

PETITIONER:
INDIAN OIL CORPORATION LTD. & ANR.

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT 10/09/1980

BENCH:
GUPTA, A.C.
BENCH:
GUPTA, A.C.
FAZALALI, SYED MURTAZA
KAILASAM, P.S.

CITATION:
1981 AIR 446 1981 SCR (1) 673

ACT:

Sales Tax legislation-Central Sales Tax Act, 1956-Section 3(1)-Factory in Barauni in Bihar-Naphtha sent by pipeline from Barauni to Kanpur in U.P.-Orders placed pursuant to an agreement by the buyer in Kanpur on the seller's office in Kanpur-Sale-Whether taxable under the Central Sales Tax or U.P. Sales Tax Act.

HEADNOTE:

The Indian Oil Corporation was a manufacturer of naphtha with its works at Barauni in Bihar while the 5th respondent was a manufacturer of fertilizers with its factory at Kanpur. The Indian Oil Corporation supplies naphtha to the 5th respondent's fertilizer factory at Kanpur through a pipeline. Both the buyer and the seller have their offices at Kanpur and indents are addressed by the buyer to the seller at their Kanpur office. The pipeline from Barauni to the petitioner's depot at Kanpur has been constructed by the petitioner, the pipeline between the buyer's and the seller's fences is however constructed by the buyer, the 5th respondent.

On the question whether the sale of naphtha should be taxed under the Central Sales Tax Act or under the U.P. Sales Tax Act, the U.P. authorities insisted that since the indent had been placed by the buyer on the seller at their Kanpur Office the sale was a local sale while the sale tax authorities in Bihar insisted that since there was transfer of goods from one State to another the sale was inter-State chargeable to tax under the Central Sales Tax Act.

Allowing the petition,

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HELD: On the facts of the present case the sales are clearly inter-State sales and the State of U.P. had no jurisdiction to assess the petitioners to sales tax under the State Act. As the movement of naphtha commences from Barauni in Bihar the sales tax payable on the sales under the agreement can be assessed and collected only by the authorities in the State of Bihar on behalf of the Government of India in view of section 9 of the Central Sales Tax Act. [680E]

It is now well-settled by a series of decisions of this Court that a sale shall be an inter-State sale under section

3(a) if there is a contract of sale preceding the movement of goods from one State to another and the movement is the result of a covenant in the contract of sale or is an incident of that contract; in order that a sale may be regarded as an inter-State sale it is immaterial whether the property in the goods passes in one State or another. [678H-679A]

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Tata Iron & Steel Co. Ltd. v. S. R. Sarkar [1961] 1 S.C.R. 379; Kelvinator of India Ltd. v. State of Haryana [1974] 1 S.C.R. 463; Oil India Ltd. v. Superintendent of Taxes [1975] 3 SCR 767; Balabhagas Hulaschand v. State of Orissa [1976] 2 SCR 939; Union of India v. K. G. Khosla & Co. (P) Ltd. [1979] 3 SCR 453, referred to.

The terms of the agreement make it quite clear that the sales of naphtha to the respondent were inter-State sales. The source of supply is the seller's refinery at Barauni in Bihar and the destination is the buyer's factory at Kanpur. This clause alone is sufficient to prove that the sales in question were inter-State sales. [679B-C]

Clause 3(iii) of the agreement which says that the naphtha shall be supplied against indents in writing addressed to the seller at their installation at Kanpur cannot be read in isolation. Sub-clause (iv) of clause 3 sets out the details of the buyer's requirement for the first four years and thereafter. Under clause 8 Indian Oil Corporation are bound not only to bring the contractual quantity of naphtha from Barauni to the seller's Kanpur installation but also to provide at their own cost storage facilities at Kanpur of a capacity equivalent to not less than 30 days' requirement of the buyer. The indents are therefore not outside the agreement but are relatable to the buyer's requirements under the agreement. It is obvious that the sales under the agreement are not possible without inter-State movement of naphtha. Clause 3 read with clause 8 also proves that really there are no two movements but only one movement from Barauni to Kanpur pursuant to the contract of sale and the arrangement regarding storage facilities provided in clause 8 is only for operational convenience, it is only a mechanism devised to facilitate the transfer of naphtha through the seller's pipeline to their depot at Kanpur and from there to the buyer's factory at Kanpur through the pipeline constructed at the buyer's cost. It is relevant in this connection to note that under clause 7(ii) the cost of transferring naphtha from Barauni to the buyer's fence is to be borne by the buyer. [679G-H; 680A-C]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 444 of 1979.

(Under Article 32 of the Constitution)

F. S. Nariman & Anil B. Dewan, B. D. Barucha, Ravinder Narain and Talat Ansari for the Petitioner.

A. Subhashini for Respondent No. 1

Lal Narain Sinha, Att. Genl. and U.P. Singh for the Respondents Nos. 2-3.

