

“Whether the sale offer for the purchase of One Bank Note Processing System BPS-204 between the Appellant and M/s. Canara Bank, Bangalore could not be said that the sale is in the course of import under Section 5(2) of the Central Sales Tax Act, 1956?”

3. The appellant is a registered dealer and had imported Bank Note Processing System BPS-204 from Germany vide bill of entry dated 10.2.2003. In the bill of entry, which has been placed on record, the petitioner has been described as the importer. In the said bill of entry M/s Zion Express Cargo Private Ltd. have been described as the cargo agent.

4. The case of the appellant is that this import vide bill of entry dated 10.2.2003 was back to back import in view of the order placed by Canara Bank, Bangalore dated 30.12.2002. The said order it is admitted was placed on the appellant and not on the German manufacturer. Copy of the said order has been placed on record at page 43 of the paper book and is addressed to the appellant. The appellant has not been described as an agent of the German manufacturer. After this order was placed on the appellant, they placed the order on the German company by the name of Giesecke & Devrient GMBH for the said equipment. (The appellant and Giesecke & Deevrient GMBH though associated, are distinct and separate identities.) This order was placed by the appellant and not by Canara Bank, Bangalore. It is also not disputed that on the import, the customs duty clearances etc. were all made by the importer i.e. the appellant and

not by Canara Bank, Bangalore. In view of the aforesaid factual position the question which arises for consideration is whether the said import and subsequent transfer/sale by the appellant to Canara Bank, Bangalore is covered by Section 5(2) of the Central Sales Tax Act, 1956 (“CST Act”) read with Section 7C of the said Act. The tribunal in the impugned order has decided the question against the appellant and in favour of the Revenue.

5. Section 5(2) of the CST Act reads as under :

“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.”

6. It may be relevant to reproduce here the Article 286(1) and (2) of the Constitution of India, which read:

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)

7. The Section 5(2) of the CST Act clarifies the ambit and scope of words “in course of import of goods into the territory of India” used in Article 286(1). The Parliament in Section 5(2) of the CST Act has exercised the power conferred on it under Article 286(2) under which it can formulate principles for determining whether sale or purchase of goods takes place in any of the modes mentioned in Clause (1) of Article 286.

8. Section 5(2) of the CST Act has been a matter of considerable debate and has been lucidly explained/interpreted by the Supreme Court. We need not refer to various decisions as we find that these have been considered and explained in the case of ***Binani Bros. (P) Ltd. Vs. Union of India (SC)*** (1974) 33 STC 254. In the said case the imports of non-ferrous material, which were subject to control orders. Imported non-ferrous metals could be supplied/sold to DGS&D and other authorities like STC etc. against contracts placed by DGS&D. The import licences were issued on the recommendation of DGS&D or other authorities like STC.

9. Question arose whether these imports were covered by Section 5(2) of CST Act and therefore no sales tax was payable. The Supreme Court referred to earlier decisions in the case of ***Ben Gorm Nilgiri Plantations Company, Conoor Vs. STO***, (1964) 15 STC 753; ***State Bank Vs. Kochi Company Ltd.***, (1952) 3 STC 436 (SC); ***State of Travancore-Cochin Vs. Shanmugha Vilas Cashew-nut Factory***, (1953) 4 STC 405(SC) and ***K G***

Khosla and Co, (P) Ltd. Vs. Deputy Commissioner of Commercial Taxes, Madras Division, Madras (1966) 17 STC 473(SC). The last case which was heavily relied upon by the Union of India in the said case as K.G.Khosla Co. Pvt. Ltd. were allowed benefit under Section 5(2), but this decision was distinguished inter alia recording as under :

“In Khosla Case, it might be recalled that Khosla and Co. entered into the contract of sale with the DGS&D for the supply of axle bodies manufactured by its principal in Belgium and the goods were to be inspected by the buyer in Belgium but under the contract of sale the goods were liable to be rejected after a further inspection by the buyer in India. It was in pursuance to this contract that the goods were imported into the country and supplied to the buyer at Perambur and Mysore. From the statement of facts of the case as given in the judgment of the High Court it is not clear that there was a sale by the manufacturers in Belgium to Khosla & Co., their agent in India. It would seem that the only sale was the sale by Khosla & Co. as agent of the manufacturer in Belgium In the concluding portion of the judgment of this Court it was observed as follows :

... It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director General of Supplies, There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within Section 5(2) of the Act, and are, therefore, exempt from taxation.

