

(1974) 02 OHC CK 0010
In the Orissa High Court
Case No : S.J.C. No. 42 of 1973

Orient Paper Mills Ltd.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 25-02-1974

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Central Sales Tax Act, 1956 — Section 2, 8

Citation : (1975) 35 STC 84

Hon'ble Judges : G.K. Misra, C.J.; P.K. Mohanti, J

Bench : Division Bench

Advocate : D.P. Pal, R.N. Bajoria and D.P. Mohanty, for the Appellant; R.K. Mohapatra, Standing Counsel, Sales Tax, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—Six questions have been referred by the Additional Sales Tax Tribunal (hereinafter to be referred to as the Tribunal). They are :

- (1) Whether, on the facts and in the circumstances of the case, the reduction granted by the assessee to its buyers from the mill rate was part of the amount payable to the assessee as consideration for the sale of the paper and/or part of the sale price within the meaning of Section 2(h) of the Central Sales Tax Act, 1956 ?
- (2) Whether, on the facts and in the circumstances of the case, the Additional Sales Tax Tribunal was right in holding that the declaration in C forms required any correction ?
- (3) Whether, on the facts and in the circumstances of the case, the freight in respect of paper sold by the assessee was part of the amount payable to the assessee as consideration for the sale of the paper and part of the sale price within the meaning of Section 2(h) of the Central Sales Tax Act, 1956 ?
- (4) Whether, on the facts and in the circumstances of the case, the Member,

Additional Sales Tax Tribunal, was right in holding that the trade discount is one kind of cash discount ?

(5) Whether, on the facts and in the circumstances of the case, the Member, Additional Sales Tax Tribunal, was right in holding that the discount in question is a cash discount ?

(6) Whether, on the facts and in the circumstances of the case, the Member, Additional Sales Tax Tribunal, was right in excluding the discount in question from the sale price of paper subject to the discount being allowed according to the practice normally prevailing in the trade ?

2. Facts may be stated clearly to answer the questions referred. The Orient Paper Mills Ltd. (the petitioner) is a company registered under the Indian Companies Act, 1956, having its registered office at Brajarajnagar in the district of Sambalpur in Orissa. The petitioner is a registered dealer under the Orissa Sales Tax Act, 1947, and the Central Sales Tax Act, 1956 (hereinafter to be referred to as the Act). The assessment relates to the period April, 1967, to March, 1968.

The petitioner manufactures and sells paper. At all material times a mill rate for the various types of papers is in vogue. The petitioner has uniform mill rate throughout India which is maintained to meet competition. The amount of the freight payable in respect of the consignments despatched used to be deducted from the bills raised on the purchaser. The petitioner agrees to reduce the mill rate by negotiations with its purchasers in respect of each transaction. The reduction so offered from the mill rate to its purchasers is referred to by the petitioner as discount. The consideration for the sale of paper is the price agreed with the purchaser after granting deduction from the mill rate, and the discount never forms part of the consideration for the sale of paper. In the agreement there is a provision for appointment of distributors and direct sales to distributors on principal to principal basis and sales to others against orders procured by the distributors and accepted by the petitioner. A true copy of the specimen agreement for the appointment of distributors had been annexed and marked 1. The petitioner used to receive orders wherein the mill rate and the reduction allowed therefrom used to be shown and against those orders the petitioner used to sell and deliver paper. In the bills prepared by the petitioner, both the mill rate and the reduction allowed therefrom to the purchasers and the amount of freight which the purchasers had to pay used to be separately shown. The petitioner used to receive from its purchasers, who were registered dealers, declarations in form C in respect of the said transactions. In the declaration forms the purchasers used to mention, amongst other particulars, the bill number, date of the bill and the net amount. The net amount mentioned in the declaration forms is the agreed price which was the mill rate less the reduction allowed by the petitioner. The sale of paper was in the course of inter-State trade and commerce.

The petitioner filed returns for the aforesaid period. In the said returns, through error and inadvertence the petitioner had included the amount of freight in

respect of the consignments of paper in the turnover and did not claim that the said freight was not taxable under the Act. At the time of the assessment, however, the petitioner submitted a statement before the assessing officer showing a break-up of the amount of the freight relating to the said sales and claimed that they should not be taxed under the Act.