Soli J. Sorabjee, V. K. Pandita and E. C. Agarwala for R.4.

Subrata Roy Chowdhury, Biswaroop Gupta, Bhaskar Gupta, Surhid Roy Chowdhury & D. N. Gupta for Respondent No. 5.

The Judgment of the Court was delivered by

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GUPTA, J.-In this petition under Article 32 of the Constitution of India dealer seeks relief from the same

sales being assessed to sales tax both under the Central Sales Tax Act and the U.P. Sales Tax Act. The first petitioner Indian Oil Corporation Limited, IOC for short, are a government company incorporated under the Companies Act, 1956 engaged inter alia in the manufacture and marketing of petroleum products. The second petitioner is the Managing Director and a shareholder of IOC. Union of India has been impleaded as the first respondent in the petition. The 2nd respondent is the Assistant Superintendent of Commercial Taxes, Central Circle, Bihar. The 3rd and 4th respondents are respectively the State of Bihar and the State of U.P. The 5th respondent Indian Explosives Limited are a company having their registered office at Calcutta; they have a factory at Panki, Kanpur in Uttar Pradesh manufacturing urea fertilizers. IOC have a refinery at Barauni in the State of Bihar and also a depot at Panki, Kanpur. In 1966 IOC completed pipeline from their refinery at Barauni in Bihar to Kanpur in U.P. through Patna in Bihar and Mughalsarai and Allahabad both in U.P. At their Barauni refinery IOC manufacture naphtha which is the principal raw material for production of fertilizers.

On February 9, 1970 an agreement was entered into by and between IOC and the 5th respondent in terms of which IOC were to sell and the 5th respondent were to buy the entire quantity of naphtha required for the 5th respondent's fertilizer factory at Kanpur. Below is a summary of the different clauses of the agreement that are relevant for the present purpose; the numbers given to the different paragraphs in this summary follow the numbering of the corresponding clauses of the original agreement:

1. The agreement shall be deemed to have come into force from September 10, 1969 [when the supply of naphtha commenced] and shall remain in force till December 31, 1980. It shall continue to be in force thereafter unless terminated by either party giving to the other not less than one year's prior notice of the intention to terminate the agreement.
2. The naphtha to be supplied shall be of the specification set out in Schedule I of the agreement.
3. (i) The quantity of naphtha that the 5th respondent agree to buy and IOC agree to sell shall be 2,50,000 tonnes per annum which is the maximum rate per annum.
(iii) The naphtha shall be supplied against the buyer's indents in writing addressed to the seller at the seller's Panki/Kanpur installation.

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- (iv) It is agreed that the buyer's requirement of naphtha for the first four years shall be 95,000, 1,70,000, 2,00,000 and 2,25,000 tonnes respectively.
- (viii) In case the buyer fails to take delivery during any year the quantities of naphtha as stipulated above for reasons other than Force Majeure at their Kanpur plant, the seller shall be entitled to sell the quantity which the buyer has failed to lift. Similarly if the seller fails to deliver the stipulated quantities of naphtha during any year for reasons other than Force Majeure at their Barauni refinery and/or the transportation system from Barauni to their Panki installation, the buyer shall be entitled to purchase the quantity not delivered in that year from other sources.

4. The supply of naphtha to the buyer shall be made from the seller's refinery at Barauni.
5. The price of naphtha shall be exclusive of transfer charges, excise duty and all other taxes levies which shall be recovered by the seller from the buyer at actual rates prevailing and levied by concerned agencies from time to time.
7. (i) Naphtha shall be supplied through a pipeline at the fence of the buyer's fertilizer factory and the pipeline between the buyer's and the seller's fences shall be constructed by the buyer at their expense.
(ii) The cost of transferring naphtha by the pipeline from the point of its manufacture to the fence of the buyer's fertilizer factory shall be borne by the buyer.
8. The seller shall provide at their cost storage facilities at the seller's Panki/Kanpur installation of a capacity equivalent to not less than 30 days' requirement of the buyer.
10. (iii) Three samples of naphtha for testing will be taken from the seller's tank at their Panki/Kanpur installation prior to transfer in the presence of buyer's representatives at such frequency as may be mutually agreed.

