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**(1983) 02 BOM CK 0004**

**In the Bombay High Court**

**Case No : Sales Tax Reference No. 49 of 1980**

Bharat Varnish Mfg. Co.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 18-02-1983

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 2

**Citation :** (1983) 53 STC 365

**Hon'ble Judges :** Sujata V. Manohar, J;D.P. Madon, J

**Bench :** Division Bench

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## **Judgement**

Sujata Manohar, J.—The assessees, M/s. Bharat Varnish Mfg. Co. are a firm manufacturing paints, varnishes, etc. For the period from 1st January, 1971, to 31st December, 1971, the turnover of the assessees in respect of inter-State sales was determined by the Sales tax Officer at Rs. 25,94,912. This amount included freight charges in respect of goods sent to their purchasers by the assessees amounting to Rs. 85,253. The assessees deducted these freight charges from their turnover on the ground that they did not form a part of the sale price. The Sales Tax Officer, however, held that the amount of freight charges could not be so deducted and it formed a part of the sale price. The assessees were taxed accordingly. From the order of the Sales Tax Officer the assessees preferred a first appeal before the Assistant Commissioner of Sales Tax. The Assistant Commissioner, however, confirmed the order of the Sales Tax Officer. Thereafter the assessees preferred a second appeal being Second Appeal No. 708 of 1976 before the Tribunal. The Tribunal also upheld the decision of the Assistant Commissioner and dismissed the appeal. At the instance of the assessees the following question has been referred by the Tribunal to us for determination :

"Whether, in the facts and circumstances of the case, the Tribunal was justified in law in adding to the sale price the freight charges paid by the buyer ?"

2. Before the Tribunal, the assessees had filed an affidavit dated 14th November,

1977, in which they had stated that during the years 1970 to 1974 it was the usual practice of the assesseees to take orders from their customers through sales agents. The assesseees, however, had not been able to preserve copies of these sales orders. They had, however, copies of the sales orders placed with them from the year 1974 onwards. The assesseees further stated in the affidavit that the form and the terms of the sales orders printed overleaf as well as on the front page of the order form were in all respects similar to the orders which had been placed from the years 1970 to 1972; and they relied upon a copy of the order placed with them and dated 26th December, 1974, as showing the terms and conditions of the contracts placed with them for the assessment period in question. On the basis of this affidavit the Tribunal had allowed the assesseees to rely upon the sale order dated 26th December, 1974, placed with them for the dated 26th December, 1974, placed with them for the supply of a certain quantity of picture varnish as illustrative of the sales orders placed with them during the assessment year 1st January, 1971, to 31st December, 1971. Accordingly the arguments relating to the terms and conditions of the sale contracts of the assesseees have been advanced before us on the basis of this order form.

3. In the order form it is mentioned that the price which is charged by the assesseees for the goods sold by them is f.o.r. place of destination. In the sample order form this price is mentioned as Rs. 7.90 per litre f.o.r. Jullundur net - Jullundur being the place where the goods were received by the purchasers. In other words, the sale price quoted on sale order is inclusive of freight upto Jullundur, and the buyer is not required to pay any freight in addition to the price of the goods. Condition No. 5 which is printed at the back of the order form is as follows : "Our responsibility ceases when the goods are out of our godown", while condition No. 6 is to the effect that : "Railway freight, V.P. charges, bank commission, etc., are at the buyer's cost." The goods thus sold by the assesseees were despatched to the buyers by rail on freight to pay basis. The documents pertaining to the goods so despatched were sent through the bank and the buyer paid the freight before taking delivery of the goods. In the invoices which were sent by the assessee-sellers to the buyers, they set out the total price charged and deducted from this price the amount of freight. After deducting freight, inter-State sales tax was charged on the net amount. In the invoice date 5th November, 1971, which is relied upon by the assesseees as a representative sample, the following is stated against the item of freight which is deducted by the assesseees from the sale price : "Less freight which you will have to pay at your end on our behalf." The position that emerges from these documents is that the price charged by the assesseees was inclusive of freight. The buyers, however, were required to pay freight on behalf of the assessee-sellers before taking delivery of the goods. The freight so paid by the buyers was deducted from the price payable by them in the invoice and they were required to pay the balance amount to the assesseees.

4. The point at issue is whether under the provisions of the Central Sales Tax Act,

1956, sales tax is payable on the price as mentioned in the sale order form or on this price less the amount of freight. u/s 2(h) of the Central Sales Tax Act, 1956, "'sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer 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 in cases where such cost is separately charged". Thus, sale price means the amount payable to a seller as consideration for the sale of goods, less certain amounts which are allowed to be deducted as per the definition in section 2(h) of the Central Sales Tax Act. If freight is separately charged, it will not form a part of the sale price. We have, therefore, to decide whether the assessee-sellers have charged separately for the cost of freight or whether the cost of freight is included within the sale price; in the former case they will be permitted to deduct such freight, while in the latter case they will not be permitted to deduct cost of freight. In this connection a reference may be made to a decision of the Supreme Court in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, The Supreme Court in that case considered the definition of "sale price" u/s 2(p) of Rajasthan Sales Tax Act, 1954. This definition was considered by the Supreme Court along with the definition of "sale price" in section 2(h) of the Central Sales Tax Act, 1956. In interpreting this definition under the Central Sales Tax Act, 1956, the Supreme Court held (at page 35) as follows :

"... It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of definition as a whole, it is obvious that the expression "... cost of freight ... is separately charged" is used in contradistinction to a case where the cost of freight is not separately charged but is included in the price. It is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part has no application."

