A

HINDUSTAN SUGAR MILLS ETC.

v.

STATE OF RAJASTHAN AND ORS.

August 22, 1978

B

[P. N. BHAGWATI AND V. D. TULZAPURKAR, JJ.]

Sale Price, under section 2(p) of the Rajasthan Sales Tax Act, 1954 and Section 2(h) of Central Sales Tax Act, 1956—Whether, in sales of cement effected under the Cement Control Order 1967, the amount of freight forms part of the "sale price" so as to be exigible to sales tax under the Rajasthan Act and Control Act—Distinction between contrtact of sale for f.o.r. destination railway 'station' and a 'contrtact where price alone is so'.

C

The appellant assessee owned a cement factory known as Udaipur Cement Works at Udaipur. During the assessment year 1971-72 and 1972-73, the sale of cement was controlled under the Cement Control Order, 1967, issued by the Central Government, in exercise of the powers conferred by Sections 18 G and 25 of the Industries (Development and Regulation) Act, 1951. Clause 7 of the Control Order specified a retention price of Rs. 161.40 per metric tonne for cement manufactured by all producers, other than those mentioned in items 1 to 5 of the schedule, which included the assessee. The maximum price at which a producer could sell cement was prescribed in clause (8) which said that no producer shall sell "any other variety of cement at a price exceeding Rs. 214.65 per metric tonne *free on rail destination railway station* plus the excise duty paid thereon", plus "such charges as may be fixed by the Central Government in respect of packing in jute bags or in any other containers". The Explanation to clause 8 clarified that for the purpose of the Control Order, the expression 'free on rail destination railway station' means "the price including the cost of transport by the cheapest mode except where any other mode of transport has been specified by the Central Government under clause (4) at the destination point".

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During the relevant assessment years, the assessee entered into diverse contracts of sale of cement with purchasers at the price of Rs. 214.65 per metric tonne, "free on rail destination railway station" plus packing charges plus excise duty. These contracts were on the terms and conditions set out in the form of "General terms and conditions of supply" adopted by the assessee. The assessee, in fulfilment of these contracts, despatched cement to the purchasers at various destinations by rail and the railway receipts were made out on the basis of 'freight to pay'. The invoices sent by the assessee showed the 'free on rail destination railway station' price of the cement despatched at the rate of Rs. 214.65 per metric tonne and added the amounts representing excise duty and packing charges and deducted the amount of railway freight, since it was to be paid by the purchasers. The assessee did not charge in the invoices sales tax on the railway freight, since in its view it did not form part of the 'sale price'; but in order to provide against a possible claim which might be made by the Sales Tax Authorities, the assessee claimed by way of deposit an amount 'towards contingent liability to sales tax on railway freight to be paid by you' that is, the purchasers.

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H

In the assessment of the assessee to sales tax under the Rajasthan Sales Tax Act, 1954 and the Central Sales Tax Act, 1956, the Sales Tax Authorities took the view that the amount of freight formed part of the "sale price" and was, therefore, liable to be included in the turnover of the assessee for the purposes of assessment of sales tax. The assessee challenged the correctness of the view by filing a writ petition in the High Court of Rajasthan, but the High Court agreed with the view taken by the Sales Tax Authorities and held that since under clause 8 of the Control Order, the price payable by the purchasers was *f.o.r.* destination price, the amount of freight included in it formed part of 'sale price'

Dismissing the appeals, the Court

HELD : 1. By reason of the provisions of the Cement Control Order 1967, which governed the transactions of sale of cement entered into by the assessee with the purchasers, the amount of freight formed part of the "sale price" within the meaning of the first part of the definition of that term and was includible in the turnover of the assessee. [296 D-E]

2. (a) The Control Order is paramount; it has over-riding effect and if it stipulates that the freight shall be payable by the producer, such stipulation must prevail, notwithstanding any term or condition of the contract to the contrary and any such term or conditions to the extent to which it is in conflict with the provisions of the control order would stand excluded. It is a statutory order having binding force and effect and it must govern the transactions of sale of cement entered into by the assessee with the purchasers. [292 C, 293 B-G, 295 A]

(b) The Control Order is designed to ensure availability of cement at a uniform price throughout India irrespective of the distance from the place of manufacture and clause 8 of the order provides a maximum price of Rs. 214.65 per metric tonne *f.o.r.* destination railway station at which a producer may sell cement manufactured by him. It was at this maximum price of Rs. 214.65 per metric tonne *f.o.r.* destination railway station that, in pursuance of this clause, the assessee sold cement to various purchasers. The price was clearly inclusive of freight. [292 D-E]

(c) Under the scheme of the Control Order the freight is paid by the producer who then recovers it from the purchaser. Clause 9 clearly contemplates that the *f.o.r.* destination railway station price would be realised by the producer, for the excess of such price over the retention price and selling agency commission is required to be paid over by the producer to the controller in the Cement Regulation Account. The amount of freight has, therefore, to be realised by the producer from the purchaser and that postulates that it is the producer who pays the freight to the railway authorities. The proviso to clause (9) makes this doubly clear by providing that "the expenditure *incurred by the producer* on freight.... shall be *reimbursed to the producer* and again clause (11) uses the expression" ....paying or equalising the expenditure *incurred* by the producer on freight". [294 A-C]

(d) When the producer pays the freight, he does so because, as between him and the purchaser, he is liable to pay the freight and he then recovers it as part of the price. [294 D-E]

