ONGC Ltd. Vs State of Gujarat

Court: Gujarat High Court

Date of Decision: Dec. 18, 2014

Acts Referred: Central Sales Tax Act, 1956 â€" Section 2(h)
Constitution of India, 1950 â€" Article 297, 39(b)
Gujarat Sales Tax Act, 1969 â€" Section 2(29), 2(36)
Gujarat Value Added Tax Act, 2003 â€" Section 2(24), 2(30), 2(33), 7, 8

Citation: (2015) 79 VST 64

Hon'ble Judges: V.M. Pancholi, J; Akil Abdul Hamid Kureshi, J

Bench: Division Bench

Advocate: N. Venkataraman, Senior Advocate, Nitin K. Mehta, Shraddha Mehta and Hemali Soni, Advocates for the Appellant; Kamal Trivedi, Advocate General and Snageeta Vishen, Additional Government Pleader, Advocates for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.
These appeals are filed by the Oil and Natural Gas Corporation (""ONGC"", for short) calling in question the

judgments of the Gujarat Value Added Tax Tribunal (""the Tribunal"") involving identical issue. Tax Appeal No. 50 of 2014 is treated as a lead

matter and the facts are therefore, recorded from such proceedings. The appellant, ONGC, is engaged in exploration, development and

production of the petroleum products. The memorandum of association of ONGC outlines the main object to be pursued by the Corporation. The

other object clauses contained in the said memorandum include the following clauses:

5. To act as an entrepreneur on behalf of the Central Government to identify new areas of economic investments and to undertake or help in the

undertaking of such investment.

6. To act as an instrument to implement the policy of the Central Government subject to such directives as may be issued by the President from

time to time, with a view to exercise control over strategic areas of economy and to serve public interest.

1.1. For the first quarter of April to June 2004, ONGC had given credit to Indian Oil Corporation (""IOC"", for short), the oil company, on the sale

price discount as directed by the Government of India in its letter dated August 27, 2004 by way of a credit note dated September 13, 2004. The

credit of tax relating to such discount was claimed by ONGC. Such tax credit on discount came to Rs. 11,07,06,024. The ONGC claimed that

discount would not form part of taxable turnover. The assessing officer however, objected to the stand of the ONGC. The Deputy Commissioner

of Commercial Tax sought explanation from ONGC on this issue. ONGC submitted a detailed reply stating that such discount was given as per the

directives of the Government of India. The same cannot be considered as a part of the turnover. It was clarified that such discount was not taken

into account for the purpose of computing royalty payable to the State Government. The assessing officer passed the order of assessment on

March 30, 2009 holding that the discount given by the ONGC to IOC on the sale of petroleum products was not an admissible deduction and that

ONGC was required to pay the tax inclusive of such discount with interest and penalty.

1.2. ONGC carried such issue in appeal. The appellate authority noted that the ONGC had not claimed any deduction of discount for computing

the royalty, but claimed deduction for computation of turnover. He was of the opinion that since the sales tax is payable on the turnover of sales

which is valuable consideration received or receivable by the seller, once the sales bill was issued, such consideration becomes receivable. He

observed that trade discount is to be reduced from the turnover and no tax would be payable on that part of the turnover, however, no such

deduction would be available on cash discount. He was of the opinion that by discounting the price, the ONGC was sharing the losses which

cannot be categorized as discount or reduction in the price. By merely describing such under recovery as discount, the nature and character of the

transaction did not change. He was also of the opinion that ONGC had knowingly furnished inaccurate particulars of transactions liable to tax. He

therefore, confirmed the levy of tax with interest and penalty.

1.3. Against such appeal, ONGC approached the Tribunal in second appeal and contended that such discount would not form part of ""sales price

as defined in section 2(29) of the Gujarat Sales Tax Act (""the said Act"", for short) and consequently would not form part of ""turnover of sales"" as

defined in section 2(36) of the said Act. It was pointed out that under the directives of the Union of India, ONGC was authorised to collect only

the price fixed by the Government of India. On the other hand, on behalf of the Government of Gujarat, it was contended that the reduction in

price was not in the nature of any of the recognized trade discounts. It was in essence an instance of under-recovery of the sale price. Such under-

realisation of the sale price was absorbed by ONGC through its profit generating products. The very expression ""under-realisation of sale price

would mean that sale price was not reduced in any manner. This was therefore, not a case of a trade discount since trade discounts are given on

the basis of bilateral contract between seller and buyer. In the present case, such discount was not on account of any contractual relation between

the buyer and seller but on account of mandate of the Government of India. According to the Government counsel, it was a case of part of the sale

price voluntarily not recovered from the purchaser. Reference was also made to the provisions of the Competitions Act suggesting that a trade

practice in the nature of artificial determination of the sale price would be restrictive trade practice.

