
(2007) 04 AHC CK 0142
In the Allahabad High Court

Moriroku Ut India Pvt. Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-04-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 366

Citation : (2007) 7 VST 482

Hon'ble Judges : Ran Vijai Singh, J;B.S. Chauhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Moriroku UT India (P) Ltd. Vs. State of U.P. and Others, (2008) 3 CLT 3 : (2008) 224 ELT 365 : (2008) 3 JT 508 : (2008) 4 SCALE 27 : (2008) 4 SCC 548 : (2008) 15 VST 559

B.S. Chauhan, J.—This writ petition has been filed for quashing the circular dated June, 2003 (annexure 1), issued by the Commissioner, Trade Tax, U. P., restraining respondent No. 3, the assessing authority, from imposing any tax on the child parts supplied by the customer to the petitioner-manufacturer free of cost or on the amortisation cost in respect of moulds and toolings given by the customer for the manufacturing of parts; and for quashing the consequential notices dated November 27, 2003 for the assessment year 2001-02 and dated December 27, 2003 for the assessment year 2003-04, issued by the assessing authority.

2. The facts and circumstances giving rise to this case are that the petitioner, a company registered under the Indian Companies Act, 1956, is a manufacturer of plastic automobile components. The petitioner is also manufacturing parts for use in the Honda Car being manufactured in India by Honda Siel Cars India Limited (hereinafter called, "the customer"), as per the designs and specifications given by it. The customer supplies tools, dyes, moulds and some child parts free of cost to the petitioner to enable it to manufacture motor parts for the customer.

The customer retains the rights to inspect and verify the condition of such moulds, dyes and tools in the premises of the petitioner and the goods are manufactured exclusively for the said customer. For the year 2000-01, a final assessment order was passed on October 29, 2002 under the provisions of the U. P. Trade Tax Act, 1948 (hereinafter called, "the Act"). Thereafter, a notice u/s 21 of the Act was issued by the assessing authority for reassessment, to which the petitioner submitted reply. While passing the reassessment order dated September 30, 2003, tax has also been imposed on the amount of amortisation costs, on the ground that the sale price of the finished goods should be the same which was the assessable value for the purpose of Central Excise Act. Being aggrieved, the petitioner preferred an appeal u/s 9 of the Act. However, the petitioner apprehends that ignoring the agreement between the petitioner and the customer, the assessing authority under the Act would again impose liability on the cost of child parts and amortisation cost, in view of the impugned circular. Hence this petition.

3. Shri Bharat Ji Agarwal, learned Senior Counsel appearing for the petitioner, has submitted that as per Rule 6 of the Central Excise (Valuation) Rules, 2000 (hereinafter called "the Rule 2000"), for determining the assessable value for imposing the excise duty, cost of goods, namely, moulds, dyes, tools and child parts supplied to the petitioner, free of cost for the manufacturing of the goods for the customer is also to be included. In view of the impugned circular, the petitioner is liable to include the amortisation cost and value of child parts, etc., for bearing the liability under the Act, though it has neither been charged by the petitioner nor it is paid to the petitioner. It cannot be treated as part of sale price, nor it could form part of the turnover of the petitioner. The petitioner has entered into a contract with the customer that the moulds, dyes, tools and child parts supplied by the customer shall be exclusively used in manufacturing the parts which would be sold only to the customer. Thus, the ownership of the same remains with the customer. Addition of amortisation cost and value of child parts for the purpose of imposing sales tax is illegal. The impugned circular is binding upon the assessing authority. Thus, the assessment is bound to be in accordance with the said circular. It is, therefore, liable to be quashed.

4. Shri Kesarwani, learned Standing Counsel appearing for the respondents, has vehemently opposed the petition contending that the writ petition is premature. The petitioner must avail the remedy of appeal and revision. The writ is not maintainable against a show cause notice, as it is not the petitioner's case that show cause notice has been issued by the authority having no competence. Such a colourable device of tax planning can neither be entertained nor encouraged nor it can be judicially approved. Supply of the moulds, tools, etc., free of cost is nothing but a novel device of tax evasion. Amortisation cost is to be included while fixing the tax liability of the petitioner. Therefore, the petitioner is bound to pay the tax in terms of the circular.

