

TVL. Ramco Cement Distribution Co. Pvt. Ltd.

Vs

State of T. N.

Civil Appeals Nos. 2684-90; 4043-44 of 1982, with 315-19 of 1983, with 5306-5336 of 1985

(S. Ranganathan, B. P. Jeevan Reddy JJ)

20.10.1992

JUDGEMENT

RANGANATHAN, J.:-

1. By its judgment dated 23-12-1981, reported as Ramco Cement Distribution Co. (P) Ltd. v. State of Tamil Nadu, (1982) 51 STC 171, the Madras High Court disposed of a batch of 48 sales tax revision cases arising out of the assessments, to local Sales Tax (T.N. S.T.) as well as Central Sales Tax (C.S.T.), of Ramco Cement Distribution Co. (P) Ltd. (16 cases), Madras Cements Ltd. (8 cases), Dalmia Cement Bharat Ltd. (21 cases) and India Cements Ltd. (3 cases). The questions at issue were answered partly in favour of Revenue and partly in favour of the assessee. C. A. Nos. 5306-5336/1985 -preferred by the State of Tamil Nadu arise out of 31 of these cases: 9 relating to Ramco Cements, 16 relating to Dalmia Cements and 6 relating to Madras Cements. C.A. No. 2684 to 2690/82 are appeals by Ramco Cements and C.A.No. 4043-4044/ 1982 are by Madras Cements from the same judgment. C.A. Nos. 315-319/ 1983 arise out of the other 5 cases relating to Dalmia Cements. C.A. Nos. 280-281/ 1989 arise out of a judgment of the High Court dated 17-1-1985 which dismissed two revision tax cases pertaining to Dalmia Cements. One of the questions involved in these cases was decided in favour of the assessee by following the decision in 51 STC 171. As the questions involved are common, all these appeals are being disposed of by a common judgment. In doing so, we shall refer to the facts in the appeals pertaining to Ramco Cements. It is common ground that the facts in other cases are similar and that the decision reached in the case of Ramco Cements will govern the other appeals as well.

2. Ramco Cement Distribution Co. Pvt. Ltd. (hereinafter referred to as 'the assessee') are the selling agents of M/s. Madras Cements Ltd., Rajapalayam. For the assessment year 1969-70, they were assessed to sales tax on a taxable turnover of Rs. 2,37,66,245/ which included an amount of Rs. 29,71,527/- representing freight charges. The assessee claimed exclusion of freight charges in computing the taxable turnover on the ground that freight had been independently charged in the invoices. It relied on the decision of the Supreme Court in the case of Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh, (1969) 24 STC 487. This contention was rejected by the assessing authority, the appellate authority as well as the Tribunal. Aggrieved by the above orders, the assessee preferred revisions to the High Court. The questions that arose for the consideration of the High Court were enunciated as follows at the commencement of its judgment :

(i) Whether the freight charges incurred by a dealer in the despatch of cement to the place of the customer could be deducted from the total turnover of the dealer under

the Central Sales Tax Act, Tamil Nadu General Sales Tax Act and the Tamil Nadu Additional Sales Tax Act;

(ii) Whether the packing charges being the cost of the packing materials used by the dealer in packing cement for being delivered to his customers could be properly excluded from his turnover for the assessment of sales tax ;

(iii) Whether the excise duty paid on packing materials used by a dealer for packing cement to be sold to his customers can be excluded in his total turnover.

These questions were answered by the High Court as follows:

"In tax revision cases arising under the Central Sales Tax Act, we hold that the freight, packing charges and excise duty on packing materials have to be included in the sale price for the computation of sales tax.

In cases arising under the Tamil Nadu General Sales Tax Act and Tamil Nadu Additional Sales Tax Act, we hold that freight, packing charges and excise duty on packing materials are not liable to be included in the sale price for the computation of the sale price.

The assessee are not liable to pay additional sales tax on freight, packing materials and excise duty on packing materials in those cases arising under the Tamil Nadu Additional Sales Tax Act."