On 11th March, 1971, the order of assessment was passed determining the taxable turnover of the petitioner at Rs. 11,94,99,304.61. In computing the aforesaid taxable turnover the Sales Tax Officer included Rs. 50,12,383.29 on account of the discount and levied tax on this sum at the rate of 10 per cent as this amount had not been included in the declaration form C. The Sales Tax Officer further imposed tax on the freight payable by the purchasers. There were some other items which need not be referred as they are no longer in controversy.

An appeal to the Assistant Commissioner of Sales Tax in respect of the aforesaid items was dismissed. In second appeal, the Tribunal remanded the case after recording the finding that the discount claimed by the petitioner was in the nature of a cash discount within the meaning of Section 2(h) of the Act. It held that there was no sufficient material before it to show that there was a practice normally prevailing in the petitioner's trade to allow cash discount to the retailers or distributors and the matter required further examination. The case was remanded to the Assistant Commissioner of Sales Tax to give an opportunity to the petitioner to prove the practice prevailing in the trade to give trade discount to genuine distributors. Regarding freight, "the Tribunal gave a direction to the Assistant Commissioner to give an opportunity to the petitioner to produce relative documents to show that freights were being separately charged so as not to be taxable. It did not decide the petitioner's stand regarding the declarations in C forms and directed that in case it was finally found that the petitioner failed to prove the prevailing practice of allowing trade discount in the trade, it would be allowed to take back C forms for necessary corrections.

Against the order of the Tribunal two reference applications were filed before it, one at the instance of the petitioner and the other at the instance of the State of Orissa. The Tribunal dismissed the reference application by the petitioner. Accordingly the petitioner came up in this application to this court. By an order dated 18th May, 1973, it was called upon by us to make a statement of the case on the first three questions. On the reference application made by the State of Orissa, the Tribunal has referred questions (4) to (6).

3. Dr. Pal advanced the following contentions : (i) The consideration of the sale transaction is determined only after discounts are deducted from the mill rate and consequently the discount is not independent of the consideration and is not included in the sale price, (ii) Freights in respect of the consignments are payable and paid by the purchasers and have been shown separately in the bills and as such would not come within the ambit of "sale price" in Section 2(h) of the Act. (iii) The declarations in C forms mentioned the net amount of the bill which

necessarily did not include the discount. Even if it be held that discount is a part of the sale price, tax is to be levied on the amount of discount at the concessional rate of 3 per cent and not at 10 per cent. The learned standing counsel combats each of these. Contentions.

4. Before examining the questions of law arising out of the appellate order of the Tribunal it would be appropriate at this stage to extract and construe the material terms of the specimen agreement (annexure 1) under which the transactions of sale take place :

4. There shall be two types of sale transactions with the distributor : (i) Direct sales to the distributor on principal to principal basis, (ii) Sales to others against the orders procured by the distributor and accepted by the company.

5. All sales to the distributors will be at the company's selling prices ruling at the time of supply, free on rail, less such discount as may be fixed by the company from time to time. The distributor shall act in full conformity with the instructions and policy of the company and due compliance of any statutory rules and regulations and order of the Government, if any, affecting sale and distributions of the products. Such resale shall be effected by the distributor in his own name and at his own risk and the company shall in no way be concerned in any dispute, difference or question which may arise between the distributor and purchaser.

6. In case of sales direct by the company to the buyers against the order procured by the distributor, if the distributor has procured the order on the basis of allowance of discount, the discount allowed to the distributor will be reduced to the extent of discount allowed to the buyers.

9. The company reserves its right to effect sale of the products to any person including Government, Local Body, institutions affiliated with the Government, etc., in the territory mentioned above without seeking consent of the distributor. The distributor shall not be entitled to any discount/ commission on any direct sales effected by the company.

It would thus be seen that there are two types of sale transactions with the distributor-one is direct sales to the distributor on principal to principal basis, the second is sales to others against orders procured by the distributor and accepted by the company.

Clause 5 of the agreement deals with the first class of cases. The term of the agreement is that all sales to distributors will be at the company's selling price prevailing at the time of supply, free on rail, and less such discount as may be determined from time to time by agreement. If any resale is made by the distributor, that would be in his own name and at his own risk and the company has nothing to do with such transactions. In this class of cases the consideration payable is determined after deducting the entire discount from the mill rate fixed in the catalogue.