5. We have heard the learned Counsel for the parties and perused the record.

6. Generally, extraordinary writ jurisdiction is not exercised unless petitioner exhausts the statutory remedies. Thus, first it is required to examine as to whether petition can be entertained or petitioner has to be asked to show cause and plead his case before the notice issuing authority. There is no dispute to the settled legal proposition that the circular issued by the higher authorities is binding upon the assessing authority. The instructions issued by the department are binding on the authorities for the reason that issuing a circular/instruction is intimately conversant not only with the policy of legislation for the purposes of the provisions of the Act but also familiar with the nature and qualities of the commodity and also its use from time to time. Therefore, such notifications/circulars/executive instructions in fiscal statutes are binding. Apart from the fact that circulars of the Board are binding on the tax department, they are in the nature of contemporanea expositio furnishing legitimate aid in the construction of the relevant provisions. More so, it is necessary to issue such circulars to give effect to internal complexity of fiscal adjustment of diverse elements. [Vide The State of Orissa Vs. Dinabandhu Sahu and Sons, , K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , Keshavji Ravji and Co. v. Commissioner of Income Tax : [1990]183ITR1(SC) , Commissioner of Income Tax, Bangalore Vs. Vasudeo V. Dempo, , Collector of Central Excise, Bombay Vs. Jayant Dalal Private Ltd., , Bengal Iron Corporation and another Vs. Commercial Tax Officer and others, , M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, , M/s. Poulouse and Mathen Vs. Collector of Central Excise and another, , British Machinery Supplies Co. Vs. Union of India (UOI) and Others, , Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., and Commissioner of Central Excise, Calcutta-IV Vs. Pandit D.P. Sharma, .

7. A Constitution Bench of the Supreme Court in Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, observed that where the circular issued by the higher authority is binding upon the assessing authorities the writ court should not hold the assessee non-suited only on the ground that he had an alternative remedy and that before he approaches the writ court he should exhaust the same.

8. A Division Bench of this Court in Oudh Sugar Mills Ltd. v. State of U.P. [1995] 97 STC 386 held that the circular so issued required the assessing authorities to follow it in the interest of Revenue, and as the tax is to be imposed ignoring any other decisions of the court on the point, the writ petition should be entertained, even if the assessee has not exhausted the statutory remedies.

9. A similar view has been reiterated in P.N.C. Construction Company Limited Vs. State of U.P. and Others, observing that where the assessing authority is bound by the circular, asking the assessee to show cause pursuant to the notice, would be illusory and a empty formality. Another Division Bench of this Court in Mercury Laboratories Pvt. Ltd. Vs. State of U.P. and Others, held that a circular being binding in nature cannot be issued as it directs the assessing authority to proceed and assess in a particular manner. It also interferes with the judicial

discretion of the assessing authority. While deciding the said case a very heavy reliance has been placed on its earlier judgment in Hindustan Aluminium Corporation Ltd. Vs. The State of Uttar Pradesh and Another, , wherein it had been held that the Commissioner of Trade Tax cannot issue such a direction or instruction or guideline which has overriding effect on the charging section/ notification.

10. A Constitution Bench of the apex court in Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, held that circulars issued by the Central Board of Excise and Customs which provide for a different interpretation from that given by the Supreme Court, to a particular phrase, would be binding upon the Revenue. Therefore, in a case where the circular is binding, the court should not ask the petitioner to avail alternative remedy.

11. Undoubtedly, a show cause notice cannot be challenged in a writ court unless the petitioner satisfies the court that the authority which has issued the notice has no competence to do so.

12. A Constitution Bench of the honourable Supreme Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., held that the question of jurisdiction must be regarded as one of substance but the meaning and implication of this observation should be ascertained only with reference to the context of the facts and circumstances of a given case.

