MURLI MANOHAR AND CO. AND ANR. A

v.

STATE OF HARYANA AND ANR. ETC. ETC.

OCTOBER 25, 1990

[S. RANGANATHAN, K.N. SAIKIA AND B
K. JAYACHANDRA REDDY, JJ.]

Haryana Sales Tax Act, 1973: Sections 9(1) and 24—Assessee—Purchasing raw materials in state without paying tax—Manufacturing goods—Selling them to dealer who exported goods out of India—Assessability to tax—Whether arises. C

Central Sales Tax Act, 1956: Sections 5(1) & 5(3)—Distinction between.

Each of the appellants/petitioners is a registered dealer in the State of Haryana. He purchased certain raw materials in the State D **without paying purchase tax thereon, in view of the provision contained in section 24 of the Haryana Sales Tax Act, 1973. He manufactured certain goods in the State with the aid of the said raw materials. He then sold the manufactured goods to dealers who, in turn, exported those goods out of India. On these facts the assessee claimed that he was not liable to pay the purchase tax on the raw materials, imposed under** E **section 9(1) of the Sales Tax Act. The Department denied the relief on the short ground that the sales effected by the appellants were not sales in the course of export outside India within the meaning of section 5(1) of the Central Sales Tax Act. According to the Department, they were only "penultimate" sales, which may be deemed to be 'export sales' because of the fiction created under section 5(3) of the C.S. Act 1956,** F **but that was not enough to escape from the clutches of the charge in section 9(1). Accordingly, the claim of the assessee was rejected by the taxing authorities. The High Court also rejected the assessee's petition.**

Before this Court, it was contended on behalf of the assessees that the effect of section 5(3) of the C.S.T. Act was to expand the scope of G **section 5(1) and include within the concept of sales in the course of export outside India also the 'penultimate' sales; that a reference to, and the meaning of, section 5(1) could not be understood without a reference to section 5(3); and that as a result of section 5(3), such penultimate sales became export sales falling beyond the purview and competence of State legislature. It was further submitted that purchases of** H

A raw material used in the manufacture of goods inside the State attracted the tax under section 9(1) unless those manufactured goods were dealt with in one of three ways; (1) disposed of by way of sale inside the State; (2) despatched to a place outside the State but by way of a sale in the course of inter-State trade or commerce; or (3) despatched to a place outside the State but by way of sale in the course of export outside the B territory of India.

In the alternative, it was contended that as the assessee had sold goods to other parties in India, those sales must be either local sales or inter-state sales; and that in any view of the matter, it would be a sale covered by the exceptions in section 9(1), and the assessee's purchases of raw material would not attract tax under section 9(1).

C

On the other hand, on behalf of the State it was, *inter alia* contended that there were no facts on record to substantiate the claim on behalf of the assessee that the sales in question fulfilled the conditions set out in section 5(3) of the C.S.T. Act. It was submitted that the D assessees would be entitled to an exemption from the impugned purchase tax only if their sales were export Sales within the meaning of section 5(1) of the C.S.T. Act, which they admittedly were not.

Alternatively, it was submitted that section 9(1)(b) had been declared unconstitutional by this Court in the *Goodyear* case (1990 2 E SCC 71) and the assessee could seek no implied exemption from its language. Therefore, if section 9 was left out, the language of section 6 (as amended) which brought to charge all purchases and sales in the State would be attracted and so the impugned taxation of purchases would be in order.

F Allowing the appeals and the petitions, this Court,

HELD: (1) The language of section 9(1)(a)(ii)—later section 9(1)(b)—using the words "within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956" have to be given full meaning; in other words, the exemption under section 9(1) has to be restricted G only to export sales falling within the scope of section 5(1). [360F-G]

Mohammed Sirajuddin v. *State,* [1975] Supp. 1 SCR 169, referred to.

(2) The language of the two provisions simultaneously introduced H in section 24(1)(a) and (b) makes interesting reading. The proviso to

clause (a) refers only to "sale by him in the course of export outside the territory of India within the meaning of section 5 of the Central Sales Tax Act, 1956" whereas the proviso to clause (b) refers to "sale by him in the course of export outside the territory of India within the meaning of sub-section (3) of section 5 of the Central Sales Tax Act, 1956". Thus, the statute, within the same provision, has made a distinction between a sale in the course of export within the meaning of section 5 and such a sale within the meaning of section 5(3). [361C-D] A B

(3) The High Court was right in concluding that the assessee was not entitled to the exemption under section 9 because the sales made by him were not sales in the course of export outside the territory of India within the meaning of section 5(1) of the Central Sales Tax Act. [362A] C

(4) What was declared unconstitutional by this Court when it declared section 9(1)(b) of the Act unconstitutional in *Goodyear* case was only the levy of a tax where raw materials were purchased and used inside the State for the manufacture of finished goods which were then simply—and without any sale—despatched—rather, consigned—outside the State. There is, however, nothing unconstitutional about the two other consequences that flow on the language of the clause : one express and the other implied; one in favour of the Revenue and the other in favour of the assessee, viz. (1) that there will be a tax on the purchase of the raw materials if the manufactured goods are disposed of in the State itself otherwise than by way of sale; and (2) that there will be no tax on the purchase of the raw materials if the manufactured goods are despatched from the State consequent on a (i) local sale; (ii) inter-State sale; or (iii) a sale in the course of export. These two aspects of section 9(1)(b) survive even after the judgment of this Court in the *Goodyear* case. [363G-H; 364A-C] D E F

Goodyear, case [1990] 2 SCC 71, explained.

