

MECLEOD & CO. LTD.

v.

STATE OF ORISSA & ORS.

November 23, 1983

[V.D. TULZAPURKAR, R.S. PATHAK AND SABYASACHI MUKHARJI, JJ.]

Orissa Taxation (on Goods carried by Road and Inland Waterways) Act, 1959 validated by Act of 1968—S. 2(5)—Read with explanation thereto—Definition of dealer—Interpretation of. Manager or agent of non-resident dealer need not have place of business or residence in Orissa State to be deemed to be dealer. Dealer—Whether non resident dealer—Test for determining residence.

The appellant-company was appointed as 'Managing Agent' and Secretary & Treasurer' respectively by two independent and separate public limited jute mills companies. These jute mills had their registered office at Calcutta and additional places of business in several parts of the country including Kendupatna in the State of Orissa and were registered as 'dealers' under the Orissa Taxation (on Goods carried by Road and Inland Waterways) Act, 1959. The appellant-company did not do any business nor had any place of its business in any part of the State of Orissa. But the appellant-company looked after the work of storing jute of the two jute mills in their godowns at Kendupatna in the State of Orissa. The Assistant Tax Officer passed ex-parte assessment orders against the appellant-company on the business of stocking, storing and carrying jute by boats of the jute mills in the State of Orissa on the basis that the appellant-company was a 'dealer' (as agent of both the jute mills) within the meaning of s. 2(5) read with the Explanation thereto of the Act. The Assistant Commissioner of Taxes dismissed the appeal and Commissioner of Taxes dismissed the revision petition filed by the appellant-company against the assessment orders. In a writ petition, the High Court negatived the contention of the appellant-company that it was not a dealer. In this appeal, the appellant-company contended : (1) that in order to be deemed to be a dealer under s. 2(5) read with Explanation thereto a manager or an agent of a dealer must reside or have a place of business in the State of Orissa and since the appellant-company did not have any such place of business in the State of Orissa it was not a dealer under that section, and (2) that the jute companies (Principals) were not 'non-resident dealers' as required by the Explanation to s. 2(5) since each one had a place of business of its own in the State of Orissa.

Dismissing the appeal,

HELD : The appellant-company was a dealer within the meaning of s. 2(5) read with the Explanation thereto of the Orissa Taxation (on Goods carried by Road and Inland Waterways) Act, 1959. [876 E]

A Under the Explanation to s. 2(5) of the Act, the manager or agent of a 'dealer' who resides outside the State is also deemed to be a 'dealer' for the purpose of the Act irrespective of whether he resides inside or outside the State. The artificial definition of a 'dealer' under the Explanation is merely an enabling provision which facilitates the assessment against a non-resident dealer but the provision does not require that the manager or the agent should have either a residence or a place of business within the State of Orissa. There is nothing B either in the main definition or in the Explanation to suggest that the manager or agent of the dealer (Principal) should have his own business within the State of Orissa before he could be proceeded against or assessed under the Act. All that the Explanation requires is that the manager or the agent should store such goods of the non-resident 'dealer' within the State of Orissa but that does not mean that for such purpose the manager or the agent either reside or have a place of business within the State of Orissa; even if he carries out the operation of storing the goods and carrying the same by motor boats within the State of Orissa from outside the State it would suffice. [871 G-H; F; 872 B-C]

D In the instant case, it is true that during the relevant period it was the jute companies (the Principals) who carried on their jute business at Kendupatna within the State of Orissa and that the appellant-company had no business of its own anywhere in that State but it was looking after the business of the Principals as their agent at Kendupatna and such business included the operation of stocking or storing of jute in their godowns at Kendupatna and carrying the same by motor boats. [871 C-D]

E In respect of an artificial person like a company the test to determine its residence will have to be considered in the context of the law prescribing the criteria in that behalf. So far as law of taxation is concerned, ordinarily the residence of a company will be at the place where the actual management of the company is carried on and that if this is done at several places it may have a dual residence but in that case at least some part of the superior and directing authority of the company must be present at the place where its residence is sought to be established. [873 A; 874 F-G]

F *Palmer's Company Law* (23rd Ed.) Vol. I at pages 101 to 103, referred to.

G The test of residence is not registration, but where the company does its real business, where the central management and control abides. It is the actual place of management of the company and not the place where it ought to be managed which fixes its residence. [875 B]

Buckley on the Companies Act (14th Edn.), Vol. 1 at pages 299; *Egyptian Delta and Investment Co. v. Todd*, [1929] A. C. 1 and *De Beers Consolidated Mines v. Howe*, [1906] A. C. 455 referred to.

