
(1978) 11 MAD CK 0030

In the Madras High Court

Case No : Tax Case No. 300 of 1974 (Revision No. 154 of 1974)

E.I.D. Parry (India) Ltd.

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 14-11-1978

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 38

Citation : (1979) 44 STC 352

Hon'ble Judges : Sethuraman, J; Balasubrahmanyam, J

Bench : Division Bench

Advocate : V.K. Thiruvengkatachari, for King and Partridge, for the Appellant; K. Venkataswami, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Balasubrahmanyam, J.—This revision petition u/s 38 of the Tamil Nadu General Sales Tax Act, 1959, is brought by E.I.D. Parry (India)

Limited, Madras (hereinafter called the assessee), against an order of the Sales Tax Appellate Tribunal, Madras.

2. The assessee carries on business as distillers. They manufacture methylated spirit, denatured spirit and rectified spirit in their distilleries in the

State and sell them to various persons and institutions. The different stages of manufacture and sale of these spirits are governed and regulated by

the Rules framed by the State Government under the Tamil Nadu Prohibition Act, 1937. The regulation of the trade, under the relevant Rules,

takes the form of a net work of licensing procedures. The system of licences is also at the same time utilised by the Rules for the purpose of raising

revenues for the State. Periodical licence fees on holders of licences are impositions of one kind. Levy of excise duties on spirits at one stage or

other in the course of trade forms another source of public revenue. In addition to those exactions, the gallonage fees are levied on the quantity of spirits handled by the trade. The gallonage fees, for instance, are payable to the State Government on spirits sold by the licensed distilleries to their customers.

3. The assessees, who ply their trade in this milieu, sell their spirits to the licensed wholesalers and retailers as well as to other persons and institutions authorised to obtain supplies from the distilleries. While effecting such sales, what the assessees do is not only to charge the customers the price of the spirits sold but also a further amount towards recovery of the appropriate gallonage fees payable to the Government on the quantity delivered under the sale. In making out their sales invoices, they separately depict the collection of gallonage fees, as distinct from the sale price for the spirits.

4. When the assessees' sales turnover for 1970-71 came to be determined for the purpose of assessment under the Tamil Nadu General Sales

Tax Act, 1959, the question arose as to how the gallonage fees collected by the assessees from the purchasers have to be dealt with for purposes

of assessment of the assessees' turnover in spirits. The assessing authority took the view that these collections must be reckoned as forming part of

the assessees' taxable turnover, in the sense that they formed part of the aggregate amount for which they sold their goods. The assessees

objected to this view of the collections of gallonage fees. But the assessing authority overruled their objections and included the amounts in the final

assessment. The amounts so included came to Rs. 10,16,857.32. The tax effect of such inclusion was Rs. 30,505.72.

5. The assessees appealed against this assessment, but without success. At the stage of second appeal, the Sales Tax Appellate Tribunal went into

some of the statutory rules governing the levy and collection of gallonage fees, but their view of the Rules only confirmed the assessing officer's tax

treatment of the gallonage fees as part of the assessees' sales turnover. While confirming the assessment in this manner, the Tribunal felt themselves

bound by a decision of a Division Bench of this Court reported in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161.

6. In this tax revision case, the assessees' Learned Counsel, Mr. V.K.

Thiruvengkatachari, argued that the gallonage fee is a revenue exaction laid on the purchasers of spirits, and not a levy on the distilleries, who sell them. He said that under the terms of the statutory rules, all that the distilleries do is to collect the gallonage fees from the concerned purchasers and remit them to the Government treasury. He said that this was an obligation imposed by the law on the distilleries. He said they had no choice at all in the matter. He accordingly urged that the gallonage fees could not be held to form part of the consideration for the sale of goods.

7. The learned Additional Government Pleader, however, submitted, adopting the view of the Tribunal in this regard, that the present case was governed by this Court's ruling in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161. He pointed out that this decision was followed by another Bench of this Court in *Taylor & Co. (Madras) P. Ltd. v. Government of Madras* [1974] 34 S.T.C. 391. He urged that we too should follow suit.

8. Mr. Thiruvengkatachari, however, submitted that the decisions relied on by the representatives of the State have no application to the present case. According to him, a study of the relevant provisions governing the collection of gallonage fees would bear this out.

9. Having regard to the nature of the rival contentions before us, we have to enter into a detailed consideration not only of the relevant statutory provisions, but also of the authorities bearing on the subject.

10. The issue for our consideration is whether the sum of Rs. 10,16,857.32 representing the collections towards the gallonage fees was rightly included as part of the assessee's taxable turnover. This question, in its very nature, provokes two lines of inquiry: (i) What precisely is the conception of turnover under the taxing statute? (ii) Whether the gallonage fees collected by a distillery on the occasion of sales can be regarded as forming part of the sales turnover of the distillery?

