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**(2008) 08 AHC CK 0341**  
**In the Allahabad High Court**

Commissioner, Trade Tax

APPELLANT

Vs

Ent Nirmata Kalyan Samiti

RESPONDENT

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**Date of Decision :** 14-08-2008

**Acts Referred:**

Uttar Pradesh Trade Tax Act, 1948 — Section 2(i)

**Citation :** (2010) 28 VST 206

**Hon'ble Judges :** Prakash Krishna, J

**Bench :** Single Bench

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## Judgement

Prakash Krishna, J.—The above four revisions were heard together and are being disposed of by a common judgment. They relate to the assessment years 1990-91, 1991-92, 1992-93 and 1993-94. The dealer-opposite party is a society and carries on the business of coal. It has supplied coal to its members who are brick-kiln owners.

2. The only question raised in these revisions is whether inward freight is part of turnover or not. In the memo of revision, the following common question of law has been framed:

(i) Whether, on the facts and in the circumstances of the case, the Trade Tax Tribunal was legally justified to hold that inward freight is not part of turnover, only on the ground that it was charged separately?

3. The assessing authority held that "inward freight" is part of turnover and the dealer is not the agent of the brick-kiln owners, the purchasers of the coal. This part of the assessment order has been set aside by the first appellate authority.

4. Shri Om Prakash Tripathi, secretary of the society appeared before the assessing officer who stated that coal was imported from outside the State of U.P. and it was supplied to its members. Purchase vouchers, supply memo form XXXI and register of C form were maintained. The assessing authority found that the dealer-opposite party has not properly maintained the account books. The contract, if any, with the persons who have purchased the coal, has not been

filed. The disclosed turnover, in the absence of proper and accurate account books, was rejected and best judgment assessment order was framed. While doing so, the assessing officer added the cost of "inward freight" towards the price of coal. In appeal, the appellate authority held that the dealer-opposite party is a registered society under the Societies Registration Act and it has supplied coal to its members on "no-profit no-loss basis", the goods were imported through rail. The "inward freight" in view of the judgment of the apex court in the case of Vinod Coal Syndicate v. Commissioner of Sales Tax [1989] 73 STC 317 : [1988] UPTC 218 will not form part of the turnover. The assessed turnover was reduced accordingly. The said order has been confirmed, as stated above, by the Tribunal.

5. The learned standing counsel in support of the revision submits that the decision rendered by the Supreme Court in the case of Vinod Coal Syndicate [1989] 73 STC 317 : [1988] UPTC 218 is not applicable to the facts of the present case. On the plain language of Section 2(i) of the U.P. Trade Tax Act, "inward freight" shall form part of the turnover. Sri R.P. Ginodia, advocate appearing on behalf of the dealer-opposite party, reiterated the stand taken by it before the authorities below and submits that in view of the judgment of this Court in Commissioner, Trade Tax v. Indian Aluminium Cable Co. Ltd., Ghaziabad [1999] 115 STC 444 : [1995] UPTC 705 and of the apex court in Vinod Coal Syndicate [1989] 73 STC 317 : [1988] UPTC 218, the order of the Tribunal is legally justified.

6. Considered the respective submissions of the learned Counsel for the parties and perused the record.

7. The sole point involved herein is whether the purchases made by the dealer-opposite party were made on its own account or as an agent of the principal (purchasers). If the answer to the question is that purchases were made by the opposite party in his own account then the freight will form part of the turnover and will be added in the price of the coal. The assessing authority has found that there is no material on record to show that the dealer-opposite party made purchases as an agent on behalf of the brickkiln owners to whom the coal was allegedly sold.

8. Neither the first appellate authority nor the Tribunal addressed the above finding of the assessing authority and they simply followed the judgment of the apex court in the case of Vinod Coal Syndicate [1989] 73 STC 317 : [1988] UPTC 218.

9. The nature of such transactions has been examined by this Court in depth in Commissioner of Trade Tax v. Sunil Kumar Coal Agent, Gorakhpur [2003] UPTC 1036. In this case the judgment of the apex court in Vinod Coal Syndicate [1989] 73 STC 317 : [1988] UPTC 218 which was followed in Bhartiya Coal Traders v. State of U.P. [1989] UPTC 778 and Commissioner of Sales Tax v. Baba Rice and Dal Mills [1999] UPTC 56 has been considered.

10. After consideration of various cases it was held that in the absence of any evidence or material of agency, the supply of coal by such persons, like the dealer-opposite party, does not create a relationship of agent and principal. In the present case, there is no evidence on record to show even prima facie the relationship of principal and agent in between the dealer-opposite party, the society and its members, the ultimate consumers of coal. There is no finding by the Tribunal as to who placed the purchase orders to the collieries and took the delivery of coal. The delivery was taken by the dealer on his own behalf or on behalf of the brick-kiln owners. Is there any privity of contracts in between the dealer and the brick-kiln owners. The copies of purchase orders given to the colliery have not been filed. Paragraphs 14 and 15 from the judgment of Sunil Kumar Coal Agent [2003] UPTC 1036 are reproduced below:

14. The dealer-opposite party has miserably failed to place any evidence on the record to show that he took the delivery of coal as an agent of the brick-kiln owners. The dealer has not filed copy of purchase orders given to collieries. It is not the case of the dealer that the purchase orders of coal were given to collieries by the alleged principals, i.e., by the brick-kiln owners in their names through the dealer as agent. There is no privity of contract in between the brick-kiln owners, who ultimately purchased the goods, and the colliery. From the facts emerging from the record it is a case of sale of coal by one principal, i.e., the dealer to brick-kiln owners. The Tribunal without appreciating the law of agency has held the dealer as an agent of brick-kiln owner. Indisputably except the allegations that the dealer-opposite party has acted as agent of brick-kiln owners there is nothing on the record to substantiate the plea. In view of above, the finding of the Tribunal that the dealer-opposite party has acted as agent of brick-kiln owners is legally not sustainable.