The High Court certified the case to be one fit for appeal to the Supreme Court and hence these appeals.

3. Both the assesseees as well as the State Government are aggrieved by the High Court's decision. The State urges that, the High Court having held that the amounts in question were liable to be included in the turnover for purposes of Central, Sales Tax Act, ought to have also held that these amounts were liable to be included in the taxable turnover for purposes of Tamil Nadu General Sales Tax Act and the Tamil Nadu Additional Sales Tax Act. On the other hand, on behalf of the assesseees, it is contended that, even for the purposes of C.S.T., the freight charges, the cost of packing materials and the excise duty on the packing materials should have been excluded in the computation of the taxable turnover. It is thus there are cross appeals before us.

4. We have heard learned counsel on both sides. In our opinion, so far as C.S.T. is concerned, the issue in the present case is fully and directly covered by the decision of this Court in *Hindustan Sugar Mills Limited v. State of Rajasthan*, (1979) 43 STC 13 : (AIR 1978 SC 1496). As stated earlier, Me assessee relied strongly on the decision of this Court in *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh*, (1969) 24 STC 487 but this decision has been considered and explained in the *Hindustan Sugar Mills* case. We do not wish to state the facts or discuss the issues at great length since, in our opinion, they are all facts and issues that were under consideration by this Court in *Hindustan Sugar Mills Ltd.* Learned counsel for the assessee contended that the Cement Control Order, under the terms of which sales of cement were effected during the relevant period by all cement manufacturers, had no relevance to the question presently at issue. According to them all that the Cement Control Order laid down was that cement could not be sold at a price higher than a price fixed by the Cement Control Order on terms described "as free on rail (F. O. R.), Destination". It did not stand in the way of cement manufacturers charging a price

less than the ceiling fixed under the Order, nor did it preclude individual contracts by the cement manufacturers with various purchasers that the latter should bear the freight charges. In view of this, it was submitted that the terms of the Cement Control Order do not alter the principle enunciated by this Court in the Hyderabad Asbestos Cement Products case (1969 (24) STC 487). It was then urged that, in fact, the assessee had entered into contracts with the purchasers which clearly stipulated that the freight will be payable by the latter. The following terms and conditions of sale were cited before us as an instance of the type of contracts entered into by the assessee

"Condition 2 : Once the consignment is handed over to the carriers and a receipt is obtained, the responsibility of the company ceases. The company does not accept any liability for any delay, shortage, damage or loss of goods in transit. Claims should be lodged with the carriers by buyers directly.

Condition 3: The consignees shall arrange to take delivery against indemnity bond, should the railway receipt or bill of lading not reach them in time. The company is not liable in any manner whatsoever and is also not responsible for any demurrage or damages that may accrue due to non-receipt or late receipt of railway receipt or bill of lading by the consignees.

Condition 4 : Prices shall be charged as ruling on the date of despatch of the goods and the company shall not be responsible for any variation in prices. 'the price of the cement supplied to the buyers shall be the current general gross list price charged by the company, free on rail less such discount as may be fixed by the company from time to time. But the terms and the times of delivery and the payments therefor shall be in the absolute discretion of the company who may vary the same from time to time. Each despatch shall be a separate contract.

Condition 10 : The conditions of any railway receipt shall be binding on the buyer and the date of delivery shall mean the date of the railway receipt and in the case of consignments sold free on rail destination, the railway freight shall be nevertheless payable by the buyers at the destinations.

Condition 11 : The buyer shall further be responsible for any additional freight, should transport by expensive route be undertaken or should the quantity despatched be less than a wagon load.

Condition 12: In the case of road deliveries, freight will be allowed up to the nearest rail head to the destination or actual transport charges whichever is less or according to the instructions of the Control authorities from time to time.

Condition 13 : The buyer shall put up his claim with the Railways direct whenever amounts are collected in excess of the freight indicated in the Railway receipt. The company will allow freight only at the scheduled wagon load rate."