11. The Tamil Nadu General Sales Tax Act, 1959, defines "turnover" in simple language. According to Section 2(r), "turnover" means the aggregate amount for which goods are bought or sold by a dealer. This, broadly, is also the line of definition of the expression in other local sales tax enactments in force in several other States in this country. It is now a common place of this branch of the law that fiscal measures brought by

the State Legislatures for taxing sales or sales turnover are to be understood and applied in terms of the time-honoured juristic conception of sale.

The Supreme Court held in the *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, that "sale" as a taxable event under the

charging provisions of the Sales Tax Acts passed by the State Legislatures in India cannot be in derogation of the concept of sale under the Sale of

Goods Act. One of the essential attributes of a sale under the general law is that it should be the product of an agreement between the seller and

the purchaser. This idea is brought out in the familiar expression "bargain", which denotes that it is essentially a mutual deal between the contracting

parties. It follows that the consideration for the sale, which we call price, must also be part of the bargain or agreement between the seller and the

buyer. Thus, a dealer's turnover must include all sums of money, which he receives from his purchasers during a given period, usually a year, as a

matter of bargain.

12. While this is the conception of sale price and sales turnover both under the general law and under the taxing statutes, dealers in commodities

have a habit of marking a distinction, both in their books of account and in their sales invoices, between sale price, pure and simple, and other

amounts received from the customers. A dealer may, for instance, collect mahimai or dharmam from his customers. This may be separately shown

in his sale bills. Where the goods are excisable, the dealer liable to duty may seek to shift that burden to his customer; he may do so by charging

the amount separately in the invoice. In like manner, he may also shift the sales tax leviable on the very transaction of sale to his purchaser. It may

be taken as a general phenomenon that the price charged by a dealer for a commodity, excepting where the sale in question is a distress sale or

one during a falling market, contains the dealer's prime cost plus his margin of profit. But the extra amounts charged by him and collected from the

purchasers are over and above the cost and the profit margin. Generally speaking, such extra collections do not represent any profit element to the

dealer himself. This is often the reason why he likes to maintain the distinction between such extra collections on the one hand, and the price proper

on the other. But tax laws are notoriously indifferent to the practices of the business community, the patterns of commercial invoices and the

methods of keeping business accounts. They are concerned rather with finding out what really are the amounts for which the dealer sells his goods

to the purchaser.

13. Ever since the sales tax legislation got into our statute books a good number of cases have gone to courts on the perennial theme, what to

include in and what to exclude from the taxable turnover. Questions, in particular, had often arisen under different State sales tax laws, as to

whether a tax which the selling dealer shifts to the purchaser can be included in the dealer's sales turnover. The familiar argument addressed in such

cases has been that since what is recovered by the dealer from the purchaser is tax which goes to the State, be it excise duty or sales tax or some

other fiscal exaction, it could not really form part of the amount for which the goods are sold. The courts, however, have tended to consider an

argument of this kind not on the mere aspect that the collection by the dealer from the purchaser represents tax due to the State, but by going into

the real nature of the particular tax concerned, the burden of which is sought to be shifted by the seller on to his purchaser.

14. It is a familiar device of fiscal legislation in this country, as elsewhere, to impose a tax on someone, but provide machinery for collecting it from

someone else. An example which comes readily to our mind is the imposition of Income Tax on salaried employees with a provision for deduction

at source at the time of disbursement of the salary by the person responsible for paying it. In cases where an obligation for tax collection is laid in

this manner on someone other than the taxpayer himself, the taxing statute usually contains sanctions not only against the taxpayer but also against

those whom we can properly describe as lay tax-collectors.

15. In contrast, there are in force certain other taxing measures, where the law having laid the imposition on someone, is quite indifferent about who

actually bears the ultimate incidence, leaving that matter to be settled by the interplay of market forces. A familiar example is that of excise duty.

This duty is, in law, a direct imposition on the producer of manufactured articles. But the timing of the levy is often fixed at the point of sale of the

manufactured articles. And when this is done, the producer, who sells the dutiable articles and who is therefore liable for the payment, is often in a

position to shift his excise burden to the purchaser. But the law itself does not

compel him to do so. It does not say that he shall collect the excise from his customer and then pay it over to the Government treasury.

16. It has thus come to pass that, in examining the attributes and components of taxable turnover under the sales tax laws, the courts have found it

necessary to keep clear the distinction between a tax, which a dealer is under an obligation to collect from his customer at the time of sale of the

dutiable commodity, on the one hand, and a tax, whose burden the dealer by virtue of his bargaining power is in a position to shift to his customer,

on the other. This is well-illustrated in the two recent decisions of the Supreme Court. In *Joint Commercial Tax Officer, Division III, Madras Vs.*

Spencer and Co. and Others, a company carrying on business in Madras as a dealer in imported foreign liquor collected from their customers the

tax levied u/s 21-A of the Tamil Nadu Prohibition Act, 1937, on sales of such liquor to them. The question was, whether the tax so collected by

that company was part of their taxable turnover under the Tamil Nadu General Sales Tax Act, 1959. The appeal before the Supreme Court was

from a decision of this Court in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161. Dealing with this particular question, this

