

(1990) 06 MAD CK 0048
In the Madras High Court
Case No : T.C. No. 1034 of 1980

L and t Mcneil Limited

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 28-06-1990

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2

Citation : (1990) 06 MAD CK 0048

Hon'ble Judges : K.S. Bakthavatsalam, J;K. Venkataswami, J

Bench : Division Bench

Advocate : K.J. Chandran, for the Appellant; R. Karuppan, Additional Government Pleader (Taxes), for the Respondent

Judgement

K.S. Bakthavatsalam, J.—The short point for consideration in this tax revision case is whether the "commitment charges" collected by the assessee by way of interest on the sale price and which was not paid up to the time of the goods would form part of the "taxable turnover" under the Tamil Nadu General Sales Tax Act, 1959.

2. The short facts leading to the filing of the tax revision case are as follows :

The assessment year with which we are concerned is 1976-77. On July 14, 1973, the Madras Rubber Factory placed orders with the assessee for supply of eight numbers of tyre curing presses at Rs. 8,10,000 each. Again a sale order was placed for supply of twelve numbers of the same kind of presses at Rs. 8,81,500 each on October 24, 1973. Against the first purchase order dated July 14, 1973, for eight presses, four presses were not taken delivery of by the Madras Rubber Factory till April 2, 1976. Against the second order dated October 24, 1973, for twelve presses, no press was taken delivery of till the same date. As such, the terms of these two contracts were revised by what was called a package deal on April 2, 1976. According to this package deal, final billing price of each of the four presses to be taken delivery of under the first order was fixed at Rs. 9,22,181. With regard to the second purchase order for twelve presses, the order

was cancelled for four presses and for the balance of eight, the final billing price was fixed at Rs. 10,96,000 per press. It was also agreed that the Central sales tax, local taxes, duties, levies, etc., would be charged extra at the prevailing rate at the time of delivery. With regard to the purchase order dated July 14, 1973, the four presses were agreed to be taken delivery of by October 29, 1976 and a contingency provision was made to the effect that in case any export order was received by the Madras Rubber Factory for any of these presses it agreed that it would pay cash for the four presses by October 29, 1976, if it could not arrange payment under I.D.B.I. scheme. It was also agreed that delivery order would be issued by the assessee on receipt of the I.D.B.I. documents. A term was introduced in the contract with regard to the payment of interest. The term "interest" was later changed as "commitment charges" as requested by the Madras Rubber Factory on September 28, 1976. The Madras Rubber Factory agreed to pay the assessee interest at 16 per cent on the outstanding account against the four presses covered by the purchase order dated July 14, 1973. The outstanding amount was calculated as follows :

Four presses at Rs. 9,22,181 each Rs. 36,88,724.00 Less : Advance received Rs. 6,31,800.00 ----- Rs. 30,56,924.00 -----

Interest was calculated from April 1, 1976, up to the date of delivery. The said amount has to be paid in two instalments. The first instalment was payable for the period from April 1, 1976 to September 30, 1976, on October 3, 1976 and the second instalment of interest from October 1, 1976, to the date of delivery of the press was to be paid before the delivery of the presses.

Similar terms were agreed to in respect of the eight presses covered by the second purchase order dated October 24, 1973. The assessment officer proposed to tax the amount of "commitment charges" to the tune of Rs. 3,82,749. Though objection was raised by the authorised employee on January 25, 1978, the assessee did not appear before the assessing authority and hence the assessing authority arrived at the taxable turnover including the "commitment charges". The assessee preferred an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, after examining the contract, came to the conclusion that in the present case there is no sale before the entire price is paid and also the interest, and as such he came to the conclusion that the amount described as "interest" or "commitment charges" are part of the money consideration for the goods. The Appellate Assistant Commissioner was of the view that unless the "interest" or "commitment charges" are paid, the assessee would not have dispensed with the machines in pursuance of the contract and as such the "interest" or the "commitment charges" have to be included in the sale price as part of the price of the presses. In this view of the matter, the Appellate Assistant Commissioner confirmed the assessment and dismissed the appeal preferred by the assessee. On further appeal to the Tamil Nadu Sales Tax Appellate Tribunal, Madras, the Tribunal after considering the materials placed before it, held as follows :

".... On a consideration of the materials placed before us, we are of the view that the agreement providing for the payment of interest called commitment charges up to the time of delivery over and above the price agreed upon would amount to an escalation of the sale price agreed upon, depending on the actual time of payment and delivery of the goods. Section 2(r) of the Tamil Nadu General Sales Tax Act defines "sale" as meaning every transfer of property in goods for cash or for deferred payment or other valuable consideration and "turnover" as the "aggregate amount" for which goods are bought or sold. The "aggregate amount" will include all payments made in consideration of the sale. In this case, instead of making a further revision of the sale price to compensate for the delay in payments in view of the time-schedule fixed by the package deal, the parties agreed to the payment of commitment charges by way of interest on the outstanding up to the time of delivery. The terms of the package deal do not indicate that there was a credit sale for the amount fixed and agreed upon on the date of the deal and that interest was to be paid for subsequent period. We, therefore, agree with the lower authorities that the commitment charges form part of the consideration for sale and have been rightly included in the taxable turnover."

The above order of the Tribunal is challenged by the assessee before us.

