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STATE OF TAMIL NADU ETC.

v.

CEMENT DISTRIBUTORS PRIVATE LTD. ETC. ETC.
November 22, 1972

B [K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

'Sale' Cement supplied in gunny bags—Price of gunny bags fixed under control order—Supply of gunny bags whether a sale taxable under Madras General Sales Tax Act 1959.

C *Madras General Sales Tax Act 1959, Rules made under—Rule 6(f)(ii) as it stood up to Sept. 27, 1963 providing for exemption in respect of 'charges for packing and delivery and other such like services'—Price of gunny bags whether comes under exemption.*

D In appeal by the State of Tamil Nadu against the judgment of the Madras High Court on the questions (i) whether the producers who supplied the Cement to the State Trading Corporation or its agent in gunny bags in pursuance of the directions given by the Government are liable to pay sales-tax on the turnover relating to the price of the gunny bags, and (ii) whether the words 'charges for packing and delivery and other such like services' in r. 6(f)(ii) of the rules under the Madras General Sales Tax 1959 as it stood upto September 1963 had the effect of granting exemption in respect of price of packing materials.

E HELD : (i) From the relevant control orders it was clear that the Government of India was purporting to fix the price of the gunny bags in which the producers were required to supply cement to the State Trading Corporation.

F When the price was wholly controlled the supply of the gunny bags could not be considered as 'sales'. This position was concluded by the decisions of this Court in *New India Sugar Mills Ltd.* and *Chittar Mal Narain Das*. Accordingly the price of gunny bags could not be included in the taxable turnover. [1021 C]

G *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar 14, S.T.C. 316; and Chittar Mal Narain Das v. Commissioner of Sales Tax, U.P. 26, S.T.C. 344; applied.*

H (ii) The charges for packing exempted under Rule 6(f) as it stood up to September 1963 included both the price of the packing material as well as the labour charges relating to the packing. The words 'and other such like services' in sub-cl. (ii) of the rule referred to the word 'delivery' immediately preceding those words. The subsequent charges effected in the rule merely clarified the intention of the rule making authority. Therefore the contention of the appellant that the rule as it stood till September 1963, merely provided for exemption of service charges for packing and not the cost of the packing material must be rejected. [1023 F]

I *State of Madras and Ors. v. Damodaran Chettiar & Co. 18, S.T.C. 451* disapproved.

J *State of Madras, In re : 7, S.T.C. 355, approved and applied.*

K CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2184-2195 of 1969, 498 to 502 of 1970 & 884 to 885 of 1971.

Civil Appeals Nos. 2184-2195 of 1969 and 498 to 502 of 1970.

Appeals by certificate from the judgment and order dated March 25, 1969 of the Madras High Court in W.P. Nos. 4161-4164 & 4246-4249 of 1965 and Writ Petitions Nos. 198 & 199 and T. C. Nos. 227 and 228 of 1967 and

Civil Appeals Nos. 884 to 885 of 1971.

Appeals by certificate from the judgment and order dated March 2, 1970 of the Madras High Court in Tax Case Nos. 21 and 22 of 1970.

S. T. Desai, A. V. Rangam, K. Venkataswami and A. Subhashini for the appellants (in C. As. Nos. 2184-2195/69).

Govind Swamindadhan, A. V. Rangam, K. Venkataswami and A. Subhashini for the appellants (in C. As. Nos. 498 to 502/70).

A. V. Rangam and A. Subhashini for the appellants. (in C. As. Nos. 884-885/71).

F. S. Nariman, Addl. Solicitor-General of India, D. S. Dang, H. K. Puri, S. K. Dhingra and Krishna Sen for the respondents (in C. A. Nos. 2184-2195/69), Respondent No. 2 (in C.A. Nos. 498-500) and Respondent (in C.A. Nos. 501-502):

The Judgment of the Court was delivered by

HEGDE, J. These appeals by certificate can be disposed of by one judgment. They raise common questions of law. The material facts are not in dispute. In Civil Appeals Nos. 498, 499 to 502 of 1970, the principal question of law that arises for decision is whether the producers who supplied the cement to the State Trading Corporation or its agents in gunny bags in pursuance of the directions given by the Government are liable to pay sales-tax on the turnover relating to the price of the gunny bags. The only other question that arises for decision in these appeals relates to the interpretation of Rule 6(f) of the rules framed under the Madras General Sales Tax Act, 1959. This question will be considered while dealing with the other appeals. In the other appeals the question for decision is whether the selling agents of the State Trading Corporation are liable to pay sales tax in respect of the price of the gunny bags in which they sold the cement to the consumers. The High Court has decided both these questions in favour of the assessees. Aggrieved by that decision, the State of Tamil Nadu has come up in appeal.

A Taking first the case of the transactions between the producers and the State Trading Corporation, there is no dispute that so far as the supply of cement is concerned, the same cannot be considered as "sales" within the meaning of the Madras General Sales Tax Act, 1959 in view of the Cement Control Order, 1958. The only question is whether the gunny bags in which the cement in question was supplied can be considered to have been sold. There is no dispute that if the price of the gunny bags is also held to have been wholly controlled then the supply of the gunny bags cannot be considered as "sales". This position must be held to be concluded by the decisions of this Court—see *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar*⁽¹⁾ and *Chittar Mal Narain Das v. Commissioner of Sales Tax, U.P.*⁽²⁾. Therefore all that we have to see is whether the price of the gunny bags in which the cement was supplied to the State Trading Corporation was controlled under cl. 6(4) of the Cement Control Order, 1958. The relevant assessment years with which we are concerned in these appeals are assessment years 1959-60, 1960-1961 and 1961-1962. It is admitted that the Central Government by its order dated March 26, 1959 informed all concerned thus :

"Packing charges for cement for period commencing First April to Thirtieth June Nineteen Fifty nine will be Rupees Eleven Decimal five four per ton in New Gunny Bags".