5. Basing themselves on these terms and conditions, learned counsel for the assessee contended that this was a case where, despite the terms of the Control Order, the assessee chose to sell the goods free on rail at the point where the goods were loaded on rail and that the liability to pay freight was entirely that of the purchasers. It was contended that these contracts were not inconsistent with or repugnant to the terms of the Cement Control Order and that on the same basis as the decision of

this. Court in the Hyderabad Asbestos Cement Products Ltd. case (1969 (24) STC 487), the assessee is entitled to exclude the amounts of freight as not forming the part of the turnover at all.

6. Interesting as these arguments are, we find that they are merely a repetition of what was urged in the case of Hindustan Sugar Mills Ltd. (AIR 1978 SC 1496). In that case also the point urged was that the Cement Control Order only fixes the maximum price and that there was nothing to prevent the producer from selling the cement at a lower price and that, if the producer opted to sell his cement at price lower than the control price and allow credit to the Purchaser where the purchaser agreed to pay the freight, the sale price can only be the smaller amount by deducting the freight charges from the gross amount of the bill. The second argument, based on the terms of the contract between the parties, was also addressed in the Hindustan Sugar Mills case. There also clauses 5, 8 and 11 of the general terms and conditions of supply were strongly relied upon on behalf of the assessee. Under those terms and conditions, it was specifically mentioned that although the price of cement was on the basis of F.O.R. destination railway station, consignments would nevertheless be despatched 'freight to pay and credit afforded in the bill for the amount of freight payable and that the purchaser should accordingly arrange to pay railway freight or road transport charges at the destination at the time of taking delivery. This Court, after referring to the above contentions, pointed out that, if the terms and conditions of the contract had stood alone, the assessee might have been entitled to succeed in excluding the freight charges on the principle of Hyderabad Asbestos Cement Products Ltd. case (1969 (24) STC 487), but that relief could not be given to the assessee in view of the scheme and provisions of the Cement Control Order and their implications. The terms of the Cement Control Order have been fully analysed and discussed at pages 33 to 35 of the report. There is, therefore, no difference either on facts or in principle between this case and the Hindustan Sugar Mills Ltd. case (AIR 1978 SC 1496). We have heard learned Counsel on both sides and we do not find any reason to doubt or dissent from the decision in the Hindustan Sugar Mills Ltd. case. On the other hand, as pointed out by the learned Judges in that case, the whole purpose of the Cement Control Order was that cement should be available for sale at all places in the country at a controlled price. No doubt, the price was described as a maximum beyond which the sale price could not go but the intention, which was also carried out by all the suppliers, was that cement was to be sold at what may be described as a controlled price on terms 'free on rail destination'. In other words, the producer was entitled to the controlled price irrespective of the amount of freight which might have been incurred in respect of the transaction. Having regard to the fact that the freight on consignments to places near the factory and consignments to places far away from the factories could show a lot of variation, the control order created a machinery by which all: freight charges were credited to a common account and any particular cement manufacturer incurring more than a specified amount was entitled to be reimbursed for the excess freight incurred by him. As the learned Judges pointed out in the earlier decision, the whole Control Order proceeds on the footing that the freight charges are to be met by the producer and that he was entitled to a consolidated price irrespective of the freight he may have incurred. In this view of the matter, the sale price, on the terms of the Central Sales Tax Act, could only be the controlled price as fixed by the Cement Control Order.

7. We find that the factual position in these cases is also not as described by the learned Counsel for the assessee. The assessee's arguments in this regard were sought to be highlighted by the production of one of the invoices by which certain goods were despatched by Dalmia Cements to Karaikal. It is interesting to see that this invoice mentions F.O.R. cement price as the controlled price stipulated in the Cement Control Order and this is also what is contemplated by condition 4 set out earlier. To this is added a Central Excise Duty. Thereafter, the assessee purports to give credit for railway freight and a net price, which is described as Net price 'F.O.R.' Works Siding is worked

