

(2001) 11 MAD CK 0066
In the Madras High Court
Case No : Writ Petition No. 21298 of 2001

India Meters Limited

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2
Tamil Nadu General Sales Tax Rules, 1959 — Rule 6

Citation : (2004) 136 STC 285

Hon'ble Judges : R. Jayasimha Babu, J;A.K. Rajan, J

Bench : Division Bench

Advocate : T.K. Seshadri, for the Appellant; T. Ayyasamy, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

R. Jayasimha Babu, J.—The assessee sold the electric meters manufactured by it to the State Electricity Board. In the contract it was provided that "the ownership of the goods will remain with the supplier till they are delivered at the destination station in good and acceptable condition as per the despatch instructions".

2. The clause in the contract dealing with payment, provided that "payment for 100 per cent value of each consignment together with full excise duty and sales tax will be made in Central payment, Madras, immediately on receipt of certified copies of acknowledgment of delivery challans from the chief store keepers of the systems concerned, subject to purchase order terms".

3. It is clear from these clauses in the contract that the transfer of title to the goods was to take place only on delivery to the customer at the customer's place and that the customer's obligation to pay would arise after the delivery had been so effected.

4. The contract also provided in the clause dealing with price that it was payable per unit ex-factory. It provided for the payment of excise duty and statutory

levies, in addition to such ex-factory price, as also the fact that the ex-factory price mentioned was exclusive of sales tax. The clause dealing with sales tax in Clause 3(b) further provided that "appropriate sales tax, if any, found leviable in accordance with the provisions of the relevant Sales Tax Act in force will be paid over and above the price of goods accepted in this order". That clause also provided, "please note that sales tax will be payable only on ex-factory price and excise duty on ex-factory price". The contract in Sub-clause (d) of Clause (3) further provided that freight and insurance charges payable up to destination was Rs. 3 per meter for which no separate voucher would be necessary and that charge would be kept firm till the completion of the contract.

5. The assessee, initially, did not include the freight charges in its taxable turnover. The original assessment was made without taking this freight charge into account for the year 1986-87. There was an inspection on February 27, 1987 at which time the inspecting officer had found that the assessee had collected freight charges and insurance charges separately under the debit notes for a total sum of Rs. 16,96,530 but the same had not been shown in the monthly returns. The assessing authority, therefore, determined 50 per cent of that amount of Rs. 16,96,530 as freight charges, after making allowance for the insurance amount and levied tax on that amount of the freight, charged by the assessee forming part of the sale price. The assessee's appeal against that order having succeeded, a further appeal was preferred by the Revenue, which came to be allowed, by the Tamil Nadu Taxation Special Tribunal. The assessee is now before us questioning the correctness of that order of the Tribunal.

6. The assessee claims that since the contract separately mentions the ex-factory price and the insurance and freight charges, and, under Rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959, the freight when specified and charged for by the dealer separately, without including the same in the price of the goods sold, is to be deducted from the turnover of the dealer, and that, therefore, the freight charged here could not have been treated as part of the sale price and subjected to tax.

7. Learned counsel in this context relied upon a decision of the apex Court in the case of *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* [1969] 24 STC 487. In that decision, rendered by a Bench of three learned Judges of the apex Court, it was held that the assessee therein had only received as price the amount of the catalogue price less the freight charges, which the buyer had paid and, therefore, what was taxable was only the price actually received. That decision was rendered in the background of the facts found which showed that the assessee had despatched goods to the stockist with the stipulation "date of delivery" shall mean the date of railway receipt. The court having found that the agreement on the part of the buyer/stockist to pay the freight charges and such freight charges having been deducted from the catalogue price, the freight charge did not form part of the price of the goods sold. That is the way in which that judgment was explained by a later two-Judge

Bench of the Supreme Court in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, The court in the later judgment extracted the following statement in the case of Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, :

"In our judgment, under the terms of the contract, there is no obligation on the company to pay the freight, and under the terms of the contract the price received by the company for sale of goods is the invoice amount less the freight...."

8. In this case, the obligation to pay the freight is clearly on the petitioner as there is no sale at all, unless the goods are delivered at the premises of the buyer and in order to so deliver, the assessee necessarily had to incur freight charges. The transfer of title to the goods as provided in Clause (10) read with Clause (6) of the agreement was to be at the place of delivery in the premises of the buyer. Though the contract mentioned the price of the meters as ex-factory price, the delivery was not at the factory gate. The specification of what the price would be at the factory gate, therefore, does not in the context of term, subject to which the sale was agreed to be effected, render it the point or the location at which the sale can be said to have been completed. Had the sale been completed at the factory gate, the expenses incurred thereafter by way of freight charges would then be capable of being regarded as expenditure which was in the nature of a post-sale expenditure and, if paid by the seller, regarded as an amount paid by such seller on behalf of the buyer.

