

CASE NO.:
Appeal (civil) 5670 of 2000

PETITIONER:
NEYVELI LIGNITE CORPORATION LTD.

RESPONDENT:
COMMERCIAL TAX OFFICER, CUDDALORE AND ANR.

DATE OF JUDGMENT: 19/09/2001

BENCH:
B.N. KIRPAL & S.N. PHUKAN & P. VENKATARAMA REDDI

JUDGMENT:
JUDGMENT

2001 Supp(3) SCR 163

The Judgment of the Court was delivered by KIRPAL, J. : Civil Appeal No. 5678 of 2000

Whether the subsidy received by the appellant is to form part of its taxable turnover under the provisions of the Tamil Nadu General Sales Tax Act, is a short question which arises for consideration in this and the connected cases.

Briefly stated the facts are that in 1957 under the provisions of Section 3 of the Essential Commodities Act, 1955, the Central Government promulgated the Fertilizer (Control) Order. This Order has been revised from time to time and in respect of the assessment year 1996-97 we are concerned with the provisions of the Fertilizer (Control) Order, 1985.

Under the provisions of the Fertilizer (Control) Order, maximum selling price for different types of fertilizer is determined under Clause 3. No manufacturer like the appellant can sell or offer for sale any fertilizer at a price exceeding the maximum price or the rate fixed under Clause 3. Non-compliance or violation of the same attracts penal consequences.

Fertilizer which is manufactured by the appellant is usually used by the agriculturists. In order to ensure the availability of fertilizer at a reasonable price, the prices are fixed under the Fertilizer (Control) Order normally at a figure which may possibly be less than the normal market price at which it can be sold. In order to ensure that no hardship is caused to the manufacturer and sufficient supplies are available, the Government of India took administrative decision and it introduced on 31st December, 1977 a Retention Price Scheme. This was introduced with effect from 1st November, 1977 and this Scheme, inter alia, contemplated the fixation of maximum sale price of fertilizer under Clause 3 of the Fertilizer (Control) Order; determination of retention price for each manufacturer; scheme of reimbursement of the difference between retention price fixed for the industry and the maximum selling price fixed under Clause 3 of the Fertilizer (Control) Order; submission of Claims by the manufacturer supported by details of manufacture along with copy of central excise records to be addressed to the Executive Director, Fertilizer Industry Coordination Committee, New Delhi; and disbursement of an amount of subsidy to the claimant-industry being the difference between the retention price and the selling price fixed under Clause 3 of the Fertilizer (Control) Order.

The procedure enunciated on 31st December, 1977 was then substituted by another one as stipulated in the Government's letter of 29th September, 1980. Broadly speaking, according to the procedure now prescribed, bills for payments and recovery under the Retention price Scheme for subsidy are

to be submitted when fertilizer is moved out of the factory along with the proof of movement. The claims are to be made in the forms which are prescribed and one of the conditions contained therein is that the fertilizer which is moved, has been sold or will be sold for agricultural purposes.

'M/s. Neyveli Lignite Corporation Limited received notices from the sales tax authorities to the effect that according to it the subsidy received by the appellant from the Government of India would form part of the taxable turnover of the appellant, and, therefore, was liable to sales tax. This was challenged by the appellant by filing a writ petition in the High Court at Madras. With the establishment of the Tamil Nadu Taxation Special Tribunal, the writ petition was transferred to the Tribunal.

The Taxation Tribunal by the decision dated 3rd October, 1998 came to the conclusion that the fertilizer subsidy disbursed by the Government of India against the claim made under the Subsidy Scheme was sale price or turnover attracting sales tax. The writ petition was, accordingly, dismissed. Hence, this appeal by special leave.

It has been contended on behalf of the appellant that what was received by the appellant from the Government of India was subsidy which could not be regarded as a part of the sale price or consideration of sale of fertilizer made by the appellant. A number of decisions were relied upon to which we shall refer later. Mr. Balakrishnan, on the other hand contended while relying upon a decision in *E.I.D. Parry (I) Ltd. etc. v. Asstt. Commr. of Commercial Taxes and Anr* [2000] 2 SCC 321 that the amount of subsidy which was received is clearly relatable to the sale of fertilizer and formed an integral part of the sale price and would, therefore, be added to the taxable turnover and sales tax levied thereon.

