

**(1990) 04 MAD CK 0039**

**In the Madras High Court**

**Case No : Tax Case (Appeal) No. 586 of 1980**

Peico Electronics and Electricals Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

**Date of Decision : 26-04-1990**

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 3, 4, 8A(1)  
Tamil Nadu General Sales Tax Act, 1959 — Section 13(5), 2

**Citation : (1990) 78 STC 88**

**Hon'ble Judges : Venkataswami, J; Govindasamy, J**

**Bench : Division Bench**

**Advocate : C. Natarajan, for the Appellant; R. Karuppan, A.G.P. (Taxes), for the Respondent**

## **Judgement**

Venkataswami, J.—This tax case (appeal) is laid challenging an order of the erstwhile Board of Revenue, made in B.P. Rt. No. 3597 of

1979 dated November 3, 1979.

2. The assessment year in question is 1974-75. The appellant reported total and taxable turnovers of Rs. 5,87,40,226.17 and 5,74,66,084.05

respectively, under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called "the Act"). The assessing authority, by an order dated January

31, 1977, determined the total and taxable turnover at Rs. 5,77,15,744 and 5,75,46,406 respectively. An appeal was preferred against the

assessment order before the Appellate Assistant Commissioner, Kancheepuram, disputing a turnover of Rs. 11,78,549. It was claimed before the

Appellate Assistant Commissioner, that the disputed turnover represented "sales returns" and, therefore, cannot be included in the taxable turnover.

The Appellate Assistant Commissioner, by an order dated February 7, 1978, did

not accept that contention in respect of a turnover of Rs.

80,221. Regarding the balance of Rs. 10,98,329, the Appellate Assistant Commissioner held that the assessing authority did not give sufficient time

to the assessee to prove the claim of sales returns, and on that ground, remanded the matter for reconsideration and for passing orders according

to law. On remand, the assessing authority entertained the claim towards sales returns in a sum of Rs. 11,07,794.31 and ultimately allowed the

same holding that the turnover was not includible in the taxable turnover by an order dated November 15, 1978.

3. The orders of the Appellate Assistant Commissioner and the assessing authority (after remand) were not acceptable to the Board of Revenue.

Hence, a notice was issued to the appellant requiring it to show cause why the order of the Appellate Assistant Commissioner and the order of the

assessing authority (after remand) should not be set aside, and the original order of the assessing authority be restored. A detailed reply was sent to

the Board of Revenue on behalf of the appellant, supporting the order of the assessing authority, after remand. The Board of Revenue, over-ruling

the objection raised in the reply notice and the contentions raised at the time of personal hearing through counsel, set aside the order of the

assessing authority (after remand) and restored the original order of the assessing authority dated January 31, 1977. Hence the present appeal.

4. The reason which prompted the Board of Revenue to issue the show cause notice, to set aside the revised assessment on the basis of the

appellate order is the following : According to section 13(5) of the Act read with rule 5-B, the claim for refund or adjustment of tax on account of

sales return should have been made within a period of six months from the date of sale or before the date of final assessment, whichever was later.

But in this case, the assessment year was 1974-75. The assessment was made on January 31, 1977. No claim for deduction was made before the

assessing authority and, therefore, the Appellate Assistant Commissioner went wrong in entertaining the claim against the provisions of the Act and

the rule in the opinion of the Board of Revenue.

5. It may be mentioned that before the Board of Revenue, an alternative argument was advanced at the time of personal hearing by the learned

counsel contending that the turnover in dispute related to ""unfructified sales""

and, therefore, the question of levy of tax will not arise and consequently the time-limit prescribed for making a claim for refund of tax on the basis of sales returns also will not arise. This contention was not accepted by the Board of Revenue. The Board of Revenue, placing reliance on a judgment of this Court in *State of Tamil Nadu v. Bombay Metal Depot* reported in [1978] 41 STC 140, took the view that once the ascertained goods had already moved to the customers as a result of an earlier contract of sale, and invoices raised therefor, and the accounts of the customers debited, there will be transfer of goods notwithstanding the rejection of the goods by the customer. Therefore, it will be only a case of "sales return" and not "unfructified sale". Therefore, according to the Board of Revenue, the disputed claim will actually fall under the head of "sales return", and the claim having not been made strictly in accordance with section 13(5) read with rule 5-B, the appellant is not entitled to the relief.

6. Mr. C. Natarajan, learned counsel appearing for the appellant, contended that even though the appellant's case can be successfully fought on the basis of "sales return", he would prefer to contend that the disputed turnover would fall only under "unfructified sales". In elaborating this submission, Mr. Natarajan referred to the facts pertaining to the transactions. The appellant was submitting the monthly returns. As soon as the goods are consigned to the customer, invoices are raised, the sales tax payable on such transactions are included in the taxable turnover of the monthly returns and the taxes are paid by the appellant. However, the invoices are forwarded to the appellant's banker with an advice to the customer to retire the invoices and take delivery of the goods from the carrier. In that process, if the customer fails to retire the document (invoices), it results in the goods being returned back to the appellant and consequently there will be neither a completed sale nor even transfer of property in goods. Therefore, in such cases, there cannot be a claim on the basis of sales returns. In such cases, there can only be a claim for a refund of the tax paid on the basis of "unfructified sales". The modus operandi, as mentioned above, is not disputed before us. The only point to be decided is, whether it will fall under the category of "sales return" or "unfructified sale". If, as found by the Board of Revenue, that even in such cases, the transaction would amount to completed sale as there was transfer of

property in the goods, then the consequence will be to get refund of tax only on the basis of "sales return".