15. It is case of transaction by one principal with another. The dealer-opposite party by camouflaging the bill-book, etc., and by charging the freight separately in the bills has tried to evade the payment of trade tax on the freight. The dealer incurred all the expenditures up to the stage of delivery of coal to the brick-kiln owners. The title in the coal passed to brick-kiln owners only at the time of delivery of coal and not earlier to it.

11. On the basis of the above discussions, it is clear that if it is a case of transaction by one principal with another different consideration will arise. By camouflaging the bill-book, etc., and by charging the freight separately in the bills a dealer may try to evade the payment of trade tax on the freight. Such dealer who has incurred all the expenditures up to the stage of delivery of coal to the brick-kiln owners is not an agent but a principal. The title in the coal passes to brick-kiln owners only at the time of delivery of coal and not earlier to it.

12. The aforesaid principle of law has been reiterated by this Court, time and again. For example Commissioner of Trade Tax v. Ramapati Tewari Jainath Tewari [2005] UPTC 76 and The Commissioner of Trade Tax Vs. S/S Sharma Coal Company, etc.

13. It may be noted that in the case of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218, the controversy involved therein was as to whether the amount paid by way of freight by the principal to the dealer who was a commission agent was liable to be included in the taxable turnover of the dealer or not.

14. At this juncture, the learned Counsel for the dealer-opposite party relied upon the case of Indian Aluminium Cable Co. Ltd. [1999] 115 STC 444 (All) : [195] UPTC 705 wherein the judgment delivered in Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 has been followed. The judgment proceeds on the footing that if freight is charged separately, it is not liable to be included in the taxable turnover of the assessee.

15. In the case on hand, there is no finding by the Tribunal that the dealer-opposite party acted as agent of the principal, namely brick-kiln owner.

16. The definition of the word "turnover" as defined in Section 2(i) of the U.P. Trade Tax Act is in pari materia with the definition of words "sale price" as contained in Section 2(h) of the Central Sales Tax Act. For the sake of convenience Section 2(h) of the Central Sales Tax Act is reproduced below:

2.(h) "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 the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

17. The aforesaid section came up for consideration before the Supreme Court in Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13 : [1979] UPTC 37 wherein the apex court has observed that the "sale price" as defined under the Rajasthan Sales Tax Act is in material part the same as defined under the Central Sales Tax Act. It was held therein that the definition of "sale price" is in two parts. It says that the 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 the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged. Further, while dealing with the second limb of the definition Clause (h) their Lordships have observed as follows (at page 34 of 43 STC):

...The second part enacts an inclusive clause. It says that "sale price" includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". Therefore, "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof is to be regarded as part of "sale price",

even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery thereof and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, "other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of "sale price". But if the State is able to show that the particular amount falls within the first part of the definition and is, therefore, part of the "sale price", the exclusion clause cannot avail the assessee to take the amount in question out of the definition of "sale price". In this view the amount of freight forms part of the "sale price" within the meaning of the first part of the definition and it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. The exclusion clause is, therefore, irrelevant and cannot be called in aid by the assessee. It may be pointed out that even if the exclusion clause were read as an exception to the first part of the definition which, as has been pointed out, cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is obvious that the "...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.

18. On consideration of the above, the following items are excluded from the sale price:

1. Cash discount allowed to buyers according to the practice normally prevailing in the trade.
2. Cost of freight or delivery, if it is separately charged in the sale bill.
3. When the cost of installation is separately shown in the sale bill.

19. The said judgment of the apex court has been constantly followed in *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales*

Tax, Indore Region, Indore and Others, and TVL. Ramco Cement Distribution Co. Pvt. Ltd., Tamil Nadu Vs. State of Tamil Nadu,

20. Even otherwise also, the assessing authority has found that there is no evidence of payment of freight by the brick-kiln owner. No document in support of the said plea was produced. The two authorities below, without reversing the said finding recorded by the assessing authority, have set aside said part of the assessment order on the basis of the case of Vinod Coal Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218.

21. Even for the applicability of the case of Vinod Syndicate [1989] 73 STC 317 (SC) : [1988] UPTC 218 necessarily a finding that freight was separately charged in the bills is required for its exclusion from "turnover". Neither the Tribunal nor the first appellate authority have examined this aspect of the case, therefore, it is desirable that the matter should go back to the Tribunal to re-examine the matter again and to record a finding with regard to the question of charging of freight separately, also.

22. By way of clarification it is added that any observation made on the merits of the case in the above judgment is only for the purposes of consideration of arguments of the counsel and the Tribunal shall be at liberty to record its findings uninfluenced by them.

23. In view of the above discussions, all the four revisions succeed and are allowed and the matter is restored back to the Tribunal to rehear and redetermine the appeal afresh in the light of the observations made above in accordance with law.

24. No order as to costs.