13. In State of U.P. v. Mohammad Nooh AIR 1958 SC 86, the honourable Supreme Court held that if the writ court comes to the conclusion that there had been a breach of fundamental principle of justice, the court should not hesitate in exercising its jurisdiction even if there is an alternative/statutory remedy available to the petitioner.

14. In A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, , the Constitution Bench of the honourable Supreme Court laid down that where there is a complete lack of jurisdiction in any officer or authority who takes the action impugned, the writ jurisdiction should be exercised.

15. The Constitution Bench of the honourable Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , observed as under:

It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue, in a fit case, an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects, or is likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well-settled, will issue appropriate orders or directions to prevent such consequences.

16. A similar view has subsequently been reiterated by the honourable apex

court in Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur, , State of Madras Vs. Madurai Mills Co., Ltd., , S.B. Gurbaksh Singh Vs. Union of India (UOI) and Others, , Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, , Union of India (UOI) and Another Vs. Brij Fertilizers Pvt. Ltd. and Others, , Union of India (UOI) and Others Vs. Upendra Singh, , Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others, , Union of India (UOI) and Others Vs. Metal Box Co. of India Ltd. and Others, and Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

17. While dealing with a similar issue in State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, , the honourable Supreme Court observed as under:

When a show cause notice is issued to a Government servant under the statutory provision calling upon him to show cause, ordinarily the Government servant must place his case before the authority concerned by showing cause and the court should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. An order violating fundamental principles of law and causing substantial injustice to a party may also be examined in a writ jurisdiction.

(Emphasis added)

18. In The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, , the honourable Supreme Court held that whether the show cause notice is founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issue also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court.

19. Thus, in view of the above, there can be no dispute to the settled legal proposition that if an authority purports to take any action which is prima facie shown to be null and void and devoid of any jurisdiction, the show cause notice can also be challenged in writ jurisdiction, and the proceedings can be quashed even at the stage of show cause notice.

20. There is another aspect of the matter. Even if the authority is competent to issue a notice, the court is required to examine the nature of the notice itself, for the reason that in case the notice itself reveals as how the mind of the notice issuing authority is working, and submitting reply to the show cause notice would merely be a formality as it shall not have any favourable result, the recipient of the notice may approach the writ court.

21. In K.I. Shephard and Others Vs. Union of India (UOI) and Others, , it was held as under:

It is common experience that once a decision has been taken, there is a tendency to uphold it, and a representation may not really yield any fruitful

purpose.

22. In *Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others*, , the honourable Supreme Court reiterated the same view placing reliance on its earlier judgments, in *Shri Shekhar Ghosh Vs. Union of India (UOI) and Another*, and *Union of India (UOI) and Another Vs. Kunisetty Satyanarayana*, .

23. In *V.C., Banaras Hindu University and Others Vs. Shrikant*, , while considering a similar case the court observed as under:

The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal ... A post decisional hearing given by the High Court was illusory ...

24. Considering the aforesaid cases in *Siemens Ltd. Vs. State of Maharashtra and Others*, , the honourable Supreme Court held that if the show cause notice is issued with pre-meditation and the authority has applied his mind and formed an opinion as regards the liability or otherwise of the recipient of the notice, writ jurisdiction should be exercised by the court as reply to the show cause notice or hearing would not yield any fruitful purpose.

25. Therefore, it is evident that where the notice itself makes it abundantly clear that the authority has already made up his mind and is likely to pass an order in a particular manner, submission of reply or hearing would be an empty formality. Thus, party be not asked to avail alternative remedy.

26. In the instant case, the circular impugned, is binding on the assessing authority. The impugned notices themselves reveal that reason for giving notice is not adding the amortisation costs while making the payment of tax. Then, it is difficult to imagine that the assessing authority is likely to entertain the pleas of the petitioner. The writ requires to be entertained by the court.

