

ARIYASENA
v
PROVINCIAL COMMISSIONER OF REVENUE,
WESTERN PROVINCE

COURT OF APPEAL
DISSANAYAKE, J., AND
SOMAWANSA, J.
CA NO. 01A/99 (PC)
BOARD OF REVIEW
NO. NWP/PR/APR/BR TT15/144/53
FEBRUARY 17, 2003

Finance Statute, No. 8 of 1990, sections 19(6), and 81 – Sale of Goods Ordinance, No. 11 of 1896 – Commission Agent – Dealer who purchases goods and sells for profit – Difference ? – Liability to tax – Is it a question of law? – Nemo dat qui none habet.

The respondent made a determination that a certain sum as turn over tax inclusive of the penalty be charged from the applicant in respect of the turn over made by the appellant from the business. The appellant refused to accept the said assessments on the basis that he is not a seller of goods but only a commission agent of 3 companies and appealed against the said assessment to the Provincial Commissioner, who dismissed the appeal. The Board of Review confirmed the order on appeal.

The Board of Review stated a case for an opinion by the Court of Appeal on the question whether the appellant did sell or committed the sale of any commodity or article within the meaning of the Sale of Goods Ordinance.

Held:

- (i) The evidence shows that once the products are accepted by the appellant at the company stores, it becomes the property of the appellant. The appellant has to pay for the products before it is removed from the company stores and in the event of any default of such payment the company is to recover such sum from the Bank Guarantees furnished by the appellant.
- (ii) It was also revealed that companies that supplied products to the appellant paid turnover tax to the Council in respect of the products supplied to the appellant.

- (iii) The appellant is not a commission agent but a dealer who sells products of the Companies for profit.

Case stated by the Board of Review under S. 84(1) of the Finance Statute No. 8 of 1990 (North-Western Province).

Chandana Prematilake for appellant-appellant

W. Dayaratne for respondent-respondent.

Cur. adv. vult

September 19, 2003

SOMAWANSA, J.

This is a 'case stated' by the Board of Review under section 84 (1) of the Finance Statute No. 08 of 1990 for an opinion of this Court. The case stated is said to arise out of a decision of the Board of Review in (TT15/144/53) which dealt with an appeal made by the appellant-appellant hereinafter referred to as the 'appellant' to the Board of Review. 01

The following facts are not in dispute, that the appellant carried on business under the name and style of National Stores at Kuliypitiya within the limits of the Provincial Council of the North Western province. That the respondent-respondent hereinafter referred to as the 'respondent' made a determination that a sum of Rs.34500/- as the turnover tax inclusive of the penalty for the quarter ending on 31.03.1993 under reference No. 20/15/0153 and a sum of Rs. 33,000/- as the turnover tax inclusive of the penalty for the quarter ending on 30.06.1993 under reference no. 20/ 15/ 93/0154 be charged from the appellant in respect of the turn over made by the appellant from the said business. The appellant who refused to accept the said assessments on the basis that he is not a seller of goods but only a commission agent of 3 companies appealed against the said assessment in terms of section 19(6) of the Finance Statute No. 08 of 1990 to the Provincial Commissioner who after due inquiry dismissed the appeal of the appellant. Thereafter in terms of Section 81 of the said Finance Statute he appealed to the Board of Review where another inquiry was held. The Board of Review by a majority decision of 4 to 01 delivered on 23.12.1998 came to a finding that the appellant is not a commission 10 20

agent but a dealer who purchases goods from various companies and sells for profit. Accordingly the assessment as determined by the respondent was confirmed and the appellant's appeal was dismissed. On an application by the appellant requiring the Board of Review to state a case for an opinion of the Court of Appeal on the question whether the appellant did sell or committed the sale of any commodity or article within the meaning of the Sale of Goods Ordinance No. 11 of 1896 in respect of which the said turnover tax has been imposed. 30

The majority of the Board of Review in its case stated has concluded that the appellant committed sales within the meaning of the Sale of Goods Ordinance. The case stated contains the following questions of law for an opinion of this Court.

- (a) Did the appellant indulge in selling any commodity or article in respect of which the said turnover taxes were imposed within the meaning of the Sale of Goods Ordinance No. 11 of 1896? 40
- (b) Alternatively even assuming that the appellant did sell any commodity or article as aforesaid did he do that as an agent of the principal companies within the principles of law of agency?
- (c) If so were the contracts of sale entered into between the principal companies and the retail businessman according to the principles of law in the Sale of Goods Ordinance and the law of agency? 50
- (d) If the question (1) is answered in the negative is the appellant not liable to pay the turnover tax in respect of the said commodities or articles?
- (e) If the questions (b) and (c) are answered in the affirmative are the principal companies liable to pay the turnover tax to the Provincial Council?

