JOINT COMMERCIAL TAX OFFICER, HARBOUR DIV. II, MADRAS A

v.

YOUNG MEN'S INDIAN ASSOCIATION (REG.) MADRAS & ORS. B

February 12, 1970

[M. HIDAYATULLAH, C.J., J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.]

Madras General Sales Tax Act, 1959, *s.* 2(*g*) *Exp. 1 & S* 2(*n*) *Exp. 1—Members' Club—Supply of refreshments to members and their guests—Whether, sales tax leviable.* C

The respondents are members' clubs. They supply refreshments in the form of food, snacks and beverages to their members or their guests to be paid for by the members. The articles necessary for this purpose are purchased by the clubs in the market out of club funds which consisted of the subscription of the members. The preparations are made within the club premises and are supplied to members at fixed prices. On the D question whether the clubs are "dealers" liable to sales tax under the Madras General Sales Tax Act, 1959,

HELD : (*Per* Full Court) As no transaction of sale was involved there could be no levy of sales tax under the provisions of the Act.

(*Per* Hidayatullah, C. J. Hegde, Grover, Ray and Dua, JJ.) The State Legislature is only competent to legislate on taxes on sale or purchase of E goods under Entry 54, List II of the 7th Schedule to the Constitution. If there is no transfer of property from one to another there is no sale which would be exigible to tax, in spite of the definition of 'sale' in s. 2(n) read with Exp. 1 of the Act. [686 G]

In proprietary clubs where some of the shareholders are not members or some of the members are not shareholders, the members are not owners F of, nor interested in, the property of the clubs. Unlike proprietary clubs the case of a members' club is analogous to that of an agent investing his own monies for preparing things for the consumption of the principal and later recouping himself for the expenses incurred. Therefore, in the present case, even though the clubs are distinct legal entities they were only acting as agents for members in the matter of supply of various preparations to them and no sale would be involved as the element of transfer would be completely absent. [685 A-B, 686 H] G

Cosmopolitan Club, Madras v. *District Commercial Tax Officer, Triplicane* (1952) 1 M.L.J. 401; *Deputy Commercial Tax Officer Triplicane Division, Madras* v. *Cosmopolitan Club*, I.L.R. [1955] Mad. 1042. *Graff* v. *Evans*, [1882] 8 Q.B.D. 373, *Trebanog Working Men's Club and Institute Ltd.* v. *Macdonald* [1940] 1 A.E.L.R. 454, *Bengal Nagpur Cotton Mills Club, Rajnandangaon* v. *Sales Tax Officer Raipur & Anr.* 8 S.T.C. 781. *Century Club & Anr.* v. *State of Mysore*, 16 S.T.C. 38, *Deputy* H *Commercial Tax Officer* v. *Enfiend India Ltd.* [1968] 2 S.C.R. 421, and *Inland Revenue Commissioners* v. *Westleigh Estate Co. Ltd. Same* v. *South Behar Railway Co. Ltd.* [1924] 1 K.B. 390, referred to.

A (*Per* Shah, J. concurring) : The analogy of cases decided under the Licensing Act in the United Kingdom concerning the supply by clubs of alcoholic drinks to their members is not appropriate. Whether refreshments, beverages and other articles supplied by members' club for consideration, to its members, are in law sold depends upon the circumstances in which the transaction takes place. In each case the liability to tax of the transaction will depend upon its strictly legal form. If an incorporated members' club supplies *its property* to its members at a fixed tariff B the transaction would readily be deemed to be one for sale, even if the transaction is on a non-profit basis; such a transaction would be liable to sales tax. Where, however, the club is merely acting on behalf of the members to make available to them refreshments, beverages and other articles, the transaction will not be regarded as a sale, for the club is the agency through which the members have arranged that the refreshments, beverages and other articles should be made available. The test in each C case is whether the club transfers property belonging to it for a price or the club acts as an agent for making available property belonging to its members. [687 G, 688 B]

State of Madras v. *Gannon Dunkerley & Co. Ltd.* [1959] S.C.R. 379, *Duke of West Minster* v. *Inland Revenue Commissioner*, 19 T.C. 490, *Bank of Chettinad Ltd.* v. *Commissioner of Income-tax, Madras*, L.R. 67 I.A. 394, *Commissioner of Income-tax, Andhra Pradesh* v. *Motors & D General Stores (P) Ltd.*, 66 I.T.R. 692 S.C. and *Commissioner of Income-tax Gujarat* v. *B. M. Kharwar*, 72 I.T.R. 603 S.C., referred to.

In the present case on the findings recorded, the respondents were not transferring property belonging to them but were merely acting as agents for and on behalf of the members and hence, the transactions were not sales and could not therefore be subject to sales tax under the Act. [688 D]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1724 E to 1727 of 1967.

