

**(1990) 11 MAD CK 0098**

**In the Madras High Court**

**Case No : Tax Case (Revision) No. 295 of 1980**

State of Tamil Nadu

APPELLANT

Vs

Bhaskaran Blue Metal Works

RESPONDENT

**Date of Decision : 15-11-1990**

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 2

Tamil Nadu General Sales Tax Act, 1959 — Section 17, 2, 3, 3A, 4

**Citation : (1991) 82 STC 116**

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

**Bench : Division Bench**

**Advocate : R. Karuppan, Additional Government Pleader, for the Appellant; R.S. Venkatachari, for the Respondent**

## **Judgement**

Mishra, J.—A short question and a short answer thereto would have sufficed but for a judgment of this Court in *State of Tamil Nadu v. Parry and Company* [1976] 38 STC 122 which it appears is in conflict with a later judgment of this Court in *Ramco Cement Distribution Co. (P.) Ltd. v. State of Tamil Nadu* [1982] 51 STC 171. Thus, we have to exercise our wit and state what the law on the subject is.

2. The question herein is, whether transport charges can be included in the "taxable turnover" of the assessee under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act"). Since no other question is involved in this case, it is not necessary to state the facts beyond stating that the assessee sought exemption of the transport charges and the Appellate Tribunal acting upon the express rule in this behalf, that is to say, rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959 (hereinafter referred to as "the Rules"), allowed the exemption. The State of Tamil Nadu has questioned the validity of the said order of the Sales Tax Appellate Tribunal.

3. In the case of *Ramco Cement Distribution Co. (P.) Ltd. v. State of Tamil Nadu* [1982] 51 STC 171 a Bench of this Court has gone into this question in some detail. If we go to refer to the various provisions of the Act and the Rules, we

shall only repeat what the Bench had done in the said case. It may, however be not out of place to point out that in the said case, the Bench considered the question, whether freight charges incurred by the dealer in the despatch of cement to the place of the customer could be deducted from the total turnover of the dealer under the Central Sales Tax Act, 1956, the Tamil Nadu General Sales Tax Act, 1959 and the Tamil Nadu Additional Sales Tax Act, 1970, or not. It will also be not out of place to refer to some of the provisions of the Act which give us a clue to answer the problem posed before us, namely, the definition of the expression "sale" in section 2(n), "goods" in section 2(j), "taxable turnover" in section 2(p), "total turnover" in section 2(q), "turnover" in section 2(r) and the rule, that is to say, rule 6(c) of the Rules.

4. The expression "goods" means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities and articles, including the goods (as goods or in some other form) involved in the execution of works contract or those goods to be used in the fitting out, improvement or repair of movable property; and all growing crops, grass or things attached to, or forming part of the land which are agreed to be served before sale or under the contract of sale. The expression "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, 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 execution of a works contract; (iii) a delivery of goods on hire-purchase or any system of payment by instalments; (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; (vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. "Taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed. "Total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax. "Turnover" means the aggregate amount for which goods are brought or sold, or delivered or supplied or otherwise disposed of in

any of the ways referred to in clause (n) by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea, grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover. Rule 6 of the Rules reads :

"6. The tax or taxes u/s 3, 3A, 4 or 5 shall be levied on the taxable turnover of the dealer. In determining the taxable turnover, the amounts specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer :

(a) all amounts for which goods specified in the Third Schedule to the Act are sold;

(b) all amounts for which goods exempted by a notification u/s 17 are sold or purchased, as the case may be, provided that the terms and conditions, if any, for the exemption in the notification are complied with;

(c) all amounts falling under the following three heads when specified and charged for by the dealer separately, without including them in the price of the goods sold;

(i) freight.

(ii) .....

(iii) charges for delivery."

5. It is thus clear that realisation of tax under the Act depends upon the actual turnover, meaning the aggregate amount for which the goods are bought or sold or delivered or supplied or otherwise disposed of by a dealer as contemplated under the Act and realised on every transfer of the property in goods, whether sale or purchase as the case may be, in accordance with the taxing provisions of the Act. To remove the possibility of misapprehensions with respect to freight being included in the turnover of the dealer concerned for purposes of tax, the rule aforequoted states in no uncertain terms that all amounts falling under the head "freight" charged for by the dealer separately without including them in the price of the goods sold will be deducted from the total turnover of a dealer for the purposes of tax or taxes u/s 3, 3A, 4 or 5. The Act, however, does not contain any definition of the price of the goods. The Rules are also silent about it. "Sale price", however, as defined under the Central Sales Tax Act in section 2(h) 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. Thus, it includes the amount which the seller

receives from the buyer for the goods and excludes any cash discount according to the practice normally prevailing in the trade. It includes any amount charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof but excludes the cost of freight or delivery or the cost of installation in cases where such cost is separately charged.

