

**(2006) 07 KL CK 0023**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) No. 12877 of 2006**

Madras Cements

APPELLANT

Vs

Assistant Commissioner (Audit Assessment)

RESPONDENT

**Date of Decision : 18-07-2006**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 19(1), 301  
Kerala Value Added Tax Act, 2003 — Section 11(9), 2, 2(1), 22(1), 24  
Kerala Value Added Tax Rules, 2005 — Rule 10, 58(10)  
Sales of Goods Act, 1930 — Section 2(10)

**Citation : (2006) 3 KLT 626 : (2006) 147 STC 626**

**Hon'ble Judges : K. Balakrishnan Nair, J**

**Bench : Single Bench**

**Advocate : C. Natarajan, K.B. Mohammed Kutty, K.Srikumar, Premjit Nagendran, K.M. Firoz, N. Balakrishnan Nair and A. Kumar, for the Appellant; Raju Joseph, Spl. Government Pleader (Taxes), for the Respondent**

**Final Decision : Dismissed**

## **Judgement**

K. Balakrishnan Nair, J.—The petitioners in these Writ Petitions, except the petitioner in W.P.(C) 16114/2006, are manufacturers of cement. The petitioner in W.P.(C) 16114/2006 is a dealer in heavy vehicles. They have approached this Court, mainly, challenging Clause (ii) of Explanation 111 to Section 2(lii) of the Kerala Value Added Tax Act, 2003. The said explanation has been introduced by an amendment (Act 39 of 2005) published on 28.8.2005 with retrospective effect from 1.4.2005. The brief facts pertaining to each of the cases are summarised below:

W.P.(C) 12809/2006

2. The petitioner is a public limited company, incorporated under the Companies Act. It is a registered dealer under the K.V.A.T and C.S.T. Acts. It is engaged in the manufacture and sale of cement in the southern States, including Kerala. The petitioner used to allow trade discount to the wholesale dealers and retail

dealers, according to the practice, normally prevailing in the trade. The normal trade practice was to allow discount for prompt cash payments, target achievements etc. The above discounts, allowed as a regular trade practice, were being deducted from the total turnover, as per the provisions of the Kerala General Sales Tax Act. Even if the discount was allowed not at the time of actual sale, but on a later date, say, at the end of the month, which did not make any difference, it was treated as a trade discount and deducted from the total turnover. The said practice, concerning diminution of the sale price by the grant of discount, was recognized and the benefit was enjoyed by the dealers under the K.V.A.T. Act 2003 also. The definition of "sale price" contained in Section 2 (xliv) of the said Act reads as follows:

sale price "means the amount of valuable consideration received or receivable by a dealer 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 or services at the time of or before delivery thereof, excise duty, special excise duty or any other duty or taxes except the tax imposed under this Act.

The relevant portion of Section 2(iii) defining turnover reads as follows:

turnover" means the aggregate amount for which goods are either brought or sold, supplied or distributed by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or for other valuable consideration, provided that the proceeds of the sale by a person not being a Company or Firm registered under the Companies Act, 1956 (Central) Act 1 of 1956) and Indian Partnership Act, 1932 (Central Act 9 of 1932) of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

The definition of turnover also contained provisions for excluding discounts. Explanation III (ii) of Section 2(lii) before its amendment by Act 39/2005, reads as follows:

Any cash discount on the price allowed in respect of any sale where such cash discount is shown separately or any amount refunded in respect of articles returned by customers shall not be included in the turnover.

The main part of the definition "sale", contained in Section 2(xliii), reads as follows:

"sale" with all its grammatical variations and cognate expressions means any transfer whether in pursuance of a contract or not of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

When these provisions are read together, the discounts allowed by the petitioner

to the purchasing dealer during the return period, were liable to be deducted from the turnover, it is submitted. But, while so, an amendment was introduced to the Kerala Value Added Tax Act, by Act 39/2005, with effect from 1.4.2005. The said amendment was notified on 28.8.2005. As per that amendment, Clause (ii) of Explanation III to the definition "turnover" contained in Section 2(lii) was amended. The said amended clause reads as follows:

Any discount on the price allowed in respect of any sale where such discount is shown separately in the tax invoice and the buyer pays only the amount reduced by such discount: or any amount refunded in respect of goods returned by customers shall not be included in the turnover.