A (e) If the obligation to pay the freight were on the purchaser, the amount of freight would obviously be deducted from the *f.o.r.* destination railway station price in the invoice and only the balance would be realised by the assessee. There would be no question of the assessee realising the amount of freight from the purchaser because the purchaser would have paid the freight in discharge of the his own liability and the assessee would have no claim to recover it from the purchaser. Then, the terms of clause 9, proviso to that B clause and clause 11 of the Control Order would not be satisfied. It would not be possible to give effect to clause 9, if what is realised by the assessee is not the *f.o.r.* destination railway price but that price less the amount of freight. The assessee also would not be able to claim to be entitled to be reimbursed under the proviso to clause 9, if he has not incurred any expenditure on the freight. The entire statutory scheme would become unworkable. [294 E-G]

C

(f) The scheme of the Control Order clearly proceeds on the basis that the freight is payable by the producer and he recovers it from the purchaser as part of the *f.o.r.* destination railway station price. The provision in the contract that the delivery to the purchaser shall be complete as soon as the goods are put on rail and payment of the freight shall be the responsibility of the purchaser is wholly inconsistent with the scheme of the Control Order D and must be deemed to be excluded by it. [294 H, 295 A]

3. (a) The definition of Sale Price in section 2(p) of the Rajasthan Sales Tax Act, 1954 is in two parts. The first part says that "sale price" means the amount payable to a dealer as consideration for the sale of any goods and therefore, the concept of real price or actual price retainable by the dealer would be irrelevant. The test would be, what was the consideration that E passed from the purchaser to the dealer for the sale of the goods. The only relevant question to ask being what was the amount paid by the purchaser to the dealer as consideration for the sale and not as to what was the net consideration retainable by the dealer, it would be immaterial to enquire as to how the amount of consideration was made up, whether it included excise duty or sales tax or freight. [286 D, F-G]

F The amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item as is usually the case, forms part of the "sale price". It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition. And so would be the case regarding the amount of freight and handling charges. It would be payable by the Purchaser not under any statutory or other liability but as part of the consideration for sale of the G goods and it would therefore form part of "sale price" within the meaning of the first part of the definition. [287 A-D, 288 D-F]

M/s. George Oakes (P) Ltd. v. *The State of Madras,* XII S.T.C. (S.C.) 476; *Dyer Meakin Breweries Ltd.* v. *Sales Tax Officer, Ernakulam,* XXVII S.T.C. (S.C.) 120 applied.

H *Sri Sundararajan & Co. Ltd.* v. *The State of Madras* (VIII S.T.C. Mad. 105); *Panrika Ltd. and Anr.* v. *Board of Trade* (1944) 1 All. E.R. 372; *Love* v. *Norman Wright (Builders) Ltd.* [1944] 1 All. E.R. 618; referred to.

(b) In a contract of sale *f.o.r.* destination railway station, the delivery of the goods to the purchaser would be complete at the destination railway station and till then the risk would continue to remain with the dealer. The agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to what was the amount of freight paid by the dealer. The dealer may, in such a case, pay the freight and charge the agreed price to the purchaser or he may obtain a railway receipt on the basis of 'freight to pay' and request the purchaser to pay the freight at the time of taking delivery of the goods from the railway at the destination railway station and give the purchaser credit for the amount of the freight against the agreed price. The latter would merely be a convenient mode of paying the agreed price. Though the purchaser can very well refuse to accept the railway receipt which is not 'freight prepaid', but 'freight to pay', he ordinarily, as a reasonable businessman would, accept such a railway receipt and pay the amount of freight on behalf of the dealer. When the purchaser, pays the amount of freight, in such a case, it would be as part of the agreed price and not as freight *vis-a-vis* the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of 'sale price' and fall within the first part of the definition. [288 G-H, 289 A-E]

(c) In a case, where the contract of sale is not *f.o.r.* destination railway station, but the price alone is so, the contract would not have all the incidents of *f.o.r.* destination railway station 'contract', but merely the price would be stipulated on that basis. The terms of such a contract may provide that the delivery shall be complete when the goods are put on rail and thereafter it shall be at the risk of the purchaser. Such a stipulation would make the railway agent of the purchaser for taking delivery of the goods. The freight in such a case would be payable by the purchaser though the price agreed upon is *f.o.r.* destination railway station. The price of the goods receivable by the dealer would, in that even, be the *f.o.r.* destination railway station-price less the amount of freight payable by the purchaser. That would be the consideration payable by the purchaser to the dealer for the sale of the goods and the amount of freight being payable by the purchaser would not be included in the 'sale price' within the meaning of the first part of the definition. The position would be the same even if the dealer pays the freight and obtains railway receipt "freight pre-paid" and claims the full *f.o.r.* destination railway station price in the bill. The amount representing freight would not be payable as part of the consideration for the sale of the goods but by way of reimbursement of the freight which was payable by the purchaser but in fact disbursed by the dealer and hence it would not form part of the 'sale price'. [289 G-H, 290 A-C]

Hyderabad Asbestos Cement Products Ltd. v. *State of Andhra Pradesh*, XXIV S.T.C. (S.C.) 487; *Tungabhadra Industries Ltd. Kurnool* v. *Commercial Tax Officer, Kurnool* (XI STC 827); explained.