7. Mr. R. Karuppan, learned Additional Government Pleader, supported the order of the Board of Revenue, by reiterating the stand taken in that order.

8. Let us now consider whether the Board of Revenue was right in its view on this aspect and in placing reliance on the decision of this Court in

State of Tamil Nadu v. Bombay Metal Depot reported in [1978] 41 STC 140. In this connection, Mr. Natarajan, learned counsel for the

appellant, explained the decision in The State of Tamil Nadu Vs. Bombay Metal Depot, by inviting our attention to section 4 of the Central Sales

Tax Act and section 2(n), explanation (3) of the State Act. His contention is that explanation (3) to section 2(n) of the State Act is a verbatim

reproduction of section 4 of the Central Sales Tax Act and the purpose behind explanation (3) to section 2(n) of the State Act and also section 4

of the Central Sales Tax Act is to locate the place of sale and not to determine the time of sale. That is the subtle distinction to be borne in mind. It

is the contention of the learned counsel for the appellant that if this subtle distinction is borne in mind, then the observations in The State of Tamil

Nadu Vs. Bombay Metal Depot, will not stand in the way of accepting the appellant's contention. We find force in this contention, and we will

support this conclusion by referring to the other decisions relied on by the learned counsel for the appellant, immediately.

9. In The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, , a Constitution Bench of the Supreme Court held that "the position therefore is

that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is

only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of

contract are liable to be assessed to sales tax on the ground that they are in the same position as sale price".

10. In Kuppuswami Mudaliar & Sons v. State of Madras reported in [1974] 34 STC 6, a Division Bench of this Court has held as follows :

In this case, as the assessee has retained the right of disposal, he cannot be said to have parted with the title to the goods before the goods were

actually taken delivery of by the purchasers. Admittedly, in this case, the out-of-State dealers took delivery of the goods only after 2nd April,

1964. Therefore, the sale by the assessee to the out-of-State dealers can be said to have been completed only after 2nd April, 1964, when the purchasing dealers had registered themselves under the Act.

11. In *G. A. Galiakotwala & Co. (P.) Ltd. v. State of Madras* reported in [1976] 37 STC 536 the Supreme Court, accepting the view taken by a

Division Bench of this Court in Tax case Nos. 197 of 1968 and 225 of 1969 in judgment dated November 7, [1976] 37 STC 536 has held as

follows :

The principal question in this appeal is whether the sales of cotton by the appellant to the mills at Tirunelveli and Karur were, inter-State sales u/s

3(a) of the Central Sales Tax Act called the Central Act or are second sales under State sales u/s 3(b) of the Central Act.

The appellant has its place of business at Coimbatore. The mills are situated within the State of Madras. The mills entered into an agreement with

the appellant for purchase of cotton. The appellant in turn placed orders with its sellers at Bombay for purchase of cotton. The appellant directed

its Bombay sellers to despatch the goods to the mills as consignees. The Bombay seller sent the consignment to the mills but the railway receipts

were sent by the Bombay seller to the appellant. The appellant then endorsed the same in favour of the mills after collection of the substantial

portion of the sale price.

The appellant contended that the consignments were sent directly by the Bombay seller to the mills and, therefore, these were direct inter-State

sales by the Bombay seller to the mills and that the property in the goods passed to the mills when the goods were loaded at Bombay. The sales

tax authorities found that the mills were the last purchaser and, therefore, these were inter-State sales between the appellant and the mills.

A most significant feature is that the railway receipts were sent by the Bombay seller to the appellant, and the appellant thereafter endorsed the

same to the mills. It is, therefore, apparent that there could not be an unconditional appropriation of the goods at Bombay towards the contract

entered into between the appellant and the mills. The property in the goods passed only when the mills took delivery of the railway receipts from

the appellant. The Bombay seller dealt with the railway receipts in such a way that it is proved that the intention of the appellant to part with the goods in any event is not until substantial payment is made by the mills.

12. In *Metal Alloy Co. P. Ltd. v. Commercial Tax Officer* reported in [1977] 39 STC 404 a learned single Judge of the Calcutta High Court has

succinctly brought out the difference between "return of goods" and "rejection of goods". The headnotes read as follows :

Return of goods and rejection of goods stand on different footings. Return of goods is a bilateral transaction brought about by the consent of the

seller and the purchaser, which consent may have been effected either prior to the delivery of the goods or subsequent to such delivery. Rejection

of goods, on the other hand, is a unilateral transaction governed by the provisions of the Contract Act or the Sale of Goods Act, open only to the

purchaser.

