

M/S. Anand Swarup Mahesh Kumar

Vs

Commissioner of Sales Tax

Civil Appeal No. 3345 of 1979

(P. N. Bhagwati, E. S. Venkataramiah JJ)

15.09.1980

JUDGMENT

VENKATARAMIAH, J. –

1. The appellant is a firm carrying on business at Mandi Anandganj, Barut, District, Meerut in the State of Uttar Pradesh and is a dealer as defined in the U.P. Sales Tax Act, 1948 (U.P. Act 15 of 1948) (hereinafter referred to as 'the Act'). It has filed this appeal by special leave under Article 136 of the Constitution against the order dated July 31, 1979 passed in Appeal 1502 of 1978 on the file of the Assistant Commissioner (Judicial) Sales Tax, Meerut Range, Meerut upholding the inclusion of the market fee and the commission (otherwise called 'dami') payable to the commission agent operating within a market area established under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (U.P. Act 25 of 1964) (hereinafter referred to as 'the Adhiniyam') in the turnover of purchases of the appellant for purposes of levy of sales tax under Section 3-D of the Act. The assessment year in question is 1974-75. The appellant was granted leave to appeal to file the above appeal directly against the order of the Assistant Commissioner (Judicial) since the question involved in this case had already been decided by the High Court of Allahabad in M/s. Durga Dass Narain Dass v. State of U.P. (Civil Miscellaneous Write Petition No. 301 of 1978 and connected cases decided on December 18, 1978) upholding the inclusion of the market fee and the commission (dami) in the purchase turnover of purposes of levy of sales tax.

2. It is necessary at the outset to refer to some of the relevant provisions of law bearing on the questions involved in the case in order to appreciate the contentions urged on behalf of the appellant. There is no dispute that the appellant is a dealer as defined in Section 2(c) of the Act and is a purchaser of goods notified under Section 3-D(1). Section 3-D of the Act provides that except as provided in sub-section (2) thereof, there shall be levied and paid for each assessment year or part thereof a tax on the turnover to be determined in the prescribed manner of purchases of such goods and with effect from such date as the State Government may be notification in the Gazette specify in relation to purchases made within Uttar Pradesh by a dealer (whether on his own account or on account of anyone else) or though a dealer acting as a purchasing agent at the rate specified therein. Sub-section (4) of Section 3-D of the Act provides that on the issue of a notification under sub-section (1) thereof no tax shall be levied under any other section in respect of the goods included in the notification. The expression 'purchase price' is defined in Section 2(gg) of the Act as follows :

2. (gg) 'purchase price' means the amount of valuable consideration paid or payable by a person for the purchase of any goods, less any sum allowed by the seller as cash discount according to trade practice and shall include any sum charged for anything done by the seller in respect of the goods at the time of or before, delivery thereof,

other than the cost of freight or delivery or the cost of installation when such cost is separately charged;

3. The expression 'turnover of purchases' is defined in Section 2(ii) of the Act thus :

'turnover of purchases' with its cognate expressions means the aggregate of the amounts of purchase price paid or payable by a dealer in respect of purchase of goods made by or through him after deducting the amount, if any refunded to the dealer by the seller in respect of any goods returned to such seller within such period as may be prescribed;

4. Section 3-F of the Act which provides for the levy of additional tax on certain dealer was introduced into the Act by U.P. Act 3 of 1971. When it was so introduced it provided that every dealer liable to pay tax under Section 3, Section 3-A, Section 3-AA or Section 3-D, whose total turnover of sales or of purchases, or of both in any assessment year exceeded rupees two lacs would, in addition to the said tax, be liable to pay for that assessment year an additional tax at the rates specified therein in respect of his turnover liable to tax subject to the other provisions contained in that section.