4. The second part of the definition enacts an inclusive clause and says that 'sale price' includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof, other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". Therefore, 'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof', is to be regarded as part of the 'sale price', even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not

A all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery thereof and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, "other than the cost of freight or delivery or the cost of installation in case where B such cost is separately charged". [295 C, F]

(b) This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing C a particular amount within the definition of 'sale price'. But if the State is able to show that the particular amount falls within the first part of the definition and is therefore, part of the 'sale price', the exclusion clause cannot avail the assessee to take the amount in question out of the definition of 'sale price'. In the instant case, since the amount of the freight forms part of the 'sale price' within the meaning of the first part of the definition, it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. D The exclusion clause is, therefore, irrelevant and cannot be called in aid by the assessee. [295 F-H, 296 A]

(c) Even if the exclusion clause were read as an exception to the first part of the definition which, cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is E obvious that the expression ". . . cost of freight . . . is separately charged" is used in contradistinction to a case where the cost of freight is not separately charged but is included in the price. It is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part F have no application. [296 A-C]

Observation :

(a) In respect of the assessee's several transactions of cement with the Central Government through the Director General of Supplies and Disposals, the opinion G given by the Law Department of the Government of India viz., "that freight was not part of 'sale price' within the meaning of the definition of that term and hence no sales tax would be payable by the assessee on the amount of freight" was not correct and was unjustified. [296 E-H]

(b) As this statement misled the assessee into not claiming the amount of sales tax on the freight component of the price from the Central Government, H in the circumstances fairness and justice demand that the Central Government, should pay to the assessee the amount of sales tax on the freight component of the price in respect of transactions of sale of cement entered into by the assessee with them under the provisions of the control order. [297 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1122 of 1976. A

From the Judgment and Order dated 10-9-1976 of the Rajasthan High Court in D. B. Civil Writ Petition No. 1080 of 1976.

V. M. Tarkunde, V. K. Shinghal, N. N. Goswamy and *Arvind Minocha* for the appellant in C. A. No. 1122 of 1976. B

F. S. Nariman , Y. S. Chitale, A. K. Srivastava, V. Bhasin, C. V. Francis and *Vineet Kumar* for the appellant in C.A. No. 1310 of 1976.

S. J. Sorabjee, L. N. Sinha, S. M. Jain, S. C. Bhandari and *B. B. Singh* for the respondents in both the appeals. C

Anantha Babu and *A. Subba Rao* for the intervener in C.A. No. 1122 of 1976.

The Judgment of the Court was delivered by

BHAGWATI, J. These appeals by special leave raise an interesting question of law relating to the applicability of the definition of "sale price" in section 2(p) of the Rajasthan Sales Tax Act, 1954 and 2(h) of Central Sales Tax Act, 1956. The question is whether in sales of cement effected under the Cement Control Order 1967, the amount of freight forms part of the "sale price" so as to be exigible to Sales Tax under these Acts. The facts giving rise to these appeals are in material respects identical and hence it would be sufficient if we state the facts of Civil Appeal No. 1122 of 1976 which was argued as the main appeal before us. D E

The appellant in this appeal is Hindustan Sugar Mills Ltd. (hereinafter referred to as the assessee). The assessee owns a cement factory known as Udaipur Cement Works at Udaipur in Rajasthan and it manufactures and sells cement to purchasers both inside and outside Rajasthan. The appeal relates to assessment of the assessee to sales tax under the Rajasthan Sales Tax Act, 1954 and the Central Sales Tax Act, 1956 for the assessment years 1971-72 and 1972-73. During these assessment years the sale of cement was controlled under the Cement Control Order, 1967 (hereinafter referred to as the Control Order). The Control Order was issued by the Central Government in exercise of the powers conferred by sections 18G and 25 of the Industries (Development and Regulation) Act, 1951. Clause (7) of the Control Order provided that the ex-factory prices admissible to the producer for the different varieties of cement shall be as specified in the Schedule and the Schedule, as it stood at the material time, specified a retention price of Rs. 161.40 per metric tonne for cement manufactured by all producers other than F G H

those mentioned at Items 1 to 5, which included the assessee. The maximum price at which a producer could sell cement was prescribed in clause (8) which said that no producer shall sell "any other variety of cement at a price exceeding Rs. 214.65 per metric tonne free on rail destination railway station plus the excise duty paid thereon". The proviso to Clause (8) provided that in the case of packed cement, there shall be added to this price such charges as may be fixed by the Central Government in respect of packing in jute bags or in any other containers. The Explanation to this clause clarified that for the purpose of the Control Order, the expression 'free on rail destination railway station' means "the price (including the cost of transport by the cheapest mode except where any other mode of transport has been specified by the Central Government under Clause (4) at the destination point". Clause (9) and (11) provided for the creation of a Cement Regulation Account in the following terms :

9. Payments to Cement Regulation Account :

Every producer shall, in respect of such transaction by way of sale of cement effected by him, pay within one month of the close of the month in which sales take place, to the Controller, an amount equivalent to the amount, if any, by which the free on rail destination price of such cement realised by him exceeds the aggregate of the following amounts, namely :

(i) the ex-factory price of such cement calculated in accordance with the rates specified in the Schedule;

(ii) a selling agency commission calculated at the rate of Rs. 3.00 per tonne;

(iii) the excise duty paid thereon; and

(iv) in the case of packed cement, the charges fixed by the Central Government in respect of the packing or the containers under the first proviso to clause 8 :

Provided that the expenditure incurred by the producer on freight by the cheapest mode of transport or where any other mode of transport has been specified by the Central Government under clause 4, by such mode of transport in respect of such transactions shall be reimbursed to the producer by the Controller from out of the Cement Regulation Account referred to in clause 11.

