THE STATE OF MAHARASHTRA

v.

M/S. EMBEE CORPORATION, BOMBAY

AUGUST 21, 1997

[S.P. BHARUCHA AND V.N. KHARE, JJ.]

Central Sales Tax Act—Sec. 5(2)—Sale of Goods Act—Sec. 4-5, 18-24—Claim of exemption from Sales Tax on import—"Sale or purchase occasions such import"—Meaning of—Import of raw materials by respondent—As a direct result of contract of sale—Whether provision requires a completed sale to precede—Held,—It is not necessary that a completed sale should precede the import for exemption from sales tax.

The Respondent-assessee, entered into a contract with Director General of Supplies & Disposal (DGS & D) for supply of carbamite to be used in the manufacture of propellant explosives in Cordite Factory, Aruvankadu. The materials were to be imported from West Germany and inspected by the General Manager, Cordite Factory as the indentor. The Respondent obtained recommendation certificate from DGS & D and the necessary export permit from the Government of West Germany. After obtaining the import recommendation certificate the Respondent was given an import licence on condition that the goods imported shall be utilised or disposed of in the manner stipulated by DGS & D and it shall not be utilised or disposed of in any other manner. The DGS & D had also furnished end-use certificate to the effect that Carbamite be allowed to be imported by the Indian Government as it was intended for consumption in India and not re-exported or re-utilised for any purpose other than consumption by the Government factory. In the Bill of Lading the name of assessee was shown as a party to be notified and the General Cordite Factory Aruvankadu was described as the consignee of Carbamite.

The Respondent claimed exemption before the Sales Tax Officer from levy of sales tax, since the sale was in the course of import of the goods into India. The claim of the Respondent was rejected by the Sales Tax Officer and the said order was upheld in Appeal. The Second Appeal was rejected by the Tribunal. The matter was thereafter referred to the High Court on request by Respondent.

A The High Court held that there were two sales viz., the sale between the assessee and DGS & D and the foreign supplier and the assessee, but both the sales were integrated or inter-linked so as to from one transaction and, as such, the sale had occasioned the import of material liable for exemption from sales tax under the Act.

B Before this Court the appellant-State, after referring to the provisions of Central Sales Tax Act & Sale of Goods Act contended that the expression "sale occasions such import" occurring in sub-section 5(2) of the Central Sales Tax Act means a completed sale, that it should precede the import, that in the present case since there was no sale in terms of the C Sale of Goods Act and that the sale has not occasioned the import and as such the respondent is not entitled to any exemption from Central Sales Tax.

Dismissing the appeal, this Court

D HELD : 1.1. While interpreting the expression "sale occasions import" occurring in sub-section (2) of Section 5 of the Central Sales Tax Act, it is not necessary that a completed sale should precede the import. [506-B]

1.2. The definition of 'Sale' in Section 2(g) of the Act and employed E in Section 3 and other sections of the Act would embrace not only completed contract, but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provides for movement of goods or movement of goods is incident of the contract of sale. [503-D]

1.3. The interpretation of Section 3(a) of the Act when applied to F Section 5(2) of the Act would mean that if an agreement for sale stipulates import of goods or import of goods is incident of contract of sale and goods have entered the import stream, such import would fall within the expression "sale occasions import". In the present case, the import of carbamite was direct result of the contract of sale and as such it can be safely held G that sale has occasioned the import. [503-F]

1.4. The decision in *Khosla's* case that sale need not precede the import is correct. There is no distinction on facts between the present case and that of *Khosla's*. It has held the field for nearly more than three decades and its correctness has not been doubted so far. Hence the plea H for referring it to larger Bench is rejected. [505-D]

K.G. Khosla & Co. Pvt. Ltd. **v.** *Dy. Commr. of Commercial Taxes,* **(1966) 17 STC 473, followed.** A

Md. Serajuddin **v.** *State of Orissa,* **36 STC 136;** *K. Gopinathan Nair Etc.* **v.** *State of Kerala,* **[1997] 2 Scale 252 and** *Binani Bros (P) Ltd. & Anr.* **v.** *UOI & Ors.,* **33 STC 254, distinguished.** B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2872 of 1991 Etc.

