

(1982) 02 GUJ CK 0005
In the Gujarat High Court
Case No : Sales Tax Reference No. 9 of 1980

Vallabh Glass Works Ltd.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 01-02-1982

Acts Referred:

Central Sales Tax Act, 1956 — Section 4(2)

Gujarat Sales Tax Act, 1969 — Section 16, 2(28), 2(29), 45(1), 45(6)

Citation : (1982) 50 STC 352

Hon'ble Judges : P.D. Desai, J; B.K. Mehta, J

Bench : Division Bench

Advocate : R.D. Pathak, for the Appellant; A.J. Patel, Assistant Government Pleader, instructed by Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Mehta, J.—At the instance of the assessee, the following seven questions have been referred to us u/s 69(1) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Gujarat Act"), for our advice :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that there was an implied agreement to deliver the goods at the destination of purchasing dealers; and therefore, the property in the goods would not have passed unless the packing charges were paid by the purchasers ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that packing charges charged for in the white bills were part of the turnover of sale price under the Gujarat Sales Tax Act, 1969 ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that packing charges, handling charges, loading and unloading charges and delivery charges at destination, charges for iron strapping and lafa charges shown in the yellow bills were part of sale price under the Gujarat Sales Tax Act, 1969 ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was

right in law in holding that packing charges charged in the white bills were part of the turnover of sale price under the Central Sales Tax Act, 1956 ?

(5) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that charges for packing, handling, iron strapping, binding and lafa charges charged in the yellow bills form a part of sale price under the Central Sales Tax Act, 1956 ?

(6) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the breach of declarations in form 19 was properly worked out by applying the proportion of total sales to consignment sales to the total purchases against form 19 and treating the breach of such declarations to the extent of proportion of consignment sales ?

(7) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that there was a breach of declarations in form 19 in respect of purchases made for manufacturing therefrom all the packing materials and that timber were not the goods that were used in the manufacture of taxable goods for sale or on the ground that timber cannot be said to be materials used as consumable stores in the manufacture of sheet-glass ?"

2. The necessary facts which have led to this reference are as under : The assessee-company is a public limited company engaged in the business of manufacture and sale of sheet-glass. It has its branches all over India. The sales of the assessee-company are within the State of Gujarat as well as in the course of inter-State trade and commerce. Certain goods are also sent to its branches outside the State of Gujarat for sale on consignment basis. It is claimed by the assessee-company that glass being a very delicate commodity, the assessee-company agreed and undertook by a separate agreement with its stockists the job of delivering glass in special packing at its customers' places within and outside the State of Gujarat for which they had charged certain amounts described as charges for "after sale services". These charges included the charges for packing - ordinary as well as special - loading, unloading, providing for iron strapping, binding and also providing wooden frames which are popularly known as lafa charges for the protection of glass during the transit and handling of the goods at the factory site as well as at the destination. These charges have been recovered under the bills of regular sales (shortly referred to hereinafter as "white bills") as well as by independent debit notes prepared for such charges (hereinafter called "yellow bills"). It should be noted at this stage that the charges recovered under the white bills are described at the end of the bills as : "extra charges", for D.P. & T.P. packing at the specific request of buyer. The charges recovered under yellow bills were on account of handling outside the factory, loading, unloading, delivery at the destination, iron strapping, binding and lafa charges. It should be further noted that so far as the charges recovered under white bills were concerned, the assessee had collected tax on such charges at the appropriate rates applicable and payable on sale of glass under the Gujarat Act. So far as the charges recovered under the yellow bills were