According to the 5th respondent, since the commencement of supply of naphtha under the aforesaid agreement IOC went on charging from them sales tax at the rate prescribed by the U.P. Sales Tax Act on the plea that the sales were chargeable under the said Act. On or about March 16, 1974 the assessing authority under the U.P. Sales Tax Act assessed IOC to sales tax under the said Act on their total turnover for the assessment year 1969-70 including 677

the sales of naphtha to the 5th respondent. The 5th respondent filed a writ petition in the Allahabad High Court challenging the assessment made on the basis that the sales were local and asserting that they were inter-state sales. Before the writ petition was disposed of the U.P. assessing authority assessed IOC for the assessment year 1970-71 treating the sale of naphtha to the 5th respondent as local sale. On August 27, 1975 the Allahabad High Court allowed the said writ petition quashing the impugned order of assessment to the extent it sought to levy tax under the U.P. Sales Tax Act on the sales of naphtha to the 5th respondent. The High Court held that the sales under the agreement dated February 9, 1970 were inter-state sales. IOC preferred an appeal against the order of assessment in respect of the assessment year 1970-71 and although the appeal was on grounds not relevant for the present purpose, it is necessary to refer to it because at a later stage IOC had the scope of the appeal enlarged, induced by the 5th respondent according to IOC, by including a ground that the sales of naphtha under the agreement were interstate sales. On June 29, 1978 the 2nd respondent levied sales tax under the Central Sales Tax Act on the sales of naphtha by IOC to the 5th respondent for the assessment year 1970-71 treating them as inter-state sales. Under section 9 of the Central Sales Tax Act the tax levied under that Act is collected in the State from which the movement of the goods commenced; in this case the movement commenced from Barauni in Bihar. IOC preferred an appeal against this order to the appellate authority. For the assessment year 1971-72 the assessing authority under the U.P. Sales Tax Act treated the sales of naphtha to the 5th respondent as inter-state sales

presumably in view of the aforesaid judgment of the Allahabad High Court. This assessment order was challenged by the Commissioner of Sales Tax, U.P. in revision before the appropriate authority. For the same assessment year the Bihar authority assessed the sales on the basis they were inter-state sales. For the next assessment year 1972-73 the U.P. authority again treated the sales as inter-state sales and again the order was challenged in revision by the Commissioner of Sales Tax, U.P. The Bihar authority also treated the sales for that year as inter-state sales. Thereafter for the assessment years 1973-74 and 1974-75 somewhat surprisingly the U.P. assessing authority went back on the view taken in the immediately preceding two years and again treated the sales as local sales and the 5th respondent preferred appeals from these two orders of assessment. In this confused situation IOC filed the instant writ petition in this Court on May, 1, 1979. Meanwhile the appellate authority under the U.P. Sales Tax Act dealing with the appeal preferred by IOC against the order of assessment relating to

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the year 1970-71 had remanded the case to the assessing authority and the assessing authority by his order dated December 20, 1979 held that the sales were local sales.

The 5th respondent had started several other proceedings to avoid the sale of naphtha to them under the agreement dated February 9, 1970 being assessed to sales tax under the U. P. Act. On August 29, 1977 they filed a suit in the Calcutta High Court against IOC seeking to restrain IOC from collecting sales tax from them under the U.P. Sales Tax Act. The 5th respondent also filed two writ petitions in the Allahabad High Court, Nos. 102 and 103 of 1978. The first petition challenges the assessment order relating to the year 1970-71 made by the U.P. authority. The second petition is directed against the revisional proceedings started by the Commissioner of Sales Tax, U.P. in respect of the assessment years 1971-72 and 1972-73. All these proceedings are still pending.

The petitioners' case in the present writ petition is that the sales of naphtha to the 5th respondent were local sales in Kanpur and as such they were assessable under the U.P. Sales Tax Act and that the assessment orders dated June 29, 1978 and November 30, 1978 respectively for the assessment year 1970-71 and 1971-72 made by the Bihar Sales Tax authority under the Central Sales Tax Act are in violation of the fundamental rights guaranteed under Articles 19 and 31 of the Constitution of India. The petitioners seek a writ in the nature of certiorari for quashing the aforesaid assessment orders and a writ in the nature of mandamus directing the Bihar sales tax authority to forebear from assessing the sales of naphtha to the 5th respondent on the basis they were inter-state sales. Alternatively the petitioners pray, in the event it is held that "the sales are inter-state sales and not intra-state sales", for "appropriate reliefs, orders, and directions" directing the State of U.P. not to assess, levy or recover any sales tax on the sales of naphtha to the 5th respondent under the agreement dated February 9, 1970.

Section 3(a) of the Central Sales Tax Act, 1956 provided that "a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase occasions the movement of goods from one State to another". It is now well settled by a series of decisions of this Court that a sale shall be an inter-state sale under section 3(a) if there is a contract of sale

preceding the movement of goods from one state to another and the movement is the result of a covenant in the contract of sale or is an incident of that contract; in order that a sale may be regarded as an inter-state sale it is immaterial whether the property in the

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goods passes in one state or another. Some of these decisions are: Tata Iron & Steel Co. Ltd. v. S. R. Sarkar [1961] 1 SCR 379, Kelvinator of India Ltd. v. The State of Haryana [1974] 1 SCR 463, Oil India Ltd. v. The Superintendent of Taxes & others [1975] 3 SCR 797, Balabhagas Hulaschand v. State of Orissa [1976] 2 SCR 939 and Union of India and Anr. v. K. G. Khosla & Co. (P) Ltd. & Ors. [1979] 3 SCR 453. In our opinion the terms of the agreement dated February 9, 1970 summarized above make it quite clear that the sales of naphtha to the 5th respondent were inter-state sales. Under clause 4 of the agreement seller is "to make the supply of naphtha to the buyer from its refinery at Barauni". The source of supply is thus the seller's refinery at Barauni in Bihar and the destination is the buyer's factory at Kanpur. This one clause alone is sufficient to prove that the sales in question were inter-state sales.