Appeals from the judgments and orders dated November 23, 1962 and November 4, 1963 of the Madras High Court in Writ Petitions Nos. 129, 130 and 181 of 1960 and Writ Appeal No. 275 of 1963.

F *M. C. Chagla* and *A. V. Rangam*, for the appellants (in all the appeals).

D. Narsaraju and *R. Gopalakrishnan*, for the respondents (in C.As. Nos. 1724, 1725 and 1727 of 1967).

P. Ram Reddy, P. Parameswara Rao and *A. V. V. Nair*, for the respondent (in S.A. No. 1726 of 1967).

G The Judgment of M. HIDAYATULLAH, C.J., K. S. HEGDE, A. N. GROVER, A. N. RAY and I. D. DUA, was delivered by GROVER, J. J. C. SHAH gave a separate opinion.

Grover, J. These appeals by certificate are directed against a common judgment of the Madras High Court in petitions filed H under Art. 226 of the Constitution by the Cosmopolitan Club, Madras, the Young Men's Indian Association, Madras and the Lawley Institute Ootacamund challenging the proceedings relating to their assessment to sales tax under the Madras General Sales

Tax Act, 1959, hereinafter called the "Act", for supplying food, snacks, beverages and other articles to their members or their guests. It was held by the High Court that each of these clubs could not be regarded as a "dealer" within the meaning of s. 2(g) read with Explanation I of the Act nor was any "sale" involved in the aforesaid activity of the club within the meaning of s. 2(n) read with Explanation I of the Act.

The Cosmopolitan Club, Madras, is a social recreation club which was started originally in the year 1873 as an unincorporated association. In 1934 it was registered under s. 26 of the Indian Companies Act 1913 as a non-profit earning institution. Its objects, as disclosed in the memorandum of association, are mainly to promote and facilitate social intercourse, discussion amongst its members etc. The articles of association provide that the members for the time being only constitute the club. It maintains an establishment for preparing and supplying refreshment to its members. It has been found by the High Court and has not been disputed that the articles necessary for the aforesaid purpose are purchased by the club in the market and the preparations are made within its premises at the direction of a committee. The preparations are supplied to the members at such prices as are fixed by the committee. A member is allowed to bring guests with him but if any article of food is consumed by the guest it is the member who has to pay for the same.

The Young Men's Indian Association is a society registered under the Societies' Registration Act 1860. It has, for its objects, the improvement of the moral and physical standards etc. of the students. The association provides certain facilities in the shape of a library with a reading room apart from residential and recreational facilities. There is a mess together with a canteen serving the needs of the members. Any member can bring a guest but the duration of his stay in the hostel or of enjoying the benefit of the preparations or beverages is limited and restricted by the rules. It is the member who has to pay the charges for any articles consumed by his guest. The employees of the association purchase the various articles required for supplying the refreshments etc. and the cost and the expenses incurred therefor inclusive of the salaries of cooks, servers and others are totalled up and divided among the members participating in the mess. No profit is made by the association in providing these amenities to its members. These facts as found in the judgment of the High Court are not disputed.

The Lawley Institute came into existence by a deed of trust dated September 15, 1911 entered into between the Maharaja of Bibbli and the Collector of Nilgiris and others. The management of the Institute vests absolutely in the board of trustees. It is

A intended to serve its members only and no person other than a member is entitled to participate in the amenities provided by the Institute. The supplying of refreshments and meals to members constitute one of such amenities. These facts are altogether uncontroverted.

B It appears that in the State of Madras levy of sales tax was first made in 1939. The statute as it stood then contained the definition of "dealer" in s. 2(b). A dealer was defined as "any person who carried on any business of buying, or selling goods" with the following Explanation :

C > "a cooperative society, a club, a firm or any association which sells goods to its members is a dealer within the meaning of this clause".

The Cosmopolitan Club, Madras, which had been paying tax since 1939 filed a petition under Art. 226 of the Constitution which was disposed of by Mack J., in *Cosmopolitan Club, Madras* v. D *District Commercial Tax Officer, Triplicane*(1). According to the learned Judge the supply of refreshments in a members' club purchased out of the club funds and composed of members' subscription was not a transfer of property from the club as such to a member nor did the club do any trade or business in purchasing from outside the requirements of members and supplying the same E to them at a fixed charge. The levy of sales tax on such supply of refreshments was held to be illegal. A division bench to whom an appeal was taken confirmed the above judgment (*Deputy Commercial Tax Officer, Triplicane Division, Madras* v. *The Cosmopolitan Club*(2). The definition of "dealer" in s. 2(g) of the Act is in the following terms :

F > "dealer" means any person who carried on the business of buying, selling, supplying or distributing goods, directly or otherwise whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes—

G > (i) .....
> (ii) .....
> (iii) .....
> (iv) .....