concerned, the assessee did not collect any amount of tax or had not paid over to the Government on the ground that these charges were not part and parcel of the sale price. In the assessment period from 1st April, 1972, to 31st March, 1973, the assessee recovered an aggregate amount of Rs. 31,51,497 and Rs. 7,87,324 as the so-called after sale service charges under white bills and yellow bills respectively. It further appears that the assessee-company had purchased certain materials without payment of tax on giving declarations in form 19 under the Gujarat Act that the materials were required for the use in manufacture of taxable goods for sale in the sense that the sales were to be effected locally or in the course of inter-State trade and commerce. A part of the goods so manufactured was, however, sent on consignment basis by the assessee-company to its branches outside the State of Gujarat and the amounts of such purchases effected on the declarations in form 19 used in the manufacture of goods consigned outside the State admittedly amounted to Rs. 95,925. The assessee-company had also purchased timber on the strength of similar declarations in form 19 for the purposes of preparing wooden boxes or crates which were used for packing the glass. In the course of assessment for the aforesaid assessment period, the Sales Tax Officer held that the after sale service charges recovered through white bills and yellow bills form part of sale price, and therefore, were liable to tax. The Sales Tax Officer further held that the assessee-company was not entitled to purchase goods on the strength of declarations in form 19 to the extent to which the goods manufactured out of such materials were consigned outside the State of Gujarat, and therefore, the purchases were unauthorised to that extent, that is, to the extent of Rs. 95,925 and were liable to be subjected to purchase tax u/s 16 of the Gujarat Act. It was further held by the Sales Tax Officer that the purchase of timber meant for use as packing materials was not permissible, and therefore, the assessee-company could not have purchased on the strength of declarations in form 19, and therefore, the purchases amounting to Rs. 7,470 of the timber were also liable to be subjected to purchase tax u/s 16 of the Gujarat Act. The Sales Tax Officer also levied penalty of Rs. 10,000 u/s 45(1) and penalty of Rs. 45,592 u/s 45(6) of the Gujarat Act as the difference between the amount of tax paid and assessed was exceeding the prescribed limit of 20 per cent, and therefore, the assessee was liable to pay penalty.

3. The assessee, therefore, carried the matter in appeal before the Assistant Commissioner of Sales Tax which was without success with the result that the matter was taken further in second appeal before the Sales Tax Tribunal.

4. On behalf of the assessee-company three contentions were urged before the Tribunal. In the first place, it was argued that the charges for after sale services recovered and the white bills and yellow bills were in respect of the services rendered to the purchasers after the sale was complete which, according to the contract for sale between the assessee-company and therefore, the charges recovered for after sale service rendered at the request and under the authority of the purchasers could not have been treated as part of the sale price. In

support of this contention, reliance was placed by the assessee-company on an affidavit filed on its behalf by its managing director, Shri M. B. Patel, before the Assistant Commissioner of Sales Tax as well on the two specimen bills, white as well as yellow, drawn by the assessee-company on Jaya Frame Works of Davangare and Associated Glass Corporation, Ahmedabad. It is not necessary to refer to the affidavit in details but the important point to which the managing director deposed to was that glass was sold in loose condition, and at the request and under the authority of the purchasers certain after sale services, as specified in the affidavit, were rendered by the assessee-company for and on behalf of the purchasers in their interest on no-profit basis. It could, therefore, not have been treated as a sale price proper as done by the sales tax authorities. It should be noted that the Tribunal, in order to ascertain the terms and conditions of the contract of sale, which the assessee claims to be ex-godown, called for specimen order forms of the up-country customers of the assessee-company, which could not be produced as the assessee-company expressed its inability because they pertain to a period 1972-73 the records of which were not available. However, the assessee-company had produced a few order forms obtained from the local dealers before the Tribunal. The said order forms disclosed that the purchasers wanted the goods to be delivered at the destination for which they were prepared to pay whatever charges as might be incurred by the assessee-company for delivering the goods at their destinations. No specimen order form of the sales effected in the course of inter-State trade and commerce was produced by the assessee-company before the Tribunal. It was also claimed by the assessee-company that its representative accompanied the goods so as to effect safe delivery thereof at the destination to the respective customers. In effect the contention was that there were two independent contracts, one for the sale of goods ex-godown and another for the delivery at the destination. The first contract was claimed to be in nature of sale of goods while another was of pure work and service. The Tribunal, having considered the affidavit, the order forms, the specimen bills and detailed contentions urged on behalf of the assessee, found that the terms of contract established conclusively that the delivery of the goods was ex-destination and it was an obligation under the contract of the assessee-company to deliver the goods at the destination of the customer for which charges for packing and other personal services rendered were recovered wither under the white bills and/or under the yellow bills. The Tribunal also found that unless the goods were delivered at the destination of the customer they were under no obligation to accept the goods said to have been delivered by the assessee-company ex-godown. The Tribunal consequently, therefore, held that after sale service charges were sale price, and therefore, liable to tax. The second contention which was urged on behalf of the assessee-company was that the Tribunal should presume that the goods purchased by the assessee-company otherwise than on declarations in form 19 were used in the manufacture of goods which were consigned outside the State, and therefore, the goods of the value of Rs. 95,925 purchased on the strength of the declarations in form 19 were used in the manufacture of the goods sold locally, or in the course of inter-State trade