(5) Section 9(1) is both a charging and exempting section. Even after the decision in *Goodyear* case the charge under a part of clause (b) still survives and so also the exemption provided in the latter part of clause (b). [364E; C] G

(6) Since the sales effected by the assessee fall within one of the three exempted categories set out in section 9(1)(b), there can be no levy of purchase tax under section 9(1) of the Sales Tax Act. [363C]

(7) The purchase of raw materials by the assessees are not H

A **chargeable to tax either under section 9(1) or section 6 or section 24(3). [366G]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6202 (NT) of 1983.

From the Judgment and Order dated 3.2.1981 of the Punjab and
B Haryana High Court in L.P.A. No. 128 of 1981.

Raja Ram Aggarwal, Arvind Minocha, H.K. Singh, S.K. Bagga, S.C. Patel and S.K. Gambhir for the Appellants.

Kapil Sibal, Additional Solicitor General, S.P. Goel, A. Subba Rao, C.V.S. Rao, Mahabir Singh, Bishambher Lal and K.C. Dua for
C the Respondents.

The Judgment of the Court was delivered by

RANGANATHAN, J. 1. All these appeals and writ petitions
D raise a common question regarding the interpretation of s 9(1) of the Haryana Sales Tax Act, 1973 (hereinafter referred to as 'the Act'). Counsel state that the facts in all these appeals are identical and that the only facts necessary (or, atleast, on record before us), on the basis of which the issue us is to be decided, are these : Each of the appellants/ petitioners (hereinafter referred to compendiously/ as 'assessees'), is a
E registered dealer in the State of Haryana. He purchased certain raw materials in the State without paying tax thereon, in view of the provision contained in s. 24 of the Act. He then manufactured certain goods in the State with the aid of said raw materials. He then sold the manufactured goods to dealers who, in turn, exported those goods out of India. On these facts, it is claimed, the assessee is not liable to pay
F the purchase tax on the raw materials imposed under s. 9(1) of the Act. This claim has been rejected by the taxing authorities and the High Court and hence these appeals. The writ petitions have been filed directly in this Court in view of a learned single Judge of the High Court having decided the issue against the assessees as early as 25.11.1980 in C.W.P. 1227/80, which was also affirmed by a Division
G Bench later.

2. The Act is a much-amended one and some of its provisions have been recently amended with retrospective effect from 27th May, 1971 a point of time when actually a predecessor Act (the Punjab General Sales Tax Act, 1948) had been in force. The provisions of the
H statute, relevant for our purpose, and their relevant amendments may be noticed first:

I. *Section 2(e)*

(a) Originally s. 2(e) defined 'export' to mean "the taking out of goods from the State to any place outside it otherwise than by way of sale in the course of inter-State trade or commerce."

(b) Act 44 of 1976, added, at the end of the above definition, the following words w.e.f. 1.4.1976:

> "or in the course of export out of the territory of India."

II. *Section 2(p)*

(a) S. 2(p) defined the expression 'turnover' as including "the aggregate of the amounts of the sales and purchases ..... made by any dealer" in any capacity during a given period. Explanation 2 to the second definition provided:

> "(2) The proceeds of the sale of any goods on the purchase of which tax is leviable under this Act or the purchase value of any goods on the sales of which tax is leviable under this Act, shall not be included in the turnover, *but the purchase value of the goods liable to tax under section 9 shall be included.*"

(b) Act 13 of 1989 amended the Explanation by inserting, in it, after the words "section 9", the words "or section 24".

(c) Act I of 1990 has amended the above Explanation retrospectively to say that the words "but the purchase value of the goods liable to tax under section 9 or section 24 shall be included" shall be omitted and shall be deemed always to have been omitted with effect from 27.5.1971. So we have to proceed on the basis that the underlined words never were there in cl. (p) of section 2. The 1990 Act also inserted an Explanation 6 to the clause w.e.f. 31.3.1983 which reads:

> "(6) The purchase of barley or of goods used in the manufacture of guar gum, scientific goods, utensils and metal handicrafts shall not form part of the turnover of a dealer for the period he is entitled to purchase the goods on the authority of his certificate of registration without payment of sales tax under section 24, provided these are used exclusively for the specified purposes."

A III. *Section 6*

Section 6, the charging section, read as under:

"6. *Incidence of taxation*—(1) Subject to other provisions of this Act, every dealer whose gross turnover during the B year immediately preceding the commencement of this Act exceeded the taxable quantum, Defined in s. 7, shall be liable to pay tax under this Act on all sales and purchases effected after the coming into force of this Act.

Provided that this section shall not apply to a dealer who deals exclusively in goods specified in Schedule B, C Goods on which no tax is leviable : s. 6 read with s. 15.

(2) Every dealer to whom sub-section (1) does not apply shall, subject to other provisions of this Act, be liable to pay tax under this Act on the expiry of thirty days after the D date on which his gross turnover during any year first exceeds the taxable quantum;

Provided that this sub-section shall not apply to a dealer who deals exclusively in goods specified in Schedule B.

E

Provided further that .....

xxx xxx xxx

Explanation—For the purposes of sub-section (1) and (2) F "purchased" shall mean the purchase of declared (As defined in s. 2(c) of the Central Sales Tax Act, 1956) goods, goods specified in Schedule C and goods falling under section 9.