H In the instant case both the principals (the jute companies) had their registered offices in Calcutta (West Bengal), that their principal businesses were carried on in Calcutta (West Bengal) and that the Central management and

control of the businesses was done from Calcutta. It is true that these two jute companies had storage equipment and godowns at Kendupatna in the States of Orissa but on their own showing (vide Certificates of Registration) at Kendupatna they had 'additional places of businesses'. As the central management and control of the two companies' businesses obtained in Calcutta (West Bengal), the two jute companies would be non-resident dealers in the State of Orissa. [876 A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 43 of 1972.

Appeal by Special leave from the Judgment and Order dated the 16th April, 1971 of the Orissa High Court in O.J.C.No.24 of 66.

V. S. Desai, S. Bhandare and T. Sridharan with him for the Appellant.

Govinga Mukhoty, G. S. Chatterjee and Sujeet K. Bhattacharya for the Respondents.

The Judgment of the Court was delivered by

TULZAPURKAR, J. This appeal by special leave raises the question whether the appellant-company could be regarded as a 'dealer' within the meaning of sec.2(5) read with the Explanation thereto of the Orissa Taxation (on goods carried by Road and Inland Waterways) Act, 1959 (hereinafter referred to as the Orissa Taxation Act and which was validated by Act of 1968) and as such was liable to be assessed under the Act for the quarters covering the period 30-9-1960 to 31-3-1962? The question which pertains to the proper interpretation of the aforesaid provisions of the Act arises in the following circumstances.

Nellimarla Jute Mills Co. Ltd., and Chitavalsah Jute Mills Co. Ltd. are two independent and separate companies having their registered offices at Mecleod House, 3, Netaji Subhas Road, Calcutta and additional places of business in several part of the country including one at Kendupatna, P.O. Kendupatna, District Cuttack, in the State of Orissa. These two public Limited Companies primarily carried on the business of jute manufacturing and owned jute mills in different parts of the country, such as, Nellimarla Jute Mills Co. Ltd., owing Jute Mills at Elore in Andhra Pradesh and Chitavalsah Jute Mills Co. Ltd. owing Jute Mills at Chitavalsah in Andhra Pradesh. The appellant-company (M/s. Mecleod & Co. Ltd. having its Registered Office at Mecleod House, 3, Netaji Subhas Road, Calcutta), by

A virtue of Agreements with the said two jute mills was appointed the
‘Managing Agent’ for Chitavalsah Jute Mills Co. Ltd. and the
‘Secretary & Treasurer’ for Nellimarla Jute Mills Co. Ltd. The
appellant-company did not do any business nor had any place of its
B business in any part of the State of Orissa. But as the Managing
Agent of Chitavalsah and as the Secretary and Treasurer of
Nellimarla looked after the work of storing their jute in their
godowns at Kendupatna, District Cuttack, State of Orissa. It may
be stated that under cl.(4) of the Agreement dated 7-10-1960 with
Nellimarla the appellant-company was precluded from and was “not
entitled (unless and except to the extent they are authorised by the
C Board of Directors) to sell any goods or articles manufactured or
produced by the Company or to purchase, obtain, or acquire
machinery, stores, goods or materials for the purposes of the
Company or to sell the same.” In other words, the prohibition
D contained in cl.(4) of the Agreement with Nellimarla merely pertained
to selling or purchasing of goods or materials for the purposes
of the company but left intact the appellant-company’s powers to
store jute of the Company in its godowns at Kendupatna in the State
of Orissa.

E Since the two jute mills carried on the trade of purchasing and
storing of jute, *inter alia* at Kendupatna, they were registered as
‘Dealers’ under the Orissa Taxation Act and the Rules framed
thereunder, each one having a separate Registration Certificate. It
may be stated that Nellimarla had filed Returns of their turn-over
for all the quarters from 30-9-1959 to 30-6-1960 and had paid the
admitted tax for the said period under the Act. Similarly, Chitavalsah
F had filed Returns of their turn-over, for all quarters from
30-9-1959 to 31-3-1960 and had paid the admitted tax for the said
period under the Act. It appears that thereafter some time in 1963
the said jute companies filed writ petitions in the Orissa High Court
under Art.226 of the Constitution challenging the validity of the
G original Act of 1959 as also the Validation Act of 1968 and obtained
interim stay of proceedings under the said Act but we were informed
by counsel that ultimately the challenge to the validity of the Acts
failed; however, we are not concerned with those proceedings in this
appeal. In the meanwhile, seven ex parte assessment orders were
H passed against the appellant-company by the Assistant Tax Officer
for quarters covering the period from 30-9-1960 to 31-3-1962 on the
business of the said two companies on the basis that appellant-
company was a ‘dealer’ (as agent of both the companies) within the