out, to which are added Central Sales Tax Act, packing charges, sales tax on packing charges (if any) and a deposit to cover any levy of sales tax on freight. In our opinion, if, as stated by the assessee, all that it did was to sell the cement at net price F.O.R. with a liability on the purchasers to bear the railway freight, the invoice need not have contained all the details which it purports to contain including all the above calculations starting with the F.O.R. price at the controlled rate. In such an event all that the assessee need have done was to invoice the purchasers at the net price F.O.R. Works Siding and despatch the goods under 'freight to pay'. It is also interesting to see that the invoice specifically includes a deposit to "cover any levy of sales tax on freight". It is clear that the invoice has been drawn up in terms of the Control Order. The price charged by the assessee is F.O.R. cement price and the Central Excise Duty has been added on this footing. The invoice mentions the amount of railway freight and permits it to be deducted only because the freight will be paid to the Railways by the purchasers on behalf of the assessee and credit is given therefor in the invoice. This process is necessary because the amounts of freight for which credit has been given have to be eventually adjusted while settling accounts between the manufacturer of cement and obtaining reimbursement, if any, from the pool account. The producer will have to satisfy the concerned authorities that, in certain instances, the freight paid is in excess of the freight which a producer can be called upon to pay in terms of para 9 of the Cement Control Order. In our opinion the invoice placed before us only reinforces the factual and legal position outlined by this Court in the Hindustan Sugar Mills Ltd. case in regard to the purpose and effect of the terms of the Cement Control Order.

8. For the reasons above mentioned, we are of the opinion that the High Court was fully justified in applying the decision in Hindustan Sugar Mills Ltd. (AIR 1976 SC 1496) to the present case and denying the benefit of deduction of freight charges from the controlled price to arrive at the turnover of the assessee for the purposes of the Central Sales Tax Act.

9. Turning now to the appeals filed by the State, the contention, as earlier mentioned, is that the High Court should have arrived at the same conclusion on the provisions of the Tamil Nadu General Sales Tax Act and Additional Sales Tax Act as it did under the Central Sales Tax Act and that in view of the decision of this Court in the Hindustan Sugar Mills case (AIR 1978 SC 1496), the relief granted for purposes of the local sales tax is erroneous. In coming to a different conclusion on the provisions of the local Sales Tax Act from that reached in respect of the Central Act, the High Court has relied upon the fact that the local sales tax is charged not on the turnover of the dealer but only on his taxable turnover. The explanation 'taxable turnover' has been defined in Section 2(p) as follows:

"2(p) 'taxable turnover' means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed."

The Tamil Nadu General Sales Tax Rules, 1959, have prescribed rules for the determination of the taxable turnover. Rule 6 reads thus :

"Rule 6 - The tax or taxes under Section 3, 4 or 5 shall be levied on the taxable turnover of the dealer. In determining the taxable turnover, the amounts specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer

(a) all amounts for which goods specified in the Third Schedule to the Act are sold;

(b) all amounts for which goods exempted by a Notification under Section 17 are sold or purchased, as the case may be provided that the terms and conditions, if any, for the exemption in the notification are complied with;

(c) all amounts falling under the following three heads when specified and charged for by the dealer, separately, without including them in the price of the goods sold

(i) freight;

(ii) (omitted);

(iii) charges for delivery;

(cc) all amounts falling under the head charges for packing, that is to say, cost of packing materials and cost of labour.

(i) when charged for by the dealer separately without including such amounts in the price of the goods sold in respect of the goods liable to tax at the hands of the assessee; and

(ii) whether or not such amounts are specified and charged for by the dealer separately, in respect of the goods not liable to tax at the hands of the assessee."

10. The High Court has held that since freight is one of the items specified in clause (i) of Rule 6(c) and since the assesseees have specified and charged for freight separately in their invoices, they are entitled to the deduction of the freight in the computation of the taxable turnover. This is the short ground on which the High Court has reached, in respect of the local Act, a conclusion different from that reached in respect of the Central Act.