5. We shall hereafter refer to some of the provisions of the Adhiniyam and the Rules made thereunder. Clauses (b) and (e) of Section 2 of the Adhiniyam define the expressions 'broker' or 'dalal' and 'commission agent' or 'arhatiya' respectively. 'Broker' or 'dalal' means a person who, in the ordinary course of business, negotiates or arranges contracts for the purchase or sale of agricultural produce, on behalf of his principal on payment of commission or remuneration, whether in cash or kind, but does not include the servant of such principal whether engaged in negotiating or arranging such contracts. 'Commission agent' or 'arhatiya' means a person who, in the ordinary course of business, makes or offers to make, a purchase or sale of agricultural produce, on behalf of the owner or seller or purchaser of agricultural produce, for arhat or commission. Section 10 of the Adhiniyam provides that as from the date to be notified by the State Government in the Gazette, no person shall, in a principal market yard or sub-market yard, levy, charge or realise, any trade charges, other than those prescribed by rules or bye-laws made under the Adhiniyam, in respect of any transaction of sale or purchase of the specified agricultural produce and no court shall, in any suit or proceeding arising out of any such transaction, allow in any claim or counter claim, any trade charges not so prescribed, and that all trade charges shall be payable by the purchaser. Sub-clause (b) of clause (iii) of Section 17 of the Adhiniyam empowers the market committee to levy market fees and to utilize such market fees and other fees collected by it under that section for purposes of the Adhiniyam.

6. Section 17(iii)(b) of the Adhiniyam, as it stood before its amendment in 1973, read as follows :

17. A committee shall, for the purposes of this Act, have the power to :-

(iii) levy and collect :

(b) market fees on transactions of sale or purchase of specified agricultural produce in the principal market yard and sub-market yards from such persons and at such rates as may be prescribed, but not exceeding one-half percentum of the price of the specified agricultural produce sold or purchased therein.

7. After clause (b) of Section 17(iii) was substituted by a new clause by U.P. Act 13 of 1973 as re-enacted by U.P. Act 20 of 1974, it read thus :

(b) market fees, which shall be payable by purchasers, on transactions of sale of specified agricultural produce in the Principal Market Yard or a sub-Market Yard at such rates, being not less than one percentum and not more than one and a half percentum of the price of the agricultural produce so sold, as the State Government may specify by notification in the Gazette.

8. The above clause was substituted by a new clause by U.P. Act No. 7 of 1978 with retrospective effect from June 12, 1973 as follows :

(b) market fee, which shall be payable on transactions of sale of specified agricultural produce in the market area at such rates, being not less than one percentum and not more than one and half percentum of the price of the agricultural produce so sold, as the State Government may specify by notification, and such fee shall be realised in the following manner -

(1) if the produce is sold through a commission agent, the commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the committee;

(2) if the produce is purchased directly by a trader from a producer the trader shall be liable to pay the market fee to the committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee to the committee; and

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee to the committee.

9. Rule 79(1) of the Rules framed under the Adhiniyam for purposes of Section 10 of the Adhiniyam provides that as from the date notified by the State Government under Section 10, no person shall, in a Principal Market Yard or Sub-Market Yards, levy, charge or realize, in respect of any transaction of sale or purchase of the specified agricultural produce, any trade charges, other than those specified by the market committee under sub-rule (2) thereof. Sub-rule (2) of Rule 79 of the Rules provides that the market committee shall specify in its bye-laws the trade charges that may be charged or realized by a trader or a commission agent or a broker or a weighman or a measurer or a palledar holding licence under the Rules, but not exceeding the limits prescribed by that sub-rule. Sub-Rule (3) of Rule 79 of the Rules also provides that all the trade charges including commission shall be payable by the purchaser.