and commerce. The Tribunal finding it difficult to distinguish as to what value of the goods had gone into the making of glass sold outside the State and what value of the goods had gone into manufacturing of the goods sold inside the State, or in the course of inter-State trade or commerce, held that the authorities were justified in determining the breach of declarations in form 19 by apportioning the consignment sales out of the total sales in proportion of the purchases made on the strength of the declarations in form 19 and treating the purchases to that extent as unauthorised. The third contention urged on behalf of the assessee was that the purchase of timber of the value of Rs. 7,470 on the strength of declarations in form 19 was authorised and legal since the assessee could not have put glass in a saleable condition without packing the manufactured product into solid wooden crates so as to ensure safe transit and delivery at the destination, and therefore, the wooden crates should be treated as consumable stores. The Tribunal, however, rejected this contention following its earlier decision in *Vasuki Carborundum Works v. State of Gujarat*, where the Tribunal had held in Second Appeal No. 361 of 1974 decided on 1st May, 1975, that packing materials could not be treated as consumable stores and consequently the Tribunal held that the levy of purchase tax on the purchases of timber of the value of Rs. 7,470 was legal and proper u/s 16 of the Gujarat Act. The Tribunal, however, reduced the penalty from Rs. 10,000 to Rs. 5,000 and Rs. 45,592 to Rs. 1,400. Thus, the order of the Assistant Commissioner of Sales Tax was substantially confirmed, except to the extent of varying penalty.

5. At the instance of the assessee, therefore, the questions set out above have been referred to us for our opinion.

6. At the time of hearing of this reference, Mr. R. D. Pathak, the learned counsel appearing for the assessee-company, did not press question No. (6) and therefore, that question is not required to be answered.

7. As regards question No. (7), he urged that the Tribunal itself, in the statement of case, made to us, conceded the position that its earlier decision in *Vasuki Carborundum*'s case was held to be erroneous in law by this Court in Sales Tax Reference No. 13 of 1976 decided on 17th November, 1978 (*Vasuki Carborundum Works Vs. The State of Gujarat*, , and therefore the decision in the present appeal so far as taxability of the turnover of the purchases of timber of the value of Rs. 7,470 is concerned, it is required to be reversed and the said turnover could not be subjected to purchase tax u/s 16 of the Gujarat Act, because packing materials were consumable stores in the light of the decisions of this Court in *Vasuki Carborundum Works*" case [1979] 43 STC 294 and *S. L. M. Maneklal v. State of Gujarat* (Sales Tax Reference No. 8 of 1978 decided on 18th December 1978.). But the Tribunal, having regard to its power of rectification of errors of fact only, was compelled to make this reference to us for proper advice. The learned Assistant Government Pleader, appearing on behalf of the State Government, conceded that so far as this Court is concerned, question No. (7) is concluded in the light of the aforesaid decisions, though the State Government

has preferred an appeal in the Supreme Court against the decision of this Court in Vasuki Carborundum's case [1979] 43 STC 294. Question No. (7) has got to be therefore answered in the negative, that is, in favour of the assessee and against the State Government.