27. As per the agreement dated October 8, 1997, the customer supplied tools, dyes, moulds and some child part to the petitioner to enable it to manufacture motor parts for the customer. The customer retains the rights to inspect and verify the condition of such moulds, dyes and tools in the premises of the petitioner and the goods are manufactured exclusively for the said customer. For the use of tools, dyes, moulds, etc., under the agreement, customer settled the amount which is called the amortisation cost (tooling cost). From the perusal of Bill No. 602 dated August 16, 2000, which is annexure 8, it appears that amortisation cost was fixed at Rs. 757.76 per unit. However, child parts were supplied free of cost. In the column of selling rate per unit amount of Rs. 2,849.78 is mentioned and in the column of tooling per unit a sum of Rs. 757.76 is mentioned. The tax has been paid only on the amount of selling rate per unit plus excise duty excluding tooling charges (which is called amortisation cost).

28. For the year 2000-01, a final assessment order was passed on October 29, 2002 under the provisions of U. P. Trade Tax Act, 1948 (hereinafter called, "the

Act"). Thereafter, a notice u/s 21 of the Act was issued by the assessing authority for reassessment, to which the petitioner submitted reply. Assessing officer passed the reassessment order on September 30, 2003 and levied the tax on the amount of amortisation cost (tooling cost) on the ground that the sale price of the finished goods should be the same the assessable value for the purpose of the Central Excise Act. Being aggrieved, the petitioner preferred an appeal u/s 9 of the Act.

29. We have perused the impugned circular of June, 2000 (annexure 1) issued by the Special Commissioner of Trade Tax and is addressed to all the Additional Commissioners of Trade Tax. In the circular, it has been stated that while making the assessment for the assessment year 2000-01 of Honda India Limited, Greater Noida, it was found that the company is manufacturing and selling the parts for Honda Siel Cars India Limited and in the bill charge excise duty on assessable value, but before charging trade tax, amortisation cost has been deducted and on the balance amount the liability of tax has been accepted and in this way the firm is evading the tax in the garb of amortisation cost.

30. Thus, the circular is only in respect of the amortisation cost. It does not say anything about the supply of child parts free of cost. Neither tax has been imposed on the cost of child parts while passing the reassessment order dated September 30, 2003, nor such an issue had been raised by the Revenue while issuing show cause notice dated September 20, 2003. The court is not supposed to decide academic issues as it would be a futile exercise.

31. The courts are meant to determine the real and alive issues and not the academic questions. (Vide Loknath Padhan Vs. Birendra Kumar Sahu, , Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, , Harsharan Verma Vs. Charan Singh and Others, , Basant Kumar Vs. State of Rajasthan and Others, and M.L. Binjolkar Vs. State of Madhya Pradesh,).

32. Grievance of the petitioner is that the circular is binding upon the assessing authority and in view of the circular it is not expected from the assessing authority to take any different view and, therefore, the validity of the circular on merit is to be examined. The circular only relates to the amortisation cost, therefore, we are confining ourself to the dispute whether the amortisation cost is the part of turnover and liable to trade tax.

33. At the cost of repetition, it is desirable to mention that the submission of the learned Counsel for the petitioner is that the amount which is payable by the purchaser and which is receivable by the seller is the "sale price" which is liable to tax. He submitted that in the present case, the price received by the petitioner was the amount after deducting the amortisation cost from the assessable value, i.e., the amount shown in the column of selling rate and excise duty on which tax was payable. The amount towards amortisation cost was neither received nor receivable. Therefore, it would not be part of the turnover. Mr. Bharat Ji Agarwal, learned Senior Counsel for the petitioner, in order to fortify his submissions

placed reliance upon the judgments in Commissioner of Income Tax, Hyderabad Vs. Motors and General Stores (P.) Ltd., , Central Wines, Hyderabad Vs. Special Commercial Tax Officer, , McDowell and Co. Ltd. Vs. Commercial Tax Officer, and Fertiliser Corporation of India Ltd. v. Commercial Tax Officer (OFA) [1991] 83 STC 129 (AP).