(b) S. 6 was amended by Act I of 1990 to read as follows with G retrospective effect from 27.5.1971:

"S. 6 *Incidence of taxation*—(1) Every dealer whose gross turnover during the year immediately preceding the coming into force of the provisions of this section exceeded the taxable quantum shall be liable to pay tax on all sales and H purchases effected after the coming into force of the provisions of this section:

Provided that this sub-section shall not apply to a dealer who deals exclusively in goods specified in Schedule B. A

(2) Every dealer to whom sub-section (1) does not apply shall be liable to pay tax on all sales and purchases effected on the expiry of thirty days after the date on which his gross turnover during any year first exceeds the taxable quantum. B

Provided that this sub-section shall not apply to a dealer who deals exclusively in goods specified in Schedule B: C

Provided further that .....

xxx xxx xxx

The earlier Explanation, however, is omitted with the same retrospective effect. D

IV. *Section 9*

(a) S. 9(1) has undergone several amendments : by Act 44 of 1976, Act 11 of 1979, Act 3 of 1983, Act 11 of 1984, Act 16 of 1986 and Act 1 of 1988. Act 1 of 1990 has also an impact, as we shall indicate later. E

The section originally read thus:

"S. 9 *Liability to pay purchase tax*—Where a dealer purchases goods other than those specified in the Schedule B from any source in the State and— F

(a) uses them in the State in the manufacture of

(i) goods specified in Schedule B; or G

(ii) any other goods and disposes of the manufactured goods in any manner otherwise than by way of sale whether within the State or in the course of inter-State trade or commerce or in the course of export out of the territory of India; H

A (b) exports them

in the circumstances in which no tax is paybale under any other provision of this Act, there shall be levied, subject to the provisions of section 17, a tax on the purchase of such goods at such rate as may be notified under section 15."

B (b) Act 44 of 1976 made two amendments to this sub-section. The first amendment was to insert, after the opening words, "where a dealer", the words "liable to pay tax under this Act". The second amendment, which is crucial for the purposes of this case, is the addition at the end of sub-clause (ii) of clause (a) above, the words:

C "within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956."

These amendments were effective from 1.4.1976.

D (c) Act 11 of 1979 redrafted the above provision, excluded milk from clause (b) and added clause (c). After this amendment, effective from 9.4.1979, the provision read thus:

"9(1) Where a dealer liable to pay tax under this Act,

E (a) purchases goods, other than those specified in Schedule B, from any source in the State and uses them in the State in the manufacture of goods specified in Schedule B; or

(b) purchases goods, other than those specified in Schedule B except milk, from any source in the State and uses them in the State in the manufacture of any other goods and disposes of the manufactured goods in any manner otherwise than by way of sale whether within the State or in the course of inter-State trade or commerce or in the course of export out of the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956; or

(c) purchases goods, other than those specified in Schedule B, from any source in the State and exports them,

H in the circumstances in which no tax is payable under any

other provision of this Act, there shall be levied, subject to the provisions of section 17, a tax on the purchase of such goods at such rate as may be notified under section 15." A

(d) A doubt had arisen whether the words "disposes of" used in clause (a)(ii)—later, clause (b)—above was comprehensive enough to include cases of despatches by a dealer of the manufactured goods otherwise than by way of sale as, for example, by way of stock transfer. The State Government had issued a notification dated 19.7.74 (even before the 1976 amendment) clarifying the position with an answer to the question in the affirmative but this notification as well as the interpretation favoured by it were quashed by a decision of the High Court reported as *Goodyear India Ltd.* v. *State,* [1982] 53 STC 163. This led to the amendment of S. 9(1) by Act 3 of 1983. This amendment substituted a new clause (b) for the earlier one w.e.f. 27.5.71, inserted a new clause (bb) w.e.f. 9.4.79 and added a proviso. Actually clauses (b) and (bb) are identical, except that the latter excludes milk from its purview w.e.f. 9.4.79. However, to avoid confusion both the clauses may be set out here: B C D

(b) purchases goods, other than those specified in Schedule B, from any source in the State and uses them in the State in the manufacture of any other goods and either disposes of the manufactured goods in any manner otherwise than by way of sale in the State or despatches the manufactured goods to a place outside the State in any manner otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export outside the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956; or; E F

(bb) purchases goods, other than those specified in Schedule B except milk, from any source in the State and uses them in the State in the manufacture of any other goods and either disposes of the manufactured goods in any manner otherwise than by way of sale in the State or despatches the manufactured goods to a place outside the State in any manner otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export outside the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956; or". G H

A The proviso added was in the following terms:

> "Provided that no tax shall be leviable under this section on scientific goods and guar gum, manufactured in the State and sold by him in the course of export outside the territory of India within the meaning of sub-section (3) of section 5 B of the Central Sales Tax Act, 1956."

(e) Act 11 of 1984 effected no material change. The exclusion of milk was decided to be dropped and so all that this amendment did was to roll both clauses (b) and (bb) into one clause, reading thus:

> C "4. Amendment of section 9 of Haryana Act 20 of 1973— For clauses (b) and (bb) of sub-section (1) of section 9 of the principal Act, the following clause shall be substituted, namely:
>
> "(b) purchases goods, other than those specified in Sche- D dule B, from any source in the State and uses them in the State in the manufacture of any other goods and either disposes of the manufactured goods in any manner otherwise than by way of sale in the State or dispatches the manufactured goods to a place outside the State in any manner otherwise than by way of sale in the course of E inter-State trade or commerce or in the course of export outside the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956; or".