From the Judgment and Order dated 6.7.90 of the Bombay High Court in S.T.R. No. 30 of 1983. C

S.K. Dholakia, S.M. Jadhav and D.M. Nargolkar for the Appellant.

G. Vellapally, G.S. Jetley, P.C. Joshi, K.M.K. Nair and Manoj Kumar Mishra for the Respondent.

The Judgment of the Court was delivered by D

V.N. KHARE, J. The short question that arises for consideration in this appeal is whether the expression "*sale or purchase* occasions such import" occurring in sub-section (2) of Section 5 of the Central Sales Tax Act (in short the Act) requires that a completed sale should precede the import. E

The material facts which have given rise to the aforesaid question are these :

In response to the tender invited by the Directorate General of Supplies and Disposal (for short 'DGS & D'), Government of India, New Delhi, the respondent M/s. Embee Corporation, Bombay (hereinafter referred to as the 'assessee') who carries on the business of buying and selling chemicals, had submitted a tender for supply of Carbamite for use in the manufacture of different types of propellant explosives as per specifications. The assessee in its tender mentioned the name of M/s. Chemiches Werk Lowi, West Germany as the supplier and from whom the materials were to be imported for which necessary import recommendation certificate was to be provided by the DGS & D for value of the material to be imported. The total price quoted in the tender was Rs. 23.50 per kg. F.O.R. Bombay and the full break-up thereof was disclosed therein. The F G H

A DGS & D accepted the tender of the assessee vide letter dated May 29, 1971 subject, *inter alia*, to the condition that the contract would be governed by the conditions of the contract as contained in form DGS & D-68 (revised) including clause 24 thereof as amended upto-date. It was also a condition that the contracted material was to be inspected by the Chief Inspector, C.I.M.E., Kirkee, Pune at Bombay Port and the General B Manager, Cordite Factory, Aruvankadu was mentioned as the indentor. The assessee thereafter requested the DGS & D to furnish the import recommendation certificate to enable it to import the material as Carbamite was a strategic material which also required an export permit to be granted by the West Germany Government to the assessee's principal. The C DGS & D issued the import recommendation certificate in favour of the assessee for procuring the aforesaid material from West Germany and recommended that the import licence might be issued as per particulars. Against the said order of the DGS & D, the Controller (Import Trade Control) issued licence as requested for. One of the conditions of the D licence was that the goods imported shall be utilised or disposed of in the manner stipulated in DGS & D letter dated June 17, 1971 and the imported materials shall not be utilised or disposed of in any other manner. The DGS & D had also furnished end-use certificate to the effect that Carbamite be allowed to be imported by the Indian Government as it was intended for consumption in India and not re-exported or re-utilised for any purpose E other than consumption by the Government factory. In the Bill of Lading the name of assessee was shown as a party to be notified and the General Manager, Cordite Factory Aruvankadu was described as the consignee of Carbamite. After the consignment arrived, the same was forwarded to the consignee named in the contract, viz., Cordite Factory, Aruvankadu.

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After the goods were supplied to DGS & D, the assessee claimed exemption before the Sales Tax Officer from levy of sales tax as, according to it, the supply under the contract was a sale in course of import of the goods into India. This plea of the assessee was rejected by the Sales Tax Officer and the same was upheld in appeal. The tribunal also substantially G rejected the second appeal of the assessee. At the instance of the assessee, the tribunal referred three questions to the High Court at Bombay for answer. The High Court while answering the questions referred to it held that in the present case there were two sales viz., the sale between the assessee and DGS & D and the foreign supplier and the assessee, but both H the sales were integrated or inter-linked so as to form one transaction and,

as such, the sale had occasioned the import of material liable for exemption from sales tax under the Act. A

In this appeal learned counsel appearing for the appellant referred to Sections 4-5 and 18-24 of the Sale of Goods Act and argued that the expression "sale occasions such import" occurring in sub-section (2) of Section 5 of the Act means as completed sale and it should precede the import, and in the present case since there was no sale in terms of the Sale of Goods Act, the sale has not occasioned the import and as such the respondent assessee is not entitled to any exemption from Central Sales Tax. B