9. Learned counsel for the Revenue invited our attention to the case of Dyer Meakin Breweries Ltd. Vs. State of Kerala, a decision rendered by the same Bench, which had decided the case of Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, . In that case, the facts were different. A manufacturer of liquor, who had his manufacturing facility in Uttar Pradesh and Haryana had transported his goods to his warehouse at Ernakulam, from where it effected sales to buyers. While doing so, it prepared two invoices, one for the price of the goods and another for what it described as "freight and handling charges", which included pro rata transport cost from Uttar Pradesh/Haryana to Ernakulam. At the time of such transportation, there was no contract between the seller and the ultimate buyer, and there was no transfer of the goods until after the goods had reached Ernakulam, from where sales were effected. As noticed by the court, "it is common ground that the sale of 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". The court, therefore, held that the expenditure incurred by the assessee in bringing the goods to Ernakulam formed part of the pre-sale expenditure, and could not be excluded while determining the taxable turnover of the assessee.

10. Both these cases emphasise the fact that expenses incurred by a seller on

freight would be part of the sale price, as until the transfer of title to the goods takes place that being the only mode in which sale could have taken place prior to the introduction of Clause (29A) in Article 366 of the Constitution there would be no sale.

11. Learned counsel also drew our attention to the decision of the apex Court in the case of *E.I.D. Parry. (I) Ltd. v. Assistant Commissioner of Commercial Taxes* [2000] 117 STC 457. The question considered therein was the ineluctability of transport subsidy given by the sugar manufacturer to the cane growers, who, under the terms of the contract were required to supply the sugarcane at the factory. The subsidy so given was held by the court to be part of the price as that amount had been given by the manufacturer, no doubt, to secure the supply of the goods from the grower/seller. The court in that case did not consider Rule 6(c) framed under the Tamil Nadu General Sales Tax Act, 1959, as there was no occasion to refer to the same.

12. It is no doubt true that Rule 6(c) of the Rules permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of the definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n), respectively, of the Act. "Turnover" is defined in the Act, inter alia, to mean "the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in Clause (n)....". "Sale" is defined in Section 2(n), inter alia, as meaning "every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration...". The definition goes on to include a number of other transactions also within that definition of "sale". The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold, which form part of the turnover and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale".

13. When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".

14. The decision of this Court, in the case of *S. Vadivel Mudaliar and Sons v. State of Tamil Nadu* [1983] 52 STC 189, merely examined the words in Rule 6(c), without considering the effect of the definitions of "turnover" and "sale" and also without referring to the decisions of the apex Court in the case of *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* [1969] 24 STC 487 and *Dyer Meakin Breweries Ltd. v. State of Kerala* [1970] 26 STC 248. The decision of the apex Court in *Hindustan Sugar Mills Ltd. v. State of Rajasthan*

[1979] 43 STC 13 has considered elaborately the various modes in which also can be effected. Having regard to that decision, which also has not been noticed in *S. Vadivel Mudaliar and Sons and Another Vs. The State of Tamil Nadu*, , it must be held that the law declared by this Court in the case of *S. Vadivel Mudaliar and Sons v. State of Tamil Nadu* [1983] 52 STC 189, cannot be regarded as having laid down the law correctly, as it has been decided ignoring the binding decisions of the apex Court.

15. In the case of *K.K. Mohammed Ebraheem Sahib and Sons Vs. The State of Tamil Nadu*, the court referred to the decisions of the apex Court reported in [1969] 24 STC 487 (*Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh*) and [1970] 26 STC 248 (*Dyer Meakin Breweries Ltd. v. State of Kerala*). The facts of that case as set out in that judgment, show that the price fixed there was a price ex-tannery, freight and loading charges being separately charged for. The goods were transported at the risk of the purchaser. It was in that background that the court held that the freight separately charged for did not constitute a pre-sale expense. The court found that the facts in that case were similar to the facts in the case of *Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh*, .

16. As the freight charge incurred here was a charge which the seller was required to incur prior to the completion of the sale it constituted a part of the pre-sale expense and was, therefore, rightly includible in the taxable turnover.

17. We find no infirmity in the order of the Tribunal calling our interference. The writ petition is, therefore, dismissed.