(f) Amendment Act 8 of 1986 substituted, in the proviso to s. F 9(1), the words "scientific goods, guar gum, utensils and handicrafts" in place of "scientific goods and guar gum" w.e.f. 26.2.86.

(g) The amendment to S. 9(1) by Act 16 of 1986 is not relevant for our purposes and we pass on to the two relevant amendments effected by Act 1 of 1988. The first was to change the marginal heading G of the section to read thus: "9(1) Liability to pay tax on purchase value of goods". The second was to omit the words "sub-section (1) of" at the end of clause (b). The relevant part of clause (b), as thus amended, will, therefore, read:

> "despatches the manufactured goods to a place outside the H State in any manner otherwise than by way of sale ..... in

the course of export outside the territory of India within the meaning of section 5 of the Central Sales Tax Act, 1956;" A

These amendments became effective from 31.12.1987.

V. *Section 24* B

S. 24 is the next section relevant for our purposes. After its amendment by Act 44 of 1976, it read thus, w.e.f. 28.11.76:

"24. *Rights of registered dealer*—Every dealer registered under this Act shall be entitled to purchase, without payment of sales tax, the following goods within the State, on C the authority of his certificate of registration by giving to the dealer, from whom the goods are purchased, a declaration, duly filled and signed by him, containing such particulars, on such form, obtained from such authority, as may be prescribed, and in case such form is not available with such D authority, in such manner as may be prescribed,—

(a) any goods, other than those leviable to tax at first stage of sale under section 17 or section 13, for the purpose of—

E

(i) resale in the State; or

(ii) sale in the course of inter-State trade or commerce;

(b) containers and packing materials and other goods F (excluding those liable to tax at the first stage of sale under section 17 or section 18), specified in his certificate of registration for use by him in the manufacture, in the State, of any goods other than those specified in Schedule B, for the purpose of—

G

(i) sale in the State; or

(ii) sale in the course of inter-State trade or commerce; or

(iii) sale in the course of export out of the territory of H

A India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956."

(b) Act 3 of 1983 renumbered the above as s. 24(1) and added, with effect from 31.3.83, a proviso each, to clauses (a) and (b). These provisoes read thus. The proviso to clause (a) was:

B "Provided that a dealer registered under this Act, shall also be entitled to purchase barley, without payment of sales tax on the authority of his certificate of registration, on furnishing to the selling registered dealer, a declaration referred to above, for sale by him in the course of export outside the territory of India within the meaning of section 5 of the C Central Sales Tax Act, 1956."

and that to clause (b) read:

"Provided that a dealer registered under this Act, shall also D be entitled to purchase, without payment of sales tax, on the authority of his certificate of registration, goods mentioned in clause (b) above, on furnishing to the selling registered dealer a declaration referred to above, for use by him in the manufacture, in the State, of scientific goods and guar gum for the purpose of sale by him in the course of E export outside the territory of India within the meaning of sub-section (3) of section 5 of the Central Sales Tax Act, 1956."

It also inserted, with retrospective effect from 1.4.76, the following sub-section.

F "(2) Notwithstanding anything contained in form S.T. 15 or the certificate of registration issued under this Act or the Rules made thereunder, no dealer shall be entitled to claim the right envisaged in sub-section (1) so renumbered, for the period from the first day of April, 1976, to the third day G of September, 1979 in contravention of the provisions of sub-section (1) so renumbered."

The Act also contained a section (s. 8) validating the notification issued under s. 9 read with s. 15 and also validating all levy, assessment and collection of taxes under s. 9 notwithstanding any judgment, H decree or order of any court or other authority.

(c) Act 11 of 1984 changed the marginal heading of the section as "Rights and liabilities of registered dealers". It added a clause (c) to sub-section (1) relating to use of the goods in the execution of works contract in the State, with which we are not concerned. However, it added a new sub-section (3) with retrospective effect from 27.5.1971, to the following effect:

> "(3) Notwithstanding any other provisions of this Act or any judgment decree or order of any court or other authority to the contrary, if a dealer who purchases goods, without payment of tax, under sub-section (1) and fails to use the goods so purchased for the purposes specified therein, he shall be liable to pay tax, on the purchase value of such goods, at the rates notified under section 15, without prejudice to the provisions of section 50;
>
> Provided that the tax shall not be levied where tax is payable on such goods under any other provision of this Act."

(d) An amendment of 1986 expanded the proviso to S. 24(1)(b) by adding "utensils and metal handicrafts" to "scientific goods and guar gum", as in s. 9(1) proviso.

(e) Act 1 of 1988, effecting from 31.12.1987, omitted the words "sub-section (1) of" in s. 24(1)(b)(ii). It also omitted the proviso to the said clause.

VI. *Section 27*

Section 27, which defines "taxable turnover" is not quite relevant for our purposes. We should only like to mention that the provisoes to s. 27(a)(iv), s. 27(b)(iii) and s. 27(c)(ii) inserted by Act 44 of 1976 w.e.f. 1.4.76 all make specific reference to sales "in the course of export out of the territory of India within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956". The provisoes to s. 27(a)(iv), in particular, make a clear contrast between sales falling under sub-section (3) and those falling under sub-section (1) of s. 5 of the C.S.T. Act.