C

Article 286 of the Constitution forbids a State from imposing or authorising the imposition of a tax on the sale or purchase of goods when such sale or purchase takes place (a) outside the State or (b) in the course of the import of goods into or export of goods outside the territory of India. The Parliament had passed the Act with a view to formulate the principles for determining as to when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside the State or in the course of import into or export from India, to provide for levy of collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce. Section 5 of the Act defines what Article 286 of the Constitution forbids and by virtue of clause 2 of Art. 286 the Parliament by enacting Section 5 of the Act has laid down the principles when a sale or purchase of goods takes place in the course of the import into or export of the goods outside India. Since a controversy has arisen as to the interpretation of principles embodied in Section 5 of the Act, it is necessary to examine the provisions of the Act, Section 3 provides – D E

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when is a sale or purchase of goods said to take place in the course of inter-State trade or commerce. The relevant provisions of Section 3 are extracted below :–

(a) occasions the movement of goods from one State to another; or G

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Section 4 lays down *when is a sale or purchase of goods said to take* H

place outside a State. Sub-section (2) of Section 4 is extracted as follows :

"A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State -

(a) in the case of specific or ascertained goods, at the time of contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation".

Again Section 5 of the Act provides -

when is a sale or purchase of goods said to take place in the course of import or export. Sub-section (2) of Section 5 is extracted below :

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

On perusal of the aforesaid provisions of the Act, the question that arises for consideration herein is, what meaning should be given to the expression "sale occasions import". It is almost settled by numerous decisions of the Supreme Court that the expression "sale occasions import" is to be interpreted in the same manner in which the expression "occasions the movement of goods" occurring in Section 3(a) of the Act has received interpretation. In other words, the expression "sale occasions import" has to be given the same meaning which the expression "occasions the movement of goods" has received by the Courts. In the light of aforesaid settled legal position emerging from the Constitution Bench decisions, we will now examine the meaning of "sale" as defined in the Act. Section 2(g) of the Act defines "sale" thus :

"sale, with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another

for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;"

The above definition of "sale" in the Act shows that the word "sale" has been given a very wide meaning so as to include not only the sale of goods, but also the transactions, namely, a transfer of goods on hire purchase system. Further, the use of words "sale of goods" in Section 3 of the Act and the words "contract of sale" occurring in Section 4(2) of the Act have been assigned the same meaning which is wider to the meaning of sale in the general law. In such a situation the word "sale" defined in Section 2(g) of the Act and employed in Section 3 and other sections of the Act would embrace not only completed contract, but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provides for movement of goods or movement of goods is incident of the contract of them. This matter may be examined from another angle. An agreement to transfer goods to the buyer for a price is an important element of sale and the same is also borne out from Section 4 of Sale of Goods Act. If Section 4 of the Sale of Goods Act is read along with Sections 3 and 4 of the Act, it would mean an agreement to sell would also be a sale within the meaning of sale provided such agreement of sale stipulates for transfer or movement of goods or movement of goods is incident of the contract of sale and in that case, such movement of goods would be deemed to be occasioned by the said. It is immaterial that actual sale does not take place at the time of movement of goods and takes place later on. This interpretation of Section 3(a) of the Act if applied to Sub-section (2) of Section 5 of the Act, would mean that if an agreement for sale stipulates import of goods or import of goods is incident of contract of sale and goods have entered the import stream, such import would fall within the expression "sale occasions import". In the present case, the import of carbamite is direct result of the contract of sale and as such it can be safely held in the present case that sale has occasioned the import.

The argument of learned counsel for the appellant that sale should precede the import came up for consideration in the case of *K.G. Khosla & Co. Pvt. Ltd.* v. *Dy. Commissioner of Commercial Taxes,* [1966] 17 STC 473. The Constitution Bench of this Court in the the said case held thus :

"The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition? In *Tata Iron and Steel Co Ltd.* v. *S.R. Sarkar*, it was held that the sale occasions the movement of goods from one State to another within Section 3(a) of the Central Sales Tax Act, when the movement 'is the result of a covenant or incident of the contract of sale'. That the cement concerned in the disputed sales was actually moved from another State into Mysore is not denied. The respondents only contend that the movement was not the result of a covenant in or an incident of the contract of sale.