34. The gist of submissions of the learned Standing Counsel is that amortisation cost is for parting the right to use the tools and is in effect a hire charge for transfer of right to use the goods. He submitted that the tools, dyes, etc., provided for use by the customer to the petitioner is transfer of right to use and it is deemed sale within the definition of "sale" u/s 2(h) of the Act and the amount fixed in the name of amortisation cost is a leasing/hire charge. He submitted that the actual price of the part is the amount mentioned in the column of selling rate per unit and the sum incurred is towards the manufacturing or any other sum expended before the delivery of the goods. He submitted that the amount which is payable towards amortisation cost to the customer is in the nature of manufacturing cost for bringing the goods in existence and, therefore, it is a part of the turnover. The petitioner has deliberately not included the amortisation cost in the selling price which was payable to the customer for providing tools, dyes, etc., for use in the manufacturing of parts which was in the nature of manufacturing expenses. He submitted that u/s 4 of the Central Excise Act, excise duty is payable on the normal value of the goods which includes cost of manufacturing plus manufacturing profit and any other expenses before the removal of the goods. Thus, when for the purposes of payment of excise duty, in assessable value (normal value) amortisation cost is included, then there is no reason why it is not includable in the turnover for the payment of trade tax. Mr. Keshewani also tried to support his submissions placing reliance upon the judgments relating to works contract, e.g., M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, , Rashtriya Ispat Nigam Ltd. Vs. State of A.P., , Cooch-Bihar Contractors' Association and Others Vs. State of W.B. and Others, and Karya Palak Engineer, C.P.W.D., Bikaner Vs. Rajasthan Taxation Board, Ajmer and Others, .

35. The relevant parts of the contract between the petitioner and the customer dated October 8, 1997 read as under:

1. Supply of toolings

The "owner" shall supply the toolings to the "supplier" and the "supplier" undertakes that the toolings shall be used for the purpose of manufacture of the parts by the "supplier" exclusively for the "owner", upon the terms and conditions specified hereinbelow in this agreement.

2. Records

(a) Complete details of all toolings given to the "supplier" by the "owner" shall be enumerated in tooling records kept by the "supplier" for this purpose. Such

tooling records shall be furnished to "supplier" by the "owner" at such intervals as may be determined by the "owner". The "supplier" undertakes that the tooling records furnished by the "owner" shall be completed, verified, signed by an authorised representative of the "supplier", and returned to the "owner" within a period of three (3) working days from the date on which the same are furnished to it by the "owner".

3. Owner and identification

(a) The "supplier" acknowledges that the toolings in its possession shall remain the property of the "owner", and that the supplier shall not, in any manner acquire any right, title or interest in the said toolings. The toolings in possession of the "supplier", shall be marked with the following words, "Sole and an absolute property Owned by Honda SIEL Cars India Limited".

7. Non disclosure

(a) The "supplier" shall keep secret and confidential, and not disclose or communicate or permit to be disclosed or communicated (unless otherwise agreed to by the "owner" in writing), the specifications and any other information and knowledge related to the toolings, and use the same only for the manufacture of the parts for the "owner", as requested by the "owner" from time to time.

8. Return

(a) The toolings in the possession of the "supplier" are subject to removal at any time at the "owner's" request in which event "supplier" will prepare the toolings so requested to be returned, for transportation to such location as is specified by the "owner", freight prepaid, in the same condition as received by the "supplier", reasonable wear and tear excepted.

(b) The packing with respect to the toolings shall be of such type as may be recommended by the "owner", and the "supplier" shall ensure that the packing is of customary type so that the toolings are protected against any damage during transit.

(c) Upon the receipt of the toolings from the "supplier", the "owner" shall inspect the toolings. In the event that the toolings are found to be damaged in any manner, reasonable wear and tear excepted, the "supplier" undertakes to compensate, in money, the "owner" to the extent of the loss(es) so incurred by the "owner" as a result of such damage(s).