meaning of sec.2(5) read with the Explanation thereto and had carried on the business of stocking or storing jute and carrying the same by motor boats at Kendupatna in District Cuttack, State of Orissa and the appellant-company received a notice of demand along with the said assessment orders claiming a total amount of Rs.74,125 inclusive of penalty. Against the said assessment orders the appellant-company preferred appeals under sec.12(1) of the Act to the Assistant Commissioner of Taxes but the appeals failed. The appellant-company preferred revisions under sec.12(3) of the Act to the Commissioner of Taxes, Orissa but the Commissioner of Taxes by his order dated 15th October, 1965 dismissed the revisions and confirmed the Assessment Orders made against the appellant-company. Aggrieved by the order of the Commissioner of Taxes the appellant-company approached the High Court by means of a Writ Petition under Art.226 of the Constitution and challenged the assessments made against them on the basis that as agent of the two Jute Companies it was not a 'Dealer' within the meaning of sec.2(5) read with the Explanation thereto of the Orissa Taxation Act. The assessment orders were also challenged on the ground that these had been passed without following the principles of natural justice inasmuch as the appellant-company had no opportunity to meet the materials, particularly the Inspector's Report relied upon by the Assistant Taxing Officer while making the assessments. The High Court by its judgment dated 16th April, 1971 negatived the appellant-company's principal contention that it could not be regarded as a 'Dealer' within the meaning of sec.2(5) read with Explanation thereto of the Act and therefore it could not be assessed at all under the Act but set aside the assessment orders and remanded the assessment proceedings to the taxing authority to pass fresh orders on the ground that through notice of the assessment proceedings had actually been served on the appellant-company the assessment orders had been made arbitrarily without the appellant-company getting a reasonable opportunity of meeting or explaining the materials in the Inspector's Report which had been relied upon by the Assessing Officer for making the assessment. Though the matter has been remanded by the High Court for fresh assessment, the principal contention of the appellant-company which goes to the root of the matter having been negatived by the High Court the appellant-company has preferred this appeal to this Court challenging the High Court's view thereon.

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A Counsel for the appellant-company put forward a couple of contentions in support of his case that on the facts and circumstances obtaining here in regard to the business of stocking or storing their jute and transporting the same by motor boats within the State of Orissa which was done by the two jute companies at Kendupatna in District Cuttack, the two jute companies (the Principals) who had registered themselves as 'dealers' under the Act could be assessed by the taxing authorities and not the appellant-company who was not a 'dealer' as defined by sec.2(5) read with the Explanation thereto of the Act. In the first place Counsel urged that though it was true that the appellant-company was acting as the agent of the two jute companies during the relevant quarters it did not have any place of business either at Kendupatna or anywhere else in the State of Orissa and unless it had such place of business in the State of Orissa which could facilitate the assessment, the appellant-company could not be proceeded against or assessed. In other words, the submission was that under the Explanation an artificial definition of a 'dealer' by means of a deeming clause had been provided with the object of facilitating the assessment proceedings against non-resident principals which could not be achieved if the agent was also a non-resident in the State of Orissa. Secondly, counsel contended that jute companies (Principals) were not 'non-resident dealer' as required by the Explanation since each one had a place of business of its own at Kendupatna District Cuttack. Relying on these aspects counsel for the appellant company contended that on true construction of the relevant provision the appellant company could not be held to be a dealer and as such the assessing authority had no jurisdiction or power to proceed against or assess the appellant-company in respect of the business of the principals (the jute companies). For the reasons which we shall indicate presently we do not find any substance in either of the contentions and both these are liable to be rejected.

G Obviously the two contentions urged by counsel for the appellant-company have a bearing on the proper construction to be placed on sec.2(5) read with the Explanation of the Orissa Taxation Act. It was not disputed before us that under the charging provision contained in sec.3 of the Act the Taxing event is the carriage of jute and other articles by motor vehicle, cart, trolley, boat etc. within the State of Orissa and the liability to be assessed in that behalf under the provisions of the Act has been laid upon a 'dealer' as defined in sec.2(5) and the Explanation thereto of the Act. Section 2(5) and the Explanation thereto run as under :

"2(5) 'Dealer' means any person who stores at one time jute in excess of fifty maunds or bamboos in excess of one thousand in number or kendu leaves in excess of one standard maund or minerals and mineralores before or after being carried by motor vehicle, cart, trolley, boat, animal or human agency or any other means except railways or airways *and includes his agent* :

Explanation : The manager or agent of a dealer who resides outside Orissa and who stores such goods shall be deemed to be a dealer for the purpose of this 'Act.'

