liability for the payment of that sales tax was that of the appellant. The appellant company did not also deposit the amount realised by it as sales tax in the State exchequer
- H because it took the position that the statutory provision creating that liability upon it was not valid. As the amount of sales tax was received by the appellant in its character as an auctioneer, the

(1) (1961) 12 S. T. C. 429.

(2) (1965) 16 S. T. C. 136.

amount, in our view, should be held to form part of its trading or business receipt. The appellant would, of course, be entitled to claim deduction of the amount as and when it pays it to the State Government. A

The fact that the appellant credited the amount received as sales tax under the head "sales tax collection account" would not in our opinion, make any material difference. It is the true nature and the quality of the receipt and not the head under which it is entered in the account books as would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt. We may in this context refer to the case of *Punjab Distilling Industries Ltd. v. Commissioner of Income Tax, Simla*⁽¹⁾. In that case certain amounts received by the assessee were described as security deposits. This Court found that those amounts were an integral part of the commercial transaction of the sale of liquor and were the assessee's trading receipt. In dealing with the contention that those amounts were entered in a separate ledger termed "empty bottles return security deposit account", this Court observed : B
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"So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold. Nor does it make any difference that the price of the bottles was entered in the general trading account while the so-called deposit was entered in a separate ledger termed "empty bottles return deposit account" for, what was a consideration for the sale cannot cease to be so by being written up in the books in a particular manner." E

We, therefore, agree with the High Court in so far as it has answered the question referred to it in the negative and against the appellant. The appeal consequently fails and is dismissed with costs. F

S.B.W.

Appeal dismissed.

(1) [1959] 35 I.T.R. 519.