However, on behalf of the petitioners and the State of U.P. it is contended that the sales were not inter-state sales and were local sales within the State of Uttar Pradesh. It is pointed out from clause 3(iii) that supplies of naphtha are made on the buyer's indents in writing addressed to the seller at their Kanpur installation and not at their refinery at Barauni which, it is contended, shows that the supplies are made from IOC's storage at Kanpur to the 5th respondent's factory also at Kanpur. It is also contended that the supply of naphtha to the buyer's factory at Kanpur involves two movements, one from Barauni to Kanpur for storage at the seller's depot, and the other from the depot to the buyer's factory. This contention is based on clause 7(i) of the agreement which states that naphtha shall be supplied at the fence of the buyer's factory through a pipeline between the buyer's and the seller's fences constructed at the buyer's expense. It is argued that this stipulation shows that the movement of naphtha from Barauni is arrested at the seller's Kanpur depot and is followed by another movement from there to the buyer's factory which proves that the sales are local sales and not inter-state because in an inter-state sale the movement of goods is the immediate and direct result of the contract of sale.

Clause 3(iii) of the agreement which says that the naphtha shall be supplied against indents in writing addressed to the seller at their installation at Kanpur cannot be read in isolation. Sub-clause (iv) of clause 3 sets out the details of the buyer's requirement for the first four years and thereafter. Under clause 8 IOC are bound not only to bring the contractual quantity of naphtha from Barauni to the seller's Kanpur installation but also to provide at their own cost storage facilities at Kanpur of a capacity equivalent to not less than 30 days' requirement of the buyer. The indents are therefore

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not outside the agreement but are relatable to the buyer's requirements under the agreement. It is obvious that the sales under the agreement are not possible without inter-state movement of naphtha. Clause 3 read with clause 8 also proves that really there are no two movements but only one movement from Barauni to Kanpur pursuant to the contract of sale and the agreement regarding storage facilities provided

in clause 8 is only for operational convenience, it is only a mechanism devised to facilitate the transfer of naphtha through the seller's pipeline to their depot at Kanpur and from there to the Buyer's factory at Kanpur through the pipeline constructed at the buyer's cost. It is relevant in this connection to note that under clause 7(ii) the cost of transferring naphtha from Barauni to the buyer's fence is to be borne by the buyer.

Each case turns on its own facts and the question is whether applying the settled principle which we have mentioned above to the facts of the present case the sales can be said to be inter-state sales. An attempt to show that some of the factors present in the instant case are present or absent in some case or other in which this Court held the sale to be a local sale or inter-state sale hardly serves any useful purpose. On the facts of the present case the sales are clearly inter-state sales and the State of U.P. had therefore no jurisdiction to assess the petitioners to sales tax under the State Act. As the movement of naphtha commences from Barauni in Bihar, the sales tax payable on the sales of naphtha under the agreement dated February 9, 1970 can be assessed and collected only by the authorities in the State of Bihar on behalf of the Government of India in view of section 9 of the Central Sales Tax Act.

On behalf of the State of Bihar a point was taken that the present petition under Article 32 of the Constitution of India complaining of violation of the fundamental right guaranteed by Article 31 of the Constitution was not maintainable after the repeal of Article 31 by the Forty-Fourth Amendment of the Constitution with effect from June 20, 1979. The petition however complains also of infringement of Article 19 and therefore does not cease to be maintainable. Counsel for the 5th respondent sought to raise a question regarding the justification of treating freight as part of the sale price, but that is not a matter that arises for consideration on the present writ petition filed by IOC.

In the result the alternative prayer made in the writ petition succeeds, the assessment orders for the assessment years 1970-71, 1973-74 and 1974-75 passed by the Sales Tax Officer, U.P. and the revision proceedings initiated by the Commissioner of Sales Tax,

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U.P. for the assessment years 1971-72 and 1972-73 are quashed and respondent No. 4, the State of Uttar Pradesh, is directed to refund to IOC the sales tax collected from them on the sales of naphtha to the 5th respondent under the agreement dated February 9, 1970 and, further, not to levy sales tax on the sales under the said agreement under the U.P. Sales Tax Act.

The writ petition is allowed as indicated above; in the circumstances of the case we make no order as to costs.

N.K.A.

Petition allowed.

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