IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Commissioner of Income Tax Undiapur. Vs. Udaipur Shahkari Upbhokta Thok Bhandar Ltd. Udaipur.

D.B. INCOME TAX APPEAL NO.45/2002
D.B. INCOME TAX APPEAL NO.46/2002
D.B. INCOME TAX APPEAL NO.49/2002
D.B. INCOME TAX APPEAL NO.50/2002
D.B. INCOME TAX APPEAL NO.51/2002
D.B. INCOME TAX APPEAL NO.53/2002
against the order dated 17.9.2001 passed in ITA Nos. 937/JP/97 , 936/JP/97, 935/JP/97 , 131/JU/99, 480/JP/95 & 132/JU/99 for assessment year 1991-92 to 1995-1996

Reportable

Date of Judgment : 2nd November 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. K.K.Bissa, for the appellant.

Mr. N.M.Ranka)
Mr.R.K.Yadav)
Mr.Sanjeev Johri), for the respondents.

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BY THE COURT:- (PER HON'BLE RAJESH BALIA J.)

In all these appeals relating to different assessment years from 1991-1992 to 1996-97, the

following common question has been raised. Since the matter has been decided by the Tribunal by common order, all the appeals are decided by this common order.

> "Whether on the facts & in the circumstances of the case the tribunal was justified in holding that the assesee Society is entitled to deductions u/s 80P (2) (e) of the Income Tax Act in respect of the income derived from Commission/margin without letting out godown of warehouse contrary to the income derived from letting of godown or warehouse and such income being deductible u/s 80P (2) (e) of the act?"

The respondent – assessee is an Co-operative Society and engaged in running a Consumer Co-operative Store and having 30 branches in the city of Udaipur itself. It is dealing in non-controlled commodities as well as in controlled commodities. In the present case, we are concerned with amount included in the computation of taxable income arising from commission earned by the Assessee Society as wholesale dealer of the controlled commodities viz. wheat, rice and sugar. The commodities in questions were declared as essential commodities and became part of regulated trade through public distribution system in terms of Orders issued by Appropriate Govt.

under Essential Commodities Act.

The assessee has its own godowns as well as hired godowns for the purpose of his business including dealing in the essential commodities. The food grains Wheat and Rice are included in Schedule I of the Rajasthan Food Grains and Other Essential Articles (Regulation of Distribution) Order, 1976 and other commodity viz 'Sugar' is also included in Schedule II of the said order.

The assessee held the licence of 'authorized wholesaler' under the provisions of the aforesaid Order of 1976. In respect of the essential commodities in question the price at which the commodity concern was to be made available to consumer was fixed by the competent authority under the provisions of the Order 1976 and such price included commission to be charged by an authorised wholesale dealer as part of consideration at which he were to sell such commodities to retail authorised dealer at fair price shop.

The present dispute had arisen out of this commission retained by the Assessee Cooperative Society in respect of essential commodity viz wheat, rice & sugar sold by it to the retailers. There is no dispute that the commodities were to be supplied by the Food Corporation of India to the respondents-assessee. He was to pay the price of the essential commodities received by him and he was entitled to earn profit at fixed rate as part of the price at which he was required to sell the said commodities to the retailer, as per directions of the Govt. Apparently, since the goods were received as essential commodities by the assessee, it was to be stored in the godown until the same was transported to the retailer on the basis of the authorisation issued by the competent authority. The supply was to be distributed ultimately as an essential commodity in a particular area during the particular period through Authorised retailer as fair price shopkeeper.

Initially, the assessee has claimed the commission, part of the price fixation, to be retained by him as its income arising from business of sale and purchase of the commodities. However, subsequently

the revised return was filed claiming that entire amount of the commission received by the assessee as exempted under Section 80P (2)(e) of the Income Tax Act, 1961 as income arising from leasing out godowns. It was claimed that the assessee was only acting as agent of the State Government for storing the essential commodities for facilitating the public distribution of such commodities by the State Government and commission was paid to the assessee only for the purpose of storage of the essential commodities at its godowns. The receiving of essential commodities was on the payment of price and its transportation to retailer in consideration of the price thereof was only an incidental service rendered by the assessee for facilitating the marketing, processing and distribution of essential commodities for the public. Therefore, the entire commission must be considered as income of society from letting out godowns or warehouses for the purpose of storage of essential commodities in question for facilitating the public distribution of such essential commodities by the State Government.

Buttressing the contention, it was urged on behalf of the assessee that stocks of the essential commodities which were supplied to the Assessee by the Food Corporation of India was only as its agent for carrying it to the public distribution system had remained throughout the property of the Food Corporation of India/State and whatever was allowed to be retained by the assessee was only for the purpose of storing of such essential commodities during transition period and providing incidental services of transportation to retailer for its distribution to the consumer at the fixed price as determined from time to time by the competent authority under the Order of 1976 and other relevant orders. In support of this contention, reliance was placed on the decision of Bombay High Court in (Commissioner of Income-Tax Vs. Bhandara Zilla Sahakari Kharedi Vikri Sangh LTD.) 212 ITR 124 and the decision of Apex Court in CIT Vs. South Arcot District Cooperative Marketing Society case (1989) 176 ITR 117.

The Assessing Officer had not accepted the contention and rejected the claim of the assessee to deduction under Section 80P(2)(e). However, the

contention urged by learned counsel for the assessee had been accepted by the CIT(A) and tribunal. Hence these appeals are preferred by Revenue.