Sales tax is levied on sale or purchases of goods under Section 3 of the Tamil Nadu General Sales Tax Act on the turnover of a dealer in a year. Turnover' is defined in Section 2(r), inter alia, to mean the aggregate amount for which the goods are bought or sold or supplied in any of the ways referred to in clause (n) by a dealer whether for cash or for deferred payment or other valuable consideration. Clause (n) of Section 2 defines 'sale' as meaning transfer of property in goods by one person to another in the course of business for cash, deferred payment or other valuable consideration. It appears to us that it is that sale consideration whether in cash or otherwise, which is receivable in respect of sales made by a dealer which can possibly form part of the turnover of a dealer. It is that sum which can be legitimately regarded as forming part of the aggregate amount for which the goods have been bought or sold. The sum has to be paid either by the purchaser or on his behalf by some other person.

In the instant case, as far as the Fertilizer (Control) Order is concerned, the appellant is only required to receive either the fixed price determined or the maximum price which may be fixed. For example, vide notification dated 30th January, 1988, maximum price per tonne of different types of fertilizer specified therein was fixed. In respect of urea, the maximum price per tonne fixed was Rs. 2,350. No manufacturer of urea could sell the same at a price in excess of Rs. 2,350. The Explanation in the said notification provided that the maximum price so fixed was to be inclusive of Central sales tax, State sales tax or other local taxes wherever levied. Neither in the notification nor in the Fertilizer (Control) Order is there any reference to the Retention Price Scheme of the Government.

The Retention Price Scheme first enunciated by letter dated 31st December, 1977 is clearly an administrative decision of the Government of India. It has been issued pursuant to the Ministry's Resolution and it enables a factory, like the appellant, to receive subsidy from the Government in case the retention price is more than the price fixed under Clause 3 of the Fertilizer (Control) Order. It is mentioned in the assessment order that according to the appellant the subsidy which is paid by the Government of

India is a non-plan expenditure which is debited to the Budget allocation. This subsidy is payable on the basis of the quantity of fertilizer produced and removed from the factory. The forms on the basis of which subsidy has to be given, do not indicate that the reimbursement of the subsidy is dependent on the sale of fertilizer having been made. The basis for the grant of subsidy is the removal of the fertilizer from the factory, though it has to be certified by the company that the said removal is for sale for agricultural purposes.

It is clear from the aforesaid that whereas in respect of sale of fertilizer the purchaser has to pay the price as fixed under The Fertilizer (Control) Order giving of subsidy is not contemplated by the said Order and the same is given pursuant to an administrative decision taken by the Government of India. The subsidy so given is undoubtedly to see that the ultimate consumer gets fertilizer at a reasonable price and the manufacturer is not unduly burdened by the lower fixation of the price of fertilizer. The payment which is so made by the Government to a manufacturer cannot be regarded as a discharge of any liability or obligation by the Government towards the purchaser of fertilizer. The two payments received by the manufacturer, namely, the subsidy and the price fixed under the Fertilizer (Control) order are independent of each other. Subsidy does not form part of the bargain between the manufacturer and the purchaser of fertilizer.

At this juncture, it will be useful to refer to the decisions of this Court which also lead to the conclusion that the subsidy so received cannot be regarded as a part of the taxable turnover. In *State of T.N. and Ors. v. Kothari Sugars & Chemicals Ltd. and Ors.*, [1996] 7 SCC 751, excess amount was paid by the purchaser to the cane grower as advance over and above minimum cane price fixed under Clause 3 and the additional cane price fixed under Clause 5A of the Sugarcane (Control) Order. The question arose whether this excess amount so paid can be regarded as a part of the price paid by the purchaser to the grower for the purposes of levy of sales tax on purchase. After referring to the provisions of the Sugarcane (Control) Order, 1966 and the scheme of paying to the cane grower as advance, this Court observed as follows :