6. It is thus clear that in arriving at the taxable turnover of a dealer under the Act read along with the Rules made thereunder, the freight charges will have to be deducted. This statement of law is available in the case of *Ramco Cement Distribution Co. (P.) Ltd. Vs. The State of Tamil Nadu*, Our attention, however, has been drawn to a judgment by a Bench of this Court in *State of Tamil Nadu v. Parry and Company* [1976] 38 STC 122 stated to be contra to what has been stated in the case of *Ramco Cement Distribution Co. (P.) Ltd. Vs. The State of Tamil Nadu*, . In *The State of Tamil Nadu Vs. Parry and Company*, in a short judgment, without referring to the other provisions of the Act, but taking notice of the "taxable turnover" under rule 6(c) of the Rules, a statement of law has been made to the following effect :

"We are unable to agree with the order of the Tribunal that merely because the freight is shown separately in the bill, the dealer is entitled to deduct that amount from the taxable turnover. In order to claim deduction, not only the freight will have to be shown and separately charged in the bill, but there should be evidence to show it was not included in the price in the bargain made between the dealer and the purchaser. If the bargain between the parties was for payment at a particular price, the mere fact that the dealer had bifurcated the price and shown the total amount under separate headings will not enable the dealer to get the deduction of the freight from the total taxable turnover."

On the basis of this authority of the court, learned Additional Government Pleader has contended that the Tribunal has erred in straightway excluding the alleged transport charges amounting to Rs. 9,555.60 from the taxable turnover.

7. Apart from the fact that the case in *The State of Tamil Nadu Vs. Parry and Company*, is distinguishable on facts, to which we shall presently refer to, it seems that it is not possible to accept the principle stated in the said judgment as it does not hold the field any longer in view of the express statement of the law coming from the Supreme Court of which notice has been taken by this Court in *Ramco Cement Distribution Co. (P.) Ltd. v. State of Tamil Nadu* [1982] 51 STC 171. In *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* [1969] 24 STC 487 the Supreme Court considered a somewhat similar contention with respect to the provisions of the *Andhra Pradesh General Sales Tax Act, 1957* and observed :

"Railway freight being Rs. 274.40 was added to the value of the goods and sales tax was collected by the company from the purchasers. That indicated, according to counsel for the respondent, that the true effect of the agreement between the parties was that the price was inclusive of the railway freight. 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."

8. The test, therefore, as indicated in the judgment of the Supreme Court is, whether the freight has been made a part of the sale price or not. If there is anything to show that the freight has been made as part of the sale price, the Revenue may be justified in proceeding to take the freight also as part of the sale price and thus include it in the turnover on which tax can be imposed. If there is nothing available to show that there was any price charged which included the freight also and the assessee is separately showing the price of sale as well as the freight charges, the Revenue will have no option but to tax on the turnover of sale and not of freight.

9. A question somewhat close to the question before us fell for decision before a Division Bench of the Punjab and Haryana High Court in *State of Haryana v. Janki Dass and Co.* [1990] 79 STC 1. It was noticed and said that it is clear from the definition of "sale price" in the Central Sales Tax Act that the cost of freight or delivery is not included in the turnover, where such cost is separately charged. Similarly, according to the definition of "turnover" in the Punjab General Sales Tax Act, 1948, the cost of freight is not includible in the turnover if it is not charged by the dealer at the time of or before the delivery of the goods; it is manifest from a perusal of the terms of contract in the present case and *Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh*, , that the dealers in both the cases were not under an obligation to pay the freight of the goods despatched free on rail (f.o.r.) destination, it was explicitly made clear in both the cases that the railway freight shall be payable by the purchaser at the destination and that the amount of freight shown in the railway receipt shall be deducted from the invoice; in the present case it has been made further clear that the purchaser had expressly stated that they authorised the respondent-dealers that they bound themselves to pay on presentation RR/GR should be made out on "to pay" basis and the freight be adjusted in the invoice. There is nothing to suggest in the language of the contract or the catalogue that it was the responsibility of the seller to send the goods up to the destination and that freight was paid by the purchaser on behalf of the seller. In *Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh*, , a dealer, to meet competition from other manufacturers, maintained a uniform catalogue rate all over the country in respect of the goods manufactured. The company sent goods to outstation customers by rail under railway receipts with "freight to pay". It made out an invoice at the catalogue rate, and the customer paid the amount of invoice less the freight for realising the railway receipt and took delivery of the

goods on payment of the railway freight. The result was that the net price received by the company was the catalogue rate less the railway freight charged in respect of the goods transported to the destination. On these facts, it was held by their Lordships of the Supreme Court :