8. The learned counsel for the assessee urged on the first five questions. The first three questions pertain to the liability of the assessee-company to pay sales tax on the so-called after sale service charges under the Gujarat Act while questions No. (4) and (5) pertain to the liability of the assessee to pay tax on the said charges under the Central Sales Tax Act, 1956. Shortly stated, the contention urged on behalf of the assessee was, that the Tribunal was clearly in error of law in drawing an inference on the facts established before it that the contract of sale effected by the assessee-company was delivery ex-destination and not delivery ex-godown as claimed by the assessee-company. In the submission of the learned counsel for the assessee, there were in fact two contracts, one for the sale of goods and another a service contract or a works contract. In so far as the Tribunal inferred that these so-called after sale service charges were part of the sale price, the Tribunal committed an error of law, inasmuch as it acted without any evidence in that behalf and contrary to the evidence adduced by the assessee-company in nature of the affidavit of the managing director, the specimen bills and certain order forms which remained uncontroverted since no other evidence was produced on record. It was further urged on behalf of the assessee-company that the Tribunal committed an error of law in holding that the assessee-company was under an obligation to deliver the goods sold at the destinations of the customers and the customers would not have accepted the goods if the contract was not delivery ex-destinations. It was contended by the learned counsel for the assessee that if the amounts/charges were not for completing the sale as was the case in the present reference, such amounts could not be included in or treated as sale price, otherwise the levy would be ultra vires the legislative competence.

9. On behalf of the State Government, these contentions were sought to be repelled by the learned Assistant Government Pleader by pointing out that the decision of the Tribunal that the so-called after sale service charges were part of the sale price itself was as a result of pure findings of fact made in the present case on appreciation of certain basic facts which were admitted on the own showing of the assessee-company, and if these findings of fact are not challenged by seeking specific questions in that behalf by the assessee-company, the conclusion is inescapable and cannot be assailed in the present reference that the so-called after sale service charges were part and parcel of the sale price. The learned Assistant Government Pleader alternatively urged that even if this Court is inclined to opine that the said after sale service charges were not part and parcel of the sale price, as has been held by the Tribunal, even then they would amount to sale price for all intents and purposes as the definition of the term "sale price" in the Gujarat Act is an inclusive definition so as to bring in within the definition of the term "sale price", "any sum charged for anything done

by the dealer in respect of the goods at the time of or before delivery thereof". The learned Assistant Government Pleader, therefore, urged that having regard to this inclusive definition of "sale price" and on the own showing of the assessee-company in their white bills that the contract was f.o.r. Vallabh Vidyangar, anything done by the assessee by rendering services of special packing or handling the goods would be within the mischief of the definition of "sale price" as it would amount to "any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof".

10. It is in this context that we have to determine, whether the Tribunal was justified in holding as it did that the so-called after sale service charges were part and parcel of sale price as defined in section 2(29) of the Gujarat Act.

11. Before we deal with the respective contentions of the charges, it would be profitable to advert to the definitions of the terms "sale" and "sale price" in the Gujarat Act. Sections 2(28) and 2(29) of the Gujarat Act respectively define the terms "sale" and "sale price" as under :

"(28) "sale" means a sale of goods made within the State, for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price or of a fees or subscription, but does not include a mortgage, hypothecation, charge or pledge, and the words "sell", "buy" and "purchase" with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation. - For the purposes of this clause, sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the Central Sales Tax Act, 1956;

(29) "sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation when such cost is separately charged."

12. If, therefore, the assessee had recovered any amounts of valuable consideration which its customers had paid, or were payable by them for any sale made, it would be a sale price which is liable to be included in the turnover for purposes of determining the amount of sales tax subject to the deductions which may be permissible under the Act. It is also necessary before we address ourselves to the relevant legal provisions having some bearing on this question before us as to what precisely the Tribunal has found in this behalf on appreciation of the evidence which was adduced before it.