With the introduction of the said amendment, discount which can be deducted from the turnover is the one, included in the tax invoice. Tax invoice, as per the definition in Section 2(xlix), includes a bill of sale containing such particulars as may be prescribed. The petitioner, bonafide believing that exemption will be granted to the discount allowed, filed the monthly returns accordingly. The 2nd respondent assessing authority issued Ext.P1 series notices, proposing to reject the returns filed by it. The petitioner filed Ext.P2 reply. While so, the 3rd respondent issued Ext.P3 pre-assessment notice u/s 24 of the KVAT Act, 2003. The petitioner filed Ext.P4 detailed objection. It is also submitted that after the introduction of the amendment, the petitioner is showing the discount allowed by it in the tax invoice itself. The petitioner further submits that denial of the benefit of trade discount, while computing turnover, for the reason that it is not included in the bill of sale, is arbitrary, irrational and unconstitutional. So, it prays to declare that the amendment introduced to Clause (ii) of Explanation III to Section 2(lii) is unconstitutional. The petitioner also seeks consequential relief of quashing Ext.P1 series notices and Ext.P3 pre-assessment notice.

W.P.(C) 12877/2006

3. The contentions of the petitioner herein, who is a manufacturer of cement, are identical to those of the petitioner in W.P.(C) 12809/2006. In this case, apart from challenging the amendment introduced to Clause (ii) of Explanation III to the definition of turnover, it also challenges the deletion of Rule 10(a) of the K.V.A.T. Rules with retrospective effect from 1.4.2005. In this case, the 1st respondent rejected the monthly returns filed by the petitioner for the period from April 2005 to August 2005, overruling its objections and passed the assessment orders Exts.P3 to P7, on 17.4.2006. The petitioner also seeks to quash those assessment orders.

W.P.(C) 15425/2006

4. In this case, apart from challenging Clause (ii) of Explanation III to Section 2(lii), defining turnover, the petitioner also challenges the newly introduced Explanation VII to the said provision. The petitioner herein has been served with Ext.P 10 series notices by the 2nd respondent u/s 22(1) of the K.V.A.T. Act, proposing to reject the returns filed by it, for the period from August 2005 to

January 2006. It also challenges the said notices in this Writ Petition.

W.P.(C) 16114/2006

5. The petitioner herein is a dealer in heavy vehicles. It challenges the amendment to Clause (ii) of Explanation III to Section 2(1ii). Apart from that the petitioner also challenges Ext.P3 notice issued u/s 67(1)(d) of the K.V.A.T. Act, proposing to impose penalty on it for the irregularities in the returns for the months of April 2005 to December 2005.

W.P.(C) 16162/2006

6. The petitioner herein challenges the amendment to Clause (ii) of Explanation III to Section 2(lii) and also the newly added Explanation VII to that Section. It also challenges Ext.PIO series notices, issued u/s 24(2) of the K.V.A.T. Act by the 3rd respondent, concerning the assessments for the months from April 2005 to February 2006. Challenge is also made against Ext.P12 series assessment orders passed by the 3rd respondent, in respect of the above period, rejecting Ext.PI 1 reply, submitted by the petitioner.

W.P.(C) 16174/2006

7. The petitioner herein challenges the amendment to Clause (ii) of Explanation III to Section 2(lii) of the K.V.A.T. Act and also Explanation VII to the said Section.

8. Since the main challenge in these writ petitions was to a statutory provision, the respondents did not file any counter affidavit. Heard the learned Counsel on both sides. Sri .C. Natarajan. senior counsel, Dr. K.B. Mohammedkutty, senior counsel, and learned Counsel M/s. K.Srikumar, Premjit Nagendran and A.Kumar addressed arguments on behalf of the Writ Petitioners. Sri.Raju Joseph, learned Special Government Pleader (Taxes) appeared for the State.

9. The learned Counsel for the petitioners submitted that the trade discounts granted by the petitioners to their dealers can, never, be treated as part of the sale price, for the reason that the discount is allowed by issuing credit notes during the month end or subsequently. The same cannot be included in the sale price, for the reason that the discount was not shown in the bill of sale. The legislative Entry 54 of List II only enables to levy tax on sale or purchase of goods. In exercise of that power, the legislature is not competent to provide an artificial meaning to sale price. Discount is never treated as part of the sale price. If the present amendment, by which Clause (ii) of Explanation III has been amended, is allowed to stand, it will amount to levying tax on something, which does not form part of sale price. Therefore, such an amendment is ultra vires of the provisions of the Constitution. The same being arbitrary, violates the fundamental rights of the petitioners under Article 14 of the Constitution of India. The amendment also violates their fundamental rights under Article 19(1)(g). The same also offends Art-301 of the Constitution of India, it is submitted. Amplifying the above points, the learned senior counsel Sri.C.Natarajan

