M/S. Central Wines, Hyderabad

Vs

Special Commercial Tax Officer

M/S. Artos Breweries Ltd.

Vs

Commercial Tax Officer and Another

M/S. Central Wines

Vs

Commercial Tax Officer and Another

M/S. Orion Chemicals and Distilleries Ltd.

Vs

Commercial Tax Officer and Another

M/S. Premier Enterprises

Vs

Principal Commercial Tax Officer and Others

Winesh Corporation

Vs

Commercial Tax Officer

M/S. Artos Breweries Ltd.

Vs

Commercial Tax Officer

M/S. Premier Enterprises, General Bazar, Secunderabad

Vs

Commercial Tax Officer and Another

M/S. Artos Breweries Ltd., Ramachandrapuram

Vs

Commercial Tax Officer, Ramachandrapuram

Civil Appeals Nos. 1118 of 1981; 2065, 1990-91 and 2923 of 1986; 2966-67, 3349 and 5884 of 1983; 740 of 1984 and 1541 of 1985

(M. P. Thakkar, K. N. Singh JJ)

09.01.1987.

JUDGMENT

M. P. THAKKAR, J. -

1. In a batch of writ petitions and TRC cases before the High Court the question raised in substance was formulated as under :

> The question, therefore, that arises in both these cases, is whether the amount collected by the seller from the buyer which comprises of the two components the actual sale price and the sales tax is a part of the "turnover" and comes within the expression "any other sum charged by the dealer whatever be the description, name or object thereof" occurring in the definition in Section 2(s) (Section 2(s) of the Andhra Pradesh General Sales Tax Act, 1957 : Turnover means the total amount set out in the bill of sale or if there is no bill of sale, the total amount charged as the consideration for the sale or purchase of goods whether such consideration be cash, deferred payment or any other things of value-including any sums charged by the dealer for anything done in respect of goods sold at the time of or before the delivery of the goods and any others sums charged by the dealer, whatever be the description, name or object thereof :
>
> Provided that in the case of a sale by a person whether by himself or through an agent of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, the amount of the consideration relating to such sale shall be excluded from his turnover when such produce is sold in the form in which it was produced, without being subjected to any physical, chemical or other process for being made fit for consumption save mere cleaning, grading or storing.) of the Act. In the former case it is shown expressly as sales tax and in the latter case it is shown in the form of debit notes. But in both the cases it is collected by the seller from the buyer at the time of the sale or rather as a condition of sale.

2. The High Court repulsed the plea of the assesses that the amount of sales tax so collected from the buyers was not includible in the turnover for the purpose of computing the sales tax liability of the assesses. The concerned assesses have approached this Court by way of the present group of appeals by special leave.

3. Sales tax is levied under the authority of Section 5 and Section 5-A on the 'turnover' of a dealer. The expression 'turnover' has been defined by Section 2(s) inter alia to include the total amount set out in the bill of sale or the total amount charged as consideration for the sale or purchase of goods whether such sales includes any other sum charged by the dealer whatever be the description, name or object thereof. Whether or not sales tax collected by the dealers from the buyers would fall under

the inclusive part of aforesaid definition is the question raised in these appeals. It has arisen in the context of two categories of cases, namely :

(i) wherein the dales tax has been separately set out in the bill of sale and is collected by the seller at the time of sale immediately after or at the time of delivery of the goods.

(ii) wherein the sales tax is not mentioned in the bill at all but simultaneously collected with the delivery of the goods separately under debit notes whereby the exact amount of sales tax due is collected from the purchaser by the seller but the said amount is kept in the suspense account.

4. The submissions which were unsuccessfully urged before the High Court and are reiterated before us on behalf of the assessees are :

(1) That where the amount is collected specifically as 'tax', it cannot be deemed to be a part of the consideration for the sale of the goods and as such it cannot form part of the turnover within the meaning of Section 2(s) of the Act.

(2) Inasmuch as the Act does not prohibit the dealer to pass on the sales tax component of the sale price to the purchaser, the dealer should be deemed to be an agent of the government for collecting the sales tax amount.

5. In repelling the aforesaid contentions, strong reliance was placed by the High Court on its Full Bench decision on Government of A. P. v. East India Commercial Company Ltd., ((1957) 8 STC 114 (AP HC)) wherein an earlier decision of a Division Bench (State of A. P. v. Bujranga Jute Mills Ltd., (1955) 6 STC 376 (AP HC)) to the effect that sales tax collected by the dealer from the buyers cannot be included in his turnover and is not liable to be taxed again was overruled. It may incidentally be mentioned that the aforesaid Full Bench judgment of the High Court was noted with approval by this Court in M/s. George Oakes (P) Ltd. v. State of Madras. ((1961) 12 STC 476 : AIR 1962 SC 1037 : (1962) 2 SCR 570)

6. Some salient features require to be underscored in order to test the merits of these submissions :

(1) There is no provision in the Act which imposes a legal obligation on the vendor of the goods to recover sales tax on the goods sold to the vendee. For instance the vendor is not prohibited from selling the goods without recovering the sales tax from the vendee. The seller may not charge or recover the sales tax from the buyer. He will not be violating any provision of the act or incurring any penal consequence by doing so. In other words the collection of the sales tax from the buyer is a matter of his choice. He may or may not do so. If he does not do so he does not expose himself to any penal consequence or legal liability.