13. The Tribunal, while considering the first half of the contention in respect of the recovery of the so-called after sale service charges under white bills that the contract of sale between the assessee-company and the customers was ex-godown delivery, in the first place, examined a few copies of the orders placed by

the local purchasers of the assessee-company which were produced before the Tribunal. The Tribunal has observed in paragraph 16 of its order as under :

"16. In support of his say, the learned Advocate produced before us a few copies of orders obtained from the local purchasers. Order forms in respect of inter-State transactions received from outside the State dealers have not been furnished even in a single case. There are exceptionally few cases where the goods have been delivered in loose condition to the purchasers and where the purchasers themselves took delivery of the goods and removed the goods in their own transport. Such cases being exceptionally few, these cannot be considered as reflecting the modus operandi of the appellant. In all other cases, where the sales are to dealers from within the State or from outside the State, not only the transport has been arranged by the appellant itself but even the delivery at the destination of the purchasing dealers had been given by the appellant. It was clarified by the learned Advocate that the goods being of fragile nature they have to be properly packed. The staff or labourers of the appellant being specialised in this matter, a representative of the appellant accompanied the transport vehicle and ensured safe delivery of the goods at the premises of the purchasing dealers"

14. The Tribunal thereafter emphasised the statement made by the learned Advocate appearing on behalf of the assessee-company before the Tribunal, that the goods were necessarily required to be properly packed having regard to its fragile nature and also required to be nature and also required to be accompanied by a representative of the assessee so as to ensure safe transit and delivery at the destination. Secondly, the Tribunal considered the various bills produced before it by the assessee-company to ascertain as to what was the amount of service charges recovered by the assessee-company. After examining the bills the Tribunal has recorded its finding in paragraph 17 as under :

"17. We have gone through the copies of various bills produced by the appellant before us and we find that substantial amounts have been recovered by way of special packing charges and also by way of other charges in the nature of handling, loading, unloading, delivery, binding and lafa charges."

15. In order to substantiate its finding, the Tribunal has detailed a few cases of sales effected by the assessee in the course of the assessment period in favour of M/s. Jaya Frama Works of Davangare, M/s. Nazarali Abdulhusen of Poona, M/s. Mohandas & Co. of Madurai and M/s. Associated Glass Corporation of Ahmedabad, and observed that packing and other charges have exceeded even the price of the goods in some of the cases. Thirdly, the Tribunal also noted on perusal of these bills in some of the cases. Thirdly, the Tribunal also noted on perusal of these bills that the condition of the contract of delivery ex-godown was absent in all the bills except in a few cases. The Tribunal has noted as under after setting out the illustrative cases of the goods to show that the so-called after sale service charges had been recovered arbitrarily. The finding of the Tribunal as to this basic fact is recorded in the following terms :

"17. ... It will be seen that only in a few cases, there were remarks "delivery at godown" in the column of "goods dispatched by", whereas in majority of other cases in the column of "goods dispatched by", the name of the transport company has been mentioned. We have tried to correlate the packing and other charges with the value of the goods. But we could not find that there is any rational basis for this and it appears that these charges have been recovered on some arbitrary basis."

16. The Tribunal therefore addressed itself to the second half of the contention of the assessee that packing charges recovered under white bills as well as handling, etc., charges recovered under yellow bills were not part of the sale price. The Tribunal found, on the admission of the learned Advocate appearing on behalf of the assessee, that in so far as the packing charges shown in the white bills were concerned, they were in respect of the packing admittedly done in the sales department, which would obviously indicate that the goods were ready for delivery ex-factory after the packing was done. The Tribunal therefore concluded as under in paragraph 19 of its order :

"19. Thus, this packing was provided and charged for before the goods were ready for delivery ex-factory. This clearly shows that these packing charges form a part and parcel of sale price as they were charged for and recovered before the goods were ready for delivery ex-factory."

17. The Tribunal also considered the question so far as handling, etc., charges recovered under the yellow bills were concerned that from the affidavit of the managing director as well as statements given by the assessee-company before the lower authorities that in all cases, except a few, the purchasers" representatives did not take delivery of the goods ex-factory, the Tribunal has recorded its finding in this behalf in paragraph 20 of its order as under :

"20. Coming to the point of charges recovered through yellow bills, from the affidavit of the managing director as well as statements given by the appellant before the lower authorities, it would be clear that but for exceptionally few cases in respect of local sales and in all cases of inter-State sales, the purchasers" representatives did not take delivery of the goods ex-factory. Though there is a mention that the purchasers wanted to have the expert services of the appellant because it was difficult and costly for them to take delivery and remove the goods at the destination, the purchasers desired to have the goods delivered at their destination. From the conduct of the appellant as a selling dealer as well as the purchasing dealers, it is clear beyond all doubt that an implied agreement was there to deliver the goods at the destination of the purchasing dealers. In order to decide as to when the property in the goods passed, or when the purchasers wanted the property to pass to them we may ask the question to ourselves whether the purchasers would have accepted the delivery ex-factory."