submitted that the Kerala Value Added Tax Act provides for filing returns, not only on monthly basis, but also, for quarterly and yearly self assessments/ assessments. So, the credit notes issued during the return/assessment period can be reckoned. The operation of the Act is not confined to individual sales/tax invoices. The scheme of the Act does not exclude the consideration of ancillary documents such as credit notes, for determining turnover. The charging provision, namely, Section 6 declares that the charge of tax is on the sales or purchase of goods, as provided in the Act and the liability to pay tax will depend upon the taxable turnover, which in turn, is the aggregate of the sale consideration. The credit note cuts down the sale consideration receivable by the seller. It diminishes the price and therefore, the discount given in the form of credit note is outside the price. There can be no tax on something, which does not come within the purview of price. In support of the above submissions, reliance is placed on *State of Tamil Nadu v. Ultramarine and Pigments Limited* (1980) 46 STC 220 (Mad.), *The State of Madras Vs. Jeewanlal (1929) Ltd.*, , *The Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Advani Oerlikon (Private) Limited*, and *D.G. Law v. Advani Oerlikon (Private) Limited* 45 STC 32 (SC). These decisions hold that discount does not form part of the sale price. It is further added that the definition of tax invoice is an inclusive definition. It includes bill of sale and ancillary documents to the invoice. The explanation cannot restrict the provisions like the definition clauses for sale, sale price, turnover etc. Price has a definite legal connotation and it is an essential component of sale. So, the legislature cannot artificially define price. Such a definition will render the provision unconstitutional. In support of the above submission, reliance is placed on the decisions in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and *Mc Dowell and Co. Ltd. v. State of Kerala and Ors.* (2002) 10 KTR 652 (DB). A few decisions under the Central Excise Act were also cited, to show that trade discount is excluded, to arrive at wholesale price.

10. The learned senior counsel Dr.K.B.Mohammedkutty also supported the above contentions. The learned Counsel further submitted that the requirement of showing discount in the tax invoice was not a requirement between the period 1.4.2005 and 28.8.2005. Therefore, the retrospectivity given to the amendment will seriously prejudice the Writ Petitioners. It is something impossible of performance now, to issue trade invoice, showing discounts with retrospective effect. So, in any view of the matter, it is contended that the retrospectivity given to the amendment is ultra vires and unauthorised. The learned senior counsel also pointed out that the deletion of Rule 10(a) of the K.V.A.T. Rules with retrospective effect from 1.4.2005 is unauthorised by the provisions of the Act. The learned Counsel appearing in the connected cases supported the above contentions.

11. The learned Special Government Pleader pointed out that cement under the K.G.S.T. Act was a single point commodity and therefore, tax was collected only at the point of first sale and all subsequent sales were exempted. Though,