As already stated, there was to be an inspection of the goods in Belgium by the representative of the DGS&D but there was no

completed sale in Belgium as, under the contract, the DGS&D reserved a further right of inspection of the goods on their arrival in India.

(emphasis supplied)

10. In *Binani Bros.* (supra) the Supreme Court also referred to *Coffee Board vs. Joint Commercial Tax Officer* (1970) 25 STC 528 (SC), as in the case of exports, also there was similar provision in respect of sale in the course of exports. (We are not concerned with Section 5(3) and 5(4) of the CST Act in the present case). Referring to the said case and the law as elucidated, it was observed by the Supreme Court in **Binani Bros. (P) Ltd.** (supra) as under:-

“In *Coffee Board v. Joint Commercial Tax Officer*, hereinafter referred to as Coffee Board Case, the Coffee Board claimed that as certain sales of coffee to registered exporters in March and April, 1963 were sales made 'in the course of export', it could not be taxed under the Madras General Sales Tax Act, 1959. The rules framed by the Coffee Board provided that only dealers who had registered themselves as exporters of coffee with the Coffee Board or their agents and who held permits from the Chief Coffee Marketing Officer in that behalf would be permitted to participate in the auctions, and after the bidding comes to an end, the payment of price would take place in a particular

way. Condition No. 26 headed "export guarantee" provided that it was an essential condition of the auction that the coffee sold thereat shall be exported to the destination stipulated in the Catalogue of lots, or to any other foreign country outside India as may be approved by the Chief Coffee Marketing Officer, within three months from the date of Notice of Tender issued by the Agent and that it shall not under any circumstances be diverted to another destination, sold, or be disposed of, or otherwise released in India. Condition 30 stated that if the buyer failed or neglected to export the coffee as aforesaid within the prescribed time or within the period of extension, if any granted to him, he shall be liable to pay a penalty calculated a Rs. 50 per 50 kilos which shall be deductible from out of the amount payable to him as per condition 31. And Condition 31 provided that no default by the buyer to export the coffee aforesaid within the prescribed time or such extension thereof as may be granted, it shall be lawful for the Chief Coffee Marketing Officer, without reference to the buyer; to seize the unexported coffee and take possession of the same and deal with it as if it were part and parcel of Board's coffee held by them in their Pool stock. The case of the petitioners before this Court was that the purchases at the export auctions were really sales by the Coffee Board in the course export of coffee out of the territory of India since the sales themselves occasioned the export bound up with the export of coffee and that the sales must therefore be treated as sales taking place within the State of Tamil Nadu liable to sales tax under the Madras General Sales Tax Act. This Court held that the Board was not entitled to the exemption claimed. The Court said that the phrase 'sale in the course of export' comprises three essentials, namely, that there must be a sale, that goods must actually be exported and that the sale must be a part and parcel of the export. The Court further said that the sale must

occasion the export and that the word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of. The Court was of the view that the sale which is to be regarded as exempt from tax is a sale which causes the export to take place or is the immediate cause of the export, that the introduction of an intermediary between the seller and the importing buyer breaks the link, for, then there are two sales, one to the intermediary and the other to the importer, and that the first sale is not in the course of export, for the export begins from the intermediary and ends with the importer. According to the Court the test was that there must be a single sale which itself causes the export and that there is no room for two or more sales in the course of export. The Court, therefore, held that though the sales by the Coffee Board were sales for export, they were not sales in the course of export, that there were two independent sales involved in the export programme: the first sale by the Coffee Board to the export promoter, and the second sale by the export promoter to a foreign buyer which occasioned the movement of goods and that the latter sale alone could earn the exemption from sales tax as being a sale the in the course of export.”

(emphasis supplied)

11. It is clear from the aforesaid decision that to claim exemption/benefit under Section 5(2) following conditions have to be satisfied, namely that the import should have a direct nexus and should be connected with the transaction of sale in India. The sale should not be considered as covered by Section 5(2) if the import is effected merely by a purchase from abroad for a further sale in India but would be covered by Section 5(2) if the sale is “in course of import”. The term “in course of

import” was elucidated and explained in *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam Vs. Indian Explosives Ltd.* (1985) 4 SCC 119 as under:-

“The test of integral connection or inextricable link between the sale and the actual import or export in order that the sale could become a sale in the course of import or export had been clearly enunciated by this Court in Ben Gorm Nilgiri Plantations Company's case (supra). There the question related to sale of tea which was claimed to be in the course of export out of the territory of India and though by majority it was held that the sales in question were not "in the course of export", the Court at p. 711 of the Report laid down the test thus:

A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a

transaction of sale cannot be called a sale in the course of export of goods out of the territory of India.