Court had earlier observed that the language of Section 21-A of the Prohibition Act itself indicated that it was a tax on sale price, which meant that

the two were distinct. This distinction, according to the learned Judges, must also be maintained untarnished in making the assessment of the

dealer's turnover under the Tamil Nadu General Sales Tax Act, 1959. On this basis, they held that whatever amount the dealer collected by way

of tax from his purchasers u/s 21-A of the Prohibition Act must be excluded from his taxable turnover. On appeal, the Supreme Court agreed with

this conclusion. But they preferred to rest their decision on a different line of reasoning. They said that u/s 21-A of the Prohibition Act the

imposition of the tax was squarely on the purchaser and not on the seller. They further observed that although the tax under that section was not a

tax on the seller, the very section compelled the seller to collect the tax from the purchaser. They, accordingly, said that the tax collected by the

seller from his customers under this provision in the Prohibition Act did not form part of his taxable turnover for the purpose of levy of sales tax

under the Tamil Nadu General Sales Tax Act, 1959.

17. In an earlier decision of the Supreme Court reported in *Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax*,

Indore, the court had to examine the precise nature of the collection of sales tax made by a dealer while selling the goods. The case arose under

the Madhya Pradesh General Sales Tax Act, 1958, before its amendment in 1963. The provision in that Act, as it then stood, was that sales tax

was payable by the seller and he had no statutory authority to collect that tax from the buyer. The question was whether the sales tax so collected

by the dealer formed part of his sales turnover. The Supreme Court held that in a case where, in the absence of statutory compulsion, a dealer

nevertheless shifted his tax burden to the buyer, then that can only be considered as part of the valuable consideration for the sale. This decision

was referred to by the Supreme Court in the subsequent case, *Joint Commercial Tax Officer, Division III, Madras Vs. Spencer and Co. and*

Others, by way of making a distinction. In the course of their judgment in this later case, they instituted a comparison between Section 21-A of the

Tamil Nadu Prohibition Act, 1937, on the one hand, and the provisions of the Tamil Nadu General Sales Tax Act, 1959, on the other. They

observed that, while the tax collected by a dealer u/s 21-A of the Prohibition Act was a tax imposed on a purchaser which the seller was under a

statutory obligation to collect, the sales tax leviable under the Tamil Nadu General Sales Tax Act, 1959, was an imposition on the seller himself and

there was no statutory obligation on his part to collect the tax from the purchasers. It was on this line of distinction that the court rested its decision.

18. Mr. Thiruvengkatachari submitted before us that the principles laid down by the Supreme Court in *Joint Commercial Tax Officer, Division III,*

Madras Vs. Spencer and Co. and Others, must govern the present case as well. He said that the gallonage fees leviable under the Rules framed by

the Government are also obligatory collections which the distilleries are obliged to effect from their purchasers under the law. He urged, therefore,

that such collections must stand excluded from the distiller's taxable turnover.

19 This submission of the Learned Counsel at once put us on an enquiry into the real impact and incidence of the impositions called gallonage fees.

There was no dispute at the Bar that the gallonage fee, although called a fee, is a compulsory fiscal imposition designed to augment the State

exchequer. The only question then is whether gallonage fees are collected by the distillers purely by virtue of their bargaining position or by virtue of

their having to do so under statutory compulsion. Having regard to the way in which the Supreme Court had proceeded to decide similar questions

in the cases we have referred to, the proper inquiry before us in the present case would be, on whom does the prohibition law impose the burden

of gallonage fees, the distiller or the purchasers?

20. The Sales Tax Appellate Tribunal have referred in their order to some of the provisions in the Rules touching the levy and collection of

gallonage fees. But we find it necessary to deal with them at some greater length. There are three sets of Rules which have a bearing on the subject

in the present case. All of them have been made by the State Government in exercise of their rule-making power under the Tamil Nadu Prohibition

Act. There are, first, the Madras Distillery Rules, 1960, which regulate the manufacture, storage and issue of spirits by the distillers. Secondly,

there are the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, which regulate the possession, sale and use of

these distinct classes of spirits. Thirdly, we have the Rectified Spirit Rules, 1959, laying down similar regulatory provisions for rectified spirits.

21. Under the Madras Distillery Rules, 1960, any one who wishes to establish a distillery in the State should have a "distillery licence". The Rules

make elaborate provisions for manufacture, storage and removal of spirits by the distillery.