1.4. The Tribunal by the impugned judgment upheld the stand of the Revenue. It was observed that the decision to discount the price was not that

of ONGC taken on its free volition but such decision was imposed on it by the Central Government. The instance therefore, would not fall in any

of the well recognised concepts of discount. The Tribunal was of the opinion that the sale price initially fixed between the buyer and the seller was

not received by the buyer but was certainly receivable, but for the waiver of profit by subsequently granting artificial discount from the sale price. It

was observed that in case of non-realisation of sale price, the sale price of the goods remained the same but the portion of non-realised sale price

is borne by the seller. In fact, the Tribunal went on to observe that ""such a practice adopted by the appellant under the mandate of the Central

Government is virtually amounting to restrictive trade practice and an artificial determination of sale price which is prohibited under the

Competitions Act."" On such basis, the Tribunal confirmed the levy of duty, but deleted the penalty and thus allowed the appeal in part. Against

such decision of the Tribunal to the extent it is adverse to ONGC, the present appeal has been filed.

2. Issue in all the appeals is identical. The appeals were admitted for consideration of the following substantial question of law:

Whether the Tribunal erred in law and on facts in confirming the demand with respect to the amount of discount given by the appellant to the

OMCs on sale of its products instead of calculating the turnover on the finally determined prices?

3. The learned advocate Shri N. Venkataraman for ONGC took us through the Government of India policy of controlling consumer prices of

different petroleum products and the manner and method of achieving such objective. He submitted that under the directives of Government of

India, ONGC is authorised to sell its specified petroleum products only at the controlled price. The whole mechanism is worked out in order to

ensure that the individual consumers do not have to bear the full burden of the international price fluctuations. These products include kerosene

distributed through public distribution system often referred to as ""PDS"" kerosene, petrol, diesel, and LPG for domestic use. He pointed out that

the Government of India also decides in what manner and by which entity the losses resulting out of such mechanism would be borne. In essence,

ONGC sells its such products to the distribution companies at the rate mandated by the Government of India and accounts for such price for the

computation of its turnover. In the background of such facts, counsel raised the following contentions:

(1) The reduced price was in the nature of a discount given by ONGC to the oil companies and was not in the nature of a bad debt. Our attention

was drawn to the decision of the Madhya Pradesh High Court in case of M/s. Gail India Ltd. Vs. State of M.P. and Others, in which in a writ

petition, under similar circumstances, the High Court held that the authority committed an error in law in disallowing the deductions claimed by

ONGC from the total turnover on the basis of credit notes issued to the oil marketing companies.

(2) Counsel submitted that the turnover would form the sale price realised or realisable. In the present case, it was only the discounted price which

was realisable price by ONGC from oil marketing companies (""OMC"", for short). Counsel referred to clause (b) of sub-section (1) of section 8 of

the Gujarat Value Added Tax Act (""the VAT Act"", for short) to contend that even in case of consideration previously agreed upon for sale has

been altered by agreement with the recipient, whether due to the offer of a discount or for any other reason, the dealer is authorized under

subsection (2) of section 8 to make adjustment accordingly.

(3) Counsel drew our attention to articles 39(b) and 297 of the Constitution of India and contended that as held by the Supreme Court in case of

Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd., , the Government of India is the custodian of all natural resources and is a trustee

holding such properties for the common good of people of the country. If such natural resources are exploited for the common good and price of

such essential commodities is controlled by the Government of India, it is only in the nature of discharging of its obligation under article 39(b) of the

Constitution.

(4) Counsel also relied on the decision of the Supreme Court in the case of IFB Industries Ltd. Vs. State of Kerala, in which it was observed that

in terms of the Kerala General Sales Tax Act and Rules made thereunder, exemption is liable subject to two conditions. Firstly, that the discount is

given in accordance with the regular practice in the trade and secondly, that the accounts should show that the purchaser had paid only the sum

originally charged less the discount. It was further held that there is nothing in the Rules to mean that a discount in order to qualify for exemption

must be shown in the invoice itself.

