

Calcutta High Court

Ahmed Khan And Sons And Ors. vs Commercial Tax Officer And Ors. on 2 September, 1985

Equivalent citations: 1987 63 STC 104 Cal

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Bench: S C Sen

JUDGMENT Suhas Chandra Sen, J.

1. The petitioner No. 1 is a partnership firm of which the petitioners Nos. 2 and 3 are partners. The partnership business is carried on under the name and style of M/s. Ahmed Khan and Sons at No. 22, Zakaria Street, Calcutta. The business of the firm is mainly export of hookah tobacco paste to Middle East countries. The petitioners for the purpose of their export business purchase substantial quantities of containers, wooden boxes, polythene papers and other packing materials in which the paste is packed for export.

2. There is no dispute that tobacco for hookah exported by the petitioners is exempt from sales tax by virtue of Section 6(1) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter described as the Act), as it comes within item 18 of Schedule I to the said Act. There is also no dispute that the petitioner is a "dealer" as defined in Section 2(c) of the Act as it carries on business of selling goods in West Bengal or of purchasing goods in West Bengal for execution of contracts. It should be noted in this connection that the tobacco paste sold by the petitioners is not manufactured by them. The petitioners buy tobacco paste manufactured by others for the purpose of selling.

3. Section 4 of the Act is the charging section. Every dealer whose gross turnover exceeds the taxable quantum in a year has been made liable to pay tax on all sales effected after the notified date. Section 4(6) has defined "taxable quantum" and is as under:

4. (5) In this Act, the expression 'taxable quantum' means--

(a) in relation to any dealer who imports for sale any goods into West Bengal, 20,000 rupees; or (aa) in relation to any dealer who manufactures or produces any goods for sale, 50,000 rupees; or

(c) in relation to any other dealer, 1,00,000 rupees.

4. Section 7 deals with registration of dealers. It provides that no dealer who is liable to pay tax under Section 4 or Section 6C of the Act shall carry on business as a dealer unless he has been registered and possesses a registration certificate. This section is, however, subject to the provisions of Section 8A which is not material for the purpose of the instant case. Section 8 is an enabling section under which any dealer, whose gross turnover during a year exceeds Rs. 10,000, may apply for registration even though he may not be liable to pay tax under Section 4 of the Act. The explanation to Section 8(1) is important for the purpose of this case and is as under:

Explanation.--A dealer may apply for registration under this section although he deals exclusively in one or more classes of goods specified in the first column of Schedule I.

5. Section 8(2) provides:

8. (2) The provisions of Sub-sections (3) and (4) and Clause (a) of Sub-section (6) of Section 7 shall apply in respect of applications for registration under this section.

6. Section 8(3) provides:

8. (3) Every dealer who has been registered upon application made under this section shall, for so long as his registration remains in force, be liable to pay tax under this Act.

7. Section 7(6) provides:

7. (6) When--

(a) any business in respect of which a certificate has been granted to a dealer on an application made, has been discontinued, or

(b) a dealer has ceased to be liable to pay tax under Section 4 and Section 6C of this Act, the Commissioner shall cancel the registration.

8. The controversy in this case has really centered around the interpretation of these sections. The petitioners have contended that the certificate of registration clearly stated that "sales of the following class or classes of goods to this dealer will be taxable at the rate mentioned in Clause (aa) of Sub-section (1) of Section 5, if the same are purchased by the dealer for resale in West Bengal:--

(b) For resale in West Bengal: Hookah tobacco & keora water, tin containers, wooden cases, iron strips, iron hooks, iron wires, drums, wooden crates, nails.

9. The certificate of registration which was issued in form IIA also required the petitioners to file return in form IIIA quarterly by the 30th day from the end of each quarter according to the dealer's accounting year.

10. The grievance of the petitioners is that the respondent No. 1 has all along in the past issued declaration forms to which the petitioner as a registered dealer was entitled for the purpose of purchase of containers and the packing materials. The respondent No. 1 is now refusing to supply the requisite number of declaration forms required by the petitioner on various pretext. The petitioner's case is that it is incumbent upon the respondent No. 1 to issue declaration forms to the petitioners as a registered dealer. The petitioners had applied under Rule 27AA of the Rules and the respondent No. 1 unlawfully withheld the issue of requisite number of declaration forms claimed by the petitioners.

11. The case of the Commercial Tax Officer, the respondent No. 1, is that the petitioners were not entitled to purchase tin containers and other packing materials free of tax or at a concessional rate of tax. It has further been stated by the respondent No. 1 that the petitioners were not entitled to

obtain declaration forms Nos. XXIV and XXXIII for the purpose of purchasing packing materials for packing hookah tobacco which was exempted from taxation under Section 6 of the Act read with Schedule I, item 18. It has been emphasised that the petitioners purchased goods for resale and as such the ratio of the Supreme Court judgment in the case of India Tobacco Co. Ltd. v. Commercial Tax Officer [1975] 35 STC 95 (SC) had no application to the case of the petitioners.