"7. In these matters there is admittedly no statutory basis since the "State advice" to the purchasers to pay a certain amount in addition to the minimum cane price fixed under clause 3, in anticipation of fixation of the additional cane price under clause 5-A, does not have any statutory basis. The amount paid as advance under the State advice also does not have any contractual basis since this was not paid as a result of an agreement between the grower and the purchaser. The amount of advance was paid in anticipation of fixation of the additional cane price under clause 5-A which means that in case the fixation under clause 5-A was at a higher amount than the amount paid as advance then the purchaser would have to pay the deficit amount. Similarly, when the amount of advance was in excess, the purchaser would be entitled to refund of the excess amount, irrespective of the fact whether the refund was actually made or not. For the purpose of determining the price of sugarcane for computation of the purchase tax, the only significant amount is the aggregate of the minimum price fixed under clause 3 and the additional cane price fixed under clause 5-A, unless a higher price is paid to the grower by agreement between the purchaser and grower."

It appears to us that the aforesaid observations are clearly applicable in the present case. Here also, there is no statutory basis for the grant of subsidy; and the amount was received by the appellant pursuant to the administrative decision taken by the Central Government. Furthermore, the subsidy is not traceable to any agreement, direct or indirect, between the manufacturer and the purchaser of fertilizer. What was payable in law as a sale price for fertilizer was the amount or the rate fixed under the Fertilizer (Control) Order and no more. This position is also made clear by the observations of this Court in *M/S. George Oakes (P.) Ltd. v. State of*

Madras, [1962] 2 SCR 570, wherein a Constitution Bench observed that the expression turnover means the aggregate amount for which goods are bought or sold, whether for cash or for deferred payment or other valuable consideration, and when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover. At page 580, it was observed that "so far as the purchaser is concerned, he pays for the goods what the seller demands, viz., price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover." It is clear from the aforesaid observations that it is that amount which flows from the purchaser to the seller which alone would form part of the turnover of the seller. Any sum received dehors the contract of sale from another entity, whether it be Government or any one else, cannot be regarded as being an amount which would form part of the sale price on which tax is payable.

In Hindustan Sugar Mills etc. v. State of Rajasthan & Ors., [1978] 4 SCC 271, the question which arose was whether freight was includible in the expression 'sale price' for the purpose of levy of sales tax. The Cement Control Order, 1967 provided for payment of railway freight by the purchaser and it is in this context that the question arose whether the freight so paid was to be regarded as a part of the taxable turnover. Examining the provisions of the Cement Control Order, it was observed that the said provisions have statutory force and it postulated the payment or price of Rs. 214.65 per metric tonne free on rail destination railway station. The Control Order was regarded as being paramount having overriding effect over contractual terms and it stipulated that the freight which was paid formed part of the sale price within the meaning of the definition of the said expression. It follows from this decision that whatever is payable by the purchaser to the seller in terms of a Control Order promulgated under Section 3 of the Essential Commodities Act has to be regarded as a part of the sale price and no more.

If the contention of the counsel for the respondent is correct, then it would mean that, say for sale of urea, the appellant would be getting a price of Rs. 2,350 per tonne plus the subsidy it receives from the Government. If this will be so, then there would be a clear violation of the provisions of the Control Order because the manufacturer cannot sell urea at a price higher than Rs. 2,350. If on the other hand the manufacturer was to reduce the price of urea by the amount of subsidy it received and was to get a sum less than Rs. 2,350 from the purchaser, the very concept or purpose of giving subsidy would be lost. The Fertilizer (Control) Order having been promulgated by the Central Government, it cannot be presumed that the Central Government would be giving subsidy which was to be regarded as a part of the price, which will have the effect of the Fertilizer (Control) Order being breached. It is apparent that the amount given by the Central Government under the administrative scheme of furnishing subsidy is not to be regarded as a part of the sale price or consideration for the sale of fertilizers by the appellant.