It is true that during the relevant quarters covering the period from 30-9-1960 to 31-3-1962 it was the jute companies (the Principals) who carried on their jute business at Kendupatna within the State of Orissa and that the appellant-company had no business of its own anywhere in that State but it was looking after the business of the Principals as their agent at Kendupatna and such business included the operation of stocking or storing of jute in their godowns at Kendupatna and carrying the same by motor boats but there is nothing either in the main definition or in the Explanation to suggest that the manager or agent of the dealer (Principal) should have his own business within the State of Orissa before he could be proceeded against or assessed under the Act. In our view it would be sufficient if the manager or agent of a non-resident dealer, looks after the operation of stocking or storing the jute of that non-resident dealer and carrying the same by motor boats etc. within the State of Orissa. Apart from this aspect of the matter, the main thrust of Counsel's contention has been that the manager or agent should at least reside or have a place of business within the State of Orissa before he could be proceeded against or assessed under the Act. On a plain reading of the Explanation that clearly is not a requirement *qua* the manager or agent. Under the Explanation the manager or agent of a 'dealer' who resides outside the State is also deemed to be a 'dealer' for the purpose of the Act irrespective of whether he resides inside or outside the State. In other words the place of residence or of business of the manager or the agent is utterly irrelevant. The artificial definition of a 'dealer' under the Explanation is merely an enabling provision which facilitates the assessment against a non-resident dealer but the provision does not require that the manager or the agent should have either a residence or a place of business within the State of Orissa. Emphasis was laid by Counsel on the phrase 'who

A stores such goods' occurring in the Explanation as referring to
manager or agent and it was submitted that the said phrase suggests
that the manager or the agent should have either residence or place
of business within the State of Orissa. It is not possible to accept
this submission for the reason that all that the Explanation requires is
B that the manager or the agent should store such goods of the non-
resident 'dealer' within the State of Orissa but that does not mean
that for such purpose the manager or the agent must either reside or
have a place of business within the State of Orissa; even if he carries
out the operation of storing the goods and carrying the same by
C motor boats within the State of Orissa from outside the State it
would suffice. On a fair reading of the main definition together with
the Explanation it seems to us quite clear that the concept of resi-
dence or non-residence is relevant *qua* the principal who must be a
non-residence dealer before his manager or agent could be proceeded
against or assessed under the Act and it is not the requirement of
D the provision that the manager or the agent of a non-resident 'dealer'
should have either residence or the place of business within the
State of Orissa.

The next submission of Counsel for the appellant-company has
been that the two principals namely Nellimarla and Chitavalsah who
are 'dealers' falling within the main definition could not be said to
E be non-resident dealers because in the case of a company, unlike an
individual every place where it carries on its business would be a
place of its residence and since admittedly each carried on business at
certain places at Kendupatna in the State of Orissa during the rel-
evant quarters it could not be said that they had been residing outside
F the State. Elaborating this contention Counsel pointed out that the
residence of a company must be distinguished from its nationality
and domicile. According to Counsel the place of registered office
of a company would be relevant for determining its nationality or
domicile but it does not determine the residence. Counsel pointed
out that in law a company may have a dual residence or multiple
G residences depending upon at how many places it carries on its
businesses and this aspect of the company's residence assumes con-
siderable relevance in the context of tax laws and since here the two
jute companies (the Principals) had also places of business within the
State of Orissa, apart from having their registered offices in Calcutta,
H they could be regarded as having their residences within the State
of Orissa and as such could not be regarded as non-resident 'dealer'.

It is true that in respect of an artificial person like a company the test to determine its residence will have to be considered in the context of the Law prescribing the criteria in that behalf and would be different from the test that determines its nationality or domicile. In *Palmer's Company Law* (23rd Edn) Vol.I these three concepts in relation to a company have been dealt with in paragraphs 8.10, 8.11 at pages 101 to 103 thus :

8.10 *Nationality, domicile and residence of company*

The situation of the registered office determines the nationality and domicile of the company but it does not determine its residence. Where legal rules use these criteria and it is obvious that the rules have to be applied to legal persons, it becomes necessary to apply these criteria by way of analogy from the case of natural persons. It is obvious that a corporation can no more have a domicile or residence than it can marry or have children. On the other hand, effect must be given to the legal prescript, which is clearly intended to cover the case of the artificial person as well as that of the natural person. Here the task of the courts is to interpret the enactment in question in relation to the artificial person

Nationality

The nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality.