This Court then, on the facts of the case, found that the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or incident of such contract. This Court did not go into the question as to whether the property had passed before the movement of the goods or not, and this was because according to the decision in *Tata Iron and Steel Co.* v. *S.R. Sarkar*, it did not matter whether the property passed in one State or the other. *Tata Iron and Steel Co.* case was again followed by this Court in *Singareni Collieries Co.* v. *Commission of Commercial Taxes, Hyderabad*.

The learned counsel for the respondent, Mr. A. Ranganadham Chetty, invited us to hold that the observations of Shah, J., in *Tata Iron and Steel Co.* case were obiter, and to consider the question afresh. We are unable to reopen the question at this stage. Shah, J., was interpreting Section 3 of the Act and although the Court was principally concerned with the interpretation of Section 3(b), it was necessary to consider the interpretation of Section 3(a) in order to arrive at the correct interpretation of Section 3(b). Further these observations were approved in *Cement Marketing Co. of India* v. *The State of Mysore*, *State Trading Corporation of India* v. *The State of Mysore* and *Singareni Collieries Co.* v. *Commissioner of Commercial Taxes, Hyderabad*. In the *State Trading Corporation* case in so far as the assessment for the assessment year 1957-58 was concerned, this Court applied the principles laid down in *Tata Iron and Steel Co.* case. Accordingly we hold that the High Court was wrong in holding that before a sale could be said to have occasioned import it is necessary that the sale should have

preceded the import." A

In this case, the Constitution Bench specifically held that sale need not precede the import and this decision is complete answer to the argument advanced by the learned counsel for the appellant.

B

Learned counsel then tried to argue that the decision of the Constitution Bench in *Khosla's* case (supra) is not applicable to the present case as in the said case, the materials were to be inspected at Belgium and London and thereafter the goods were to enter into India. This argument is not correct. In *Khosla's* case (supra), the inspection of goods was to be carried out in Belgium as well as on arrival into India. In the present case, C the inspection was to be done on arrival of goods into India and as such, there is no distinction on facts between the present case and that of *Khosla's*. Learned counsel then urged that the decision of the Constitution Bench in *Khosla's* case (supra) has not been correctly decided and as such this case be referred to a larger Bench. We have considered the matter D and found that *Khosla's* case (supra) has held the filed nearly more than three decades and its correctness has not been doubted so far. We, therefore, reject the prayer of learned counsel for the appellant.

Learned counsel then urged that this case is covered by decisions of this Court in the cases of *Binani Bros. (P) Ltd. Anr.* v. *Union of India & Ors.*, 33 STC 254; *Md. Serajuddin* v. *State of Orissa,* 36 STC 136 and *K. Gopinathan Nair Etc.* v. *State of Kerala,* [1997] 2 Scale 252. The decision of this Court in the case of *Binani Bros.* (supra) is distinguishable as in that case no obligation was imposed on the appellant to supply the imported goods to DGS & D after they had been imported and the same could be F directed to other channels. Similarly, the decision of this Court in the case of *Md. Serajuddin* (supra) is not applicable to the present case as in that case it was found that the appellant in the said case sold the goods directly to the Corporation who entered into a contract with a foreign buyer and it was found that the immediate cause of export was the contract between the foreign buyer who was importer and the corporation who was the G exporter. Such sales were described as back to back contract. This decision rested on the peculiar facts of that case. We are, therefore, of the view that the appellant cannot derive any assistance from the said decision. The last case which was brought to our notice was *K. Gopinathan Nair Etc.* v. *State of Kerala* (supra). In the said case, on facts, it was found that on account H

A of the sale to CCI by foreign exporters raw cashew nuts were imported into India. The importer being the CCI and not the local user, this Court held that principles evolved by it in para 12 of the judgment were not applicable to that case. We do not, therefore, find that this decision is helpful to the *appellant's* case.

B The result of the aforesaid discussion is that while interpreting the expression "*sale occasions import*" occurring in sub- section (2) of Section 5 of the Act, it is not necessary that a completed sale should precede the import.

C For the foregoing reasons, we do not find any merit in the appeal and the same is accordingly dismissed. There shall be no order as to costs. In view of the decision in Civil Appeal No. 2872 of 1991, the S.L.P. stands dismissed.

V.M. Appeal dismissed.