E Again by its order dated June 24, 1959, it stipulated that the packing charges for cement for the period commencing 1st July to 30th September 1959 will be Rs. 11.04 per ton, in new gunny bags. The Central Government by its letter dated December 26, 1959 informed the Staff Trading Corporation that it has accepted the Tariff Commission's recommendations in respect of the fixation of the packing charges and the principle that would be adopted was on the basis of the average of the maximum and minimum market price of the packing material during each week of the 9 months immediately preceding the quarter for which the charges were to be in force plus Rs. 1.25 per ton to cover incidental charges. By its telegram dated February 17, 1961, the Central Government informed all the State Governments that having regard to the prevailing jute bag price, the Government was pleased to fix under clause 6(4) of the Cement Control Order, 1958 the charges for packing cement in D.W. as well as serviceable second hand DW Heavy Cases Jute Bags at Rs. 17 per ton for the period effective from the 20th of February to the 31st March 1961. From these orders, it is clear that the Government of India was purporting to fix the price of the gunny bags in which the producers were required to supply cement to the State Trading

Corporation. The learned Advocate-General of Tamil Nadu contended that the Central Government under cl. 6(4) of the Cement Control Order, 1958 could have fixed only the maximum price of gunny bags and not the actual price; that being so, there was scope for bargaining between the producers of the cement and the State Trading Corporation. This contention has not been taken in the High Court; nor in the appeal memo. The Central Government has not put in its appearance in this Court. Hence we cannot go into the question whether the Central Government had power to fix the actual price of the gunny bags. The fact remains, that the Central Government had fixed the actual price of the gunny bags. Its right to fix the price had not been disputed in the pleadings before the High Court nor does it appear from the judgment of the High Court that that question was urged before it. It is raised for the first time at the hearing.

In the result, for the reasons mentioned above the contention that supplies of gunny bags by the producers amounted to "sales" must be rejected.

Now coming to the contention raised in the other appeals which also arises in some of the appeals earlier considered, it relates to the interpretation of rule 6(f) of the rules framed under the Madras General Sales Tax Act, 1959. That rule as it stood upto September 1963 read thus :

"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) charges for packing and delivery and other such like services."

On September 27, 1963, this rule was recast thus :

"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) charges for packing, that is to say, cost of packing materials and cost of labour;
- (iii) charges for delivery and other such like services."

This rule was again recast on March 9, 1964. The rule as reframed reads thus :

A "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;
- B** (ii) charges for packing, that is to say, cost of packing materials and cost of labour and other such like services;
- (iii) charges for delivery."

C In the above group of appeals, some relate to the assessment years 1962-63, and 1963-64.

D Mr. S. T. Desai, learned Counsel appearing for the State of Tamil Nadu in this group of appeals contended that the rule as it stood till September 1963, merely provided for exemption of service charges for packing and not the cost of packing material.

E It is not disputed that the price of the packing materials was separately charged in the bills issued. In support of his contention that price of packing material is not covered by the rule in question, Mr. Desai relied on the decision of the Madras High Court in *State of Madras and Ors. v. K. Damodaran Chettiar & Co.* ⁽¹⁾ This decision undoubtedly supports Mr. Desai's contention; but the learned judges who decided that case overlooked an earlier

F decision of that High Court in *The State of Madras. In re*⁽²⁾; In that case Rajagopalan and Rajagopala Ayyangar JJ. had taken the view that a rule identical in terms with rule 6(f) as it stood till September, 1963 exempted the price of the packing material as well. We are entirely in agreement with the view taken by the learned judges in that case. The charges for packing include both

G the price of the packing material as well as the labour charges relating to packing. The words in sub. cl. (ii) of rule 6(f) "and other such like services" in our opinion refer to the word "delivery" immediately preceding those words. The subsequent changes effected in the rule merely clarified the intention of the rule making authority. We hold that *Damodaran Chettiar's* case (*supra*) was not correctly decided.

H At the hearing a new contention was sought to be raised by Mr. S. T. Desai. He sought to urge that the exemption given for packing material must be held to be not available in respect of the cases arising under the Central Sales Act (some of the appeals relate to assessments under the Central Sales Tax Act) in view of certain amendments made in the Central Sales Tax Act in 1969, with retrospective effect after the disposal of the petitions by the

(1) 18, S.T.C. 451.

(2) 7, S.T.C. 355.

High Court. We did not permit him to raise that totally new contention as the same was not raised either in the petitions of appeal or by any special application. Further the appellant did not serve any notice on the respondents informing them of its intention to raise that question at the hearing.

In the result these appeals fail and they are dismissed with costs; but there will be only three sets of hearing fee, one set for the counsel appearing for the State Trading Corporation and its agents; one for the counsel appearing for Dalmia Cement Bharat Ltd.; and one for the counsel appearing for Thiruvalargal India Cement Ltd.

G.C.

Appeals dismissed.