22. The Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, regulate the manufacture, distribution, possession and

use of a variety of spirits going under the names of methylated spirit, denatured spirit, methyl alcohol, varnish and the like. Rule 3 says that only

distilleries which possess distillery licence can manufacture these spirits. The Rules prohibit transactions in these spirits otherwise than under

appropriate licences. A wide variety of licences is set out under Rule 8. This rule provides, inter alia, that both wholesale and retail vendors of

spirits must obtain annual licences for obtaining their supplies. Licences are also necessary for special classes of users such as the railways,

ordnance depots, industrial users, etc. The wholesalers under licences will have to get their supplies from a distillery in the State. The retailers will

get their supplies either from the distillers or from the licensed wholesalers. The licences are to be issued in prescribed forms. These forms carry a number of special conditions. Certain general conditions are also laid down in Rule 10. General condition (IX) is the pertinent provision made by the rule-making authority under which the charge to gallonage fees is laid on these spirits. This clause also fixes the rates of gallonage fees at so much per litre. It proceeds to lay down how, by whom and on what occasion the gallonage fees become payable. The clause, inter alia, says that, in regard to supplies of spirits obtained by the licence-holders and others from a distillery, "the gallonage fee shall be paid to the distiller by the purchaser at the time of purchase of stock from the distillery". Such purchasers will have to be sending periodical returns to the licensing authority on the quantities purchased. The returns are to be in a prescribed form. The form provides for a number of particulars to be filled in by the purchasers. One particular item of information which the purchaser has to render in his return is "the amount of gallonage fee paid on quantities obtained from a distillery".

23. While the liability to pay gallonage fees is thus laid on the purchasers, the distillery has a corresponding obligation to collect the amounts from the purchasers. Rule 4(b) of the Madras Distillery Rules, 1960, lays down that the denatured spirit "shall be issued...on collection of the gallonage fee at the prescribed rate to licensees of such spirit in the State". Rule 39(b) (1) of the same Rules clarifies that the rates at which the distillery "shall collect" the gallonage fees from the purchasers are the rates prescribed in the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959.

24. Similar provisions are found as respects sales by distilleries of rectified spirits. These provisions are contained in the Madras Rectified Spirit Rules, 1959. The manufacture of rectified spirit can only be by a licensed distillery (see Rule 3). Licences must be taken by persons who wish to possess rectified spirits (Rule 6). Rule 12 provides that supplies can be obtained by licence-holders and others from distilleries only on indents. Rule 9 lays down the levy of gallonage fees at certain rates. It proceeds to lay down that "the gallonage fee shall be paid by the holders of licence in the manner laid down in the licence conditions". The licences are to be issued in

prescribed forms. The forms lay down various conditions. These include conditions governing the levy of gallonage fees. Form R.L. prescribed by the rule-making authority makes appropriate provision for levy of gallonage fees on rectified spirits issued by a distillery. Paragraph 6(1) of this form lays down that the gallonage fee ""shall be paid by the licensee, in the case of supplies obtained from a distillery, in this State, at the distillery itself at the time of getting the supply"". The corresponding obligation of the distillery to collect the gallonage fees from the purchasers is to be found elsewhere in the Rules. Rule 12 of the Rectified Spirit Rules, 1959, says, in Sub-rule (ii), that ""in case the supplier is the distillery, the issue shall be made only after collection of the amount of excise duty (if payable) and gallonage fee leviable on the quantity supplied"". The distillery's obligation to collect the fee from the purchaser is also found mentioned in Rule 39(b)(2) of the Madras Distillery Rules, 1960. This rule provides the link between the two sets of Rules when it lays down that the gallonage fee shall be collected, if rectified, at the rates prescribed in or under the Madras Rectified Spirit Rules, 1959.

25. The provisions relating to levy and collection of gallonage fees, which we have set out above, apply both to licensed and non-licensed purchasers of spirits from the distilleries. This is indicated at the appropriate places in the relevant Rules themselves.

26. What we have attempted in the preceding paragraphs, with the assistance of the Learned Counsel, is to ferret out the provisions relating to gallonage fees from a bewildering complexity of statutory instruments. Granting that different kinds of manufactured spirits might call for different regulatory provisions under the Rules, in the context of the paramount legislative policy of prohibition, we feel that the draftsman could yet have adopted a uniform style of rule-making at least for prescribing the levy and collection of gallonage fees, considering that they are general in their application to spirits of different kinds. The lack of uniformity in the text and in the format of the Rules alike has tended to obscure the real nature and incidence of these exactions. As might have been noticed, for certain kinds of spirits, the gallonage fees are prescribed in the body of the Rules themselves. For certain other kinds, one has to go hunting for them amidst the small print of the forms, because the texts of the Rules are wholly

silent on the subject. Again, while the actual levy is declared by one set of Rules, the corresponding provision for collection is consigned to a

different place in a different compilation. The Rules, as a whole, do not fall into a sensible or consistent pattern. They are quite an unruly lot.

27. Shortcomings of legal draftsmanship apart, however, two things stand out boldly and clearly on our collation and study of the relevant Rules.

One is that the gallonage fee, as an exaction by the exchequer, is squarely laid by the Rules on the purchaser of spirits. The purchaser is the one

who is under a liability to pay the amount. There is no shirking this liability, unless it be under some express exemption. The other position which

emerges is that the Rules appoint the distilleries as the accredited instrumentalities for recovery of these amounts. The distiller is the one who is

under an obligation to collect the appropriate sum of money from the purchaser and remit it to the treasury. This obligation also is inescapable.