* * * * *

11. Cement Regulation Account :

(1) The Controller shall maintain an account to be known as the Cement Regulation Account to which shall be credited the amounts paid by the producer under clause 9 and such other sums of money as the Central Government may, after due appropriation made by Parliament by law in this behalf, grant from time to time.

(2) The amount credited under sub-clause (1) shall be spent only for the following purposes, namely :

(i) paying or equalising the expenditure incurred by the producer on freight in accordance with the provisions of this Order ;

(ii) equalising concession, if any, granted in the matter of price for supplies to Government or for purposes of export under the third proviso to clause 8;

(iii) expenses incurred by the Controller in discharging the functions under this Order subject to such limits, if any, as may be laid down by the Central Government in this behalf."

Clause (14) which is the last clause laid down the procedure for making claims for payment from the Cement Regulation Account. It provided that "every producer shall make an application regarding his claim for any reimbursement towards equalising freight or equalising concession in the matter of export price to the Controller who may, in settling the claim, require the producer to furnish all details, relating thereto, including the cost of freight incurred, excise duty, if any, paid etc." The underlying object behind these provisions was that cement should be available at uniform price throughout the country and that is why it was provided that no producer shall sell cement at a price exceeding Rs. 214.65 per metric tonne "free on rail destination railway station" plus packing charges and excise duty. This was the maximum price at which the Central Government intended that cement should be available any where in India, irrespective of the distance from the place of manufacture. Now this price was worked out on the basis of average freight and since the actual freight would necessarily be more or less than the average freight depending on the distance of the place of destination from the manufacturing site, clauses 9 and 11 of the Control Order provided a machinery by which the producer could be ensured the retention price specified in the Schedule alongwith selling agency commission at the rate of Rs. 3.00 per metric tonne, packing charges and excise

duty. This result was achieved by providing that the producer should hand over to the Controller the excess of the "free on rail destination railway station" price including packing charges and excise duty realised by him *over* the retention price, selling agency commission, packing charges and excise duty and he should then be re-imbursed the amount of expenditure actually incurred by him on freight by the cheapest mode of transport. This would leave with the producer the retention price together with the selling agency commission, packing charges and excise duty and also re-imburse him the actual freight paid by him.

During the relevant assessment years, the assessee entered into diverse contracts of sale of cement with purchasers at the price of Rs. 214.65 per metric tonne "free on rail destination railway station" plus packing charges and excise duty. These contracts were on the terms and conditions set out in the form of 'General terms and conditions of supply" adopted by the assessee. A copy of the "General terms and conditions of supply" was handed over to us by the learned counsel appearing on behalf of the assessee at the hearing of the appeals and it was not disputed on behalf of the State that these were the general terms and conditions on which contracts were entered into by the assessee with the purchasers. Clauses 5, 8 and 11 of the "General terms and conditions of supply" were strongly relied upon on behalf of the assessee and we shall, therefore, set them out *in extenso* :

> 5. Although the price of cement is on the basis of F.O.R. destination railway station, consignments will nevertheless be despatched "freight to pay" and credit afforded in our Bill for the amount of freight payable. The purchaser should accordingly arrange to pay Railway freight/Road transport charges at the destination at the time of taking delivery.
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> 8. Once the consignment is handed over to the Carrier and a receipt is obtained, the responsibility of the Company ceases. The Company does not accept any liability for any delay, shortage, damage or loss of goods in transit. Claim should be lodged with the Carriers by the Buyers directly.
>
> 11. In respect of any claim for over charge of freight, the purchaser shall put up claim with the concerned Railway authorities.

The assessee, in fulfilment of these contracts, despatched cement to the purchasers at various destinations by rail and the railway receipts were made out on the basis of "freight to pay". The invoices sent by the assessee showed the "free on rail destination railway station" price of the cement despatched at the rate of Rs. 214.65 per metric tonne and added the amounts representing excise duty and packing

charges and deducted the amount of railway freight since it was to be paid by the purchasers. The assessee did not charge in the invoices sales tax on the amount of railway freight, since in its view it did not form part of the "sale price", but in order to provide against a possible claim which might be made by the sales tax authorities, the assessee claimed by way of deposit an amount "towards contingent liability to sales tax on railway freight to be paid by you" that is, the purchasers. Each invoice also contained a statement at the commencement that : "Every care is taken in packing and despatching goods and our responsibility for shortage, loss, delay or damage ceases after delivery at Works Siding. All such claims should be preferred with the railways or the carriers concerned". The purchasers received the railways receipts from the banks against payment of the amounts of the invoices and thereafter took delivery of the cement despatched by the assessee after making payment of the railway freight.

The question arose in the assessment of the assessee to sales tax under the Rajasthan Sales Tax Act, 1954 and the Central Sales Tax Act, 1956 as to whether the amount of freight deducted from the free on rail destination railway station price (hereinafter for the sake of brevity referred to as F.O.R. destination price) in the invoices made out by the assessee and paid by the purchasers formed part of the "sale price" within the meaning of the definition of that term in section 2(p) of Rajasthan Sales Tax Act, 1954 and section 2(h) of the Central Sales Tax Act, 1956. The Sales Tax Authorities took the view that the amount of freight formed part of the "sale price" and was, therefore, liable to be included in the turnover of the assessee for the purpose of assessment of Sales Tax. The assessee challenged the correctness of this view by filing a writ petition in the High Court of Rajasthan but the High Court agreed with the view taken by the Sales Tax Authorities and held that since under clause 8 of the Control Order, the price payable by the purchasers was F.O.R. destination price, the amount of freight included in it formed part of the "sale price". The assessee thereupon preferred Civil Appeal No. 1122 of 1976 after obtaining special leave from this Court.