The learned counsel for Revenue has contended that godowns/warehouses owned or hired by the assessee for storing of the goods were as a part of its business of selling and purchasing of the commodities both essential and non-essential. He was not a mere storing agent on behalf of the State Government for the essential commodities but was duly authorised licence holder for the essential commodities as a wholesale dealer, albeit the area of its freedom in the matter of carrying on business was circumscribed by the statutory Orders issued in respect of Essential Commodities under the Essential Commodities Act by appropriate authorities. The exemption/deduction under Section 80P (2)(e) is not available to any cooperative society in all spheres of activity which may be using the godowns as a part of its own regular business activity. The deduction under Section 80P (2)(e) is available only in respect of such income derived from the use of the godwons leased out for the purpose of facilitating the business which is anterior to actual trading. Since

the assessee was having licence for dealing in Essential Commodities so declared under the Order of 1976 as a wholesaler and was receiving supplies of the essential commodities as a part of its wholesale trade, he having obtained the licence/authorisation of the wholesaler on his own volition, he was required to trade as per the terms and conditions imposed under the licence and after he received the essential commodities from Food Corporation of India and other agencies on payment of price fixed for such supplies he was to sell commodities to other authorised retailer/Fair Price shopkeeper at a price fixed for such sale by the State Government or other competent authority authorised in this behalf. In such event difference in price paid on supplies and price received on sale to retailer could properly be gross profit of such transaction and nothing else. In this connection, storage of the essential commodities by the assessee from the date of receipt of supplies to date of disposal was not as a recipient of the commodities for the storage on behalf of State but as a part of its own stock in trade. Merely because the stock in trade is in storage at a godown, which is integral feature of any trading activity in the commodities, the assessee cannot be said to be

rendering services of leasing out godown/warehouses for storing of essential commodities and receiving consideration for leasing one godown on rent or for use for incidental activities.

That being the case, the nature of income embedded in the price at which assessee was required to sell the essential commodities to the retailer was not a remuneration received from the lessee for use of godown for the purpose of storing and facilitating marketing of that commodities.

Learned counsel for the appellant places reliance on the decision of Karnataka High Court in Udupi Taluk Agricultrual Produce Co-operative Marketing Society Ltd. Vs. CIT 1987)166 ITR 365:

In that case the tribunal recorded its finding that no income was earned by the assessee from letting out the godowns or warehouses for the purposes of storage, processing or facilitating the marketing of commodities. It is in the aforesaid backdrop, the High Court came to the conclusion that Section 80P(2)(e)

was not attracted and observed that the tribunal in coming to these conclusions had noticed the decision of Madras High Court in South District Corporative Marketing Society Ltd. (1973) 92 ITR 371 later on affirmed by Supreme Court and said:-

> "This is a liberal construction of clause (e). But, nonetheless, it seems to us that the income derived by the cooperative society for the purpose of exemption under clause (e) must be relatable to the letting out or the use of its godowns or warehouses. Any income derived by the society unconnected with such letting out or use of the godowns or warehouses will not fall under clause (e)."

It will be apposite here to notice Section 80P(2) which reads as under:-

(2)The sums referred to in sub-section(1) shall be the following namely:-

(a) in the case of a co-operative society engaged in-
(i) carrying on the business of banking or providing credit facilities to its members, or

(ii) a cottage industry, or

[(iii) the marketing of agricultural produce grown by its members, or]

(iv) the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to its members, or

(v) the processing, without the aid of power, of the agricultural produce of its members,[or]

[(vi) the collective disposal of the labour of its members, or

(vii) fishing or allied activities, that is to say, the catching, curing, processing, preserving, storing or marketing of fish or the purchase of materials and equipment in connection therewith for the purpose of supplying them to its members,]
the whole of the amount of profits and gains of business attributable to any one or more of such activities :

[Provided that in the case of a co-operative society falling under sub-clause (vi), or sub-clause (vii), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely:-

(1)the individuals who contribute their labour or, as the case may be, carry on the fishing or allied activities;

(2)the co-operative credit societies which provide financial assistance to the society;

(3)the State Government;]

[(b) in the case of co-operative society, being a primary society engaged in supplying milk, oilseeds, fruits or vegetables raised or grown by its members to-

(i) a federal co-operative society, being a society engaged in the business of supplying milk, oilseeds, fruits, or vegetables, as the case may be; or

(ii)the Government or a local authority; or

(iii) a Government company as defined in section

617 of the Companies Act, 1956 (1 of 1956), or a corporation established by or under a Central, State or Provincial Act (being a company or corporation engaged in supplying milk, oilseeds, fruits or vegetables, as the case may be, to the public),
the whole of the amount of profits and gains of such business;]

(c) in the case of a co-operative society engaged in activities other than those specified in clause (a) or clause (b) (either independently of, or in addition to, all or any of the activities so specified), so much of its profits and gains attributable to such activities as [does not exceed,-

(i) where such co-operative society is a consumers' co-operative society, [one hundred] thousand rupees; and

(ii) in any other case, [fifty] thousand rupees.

(d) in respect of any income by way of interest or dividends derived by the co-operative society from its investments with any other co-operative society, the whole of such income;

(e) in respect of any income derived by the co-operative society from the letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities, the whole of such income;

(f) in the case of a co-operative society, not being a housing society or an urban consumers' society or a society carrying on transport business or a society engaged in the performance of any manufacturing operations with the aid of power, where the gross total income does not exceed twenty thousand rupees, the amount of any income by way of interest on securities [.....] or any income from house property chargeable under section 22.

From the perusal of the aforesaid provision it is apparent that while the cooperative society has been treated by the Act of 1961 as an assessee for extending certain concession in computing taxable income but at the same time, it has not exempted the income of cooperative society in its entirety. It has classified the cooperative societies on the basis of various activities carried out by the cooperative societies. The cooperative society which is a consumer cooperative society has been treated differently than other types of cooperative society namely the cooperative society engaged in business of banking or providing facilities for industrial or marketing, in the matter of grant of tax exemption or benefit of deduction in respect of its income from different sources.