VII. *Validation provision*

Act 1 of 1990 effected no amendments to s. 24 or 27. But s. 14 of

this Act (which is a validation section on the same lines as those contained in the earlier amendment Acts) has been referred to in the course of the arguments before us and can be usefully extracted. It reads:

> "14. Notwithstanding any judgment, decree or order of any court or tribunal or other authority to the contrary, any levy, assessment, re-assessment or collection of any amount by way of tax made or purporting to have been made and any action taken or things done or purporting to have been taken or done before the commencement of the Haryana General Sales Tax (Amendment and Validation) Act, 1990, in relation to such levy, assessment, re-assessment or collection made under the provisions of section 9 or sub-section (3) of secton 24 of this Act shall be deemed to be as valid and effective as if such levy, assessment, re-assessment or collection had been made or action taken or things done under the provisions of clause (p) of section 2, section 6, section 15-A, section 17, section 27 and Schedule D appended to this Act and as amended by the provisions of the Haryana General Sales Tax (Amendment and Validation) Act, 1990 and shall not be called in question in any court or tribunal or other authority and accordingly—
>
> (i) all acts, proceedings or things done or action taken by the State Government or by any officer of the State Government or by any authority, in connection with the levy, assessment, re-assessment or collection of such a tax shall, for all purposes be deemed tc be, and to have always been done or taken in accordance with law;
>
> (ii) no suit or other proceedings shall be maintained or continued in any court or before any authority for the refund of any such tax so collected; and
>
> (iii) no court or authority shall enforce a decree or order directing the refund of any such tax so collected.

These, then, are the relevant provisions of the Act.

Before turning to the question posed for our consideration, it is necessary to refer to s. 5(1) of the Central Sales Tax Act, 1956. Thus sub-section read as follows:

> "5. *When is a sale or purchase of goods said to take place in the course of import or export*—(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India." A B

This sub-section came up for the consideration of this Court in *Mohammed Sirajuddin* v. *State*, [1975] Supp. 1 S.C.R. 169. In that case the appellant's goods were exported out of India. The course of the transaction was that the appellant sold goods to the State Trading Corporation (S.T.C.) but, to the knowledge of both these parties, the goods were to be exported to fulfill contracts entered into by the S.T.C. with foreign buyers, the terms of such contracts between the foreign buyers and the S.T.C. being referred to in, and part of, the appellant's contracts with the S.T.C. The apppellant claimed its sales to be "sales in the course of export" and hence exempt under s. 5 of the C.S.T. Act. This Court, Khanna, J. dissenting, held that the sales of the appellant were not exempt u/s 5(1). The appellant had agreed to sell his goods only to the S.T.C. and there was no provity of contract between him and the foreign buyer. The court held that the movement of goods outside India was occasioned by the contract between the S.T.C. and the foreign buyer and not by that between the appellant and the S.T.C. The decision caused several practical difficulties and called for an amendment of the C.S.T. Act. The object and reasons of the C.S.T. (Amendment) Act (Act 103 of 1976), may be usefully extracted. It said: C D E

> "According to section 5(1) of the Central Sales Tax Act, a sale or purchase of goods can qualify as a sale in the course of export of the goods out of the territory of India only if the sale or purchase has occasioned such export or is by a transfer of documents of title to the goods after gods have crossed the customs frontiers of India. The Supreme Court had held (vide: *Mohd. Serajuddin* v. *State of Orissa*, 36 S.T.C. 136 that the sale by an Indian exporter from India to a foreign importer alone qualifies as a sale which has occasioned the export of the goods. According to the Export Control Orders, exports of certain goods can be made only by specified agencies such as the State Trading Corporation. In other cases also, manufacturers of goods, particularly in the small-scale and medium sectors, have to F G H

depend on some experienced export house for exporting the goods because special expertise is needed for carrying on export trade. A sale of goods made to an export canalising agency such as the State Trading Corporation or to an export house to enable such agency or export house to export those goods in compliance with an existing contract or order is inextricably connected with the export of the goods. Further, if such sales do not qualify as sales in the course of export, they would be liable to State sales tax and there would be a corresponding increase in the price of the goods. This would make our exports incompetitive in the fiercely competitive markets. It is, therefore, proposed to amend, with effect from the beginning of the current financial year, section 5 of the Central Sales Tax Act to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning export of those goods out of the territory of India shall also be deemed to be in the course of such export if such last sale or purchase took place after and was for the purpose of complying with the agreement or order for, or in relation to, such export."

S. 5(3), inserted by the above Amendment Act w.e.f. 1.4.1976, reads thus:

"(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

Now, coming to the facts of the present case, the assessees purchased raw materials inside the State of Haryana but paid no tax thereon, as they were registered dealers and furnished the declaration forms prescribed under s. 24. Their sales of the manufactured goods are to persons who have exported the goods outside India and so, they claim, they are not liable to pay the tax sought to be imposed on them under s. 9(1). The department, however, has denied the relief on the short ground that the sales effected by the appellants are not sales in the course of export outside India *within the meaning of s. 5(1) of the C.S.T. Act.* They are only "penultimate" sales; they may be deemd to be 'export sales' because of the fiction created under S. 5(3) of the

C.S.T. Act but that is not enough to escape from the clutches of the charge in s. 9(1). A

Sri Rajaram Agarwal, learned counsel for the assessees, contended that the effect of s. 5(3) of the C.S.T. Act is to expand the scope of s. 5(1) and include within the concept of sales in the course of export outside India also the 'penultimate' sales dealt with in *Mohd. Sirajuddin's* case (supra). A reference to, and the meaning of, section 5(1) cannot be understood without a reference to section 5(3). As a result of s. 5(3), such penultimate sales become export sales falling beyond the purview and competence of State legislatures. The provisions in s. 9(1) of the Act need to be interpreted harmoniously and consistently with the constitutional scheme. S. 9(1) is a charging section. Purchases of raw materials in the State used in the manufacture of goods inside the State attract the tax under s. 9(1) unless those manufactured goods are dealt with in one of three ways: B C

(1) disposed of by way of sale inside the State;

(2) despatched to a place outside the State but by way of a sale in the course of inter-State trade or commerce; or D

(3) despatched to a place outside the State but by way of sale in the course of export outside the territory of India.