It will thus be seen that Civil Appeal No. 1122 of 1976 is directed against the judgment of the Rajasthan High Court which has taken a view against the assessee. The other appeal, namely, Civil Appeal No. 1310 of 1976 which has been heard alongwith Civil Appeal No. 1122 of 1976 has been filed by the assessee directly against an adverse order made by the assessing authorities but the question in that appeal is the same as in Civil Appeal No. 1122 of 1976. It must be conceded straightaway that the question is not free from difficulty

A and there is a sharp divergence of opinion amongst different High Courts, with an almost equal number of High Courts ranging on either side. But fortunately there are two decisions of this Court which throw some light on this question. We shall refer to them in due course.

Though we are concerned in these appeals with assessments made B under both Rajasthan Sales Tax Act, 1954 and Central Sales Tax Act, 1956, it would be sufficient to refer only to the provisions of the Rajasthan Sales Tax Act, 1954, since the material provisions of both the Acts are identical. Section 3 of the Rajasthan Sales Tax Act, 1954 provides that every dealer whose turnover in the previous year exceeds a certain limit shall be liable to pay tax on his taxable turn- C over, subject to the provisions of that Act. "Taxable turnover" is defined in section 2(s) to mean that part of the "turnover" which remains after deducting the aggregate amount of proceeds of certain categories of sales and "turnover", according to section 2(t), means "the aggregate of the amount of sale prices received or receivable by a dealer in respect of the sale or supply of goods—". The defini- D tion of 'sale price' is given in section 2(p) and according to that definition, it means :

> —the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, E but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged".

F This definition is in two parts. The first part says that 'sale price' means the amount payable to a dealer as consideration for the sale of any goods. Here, the concept of real price or actual price retainable by the dealer is irrelevant. The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is G made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer.

Take for example, excise duty payable by a dealer who is a manu- H facturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown

as a separate item in the bill, but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to re-imburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchases would be liable to pay the amount of excise duty to the dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'. So also, the amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item as is usually the case, forms part of the 'sale price'. It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition. This position is now well settled as a result of the decision of this Court in *M/s George Oakes (Pvt.) Ltd.* Versus *The State of Madras & Ors.* (XII STC 476) whether the view taken by Madras High Court in *Sri Sundararajan & Co. Ltd.* Versus *The State of Madras* (VIII STC 105) was approved. There S. K. Das, J., speaking on behalf of the Court, approved of the following observations of Lawrence, J., in *Paprika Ltd. & Anr.* Versus *Board of Trade* (1944) All E.R. 372) :

> "Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does not cease to be the price which the buyer has to pay even the price is expressed as 'x' plus purchase tax."

The learned Judge also quoted with approval what Goddard, L.J., said in *Love* v. *Norman Wright (Builders) Ltd.* [(1944) 1 All E.R. 618] :

> "Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So if a seller

A offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not."

B and summed up the position in the following words :

"So far as the purchaser is concerned, he pays for the goods what the seller demands, namely, the 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
C the consideration for the sale and included in the turnover."

We may then take a case where a dealer transports goods from his factory to his place of business and sells them at a price which is arrived at after taking into account 'freight and handling charges' incurred by him in transporting the goods. The amount of 'freight
D and handling charges' included in the price would obviously be the part of the 'sale price', because it would be payable by the purchaser to the dealer as part of the consideration for the sale of the goods. The same would be the legal position even if the 'freight and handling charges' are shown separately in the bill and added to the price of the goods, for the character of the payment would remain the same. Since
E 'freight and handling charges' represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price charged to the purchaser. The amount of 'freight and handling charges' would be payable by the purchaser not under any statutory or other liability but
F as part of the consideration for the sale of the goods and it would, therefore, form part of 'sale price' within the meaning of the first part of the definition. This position is also well settled having regard to the decisions of this Court in *Dyer Meakin Breweries Ltd.* v. *Sales Tax Officer, Ernakulam* (XXVII STC 120).

G We may now take another example which is very much near to the one which we have already discussed. The dealer may, instead of transporting the goods from his factory or his place of business and selling them there, enter into a contract of sale F.O.R. destination railway station. Where such a contract is made, the seller undertakes an obligation to put the goods on rail and arrange to have them
H carried to the destination railway station at his expense. The delivery of the goods to the purchaser in such a case is complete at the distination railway station and till then the risk continues to remain with

the dealer. The freight is payable by the dealer since he has to arrange for the goods to be carried by rail to the destination railway station at his expense and there is no obligation on the purchaser to pay the freight. The purchaser is concerned only to pay the agreed price for the delivery of the goods at the destination railway station. The agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to what is the amount of freight. Even if there is any fluctuation in the amount of freight, since the making of the contract, the purchaser would have no concern, because he is liable to pay only the agreed price which includes the freight, whatever it be. The dealer may, in such a case, pay the freight and charge the agreed price to the purchaser, or he may obtain a railway receipt on the basis of freight to pay" and request the purchaser to pay the freight at the time of taking delivery of the goods from the railway at the destination railway station and give the purchaser credit for the amount of the freight against the agreed price. The latter would merely be a convenient mode of paying the agreed price. Since it is the obligation of the dealer to deliver the goods free on rail destination railway station, the dealer is liable to pay the freight as between him and the purchaser and the purchaser can very well refuse to accept the railway receipt which is not "freight pre-paid" but "freight to pay". But he may, ordinarily as a reasonable businessman he would, accept such railway receipt and pay the amount of freight on behalf of the dealer. When the purchasers pay the amount of freight in such a case, it would be as part of the agreed price and not as freight *vis-a-vis* the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of "sale price" and fall within the first part of the definition.