monthly returns were filed under the K.G.S.T. Act the assessments were done only annually, on the basis of the annual returns and corresponding accounts. So, there was no difficulty to take into account, the discounts given by the manufacturer. If discounts are subsequently given, the proportionate tax collected from the purchaser will be returned to him. But the learned Special Government Pleader points out that under the VAT system, sale at every point is taxable. The tax paid by the dealer is known as input tax and the tax collected by the dealer is known as output tax. A dealer paying input tax can deduct the amount of tax paid from the output tax to be paid and the balance alone need be paid to the exchequer. Normally, in the case of cement, there will be three sales before it reaches the consumer. The first sale is from the manufacturer to the wholesale dealer, who, in turn, will sell it to the retail dealer. From the retailer, it is sold to the consumer. u/s 11(9) of the K.V.A.T. Act, in order to claim input tax credit, the purchasing dealer shall obtain and keep the purchase invoice, showing the input tax paid by him. Sub-rule(10) of Rule 58 of the K.V.A.T. Rules stipulates that every seller shall issue a bill or invoice or cash memorandum in respect of every sale, in Form No. 8. Form No. 8 would show that the details to be entered in it, include taxable value and the tax collected. A manufacturer, who is selling goods to the wholesale dealer, should issue a cash memorandum in Form No. 8. showing the sale price as well as the tax amount. The purchasing dealer can avail input tax credit when he effects sale. The input tax credit is calculated on the basis of the tax invoice. The dealer, who purchases goods from the manufacturer when makes sale to the retailers, collects tax on the basis of the selling price and from the tax, so collected, the input tax already paid by him, is deducted and the balance alone is paid to the State. The retailer, who effects sale to the consumer will collect tax, on the basis of his selling price and after adjusting the tax paid by him as input tax, the balance is paid to the State, as output tax. Thus, from the chain of events, it can be seen that the tax paid by the last seller alone, is received by the State, as the payments made by the earlier dealers are reimbursed to them, from the tax collected by them. The learned Special Government Pleader further points out that cement, being a perishable commodity, it cannot be stocked for long. Every month, there will be a lot of purchases and sales. By the time, the discounts are received at the end of the month or quarter or year, the stock is already sold out and tax is collected from the consumer. So, if discounts are allowed after the sale is effected, the differential tax will be retained by the dealer/manufacturer. No dealer can retain the tax collected by him. He should pay it to the State exchequer. The learned Special Government Pleader added that the above position was in existence with effect from the date of enforcement of the K.V.A.T. Act. Explanation III(ii) to the definition of "turnover" did not insist that cash discounts should be shown separately in the invoice. Rule 10 of the K.V.A.T. Rules also did not specifically insist for showing cash discount in the tax invoice. Rule 10(a) only insisted that all amounts allowed as cash discount, shall be deducted from the total turnover of the dealer, provided such discount is allowed in accordance with the regular practice in the trade and also that the accounts show that the purchaser has paid

only the sum originally charged, less the discount. By the amendment, it is now clarified that the discount allowed should be shown separately in the tax invoice. In view of the said clarification, Rule 10(a) became redundant and was deleted with retrospective effect. In the light of the decisions of the Apex Court, clarificatory legislation is always retrospective. Therefore, the challenge to the retrospectivity given to the amendment is not sustainable, it is contended.

12. The learned Special Government Pleader added that the contention of the learned Counsel for the petitioners that the impugned provisions violate Articles 14 and 19(1)(g), is made without any basis. The contention that the present amendment goes beyond the powers conferred on the legislature, under Entry 54 of the State List of the 7th Schedule to the Constitution, is also unsustainable. It is trite law that every legislative entry is a field of legislation and the respective Legislatures can legislate on all aspects, which will reasonably come within the scope of the legislative field. The legislature is competent to make provision on discounts. In fact, the discount given by way of credit notes, is an incentive given to the dealers to do more business for the manufacturer. Further, Section 7 never prohibited reckoning of trade discount. The contention that the impugned amendments will be hit by Article 301 of the Constitution of India, is plainly unsustainable. The challenge to the deletion of Rule 10(a) is also unsustainable, for the reason that the Rule was redundant, in view of the provisions in the Act, it is submitted.

13. The learned Special Government Pleader also submitted that the explanation newly introduced to Clause (ii) of Explanation III to Section 2(lii), in no way, runs counter to the provisions contained in the Sale of Goods Act, especially, in view of the definition of "price" contained in Section 2(10) of the Sale of Goods Act, 1930. He further points out that the decisions relied on by the learned Counsel for the petitioners were rendered under the provisions of the earlier enactments like Tamil Nadu Sales Tax Act. K.G.S.T. Act and Central Sales Tax Act. In view of the provisions contained in the K.V.A.T. Act, providing for input tax credit, the decisions under the earlier enactments can have no application, while interpreting the provisions of the said Act, it is submitted. In support of his submissions, the learned Special Government Pleader relied on the decisions in *Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another*, and *India Pistons Ltd. Vs. State of Tamil Nadu*, and also a few other decisions.

14. The short point that arises in these Writ Petitions, is whether the cash discount given through credit notes, subsequent to the date of sale, but within the return/assessment period, should be deducted from the turnover, which is the aggregate sale consideration. I feel that the same can be decided, without any difficulty, by referring to the relevant provisions of the Act. The legislature is always competent to make a provision, concerning, how the claim for deduction of discount in the sale price can be allowed. Going by Form No. 8, prescribed under Rule 58(10) of the K.V.A.T. Rules, it was obligatory to show the gross value, the cash discount and the net value, apart from taxable value and tax