"(i) that under the terms of the contract there was no obligation on the part of the company to pay the freight and the price received by the company for the sale of the goods was the invoice amount less the freight;

(ii) that the form in which the invoice was made out was 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 could not on that account be altered. That the company might be liable to refund the amount of excess sales tax to its purchasers was a matter between the company and the purchasers and the State could not seek to levy tax on railway freight if it was not made part of the price."

The Supreme Court reiterated the above law in *Hindustan Sugar Mills Ltd. v. State of Rajasthan* [1979] 43 STC 13 in which certain observations made in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, were explained. The Supreme Court stated in *Hindustan Sugar Mills Ltd. case* [1979] 43 STC 13 thus :

"We may also at this stage refer to another decision of this Court earlier in point of time. That is the decision in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, . What happened in this case was that the appellant sold and despatched hydrogenated groundnut oil to the purchasers at an agreed price which was inclusive of freight. It is not very clear from the record but it does appear that the railway receipts obtained by the appellant were on the basis of "freight to pay" and the amount of freight was paid by the purchasers and in the invoices made out by the appellant, the agreed price inclusive of freight was shown and from this the amount of freight was deducted and on the balance the amount of sales tax computed. The appellant claimed to deduct the amount of freight from the turnover on the strength of rule 5(1)(b) of the Turnover and Assessment Rules, which provided that in determining the net turnover of a dealer, he shall be entitled to a deduction of "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) ....." This Court held that the deduction claimed was not permissible since the conditions for the applicability of rule 5(1)(g) were not satisfied. It was pointed out that it was clear from the contents of the specimen invoice produced by the appellant that "the appellant has charged a price inclusive of the railway freight and would, therefore, be outside the terms of rule 5(1)(g), which requires that in order to enable a dealer to claim the deduction it should be charged for separately and not included in the price of goods sold. The conditions of the rule not having been complied with, the appellant was not entitled to the deduction in

respect of freight". Here, the freight was payable by the appellant because the price was inclusive of the freight and there was no stipulation in the contract, as in Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, that the delivery to the purchaser shall be complete when the goods are put on rail or that the payment of freight shall be the obligation of the purchaser. And it did not make any difference to this position that the freight was not initially paid by the appellant but was paid by the purchaser and given credit for against the agreed "freight inclusive" price in the invoice."

10. The judgment of this Court in State of Tamil Nadu v. Chettinad Cement Corporation Limited [1976] 38 STC 519 was also referred to in the case before the Punjab and Haryana High Court. They distinguished the case saying that it deals with a controlled commodity, that is to say, cement. Its sale was controlled by the Cement Control Order. The distinction has been brought out in Hindusthan Sugar Mills Vs. State of Rajasthan and Others, :

"The scheme of the Control Order was that the freight was payable by the producer and he recovered it from the purchaser as part of the f.o.r. destination railway station price. The provision in the contract that the delivery to the purchaser was complete as soon as the goods were put on rail and payment of the freight was the responsibility of the purchaser was wholly inconsistent with the scheme of the Control Order and must be held to be excluded by it. The Control Order was paramount; it had overriding effect and if it stipulated that the freight was payable by the producer, such stipulation must prevail, notwithstanding any term or condition of the contract to the contrary. Therefore, by reason of the provisions of the Control Order, which governed the transactions of sale of cement entered into by the assessee with the purchasers, the amount of freight formed part of the "sale price" within the meaning of the first part of the definition of that term in section 2(p) of the Rajasthan Act and section 2(h) of the Central Act and was includible in the turnover of the assessee."

11. Thus, it is clear that freight cannot be included in the taxable turnover unless it is found that it was paid as a part of the stipulation of the price of the goods sold. The law on the subject has thus to be understood as above.

12. Coming to the facts of this case, we have no hesitation in holding that in the absence of any material to the contrary to suggest that there has been freight realised as a stipulation of the transfer of property in the goods sold, the Revenue shall not be entitled to claim any tax upon the transportation charges.

13. In the result, we find no merit in this tax case revision. Accordingly, it is dismissed. No costs.

14. Revision petition dismissed.