This would plainly and indubitably be the position where the contract of sale entered into by the dealer is F.O.R. destination railway station. But here it is necessary to bear in mind a rather important distinction. There may be a case where the contract of sale may not be F.O.R. destination railway station, but the price alone may be so. Where such is the case, the contract does not have all the incidents of a F.O.R. destination railway station contract, but merely the price is stipulated on that basis. The terms of such a contract may provide that the delivery shall be complete when the goods are put on rail and thereafter it shall be at the risk of the purchaser. Such a stipulation would make the railway agent of the purchaser for taking delivery of the goods. The freight in such a case would be payable by the purchaser though the price agreed upon is F.O.R. destination railway station. The price of the goods receivable by the dealer would, in

A that event, be the F.O.R. destination railway station price less the amount of freight payable by the purchaser. That would be the consideration payable by the purchaser to the dealer for the sale of the goods and the amount of freight being payable by the purchaser would not be included in the 'sale price' within the meaning of the first part of the definition. The position would be the same even if B the dealer pays the freight and obtains railway receipt "freight prepaid" and claims the full F.O.R. destination railway station price in the bill. The amount representing freight would not be payable as part of the consideration for the sale of the goods but by way of reimbursement of the freight which was payable by the purchaser but C in fact disbursed by the dealer and hence it would not form part of the 'sale price'.

This was precisely the basis on which the decision in Hyderabad *Asbestos Cement Products Ltd.* v. *State of Andhra Pradesh* (XXIV STC 487) was given by this Court. There the appellant maintained a uniform catalogue rate all over the country in respect of its manu- D factures and the catalogue rate obviously included freight in transporting goods to the customers. The appellant despatched goods to the customers by rail under railway receipts with "freight to pay" and made out invoices at the catalogue rate, deducted discount from it and charged sales tax on the balance and then gave credit for the amount of freight to be paid by the customers. The question arose in the E assessment of the appellant to sales tax whether the amount of freight formed part of the 'sale price' and was, therefore, includible in the turnover of the appellant. The terms of the contracts with the customers were in a printed form and clauses (4) and (16) thereof provided as follows : (4) The price of the said productions supplied to F the stockists shall be the current general gross list price charged by the company free on rail, less such discount as may be fixed by the company from time to time——(16) "——the date of delivery shall mean the date of the railway receipt and in the case of consignments sold free on rail destination, the railway freight shall be nevertheless payable by the stockists at the destinations and the amount of freight shown G on the railway receipt shall be deducted from the invoice of the company". It will be seen that under clause (4) the price of the goods was stipulated to be "the current general gross list price charged by the company free on rail", but clause (16) made it clear that "the date of delivery shall mean the date of the railway receipt" and though the goods may be sold free on rail destination, "the railway freight H shall nevertheless be payable by the stockists at the destinations and the amount of freight——shall be deducted from the invoice of the company". The combined reading of clauses (4) and (16) clearly

showed that it was only the price which was F.O.R. destination and the delivery to the customers was complete as soon as the goods were put on rail and payment of freight was the obligation of the customers as between them and the appellant. That is why Shah, J., speaking on behalf of the Court said : "If clause (4) stood alone the price charged by the company may be deemed to be the catalogue rate less the discount payable to the purchasers. But by clause (16) the purchasers clearly undertook to pay railway freight which was deducted from the invoice made out by the company. By clause (16) the company received the catalogue rate less the railway freight as price of the goods sold. We are unable to agree with the High Court that "the term relating to the price in the contract between the company and the stockists envisaged by this clause [clause (16)] implies an obligation on the part of the company to pay the railway freight". In our judgment, under the terms of the contract, there is no obligation on the company to pay the freight, and under the terms of the contract the price received by the company for sale of goods is the invoice amount less the freight" and held that the amount of freight was not part of the 'sale price'. It was, to quote again the words of Shah, J., "not made a part of the price".

We may also at this stage refer to another decision of this Court earlier in point of time. That is the decision in *Tungabhadra Industries Ltd. Kurnool* Versus *Commercial Tax Officer Kurnool* (XI STC 827). What happened in this case was that the appellant sold and despatched hydrogenated groundnut oil to the purchasers at an agreed price which was inclusive of freight. It is not very clear from the record but it does appear that the railway receipts obtained by the appellant were on the basis of 'freight to pay' and the amount of freight was paid by the purchasers and in the invoices made out by the appellant, the agreed price inclusive of freight was shown and from this the amount of freight was deducted and on the balance the amount of sales tax was computed. The appellant claimed to deduct the amount of freight from the turnover on the strength of Rule 5(1)(g) of the Turnover and Assessment Rules which provided that in determining the net turnover of a dealer, he shall be entitled to a deduction of "all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of the goods sold : (i) freight; (ii)——. This Court held that the deduction claimed was not permissible since the conditions for the applicability of Rule 5(1)(g) were not satisfied. It was pointed out that it was clear from the contents of the specimen invoice produced by the appellant that "the appellant has charged a price inclusive of the railway freight and would therefore be outside