It was submitted by the counsel for the appellant that the majority of the Board of Review has misdirected themselves on facts and thereby committed an error in law in coming to their said conclusion and has also committed error in law in their order dated 11.12.1998. Therefore he submits that there is a question of law 60

arising on the case stated as to whether the appellant did sell or committed the sale of any commodity or article within the meaning of the Sale of Goods Ordinance No. 11 of 1896 in respect of which the turnover tax has been imposed.

It appears to me that the short point that has to be decided in the stated case is whether the appellant is a commission agent or a dealer and the answer would depend on what the evidence would establish. Hence it is essentially a question of fact and not a question of law. In terms of section 84 (1) of the Finance Statute No. 08 of 1990 case stated for the opinion of this Court has to be on a question of law.

Be that as it may, let us now consider the material placed before the Board of Review and see whether the appellant could be considered a commission agent and not a dealer. However if he is found to be a dealer he would be liable to pay turnover tax in terms of the Finance Statute No. 08 of 1990. Imposition of turnover tax is dealt with in Chapter 1 Part 01 of the said Finance Statute No. 08 of 1990 and the relevant Sections read as follows:

3. (1) "Subject to such limits and exemptions as may be prescribed by law made by Parliament and other provisions of this Statute, there shall be charged for every quarter commencing on or after January 1st, 1991 from every person who carries on any business in the province a tax (hereinafter referred to as the "turnover tax") in respect of the turnover made by that person from that business at such rate as the Minister may fix from time to time by Order published in the Gazette.

(2) For the purpose of this Chapter "business" shall mean selling by wholesale or retail of any commodity or article but shall not include a sale by a manufacturer.

4. (1) A person shall, in respect of any business carried on by him in the province, be chargeable with turnover tax for each quarter."

It is contended by the counsel for the appellant that the Board of Review in its majority decision has failed to answer the vital question as to whether there was evidence to establish the exis-

tence of contract of sale between the appellant and the retailer whereby the property in goods were transferred from the appellant to the retailers. At this point, I would refer to the relevant sections in the Sale of Goods Ordinance No. 11 of 1896. The relevant Sections are as follows: 100

2. (1) "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price". There may be a contract of sale between one part-owner and another.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called "a sale", but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell". 110

4. Subject to the provisions of this Ordinance and of any enactment in this behalf, a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

9. (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. 120

18. (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. 130

19: Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the

contract is made, and it is immaterial whether the time of payment or the time of delivery or both, be postponed.

On behalf of the respondent 3 witnesses were called who were representing three companies. Anura Weerakoon, Manager Eveready Battery Co. Lanka Ltd., was one of the witnesses who gave evidence. In his evidence it transpired that his company had no transactions with the appellant during the period 01.01.1993 to 30.06.1993 the period in respect of which the turnover tax in question has been imposed on the appellant. However he spoke of the period prior to and after the said period. Also it transpired that transactions between his company and the appellant were not based on payment of commission but were based on outright sales, that goods were sold to the appellant and accordingly reduced from the company stock ledgers, that all dealings are carried out on a cash basis by 'cheque' or 'cash' when goods are sold and once sold appellant became the owner of goods purchased and the goods are transported from company to the appellant's shop not by company vehicles but by vehicle of the appellant. The distribution of goods purchased by the appellant are done by the company vehicles bearing the company's name and logo through a sales representative of the company. A representative of the appellant would also accompany the salesman in the vehicle for the purpose of accepting cash and cheques in respect of goods delivered to retailers by the sales representative. The bills known as van job orders and for this purpose are those of the company and is signed by the sales representative and they do not bear the name of the appellant. The witness admitted that the company accepted the full responsibility as to the quality of the products and entertained complaints and a production manager was appointed to deal with such complaints.