(5) Reliance was also placed on the decision of the Supreme Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue

(Taxes), Ernakulam Vs. Motor Industries Co., Ernakulam, in which the issue pertained to additional trade discount given by the seller to the

distributor-purchaser for popularising the sales and consumption of product which was allowed in accordance with the trade agreement. The

Supreme Court held that such trade discount was not in the nature of service charge or trade-in contract and was therefore, deductible.

(6) Heavy reliance was placed on the decision of the Supreme Court in the case of Deputy Commissioner of Sales Tax (Law), Deputy

Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam Vs. Advani Oorlikon (P) Ltd., , in which it was held that under the

Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the

assessee. In a case where trade discount is allowed on the catalogue price, the sale price is the amount determined after deducting the trade

discount. The trade discount does not enter into the composition of the sale price, but exists apart from and outside it and prior to it. It was held

that it is immaterial that the definition of ""sale price"" in section 2(h) of the Act does not expressly provide for the deduction of trade discount from

the sale price.

(7) Reliance was also placed on decision of learned single judge of Kerala High Court in the case of Madras Fertilisers Limited Vs. Asst.

Commissioner (Assessment), Agrl. Income Tax and Sales Tax Dept. and Another, in which the fertiliser company received subsidy from the

Government to offset for the losses suffered in the sale of fertiliser on the controlled price. The High Court held that such component cannot form

part of the sale price as the same was received for a different purpose and not as a consideration of sale. The counsel submitted that in the present

case, ONGC did not even receive any subsidy from the Government but had to absorb the losses of the reduced price on its own. So also was the

view of the learned single judge of the Gauhati High Court in the case of Bongaigaon Refinery & Petrochemicals Limited v. Commissioner of

Taxes, Assam reported in [1996] 103 STC 132 (Gauhati).

4. On the other hand, learned Advocate General opposed the appeals raising the following contentions:

(1) This is not a case of discount from the sale price. Term ""sale price"" is defined in section 2(29) of the Gujarat Sales Tax Act and section 2(24)

of the VAT Act.

(2) In the present case, the sale price remained unchanged. The discounted portion of the sale price would represent the unrealised sale

consideration. It did not emanate from any trade practice and, therefore, cannot be categorised as a trade discount.

(4) In case of a trade discount, the rate of discount must be known before or at least at the time of sale. Discount cannot be left uncertain to be

decided at a later stage long after the sale is completed as in the present case.

(5) The public trust doctrine does not apply. It is purely a commercial transaction between a seller and a buyer. In any case, the State Government

cannot be prevented from realising its rightful sales tax.

(6) In support of his contentions, counsel relied on the following decisions:

(1) In case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Motor Industries Co., Ernakulam, , in which

it was observed as under (page 52 in 53 STC):

6. . . . There may also be cases where the buyer may become entitled to an extra allowance for some service unconnected with the sale of the

goods in question being rendered to the seller. In such cases the allowance in the price of the goods sold given by the seller to the buyer either by

way of consideration for the goods supplied by the buyer to the seller or for services rendered by the buyer to the seller would not be a trade

discount as such which would qualify for deduction in the determination of the taxable turnover . . .

(2) In case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, in which the seller gave a warranty discount for the

manufacturing defect in the tyres sold to the purchasers. The Supreme Court held that such warranty discount was not in the nature of trade

discount. It was only a refund for the manufacturing defect and the tyres sold.

(3) In case of Commnr. of Central Excise, New Delhi Vs. M/s. Vikram Detergent Ltd., in which the component of damage discount to

compensate the buyer of damaged goods was held not deductible for computation of excise duty.

(4) In case of Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another, , where the Division Bench of the Gujarat High Court noted

that after the goods were sold and delivery taken, the invoices on the basis of original contract price were prepared. Later on discount was given

through the credit note. Such discount was in the nature of a lump sum. It was held that such reduced price could not be excluded for the

computation of turnover.