In the case of consumer cooperative society engaged in activities other than the cooperative society prescribed under clause (a) or (b)of Sub Section (2), the entire income has not been exempted but only the minimum limit of taxable income has been made higher than other assessees under the Act.

A consumer cooperative society is entitled to get deduction of 1,00,000/- out right from its total income from whatever source to the extent the consumer cooperative society has a taxable income up to 2,00,000/-. The income earned by it vary according to its business as a consumer cooperative society. The income of other cooperative societies, which do not fall within the purview of Sub Clause (a) and (b) of Sub Section 2 of Section 80 (2)(P) becomes taxable. The limit during the relevant period up to which any cooperative society would not become taxable was Rs.20,000/- and thereafter it has been enhanced to Rs. 1,00,000/-.

It is significant to notice Explanation to Clause (e) of Sub Section (2) of 80(P), which defines, the Consumer cooperative society. While clauses (a) (b) & (c) deal with the case of the cooperative society for the purpose of granting certain tax exemption in respect of the total income, Clauses (d) (e) and (f) of Sub Section 80P(2) deal with the types of income earned by such cooperative society to be deducted from its total income for the purpose of computing its

taxable income. Clause (d) deals with income derived by way of interest and Clause (e) deals with income derived by the cooperative society from letting out the godowns or warehouses and clause (f) deals with the income earned as interest on securities or income from use of warehouse in respect of specific cooperative society whose gross total income comes to Rs. 20,00,000/-.

It is with two fold view that the issue is to be examined. Firstly, that the assessee is a consumer cooperative society and secondly, it owns godown as well as hires godown for storing its merchandise including essential commodities in which it is trading under an authorisation but is not a Society engaged in the activity of the constructing warehouses for the purpose of earning income therefrom. Despite our querry, the constitution and by-laws of the cooperative society in question was not furnished to us. However, it can safely be inferred that earning income from leasing out warehouses is not the primary activity of the assessee society but it is only incidental to its activity of dealing in consumer articles. We may not be taken to have expressed opinion that benefit of Clause (e) of

sub Section 2 of Section 80P (2) is available only to the cooperative society whose object is to construction warehouse and then earn from storing the commodities for the purpose of processing and facilitating the marketing of the commodities. For that matter any other cooperative society, if it has godown or warehouse at its disposal owned or hired, and earns any income by leasing out and allowing its use for storage of processing or commodities for facilitating the marketing of such commodities, income derived from such activities by such cooperative society will also be falling within the ambit Clause (e) of Section 80P (2). Clause (e) of Section 80P (2) in that sense is generic in its application to where nature of income derived by it can be considered from letting out or from use of such godown or warehouse for facilitating the marketing of commodities.

Therefore, the core question would be whether the assessee was storing the commodities in question in his godown or warehouse for the purpose of storage, processing and facilitating marketing of such commodities or was using his godown for the purpose of its own business of trading for holding

stocks as a part of its trading necessity.

We are of the opinion that storing of commodities by a trader or for that matter the consumer cooperative society of its 'stock in trade' during the course of carrying of its business of trading does not fall within the ambit of the scheme of Clause (e) of Section 80P (2). If that were so the separate provision would have been redundant and the entire income of the Consumer Cooperative Society would have been deductible.

Without keeping stocks, wherever stored, the trading activity by a trader cannot be conceived. Use of different phraseology for facilitating the marketing of commodities under Clause (e) can only mean storage of the commodities either for the purpose of processing of the commodities stored therein making them marketable or for providing such other services before its marketing. But where any commodity is stored there only as traders 'stock in trade', whether in godowns or warehouse owned by it or at such premises hired by it, It cannot be considered as activity of storage for facilitating and marketing. In other

words, the activity for which remuneration is charged by assessee cooperative society for use of the warehouses and godown is for the user, which must relate to a period anterior to its coming to marketable stage. Wholesaler as well as retailer both are traders engaged in sale and purchase of the commodities in which they trade.

Taking any other view will mean that every wholesaler who passes on commodities to a retailer, before the commodities reach end consumer, will only be treated as provider of service for facilitating marketing. In other words except the end stage seller all middleman will be considered as storing commodities only for the purpose of facilitating marketing of commodities. That will be subverting the very object and purpose of the provision itself. 'Marketing' cannot be confined only to the end stage trading activity of sale by retailer and purchase by end consumer.

To answer the question whether assessee was only storing the essential commodities in question at his godown on behalf of the State before it is marketed for a temporary period and the commission

of the wholesaler would be charged in the ultimate price to be charged from the consumer is only for the purpose of providing storage facilities by the assessee to the Government or other authority entrusted with the task of providing essential commodities or was actually holding the commodities as part of its trading stock albeit then under regulatory provision, the Order of 1976 promulgated for declaring and regulating trade in commodities as essential commodities and the terms and conditions of the licence issued thereunder needs attention.

The key factor on which emphasis was laid by the assessee before us is that the cooperative society was only authorised to store the commodities on behalf of the State Government and it had no more role to play. This contention has been accepted by the tribunal by referring to the terms of the agreement. However no separate agreement in respect of different commodities has been placed before us despite the fact that we directed during the course of hearing of appeals to the revenue as well as the assessee to place on record the documents on the basis of which the tribunal has reached the conclusion and read the terms

of agreement.

The copy of the wholesale authorization placed before us shows that it was in terms with Form B appended to the Order of the 1976 containing terms and conditions under which the authorization is made for acting as a wholesaler in respect of the essential commodities mentioned in the licence.