18. After making these findings of fact, either on the admission of the learned

Advocate appearing on behalf of the assessee-company, or from the evidence which has been produced by the assessee-company before the sales tax authorities, or from the evidence produced before the Tribunal, the Tribunal addressed itself to the question as to when the property in the goods passed to the purchasers. The Tribunal has posed the said problem in the following terms :

"20..... In order to decide as to when the property in the goods passed, or when the purchasers wanted the property to pass to them we may ask the question to ourselves whether the purchasers would have accepted the delivery ex-factory where the appellant as a selling dealer was not prepared to give the so-called after sale service ? The obvious answer to this would be in the negative. This is because the goods being fragile, the purchasers would not be prepared to take the risk of breakage during transit, and therefore, the purchasers wanted that the goods should be delivered at their destination for which they were prepared to pay the charges made by the selling dealer, that is, the appellant. In interpreting the nature of a transaction, we have to look into the substance of the matter and not the way in which the agreements have been entered into. Taking into consideration all the facts and circumstances of the present case, it would be clear that the substance of the contract was that the appellant was under an obligation to deliver the goods at the purchaser's destination."

19. In that view of the matter, therefore, the Tribunal held that these so-called after sale service charges recovered under the white bills and yellow bills would form part of sale price.

20. The crux of the problem therefore is whether the Tribunal was right on the facts and in the circumstances of the case as found by it in holding that these so-called after sale service charges recovered by the assessee-company under the white and yellow bills were part of the sale price ? The answer to the question depends on whether these charges were valuable consideration for purposes of effecting the sales, or any other amount received for anything done in respect of the goods at the time of or before delivery. It should be recalled that the Tribunal has found, as a matter of fact, on appreciation of the evidence adduced by the assessee-company, or on admission made on behalf of the assessee that the delivery of the goods by the assessee-company to its various customers was at the destination. Till these findings of fact are there, it would be difficult, in our opinion, to successfully assail the conclusion which the Tribunal has reached on the basis of those findings. The reasons for our opinion are as follows : In the first place, we have to determine as to what was the nature of the contracts. It cannot be gainsaid, and in fact it was not seriously disputed on behalf of the assessee, that the contracts between the assessee-company and its purchasers were for unascertained goods by description. The goods which are not specific are unascertained goods. Section 2(14) of the Sale of Goods Act defines what is "specific goods". The said term means "goods identified and agreed upon at the time of contract". It is nobody's case that the goods in question were identified

and agreed upon at the time of the contract.

21. The next point to be considered is as to when the property in the goods passed to the respective buyers. It was urged on behalf of the assessee that the Tribunal has proceeded on the so-called *modus operandi* of the assessee-company in general and each individual contract is not scanned and analysed for purposes of determining the nature of each such contract. There is some substance in this contention; but it would not make any material difference in the ultimate analysis in the view of the matter which we are inclined to take this reference.