What is the nature of a subsidy also came up for consideration before this Court in Assam State Electricity Board and Ors. v. Brahma Putra Steels (P) Ltd., and Ors., [1996] 8 SCC 73. There was an industrial policy of the Government of Assam which provided for subsidy being granted and a question arose whether this subsidy was in any way linked with electricity charges payable by the consumer. The Court held that the policy statement which provided for the grant of subsidy to an industry was not linked with the payment of electricity charges by the industry to the Board.

As already mentioned, Mr. Balakrishnan, learned senior counsel for the respondent, relied upon a decision of this Court in E.I.D. Parry (I) Ltd. etc. v. Asstt. Commr. of Commercial Taxes and Anr., [2000] 2 SCC 321. In that case, the Sugarcane (Control) Order, 1966 fixed a minimum price which

was payable for the purchase of sugarcane. Planting subsidy, dehors the Control Order, was announced by the manufacturer of sugar for sugarcane growers who undertook to grow the required variety of sugarcane and to sell the same to the said manufacturer. The question arose whether payment of this subsidy constituted a part of the sale price and whether it was includible in the taxable turnover. After referring to the earlier decision of this Court including that of Kothari Sugars (Supra), it was observed at page 336 as follows :

"18. What transpires from the above case-law is that the amounts paid by way of consideration by the purchaser to the seller of goods in pursuance of the contract of sale can legitimately be regarded as purchase price while calculating the turnover for the purposes of sales tax legislation. What can legitimately be brought to sales tax or purchase tax is the aggregation of the consideration for the transfer of property. All the payments should have been made pursuant to the contract of sale and not dehors it. Any amount paid as ex gratia payment or as an advance cannot be the component of the purchase price and therefore cannot legitimately be included in the turnover of the purchasing dealer. Whether one of the components of the purchase price goes to the coffers of the seller or not will not cease to be so if it is necessary for completing the same. Thus the total amount of consideration for the purchase of goods would include the price strictly so called and also other amounts which are payable by the purchaser or which represent the expenses required for completing the sale as the seller would ordinarily include all of them in the price at which he would sell his goods. But if the sale price is fixed statutorily then the only obligation of the purchaser under the agreement would be to pay that price only and no other amount can be included in the purchase price even if the same is paid by the purchaser to the seller."

The aforesaid observations clearly support the contention of the learned Solicitor General before us, namely, that the sale price which has been fixed by the Fertilizer (Control) Order is the only obligation of the purchaser under the agreement to pay the same and no other amount including subsidy could be included in the purchase price. In EID Parry (supra), however, the Court came to the conclusion that the aforesaid principle was not applicable because the planting subsidy was given to the cane growers at the time of delivery of sugarcane by them. "The planting subsidy was given by the appellants to the cane-growers not by way of agrarian reforms or a social welfare measure. The appellants had given planting subsidy as purchasers of sugarcane and as a part of the consideration for which the sugarcane was ultimately purchased by them." The Court regarded this subsidy as a deferred payment and, therefore, includible in the taxable turnover. It is clear that this subsidy was paid pursuant to an agreement between the growers and the purchasers and the payment was made at the time of the sale. In the present case, however, there is no agreement between the appellant and the purchasers of fertilizer for payment of any amount by the purchasers to the manufacturer in excess of the price fixed under the Fertilizer (Control) Order. Subsidy is paid to the appellant not by or on behalf of the purchasers, but is paid by the Government of India for different reasons and under its own scheme and after a budgetary allocation. As we have already observed, the scheme of payment postulates the right of the appellant to receive the subsidy on its clearance from the factory and not necessarily after the sale of fertilizer. Even before the sale of fertilizer, the right to receive the subsidy arises and under the circumstances, it cannot be said that subsidy would form part of the sale price or turnover of the appellant.