amount. So, tax is collected for the taxable value, which is the aggregate of the net value and excise duty, if any, payable. The net value is arrived at, by deducting the cash discount from the gross value. So, even if subsequently, some cash discount is given, by issuing a credit note, the same cannot be treated as a deduction on the sale price. The pleadings in these Writ Petitions would show that trade discount given on the price shown in the list always reflects in the tax invoice and is never treated as part of the turnover. But, cash discount in the form of credit notes are subsequently given for prompt payment of the sale consideration and also for achieving targets in the sales. Though, they are called as cash discounts in fact those payments are incentive payments, which cannot be treated as part of the sale price. As rightly pointed out by the learned Special Government Pleader, the goods received from the manufacturer by the wholesale dealer are re-sold to the retailer and from there, to the actual consumer, who bears the entire tax burden. By the time cash discount is given, all these transactions may take place. The cash discount can be deducted from the sale price, if only it is shown that the wholesale dealer has made the sale after the receipt of the cash discount and the benefit of the cash discount has been given to the retailer, who, in turn, has passed the benefit to the consumer. Without any such claim or materials, the claim made by the petitioners that the cash discount paid by them to their dealers should be given credit in the sale price, cannot be accepted. Further, along with every sale covered by the bill of sale, the manufacturer has collected tax. He cannot appropriate a portion of it, on the ground that subsequently, he has given some discount to his dealer.

15. The contention of the petitioners that the non-exclusion of cash discount from the sale price, for the reason that the same was given subsequent to the sale, is ultra vires of the provisions of the Constitution, cannot be accepted. It is well settled law that every legislative entry is only a field of legislation and the legislature, subject to the limitations in the Constitution, has got plenary powers to legislate under the relevant field. So, if the State Legislature provides that cash discount will be excluded from the sale price, if only it is shown in the tax the same is perfectly within jurisdiction and intra vires. The contention of the petitioners that the same runs counter to the concept of sale and sale price, as explained by the Courts, cannot be accepted. The Courts can say only, what is the law or what was the law. But, the legislature can say, what should be the law. The said power has been invoked in this case. Under our Republican Constitution, the people, through their delegates in the legislature, decide what are the laws which should govern them. The courts, which are answerable only to Law and God under our constitutional scheme, have only the power to interpret the law. If the courts are to make law and claim that the same will bind the legislature, the same will amount to disturbing the constitutional symmetry. In this context, it is apposite to quote the words of Abraham Lincoln in his second inaugural speech, which read as follows:

The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of



the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their own government into the hands of that eminent Tribunal.

16. On merits also, the case of the petitioners is unsustainable. The legislature has not provided that something, which is not part of the sale price, shall be treated as sale price. It has expressly excluded discounts, including cash discount, as evident from Rule 58(10) and the Form prescribed thereunder. The newly introduced explanation provided only a clarification, as to how can avail the benefit of cash discount. Therefore, the challenge made against the newly introduced Clause (ii) of Explanation III to the definition of turnover, is unsustainable. The same is the case of the challenge against Explanation VII thereto. The actual tax payer is the consumer. The dealers only collect the tax and pay it to the Government. By the introduction of this Explanation, neither the fundamental rights of the petitioners under Article 14 or Article 19(1 )(g) nor their constitutional rights under Article 301 of the Constitution are affected. The contentions urged in this regard are plainly unsustainable, as they are made without any supporting materials or arguments. Therefore, the challenge to the amendments mentioned above and to the deletion of Rule 10(a) is repelled. Having regard to the nature of the dispute raised for decision in this case, I feel that it is unnecessary to refer to the decisions cited by both sides in detail.

17. An explanation newly introduced, can operate retrospectively. It only explains what was always there. The said principle will squarely apply to this case. Further, the contention that the explanation is modifying the main provision, is also not sustainable. The VAT Act, which provides for taxation at multi point sales and adjustment of input tax, also contemplates collection of tax on price reduced by discount, which should reflect in the bill of sale, as evident from Form 8. The claim of the petitioners that retrospective exclusion of the cash discount will seriously prejudice them, as they have already given cash discount, cannot be accepted. The petitioners have collected tax from the dealers, as per the bill of sale, which is in Form No. 8. Therefore, they are bound to pay it to the Government. If the contention of the petitioners is accepted and the tax liability is reduced, based on the cash discount subsequently given, the petitioners will be keeping a portion of the tax they have already collected from the purchasing dealers. That will amount to unjust enrichment. So, the claim of the petitioners for relief, at least in relation to the period from April to August, 2005 also cannot be accepted.

In the result, the Writ Petitions fail and they are dismissed.