Under no circumstances, can the distiller excuse himself from discharging it.

28. Mr. Thiruvengkatachari urged that the distinction which the gallonage Rules clearly mark between the selling distillers and the purchasers of

spirits as to their respective fiscal obligations is quite akin to, and is no way different from, what Section 21-A of the Prohibition Act itself lays

down by way of allocation of fiscal obligations as between the seller and the purchaser of imported foreign liquor. He, accordingly, urged that we

should decide the question before us in this case on the same lines on which the Supreme Court decided in *Joint Commercial Tax Officer, Division*

III, Madras Vs. Spencer and Co. and Others,

29. We have earlier referred to the issue which called for decision in that case and the view which the Supreme Court took of the nature and

incidence of the tax levied by Section 21-A of the Prohibition Act. The section, excluding words not relevant for our present purpose, is in the

following terms:

Every person or institution selling foreign liquor shall collect from the purchaser and pay over to the Government a sales tax calculated at the rate

of... in the rupee on the price of the liquor so sold.

30. On this language, the Supreme Court, as we mentioned earlier, had had no hesitation whatever in holding that the tax laid by the section was

squarely on the purchaser, and the part which the seller was obliged to play by

the section was merely to collect the purchaser's tax for remittance to the Government. It might have been observed that Section 21-A does not, in terms, say that the tax is to be paid by the purchaser. Even so, the Supreme Court held that the tax was the purchaser's liability. They were obviously fully alive to the implications and consequences, as against the purchaser, which flowed from the expression ""collect"", Which the legislature had employed to circumscribe the nature of the seller's obligation and at the same time distinguish it from the purchaser's liability.

31. As compared to the language of the charge in Section 21-A of the Prohibition Act, the Rules framed under the same Act for the collection and levy of gallon-age fees seem to us to be decidedly more explicit. These Rules, as we have pointed out more than once, do not mince any words, but expressly make the demand that the gallonage fees shall be paid by the purchaser, while at the same time, making corresponding provision to the effect that the distiller shall collect the amounts from the purchaser. In these events, we think, we must agree with Mr. Thiruvenkatachari's argument that the principle to be derived from the Supreme Court's decision in *Joint Commercial Tax Officer v. Spencer & Co.* [1975] 36 S.T.C. 188 (S.C.) must apply a fortiori to the present case.

32. The learned Additional Government Pleader, however, urged that the point arising in this case is covered by *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161 a decision of a co-ordinate Bench of this Court, which he described as a direct ruling on the question of the precise sales tax treatment of the gallonage fees. He said that a subsequent Division Bench of this Court in *Taylor & Co. v. Government of Madras* [1974] 34 S.T.C. 391 not only felt themselves bound by the earlier ruling, but also rejected the submission that it required reconsideration. He urged that the Supreme Court's decision *Joint Commercial Tax Officer, Division III, Madras Vs. Spencer and Co.* and *Others*, was concerned with an altogether different tax situation arising out of quite a different obligation imposed by the legislature in the body of the Prohibition Act. He said that no general principle could be derived or extracted from that decision to help decide the present case.

33. These submissions bear examination. We have given our earnest consideration to them. But we are unable to accept them as valid. In the first

place, we are unable to regard the Division Bench decisions in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161 and *Taylor*

& *Co. v. Government of Madras* [1974] 34 S.T.C. 391 as direct authorities on the question which falls for our determination in the present case.

Under a broad system of head-noting or classification, all these cases, including the instant case, can be indexed under the caption "'gallorage fees'".

But, as we had indicated earlier, this expression, as employed in the Rules before us, serves as nomenclature for a variety of exactions. All of them

have one characteristic in common; they are specific duties on liquors and spirits, levied at so much per unit of measurement. Before our country

went metric, the unit of measurement was the imperial gallon. Hence, apparently, the use of the descriptive epithet, "'gallorage'". Even this term as a

characteristic of the basis of the levy has become out-of-date under the metric system. Besides, while all the impositions go by the same generic

name of gallorage fees, there are marked differences to be found in the various sets of Rules framed under the statute, not only in the rates

imposed, but also in their incidence, in their impact, and in the dutiable event. For instance, both under the Madras Rectified Spirit Rules, 1959,

and the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, the gallorage fees are levied on spirits not only on the

occasion of sales by the distilleries to the holders of licences and others, but also on the occasion of imports effected by the residents in the State

from outside. The imposition on imported spirits, also going by the same name of gallorage fees, is governed by different considerations. The

importer, for instance, has generally to prepay the gallorage fees before he can obtain the import authorisation or permit from the concerned

authority. Licences and licence conditions for imports are not the same as those which govern the purchase of spirits from local manufacturers.