11. We agree with the learned Counsel for the State of Tamil Nadu that, in coming to the above conclusion, the High Court has overlooked the significance of the inclusion of the words "without including them in the price of the goods sold" in clause (c). These words make it clear that the freight charges are not to be deducted in the computation of the taxable turnover merely because they are specified and charged for separately by the dealer. A further pre-requisite for their deduction is that these charges should not have been included in the price of the goods sold. This takes us back to the consideration as to whether the price charged for by the assessee includes freight or not, which we have discussed elaborately in respect of the levy of Central Sales Tax. Once we come to the conclusion - as we have - that freight has been included. as part of the price sold and that the liability to pay the freight remains with the dealer, though permitted to be set off against the sale price by the purchaser or consumer it follows that the deduction of the freight as a separate item in the computation of taxable turnover is not permissible. Rule 6(c) will apply only in cases where the sale price charged does not include the freight charges and the dealer separately collects freight from the consumer without including the same in the sale price. In fact, this aspect has been made clear in three decisions of this Court dealing with similar rules. In *Tungabhadra Industries Ltd. v. Commercial Tax Officer, Kurnool*, (1960) 11 STC 827: (AIR 1961 SC 412), the dealer claimed deduction of railway freight from the amount of price of the goods sold as stated in the bill on the strength of Rule 5(1)(g) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, which is in precisely the same terms, as Rule 6, which is now being considered by us. The claim was negated by this Court. It observed (at pp. 417-18 of AIR):

"The appellant claimed exemption on a sum of Rs. 3,88,377-13-3 on the ground that it represented the freight in respect of the goods sold by the appellant, asserting that they had been charged for separately. The assessing officer rejected the claim and this rejection was upheld by the departmental authorities and by the High Court in revision. It would be seen that in order to claim the benefit of this exemption the freight should (i) have been specified and charged for by the dealer separately, and (ii) the same should not have been included in the price of the goods sold. The learned Judges of the High Court held that neither of these conditions was satisfied by the bills produced by the appellant. We consider, the decision of the High Court on this point was correct. In the specimen bill which the learned Counsel for the appellants has placed before us, after setting out the quantity sold by weight (23,760 lb.) the price is specified as 15 annas 9 pies per lb. and the total amount of the price is determined at Rs. 23,388-12-0. From this the railway freight of Rs. 1,439-12-0 is deducted and the balance is shown as the sum on which sales tax has been computed. From the contents of this invoice it would be seen that the appellant has charged a price inclusive of the railway freight and would therefore be outside the terms of Rule 5(l)(g) which requires that in order to enable a dealer to claim the deduction it should be charged for separately and not included in the price of goods sold. The conditions of the rule not having been complied with, the appellant was not entitled to the deduction in respect of freight."

12. The same conclusion was reached by this Court in *Dyer Meakin Breweries Ltd. v. State of Kerala*, (1970) 26 STC 248. Here, the appellant-company, which manufactured liquor at various places in U.P. and Haryana, transported the goods from its breweries and distilleries to its place of business in Ernakulam and sold them there. When selling liquor to the customers the appellant made out separate bills for ex-factory price and for "freight and handling charges". The appellant claimed that the amount charged for "freight and handling charges" incurred by it in transporting the goods from the breweries and distilleries to the warehouse in Kerala were eligible for deduction under Rule 9(f) of the Kerala General Sales Tax Rules, 1963, a rule which is in the same terms as Rule 6, with which we are now concerned in the present case. This claim was negated by this Court. The Court observed :

"It is common ground that the sale of the liquor took place in Ernakulam. The company arranges to transport liquor for sale from the factories to its warehouse at Ernakulam. It was not brought for any individual customer. All the expenditure incurred is prior to the sale and was evidently a component of the price for which the goods were sold. It is true that separate bills were made out for the price of the goods ex-factory and for "freight and handling charges". But, in our judgment, the Tribunal was right in holding that the exemption under clause (f) of Rule 9 applies when the freight and charges for packing and delivery are found to be incidental to the sale and when they are specified and charged for by the dealer separately and expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories to the warehouse of the company is not admissible under Rule 9(f). Rule 9(f) seeks to exclude only those charges which are incurred by the dealer either expressly or by necessary implication for and on behalf of the purchaser after the sale when the dealer undertakes to transport the goods and to deliver the same or where the expenditure is incurred as an incident of sale. It is not intended to exclude from the taxable turnover any component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the

goods available to the intending customer at the place of sale."