In English law, nationality is rarely adopted as a legal test.

Domicile

The place of registration is like-wise the domicile of a company, and this domicile clings to it throughout its existence. It is, however, possible that by operation of the law of the Company's domicile, another system of law may be substituted for the law of the place of registration.

Unlike an individual, a company cannot have a domicile of choice.

Residence

8.11 The residence of a company is not as easily established as its nationality or its domicile. The test of residence is mainly used if questions pertaining to taxation, the character of the company as an overseas trading corporation, service of process on the company and attribution of enemy character to the company arise. In these cases, the residence of the company is not determined by the application of a uniform test but a different meaning is given to those words in each of them. Moreover, a company—like an individual—may have several residences at the same time, whereas it can have one domicile and one nationality only.

Tax Law

8.12 In tax law a company is ordinarily resident where the actual management of the company is carried on, even though it ought to be managed elsewhere according to its constitution. If this is done at several places, the company has a dual residence (or possibly even more residences), *but in that case at least some part of the superior and directing authority of the company must be present in the country in which it is sought to establish the residence of the company.*

From what is stated above it will be clear that so far as law of taxation is concerned—and in the instant case we are concerned with tax law, namely, the Orissa Taxation Act—ordinarily the residence of a company will be at the place where the actual management of the company is carried on and that if this is done at several places it may have a dual residence but in that case at least some part of the superior and directing authority of the company must be present at the place where its residence is sought to be established.

In Buckley on the Companies Act (14th Edn.), Vol.1 at page 299 the following passage occurs :

For the purpose of the Income Tax Acts, the place of registration of a company is not, any more than the birth place of an individual, conclusive as to its 'residence'. A company registered here (in England), with a registered office here, (in England) and governed by a board which meets here, is no doubt resident here. But also a company registered abroad, whose head office and directors' meeting are here, is resident here. *The test of residence is not registration, but where the company does its real business, where the central management and control abides.* It is the actual place of management of the company and not the place where it ought to be managed which fixes its residence."

The underlined portion in the passage quoted from Buckley is based on the decision of the House of Lords in the leading case of *Egyptian Delta Land and Investment Co. v. Todd*.⁽¹⁾ In that case the company was incorporated in England, had its registered office in England and fulfilled its statutory obligations in that country but had transferred the whole of its business to Egypt which was entirely controlled and managed from Cairo where the director and the secretary permanently resided and the question arose whether for the purposes of Income Tax Acts the company could be regarded as a resident in England'. After exhaustive survey of the earlier case law on the point the House of Lord took the view that the incorporation under the Companies Acts, with the attendant statutory obligations did not in itself, as a matter of law, constitute a British company a person residing in the United Kingdom within the meaning of the Income Tax Acts; that it was merely a factor to be considered in determining residence, and was a matter for the Commissioners to decide. It also took the view that it was settled by authority that the residence of a company, whether British or foreign, for income tax purposes was, preponderantly and if not exclusively, determined by the place where its real business was carried on and since the whole of the company's business was controlled from Cairo the company was not resident in England and it upheld the Commissioners' decision of discharging the assessments. In taking the aforesaid view the House of Lords approved and followed the criteria that had been laid down in an earlier decision in the case of *De Beers Consolidated Mines v. Howe*⁽²⁾ to the effect "the test of residence is

(1) [1929] A.C. 1.

(2) [1906] A.C. 455.

A not registration but where the company does its real business, where the central management and control abides."

B Applying the aforesaid criteria to the facts of the present case it was not disputed before us that both the principals (the jute companies) had their registered offices in Calcutta (West Bengal), that their principal businesses were carried on in Calcutta (West Bengal) and that the central management and control of the businesses was done from Calcutta. It is true that these two jute companies had storage equipment and godowns at Kendupatna in the State of Orissa but on their own showing (vide certificates of Registration) at Kendupatna they had 'additional places of businesses'. It was not even the appellant company's case that the central management and the control of the two jute companies' businesses was in the State of Orissa. The test laid down in the House of Lords' decision does not suggest that at every place where some business of the company is carried on it shall have its residence there. As pointed out above, the central management and control of the two companies' businesses obtained in Calcutta (West Bengal) and that being the position the two jute companies would be non-resident dealers in the State of Orissa. The second contention of the counsel for the appellant company, therefore, fails.

E In the result we are of the view that the High Court was right in coming to the conclusion that the appellant-company was a dealer within the meaning of s.2(5) read with the Explanation thereto of the Orissa Taxation Act, 1959. The appeal is, therefore, dismissed with costs.

F H.S.K.

Appeal dismissed.