Rule 5 of the Rectified Spirit Rules, 1959, governs the levy and incidence of gallorage fees on import of rectified spirits into the State. It says that

the importer (unless already exempted) shall prepay the excise duty and the gallorage fee at the rate in force on the quantity of rectified spirit

proposed to be imported and obtain an import permit by forwarding the chalan with the application for permit"". Under this rule, both the initial

impact and the ultimate incidence of the gallorage fees may be said to rest on the importer. Likewise, under the latter part of condition (IX) of Rule

10 of the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, it is provided that ""in the latter case of imports, the amount of gallonage fee at the above rate, calculated for the quantity proposed to be imported, shall be paid into the treasury and the treasury receipt (chalan) shall be enclosed with the application for import permit"".

34. The lesson to be drawn from the Rules such as these is that one cannot proceed in a general way to determine the nature and incidence of the gallonage fees on the mere aspect of their being called so; careful attention has to be paid to the terms of the relevant provisions governing the actual occasion and the event of the levy, the person on whom the impact lies, and the provisions, if any, relating to its recovery from any other quarter. We, therefore, propose to consider the two earlier Bench decisions, *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161 and *Taylor & Co. v. Government of Madras* [1974] 34 S.T.C. 391 in the context of the particular kind of gallonage fees they have had to consider in those cases.

35. In both the cases, the question had to be considered in connection with the sales tax assessment of a dealer of liquor who sold them to consumers as alcoholic beverages. Transactions of sale of such liquor, among other things, are strictly governed by the provisions of the Madras Liquor (Licence and Permit) Rules, 1960, passed by the State Government under the Tamil Nadu Prohibition Act, 1937. Under these Rules, consumers of liquor have to have permits for purchase and consumption. Dealers have to take out licences for purchase, storage and sale of liquor.

The Rules provide for certain general licensing conditions to be read as having been incorporated in the licences. Condition (XI) in Rule 22 is one of them, and it levies gallonage fees in the following terms:

In addition to the annual fixed fee, or other fee, if any, prescribed for licences issued under these Rules a gallonage fee calculated at the rates mentioned below, or at such other rates as may be notified by Government from time to time, shall be levied on liquor, medicated wine or sacramental wine sold or issued or imported into the State for purposes of consumption within the State, in the manner prescribed in these Rules.

36. The question before this Court in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161 and *Taylor & Co. v. Government of*

Madras [1974] 34 S.T.C. 391 was whether the gallonage fees levied at the point of sale under the aforesaid Rules, and included by a licensed

dealer in his sales invoices to his purchasers can be excluded from the dealer's taxable turnover for assessment to sales tax under the Tamil Nadu

General Sales Tax Act, 1959. The decision in both the cases was that the amounts must be included as part of the price at which the dealer sells

the liquor to the permit-holders.

37. The case for including the amounts of gallonage fees in the taxable turnover of the seller was put in various ways by Ramaprasada Rao, J. (as

he then was), while he delivered the judgment of the Bench in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161. The learned

Additional Government Pleader relied on the following passage:

The payment of gallonage fee appears to be one of the conditions precedent for a person to hold a licence and therefore it is an expense which he

has necessarily to incur as a licensee under the Madras Liquor (Licence and Permit) Rules. We can therefore safely conclude that such expenses

which are necessary for the trade were incurred by them before the sale of liquor to any person concerned. It is not as if this gallonage fee is a tax

collected by them for and on behalf of the State for being paid over to the State. It forms part of the capital expenditure and has to be incurred by

them and it would necessarily be added on to the cost of the liquor sold by the petitioners from time to time. No attempt has been made by the

petitioners to establish before us or at any time before the revenue, that the gallonage fee is an expense incurred by them independently and without

reference to the cost of the liquor. In fact, such a contention ordinarily cannot be raised by a merchant. Rightly, therefore, the revenue contended

that the gallonage fee is like customs duty and has to be therefore telescoped into the assessable turnover.

38. Having studied this passage, we think the crux of the whole reasoning is to be found in the learned Judge's observation:

It is not as if this gallonage fee is a tax collected by them for and on behalf of the State for being paid over to the State.

39. In other words, according to the learned Judge, the gallonage fee leviable under general condition (XI) of Rule 22 of the Madras Liquor

(Licence and Permit)

40. Rules, 1960, is a tax which the dealer has to pay himself and which he is not under any statutory obligation to realise from his purchasers. This

being so, it is easy enough to see on which side of the dividing line this type of case falls, in the light of the relevant principle which the Supreme

Court subsequently enunciated in *Joint Commercial Tax Officer, Division III, Madras Vs. Spencer and Co. and Others*,

41. On the view that the kind of gallonage fee which the two earlier Benches of this Court had to consider was an out-and-out payment by the

seller himself without any statutory compulsion on him to collect it from his customers, the learned Judges' ultimate determination on the question of

the inclusion of the amounts in the dealer's assessable sales turnover followed as a consequence, both on principle and on the subsequent authority

of the Supreme Court. By the same token, it must also be distinguished from the present case, where we have had to consider a different set of

statutory rules which cast the obligation on the seller to collect the gallonage fees from the purchasers and remit them to the State.