Learned Solicitor-General has drawn our attention to various decisions of the High Court who have taken a similar view. Some of them are Fertilizer Corporation of India Ltd. v. Commercial Tax Officer (OFA), Punjagutta Division, Hyderabad and Ors., 83 STC 129 (A.P.), Coromandel Fertilizers Ltd. v. The Commercial Tax Officer (OFA), Punjagutta Division, Hyderabad, 85 STC 552 (A.P.); Natraj Organics Ltd. v. Assistant Commissioner (Assessment), Sales Tax, Muzaffarnagar, 96 STC 261 (Allahabad); Rashtriya

Chemicals and Fertilizers Limited v. State of U.P. and Others, 101 STC 487 (Allahabad); Bongaigaon Refinery & Petrochemicals Ltd. v. Commissioner of Taxes., Assam & Ors., 103 STC 132 (Gauhati); and Commissioner of Taxes and Ors. v. Bongaigaon Refinery & Petrochemicals Ltd., 114 STC 26 (Gauhati). A Single Judge of the Kerala High Court in Madras Fertilizers Ltd. v. Asstt. Commissioner (Assessment), Special Circle-II, Agrl. Income-tax and Sales Tax Dept., Ernakulam & Anr., 95 STC 134 (Kerala) after analysing the provisions of the Fertilizer (Control) Order and the claim of payment of subsidy, observed as follows :

"11. Sale is a bilateral transaction which stems out of a contract between the seller and the purchaser. An essential ingredient of a sale is "price". Fixation of the price is a matter of agreement between the parties. "Sub-section (1) of section 9 of the Sale of Goods Act, 1932, provides that the price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. In cases where the price is not determined in accordance with these provisions the buyer shall pay the seller a reasonable price. Therefore, price is an essential element of a contract of sale and is ordinarily a matter of agreement between the parties. What the purchaser of the fertiliser bargains when he purchases fertilizer from the petitioners is to obtain a certain quantity of fertilisers at a certain price which shall not exceed the price fixed by the Central Government by notification under the Fertilizer (Control) Order. The sale is not conditional on the Central Government paying any amount by way of subsidy. There is no agreement between the parties for any further amount to be paid, than what is paid by the purchaser at the time of the sale.

"Turnover" is defined in section 2 (xxvii) of the KGST Act as meaning the aggregate price for which goods are either bought or sold, supplied or distributed by a dealer. "Sale" is defined in section 2(xxi) as meaning every transfer, whether in pursuance of a contract or not, of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration. The essential contract between the parties, namely, the seller and the purchaser of fertilisers, is only for payment of the price subject to the maximum fixed by the Central Government and not for any other. This being the contract, any other sum received by the seller-petitioners for a different purpose and not as consideration for the sale, is not part of the sale price, and therefore of their turnover. The fact that the amount of subsidy is determined with reference to the quantum of fertilisers cleared from the factory on which considerable stress was made by the Government Pleader, does not lead to any inference that the payment is made in consideration of the sale. The retention price and the transfer price are fixed with reference to various factors. The subsidy is paid for the benefit of the public, to keep the prices at a reasonable level, and at the same time to ensure a reasonable return on investment to the units, and not as consideration for the sales effected by them. I am therefore of the view that the amount of subsidy received by the petitioners for the purpose of their units, which is not related to any particular transaction of sale, but is related to other circumstances, cannot constitute turnover in their hands assessable under the KGST Act."

This decision was affirmed by the Division Bench in Assistant Commissioner of Sales Tax (Assessment), Special Circle-II, Ernakulam & Ors. v. Krishak Bharathi Co-op. Ltd., 99 STC 17 (Kerala) and the special leave petition filed against the same was dismissed by this Court. We are in respectful agreement with the view of the Single Judge of Kerala High Court and that, in our opinion, is the correct enunciation of law.

For the aforesaid reasons, this appeal is allowed and the judgment dated 3rd August, 1998 and other orders passed subsequent thereto of the Tribunal are set aside.

C.A. Nos. 5679-5683/2000, 6213/2000 and 6214/2000.

For the reasons stated in our judgment in C.A. No. 5678 of 2000, these appeals are also allowed and the impugned orders of the High Court are set aside.

TC(C)Nos. 14/2001, 15/2001, 16/200], 17/2001, 18/2001, 19/2001 and TC(C) Nos. 27-35/2001 @ TP(C) Nos. 239-247/01.

For the reasons stated in our judgment in C.A. No. 5678 of 2000, these transferred cases are allowed, the result of which will be that the writ petitions filed in the High Court stand allowed and the orders of the Tribunal quashed.

JUDIS