A the terms of Rule 5(1)(g) which requires that in order to enable a dealer to claim the deduction it should be charged for separately and not included in the price of goods sold. The conditions of the rule not having been complied with, the appellant was not entitled to the deduction in respect of freight." Here the freight was payable by the appellant because the price was inclusive of the freight and there was B no stipulation in the contract, as in the *Hyderabad Asbestos Cement Company's case,* that the delivery to the purchaser shall be complete when the goods are put on rail or that the payment of freight shall be the obligation of the price. And it did not make any difference to this position that the freight was not initially paid by the appellant but was C paid by the purchaser and given credit for against the agreed 'freight-inclusive' price in the invoice.

Now, in the light of this discussion, let us turn to examine the facts of the present appeals. The Control Order here becomes very material. It is a statutory order having binding force and effect and it D must govern the transactions of sale of cement entered into by the assessee with the purchasers. The Control Order is designed to ensure availability of cement at a uniform price throughout India irrespective of the distance from the place of manufacture and clause (8) provides a maximum price of Rs. 214.65 per metric tonne F.O.R. destination railway station at which a producer may sell cement manu- E factured by him. It was at this maximum price of Rs. 214.65 per metric tonne F.O.R. destination railway station that, in pursuance of this clause, the assessee sold cement to various purchasers. The price was clearly inclusive of freight. But the question is : who, under the terms of the contract, was liable to pay the freight, the assessee or the purchaser ? Was the contract one for delivery at destination railway F station or was it a contract in which delivery to the purchaser would be complete as soon as the goods are put on rail at the place of despatch ? The answer to this question would clearly be in favour of the assessee if we have regard only to the terms and conditions of the contract without taking into account the provisions of the Control Order. Clause (8) of the "General Terms and Conditions of Supply" G incorporated in the contract provided that once the goods are handed over to the railway and a railway receipt is obtained, the responsibility of the assessee shall cease and the risk shall pass to the purchaser and, therefore, if there is non-delivery or shortage or delay in delivery, it is the purchaser who, according to this clause, shall be entitled to make a claim against the railway. If there were over-charge of H freight then again under clause (11) it is not the assessee but the purchaser who would be entitled to lodge a claim with the railway authorities. The specimen invoice produced by the assessee also made

it clear that the responsibility of the assessee for shortage, loss, delay or damage shall cease as soon as the goods are delivered at the Work Siding and all such claims may be preferred by the purchaser against the railway and in case excess freight has been charged, the purchaser shall be entitled "to lodge claim with the railways". It would, thus, be seen that according to these provisions the delivery of the goods to the purchaser would be complete as soon as they are put on rail at the Work Siding and the risk then passes to the purchaser and payment of freight would be the responsibility of the purchaser. This would be the position apart from the provisions of the Control Order and on this position, there can be doubt, for reasons already discussed, that the amount of freight would not form part of the 'sale price'. But we have to consider the impact of the proivsions of the Control Order, for these provisions having statutory force and authority have overriding effect and the terms and conditions of the contract to the extent to which they conflict with these provisions must be held to be excluded. Let us, therefore, examine the impact of the relevant provisions of the Contral Order on the terms and conditions of the contract.

It is clear from the scheme of the Control Order that the price chargeable by a producer is contemplated to be Rs. 214.65 per metric tonne F.O.R. destination railway station. This of course is the maximum price at which a producer may sell cement and theoretically, of course, there is nothing to prevent him from selling it at a lower price, but it is assumed by the Central Government that in a seller's market where there is scarcity of supply, the producer will sell at the maximum price permitted to him under the Control Order and that is the basis on which the machinery of Cement Regulation Account is worked out in the Control Order. This machinery would become unworkable and at the least it would require the Central Government to subsidise the Cement Regulation Account in a large way, if every producer were to sell cement at a price lower than Rs. 214.65 per metric tonne F.O.R. destination railway station. It is, therefore, obvious that though the Control Order merely provides the maximum price of Rs. 214.65 per metric tonne F.O.R. destination railway station at which a producer may sell cement, leaving it theoretically open to him to sell it at a lower price, the basic assumption underlying the Control Order is that every producer will sell at the maximum price. And in fact, in both the cases before us, every transaction of sale of cement by the assessee was at the price of Rs. 214.65 per metric tonne F.O.R. destination railway station. This, however, by itself would not be determinative of the controversy because the question would remain as to who, between the assessee and the purchaser, is

liable to pay the freight and that requires us to consider whether there is anything in the Control Order which overrides the relevant provisions of the contract bearing on this question and by necessary implication, exclude them. Clause (9) clearly contemplates that the F.O.R. destination railway station price would be realised by the producer, for the excess of such price over the retention price and selling agency commission is required to be paid over by the producer to the controller in the Cement Regulation Account. The amount of freight has, therefore, to be realised by the producer from the purchaser and that postulates that it is the producer who pays the freight to the railway authorities. The proviso to clause (9) makes this doubly clear by providing that "the expenditure *incurred by the producer* on freight——shall be *reimbursed to the producer*" and again clause (11) uses the expression "—paying of equalising the expenditure *incurred* by the producer on freight". It is, therefore, clear that under the scheme of the Control Order the freight is paid by the producer and he then recovers it from the purchaser. But that does not conclude the controversy. The question still remains : When the producer pays the freight, does he do so because, as between him and the purchaser, he is liable to pay the freight and he then recovers it as part of the price or the obligation to pay the freight is on the purchaser and the producer pays it on behalf of the purchaser and then recovers it by way of reimbursement.