10. Tooling amortisation

Depreciation with respect to the toolings rendered to the "supplier" by the "owner" will be claimed by the "owner", and the "supplier" will not, in any manner, whatsoever, claim depreciation on the same in its books of account. Tooling amortisation cost, per tooling will be determined at the time of finalisation of the prices, and will be added to the cost only from the point of

view of calculation of statutory levies in force from time to time.

17. Assignment

(I) The "owner" shall have the right to assign its rights and liabilities under this agreement, in respect of the toolings rendered by it to the "supplier", whereas the "supplier" shall have no right to assign its rights and liabilities hereunder or any interest herein without the prior written consent of the "owner".

36. The invoice (annexure 8) reads as under:

----- Excise Regn. No. 20/moriroku/ch 87 Full Postal Address of
Consignee : /2810074154/97 Excise Range: Honda Siel Cars India Ltd. FCO No.
2810074154AAACM8884 RANGE: I Division III P. No. A-I, Sec 40-41 DXM001
Phase-II, Near N.E.P.Z. (Kasna Road) CST No. ND-0085872 Dt. 30th August,
Noida-201305 Greater Noida, 1997 Gautam Budh Nagar (UP) G.B. Nagar (U.P.)
CST No. ND-5082377 Dt. 30th August, ECC No. AAA CH 1765 QXM 001 1997
Excise Tariff Heading No. 8708.00 Rate of Excise Duty 16.00 % -----

Total as- Pur- Selling Child sessable Total sell- Excise Description of chase
Quan- Unit rate per Tooling part value for ing value duty rate materials order tity
unit per unit per excise duty (Rs.) 16.00 % No. (Rs.) (Rs.) unit payment (Rs.)
(Rs.) PNL INST SUB ASSY 1118 77108-SX8-N200 AD4 24 Nos 2849.78 757.76
0.00 86,580.96 68,394.72 13,853.00 -----

----- Sales tax exempted u/s 4A of
U. P. Trade Tax Act, 1948 vide certificate No. 3845 dated October 8, 1998

----- Total excise duty in
words : Thirteen thousand eight Total 86/580.96 68,394.72 13,853.00 hundred
fifty three only -----

----- Serial No. of debit entry in PLA.... 82,247.72 Serial
No. of debit entry in RG23A/23C Part II RG 23A-H S. No. 323 Date of issue of
invoice : 16-8-2000 Time: 08.51.25 Sales tax : Local 514.05 against 380.625

Date of removal of goods :16-8-2000 Time : 09.15 hrs. Mode of transport
by...Vehicle Regn No. UP16-4141 R.No...Dt...Name of Carriers.... Round off: 0.23

Total 82,762.00 -----

37. The definition of "sale" has undergone a sea change after the coming into
force of the 46th Constitution Amendment Act. Clause (29A) of article 366 of the
Constitution of India defines "sale" to mean:

366. (29A) "tax on the sale or purchase of goods" includes--

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property
in any goods for cash, deferred payment or other valuable consideration ;

(b) a tax on the transfer of property in goods (whether as goods or in some other

form) involved in the execution of a works contract;...

38. The State of Uttar Pradesh has amended the definition of "sale" in the Act in consonance with Clause (29A) of article 366 of the Constitution.

39. The definition of "sale", thus, is different from the provisions of the Sale of Goods Act, 1930, as in terms thereof a contract of sale of goods would be deemed to be a contract of sale or transfer of property in the goods to the buyer for a price.

40. The definition of "sale" provided u/s 2(h) of the Act reads as under:

Section 2(h). "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration and includes--

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration ;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii)

(iv) a transfer of the rights to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Explanation I.--A sale or purchase shall be deemed to have taken place in the State--

(i) ...

(ii) in a case falling under Sub-clause (iv), if the goods are used by the lessee within the State during any period, notwithstanding that agreement for the lease has been entered into outside the State or that the goods have been delivered to the lessee outside the State.