In these circumstances, one must examine the scheme of the Order under which such licence authorisation was issued, the Essential Commodities Act under which the Orders are issued and different consequences that follow depending upon prevalent rules in the State at the relevant time in respect of the commodities in question.

The preface of the Order of 1976 says that "this is necessary so to do for maintaining supplies of the foodgrains in essential commodities and securing its equitable distribution and availability of fair price shops.

With this aim in view, if we look at sub

clause [c] of clause 2 of the Order defining 'Authorized Fair Price Shop keeper' it means a retail dealer, in change of a shop, authorized under Clause 3 and it includes a person in charge of the shop where foodgrains and other essential articles are sold under the control of the State Government. This definition shows that the distribution of Essential Commodities may be directly by the State Government through a shop maintained under its control or it may be done through a private retailer/dealer who is duly authorized **to sell** such Essential Commodities under Clause 3.

Similarly 'Authorized Wholesaler' is defined in sub clause (f) of Clause 2 to mean a person, a firm, an association of persons or a co-operative society or any other institution authorised or appointed as an agent under clause 3 of this Order by the State Government or the Collector.

Under Sub clause (b) of Clause 2 “Authorization” means an authorisation issued under clause 3 of this Order.

This takes us to Clause 3 of the order which envisages that the Collector or any other officer authorised by the State Government may issue an authorisation to any person being an **'authorised wholesaler/fair price shopkeeper'** to obtain and supply foodgrains and other Essential Articles in the area specified therein.

Sub clause (2) of clause 3 significantly emphasise that no person other than an authorisation holder **shall sell** any of the foodgrains or any other essential articles supplied by the Government for distribution under this Order or any other Order. Thus the activity of authorised Fair Price Shop Keeper or Wholesaler is not merely holding stocks on behalf of the Government but is of sale and purchase of essential commodities, if such persons are other than State/ Every application for the authorisation is required to be submitted to the Collector in Form 'A'. Every Authorisation issued under this Order is required to be in Form 'B'.

The form 'B' under which the authorization has to be issued reveals the terms and conditions

under which the Authorised Holder **has to carry on his trade of selling such commodities.**

It says that no Authorization Holder shall store Foodgrains & other essential articles at any place other than those specified in this authorisation without prior permission in writing of the Collector. **No authorisation holder shall refuse to sell Foodgrains and other essential articles during business** hours on the presentation to him of a valid permit/indent/ration card to the extent of the amount of Foodgrains or other essential articles due on the permit/indent/ration card. **No authorization holder shall sell Foodgrains at a price in excess of that fixed by the State Government or the Collector or shall sell any other essential articles at a price in excess of that fixed by the Central Government or the State Government or any authority or Officer of such** Government or the manufacture, as the case may be, in that behalf.

Clause (4) provides that **no authorisation holder shall sell or hold in stock for sale** any commodities similar to Foodgrains and other essential articles **except with the permission of the State**

Government or the Collector. This is apart from other conditions of maintenance of stock periodically so as to make control over the trade of the essential commodities, namely food grains or other articles, within the effective control of the State Government.

The purpose for which the order was made was that there may be equitable distribution of essential commodities, which may other wise be in short supply, at fair price shop. It aims on controlling the distribution of the short supply of the essential commodities by keeping a control on the quantity of the stocks that can be held by the individual or the wholesaler on the one hand to keep a check on hoarding and on the other hand selling commodities at all levels at a price fixed by the State Government controlling the margin of profit of middleman trading in the essential commodities within the specific limits. The object of the order is to maintain the continued supply of the essential commodities in equitable manner and to limit the profit margins in the essential commodities trade and vouch against creating supply scarcity by unethical hoarding of essential commodities. However, all these conditions do not disclose any

intention on the part of the legislation, primary or delegated, to exclude the trading in essential commodities altogether by private business. It emphasise on the other hand trading in essential commodities through the private hands by permitting a middle man like wholesaler and retailer carrying on trade in these commodities, limiting profit margin for both, before the commodities reach the common consumer.

If the stocks were to remain property of the State all levels, and there were to be no private trading, there was no purpose for bringing / limit on holding of stocks by Authorised Holders, because the contention of assessee is to be accepted in this regard all stocks wherever lying remain property of State which storing too is only on behalf of State, who has no limit of holding.

The regulation also exclude multi layers are of middle men. Though the trading in essential commodities is strenuously regulated, still is not taken out from voluntary activity of trade nor there is any warrant to assume that trading in Essential

Commodities by the private hands is excluded altogether. The fact is that while definition of Authorised Fair Price Shopkeeper as well as Authorised wholesaler emphasise a private dealer both as retailer and wholesale to be essential chain in regulating trade in Essential Commodities.

Frequent and independent use of expression 'Sale of the essential commodities by the Authorisation Holder'- whether as authorised wholesaler or authorised Fair Price Shopkeeper further goes to show that authorisation holders are to indulge in sale and purchase of the Essential Commodities and are not merely acting as agent of the State Government or they are subordinate to the State Government in all respects. The provisions of the order no where reveals that when essential commodities are supplied to the wholesaler, the property in them does not pass on to the wholesaler and it remains with the State government, notwithstanding regulatory control by the State the property in the goods passes to the authorised wholesaler. The constituents that goes in fixation of the price also goes to show that when the goods go out of the godowns of Food Corporation of

India, the price includes the issue price plus octroi paid thereon and significantly it also includes **'the sales tax chargeable on such issue price'** and surcharge on sales tax. This also shows that it envisages passing of property in the commodity from Food Corporation of India to Authorised Holder on payment of sales consideration which is an essential ingredients of activity of sale. The passing of the property in the goods to the buyer is essential ingredient of sale of goods to attract sales tax.