In the second class of cases the company is in direct connection with the purchasers against orders procured by the distributor. Out of the total discount a part goes to the distributor as commission and another part is given by way of discount to the purchasers. What is given to the distributor by way of commission is to be included in the sale price but what is given by way of discount to the purchasers is to be excluded from the mill rate in fixing the consideration.

Clause 9 of the agreement gives absolute freedom to the company to make sales of its products to any person without the consent of the distributor and on such direct sales without the intervention of the distributor the latter is not entitled to any commission.

5. The aforesaid analysis flows directly from the definition of "sale price" in Section 2(h) of the Act, which runs thus:

"sale price" means the amount payable to a dealer as consideration 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 at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

Essentially, "sale price" means the amount payable to a dealer as consideration for the sale of any goods. In this case the mill rate is mentioned in the catalogue. Under the agreement itself the mill rate is reduced by the discount. The consideration actually payable by the purchaser to the petitioner is the mill rate less the discount. Consideration is the amount which is actually paid or payable after the discount is deducted or deductible. The mere fact that the definition makes provision for cash discount being deducted does not take out an agreed amount to be deducted from the price while fixing the consideration.

There is a fundamental distinction between cash discount and trade discount. Cash discount has been defined in Webster's Third New International Dictionary, Volume I, at page 346 as "a discount granted in consideration of immediate payment or payment within a prescribed time". In Dictionary of Economics and Commerce by J. L. Hanson, at page 130, the definition is "an inducement offered by a creditor to debtors to pay promptly".

Trade discount, on the other hand, has been defined thus :

A percentage deduction from the list price of goods allowed by a manufacturer or wholesaler to customers engaged in trade." (see Webster's Third New International Dictionary, Volume I, p. 2422).

In Dictionary of Economics and Commerce by J. L. Hanson, at page 130, it is as follows:

A deduction from the catalogue price of an article generally allowed by a

wholesaler to a retailer, that is, trade discount.

The same concept also is to be found from the book "Advanced Accounting" by J. R. Batliboi. (25th Edition) at page 14. The entire passage may be extracted:

Distinction between trade discount and cash discount.-Trade discount is an allowance made by wholesale dealers to retailers off the catalogue or invoice price. This allowance is made between buyers and sellers engaged in the same class of trade. The object of the trade discount being allowed by the wholesale dealer to the retailer is to enable the latter to sell the goods at the price mentioned in the catalogue or price list issued by the wholesale trader. The trade discount is to enable the dealer to meet all the necessary business expenses and yet leave him a margin of profit on his selling the goods at the catalogue price. The amount of trade discount allowed varies considerably according to different trades and even on different articles in the same trade.

In the books of the wholesale dealer, trade discount is deducted from the outward invoice sent to the retailer and the entry in the sales book is made of the net amount, because the actual amount realisable by him is the catalogue price less the trade discount. Similarly, in the books of the retailer, the entry in the purchase book is made of the net amount, i. e., the amount for which he is liable. Thus, trade discount as a rule does not appear in the books either of the seller or of the purchaser.

Cash discount is an allowance in addition to the trade discount made by the seller to the purchaser, provided the latter settles his account promptly or within a specified time, known as the "period of credit". This allowance for the prompt payment of accounts may be either receivable or payable. It is receivable by the trader when he pays his account promptly or within the period of credit, and is allowed by him to his own customers in consideration of the prompt settlement of amounts due to him.

Cash discount referred to in Section 2(h) of the Act is different from the trade discount as has been indicated already. Whether from the point of view of buyers or sellers, the only figure that matters is the amount actually paid and received. Consideration is fixed after the discount is deducted from the quoted price and such discount is trade discount. The concept has been very clearly elucidated in *P. V. S. Kabalamurthi Pillai v. P. V. Subramania Pillai* AIR 1931 Mad. 600 by an illustration as follows :

To seem to make a concession while in point of fact no concession is made or intended is a device which tradesmen usually employ. To take an instance, if you want to charge for an article Rs. 75 you may quote its price as Rs. 100 and allow a discount of 25 per cent or you may quote Rs. 125 as its price with a discount of 40 per cent. In either case, the buyer pays and the seller receives only Rs. 75. So long as the buyer parts only with Rs. 75, it little signifies to him whether the price quoted is Rs. 100 or Rs. 125.