22. The Tribunal has found that in almost all cases, except few, the purchasers had not taken delivery *ex-factory* of the assessee-company. The Tribunal has further found that in almost all the bills, except a few, there was no mention that the contract between the assessee-company and its various purchasers was for delivery *ex-factory*. The learned Advocate for the assessee-company made a grievance that the Tribunal has not considered as to where the property in the goods passed and merely proceeded on the ground as to where the delivery was effected. In this connection, the learned Advocate for the assessee has drawn our attention to paragraph 20 of the order of the Tribunal where the Tribunal has addressed itself to this aspect by raising a question as to whether the purchasers would have accepted the delivery *ex-factory*. It was also pointed out to us that the Tribunal has in paragraph 19 of its order emphasised that since the packing was provided and charged before the goods were ready for delivery *ex-factory*, the charges were recovered as a part of the sale price. It was urged that these two findings are inconsistent. We do see some force in this criticism. It is no doubt true that what is relevant u/s 23 of the Sale of Goods Act, which provides as to when a property passes in a contract for sale of unascertained goods by description, is the factum of unconditional appropriation of the goods by the seller with express or implied assent of the buyer. It is no doubt true that the appropriation may be, and often is quite distinct from delivery and therefore the next important question which arises, in our opinion in the present reference, is whether the assessee-company had unconditionally appropriated the goods to the contract with the express or implied assent of the buyers and at what point of time the unconditional appropriation was so effected. In this connection, reference to section 23(2) of the Sale of Goods Act is also relevant. In effect and substance it provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. The Tribunal has found as a matter of fact that in almost all cases with a few exceptions where the sales were to the dealers from within the State or from outside the State not only the transport had been arranged by the assessee-company but even the delivery at the destination of the purchasing dealers had been given by the assessee. The reason advanced by the learned Advocate for the assessee-company appearing before the Tribunal for adopting this course

was that the goods being of fragile nature they had to be properly packed and delivered. It cannot, therefore, be said that the deeming fiction provided in section 23(2) would be attracted in the present case so as to construe the delivery to the buyers' representatives in a few cases where such delivery was effected or to a carrier for purposes of transmission to the buyers as unconditional appropriation of the goods to the contract. The learned Advocate for the assessee, therefore, urged that the printed pro forma of the white bills produced before the Tribunal indicated that the rates under the various contracts were "f.o.r. Vallabh Vidyanagar" and therefore, when delivery was effected to the railway or to the public carriers for transmission to the buyers the goods under the contract were unconditionally appropriated. The white bills also disclosed that the freight was to be paid by the buyers and having regard to these two facts, the extra charges recovered for special type of packing as well as for handling and delivery at the destination are the subject-matter of separate agreement between the parties, and therefore, they cannot be considered as a part of the sale price. We are afraid that in view of the finding of fact made by the Tribunal, the learned Advocate for the assessee is not justified in construing the contracts as he has canvassed before us. A somewhat similar question arose before the Supreme Court in *The Commissioner of Sales-Tax, Eastern Division, Nagpur Vs. Husenali Adamji and Co.*, where the assessee who was assessed to sales tax under the C.P. and Berar Sales Tax Act, 1947, entered into an agreement for supply of "sawar" logs to Western India Match Company Ltd. during the season 1947-48. The contract of sale between the assessee and the company provided, inter alia, that the logs on arrival at Ambarnath were liable to be rejected by the company's factory manager, if the logs did not conform to the specifications, notwithstanding the fact that such logs may have been accepted by the company's representative before being railed to Ambarnath. The assessee despatched the goods from different railway stations in Chanda district and the railway receipts were made out in the name of the company as the consignee. On this contract, it was held by the Supreme Court that it was for sale of unascertained goods and consequently the property in them could not u/s 18 of the Sale of Goods Act pass unless and until the goods were ascertained, and on proper construction of the contract as a whole, the intention of the parties clearly was that the supplier would send the logs by rail from different stations in the Central Provinces to Ambarnath where the Western India Match Company Ltd.'s manager would inspect, measure and accept the same, if in his opinion they were of the description and quality agreed upon. The Supreme Court, therefore, held that the property in logs passed to the buyer in Ambarnath and the sales in question did not take place in the Central Provinces and consequently were not sales within the meaning of and therefore liable to pay tax under the C.P. and Berar Sales Tax Act, 1947 (sic). It is an accepted position in the Sale of Goods Act that where in pursuance of a contract of sale the seller is authorised or required to send the goods to a buyer, or deliver the goods to a carrier, whether he is named by the buyer or not, for purposes of transmission to the buyer, it is prima facie deemed to be a delivery of the goods to the buyer [vide section