If, therefore, the price which is charged is covered by the first part of the definition in section 2(h) of the Central Sales Tax Act, 1956, it would not fall within the second half of the definition. In other words, if the buyer is required to pay by way of sale price an amount which would cover all costs, charges and expenses incurred by the seller, including freight, then that amount represents the sale price on which sales tax can be levied. Subsequently splitting up the payment of this sale price by asking the buyer to pay freight and then adjusting the amount so paid against the price, cannot change the quantum of sale price on which sales tax can be levied. Such splitting up of price is merely a method of recovery of price. The Supreme Court in that case considered the two earlier decisions of the Supreme Court in the case of Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, and the case Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, The Supreme Court made a

distinction between the case where the price was charged f.o.r. place of destination and the case where price was charged f.o.r. simpliciter and it held that in the former case the price was inclusive of freight while in the latter case the freight can be considered as having been separately charged.

5. In the case of Commissioner of Sales Tax v. Ranabhai Bhanji reported in [1975] 36 STC 182 our High Court was required to consider an identical question under the provisions of Bombay Sales Tax Act, 1953. u/s 2(14) of the Bombay Sales Tax Act, 1953, if the cost of freight, inter alia, is not separately charged, it would be included in the sale price payable to a dealer. The court held that before a dealer can separately charge his purchaser for the cost of freight or delivery, there must be right in the dealer to make such a charge and a liability on the part of the purchaser to be so charged. This right and corresponding liability can only be a matter of contract between the seller and the buyer. If it is not a matter of contract, then there is no right in a seller to raise a separate charge against the purchaser, nor any corresponding obligation on the purchaser to make payment of the amount so separately charged.

6. We have, therefore, to see whether there was any contract between the buyer and the seller in the present case under which the seller had contracted to charge the buyer separately for freight and the buyer had correspondingly undertaken an obligation to pay for freight separately. From the order form which is before us we do not find any such obligation undertaken by the buyer. On the contrary, the terms of contract between the parties show there was no obligation on the part of buyer to pay separately for the freight; the price which was charged to the buyer was inclusive of freight. In the absence of any such obligation on the part of the buyer to pay separately for the freight, a subsequent payment of freight by the buyer, for which he is given credit in the invoice, does not alter the legal character of the bargain between the parties. Mr. B. C. Joshi, the learned Advocate for the assesseees, however, relied upon conditions Nos. 5 and 6 which are on the reverse of the order form and submitted that the liability to pay freight must be determined on the basis of whether risk in the goods had passed to the buyers or not. He submitted that if the risk in respect of the goods had passed to the buyer at the time of payment of freight, then, the liability to pay freight was of the buyer and freight would not be included in sale price. It should, therefore, be considered as having been charged separately. This argument, however, cannot be accepted because passing of risk in the goods does not have any relevance to the question as to what was the sale price payable by the buyer under the contract of sale and whether the buyer was to be charged separately for the freight or not. Furthermore, even assuming that there is anything in these conditions which would suggest that the buyer had to pay the freight, such printed conditions being contrary to the express terms which are typed on the face of the order form, they would not prevail. Under the terms of the contract, therefore, it was not open to the assesseees to charge their buyers separately for freight in addition to the price. In fact, the invoice which is sent is also on the basis that the price

was inclusive of freight. It may be open to the seller to split up the recovery of the price or agree, that the amount of freight would be paid by the buyer on the seller's behalf and the balance amount of price would be collected by the seller from the buyer, and this is in fact done in the present case. The invoice shows that the sellers have given to the buyer credit for the amount of freight which is paid by the buyer and have recovered from him the balance amount of sale price. In fact the invoice shows that freight was paid by the buyer on behalf of the sellers. In these circumstances, the mere fact that the amount of freight is deducted from the invoice does not lead to the conclusion that freight was agreed to be charged separately by the sellers. A similar view has been taken by Madhya Pradesh High Court in case of Commissioner of Sales Tax, M.P. v. Gill & Company Ltd., Ujjain, reported in [1974] 33 STC 536 and in case of Birla Jute Manufacturing Co. Ltd. v. Commissioner of Sales Tax, Madhya Pradesh, reported in [1972] 29 STC 639. The Allahabad High Court has also taken a similar view in the case of United Timber Corporation v. Commissioner, Sales Tax, Uttar Pradesh, Lucknow, reported in [1972] 29 STC 646. In the present case, therefore, there being no agreement to charge freight separately, and the price charged being a lump sum price, the assessee cannot deduct from the sale price charged by them the amount of freight.

7. In the premises, we answer the question referred to us in the affirmative, that is to say, in favour of the department and against the assessee.

8. The applicants will pay to the respondent the cost of the reference. The fees of Rs. 100 deposited by the applicants will be appropriated towards the cost of the reference.