3. Mr. K. J. Chandran, learned counsel appearing for the assessee, contends that the "interest" or "commitment charges" paid by the assessee cannot be taken into account as part of the sale price and cannot be included in the taxable turnover. The contention of the learned counsel appearing for the petitioner is that the parties bargained for a particular price with regard to each press, that invoices were also raised separately, one for the price of the press and another for the payment of "commitment charges" and that as such the "commitment charges" cannot be included in the taxable turnover. The learned counsel further argues that in view of the explanation (3) to section 2(n) of the Tamil Nadu General Sales Tax Act, it is a case of sale of ascertained goods and it has to be taken as a sale taken place at the time of the contract of sale. The learned counsel relies upon the decisions in *State of Madras Vs. Baliga Lighting Equipment (P.) Ltd.*, and in *Food Corporation of India v. State of Kerala* [1988] 68 STC 1 (SC).

4. Mr. R. Karuppan, learned Additional Government Pleader (Taxes), argues that the order of the Tribunal is not erroneous in law and that the Tribunal has rightly come to the conclusion that the "commitment charges" have to be included in the taxable turnover.

5. It is necessary to extract certain provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act") to decide the question raised by Mr. K. J. Chandran, the learned counsel appearing for the assessee. Section 2(r) defines "turnover" which is to the following effect :

""turnover" means the aggregate amount for which goods are bought or sold or

supplied or distributed by a dealer either directly or through another, on his own account or on account of other whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover."

Section 2(q) of the Act defines "total turnover" which is to the following effect :

""total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax."

Section 2(p) of the Act defines "taxable turnover" which is to the following effect :

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

Explanation (3)(a) to section 2(n) of the Act is to the following effect :

"The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State -

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) where there is a single contract of sale or purchase of goods, situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places."

The definition as extracted above clearly shows that the total amount charged as the consideration for the sale is to be taken into account for determining the turnover. In every transaction of sale, there is bound to be a seller at one end and a buyer at the other end and transfer of title in the goods takes place for a consideration. In *Hindustan Sugar Mills v. State of Rajasthan* [1979] 43 STC 13, the Supreme Court has observed as follows :

"..... The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale ...

Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily, it is not shown as a separate item in the bill, but it is included in the price charged by him. The "sale price" in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But, even so, it would be part of the "sale price" because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill"

This Court, quoted with approval the following passage in the judgment of Goddard, L.J., in *Love v. Norman Wright (Builders) Ltd.* [1944] 1 All ER 618, in *George Oakes (P.) Ltd. Vs. State of Madras*, in which it is observed as follows :

"..... Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up to cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller had included tax or not So far as the purchaser is concerned, he pays for the goods what the seller demands, viz., the price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover"

In another reported case in *Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar*, the Supreme Court quoted with approval a passage from the judgment of the Privy Council in the case of *Bank of Chettinad Ltd. v. Commissioner of Income Tax* [1940] 8 ITR 522 and in which the Supreme Court has stated :

"..... The taxing authority is entitled and is indeed bound to determine the true relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But the legal effect of a transaction cannot be displaced by probing into the "substance of the transaction" ".

In view of the principles laid down by the Supreme Court, there is no doubt that the "commitment charges" have to be included in the taxable turnover. We are of the opinion that the Tribunal was right in saying that the sale was completed only on payment and not earlier nor was there an appropriation to the contract when the goods were ordered or manufactured. We are of the view that the "commitment charges" are linked to the payment and delivery and they form part of the consideration for the sale of goods which took place only at the time of delivery. In our view, the aggregate amount received by the assessee will include all payments made in consideration of the sale. We are not able to agree with the contention of Mr. K. J. Chandran, the learned counsel appearing for the petitioner, that the "interest" and "commitment charges" are something different and they cannot be included in the taxable turnover. We are of the view that instead of making a further revision of the sale price to compensate for the delay of goods, the parties agreed to the payment of "commitment charges" by way of interest on the outstanding up to the time of delivery. We are also of the view that it cannot be disputed that it is a credit sale. The terms of the package deal do not indicate that there was a credit for the amount fixed and agreed upon on the date of the deal and that interest was to be paid for subsequent period. So also, we are not impressed upon the argument based on explanation (3) to section 2(n) of the Act. In our view, the argument of the learned counsel appearing for the assessee, with regard to section 2(n) of the Act, has to be rejected since that section has nothing to do with the transaction on hand and that provision is only about the "situation" of the sale. In our view, "interest" or "commitment charges" have to be included in the taxable turnover of the assessee.

6. We do not think the decision cited by Mr. K. J. Chandran, the learned counsel appearing for the assessee, which is reported in *Food Corporation of India v. State of Kerala* [1988] 68 STC 1, applies to the facts of the case on hand. That case was about the administrative surcharge and price equalisation charge due to Government from retailers and the Supreme Court in that case has held that those two items were never part of the price and that the price in fact was specifically determined under a separate provision of the agreement. So also, the decision relied upon by the learned counsel for the assessee, which is reported in *State of Madras v. Baliga Lighting Equipment (P.) Ltd.* [1969] 23 STC 154, a Division Bench of this Court has held that the insurance charges incurred to cover the risk in transit of the goods cannot be included as part of the turnover under rule 6 of the Madras General Sales Tax Rules, 1959. We are of the view that that case is distinguishable from the facts of the case on hand. In the view we have taken that "commitment charges" or "interest" form part of the sale price which have to be included in the taxable turnover of the assessee, the tax revision case is dismissed. However, there will be no order as to costs.

7. Petition dismissed.