10. Three contentions are urged before us in support of the above appeal - (1) that it is not open to the assessing authority to demand any additional tax under Section 3-F of the Act in view of the provision contained in sub-section (4) of Section 3-D of the Act which expressly prohibits the levy of tax under any other section of the Act in respect of purchase turnover of the goods notified under Section 3-D(1); (2) that the market fees payable under the Adhiniyam, being a sum which can be collected from the purchaser by virtue of the provision contained in Section 17(iii)(b) of the Adhiniyam by the commission agent who is required to pay the same to the market committee, cannot be considered as forming part of the consideration paid or payable by the purchaser to the commission agent in respect of purchase of goods at an auction held within a market area

established under the Adhiniyam and, therefore, it cannot be included in the turnover of purchases for purposes of levy of tax under Section 3-D of the Act; and (3) that the commission (dami) payable by a purchaser of goods to the commission agent operating within the market area being a trade charge payable by the purchaser by virtue of Section 10(2) of the Adhiniyam read with Rule 79(3) of the Rules framed thereunder cannot also be included in the turnover of purchases.

11. Insofar as the first contention is concerned, the appellant depends upon sub-section (4) of Section 3-D of the Act which no doubt says that in respect of the turnover of purchases of the goods notified under Section 3-D(1), no tax can be levied under any other provision of the Act. But Section 3-F of the Act which was introduced into the Act subsequently by U.P. Act 3 of 1971 provides that every dealer liable to pay tax under Section 3, Section 3-A, Section 3-AA or Section 3-D whose total turnover of sales or purchases or of both in any assessment year exceeds rupees two lacs shall, in addition to the said tax, pay for that assessment year an additional tax at the rate specified therein. Since Section 3-D of the Act is expressly mentioned in Section 3-F, it has to be held that Section 3-F overrides sub-section (4) of Section 3-D and that additional tax can be collected even in respect of the turnover of purchases of goods notified under Section 3-D(1) notwithstanding sub-section (4) of Section 3-D of the Act. It cannot be said that by enacting sub-section (4) of Section 3-D, the State legislature forfeited its power to levy any other tax under the Act on the goods notified under Section 3-D(1) for ever. It is always open to the legislature to modify the effect of sub-section (4) of Section 3-D by a subsequent legislation. We do not, therefore, find any substance in the contention that additional tax levied under Section 3-F cannot be levied in respect of the turnover of purchases of goods notified under Section 3-D(1) of the Act. The first contention, therefore, fails.

12. We shall now proceed to consider the question whether market fees paid on transactions of sale or purchases of specified agricultural produce in the market area established under the Adhiniyam can be included in the turnover of purchases for purposes of levy of tax under the Act. Before the amendment of Section 17 (iii)(b) of the Adhiniyam by U.P. Act 7 of 1978, it specifically provided that market fee payable on transactions of sale or purchase of specified agricultural produce in the market area should be paid by the purchaser. After the amendment which was brought into force with retrospective effect from June 12, 1973, market fees payable on the transactions of sale or purchase of agricultural produce within the market area can be realized by the market committee from the commission agent who is authorised to realize the same from the purchaser by virtue of Section 17(iii)(b)(1) which reads :

If the produce is sold through a commission agent, the commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the committee.

13. The argument urged on behalf of the appellant is that when a dealer who in this case happens to be a commission agent is permitted by law to collect the market fee which he is liable to pay to the market committee from the purchaser, such market fee cannot form part of the consideration for sale and, therefore, cannot be included in the turnover of purchases for purposes of levy of tax under the Act. But on behalf of the State Government, it is urged that all sums paid by a purchaser to a seller or to a commission agent for the purchase of the goods including any tax or fee payable by him form the consideration for the purchase and, therefore, are liable to be included in the turnover of purchases. Reliance is placed by the State Government on *M/s. George Oakes (P) Ltd. v. State of Madras* ((1962) 2 SCR 570 : AIR 1962 SC 1037 : (1961) 12 STC 476) in which this Court while interpreting a similar provision in the Madras General Sales Tax Act, 1939 observed that the