41. Section 2(i) of the Act, 1948 defines "turnover", as under:

(i) "turnover" means the aggregate amount for which goods are supplied or distributed by way of sale or are sold, by the dealer, either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration:

Explanation I: [Omitted by UP Act 12 of 1979, w.e.f. 1-6-1975]

Explanation II: Subject to such conditions and restrictions, if any, as may be prescribed in this behalf :--

(i) the amount for which goods are sold or purchased shall include the price of the packing material in which they are packed, and any sums charged for

anything done by the dealer in respect of the goods sold, at the time of or before the delivery thereof, other than cost of freight or delivery or cost of installation or the amount realised as trade tax on sale or purchase of goods when such cost or amount is separately charged.

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and

(iii) where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same without profit to the customer, the sale in respect of such goods shall be included in the turnover of the latter dealer alone.

42. Perusal of the agreement dated October 8, 1997 between the petitioner and the customer reveals that the toolings were supplied for use in the manufacture of the parts exclusively for the customer. As per Clause (a) under the heading "owner and identification" the possession of such toolings has been given by the customer to the petitioner for use. In this view of the matter, the supply of toolings for use in the manufacture amounts to transfer of right to use such toolings by the customer to the petitioner and, therefore, such supply of tooling amounts to sale within the extended definition of "sale" provided in Section 2(h) of the Act. The amortisation cost has been fixed for providing such toolings towards transfer of right to use. Such amortisation cost was liable to be paid either directly or by way of adjustment with the sale price. The amortisation cost is in the nature of manufacturing expenses being incurred relating to manufacturing. Toolings are required in the manufacturing to bring the parts into existence. Thus, any expenses incurred for getting tooling is in the nature of cost of manufacture. In the bill, the amortisation cost has been separately shown and has not been included in the sale price, though it is the cost of manufacturing it and forms part of the sale consideration.

43. In the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, , the definition of "sale price" in Section 2(p) of the Rajasthan Sales Tax Act, which is similar to the definition of the "turnover" under the U. P. Trade Tax Act, has been considered. The apex court held as follows : (at pp. 27 to 29 of STC)

This definition is in two parts. The first part says that "sale price" means the amount payable to a dealer as consideration for the sale of any goods. Here, the concept of real price or actual price retainable by the dealer is irrelevant. 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 and not as to what is the net consideration retainable by the dealer.

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 in 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 a 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. In either case, it would be part of the "sale price". So also, the amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item, as is usually the case, forms part of the "sale price". It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition.

We may then take a case where a dealer transports goods from his factory to his place of business and sells them at a price which is arrived at after taking into account "freight and handling charges" incurred by him in transporting the goods. The amount of "freight and handling charges" included in the price would obviously be part of the "sale price", because it would be payable by the purchaser to the dealer as part of the consideration for the sale of the goods. The same would be the legal position even if the "freight and handling charges" are shown separately in the bill and added to the price of the goods, for the character of the payment would remain the same. Since "freight and handling charges" represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price charged to the purchaser. The amount of "freight and handling charges" would be payable by the purchaser not under any statutory or other liability but as part of the consideration for the sale of the goods and it would, therefore, form part of "sale price" within the meaning of the first part of the definition.

44. In the case of *Dyer Meakin Breweries Ltd. Vs. State of Kerala*, , the apex court considered a case wherein the assessee claimed that the amount charged for "freight and handling" incurred by it in transporting the goods from the breweries and distilleries to the warehouse in Kerala was eligible for deduction under Rule 9(f) of the Kerala General Sales Tax Rules, 1963. The court negatived the said claim observing that all the expenditure incurred prior to the sale was evidently a component of the price for which the goods were sold and making separate bills for the price of the goods ex-factory and for "freight and handling

charges" would not make the difference. The court observed as under : (at page 250 of STC)

It is common ground that the sale of the 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 was prior to the sale and was evidently a component of the price for which the goods were sold. It is true that separate bills were made out for the price of the goods ex-factory and for "freight and handling charges". But, in our judgment, the Tribunal was right in holding that the exemption under Clause (f) of Rule 9 applied when the freight and charges for packing and delivery are found to be incidental to the sale and when they are specified and charged for by the dealer separately and expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories to the warehouse of the company is not admissible under Rule 9(f). Rule 9(f) seeks to exclude only those charges which are incurred by the dealer either expressly or by the necessary implication for and on behalf of the purchaser after the sale when the dealer undertakes to transport the goods and to deliver the same or where the expenditure is incurred as an incident of sale. It is not intended to exclude from the taxable turnover any component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the goods available to the intending customer at the place of sale.