M.J.R.C. Fernando, Area Manager Delmage Forsyth & Co. Ltd. was another witness who gave evidence on behalf of the respondent. His evidence revealed that sales by them are considered as outright sales and ownership is transferred to the appellant, that sales are done on credit basis and payment is made by cheque. That where expiry date has lapsed or if there is a quality problem returns are accepted. No commission is paid, but a discount is given which is selling price less agents selling price, that

for the distribution of the company products to the retailers from the appellant's stores company employed a sales representative and a van with a driver and a person from the appellant's stores accompanied the sales representative for the purpose of accepting money from the retailers. The bill used for that purpose was called Redistribution Sales Memo wherein a space is provided for the insertion of the agent's name and seal and the words 'sold on behalf of' appears on the top right hand corner of the memo. His 180
evidence also revealed that a bank guarantee is obtained by the company for the appellant to secure payment of unsettled bills or cheques. That unsold goods after 6 months are taken back by the company, that for the consumer to set a claim to the goods purchased by him the only document available is the bill issued by the company. Further it was revealed that if someone from Kuliypitiya was to come to the company for purchase of goods that person would be directed to the appellant and that the appellant could sell any product of the company without using a company memo.

S. Soundarajah, Accountant Eswaran Brothers was also 190
called by the respondent. It transpired in his evidence that the appellant is not a commission agent but a purchaser. That in the contract entered into between the company and the appellant which is marked X12 the appellant is designated as dealer, that goods are issued to appellant on cash, cheques and credit. That no commission is given to the appellant for distribution of goods but with reference to X12 there could be other agreements or understanding between the company and the appellant, that at the bottom of van job order marked X13 contains the words serviced by Eswaran Brothers Marketing (Pvt) Ltd. on behalf of the dealer. 200

On an examination of this document marked X13 on the top right hand corner there is a cage and on top of it the words Distributor is printed. Further his evidence revealed that the company accepted responsibility with regard to quality of goods sold to the appellant, that where the expiry date has lapsed or the goods are damaged company would take back such goods, that goods issued to appellant was distributed to retailers by company employees using company vehicles and a person from the appellant's stores accompanied them for the purpose of collecting payments from the retailers. 210

The position of the appellant was that he was an agent for these companies, that his duty was to store and keep in safe custody the goods received from the company in his stores at Kuliyaipitiya and to collect cash and cheques from the retailers, cash the cheques and remit the total amount at the rate of the agent's price to the respective companies by his own cheque. For that he was given a commission which was the difference between the wholesale price and the agent's price, that originally he had to give blank cheques with his signature as security for stocks received by him, but later submitted bank guarantees for the same purpose, that goods were distributed by respective company vehicles driven by company drivers and the company sales representative distributed the goods to the retail outlets, that what was not distributed was returned to the company, that dishonoured cheques were handed back to the respective sales representatives. Similarly, complaints as regards goods were also referred to the sales representative. He denied purchasing goods from the company on credit and stated that it was incorrect to say that he purchased goods from companies and sold them to retailers. 220

On behalf of the appellant Sanjeewa de Silva who had been a sales representative of Eswaran Brothers covering Kuliyaipitiya was called. His evidence was that goods at the appellant's stores were loaded to company vehicles and that a person from the appellant's stores would accompany him only for the purpose of taking charge of cash and cheques collected by him from the retailers. In his evidence he referred to an occasion where two cheques he collected were dishonoured and as the retailer could not be traced he was asked by the company to make good the amount of the two cheques to the appellant from his monthly salary. 230

On an examination of the evidence led at the inquiry, particularly the evidence shown above, it appears to me that the Board of Review has come to a correct finding. In that representatives from all three companies who were called to give evidence specifically say that goods of the respective companies are sold to the appellant either on cash or cheques or on credit and once the goods are sold they become the property of the appellant and transporting the goods from the company stores to the appellant's stores at Kuliyaipitiya is done by the appellant using his own lorries. The 240

interpretation of contracts, the principles of offer and acceptance, the relationship between the companies, the appellant and the retailer and the common law principle '*nemo dat qui none habet*' (no one can give what he does not have) will be of no significance when the representatives of the three companies in no ambiguous words have said in their evidence that the appellant is not a commissioned agent but a dealer who buys goods from the respective companies and sells the same to the retailers. 250

It is conceded that ownership to goods sold by the company sales representative to the retailer is confirmed by the receipt or bill issued by the company's sales representative. However the receipt cannot be taken to be conclusive proof that the goods belong to the company or that its company's property that is being sold. For all bills, or receipts issued by the sales representative carry the words either 'sold on behalf of agent' or 'serviced by the company on behalf of the dealer'. As evidence revealed the bills issued by the sales representative were called either redistribution sales memo or the van jobbing order whereas the company sold products to the dealer by issuing invoices on payment of cash. 260