> Explanation-I. A society including a cooperative society, club or firm or an association which, whether H or not in the course of business, buys, sells or distributes goods from or to its members for cash or for deferred

(1) [1952] 1 M.L.J. 401. (2) I.L.R. [1955] Mad. 1042.

payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purpose of this Act;

Explanation II....."

The definition of sale as given in s. 2(n) reads :-

"sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods, by one person to another in the course of business for cash or for deferred payment or other valuable consideration....."

Explanation I. "The transfer of property involved in the supply or distribution of goods by a society (including a cooperative society) club, firm or any association to its members, for cash, or for deferred payment, or other valuable consideration, whether or not in the course of business shall be deemed to be a sale for the purpose of this Act".

"Turnover" is defined to mean :

"the aggregate amount for which goods are bought or sold or supplied or distributed by a dealer either directly or through another on his own account or on account of others whether for cash or for deferred payment or for other valuable consideration....."

It is common ground that for the levy of sales tax there must be a sale of refreshments, beverages and other preparations by the club to its members. If there is no transfer of property involved in the supply or distribution of goods by a club it would not fall within Explanation I contained in the definition of sale in s. 2(n) nor can the club be regarded as a dealer within s. 2(g) read with Explanation I.

The law in England has always been that members' clubs to which category the clubs in the present case belong cannot be made subject to the provisions of the Licensing Acts concerning sale because the members are joint owners of all the club property including the excisable liquor. The supply of liquor to a member at a fixed price by the club cannot be regarded to be a sale. If, however, liquor is supplied to and paid for by a person who is not a bona fide member of the club or his duly authorised agent there would be a sale. With regard to incorporated clubs a distinction has been drawn. Where such a club has all the characteristics of a members' club consistent with its incorporation, that is to say, where every member is a shareholder and every shareholder is a member, no licence need be taken out if liquor

A is supplied only to the members. If some of the shareholders are not members or some of the members are not shareholders that would be the case of a proprietary club and would involve sale. Proprietary clubs stand on a different footing. The members are not owners of or interested in the property of the club. The supply to them of food or liquor though at a fixed tariff is a sale. B (See Halsbury's Laws of England, 3rd Ed., Vol. 5, pp. 280-281.) The principle laid down in *Graff* v. *Evans*(1) had throughout been followed. In that case Field J., put it thus :

> "I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were C their agents with respect to the general property in the goods".

The difficulty felt in the legal property ordinarily vesting in the trustees of the members' club or in the incorporated body was surmounted by invoking the theory of agency *i.e.* the club or the trustees acting as agents of the members. According to Lord D Hewart (L.C.J.) in *Trebanog Working Men's Club and Institute Ltd.* v. *Macdonald*(2), once it was conceded that a members' club did not necessarily require a license to serve its members with intoxicating liquor it was difficult to draw any distinction between the various legal entities which might be entrusted with the duty of holding the property on behalf of members, be it an individual E or a body of trustees or a company formed for the purpose so long as the real interest in the liquor remained in the members of the club. What was essential was that the holding of the property by the agent or trustee must be a holding for and on behalf of and not a holding antagonistic to members of the club.

In the various cases which came to be decided by the High F Courts in India the view which had prevailed in England was accepted and applied. We may notice the decisions of the Madhya Pradesh High Court in *Bengal Nagpur Cotton Mills Club, Rajnandangaon* v. *Sales Tax Officer Raipur & Another*(3) and of the Mysore High Court in *Century Club & Another* v. *The State of Mysore & Anr.*(4). In the former it was held that the supply to G the member of a members' club registered under s. 26 of the Indian Companies Act 1913 of refreshments purchased out of club funds which consisted of members' subscription was not a transfer of property from the club as such to a member and the club was not liable to sales tax under the C.P. & Barar Sales Tax Act 1947 in respect of such supplies of refreshment. The principle adverted to in *Trebanog Working Men's Club*(2) was adopted H

(1) [1882] 8 Q. B. D. 373.
(2) [1940] 1 A.E.L.R. 454.
(3) 8 S. T. C. 781.
(4) 16 S. T. C. 38.

and it was said that if the agent or a trustee supplied goods to the members such supplies would not amount to a transaction of sale. The Mysore court expressed the same view that a purely member's club which makes purchases through a Secretary or manager and supplies the requirements to members at a fixed rate did not in law sell these goods to the members.