(emphasis added)

45. Similar view has been reiterated by the apex court in *D. C. Johar & Sons (P.) Ltd. v. Sales Tax Officer, Ernakulam* [1971] 27 STC 120 ALL and TVL. *Ramco Cement Distribution Co. Pvt. Ltd., Tamil Nadu Vs. State of Tamil Nadu*, .

46. In *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* [1969] 24 STC 487 AP the apex court held "that the form in which the invoice was made out was not determinative of the contract between the company and its customers". The substance of transaction is to be considered.

47. In the case of *Dhampur Sugar Mills Ltd. Vs. Commissioner of Trade Tax, U.P.*, , the honourable Supreme Court considering the various statutory provisions of the Act interpreted the provision of Section 2(h) observing that the definition being an inclusive one must be given a broad meaning. In this case, the seller has taken the factory on lease and was liable to pay licence fee. The seller sold the molasses to the party to whom the licence fee was payable. In the bill, amount payable towards license fee was reduced from the sale price and claimed that the trade tax was payable only on the net amount payable by the purchaser. The apex court held as follows : (at page 69 of STC)

An adjustment of price in a case of this nature, in our opinion, therefore, would come within the purview of the term "other valuable consideration", inasmuch as both the appellant and the company, were aware that they have to fulfil their respective terms and obligations, ...

The court further held that : (at page 71 of STC)

... the price of molasses to be adjusted from the amount payable by the appellant to the owner by way of consideration for use of the mill. Such a mutual arrangement is merely one for the purpose of adjusting the accounts. The transactions between the parties in effect and substance involve passing of monetary consideration. It would, thus, come within the purview of the expression "any other valuable consideration".

48. Merely because a clause of retention of ownership is included in the terms of contract denying acquisition and the right, title or interest of the supplier in the toolings, the same does not preclude the user of toolings which have been specifically provided for in Clause 1 of the agreement. Secondly, merely because toolings are to be returned back to the owner, the same would not waive the consideration, which would pass on and is captioned as tooling amortisation. Clause 10 of the agreement specifically provides for determination of the tooling amortisation cost at the time of finalisation of prices. The invoice filed by the petitioner itself makes it clear that the toolings stood quantified to the tune of Rs. 757.76 per unit. The aforesaid provision made in the contract itself, therefore, leaves no room for doubt that there is a clear intention between the contracting parties to permit user of toolings against the amortisation cost. The aforesaid transaction, therefore, in our considered opinion, is clearly covered under the definition of Section 2(h)(i) and (iv) of the U.P. Sales Tax Act.

49. The amortisation cost which is fixed for transfer of right to use the toolings is the amount payable by the petitioner to the customer. It is in the nature of manufacturing cost to bring the manufactured goods in existence and, therefore, is part of the sale consideration. The amortisation cost was payable by the petitioner to the customer. It may be payable either in terms of money or by way of adjustment in the books with the amount receivable from the customer.

50. In the present case, in the bill, the selling price has been shown without including the amortisation cost and the said cost has been separately shown. In this way, though the sale consideration includes the amortisation cost, but by way of adjustment, sale consideration has been reduced by the amortisation cost. In this view of the matter, the amount actually payable towards sale consideration of the part was/is the amount shown in the column "selling rate plus amortisation cost", shown in the bill. The petitioner ought to have paid the tax on the amount including the amortisation cost which is the sale consideration of the goods.

51. For the reasons stated above, we do not find any illegality in the circular 51 issued by the Commissioner and the same is accordingly, upheld. The petition stands dismissed. Consequential proceeding may follow.