He submitted that the transactions in the present case fall under category (3) above. In the alternative, he submitted that, clearly, as the assessees had sold goods to other parties in India, those sales must be either local sales falling under category (1) or inter-State sales falling under category (2). In any view of the matter, therefore, the assessee's purhases of raw materials would not attract tax under s. 9(1). E F

On the other hand, Sri Gupta, learned counsel for the State, submitted that there were no facts on record to substantiate the claim on behalf of the assessee that the sales in question fulfilled the conditions set out in s. 5(3) of the C.S.T. Act, as claimed. He submitted that even if the claim were to be accepted, the assessees would be in no better position. He fully supported the reasoning of the High Court and urged that full effect should be given to the words "within the meaning of sub-section (1) of section 5" which found a place in s. 9(1)(b) till they were dropped by Act 1 of 1988. If due regard be given to these words, he pointed out, the assessees would be entitled to an exemption from the impugned purchase tax only if their sales G H

were export sales within the meaning of section 5(1) of the C.S.T. Act which they, admittedly were not. He submitted that the argument that, to levy the tax imposed by s. 9(1) in cases covered by s. 5(3) but not s. 5(1) of the C.S.T. Act would violate Article 286 of the Constitution, was misplaced and overlooks the vital circumstances that what s. 9(1)(b) taxes are the purchases of raw materials and not the manufactured goods that were eventually exported. Alternatively, he submits, s. 9(1)(b) has been declared unconstitutional by this Court in the *Goodyear* case [1990] 2 SCC 71 and, therefore,, the assessees can seek no implied exemption from its language. If s. 9 is left out, he says, the language of s. 6 (as amended) which brings to charge all purchases and sales in the State would be attracted and so the impugned taxation of the purchases would be in order. For these reasons, he submits that the writ petitions were rightly rejected by the High Court and that the appeals as well as writ petitions before us deserve to be dismissed.

It will be convenient first to dispose of the contention dealt with by the High Court. For the purposes of this argument we shall assume that the sales made by the assessees were 'penultimate sales' which would fall within the purview of section 5(3) of the C.S.T. Act. The argument on behalf of the Revenue, which has found favour with the High Court is that section 9(1) exempts only sales made in the course of export within the meaning of section 5(1) of the C.S.T. Act but not those under section 5(3) of the said Act. After careful consideration we think that this argument was rightly accepted by the High Court. In the first place there is no dispute before us that section 5(3) covers a category of cases which would not otherwise have come within the purview of section 5(1), as explained in *Mohd. Sirajuddin's* case. The language of section 9(1)(a)(ii)—later 9(1)(b)—using the words "within the meaning of sub-section (1) of section 5 of the Central Sales Tax Act, 1956" have to be given full meaning; in other words, the exemption under section 9(1) has to be restricted only to export sales falling within the scope of section 5(1). It seems clear, from the circumstances referred to below, that the legislature deliberately used these words and intended to give a restricted operation to section 9(1)(a)(ii)(b). These circumstances are:

(1) Section 9(1)(a)(ii), as originally framed, merely uses the words "in the course of export outside the territory of India". Clause 9(1)(b) referred to cases where raw materials were purchased and exported and the word 'export' was defined in section 2(c) as meaning "the taking out of the goods from the

State to any place outside it otherwise than by way of sale in the course of inter-State trade or commerce." Act 44 of 1976 amended the definition of 'export' in section 2(c) by adding the wide words "or in the course of export out of the territory of India" w.e.f. 1.4.1976. But the same Act narrowed down the scope of clause (a)(ii) by adding the restrictive words at the end of the clause.

(2) If a reference is made to section 24, one finds that section 24(1)(iii) refers again to sub-section (1) of section 5 of the Central Sales Tax Act only. However, the language of the two provisoes simultaneously introduced in section 24(1)(a) and (b) by Act 3 of 1983 makes interesting reading. The proviso to clause (a) refers only to "sale by him in the course of export outside the territory of India within the meaning of section 5 of the Central Sales Tax Act, 1956", whereas the proviso to clause (b) refers to "sale by him in the course of export outside the territory of India within the meaning of sub-section 3 of section 5 of the Central Sales Tax Act, 1956". Thus the statute, within the same provision, has made a distinction between a sale in the course of export within the meaning of section 5 and such a sale within the meaning of section 5(3).

(3) When we turn to s. 27 next, we find two provisoes introduced in s. 27(1)(iv)(a) by Act 44 of 1976, the same amending Act that introduced the extra words at the end of s. 9(1)(a)(ii). These provisoes make a marked contrast between sales falling under sub-sections (1) and those falling under sub-section (3) of s. 5 of the C.S.T. Act.