The reason for the presence of the sales representative of the company, the user of the company vehicle driven by a company driver is satisfactorily explained by the witnesses called by the respondent. Evidence revealed that the respective companies adopted this procedure in order to maintain its goodwill, the quality of the product and also with the intention of clearing a sales target of at least 50% of the products to the public and also to prevent any substantive product being introduced through the dealers in the process of such sale. 270

It is also to be noted that whatever may be the understanding or agreements entered into between Eswaran Brothers and the appellant, the dealership agreement between the said Eswaran Brothers and the appellant marked X12 is vital evidence which goes to show that the appellant was dealing with the said Eswaran Brothers company as a dealer. The document X12 is addressed to the appellant's National Stores, with the heading products dealership. Some of the clauses relevant to the issue at hand are as follows: 280

4. Any Retail Orders booked by company personnel on your behalf should be fulfilled by you within the shortest possible time and this period should not exceed three weeks from the date of the Retail Orders.
7. (a) All orders (under 6) should be accompanied by payment in *Cash* or *Cheque* issued by your establishment. The acceptance of cheques will be at the discretion of the company. All payments should be directed *ONLY TO THIS OFFICE*. 290
(b) Accepted cheque payments should not be stopped after goods have been collected from our stores without prior intimation to the Company in writing stating valid reasons for such action. *Such payments should be made good only by CASH OR BANK DRAFT within 7 days.* 300
10. Your supplies may be collected from the Company warehouse.
11. Your representative or agent calling for collection should carry the necessary authority to do so on your behalf. The Company shall not be responsible for losses or damage caused to products in transit or otherwise after goods have been duly accepted from the Company Stores by your representative or agent against the invoice certified by the stores.
12. Products will be released from the Company Stores only on presentation of the receipted invoice issued by the Company Sales Office. 310
15. Return of goods purchased will not be accepted and/or replaced unless faulty manufacture is clearly indicated based on test reports of our Quality Control Department. Acceptance of returned products shall be *only by prior reference and approval of the Company*. All returned goods are subject to testing and the findings of the Company Quality Control Department, shall be final. 320

When one looks at this agreement one could see that once the products are accepted by the appellant at the company stores, it becomes the property of the appellant. The appellant has to pay for the products before it is removed from the company stores and in the event of any default of such payment the company is to recover such sum from the bank guarantee furnished by the appellant.

The evidence also revealed that the companies that supplied products to the appellant paid turnover tax to the Western Provincial Council in respect of their products supplied to the appellant. Evidence on this point went unchallenged and this evidence would show that between the respective companies and the appellant there was a sale of goods and once the goods were sold they become the property of the appellant. Also according to the evidence of M.J.R.C. Fernando of Delmege Forsyth & Co., and S. Soundarajah of Eswaran Brothers the profit that goes to the dealer, or in the instant case to the appellant is the difference between the agents price and the wholesale price. 330

It appears that even the evidence of Sanjeewa de Silva called by the appellant as a witness would go to show that the appellant was in fact a dealer for when two cheques collected by the witness for goods sold were dishonoured and the person who issued the cheques could not be traced the witness was directed by the company to pay the amount of the two cheques to the appellant from his monthly salary. This piece of evidence again go to show that the goods sold by the sales representative of the company belong to the appellant and not the company. 340

No amount of speculation that there was no offer and acceptance between the appellant and the retailers and the applicability of common law principle *nemo dat qui none habet* in respect of the transaction that took place between the appellant and the retailer based on the bills issued when goods are sold or in view of the company sales representative issuing company bills to the retailer could over shadow the clear unambiguous evidence of the representatives of the companies to the effect the appellant was a retailer. 350

For the above reasons. I hold that the appellant is not a commissioned agent but a dealer who sells products of the above-mentioned companies for profit. The Board of Review having closely analysed and considered the evidence placed before them and the relevant provisions of law has come to a correct finding that the appellant has failed to establish that he is a commissioned agent and not a dealer of the said companies. 360

Therefore in expressing my opinion in terms of section 84(6) of the Finance Statute No. 8 of 1990 the question of law referred to in the case stated as set out above is answered as follows:

- (a) Yes.
- (b) No.
- (c) No.
- (d) Question (a) has been answered in the affirmative. 370
- (e) Questions b and c have been answered in the negative.

I hold that the majority decision of the Board of Review had made no error of law.

DISSANAYAKE, J. - I agree.

The decision of the Board of Review upheld.