Without transaction being a sale, charging of sales tax cannot be permitted on principle enunciated by the Supreme Court in a catena of decision. It is well established that before levy of sales tax, it must fulfil all ingredients essential for constituently a transaction to be a sale under the Sale of Goods Act. One of the essential ingredients of the sale is that property in goods must pass on the buyer for consideration fixed under the agreement. The contention that any regulated commodity excludes the voluntarily nature of transaction of assessee to be considered as sale, was negatived.

In this connection, we may refer to earliest decision of Supreme Court in AIR 1954 SC 459 Sales Tax Appellate Tribunal Vs. M/s Budhprakash Jaiprakash which arose under the U.P. Sales Tax Act, 1948. In this case the question had arisen about levy of tax by the Assessing Authority in respect of the turnover relating to forward contract. The assessee had challenged that the imposition of sales tax on forward contracts was ultra virus the powers of the State Legislature. The UP Sales Tax Act, 1948 has been enacted by the provincial legislature in terms of the legislative power conferred on the Provincial Legislature under the Government of India Act, 1935 under Entry 48 in List II of the VIIth Schedule of the said Act. Under Sec. 2(h) of the U.P. Act, Sales was defined to include forward contracts. The Supreme Court upheld the challenge by holding that the power conferred under Entry 48 to impose tax on the sale of goods can be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of 'sale' by including forward contracts

arrogate to itself a power which is not conferred upon it by the Govt. of India Act, or for that matter by Constitution of India and the definition of “sale” in Sec. 2(h) of the Act XV of 1948 must, to that extent, be declared 'ultra vires'.

It was further said:

> “it would be proper to interpret the expression”sale of goods” in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title.”

The principal was reiterated in AIR 1958 SC 560 State of Madras Vs. Gannon Dunkerley & Company wherein the court approved that:-

> “Hence it follows that to constitute a valid sale, there must be a occurrence of the following elements viz. (i) the parties competent to contract (2) mutual assent; (3) thing of sale transfer from seller to buyer and; (iv) a price in money paid or promised.”

With this premise the contention about the effect of regulatory statute on element of voluntary

agreement was considered in the case of M/s Vishnu Agencies Pvt. Ltd. (AIR 1978 SC 449), wherein a seven Judges Bench of the Supreme Court considered the question whether compulsory sale under any statute is exigible to Sales Tax. Adverting to the essential elements of sale of goods for the purpose of levy of Sales Tax, the Court referring to settled principle that subject of tax is a contract of sale of goods, held that **so long as mutual consent is not totally excluded in any dealing in law it is a contract.**

The court approved opinion of Hon'ble Hidayatulla, J., as his lordships then was who delivered a dissenting opinion in M/s New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar AIR 1963 SC 1207 and quoted with approval the following:

> " though it was true that consent makes a contract of sale, such consent "may be express or implied" and it cannot be said that unless the offer and acceptance are there in an elementary form, there can be no taxable sale". The court further said that the learned Judge thus summed up pithily 'so long as the parties trade under the controls at fixed price and accept these as any other law of the realm because they must, the contract is at the fixed price

> both sides having or deemed to have agreed to such a price. Consent under the law of contract need not be expressed, it can be implied."

In AIR 1981 SC 2001 Madhya Pradesh Ration Vikereta Sangh Socity & Ors. State of M.P. & Ors., the contention was raised before the Supreme Court in slightly different perspective in relation to the Cooperative Societies of Madhya Pradesh. The question before the Madhya Pradesh High Court was whether the M.P.(Foodstuffs) Civil Supplies Public Distribution Scheme, 1981, formulated by the State Government under sub-clause (d) of Clause 2 of the M.P. Foodstuffs (Distribution) Control Order, 1961, introducing a new scheme for running of Government fair price shops by agents to be appointed under a Government scheme giving preference to cooperative societies, in replacement of the earlier scheme of running such fair price shops through retail dealers appointed under Clause 3 of the Order, is violative of Articles 14 and 19 (1) (g) of the Constitution. The court repelled contention on both counts.

Countering the challenge under Article 14 on the ground of hostile discrimination between an ordinary retailer and a cooperative society for the purpose of giving preference in the matter of grant of licence the court said:-

> "There is an intelligible differentia between the retail dealers who are nothing but traders and consumers' co-operative societies. The position would have been different if there was a monopoly created in favour of the latter. The scheme only envisages a rule of preference. The formulation of the scheme does not exclude the retail traders from making an application for appointment as agents. It cannot be said that the State Government was not actuated with the best of intentions in bringing about a change in the system of distribution of foodstuffs through fair price shops."

Negativing the charge of impugned provision violating Article 19 (1) (g), the court opined that the scheme is also not violative of Article 19 (1) (g) of the Constitution as it **in no way infringes the petitioners' right to carry on their trade of foodgrains. They are free to carry on business as wholesale or retail dealers in foodgrains by taking out licences under the M.P. Foodgrains (Licensing)**

Order 1964. There is no fundamental right in any one to be appointed as an agent of a fair price shop under a Government Scheme. Further, the question whether fair price shops in the State of Madhya Pradesh under a Government Scheme should be directly run by the Government through the instrumentality of consumers' co-operative societies as its agents or by retail dealers to be appointed by the Collector under Clause.3 of the Control Order, is essentially a matter of policy with which the Court is not concerned. However, by the expression “co-operative societies”, and if by mistake there was a wrong allotment made to a 'co-operative society' which was not a “consumers” co-operative society”, the Government would take steps to cancel the allotment. In other words in respect of the essential commodities the order issued by M.P. Foodstuffs Control Order did not exclude the element of trading by the authorisation issued in favour of any person under the Control Order.”

Thus the Apex Court affirmed the position of licence holders under Food Stuff Control Order as a traders and not mere stockholder on behalf of State.