(2) There is no legal obligation imposed by the Act on the buyer of the goods to pay sales tax at the time of the purchase of the goods. If the vendor does not insist on such payment and if the buyer does not pay the tax he does not violate any provision of the law or incur any legal liability.

(3) There is no provision in the Act which casts any legal duty on the vendor to mention in the bill or the voucher issued to the buyer that sales tax has been

recovered from the buyer. Nor is there any obligation on him to show that sales tax is included in the price charged or to specify the amount of sales tax separately in the bill or voucher.

(4) Nothing in the Act requires the dealer to set apart the amount recovered from the vendee by way of sales tax. He is neither bound to keep separate account of the amount so recovered nor to keep it in a separate cash box. He can treat it as his own money, keep it in his own cash box, and use it as if it were his own property. If the amount is stolen or is misappropriated by his employee it is he who loses his own money and it is not the revenue which has to bear the loss.

(5) His liability to pay sales tax is analogous to his liability to pay the municipal taxes of the income tax etc. The liability is to pay from his own property and not from any property earmarked for that purpose from our of the collection of tax made from the buyers.

(6) The dealer is no doubt required to deposit along with sales tax return periodically the amount of tax due on the sales effected by him. But that is merely a convenient mode of discharging his liability at the intervals as enjoined by the Act. It is neither linked not dependent on recovery if any made by him from the buyer (which he may or may not make).

(7) The dealer is not paid any remuneration or reward for collecting the sales tax. If he was acting as an agent, the State would be obliged to pay him some remuneration or reward for the State cannot oblige him to word as its agent gratis. It would amount to forced labour if it were otherwise.

7. The aforesaid factors viewed cumulatively make it evident that a dealer who sells the goods does not act as an agent for the State in collecting the sales tax from the persons to whom he sells the goods. If he was acting as an agent he would be required to take reasonable care of the sale proceeds as a bailee. He would also be required to set apart the same without intermingling with his own money, for, he cannot use the monies belonging to the State for his own private purposes. If the intention of the legislature was to make him an agent, the legislature would have imposed penal liability on the vendor if he were not to collect the taxed. He would be obliged to maintain separate accounts of the collection made by him as also to treat the collections as the collections made by the agent on behalf of the principal. It is therefore futile to contend that the sales tax component of the sale price charged by the vendor to the vendee is collected by him as an agent of the State Government. Even if therefore the bill or the voucher issued to the purchaser indicates the amount of sales tax separately what is collected by the vendor from the vendee is not tax but is merely a part of the sale price charged by the vendor to the vendee. So far as the statute is concerned it does not cast any obligation on the purchaser of the goods to pay any tax and therefore what is collected by the vendor from the vendee by way of consideration for passed the property in the goods to the vendee is the price charged by him and not tax collected by him from the purchaser. The amount of money which goes from the pocket of the vendee to the pocket of the vendor as a condition or consideration for passing of the property in the goods is thus the sale price and not the tax. It is the amount, but for the payment of which, the vendor would not transmit his title to the goods in favour of the vendee, and not any amount paid by the vendee towards any tax liability incurred by him on making the purchase of the goods. It is not doubt true that a dealer as a prudent businessman would pass on the burden in the context of the sales tax liability to the buyer. But then he would be doing

so in order that he may not make a loss on the transaction. Inasmuch as no businessman carries on business with a view to incur loss, that he would take into account this factor at the time of collection, the sale price from the vendee stands to reason. That however does not mean that he is collecting the tax from the purchaser (for which in fact he has no authority in law under Act). Just as a businessman would take into account the expenses that he would have to incur for the running of the business such as rent, salary, and other establishment charges, just as he would keep a reasonable profit margin in the context of the investment made by him, he would also take into account the factor that he would have to pay sales tax on the turnover having regard to the statutory liability imposed on him by the Act. That however does not mean that what he is charging from the vendee is the tax and not a part of the sale price. So also it would not mean that he has been voucher issued to the vendee is so made out to show that the sales tax is charged separately. If he does so he would be doing so only for the sake of his accounting purposes and convenience. The consideration obtained by him from the vendee would in the eye of law be the sale price regardless of what nomenclature is given to a part of the price charged by him.

8. Thus there is no substance whatever in the contention that the sales tax component included in the sale price is not includible in making the aggregate for the purpose of the turnover, it being a tax recovered from the purchaser and not the price of the goods charged to the vendee.