6. This view is also supported by Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, . In that case Clause (4) of the contract, which is exactly similar to clause 5 of annexure 1, runs thus :

The price of the said productions supplied to the stockists shall be the current general gross list price charged by the company, free on rail, less such discount as may be fixed by the company from time to time ; but the terms and the times of delivery and the payments therefore shall be in the absolute discretion of the company who may vary the same from time to time.

This clause was construed by the Supreme Court as meaning that the ultimate price charged shall be taken as the catalogue rate less the discount payable to the purchasers. Their Lordships observed thus :

If Clause (4) stood alone the price charged by the company may be deemed to be the catalogue rate less the discount payable to the purchasers.

After the aforesaid pronouncement of the Supreme Court the matter does not appear to be res integra.

The same view has been taken in A.K. Roy and Another Vs. Voltas Limited, , while construing an agreement for determining the meaning of "wholesale cash price" in Section 4(1)(a) of the Central Excises and Salt Act, 1944. In paragraph 18 their Lordships observed thus :

If a manufacturer were to enter into agreements with dealers for wholesale sales of the articles manufactured on certain terms and conditions, it would not follow from that alone that the price for those sales would not be the "wholesale cash price" for the purpose of Section 4(1)(a) of the Act if the agreements were made at arms length and in the usual course of business.

In that case the agreements provided, among other things, that the dealers should not sell the articles sold to them except in accordance with the list prices fixed by the respondent, and that the respondent would sell them the articles at the list price less 22 per cent discount. Their Lordships held that if a sale is made under such term the agreement represented the wholesale cash price.

7. The learned standing counsel placed reliance on Deputy Commissioner of Agricultural Income Tax and Sales-tax South Zone, Quilon Vs. Aluminium Industries Ltd., Kundara, , which was reversed in appeal by the Supreme Court in Deputy Commissioner v. Aluminium Industries Ltd. [1970] 25 S.T.C. 476 (S.C.). We have carefully examined these decisions and the point in issue has not been answered in both these cases. Under Rule 7(1)(a) of the Kerala General Sales Tax Rules, 1950, there was a provision that all amounts allowed as discount, as described therein, would be deducted from the gross turnover of a dealer. It was contended that cash discount alone was deductible in determining the turnover and not the trade discount. After noticing the rival arguments in paragraph 6 their Lordships did not give any pronouncement whether trade discounts were deductible from the catalogue price in fixing the consideration. They merely

examined the case with reference to the definition in Rule 7(1)(a). This decision is of no assistance in this case. Moreover, in appeal the Supreme Court set aside this decision and remanded the case for re-examination without expressing any opinion whether trade discount is to be deducted from the catalogue price in fixing the consideration.

Reliance was also placed by the learned standing counsel on *The Hyderabad Chemicals and Fertilizers Ltd. Vs. State of Andhra Pradesh*, . Their Lordships observed that commission paid to the agent was not a discount within the meaning of the Andhra Pradesh Sales Tax Act and Rules where an agreement between a manufacturing company and its sole selling agent envisaged only a relationship of principal and agent and not that of vendor and purchaser and there was no evidence to show that the parties had given up the agreement of agency and had been entering into outright sale transactions. No exception can be taken to the aforesaid observation but this decision does not throw any light on the point in issue.

8. The resultant position, therefore, is that trade discount is to be deducted from the catalogue price in accordance with the terms of the agreement and it is only thereafter that the consideration is to be fixed which is the sale price within the meaning of Section 2(h). Such a concept has nothing to do with the deduction of cash discount as referred to in the definition.

9. The next question for consideration is whether the freight paid by the purchasers is to be excluded from the sale price. The definition of "sale price" in Section 2(h) itself prescribes that cost of freight will not be included in the sale price if it is separately charged. The undisputed factual position is that freight was initially included in the consideration and again subsequently deducted by showing it separately. This is only a method of calculation, but essentially the bill shows that cost of freight has been separately charged and in point of fact such freights have been paid by the purchasers. On this simple analysis, we hold that freight, in the facts and circumstances of this case, is not to be included in the sale price.

Reliance was placed on *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, . Rule 5(1)(g) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, prescribed that in determining the net turnover of a dealer he is entitled to have deducted from his gross turnover "all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of the goods sold:

(i) freight;

(ii) ...