5. Section 7 of the VAT Act pertains to levy of tax on turnover of sales and rates of tax. Sub-section (1) thereof provides that subject to the

provisions of the Act, there shall be levied a tax on the turnover of sales of goods specified in Schedule II or Schedule III at the rate set out against

each of them in the respective Schedule. The ""taxable turnover"" defined under section 2(30) of the VAT Act means the turnover of all sales or

purchases of a dealer during the prescribed period in any year, which remains after deductions provided in the said provision. The term ""turnover

of sales"" is defined in section 2(33) of the VAT Act as under:

(33) "turnover of sales" means the aggregate of the amount of sale price received or receivable by a dealer in respect of any sale of goods made

during a given period after deducting the amount of sale price, if any, refunded by the dealer to a purchaser, in respect of any goods purchased and

returned by the purchaser within the prescribed period.

6. The term ""sale price"" is defined under section 2(24) of the VAT Act as under:

(24) "sale price" means the amount of valuable consideration paid or payable to a dealer or received or receivable by a dealer for any sale of

goods made including the amount of duties levied or leviable under the Central Excise Tariff Act, 1985 or the Customs Act, 1962 and any sum

charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, and includes,--

(a) in relation to,--

(i) the transfer, otherwise than in pursuance of a contract, of property in any goods,

(ii) the transfer of the right to use any goods for any purpose, whether or not for a specified period,

(iii) the supply of goods by any unincorporated association or body of person to a member thereof,

(iv) the supply by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating),

the amount of cash, deferred payment or other valuable consideration paid or payable therefore;

(b) in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, such

amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works

contract, the amount representing labour charges for such execution;

(c) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to

a person for such delivery;

7. Terms defined in Gujarat Sales Tax Act, 1969, Central Sales Tax Act and VAT Act are substantially similar. We may therefore, concentrate on

such provisions as contained in the VAT Act.

8. The entire focus of the controversy revolves around the expression ""the amount of sale price received or receivable by a dealer in respect of any

sale of goods"". In facts of the case, what would be the amount of sale price received or receivable by ONGC from OMC is the fundamental

question. According to ONGC, it is the finally computed sale price which alone would qualify as one being received or receivable. The State

however, contends that it is the originally invoiced price and not the discounted price which would be receivable, whether received or not.

9. In this context, we may peruse the facts more minutely. As noted and even otherwise undisputedly ONGC was under an obligation to implement

the policy of the Central Government and carry out such directives as may be issued from time to time in public interest. The fact that ONGC

therefore, was bound by the price mechanism created by the Central Government from time to time is not in dispute. Whether under the controlled

price mechanism or under any other formula, it was only that price which the Central Government would authorise the ONGC to collect from the

OMCs that the ONGC could charge. It was also not in dispute that it is only such price which the ONGC actually collected from OMCs during

the period under consideration. From the documents on record we notice that till March 2002, the prices of specified petroleum products such as

PDS kerosene, LPG for domestic cooking, etc., were regulated through Administrated Price Mechanism (""APM"", for short). The Ministry of

Petroleum and Natural Gas passed a resolution dated March 28, 2002 and decided to dismantle the APM with effect from April 1, 2002.

Relevant portion of such resolution reads as under:

2. Pursuant to the decisions contained in the aforesaid resolution of November 1997, the Government have now decided to dismantle the APM in

the hydrocarbon section with effect from April 1, 2002. The details of the decisions are given below. . .

. . .

(iv) The price of indigenous crude oil of Oil and Natural Gas Corporation Ltd. and Oil India Ltd. will be market determined with effect from April

1, 2002.

. . .

(vii) A cell, by the name/Petroleum Planning and Analysis Cell'' will be created under the Ministry of Petroleum and Natural Gas effective April 1,

2002 to assist the Ministry. The expenditure on this cell will be borne by the Oil Industry Development Board (OIDB).

10. It appears that such dismantling of the APM had serious adverse impact on the consumers of such products. The Government of India

therefore, had to device a new mechanism by which the end consumers did not have to bear the full burden on such products directly or indirectly.