(4) As will be seen from the extract of the legislative amendments set out earlier the legislature has subsequently deleted the reference to sub-section 3 of section 5 in section 9(1)(b). However, this amendment, which has been made both in section 9 and in section 24 by Act 1 of 1988 has not been given any retrospective effect. Considering that the legislation is replete with instances of retrospective effect (in some cases even to as early as a date as 7.9.1955), the failure or omission to give any retrospective effect to the amendment to section 9 in this regard is an eloquent pointer to the intention of the legislature.

In view of the circumstances outlined above, we are of the opinion that the High Court was right in concluding that the assessee

was not entitled to the exemption under s. 9 because the sales made by him were not sales in the course of export outside the territory of India within the meaning of section 5(1) of the Central Sales Tax Act.

Shri Rajaram Agarwal, learned counsel for the assessees raised a new contention before us, which we have already referred to as an alternative contention. This contention which really seems to be unanswerable appears to have been missed at the stage of the High Court but this contention is purely one of law and merits consideration. The point made by him was this. There is no dispute that the assessees have transferred the manufactured goods by way of sale and that these goods have been despatched to various ports of India. The exact terms of despatch are not clear and there are no facts on record which will help us to understand the course of transactions in the several cases before us. But Shri Agarwal submitted that the sales made by the assessees can only fall within one of three categories. They are either local sales or inter-State sales or export sales. Each of the assessee have sold its goods to another dealer. If that dealer is also a resident of Haryana and has taken delivery of the goods in Haryana and exported them thereafter, the assessees' sales would be local sales. If the purchaser-dealer of the manufactured goods is in some other State and the goods have been moved out of Haryana in pursuance of that sale, they would be inter-State sales. The goods which have been sold by the assessee must have been delivered to the dealer in pursuance of the sale either within the State or outside the State in India. In either event, it would be a sale covered by the exceptions in section 9(1). It would be a local sale or inter-State sale. The only third possibility is that assessee sold the goods to a dealer outside India and exported the goods in pursuance of that sale in which event it would be a sale within the meaning of section 5(1) of the Central Sales Tax Act.

We think Shri Agarwal is right in saying that any sale effected by the assessees in the circumstances, which have been set out by us earlier, must fall in one of three categories. We are unable to conceive of a fourth category of sale, which could be neither a local sale nor an inter-State sale nor an export sale. Shri Gupta, on behalf of the State, contended that the goods might have been directly moved by the assessee to a port for shipment abroad in pursuance of an export contract entered into by the dealer who purchased from the assessee. Even in such a case if the transport of goods from the assessee's place of business to the port is in pursuance of the terms of the sale, the movement of the goods would be occasioned by the sale made by the assessee and would be an inter-State sale. If, on the other hand, the goods were sent

to the port by the assessee subsequent to and independent of the sale made by him, then, for the purpose of that transport, the assessee would only be an agent of the purchaser and the movement of the goods in pursuance of the contract of sale entered into by the purchaser and would be one in the course of export within the meaning of s. 5(1) of the C.S.T. Act. As pointed out by Sri Agarwal, even in *Mohd. Sirajuddin's* case (supra), although the exemption claimed for the sales as export sales was denied, the conclusion of the High Court that the sales to S.T.C. were inter-State sales chargeable under s. 5(1) of the C.S.T. Act was upheld. We are, therefore, of the opinion that this alternative contention urged by the learned counsel for the assessee has to be accepted and it has to be held that, since the sales effected by the assessees fall within one of the three exempted categories set out in section 9(1)(b), there can be no levy of purchase tax under section 9(1) of the Act.

Faced with this situation, Shri Gupta, for the State, contended that this argument will not avail the assessees as, according to him, s. 9(1)(b) of the Act has been declared unconstitutional by this Court and is, therefore, *non est.* It is somewhat curious that such contention should come from the department which has charged the assessees on the basis of s. 9(1)(b). Nevertheless, we proceed to consider this contention, as Sri Gupta says he can support the assessments, alternatively, under s. 6 of the Act, without any aid from s. 9 at all. This contention, it seems to us, proceeds on a misconception of the issue before, and the ratio of the decision of this Court in the *Goodyear* case [1990] 2 SCC 71. That was a case in which certain dealers, having purchased raw materials and manufactured goods inside the State despatched those goods outside the State *otherwise than by way of sale.* The State levied a purchase tax on the raw materials u/s 9(1). Thereupon the assessee contended that the levy of tax in the circumstances was in truth and substance the levy of a tax on the manufactured goods on the event of their consignment outside the State otherwise then by way of sale and that the State legislature was not competent to levy such a tax. This contention was accepted by this Court. What was declared unconstitutional by this Court was, threfore, only the levy of a tax where raw materials are purchased and used inside the State for the manufacture of finished goods which are then simply—and without any sale—despatched—rather, consigned—outside the State. There is, however, nothing unconstitutional about the two other consequences that flow on the language of the clause : one express and the other implied; one in favour of the Revenue and the other in favour of the assessee viz.

A (1) that there will be a tax on the purchase of the raw materials if the manufactured goods are disposed of in the State itself otherwise than by way of sale; and

(2) that there will be *no* tax on the purchase of the raw materials if the manufactured goods are despatched from the State conse-
B quent on a

(i) local sale;

(ii) inter-State sale; or

(iii) a sale in the course of export.
C

It seems that these two aspects of s. 9(1)(b) survive even after the judgment of this Court in the *Goodyear* case [1990] 2 SCC 71.