Conversely, in order that the sale should be one in the course of import it must occasion the import and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be sapped (sic snapped).”

12. In the case of *K. Gopinathan Nair Vs. State of Kerala* (1997) 105 STC 580, the majority judgment examined the scope of Section 5(2) of the CST Act. In this case reference was made to *K G Khosla and Company Pvt. Ltd. (supra)*, *Coffee Board (supra)*, *Binani Bros. Pvt. Ltd. (supra)* and with reference to *Mod. Serajuddin v. State of Orissa* (1975) 36 STC 136 (SC) it was observed:-

“....the interpretation of the term 'in the course of export' as found in Section 5(1) of the Central Sales Tax Act. However, while interpreting the said phraseology the Constitution Bench also construed identical phraseology found in Section 5(2) dealing with 'in the Course of import'. In that case the appellant before this Court was assessee who was registered dealer under the Central Sales Tax Act, 1956, carrying on business of mining and exporting mineral ores to foreign countries. He had entered into four contracts for sale

of chrome concentrates. Two of them were directly with foreign buyers. The other two were with the State Trading Corporation (STC) ever since export of mineral ores was canalised through it. The STC in turn entered into contracts with foreign buyers. The High Court held sales under the first two contracts directly with foreign buyers exempt from sales tax being in the course of export. But it held sales under the contract with STC not exempt from sales tax under Article 286(1)(b) of the Constitution read with Section 5(1) of the Central Sales Tax Act. The majority of the Constitution Bench speaking through Ray, C.J., upheld the decision of the High Court against the assessee. It was held that Section 5 of the Central Sales Tax Act has given a legislative meaning to the expression 'in the course of export' and 'in the course of import'. The expression 'in the course' implies not only a period of time during which the movement is in progress but postulates a connected relation. Sale in the course of export out of the territory of India means sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. In Paragraph 18 of the Report the following pertinent observations were made:

“A sale in the course of export predicates a connection between the sale and export. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But it does not mean that distinction between transactions which may be called sales for export and sales in the course of export is not real. Where the sale is effected by the seller and the seller is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with sale so that

the bond cannot be dissociated without a breach of the obligations arising by statute, contract, or mutual understanding between the parties arising from the nature of the transaction the sale is in the course of export.”

While considering the question whether the sale is in the course of export, the Constitution Bench considered the further question whether there should be a single sale or there can be two or more independence sales. In this connection, it was observed that there must be a single sale which itself causes the export and there is no room for two or more sales in the course of export. The sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export because the export commences with the intermediary. The tests are that there must be a single sale which itself causes the export or is in the progress or process of export. There is no room for two or more sales in the course of export. The only sale which can be said to cause the export is the sale which itself results in the movement of the goods from the exporter to the importer. So the test is whether there were independent transactions or only one transaction which occasioned the movement of the goods in the course of export. Applying this principle to the facts of the case it was held that the sale by the assessee to the STC which was the canalising agency for exports had no connection with the export by STC of the purchased goods to the foreign buyers and, therefore, the

sale by the assessee in favour of the canalising agency, namely, STC was held no to be a sale in the course of export but was found to be a sale for export. In this connection the following pertinent observations were made in paragraphs 25 and 26 of the Report:

“Hence the contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound. The pre-eminent question is as to which is the sale or purchase which occasions the export. The distinction between sales for export and sales in the course of export cannot be disregarded.”

The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale are: There was no privity of contract between the appellant and the foreign buyer. The privity of contract is between Corporation and the foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods. All relevant documents were in the name of the Corporation whose contract of sale was the occasion of the export. The expression "occasions" in Section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the Corporation and the appellant.

The appellant sold the goods directly to the Corporation. The circumstance that the appellant did so to facilitate the performance of the contract between the Corporation and the foreign buyer on terms which were similar did not make the contract between the appellant and the Corporation the immediate cause of the export.”