The Government would therefore, continue to subsidize such products even post APM in some manner or other. Eventually, the Ministry of

Petroleum and Natural Gas issued a detailed circular dated October 30, 2003 providing for a broad methodology for ensuring that the end

consumers receive such products at an affordable cost. Relevant portion of the said circular reads as under:

As you are aware, PDS kerosene and domestic LPG continue to be subsidized products post APM. The Government had earlier notified The

PDS kerosene and Domestic LPG Subsidy Scheme, 2002" on January 28, 2003 for administering post APM subsidies on these products. The

issue of post APM pricing of PDS kerosene and domestic LPG has been reexamined by the Government and it has been decided that the Oil

Marketing Companies (OMCs), viz., IOC (including IBP), BPC and HPC will not increase the selling prices of these products during 2003-04.

The resultant under-recoveries of OMCs would be absorbed/shared amongst the oil companies.

2. Based on the methodology adopted in computing the costs under The PDS Kerosene and Domestic LPG Subsidy Scheme, 2002" and

assuming (i) average international prices of kerosene and LPG during 2003-04 at the same level as during 2002-03, (ii) budgetary subsidy for

2003-04 as per the allocation and (iii) projected consumption of PDS kerosene and domestic LPG during 2003-04 the under-recoveries of

OMCs during 2003-04 on account of non-revision in the selling prices of PDS kerosene and domestic LPG, have been assessed. The amount of

actual under-recoveries would however, depend, inter alia, upon prices of these products, growth in domestic demand, taxation structure and

other related factors. The Government has considered the matter and decided that following broad mechanism for sharing these under-recoveries

amongst the public section oil and gas companies under the administrative control of this Ministry will be followed:

(i) OMCs would strive to make up for about 1/3rd of the projected under-recoveries by cross-subsidization through other retail products.

(ii) The balance under-recoveries of OMCs, after accounting for over-recoveries from other retail products, would be equally shared amongst the

OMCs and upstream section (ONGC and GAIL). Considering that OIL is a relatively smaller company with its operations concentrated in the

northeast region, it would be exempted from sharing the under-recoveries.

(iii) The amount of under-recovery of each OMC to be made good by the upstream sector would be equal to half of the balance under-recoveries

after taking into account the over-recoveries from other retail products with these over-recoveries adjusted amongst the OMCs in the same ratio

as the ratio of total under-recoveries from PDS kerosene and domestic LPG.

(iv) The contribution from ONGC and GAIL would come in terms of appropriate discounts on the prices of crude oil, LPG and kerosene supplied

by them to OMCs.

(v) Within the allocated sharing burden of upstream sector companies the contribution of ONGC and GAIL would be broadly in the ratio of each

company"s PAT (profit after tax) during 2002-03.

(vi) The revenue of State Governments in terms of royalty on crude oil will not be affected by the discount on ONGC"s crude oil.

11. During the pendency of the proceedings before the Tribunal, the Government of India issued a clarification letter dated November 5, 2009 in

which it was stated as under:

3. The amount of under-recoveries of OMCs on the sensitive petroleum products depend upon, inter alia, the international oil prices and domestic

demand. Hence under-recoveries and discounts to be allowed are calculated and intimated by the Government to the public sector oil companies

at the end of each quarter. Accordingly, actual prices realized by the Upstream Oil Companies on the sale of Crude Oil, LPG (Domestic) and

PDS kerosene during 2003-04 till date are net of discounts as intimated by Government from time to time.

4. As far as payment of royalty on crude oil is concerned ONGC was initially directed that revenue of State Governments in terms of royalty on

crude oil should not be affected by the discount. However, royalty payable to the Central Government on offshore crude has always been paid on

post-discount prices or the sale price actually obtained by Upstream Oil Companies. Subsequently keeping in view the provisions of the, Oilfieilds

(Regulation and Development) Act 1948, the Petroleum & Natural Gas Rules, 1959, the Petroleum & Natural Gas (Amendment) Rules, 2003 and

Notifications issued thereunder. ONGC"s representation and the opinion of the Ministry of Law on the issue, the decision to pay onshore royalty

on post-discount prices, i.e., on the actual sale price realised, was conveyed by the Government in May 08.

5. In view of the above, it is clarified that

(a) The mechanism under which upstream oil companies issue price discounts to OMCs is not their internal arrangement but decisions taken at the

level of the Union Cabinet from time to time.

(b) The above burden sharing mechanism effective from 2003-04 is still in vogue and offering of discounts is not a post-sale event. As explained in

para 3 above, discounts are calculated and communicated by Government on a quarterly basis.