A five judges bench of the Calcutta High Court in Ghasiram Agarwalla Vs. The State AIR 1967 Cal. 568 considered the question whether the property in stock of wheat received by the appellant under agreement pass in him, and if so when. It also considered 'whether authorisation resulting in 'Agreement of the distribution of the wheat through Fair Price Shops' had agreed to sell wheat during shop-hours to consumers within his zone at a certain retail rate fixed by the Government, makes him agent of Govt.

The wheat was delivered by the Government to the retailer on his deposit of price of wheat at the agreed wholesale rate. At one stage, by night-time the retailer removed some bags of wheat from the shop and thereafter possibly apprehensive of adverse consequences brought them back to his shop. The court held that retailer received wheat from the Government could not be regarded as an agent of the Government and that the property in that wheat did pass to him.

Learned Chief Justice speaking for the majority held that “I am unable to agree that the legal

position of a license under a Food Procurement Order is that of a servant under Government who is the master. Simply because the law enables certain restrictions to be put on transactions, it does not mean that the relationship of master and servant is created between the Government and the licensee. As to whether some kind of fiduciary relationship is created, will depend on the terms of the statutory provision under which the license has been issued or upon the terms of agreement between the parties."

He also concluded that the transaction between the Govt. and retailer is one of sale and purchase and is not of agency . In other words the property in goods passes to the retailer and he does not hold the property as an agent or in trust for the Govt.

With conclusion of learned Chief Justice three brother Justice concurred, Hon'ble Chatterjee,J too concurred with final order proposed by the learned Chief Justice but dissented on the question on passing of property in goods.

Accordingly the majority view of the

Calcutta High Court opined that the retailer by virtue of the agreement could not be regarded as an agent of the Government in respect of the wheat received by him under the agreement, primarily because he receives goods on payment of full price and he retains his character as a trader.

In the case in hand also the wholesaler receives goods from FCI on payment of price fixed for sale to wholesaler which is inclusive of sales tax and surcharge chargeable on sale of goods. He then is ordained to sell such goods only to authorised Fair Price Shopkeeper on a regulated price determined for such transaction which include fixed profit on his purchase price plus transportation charges as per scale. By parity of reason the conclusion is discernible that the Authorised Holder is not an agent of Govt. to hold stocks on behalf of Govt. at its godowns but he is a trader who receives commodities under a transaction of sale and purchase, on payment of price and property in goods passes on to him. He holds goods on his own behalf as his stock in trade.

As a part of its business activity of trading

in the consumer goods like any other businessmen the assessee had to store or keep stocks whether of controlled or non-controlled commodities. The assessee was also to maintain storage for his trading stocks. Since the trading in Essential Commodities became regulated as per Orders issued under Essential Commodities Act, the quantity of stock of Essential Commodity concerned which could be kept at a time was fixed through orders issued by competent authority. So also place of keeping stocks was also required to be disclosed in Authorisation.

At this stage we may also notice gamut of price fixation regulated under the orders issued by Competent Authority from time to time. Details of price fixation, on which commodities were to be supplied to the consumers, was made available to us.

As an illustration for the purpose of wheat, the price fixation detailed the constituents as the issue price at the Food Corporation, godown, after adding sales-tax, Surcharge and octroi. The price at which the wheat was to be supplied to the wholesale dealer came to be Rs. 202.23 per quintal. As per order

dated 12.5.87 price fixation could vary from time to time as per directions issued by the competent authority. Significantly, for the purpose of fixing the price on which wholesaler would supply the commodities to the retailer, Rs. 2.25 per quintal was added as commission to the wholesaler and Re. 1.00 for transportation purpose which make the total price at which the whosesaler will sell the supplies received by him came to be Rs. 204.48 per quintal. For the purpose of fixing retail price of wheat to be sold to ed customer in addition wholesale sale price Re.1 as transportation charges for supplies from wholesaler and commission of the retailer was added. Transportation charges from the wholesaler's godown to the retail outlet was also added. Since in the distribution price to various party of the State would vary, equalization amount was also added to the rate of essential commodities to be disbursed to the consumer.

The price fixation details further shows difference in transportation charges, where godown of Food Corporation of India and godown of wholesaler is situated at different places. The transportation charges to be added in supply price to wholesaler in

such event would vary according to the distance of wholesaler's godown from the godown of Food Corporation. However, in fixing these prices, the commission of the wholesaler remained 2.25 per quintal. Somewhat similar process was adopted by the competent authority in fixing price of other Essential Commodity on which the Assessee Society dealt with.

Very clearly he was not an agent for storing foodgrains or other essential commodities, on behalf of State but the whole scheme reveals storage of essential commodities by the Society was part of trading activities of regulated business in Essential Commodities.

Once we reach this conclusion that it is a part of trading activity of the cooperative society, in respect of which supplies of the essential commodities as authorised wholesaler on payment of price reaches him, the property in goods passes on to authorised holder as under a completed sale and thereafter subsequent transaction by assessee in ordinary course are his marketing activities. If that is the right

conclusion, which we think so, the additional amount received by the assessee over and above price paid by him is his gross profit. He is allowed to retain the difference between the purchase price and sale price not by way of commission but as his own surplus. It is misnomer to call it commission received from Govt. He receives nothing from the Govt. Whatever he receives from retailer are his business receipts and is received on account of sale of the essential commodities and not for use of his godown or for any services rendered to facilitate, marketing of that commodity. Respondent cooperative society was storing its own trading stocks in its godowns, whether owned by him or acquired on hire for the purpose of safe custody of its stock in trade. No commission could be received by him for storing the essential commodities as part of its own stock in trade at its godown. He could not render service to himself to refer any part of receipts to letting out godown for storage or for use or lending incidental services to facilitate marketing of the commodities for someone else.

