

Supreme Court of India

Peninsular Traders, Perumbavoor ... vs Dy. Commissioner, Sales Tax ... on 31 July, 1997

Equivalent citations: JT 1998 (9) SC 133, (1998) 9 SCC 461, 1998 108 STC 575 SC

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Bench: S Bharucha, V Khare

JUDGMENT S.P. Bharucha, J.

1. In these appeals the challenge is to the common judgment of a Division Bench of the High Court at Kerala in tax revision cases.

2. On 23-3-1970 the appellant M/s. Peninsular Traders (now referred to as "the firm") entered into an agreement with the appellant M/s. Indian Rare Earth Ltd. (now referred to as "the company") for the "distributorship of tri sodium phosphate". For the Assessment Years 1970-71 to 1973-74 the firm was treated as the agent of the company and assessments were finalised accordingly. On 17-1-1976 the Deputy Commissioner issued notices under Section 35 of the Kerala General Sales Tax Act setting aside the aforesaid assessments and remanding the matters to the assessing authority for fresh assessment upon the basis that the firm was not the agent of the company but the purchaser of the said chemicals from the company. The Kerala Sales Tax Appellate Tribunal, approached by the appellants, reversed the order of the Deputy Commissioner. The tax revision cases were filed by the Sales Tax authorities before the High Court and the High Court, by the judgment and order under challenge, allowed the tax reference cases. Hence these appeals.

3. Section 2(xxi) defines a sale for the purposes of the said Act to mean every transfer, whether in pursuance of a contract or not, of property in goods by one person to another in the course of trade or business, for cash or for deferred payment or other valuable consideration. Explanation 5 thereto states that two independent sales shall be deemed to have taken place when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser.

4. The question, therefore, is whether under the agreement the property in the chemicals was transferred by the company to the firm and by the firm to the purchasers thereof. An analysis of the agreement is called for.

5. The agreement opened with the appointment of the firm as one of the company's distributors for the said chemicals on the terms and conditions thereunder. Clause (1) stated that the firm would be the company's sole distributor for the said chemicals for the areas covered by the States of Tamil Nadu and Kerala. Clause (2) required the firm to sell the said chemicals on the company's behalf at prices to be fixed by the company from time to time, the current prices being set down, in addition to which the firm was entitled to charge reasonable transportation and other expenses incurred by it. Clause (3) stated that the selling price was subject to revision by the company at its discretion and that buyers from the firm would not be entitled to any compensation in respect of unsold stock held by them on the date from which the revised price became effective. Clause (6) required the firm to send to the company monthly statements showing the total quantity of the said chemicals received from the company during the month, the quantity and value of the sales effected by the firm on the company's behalf during that month and the closing stock remaining unsold at the end of the

month. The firm was required to send true copies of invoices showing full details of the sales effected by the firm. The sale proceeds were to be debited to the firm's account with the company. Clause (9) required the firm to collect sales tax on the sales of the company's products effected by the firm and remit the same to the company. By reason of Clause (10) the firm was entitled to commission at the rate of 6% on the value of goods sold by the firm and remitted to the company, the commission being credited to the firm's account at the end of every month. Clause (11) stated that enquiries received by the company for the firm's territory would generally be passed on to the firm. Clause (12) required the firm to push the sales of the company's chemicals in its territory and required the firm not to deal in any product of a similar nature which was likely to affect adversely the sales of the company's said chemicals.

6. As against these clauses in the agreement, which are strongly indicative of the relationship of principal and agent between the company and the firm, there are Clauses 4, 5, 7 and 8 upon which the High Court relied and which are stressed by learned counsel for the Sales Tax authorities. Clause (4) read thus:

"Full payment for the total quantity lifted by you should be made at the end of the month. For any delay beyond 30 days from the date of delivery of the material you will pay interest at the rate of 9% per annum on the amount outstanding from time to time. If you make default in payment for a period of 2 months, the company reserves the right to terminate this appointment without notice to you. But the termination of the appointment will not prejudice the right of the company to proceed against you for the balance amount due to the company."

Clause (5) stated that the company would endeavour to make regular supplies of the said chemicals to the firm but that the firm should arrange to collect the same from its works. It fixed the quota to which the firm was entitled. Clauses (7) and (8) read thus:

"7. You will be responsible for the realisation of the sale proceeds against all sales effected by you and you will be responsible for any bad debts or delays in payment by the parties concerned.

8. You will be responsible for the safe custody of the material collected by you and keeping it in good condition and no expenses or charges incurred by you on this account will be borne by us. You will not be entitled to any credit or damaged material."

7. The overall effect the agreement produced on our mind is that it is an agreement of agency and that there is no transfer of the said chemicals from the company to the firm. As is clear from several clauses in the agreement, particularly Clauses (6) and (10), a running account was to be maintained by the company of its dealings with the firm and that the value of the said chemicals was to be debited to the firm's account only when sold by the firm. Clause (4), when it required payment to be made of the quantity lifted by the firm by the end of the month or be charged interest at the rate of 9%, therefore, suggests that the firm's account would be debited only in the event that payment for all the chemicals lifted delivery during the month had not been sold by the month-end. There is nothing in it which indicates that the property in the unsold chemicals would pass to the firm at the month-end. Clause (5) does not carry the matter further. Clause (7) is not an unusual clause, of the

agent being responsible for the solvency of purchasers from itself; so also Clause (8), the terms whereof are not an unusual obligation undertaken by an agent.

8. The view that we take is supported by the observations of the Tribunal made in regard to the books of account of the company. The relevant entry, quoted below, speaks of the manner in which the parties implemented the agreement:

"We hereby certify that the sum of Rs 11,79,097.00 being the value of 1100.70 metric tonnes of tri sodium phosphate sold by Messrs Peninsular Traders, Perumbavoor, Kerala State on our behalf during the period from 1-4-1971 to 31-3-1972 have been included in our annual return for the year 1971-72 submitted to the Assistant Commissioner of Sales Tax (Assessment), Sales Tax Office, Special Circle, Ernakulam, and that the sales tax collected from them in respect of the above sales have been remitted to him."

9. The stress by learned counsel for the Sales Tax authorities on the judgment of this Court in *Always Agencies v. Dy. Commr. of Agricultural Income Tax and Sales Tax*, would appear to be somewhat misplaced for what the distributor got under the agreement that was construed in that case was a rebate and not a commission. It was also pointed out that supplies were made to the distributor against payment, either immediate or deferred, and even when the goods were lifted directly by customers it was the distributor who had to guarantee their payment. These circumstances showed that in respect of such transactions the property in those goods passed to the distributor when the bills were endorsed and handed over to it. The agreement before us does not contain such clauses.

10. We come to the conclusion that neither the agreement nor the practice thereof indicates the transfer of the property in the said chemicals by the company to the firm.

11. The appeals are allowed. The judgment and order under appeal is set aside. The order of the Tribunal is restored.

12. No order as to costs.