(emphasis supplied)

13. If we apply the aforesaid tests laid down by the Supreme Court, it has to be held that the conditions stipulated in Section 5(2) of the CST Act are not satisfied. Unlike the case of K G Khosla, the import in the present case was by the appellant in his own name. The appellant was the importer. The appellant no doubt had entered into an earlier contract with Canara Bank, Bangalore but for the purpose of said contract the appellant was not the agent of the supplier in Germany. The contract between the Canara Bank, Bangalore was on principal to principal basis. The obligation to comply with the purchase order was that of the appellant alone. Similarly, when the appellant entered into contract with the German company it was a contract on principal to principal basis. Canara Bank, Bangalore did not have privity of contract whatsoever with the German company. Any default of the contract in the first contract with Canara Bank, Bangalore would be liability and obligation of the appellant and not that of the German company. Thus, they were two independent transactions. The first transaction between the Canara Bank, Bangalore and the subsequent transaction between the appellant and the German company. Back to back contracts by themselves do not establish and

prove that the first part of Section 5(2) is attracted and applicable. The import may have been with the intention to supply the imported goods to the Canara Bank, Bangalore but this by itself is not sufficient to satisfy requirement of Section 5(2) of the CST Act. The imported goods could have been diverted to another third person, without violation/default of the contract between the appellant and the Canara Bank, Bangalore. It may be noted that pending the supply of the new machine, the appellant had provided a standby machine to the Canara Bank, Bangalore as per the terms of the contract. In view of the aforesaid position it cannot be said that the import was occasioned by said import and therefore qualifies for exemption under Section 5(2).

14. Ld. counsel for the appellant has relied on judgments of the Supreme Court in *Indure Ltd. Vs. Commissioner of Commercial Taxes, West Bengal & Ors.* (2010) 34 VST 509 (SC) and *State of Maharashtra Vs. Embee Corporation* (1997) 107 STC 196 (SC). In *Indure Ltd. (supra)* the ownership of equipment imported as per the contract exclusively vested with NTPC upon dispatch to India and negotiations of dispatch documents was by NTPC. Therefore, the imported goods could not have been transferred or sold to any other person. The import was by NTPC and therefore it was held that Section 5(2) was applicable. We may reproduce here the following factual position which has been noticed in *Indure Ltd. (supra)* :

“It, further, contemplated that ownership of equipment supplied by the Company, under the supply portion of the contract shall vest exclusively with N.T.P.C upon despatch in India and negotiation of despatch document with N.T.P.C. Term of Contract Agreement contemplated that the Company guaranteed to the N.T.P.C that the equipment package under the contract shall meet the ratings and performance parameters, as stipulated in the Technical Specifications (Volume-II) and in the event of any deficiencies found in the requisite performance figures, N.T.P.C. may at its option reject the equipment package and recover the payment already made or alternatively accept it on the terms and conditions and subject to levy of the liquidated damages in terms of contract.”

15. With this factual background, the Supreme Court distinguished decisions in **Binani Bros. (P). Ltd.** (supra), **K Gopinathan Nair** (supra) etc. as the pipes imported were only to be used for erection and commissioning of the plant for NTPC and could not be transferred/sold to any third person. On the imported pipes the name of NTPC was embossed. We have noticed the factual position in the present case. The appellant was the importer. The appellant may have imported the equipment to sell the same to Canara Bank, Bangalore, but there was no legal or contractual obligation to sell the equipment only to Canara Bank, Bangalore. There was no bar or prohibition on the appellant not to sell the imported equipment to a third party, instead of supplying it to Canara Bank, Bangalore or in case Canara Bank, Bangalore refuse to take delivery, to sell it to any other person.

16. Decision in the case of Embee Corporation (supra) is also distinguishable. In the said case there was a condition that the imported product would be sold and utilized by a particular specified factory. Export from Germany was allowed by the German authorities on the said condition. On the bill of lading also the name of the factory i.e., the user was specifically mentioned and described as a consignee. Because of the statutory requirements and the terms of import itself, the imported product could not be sold or transferred to any other party.

17. In view of the reasoning given above we answer the question of law in affirmative, against the appellant and in favour of the Revenue.

The appeal is disposed of, with no order as to costs.

SANJIV KHANNA,J

R.V.EASWAR, J

JANUARY 02, 2012

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