We find force in this contention of the

Revenue that expression “facilitating marketing of the commodities” must be extended to providing some facility regarding marketing of commodities but it cannot be permitted the marketing itself.

We may profitably notice here ratio of decision in 94 ITR 129 it was a case wherein Allahabad High Court (U.P. State Warehousing Corporation Vs. Income Tax Officer, A-Ward Circle II, Lucknow & Another) was called upon to decide about exemption claimed by the Warehouse Corporation under Section 10(29) of the Income Tax Act which was extended to an authority constituted for the marketing of commodities.

Section 10(29) of the Act of 1961 provides:

“10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

(29)in the case of an authority constituted under any law for the time being in force for the marketing of commodities, any income

derived from the letting of godown or warehouses for storage, processing or facilitating the marketing of commodities."

Under this provision, an assessee would be entitled to exemption if_

1. it is an authority constituted under any law:
2. it is an authority constituted for the marketing of commodities; and
3. the exemptible income is in respect of letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities.

There is parity of expressions about income derived from letting out of godowns or warehouses used in Section 80P (2) (e) regulating claim to deduction from total income and Sec. 10 (29) regarding exemption of such income from inclusion in computation of taxable income.

The contention was raised by the assessee that since warehouses corporation was engaged in marketing, sale and purchase, which was an authority set up under Warehousing Corporation, therefore it

was entitled to claim, the exemption under Section 10 (29). The Revenue on the other hand contended, as in the present case, that income arising from sale or purchase on its own behalf, for the storage of own goods at godowns no exemption is permissible. The court said that the term facilitating “marketing of commodities” as used in section 10(29) excludes an activity done by the assessee for its own benefit, because it refers to income from letting of godowns or warehouses for purposes, inter alia, of facilitating the marketing of commodities. Obviously, if the owner of the warehouse does the activity for facilitating for his own benefit, he will not get any income from letting of the warehouse. In the last clause, the term”marketing” clearly excludes the idea of an activity done for one's own self. The word “marketing” has been used in the wider sense to include the various activities which generally go to form the trade of marketing. It was stated:-

> “The expression 'for facilitating the Marketing of commodities cannot possibly refer to functions of buyers and selling on one's own behalf because when a person buys or sells; he, according to the definition propounded by the Revenue indulge in Marketing . He cannot be said to facilitate marketing. The use of word

'facilitating' seems to refer to functions like gradation or standardisation in the warehouses or giving of facilities by way of distribution by the authorities running the warehouses of goods or commodities belonging to others."

This aspect of the matter was again considered by Gujarat High Court in slightly different context in CIT Vs. Ahmedabad Maskati Cloth Dealers Co-operative Warehouses Society Ltd. 162 ITR 142. The principles was followed by Gujarat High Court in CIT Vs. Gujarat Warehousing Corporation (1980) 124 ITR 282 while constructing same provision. It was a case in which Ahmedabad Maskati Cloth Dealers Co-operative Warehouses Society Ltd. had claimed deduction of its income under Section 80P (2) (e) in respect of licence fee received by it from the members alottees of shops to various trader for carrying on their business at New Cloth Market. The court considered three essential conditions for invoking Sec. 80 P (2)(p) viz.

(i) the assessee must be a cooperative society,

(ii)the cooperative society must have income derived from letting of

godowns or warehouses & thirdly.

(iii)these godowns or warehouses must be let for the purpose of storage, processing or facilitating the marketing of commodities.

In other words, if the godowns or warehouses are let for a purpose other than any of the aforesaid three purposes, the benefit of exemption under the said clause would not be available to the society. Without entering into details of meaning the court prima facie opined that the expression 'facilitating the marketing of commodities' would suggest prior to stage of sale of commodity, and it would not include sale of clothe or other furnished product at premises used for purely business purposes.

Likewise a Division Bench of Karnataka High Court in Udupi Taluk Argicultrual Produce Marketing Cooperative Society Ltd. Vs. CIT reiterated that the income derived by a cooperative society for the purpose of exemption under Section 80P(2)(e) must be relatable to letting out or for use of its godowns or warehouses for facilitating the marketing of marketing

of commodities.

The conclusion reached by us is in consonance with the ratio emerging from the decision discussed above.

This takes us to consider two decisions referred by the learned counsel for the assessee. Firstly relying on 176 ITR page 117, and Commissioner of Income Tax, Madras Vs. South Arcot District Co-operative Marketing Society LTD. it was contended that payment of the price of the commodities received by the assessee and subsequently receipt of the price from the authorised retailer was only a part of facilitating the trade of public distribution system. In other words, it was for facilitating the marketing of essential commodities so as to reach the public at large.

The facts noticed by the Supreme Court in the aforesaid decision reveals that it was a case of cooperative society, which had entered into an agreement with the State Government during the previous year ending June 30, 1960 relevant to the

assessment year 1961-62, whereby the assessee **agreed to hold a stock of ammonium sulphate belonging to, and on behalf of, the State Government, and to store it in godowns which, admittedly, belonged to the assessee.** Under the agreement, the assessee was required further to take all necessary steps to enable such stocking and storage of the fertiliser, including taking delivery of the stock at the rail-head and transporting it to the godown. For this reason, the entire amount received by the respondents cooperative society was held to be entitled to exemption under Section 14(3) (iv) of the Indian Income Tax Act, 1922 as it was then existing. The court approved the decision rendered by the Madras High Court from which the appeal was before the court as well as the Gujarat High Court while considering the analogous provision of section 80P(2)(e) of the Income Tax Act, 1961, that the provision for exemption was intended to encourage cooperative societies to construct warehouses which were likely to be useful in the development of rural economy and exemption was granted from income tax in respect of income derived from the letting of such warehouses for the storage of fertilisers and other related commodities concerned with

cooperative marketing.