42. The learned Additional Government Pleader then urged that although the relevant Rules which have application to the present case might

contemplate that the distilleries act as the mere hand that collects the gallonage fees from the purchasers for being remitted to the Government, the

way things had actually happened in this case was quite different, and this has to be taken note of in considering the validity of the assessment in

question before us. He explained that E.I.D. Parry, the assessee in this case, do not follow the procedure contemplated by the Rules, of first

collecting the gallonage fees at the time of every sale and thereafter paying the amounts so collected to the Government. On the contrary, what they

do is to maintain a large advance deposit of money with the excise department sufficient to cover, in the gross, the gallonage fees payable on their

expected sales of spirits over a period. With this deposit to their credit, the assessee proceeds to collect from their customers the appropriate

gallonage fees as and when individual sales happened to be effected.

43. It is common ground that what has been described above is the *modus operandi* by which the assessee has been discharging their statutory

obligation of collecting the gallonage fees from their customers and crediting them to the Government. It may be said that, in doing so, they have

reversed the statutory process. Whereas the Rules say, "collect and credit", what the assesseees do is to credit and collect. Even so, the question is

whether, because of this inversion in the collection procedure, any different result flows for the tax treatment of such collections in the assesseees"

assessment to sales tax.

44. In the course of argument, it was not suggested that this system of advance deposit of gallonage fees is unknown and without precedent. On

the contrary, a scheme of this kind seems to have been long in vogue in the excise department, sanctioned also by the manual of executive

instructions. The practical convenience of such a system, both to the department and to the distilleries concerned, was hardly in doubt at any time.

But the point made by the learned Additional Government Pleader is that, under this system, if the assesseees go on collecting the gallonage fees

from the purchasers at every individual sale, they would be doing so only for themselves and not for the purposes of paying the amounts over to the

Government. He granted that there might be a considerable sum of money already in deposit with the excise authorities to the assesseees' credit

under this account, but even so, he said, that cannot alter the fact that the collections actually effected by the assesseees from their purchasers do

not find their way to the Government treasury. The realisations from the purchasers only reimburse the assesseees' own purse.

45. The learned Government Pleader's interpretation of the assesseees' practices and processes may well be accepted as correct, but they do not,

in our view, alter the crucial position that what the assesseees collect is under legal compulsion, whenever they do it and whatever they do with it

afterwards. It is beyond the scope of this case to go into the question as to how far the procedure adopted by the assesseees of first depositing and

then collecting the gallonage fees is proper or legal. But, even if the assesseees ought properly to have handed over the collections of gallonage fees

to the Government, their omission in this regard cannot alter the nature of the collections. For, whether they "collect and credit" or "credit and

collect", they do so not out of choice, but out of legal coercion. It is this consideration which the Supreme Court have regarded as paramount. The

mere inversion of the statutory process without any difference in the end-result, cannot, therefore, be material to the present discussion. It may

even be dismissed as spoonerism in action, as when the late Dr. Spooner, on one occasion, is reported by his biographer to have poured claret

over spilled salt to make it into a purple mound. The suggestion is that ordinary mortals are accustomed to bring about the same result by spreading

salt over spilled wine, just to prevent it from spreading.

46. The learned Additional Government Pleader then relied on a recent decision of the Supreme Court in *Mcdowell and Company Ltd. Vs.*

Commercial Tax Officer VII Circle, Hyderabad, to say that since the assessee retained with themselves the actual collections of gallon-age fees

from their customers, those amounts must be regarded as part of their circulating capital and so liable to be included and taxed as forming part of

their sales turnover. We think this argument involves a misunderstanding of the actual decision of the Supreme Court in that case and the issues

involved therein. The assessee before the Supreme Court were manufacturers of "Indian liquor" excisable under the Rules framed by the Andhra

Pradesh Government under the Andhra Pradesh Excise Act, 1968. Under those Rules, liquor cannot be removed from a distillery by anyone

without payment of excise duty. He must possess a licence and also pay the excise duty to the Government's Distillery Officer before obtaining

release of the liquor from the distillery. The question which arose in the context of sales tax assessment was whether the excise duty paid by a

purchaser to the Government prior to, and as a condition precedent for, removal of the liquor from the distillery was part of the distillery's sales

turnover. It was found in that case that the excise duty was a direct payment by the purchaser to the Government. It was further found that such

payment of excise duty, in the very nature of things, did not find a place either in the distillery's sales accounts or in their sales invoices. In those

circumstances, the State sales tax authorities nevertheless proceeded to assess these amounts as part of the distiller's sales turnover. The High

Court upheld the assessment.

47. On appeal, the Supreme Court reversed the High Court's decision. They observed that under the terms of the relevant Rules in force in the

State, the excise duty was neither charged on, nor collected by, the distillers. The learned Judges expanded this idea by saying that the excise duty

paid by the purchasers did not go into the assessee's till and had not become a

part of the assessee's "circulating capital".