Shri Gupta, however, drew our attention to certain sentences in
D the headnote as well as the body of the above decision where certain wider expressions have been used, such as : "s. 9(1)(b) was *ultra vires*" "s. 9(1) and 24(3) are constitutionally invalid" "s. 9(1)(c) is *ultra vires*" and "..... the latter part of s. 9(1)(b) is *ultra vires* and void". As pointed out above, s. 9(1) is both a charging and exempting section. Even after the decision the charge under a part of clause (b) still
E survives and so also the exemption provided in the latter part of clause (b). But let us examine what the position would be if we hold, as contended by Shri Gupta, that the effect of the decision is that the words "or despatches the manufactured goods to a place outside the State in any manner otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export outside the
F territory of India within the meaning of sub-section (1) of section 5 of the Central Sales tax Act, 1956" in s. 9(1)(b) should be deemed to have been deleted from the statute. Shri Gupta contends that, if s. 9(1) is left out of account for this reason, the purchases of raw materials by the assessee would be liable to tax under s. 6 of the Act. This argument will now be considered.

G

The contention of Shri Gupta on this aspect proceeds thus : s. 6, which is the charging section, both originally and after its retrospective amendment in 1990, imposes a tax on all sales *and* purchases effected by a dealer. In the original section, there was an Explanation which restricted the meaning of purchases for the purposes of the section. It
H provided that only purchases of declared goods, goods specified in

Schedule C *and goods falling under s. 9* would be part of the 'turnover'. In other words purchases which did not fall under s. 9 i.e. which could not be taxed under section 9, could not be taxed then under s. 6 either. But the 1990 amendment has omitted this Explanation retrospectively. The result is that all purchases are now taxable in the State.

This contention is an interesting one but it overlooks the effect of s. 2(p) read with s. 15 of the Act. Though s. 6, as amended, purports to make dealers liable to pay tax on their sales as well as purchases, the actual charge of tax, under s. 15, is only imposed on the sales and purchases that form part of his taxable turnover. To ascertain what this is, one has to turn to s. 2(p) of the Act. This definition includes, within the definition of 'turnover' the purchase value of goods liable to tax under s. 9 but, the goods presently in question are not laible to tax under s. 9, not only as contended for the assessees and held by us above but also on the hypothesis as to the invalidity of s. 9(1)(b) on which the present argument on behalf of the Revenue proceeds. The definition also excludes from its purview "the sale proceds of goods on which purchase tax is leviable under this Act" and "the purchase value of any goods on the sales of which tax is leviable unde this Act". There can be no dispute that a tax is leviable under the Act on the goods in question when they are sold by a dealer and, indeed, the assessees would have had to pay tax on the sales made to—the purchases effected by—them but for a claim for exemption under s. 24. The definition of 'turnover' clearly postulates that goods are either to be taxed at the point of purchase or sale and the same transaction cannot be taxed as a sale in the hands of the dealer who sells to the assessees and as a purchase in the hands of the assessees. The only exception was the limited class of goods covered by s. 9 but even this exception has been left out with complete retrospective effect. We do not, therefore, think that Sri Gupta is right in arguing that the purchase tax on the raw materials can be upheld under s. 6 itself even if the charge under s. 9 fails. Explanation 6, inserted in s. 2(p) read, with the provisoes inserted in s. 24(1) w.e.f. 31.3.1983 and their amendment in 1986 have also a bearing in the cases of raw materials purchased for manufacture of guar gum and utensils where the purchase is exempt even if purchased by a registered dealer for the purpose of export within the meaning of s. 5(3) of the C.S.T. Act, 1956—and some of the assessees before us are such manufacturers—out we leave these amendments out of account as they are relevant only for purposes of later assessment years. The raw materials purchased by the assessees are goods on the sales of which tax is leviable under the Act though the assessees are

A exempt from payment of such tax by reason of s. 24(1). The value of the purchases cannot, therefore, be included within the definition of "turnover" and, consequently, s. 6 will not come to the aid of the Revenue to support the levy of the impugned sales.

B We may also make a reference to sub-section (3) of s. 24, inserted with retrospective effect from 27.5.1971, which taxes the purchase of raw materials, when the dealer who purchases them had claimed exemption under section 24(1) but is found not to have used the goods for the purposes specified therein i.e. for the manufacture of goods for the purpose of

C (a) local sale;

(b) inter-State sale; or

(c) sale in the course of export outside the territory of India within the meaning of sub-section (1) of section 5 of the C.S.T. Act.

D

This provision will not help the Revenue for two reasons: (i) As held earlier, while discussing the alternative contention of Shri Agarwal, the assessees here have effected either local or inter-State sales, if not sales in the course of export within the meaning of s. 5(1) of the C.S.T. Act, 1956. It may be pointed out that, after Act I of 1988, this provision does not tax purchases even in cases where the manufactured goods are disposed of only by way of 'penultimate sales falling under s. 5(3) but not under s. 5(1) of the C.S.T. Act, 1956, but this amendment came later and will have to be left out of account for the purpose of these cases; (ii) This provision has been held to be *ultra vires* in the *Goodyear* case (supra).

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We have, therefore, reached the conclusion that the purchases of raw materials by the assessees are not chargeable to tax either u/s 9(I) or s. 6 or s. 24(3). The appeals and petitions are, therefore, allowed. The relevant assessments to tax will be computed/modified accordingly. We, however, make no order regarding costs.

G

R.S.S. Appeals & Petitions allowed.