39(1) of the Sale of Goods Act]. Sub-section (2) of section 39 casts an obligation on the seller unless otherwise authorised by the buyer, to make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and other circumstances of the case and if the seller omits to do so, and if the goods are lost or damaged in transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself. The finding extracted from paragraph 16 of the order of the Tribunal shows that but for exceptionally few cases in respect of local sales and in all cases of inter-State sales, the purchaser's representative did not take the delivery of the goods ex-factory and the purchasers wanted to have the expert services of the assessee-company in the matter of packing and transport because it was difficult and costly for them to take delivery and remove the goods on their own to the destination and that the representative of the assessee-company accompanied the goods till they were delivered at the destination to the purchasers. The reason given by the learned Advocate for the assessee in this behalf was that the goods being of fragile nature, they had to be properly packed and safe transit and delivery were ensured. It is also an accepted position in the Sale of Goods Act that where the goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for purposes of ascertaining whether they are in conformity with the contract. Section 41 of the Sale of Goods Act has made this provision. In the Sales of Goods by Pollock and Mulla, Fourth Edition, under the caption "Buyer's right to examine the goods" in the commentary on section 41 at page 176, the following principle about the buyer's right to examine the goods has been digested :

"The effect of sub-section (1) is that, in cases where there has been no previous examination of the goods, 'the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract' (vide *Sorabji Hormusha Joshi and Co. Vs. V.M. Ismail and Another*, for 'no acceptance can properly be said to take place before the purchaser has had an opportunity of rejection' and 'a right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptances so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right ..."

23. The Tribunal has rightly, in our opinion, inferred from the facts which had been found that having regard to the nature of the goods which was fragile, the purchasers were not prepared to take the risk of breakage during transit, and therefore, the purchasers wanted the goods to be delivered at their destination for which they were prepared to pay the charges made by the assessee-company, and having regard to the substance of the transaction and the facts and circumstances which were established, it was clear that the assessee-company undertook an obligation to deliver the goods at the purchasers'

destination. The very fact that the purchasers had requested the assessee-company to provide them with services which, inter alia, included inspection and open delivery, makes it clear that till the goods were delivered at the destination to the purchasers after affording them inspection and open delivery thereof for which the assessee-company was authorised by the buyers to charge them reasonably, it cannot be said, as has been rightly held by the Tribunal, that the property in goods passed to the buyers, and therefore, all the valuable considerations which had been charged by the assessee-company to their buyers not only for and on account of the price of the goods but also for the special packing and for safe transit and delivery at the destination was the sale price proper. It is, therefore, not necessary for us to go into the extended definition of the term "sale price", because on the findings of fact made by the Tribunal on appreciation of the evidence adduced or the admissions made by the assessee-company, the contract of sale was complete only at the destination when the goods covered by them were safely delivered to the buyers, and therefore, all considerations which had been charged for completing the contract of sale would be the sale price proper in the sense in which it has been defined in the Gujarat Sales Tax Act.

24. Before we answer the questions, we think that question No. (1) should be reframed in light of the dispute between the parties and the findings which have been made by the Tribunal on appreciation of the evidence which we do hereby with the consent of the learned Advocate for the assessee-company and of the learned Assistant Government Pleader appearing on behalf of the State Government, and reframe the question as under :

"When, on the facts and in the circumstances of the case, the property in the respective contracts of sale of glass between the assessee-company and the respective purchasers passed to the purchasers ?"

25. The other questions have been properly raised so as to cover the dispute effectively between the parties.

26. We, therefore, answer the questions as under :

Question No. (1) : The contract between the assessee-company and the respective purchasers required that the goods were to be delivered at the destination to the purchasers and till then the property in the goods did not pass to the buyers.

Questions Nos. (2) to (5) are answered in the affirmative, that is, in favour of the revenue and against the assessee.

Question No. (6) was not pressed.

Question No. (7) is answered in the negative, that is, in favour of the assessee and against the revenue.

Having regard to the fact that the assessee has partially succeeded so far as

question No. (7) is concerned, we think that there should be no order as to costs in this reference.

27. Reference answered accordingly.