48. These last observations of the Supreme Court were relied on by the learned Additional Government Pleader as enunciation of a distinct

principle. For the purposes of the present case, he restated the proposition by saying that a dealer's collections from his purchasers, over and

above what he charged them for the price of goods simpliciter, go into his till, and when they do so and become part of his circulating capital, they

will necessarily form part of his sales turnover as well, properly assessable to sales tax in his hands.

49. We do not think the Supreme Court purported to decide in that case that whatever goes into a seller's till, becomes part of its circulating

capital, and whatever constitutes his circulating capital also represents his assessable sales turnover for levy of sales tax in his hands. The real basis

of the court's decision in that case was that excise duty paid directly by the purchasers to the State Distillery Officer for obtaining clearance for

their purchase from the distilleries has nothing whatever to do with the distilleries' sales of liquor or the price at which such sales were effected. It is

in this context, and by way of description, that the court said that the purchaser's payments into the treasury of excise demands did not go into the

distiller's coffers of their circulating capital.

50. In the present case, we have already referred to the reason why the assessee did not turn over their collections of gallonage fees to the

Government. The reason is not far to seek. It is that they already had to their credit with the Government an advance deposit under this account. In

this sense, therefore, as much money went out of the assessee's till as came into it, by way of gallonage fees, and there was really no net increase

or net decrease in circulating capital, if that is the way to describe the situation.

51. But even if it were assumed for a moment that the assessee's collections of gallonage fees form, for the nonce, a part of their circulating capital,

we do not see how that concludes the discussion against them in their sales tax assessment. To argue that things which go into a trader's circulating

capital must also enter into his sales turnover may not be an accurate way of stating a principle even in the language of accountancy. For, there may

be items properly included in a trader's circulating capital, or for that matter, his trading account, which may not legitimately be included in the sales

turnover. A dealer's unsold stock-in-trade provides a case in point. The outlay on such stock, as much as the outlay on stock that is already sold, reflects the trader's circulating capital. What is more, the value of stock on hand must necessarily enter into the reckoning in the dealer's trading account, under any system of closing stock inventorying, for otherwise the result of the year's trading would not get properly ascertained. In contrast, however, as anyone can see, a trader's sales turnover can, under no circumstances, include his stock on hand, for the excellent reason that it remains unsold. There may be quite a few other items figuring in commodity trades on which there can be room for doubt as to whether they should be included or not in the trading account or in the circulating capital. But these considerations, relevant though they may be in accountancy theory or business practice, do not, however, touch the question of assessment of sales turnover. For, the only concern of a turnover tax is to arrive at the figure for which goods are sold, an inquiry which calls for an essentially simple and pragmatic approach. We do not understand the Supreme Court to have lent their weight in the *McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad*, to purely book-keeping conceptions as a basis of assessment, in preference to a determination of the taxable turnover according to the words of charge which the legislature has employed in the statute.

52. For similar reasons, we must reject another notion put forward by the learned Additional Government Pleader to the effect that the gallowage fees, in the hands of the collecting distillery, must enter into the selling cost of the product. This, to our mind, is really begging the question as to whether these collections can form part of the assessee's sales turnover. We are not here concerned with what would be the position in the purchaser's assessment, if any.

53. Nor can we accept the learned Additional Government Pleader's theory that the gallowage fees form part of the assessee's capital expenditure. The reference to "capital expenditure", in the present context, is obviously borrowed from *Ramaprasada Rao, J.*'s judgment in *Spencer & Co. v. Joint Commercial Tax Officer* [1969] 24 S.T.C. 161. The argument is that since the distiller has to have licences to manufacture and sell spirits and since the licences require that he should collect and pay the

gallorage fees, the payment must form part of his "capital expenditure".

54. It may, perhaps, be conceded that the intricacies of cost accounting might discover elements of cost per unit even in general overheads. But we fail to see how any item which properly goes into reckoning as part of a trader's capital expenditure can have anything to do with his trading account, considering that capital expenditure is the very antithesis of circulating capital, and considering, further, that sales tax has to do with a dealer's receipts and not with his outgoings or expenses.

55. We are inclined to feel that it would altogether assist discussion of fiscal questions of every kind if people who discuss them scrupulously avoid the use of jargon borrowed from accountancy, political economy and other disciplines. In most cases, sticking to the words of the taxing statute and asking ourselves the right questions, which the words of charge raise, might be the easiest and the most satisfactory way of arriving at solutions in tax cases.

56. On the pertinent question in this case as to whether the amount of Rs. 10,16,857.32 is or is not to be included in the assessee's sales turnover, we have examined not only the relevant provisions of the Tamil Nadu General Sales Tax Act, 1959, but also the relevant Rules under the Tamil Nadu Prohibition Act, 1937, to find what fiscal character the said amount bears. And, for the reasons we have earlier set out, we must answer the question in the assessee's favour, holding that the amount does not form part of their assessable turnover.

57. This tax revision case is accordingly allowed. The assessing authority is directed to exclude the amount in question from the assessment for 1970-71. The respondent will pay the assessee's costs. Counsel's fee Rs. 250.