expression 'turnover' meant the aggregate amount for which goods were bought or sold whether for cash or deferred payment or other valuable consideration and when a sale attracted purchase tax and the tax was passed on to the consumer what the buyer had to pay for the goods included the tax as well and the aggregate amount so paid would fall within the definition of turnover. In the above case, the court was construing the meaning of the expression 'turnover' appearing in a statute in which there was no provision authorising the seller to recover the sales tax payable by him from the purchaser although the price of the goods realized by him included the sales tax payable by him and thus he had passed on his liability to the purchaser. The next decision on which reliance was placed by the state Government is Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Sales Tax, Indore (1971 Supp SCR 945 : (1971) 2 SCC 559). In that case this Court held that the expression 'sale price' as defined in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 included the sales tax collected by a dealer from his purchaser as there was no provision in that statute imposing any liability on the purchaser to pay the tax imposed by it on the dealer and there was no law empowering the dealer to collect the tax from his buyer. In both the decisions referred to above, this Court relied upon Paprika Ltd. v. Board of Trade ((1944) 1 KB 327 : (1944) 1 All ER 372) and Love v. Norman Wright (Builders) Ltd. ((1944) 1 KB 484 (CA)) in which it had been laid down that the price payable by a purchaser under a contract of goods for the purpose of certain penal provisions was the price fixed by the contract and a seller who wished to recover the amount of the purchase tax should, except where an adjustment was authorised by statute, include that amount in the price so fixed. From the observations made in the decisions referred to above, it follows that where a dealer is authorised by law to pass on any tax payable by him on the transaction of sale to the purchaser, such tax does not form part of the consideration for purposes of levy of tax on sales or purchases but where there is no statutory provision authorising the dealer to pass on the tax to the purchaser, such tax does form part of the consideration when he includes it in the price and realizes the same from the purchaser. The essential factor which distinguishes the former class of cases from the latter class is the existence of a statutory provision authorising a dealer to recover the tax payable on the transaction of sale from the purchaser. It is no account of the above distinction that this Court held in Joint Commercial Officer, Division II, Madras-2 v. Spencer & Co. (1975 Supp SCR 439 : (1975) 2 SCC 358, 361 : 1975 SCC (Tax) 343, 346) that the sales tax which a seller of foreign liquor was liable to pay under Section 21-A of the Madras Prohibition Act, 1937 did not form part of the turnover on which sales tax could be levied under the Madras General Sales Tax Act, 1959 because the seller was entitled to recover the sales tax payable by him from the purchaser. The relevant part of Section 21-A of the Madras Prohibition Act, 1937 referred to above read thus :

21-A. Every person or institution which sells foreign liquor -

shall collect from the purchaser and pay over to the government at such intervals and in such manner as may be prescribed, a sales tax calculated at the rate of eight annas in the rupee, or at such other rate as may be notified by the government from time to time, on the price of the liquor so sold.

14. In the course of the decision in the case of Spencer & Co. (1975 Supp SCR 439 : (1975) 2 SCC 358, 361 : 1975 SCC (Tax) 343, 346) this Court observed thus :

It is clear from Section 21-A of the Madras Prohibition Act, 1937 that the sales tax which the section requires the seller of foreign liquor to collect from the purchaser is a tax on the purchaser and not on the seller. This is what makes the authorities on which counsel for the appellants relied inapplicable to the cases before us. Under Section 21-A the tax payable is on the price of the liquor and that tax is to be paid by the purchaser, the seller is required to collect the tax from the purchaser

which he has to pay over to the government. Section 21-A makes the seller a collector of tax for the government. Section 21-A makes the seller a collector of tax for the government, and the amount collected by him as tax under this section cannot therefore be a part of his turnover. Under the Madras General Sales Tax Act, 1959 the dealer has no statutory duty to collect the sales tax payable by him from his customer, and when the dealer passes on to the customer the amount of tax which the former is liable to pay, the said amount does not cease to be the price for the goods although "the price is expressed as x plus purchase tax" (Paprika Ltd. v. Board of Trade) ((1944) 1 KB 327 : (1944) 1 All ER 372). But the amounts collected by the assessee concerned in these appeals under a statutory obligation cannot be a part of their taxable turnover under the Madras General Sales Tax Act, 1959.