9. What is more, in George Oakes (Pvt.) Ltd. v. State of Madras ((1961) 12 STC 476 : AIR 1962 SC 1037 : (1962) 2 SCR 570), this Court had an occasion to consider a similar challenge made in the context of the constitutional validity of Section 8-b of Madras General Sales Tax Act, 1939 wherein this Court has repelled this very argument is no unclear terms :

Obviously, it is not the name the legislature accords to a payment by a purchaser to a seller, who is a dealer as defined by the Act, that determines the question of the legislative competence. No doubt Section 8-b called the payment as amount (collected) by way of tax. It is equally true that the statutory liability to pay the sales tax is laid on the dealer. What is taxable is not each transaction of sale but the total turnover of the dealer, computed in accordance with the provision of the Act and the Rules. But it is well recognised that whatever be the form of the statutory provisions, the ultimate economic incidence of the tax is on the consumer, the purchaser. It was that well settled principle that was restated in Bengal Immunity Co. Ltd. v. State of Bihar. ((1955) 2 SCR 603 : AIR 1955 SC 661) Even if the registered dealer collects the amount by way of tax under the authority of Section 8-B of the Act, the payment is by the purchaser on the occasion of the sale by the dealer. Vis-a-vis the dealer it is in reality part of the price the purchaser has to pay the seller for purchasing the goods.

10. Reliance was placed by the appellants on McDowell & Company v. CTO, (AIR 1977 SC 1459 : (1977) 1 SCC 441 : 1977 SCC (Tax) 198 : 1977 Tax LR 1944) in support of the plea that the amount collected from the buyers if kept apart cannot be included in computing the turnover of the dealer. In our opinion, this submission is clearly misconceived. In Mcdowell case, (AIR 1977 SC 1459 : (1977) 1 SCC 441 : 1977 SCC (Tax) 198 : 1977 Tax LR 1944) this Court was dealing with the question as regards the includibility of excise duty and countervailing duty in the aggregate turnover of the dealer. This Court has taken that view inasmuch as the excise duties and countervailing duties were paid directly by the purchasers to the excise authorities before removing the same from the distilleries or the bonded warehouses and accordingly the same were not includible in the turnover of the dealer. Since the amount was not charged or paid by the dealers but by the manufacturers, this court upheld the contention of the assesses (vide paragraph 12 of the judgment).

11. This decision can be of no avail to the appellants because in the present case the amount in question is charged or recovered by the sellers from the buyers whether it is mentioned as sales tax or not. The principle laid down in McDowell case, (AIR 1977 SC 1459 : (1977) 1 SCC 441 : 1977 SCC (Tax) 198 : 1977 Tax LR 1944) cannot be applied to the fact-situation in the present case. In fact in McDowell case, (AIR 1977 SC 1459 : (1977) 1 SCC 441 : 1977 SCC (Tax) 198 : 1977 Tax LR 1944) the Full Bench decision of the Andhra Pradesh High Court ((1957) 8 STC 114 (AP HC)) has been noted with approval in paragraph 17 of the judgment.

12. It was further argued by learned counsel for the appellants drawing inspiration from Anand Swarup Mahesh Kumar v. CST, ((1980) 4 SCC 451 : 1981 SCC (Tax) 1) that the matter requires reconsideration in the light of the observations made therein. We are unable to accede to this submission. In Anand Swarup Mahesh Kumar case this Court was concerned with the "market fee" collected by a dealer from the purchaser for being passed on to the market committee under U.P. Act No. 25 of 1964. It was an amount which the statute authorised the dealer to collect from the purchaser separately and directly under the authority of Section 17(iii)(b)(1) of the said Act and to pass it on or make it over to the Market Committee. It is evident that it was an amount collected by the dealer under the statutory authority as an agent of the Market Committee for being passed on to the Management Committee and therefore could not be treated as a component of the sale price of the goods which were sold to the purchaser. It was in this context that this Court came to the conclusion that the market fee so collected could not be included in the turnover as is evident from the pertinent passage : (SCC p. 457, para 13)

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 from 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 on account of the above distinction that this Court held in Joint Commercial Officer 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.

13. It will thus be seen that Court has again reaffirmed the position that the includibility must turn on the question as to whether or not the tax is recoverable from the purchasers under a statutory obligation. This decision cannot therefore be of any avail to the appellants inasmuch as there is no such statutory provision in the Act with which we are concerned.

14. Lastly it was argued that in the second category of cases where the sales tax was not included in

the bill and was kept in the suspense account by the seller, it could not be included in the total turnover. This fallacious argument was rightly negatived by the High Court for the obvious reason that the amount includible in the turnover on the true interpretation of the relevant provisions cannot become excludible merely by reason of the accountancy device adopted by the assessee concerned.

15. There is no substance in any of the contentions urged on behalf of the appellants. The view taken by the High Court is unexceptionable. The appeals fail and are dismissed. The interim orders shall stand vacated. The appellants-assessees will be liable to pay the amount due as sales tax along with interest thereon at the rate 12 per cent as per the condition imposed by this Court at the time of granting the interim stay. The sales tax authorities may recover the amount due by encashing bank guarantee as also by effecting recovery in accordance with law.

</html