On behalf of the appellant reliance has been placed on a decision of this court in *Deputy Commercial Tax Officer & Anr.* v. *Enfiend India Ltd.*(1). In that case the Explanation to s. 2(g) was found to be *intra vires* and within the competence of the State legislature. The judgment proceeded on the footing that when a co-operative society supplied refreshments to its members for a price the following four constituent elements of sale were present: (1) parties competent to contract; (2) mutual consent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer and (4) price in money paid or promised. The mere fact that the society supplied the refreshments to its members alone and did not make any profit was not considered sufficient to establish that the society was acting only as an agent of its members. As a registered society was a body corporate it could not be assumed that the property which it held was the property of which its members were owners. The English decisions were distinguished on the ground that the courts in those cases were dealing with matters of quasi criminal nature.

It appears that in England even in taxation laws the position of a members' club though incorporated has been recognised to be quite different. In *Inland Revenue Commissioners* v. *Westleigh Estate Co. Ltd.*(2); *Same* v. *South Behar Railway Co. Ltd.* and *Same* v. *Eccentric Club* Pollock M.R. dealing with the case of the Eccentric Club pointed out that the members' club was only structurally a company and it did not carry on trade or business so as to attract the Corporation Profits Tax.

The essential question, in the present case, is whether the supply of the various preparations by each club to its members involved a transaction of sale within the meaning of the Sale of Goods Act 1930. The State Legislature being competent to legislate only under Entry 54, List II of the 7th Schedule to the Constitution the expression "sale of goods" bears the same meaning which it has in the aforesaid Act. Thus in spite of the definition contained in s. 2(n) read with Explanation I of the Act if there is no transfer of property from one to another there is no sale which would be exigible to tax. If the club even though a distinct legal entity is only acting as an agent for its members in the matter of supply of various preparations to them no sale would be involved

(1) [1968] 2 S.C.R. 421. (2) [1924] 1 K. B. 390.

A as the element of transfer would be completely absent. This position has been rightly accepted even in the previous decision of this Court.

The final conclusion of the High Court in the judgment under appeal was that the case of each club was analogous to that of an B agent or mandatory investing his own monies for preparing things for consumption of the principal, and later recouping himself for the expenses incurred. Once this conclusion on the facts relating to each club was reached it was unnecessary for the High Court to have expressed any view with regard to the *vires* of the Explanations to s. 2(g) and 2(n) of the Act. As no transaction of sale was C involved there could be no levy of tax under the provisions of the Act on the supply of refreshments and preparations by each one of the clubs to its members.

The appeals must fail and are dismissed but there will be no order as to costs.

D

Shah, J. Where general property in goods belonging to a person is under a contract transferred to another for a price paid or promised, the transaction is a sale. The State Legislature has under the Constitution power to legislate under Entry 54 List II E in respect of taxes on sale or purchase of goods and the expression "sale" has the same meaning it bears in the Sale of Goods Act, 1930 : see *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*(1). A transaction which is not of the nature of sale within the meaning of the Sale of Goods Act, cannot, therefore, be subjected to tax under a law enacted in exercise of power under Entry 54 List II.

F

Whether refreshments, beverages and other articles supplied by a Member's Club for consideration to its members are in law sold depends upon the circumstances in which the transaction takes place. In each case the liability to tax of the transaction will depend upon its strictly legal form. If an incorporated members' club supplies its property to its members at a fixed tariff, the G transaction would readily be deemed to be one for sale, even if the transaction is on a non-profit basis; such a transaction would be liable to sales tax. Where, however, the club is merely acting on behalf of the members to make available to them refreshments, beverages and other articles, the transaction will not be regarded as a sale, for the club is the agency through which the members H have arranged that the refreshments, beverages and other articles should be made available. The test in each case is whether the

(1) [1959] S.C.R. 379.

club transfers property belonging to it for a price or the club acts as an agent for making available property belonging to its members. A

In my judgment, the analogy of the cases decided under the Licensing Act in the United Kingdom concerning the supply by clubs of alcoholic drinks to their members is not appropriate. In a criminal trial or a quasi-criminal proceeding, the Court is entitled to consider the substance of the transaction and determine the liability of the offender. But in a taxing statute the strict legal position as disclosed by the form and not the substance of the transaction is determinative of its taxability: see *Duke of West Minister* v. *Inland Revenue Commissioners*(1); *Bank of Chittinad Minster* v. *Inland Revenue Commissioners*(1); *Bank of Chittinad Income-tax, Andhra Pradesh* v. *Motors & General Stores(P) Ltd.*(2); and *Commissioner of Income-tax, Gujarat* v. *B. M. Kharwar*(4). B C

It appears on the findings recorded by the High Court that the clubs or associations sought to be rendered liable in these appeals were not transferring property belonging to them but were merely acting as agents for and on behalf of the members. They were not selling goods but were rendering a service to their members. D

I agree therefore that the appeals must fail.

Y.P. *Appeals dismissed.*

(1) 19 T.C. 490. 519.
(2) L. R. 67 I. A. 394.
(3) 66 I.T.R. 692 S.C.
(4) 72 I.T.R. 603 S.C.