15. We do not find any substantial difference between Section 21-A of the Madras Prohibition Act, 1937 and Section 17(iii)(b)(1) of the Adhiniyam. Whereas the levy under Section 21-A of the Madras Prohibition Act, 1937 was sales tax payable to the State Government, under Section 17(iii)(b)(1) of the Adhiniyam, the levy in question is market fees payable to the market committee and secondly whereas the former provision stated that "every person or institution which sells foreign liquor shall collect from the purchaser and pay over to the government", the latter provision states that "if the produce is sold through a commission agent, the commission agent may realise the market fees from the purchaser and shall be liable to pay the same to the committee". The levies in both the cases are statutory although under the Madras Prohibition Act, 1937, it is a tax payable to the government and under the Adhiniyam, it is a fee payable to a market committee which is a statutory body. The only distinguishing feature between the two laws is liquor shall collect sales tax from the purchaser, the Adhiniyam provides that the commission agent may realize the market fees from the purchaser. The use of 'shall' in the former case and of 'may' in the latter case is not of much consequence insofar as the question involved in the present case is concerned because in both the cases the seller or the commission agent who is liable to pay the tax or the fee, as the case may be, is entitled statutorily to realize it from the purchaser and wherever a dealer is authorised by law to do so, the tax or fee realized by him from the purchaser cannot be treated as part of the turnover for purposes of levy of sales tax. The contention of the appellant that market fees payable under the Adhiniyam cannot be included in the turnover of purchases has, therefore, to be upheld.

16. There is, however, no substance in the third contention of the appellant that the commission (dami) payable by a purchaser to a commission agent operating within a market area established under the Adhiniyam cannot be treated as forming part of the turnover of purchases for two reasons - (i) the commission paid by the purchaser is not any tax or fee payable to a government or statutory body which is not a party to the contract of sale and (ii) the commission is actually the profit of the dealer who in this case happens to be a commission agent and should, therefore, necessarily be considered as consideration for the sale of goods.

17. The provisions contained in Section 10 of the Adhiniyam and the Rules framed thereunder do not in any way affect the above conclusion reached by us. Section 10 of the Adhiniyam merely provides that as from the date to be notified by the State Government in the Gazette, no person shall, in a principal market yard, or sub-market yard, levy, charge or realize, any trade charges other than those prescribed by rules or bye-laws made under the Adhiniyam, in respect of any transaction of sale or purchase of the specified agricultural produce and no court shall, in any suit or proceeding arising out of any such transaction, allow in any claim or counter claim, any trade charges not so prescribed. It also provides that such charges shall be collected from the purchasers thereby barring the collection of such charges from the producers of agricultural produce who are ordinarily the

sellers in a market area. Sub-rule (1) of Rules 79 of the Rules framed under the Adhinyam provides that as from the date notified by the State Government, no person shall, in a principal market yard or sub-market yard, levy, charge or realise, in respect of any transaction of sale or purchase of the specified agricultural produce any trade charges, other than those specified by the market committee under sub-rule (2) thereof, and sub-rule (2) of Rule 79 authorises the market committee to make bye-laws prescribing the maximum commission that may be charged by a commission agent or a broker. Sub-rule (3) of Rule 79 reiterates that all trade charges shall be payable by the purchaser. A combined reading of Section 10 of the Adhinyam, Rule 79 of the Rules made under the Adhinyam and the bye-laws made by the market committee shows that a commission agent cannot realize any commission higher than what is prescribed by law. The commission chargeable by the commission agent is not a sum which he has in his turn to pay to an authority either by way of tax or by way of fee but is only a reward for the services rendered by him. We, therefore, reject the above submission made on behalf of the appellant.

18. For the foregoing reasons, the appeal is allowed in part. The inclusion of the market fees in the turnover of purchases of the assessee for purposes of levy of tax under the Act is set aside. The assessing authority is directed to modify the order of assessment in accordance with this decision. In the circumstances of the case, the parties shall bear their own costs.

</html