Their Lordships examined this rule and held that as in that particular case the freight had been included in the price of the goods sold, freight is to be included in the sale price though separately charged. The definition of "sale price" in

Section 2(h) is somewhat differently worded. All that it requires is that freight is to be separately charged. No disqualification was imposed on account of the freight being initially included in the price of the goods sold and then deducted separately. This decision is, therefore, distinguishable.

On the other hand, the principles laid down in *Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh*, apply to this case though by Clause (16) of the contract therein the purchasers clearly undertook to pay railway freight which was deducted from the invoice made out by the company. In this case there is no written agreement that freight was to be paid by the purchasers. But that is wholly immaterial. In the absence of any agreement in writing to the contrary oral evidence and conduct of the parties is admissible for determining the term of the agreement. In this case the undisputed position is that the consignments were to be sent free on rail and the freight was payable and paid by the purchasers. In such circumstances, the aforesaid decision is applicable in principle as the ultimate conclusion regarding the existence of a term that freight was payable by the purchasers is to be found in both the cases. In that case their Lordships observed :

But the form in which the invoice is made out is not determinative of the contract between the company and its customers. If, apprehending that it may have to pay sales tax on the freight, the company collected sales tax on the freight, the true nature of the contract between the company and the purchasers cannot on that account be altered. The company may be liable to refund the amount of excess sales tax to its purchasers. But that is a matter between the company and the purchasers and the State cannot seek to levy tax on railway freight if it is not made a part of the price.

On the aforesaid analysis, we have no doubt that freight was payable and in fact was paid by the purchasers. It has been shown separately and is not to be included in the sale price.

10. The last contention is that in the declaration form C the discount deducted from the consideration was not mentioned in the net amount stated in the form. In view of our conclusion that trade discount was not a part of the sale price, this question is really academic. Declarations in form C as filed are in order.

But as the question of law has been referred to us it would be proper to clarify the legal position. In *The State of Madras Vs. Radio and Electricals Ltd. etc.*, , the nature and incidence of the declaration forms have been clearly pronounced. Their Lordships observed thus :

The Act and the Rules do not impose an obligation upon the purchasing dealer to declare that goods purchased by him are intended to be used for one purpose only, even though under his certificate of registration he is entitled to purchase goods of the classes mentioned in Section 8(3)(b) for more purposes than one. When the purchasing dealer furnishes a certificate in form C without striking out any of the four alternatives, it is a representation that the goods purchased are

intended to be used for all or any of the purposes, and the certificate complies with the requirements of the Act and the Rules. The sales tax authority is, of course, competent to scrutinise the certificate to find out whether the certificate is genuine. He may also, in appropriate cases, when he has reasonable grounds to believe that the goods purchased are not covered by the registration certificate of the purchasing dealer, make an enquiry about the contents of the certificate of registration of the purchasing dealer. But it is not for the Tax Officer to hold an enquiry whether the goods specified in the certificate of registration of the purchaser can be used by him for any of the purposes mentioned by him in form C, or that the goods purchased have in fact not been used for the purposes declared in the certificate.

We have ourselves looked into the declaration form C. It has been properly filled up. There is no omission of any column. In mentioning the net amount at a lesser sum the petitioner had to adhere to its own contention that discount is not to be included in the sale price. If we had taken a different view, then the certificate would not be defective inasmuch as it refers to all the sale transactions and makes no omission therein. In such a case the certificate is not to be corrected as has been directed by the Tribunal. The revenue would merely call upon the petitioner to pay the excess amount at the concessional rate of 3 per cent on the discount and not at 10 per cent. The position would, however, be different if any of the sale transactions would have been omitted from the net amount.

11. On the analysis given by us, we would answer the questions referred to us thus :

Q. (1) In the facts and circumstances of this case, the reduction granted by the petitioner is not a part of the sale price.

Q. (2) In the facts and circumstances of this case, the Tribunal was wrong in holding that the declaration in form C required correction.

Q. (3) Freight paid is not a part of the sale price.

Q. (4) The Tribunal is wrong in saying that trade discount is one kind of cash discount.

Q. (5) The impugned discount is not a cash discount.

Q. (6) The Tribunal was wrong in remanding the case for an enquiry as to whether the discount is a cash discount according to the practice normally prevailing in the trade.

12. In the result, the application is allowed with costs as indicated above. Sales tax is not exigible from the petitioner on the discount and freight and the declarations in form C were valid. Hearing fee Rs. 200.

Mohanti, J.

13. I agree.