Apparently the basic premise on which judgment proceeded was that the assessee co-operative society was only storing the commodity in question for and on behalf of Govt. The property in goods at all times remained with the Govt. Thus whatever the assessee received from the Govt. was for letting the godown for storing fertilizer or for its use to facilitating its marketing by the owner State. This fact about agreement under which the assessee society was storing goods at his godowns made all the difference. In the present case it has been demonstrably clear that the commodity was held by the assessee as its own property in commodities has passed on to it and it could not earn any income by letting out its godowns to itself for storing its own stocks. Hence the ratio in South Arcot Dist. Co-operative Society does not assist the assessee.

The other decision which was relied on by learned counsel for the assessee is of the Bombay High Court reported in 212 ITR 124, Commissioner of

Income Tax Vs. Bhandara Zilla Sahakari Kharedi Vikri Sangh LTD.

The assessee had constructed certain godowns which were used for earning income of commission under the two different agreements- (i) for distribution of fertilisers with the State of Maharashtra (ii) pertaining to sub-agency for procurement of paddy/rice under the Monopoly Purchase Scheme of the Government with the Maharashtra State Cooperative Marketing Federation Limited.

The assessee claimed exemption in respect of those commissions under Section 80 P (2)(e) of the Income Tax Act. The Income Tax Officer disallowed the claim on the ground that no part of the claim fell under Section 80P (2)(e). The Appellate Assistant Commissioner and the Tribunal allowed the full deduction applying the ratio of the decision of the Madras High Court in the case of CIT Vs. South Arcot District Co-operative Marketing Society Ltd.

On a reference, the High Court held that entire income received by the assessee society under

fertilizer agreement fell within the ambit of Sec. 80 P(2) (e)

The Court said :-

> "It relates to wholesale distribution of fertilisers under the Fertiliser (Control) Order, 1957, and the Inorganic Fertiliser (Movement and Control0 Order, 1960. The assessee was to hold the stocks, store the goods in godowns, preserve them, maintain accounts and sell the goods as per directions of the Government. For all this it was to get commission at varying rates ranging between Rs. 35 and Rs. 50 per tonne of goods actually sold. It is thus apparent that there is no difference whatsoever between the essential nature of this agreement and the essential nature of the agreement considered in the case of CIT Vs. South Arcot District Co-operative Marketing Society ltd. (1989) 176 ITR (SC). The ratio of that decision, therefore, straightaway applies to the entire income of commission received under the fertiliser agreement and the whole of it is entitled to deduction under section 80P2(e).

Apparently the court assumed parity between facts of the case before it with facts of case in South Acrot Dist. Cooperative Society case in which case property in goods stored at the godowns of cooperative society did not pass on to the society but it had held the goods for and on behalf of the Govt. For the reason we have already noticed while considering South Acrot Dist. Corporative Society's case, this part

of judgment does not further the cause of assessee.

Secondly, referring to the paddy agreement, it was found by the court that the assessee was appointed as a sub-agent under the scheme of the monopoly procurement of paddy/rice. **The State Government had totally banned private trade in paddy/rice and had bestowed upon itself the exclusive right to procure and market those commodities.** The Government had appointed the marketing federation as its chief purchasing and milling agent under the scheme and had authorised the said federation to appoint purchasing and milling sub-agents in respective areas. The sub-agent was to purchase paddy/rice, store the commodities in godown, maintain proper accounts and also to mill the commodities. For all this, the assessee was entitled to commission.

Two submissions were made regarding the paddy agreement. The first submission was to the effect that income derived by way of commission under the agreement was totally ineligible for deduction because no part of it represents income from letting

out of godowns. In support of this proposition strong reliance was placed upon the Karnataka High Court decision in the case of Udupi Taluk Agricultural Produce Co-operative Marketing Society Ltd. V. CIT (1987) 166 ITR 365. The second submission was that in no case the entire income of commission can be held to be deductible since at least a part of it was attributable to the distinct activity of milling for which separate charges were fixed and which can have no nexus with the activity of user of godown. The nature of the agreement and the break-up of the commission amount leave no manner of doubt that the entire income cannot be said to have been derived from the letting of godowns. The assessee, also did not dispute the obvious position that the entire income from commission of Rs. 4.80 per quintal was not entitled to exemption under Section 80P(2)(e).

In these circumstances the Bombay High court came to the conclusion that the entire amount received by the assessee under different heads was not to be excluded from taxable income but only what was properly referable to the letting of godown and for facilitating marketing of the commodities could be

deducted and for that matter was restored to the Tribunal for determining the receipts for different and specific purpose were to be computed while reserving the exclusive trading rights. Thus the paddy contract also did not result in passing of property in the goods to the assessee. Yet the deduction was restricted to income properly referable to Section 80 P(2)(e). That being the position, the Bombay High Court decision is based on its own facts and is distinguishable.

As a result of aforesaid discussion, we are of the opinion that since the assessee was storing the commodities in question in godown as a part of its own trading stock, it being trader in the essential commodities in question , the provisions of the 80P(2)(e) are not applicable, to be invoked by the assessee. He is only entitled to claim deduction of expenses incurred by him on hiring of godown, and the depreciation, as may be allowable on godowns owned by it as business assets, while computing income from its business.

Accordingly, all the appeals are allowed. The order of the Tribunal as well as of the Commissioner [Appeals] are set aside and the

Assessing Officer is directed to recompute the income in the light of the aforesaid judgment.

No order as to costs.

(GOPAL KRISHAN VYAS),J. (RAJESH BALIA),J.

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