12. In the India Tobacco Co.'s case [1975] 35 STC 95 (SC), the Supreme Court held that India Tobacco Company was a dealer under the Bengal Finance (Sales Tax) Act, 1941, and as such, was entitled to the benefits of Section 5(2)(a)(ii) of the Act in making purchases free of sales tax of raw materials and other goods required for use in the manufacture of cigarettes on the strength of such exemption entered in his registration certificate. The controversy in that case was whether the West Bengal Sales Tax Act, 1954, took out "cigarette" and "a dealer in cigarette" from the purview of the Bengal Finance (Sales Tax) Act, 1941. The dispute in the instant case is quite different. Tobacco for hookah would have been taxable under the Bengal Finance (Sales Tax) Act, 1941, but for its being included in Schedule I to the Act, tobacco for hookah is not taxable by virtue of the provisions of Section 6 of the Act. Can a dealer in such tobacco claim benefit of the concessional rate of tax as a registered dealer in respect of purchases made by him of containers and packing materials ?

13. The answer to this question must depend on the Schedule of the Act. Section 6(1) of the Act provides that no tax shall be payable under the Act on the sale of goods specified in Schedule I to the Act. The State Government has been empowered by Section 6(2) to add to or amend the schedule. The object is clearly to release transactions in certain commodities from the burden of taxation. Will that object be achieved by withdrawing concessional rates of tax in respect of the containers in which the tax-free commodities are sold ? For example, bread and salt have been included in Schedule I to the Act. The object obviously is not to tax the daily necessities of the common man. If a dealer in bread and salt has to pay additional tax on the packaging because no sales tax has been levied on bread and salt the prices will automatically go up. What is gained in the swing will be lost in the roundabout.

14. It is well-settled that in a taxing statute the question whether any commodity is taxable or not must be decided by the clear words of the statute and not by reference to the spirit of the statute or any supposed intendment of the statute. But happily in this case, there is no conflict between the object of the statute and the language that has been actually employed to achieve that object. In Schedule I itself a distinction has been made in certain cases of goods sold without containers and goods sold in containers. All cereals and pulses are tax-free except when sold in sealed containers. Similarly vegetables, green or dried, and cooked foods are tax-free except when sold in sealed containers. In cases of many articles like bread, salt and milk no such exception has been made. Tobacco for hookah has also been made free of tax without any condition. It will enjoy immunity from tax even if it is sold in a container.

15. There is nothing to indicate in the schedule that the legislature intended in such cases to grant immunity only to the contents and not to the containers.

16. The incidence of taxation is on every dealer whose gross turnover exceeds taxable quantum in a particular year. Section 2(c) has defined "dealer" to mean that any person who carries on business of selling goods. "Goods" include all kinds of movable properties other than actionable claims, stocks, shares and securities. Tobacco for hookah clearly comes within the definition of "goods" and will be included in the gross turnover of a dealer. Section 5 provides that the tax payable by a dealer shall be levied on his taxable turnover. "Taxable turnover" has been defined by Section 5(2) to mean that part of the gross turnover of a dealer during any period which remains after deducting therefrom--

(a) his turnover during that period on--

(i) the sale of goods declared tax-free under Section 6;

(ii) sales to a registered dealer....

17. The other part of Section 5(2) is not relevant for the purpose of this case. Therefore, the Act envisages computation of the gross turnover of a dealer by including therein the value of various goods mentioned in Schedule I to the Act which has been declared tax-free under Section 6. After the computation of gross turnover is made at the stage of assessment, turnover will be computed by excluding therefrom, inter alia, value of goods declared tax-free under Section 6.

18. The distinction between exemption of tax and non-liability to tax of a commodity must be borne in mind in this context. It was explained by the Supreme Court in the case of *A.V. Fernandez v. State of Kerala* [1957] 8 STC 561 (SC), that a liability to tax is followed by the provisions regarding assessment of such liability. If there is no liability to tax, there cannot be any assessment. The Supreme Court held:

Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be 'ascertained without any reference whatever to the same'.

There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are *prima facie* liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

19. In the instant case, there cannot be any dispute that the goods mentioned in Schedule I to the Act has to be included in the gross turnover. At the stage of the assessment the turnover in respect of the goods included in Schedule I will have to be excluded in calculating taxable turnover just as sales to a registered dealer will have to be excluded. It is also to be borne in mind that the exemption granted in Schedule I is unconditional in some cases and subject to various conditions in some other cases. In making computation of the exempted turnover under Section 5(2)(a)(i) it will have to be examined whether the conditions have been fulfilled in cases of conditional exemptions. Therefore, it cannot be said that the goods mentioned in Schedule I have been taken out of the purview of the Act altogether and a person who deals in such goods is not to be treated as a dealer under the Act at all. Bearing in mind the distinction pointed out by the Supreme Court in the case of *A.V. Fernandez v. State of Kerala* [1957] 8 STC 561 (SC), it must be held that sales of hookah tobacco made by the petitioner are prima facie liable to be included in his gross turnover and the only thing that the petitioner is entitled to claim such sales as deduction from the gross turnover in order to arrive at the net turnover on which the sales tax can be imposed.

20. In that view of the matter, it cannot be said that these transactions were taken out of the ambit of the Act altogether. Consequently it follows that the petitioner cannot be denied the concessional rate of tax on the packing materials and the containers bought by the petitioner for the purpose of selling tobacco paste.

21. In this connection, it is also important to bear in mind that a dealer is entitled to get himself registered under Section 8 even though he may not be liable to pay tax under Section 4. It has been specifically provided that a dealer may apply for registration although he exclusively deals in goods specified in the first column of Schedule I. The entire purpose of this explanation will be defeated if the construction suggested by the department is accepted.

22. This writ petition, therefore, must succeed. There will be orders in terms of prayers (a) and (b).

23. There will be no order as to costs.