Section 8A(1)(b) of the Central Sales Tax Act, 1956, inserted in the Act with retrospective effect by section 5 of the Central Sales Tax

(Amendment) Act, 1969, has application only when the goods are returned by the purchaser. Therefore, the time-limit mentioned in that section

has no application in the case of rejection of goods because the very act of rejection gave a go-by to the transactions which were in furtherance of

a supposed sale.

13. Section 25(3) of the Sale of Goods Act 1930, reads as follows :

Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure

acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he

wrongfully retains the bill of lading the property in the goods does not pass to him.

14. Section 2(n) and explanation (3) to section 2(n) of the State Act, at the relevant time, read as follows :

Section 2(n). "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to

another in the course of business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation,

charge or pledge.

Explanation (3)(a). The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State -

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

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

Explanation (3)(b). Where there is a single contract of sale or purchase of goods, situated at more places than one, the provisions of clause (a)

shall apply as if there were separate contracts in respect of the goods at each of such places.

15. Section 4 of the Central Sales Tax Act reads as follows :

4. When is a sale or purchase of goods said to take place outside a State. - (1) Subject to the provisions contained in section 3, when a sale or

purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have

taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State -

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

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

Explanation. - Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section

shall apply as if there were separate contracts in respect of the goods at each of such places.

16. In this background, let us now see the decision in The State of Tamil Nadu Vs. Bombay Metal Depot, on which the Board of Revenue placed

heavy reliance, to support its order. In that case, no doubt, a Division Bench of this Court has observed as follows :

..... where the description of the goods is clear and where such goods have been sent in conformity with such description and where such goods have also been accepted on the basis that they conformed to the said description it would follow that there was ascertainment and appropriation of the goods to the contract. Where the goods are ascertainable and the goods of that description are despatched then the goods so despatched could be taken as appropriated to the contract unconditionally. The circumstance that the purchaser had a right of rejection did not postpone the transfer of property in the goods.

Those observations were made in the context of finding out the situs of the sale and not with reference to the time of the sale which is the relevant criterion in this case. Further, it is seen from the decision that the learned Judges, construing the terms of contract, have observed as follows :

... From a construction of the terms of this letter, it is clear that the intention was the property in the goods passed to the purchaser as soon as the endorsement was made. There is nothing to show that the intention was to effect a transfer of property in the goods only on actual delivery. Though it is true that it is possible to make an endorsement on the railway receipt without an intention to pass the property in the goods, for which certain decisions were cited before us, we consider that those decisions are not of any assistance in the present case because the contract between the parties is so clear that the goods were ascertained or ascertainable goods and that the property in them got transferred as soon as the endorsement was made. We do not, therefore, think it necessary to go into those decisions.

The later observations in the above quotation, instead of supporting the case of the Revenue, support the case of the appellant. Therefore, looked at from any angle, it cannot be said that reliance can be placed on the said decision, to support the stand of the Revenue. On the facts, it is clear that the transfer of property in the goods in question did not pass to the purchaser inasmuch as the purchaser failed to retire the documents from the bank to enable him to take delivery of the goods from the carrier. It is not suggested in the course of arguments by the learned Additional Government Pleader that there was any understanding or a term of contract which may be construed that the property in the goods passed to the purchaser as soon as the goods are put in the common carrier. Therefore, no

reliance can be placed on that decision. On the other hand, the extracts from the judgments of the Supreme Court in [1954] 5 STC 193 (Sales Tax Officer v. Budh Prakash Jai Prakash) and [1976] 37 STC 536 (Galiakotwala & Co. (P.) Ltd. v. State of Madras), clearly support the case of the appellant, and as a matter of fact, the observations of the Division Bench of this Court in [1974] 34 STC 6 (Kuppuswami Mudaliar & Sons v. State of Madras) (again, extracted above) are to the point.

Still further, the observations of the Calcutta High Court (Metal Alloy Company Pvt. Ltd. v. Commercial Tax Officer [1977] 39 STC 404)

(extracted above) are apposite to the facts of this case.

17. One more important factor is, that the goods returned as a result of unfructified sales and taken delivery of by the appellant were sold again,

and the Revenue has collected tax on that. This fact was also brought to the notice of the Board of Revenue by the learned counsel appearing for

the appellant. However, that was not squarely met by the Board of Revenue in its order, except stating that the assessee has to be blamed for the

same. In any event, the Revenue is not entitled to get the tax collected twice on the same goods while the goods are exigible to tax on a single

point. But we may make it clear that we are not basing our decision on this ground alone. We are satisfied that in the facts and circumstances of the

case and in the light of the principles laid down by this Court and the Supreme Court, the turnover in question represents the unfructified sales and,

therefore, the tax paid on those "unfructified sales" is liable to be returned, and the rejection on the ground that the claim was not made in time

treating the same as "sales returns", cannot be sustained.

18. In the result, the appeal is allowed, and the order of the Board of Revenue is set aside. Consequently, the order of the assessing officer dated

November 15, 1978 (after remand), is restored subject to factual mistakes if there are any, as pointed in paragraph 7 of the Board's Order.

However, there will be no order as to costs.

19. Appeal allowed.