13. In *Johar and Sons (P) Ltd. v. Sales Tax Officer, Ernakulam* (1971) 27 STC 120 (SC), the same question arose, again in the context of the Kerala General Sales Tax Rules, 1963. The Court followed the decision in *Dyer Meakin Breweries Ltd. case* (1970 (26) STC 248) (SC). It was pointed out that the decision in *Tungabhadra Industries Ltd.* (AIR 1961 SC 412) had rested on the facts of the case without going into the interpretation of the relevant rule of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. It was, however, held that the *Dyer Meakin* decision would apply to the case before the Court. A number of subsequent decisions has also held to a like effect *C.C.T. v. Ashoka Marketing Ltd.* (1973) 32 STC 411 : (1974 Tax LR 1874) (Patna); *State of Mysore v. Panyam Cements and Mineral Industries Ltd.*, (1974) 33 STC 407, *State of Tamil Nadu v. Parry and Company* (1976) 38 STC 122: (1976 Tax LR 1832) (Mad), *State of Tamil Nadu v. Chettinad Cement Corporation Ltd.* (1976) 38 STC 519 (Mad) and *Premier Breweries Ltd. v. State of Karnataka*, (1984) 56 STC 14 : (1985 Tax LR NOC &) (Kant). We are, therefore, of the opinion that the High Court was in error in trying to distinguish the decision in the *Hindustan Sugar Mills case* (AIR 1978 SC 1496) and in excluding freight charges from the taxable turnover for the purposes of the Tamil Nadu Acts.

14. The position in regard to packing charges as well as the excise duty on packing charges is also no different. As pointed out by this Court in the *Hindustan Sugar Mills case* (AIR 1978 SC 1496) and in *Commr. of Sales Tax v. Rai Bharat Das and Bros.*, (1988) 71 STC 277 : (AIR 1989 SC 315), packing charges form part of "sale price" because the expression "any sum charged for anything done by the dealer in respect of the goods" used in the definition in Section 2(h) of the Central Sales Tax Act, 1956, squarely covers such charges as packing is an integral element of the transaction of sale and packing charges are an integral part of the sale price. Once this is so, it follows that these charges and the excise duty thereon cannot be excluded from the turnover for purposes of the Central Sales Tax Act. Nor will, for the reasons earlier discussed in relation to freight charges, the assessee be in a position to claim a deduction in respect of these charges by virtue of rule 6(cc) of the Sales Tax Rules. In our view, this position has been correctly set out, applying the decision in the case of *Rai Bharat Das and Bros.*, (AIR 1989 SC 315) in *State of Tamil Nadu v. Vanniaperumal and Co.*, (1990) 76 STC 203 (Mad) (FB) *Dalmia Cement (Bharat) Ltd. v. State of Tamil Nadu*, (1991) 81 STC 327 (Mad) and *Dalmia Cement (Bharat) Ltd. v. State of Tamil Nadu*, (1991) 83 STC 442 (Mad). We are, therefore, of the opinion that the packing charges and excise duty thereon cannot also be deducted in computing the taxable turnover for the purposes of the Tamil Nadu Acts.

We, therefore, hold

- (i) that the freight charges should be included in arriving at the taxable turnover for purposes of C.S.T. and T.N.S.T.; and
- (ii) that packing charges and excise duty thereon should also be included in arriving at the taxable turnover for purposes of both C.S.T. and T.N.S.T.

15. The appeals by the State of Tamil Nadu are accordingly allowed and the appeals filed by the assessee are dismissed. There will, however, be no order regarding costs.

Order accordingly.

</html