We are of the view that the former, and not the latter, represents the correct legal position. If the obligation to pay the freight were on the purchaser and in fact the purchaser paid the freight, as happened in both the cases before us in respect of every transaction of sale of cement, the amount of freight would obviously be deducted from the F.O.R. destination railway station price in the invoice and only the balance would be realised by the assessee. There would be no question of the assessee realising the amount of freight from the purchaser because the purchaser would have paid the freight in discharge of his own liability and the assessee would have no claim to recover it from the purchaser. Then how would the terms of clause (9), proviso to that clause and Clause (11) of the Control Order be satisfied ? How would it be possible to give effect to clause (9) if what is realised by the assessee is not the F.O.R. destination railway station price but that price less the amount of freight ? How would the assessee claim to be entitled to be reimbursed under the proviso to clause (9) if he has not incurred any expenditure on the freight ? The entire statutory scheme would become unworkable. The scheme of the Control Order clearly proceeds on the basis that the freight is payable by the producer and the recovers it from the purchaser at part

of the F.O.R. destination railway station price. The provision in the contract that the delivery to the purchaser shall be complete as soon as the goods are put on rail and payment of the freight shall be the responsibility of the purchaser is wholly inconsistent with the scheme of the Control Order and must be held to be excluded by it. The Control Order is paramount : it has overriding effect and if it stipulates that the freight shall be payable by the producer, such stipulation must prevail, notwithstanding any term or condition the contract to the contrary. The conclusion is, therefore, inevitable that the amount of freight forms part of the 'sale price' within the meaning of the first part of the definition.

This renders it unnecessary to consider the second part of the definition, but the latter clause of the second part was strongly relied upon on behalf of the assessee to support the exclusion of the amount of freight from 'sale price' and hence we must proceed to consider it. The second part enacts an inclusive clause. It says that 'sale price' includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged." Therefore, 'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof' is to be regarded as part of 'sale price', even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery thereof and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, "other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of 'sale price'. But if the State is able to show that the particular amount falls within the first part of the definition and is, therefore, part of the 'sale price', the exclusion clause cannot avail the assessee to take the amount in question out of the definition of 'sale price'. Here, on the view taken by us, the amount of freight

A forms part of the 'sale price' within the meaning of the first part of the definition and it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. The exclusion clause is, therefore, irrelevant and cannot be called in aid by the assessee. We may point out that even if the exclusion clause were read as an exception to the first part of the definition which, as we have pointed out, B cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is obvious that the expression "—— cost of freight—— is separately charged" is used in contradistinction to a case where the cost of freight is not separately C charged but is included in the price. It is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part have no application.

D We must, therefore, hold that, by reason of the provisions of the Control Order which governed the transactions of sale of cement entered into by the assessee with the purchasers in both the appeals before us, the amount of freight formed part of the 'sale price' within the meaning of the first part of the definition of that term and was includible in the turnover of the assessee.

E

Before we part with these appeals we think it necessary to advert to one rather unusual circumstance which has caused some anxiety to us. We were told by the learned counsel appearing on behalf of the assessee and that was not disputed on behalf of the State that the assessee had entered into a large number of transactions of sale of F cement with the Central Government through the Director General of Supplies and Disposals and when the assessee claimed to recover the amount of sales tax in respect of these transactions from the Central Government on the basis that freight was part of 'sale price', the Director General of Supplies and Disposals pointed out to the assessee that the Law Department of the Government of India had advised G them that freight was not part of 'sale price' within the meaning of the definition of that term and hence no sales tax would be payable by the assessee on the amount of freight and the assessee was, therefore, not justified in claiming to recover the amount of sales tax from the Central Government. The assessee, in view of this statement made on behalf of the Central Government, did not press its claim to recover H the amount of sales tax on the freight component of the price from the Central Government. Now, it appears clearly from this judgment that the opinion given by the Law Department of the Government of

India was not correct and the statement made on behalf of the Government of India that no sales tax will be payable by the assessee on the amount of freight was unjustified. There can be no doubt that this statement misled the assessee into not claiming the amount of sale tax on the freight component of the price from the Central Government. We think that, in the circumstances, fairness and justice demand that the Central Government should pay to the assessee the amount of sales tax on the freight component of the price in respect of transactions of sale of cement entered into by the assessee with them under the provisions of the Control Order. It is true and we are aware that there is no legal liability on the Central Government to do so, but it must be remembered that we are living in a democratic society governed by the rule of law and every Government which claims to be inspired by ethical and moral values must do what is fair and just to the citizen, regardless of legal technicalities. We hope and trust that the Central Government will not seek to defeat the legitimate claim of the assessee for reimbursement of sales tax on the amount of freight by adopting a legislatic attitude but will do what fairness and justice demand. After all, the motto of every civilized State must be : "Let right be done".

We accordingly confirm the judgment of the Rajasthan High Court in Civil Appeal No. 1122 of 1976 and the Order of the Sales Tax authority in Civil Appeal 1310 of 1976 and dismiss both the appeals with no order as to costs.

S.R. *Appeals dismissed.*