(c) During 2003-04 to 2007-08, royalty on onshore crude was paid by ONGC on pre-discount prices on the specific directive from Government,

which was subsequently reviewed and modified keeping in view the provisions of ORD Act and P & NG Rules.

12. It is undisputed that such mechanism operates even today and operated during the entire period under consideration. It can be seen that to

ensure that the prescribed petroleum products reach the end consumers at affordable cost, the same had to be sold at lower than the market price

or at times even lower than the production or procurement cost. Instead of subsidizing this component of loss by the Government, under the said

circular dated October 30, 2003, it was envisaged that the 1/3rd of the under-recoveries would be borne by the OMCs by cross-subsidization

through other retail products. The balance of 2/3rd under-recoveries would be equally shared amongst OMCs and the upstream sector, i.e.,

ONGC and GAIL. It was provided that the contribution from ONGC and GAIL would come in terms of appropriate discounts on the price of

crude oil, LPG and kerosene supplied by them to OMCs.

13. This price fixing mechanism also required complex economic considerations. The precise rate at which therefore, even under this regime the oil

companies would sell their petroleum products to the OMCs had to be decided by the Government of India based on range of factors. Such

factors would include the international oil price, the local demand and the local manufacturing cost of the oil products. The Government would also

have to take into consideration other factors such as the burden of public sector companies, effect of any price increase on economy and inflation.

Complex economic factors would have to be balanced. Since all these factors would not be known in advance, the Government of India would fix

a provisional rate at which the oil companies would supply such petroleum products to the OMCs. The situation would be reviewed quarterly and

at the end of the quarter, the Government of India would finalise the price of such petroleum products already supplied for the past quarter. The

periodical sales during the quarter in question would be invoiced on the basis of such provisional rates declared by the Government of India. Once

final computation is done and the discount is declared finally for such period, the ONGC would issue credit note or debit note depending on the

fluctuations as compared to provisional price earlier declared by the Government of India. Several such invoices at the time of actual sale and the

credit notes subsequently issued on the basis of finalisation of the discounted rates are on record to demonstrate this cycle. Short question is, which

component would qualify for computation of turnover. In other words, originally invoiced price or the subsequently discounted price would form

the basis for sale price of the goods released or realisable.

14. In our understanding, it is the final price which the ONGC received from the OMCs which alone can form part of the taxable turnover. As

noted, under the price control mechanism, ONGC was under an obligation to sell its specified petroleum products at the rate fixed by the

Government of India. To ensure that such petroleum products are available to the consumer at affordable price, the Government of India devised a

mechanism where such products would be sold by ONGC and other oil companies to the OMCs at a price less than the market price or may even

be less than its procurement price. Such component the ONGC and other oil companies had to bear from their other profit making products by

cross-subsidizing the sale of specified petroleum products. This was in substitution of earlier price control mechanism where Government of India

would bear the burden by subsidizing such products. In essence, ONGC could charge only such rate from OMCs as Government of India

directed. The precise computation of the rate required complex considerations of economic and other aspects. Various factors such as cost of

production for procurement of all products, the international price of the product, the local demand and of course, the other economic

considerations such as the ability of the various stake holders to absorb the loss,, would enter into consideration. Since all these parameters would

not be known before hand, the Government of India would announce provisional prices for such products. We are informed that the broad formula

adopted for such purpose was the crude price in international market minus the last discount which would prevail for a quarter. At the end of the

quarter after taking into consideration all the relevant factors, Government of India would declare the final price. Since for the petroleum products

already supplied by ONGC to OMCs during such quarter, the invoices would have been raised on the basis of provisional discount, the

adjustment would have to be done on the basis of final discount declared by the Government of India. Though in most cases, the final discount may

be higher than the provisional discount earlier declared, it is entirely possible that in some cases, such final discount may be lower than the

provisional price. ONGC would eventually therefore, adjust its accounts with OMCs by raising either the debit note or credit note as may be

required.

15. Under no consideration any price other than the final price so arrived at, can be stated to be the price of goods sold either realised or

realisable. From the outset the terms between ONGC and OMCs were clear. ONGC would supply the petroleum products to the OMCs at a

price that may be fixed by the Government of India. Initially though such products were invoiced at the provisional price, the final bills would be

raised by adjusting such provisional price with the finally fixed price by Government of India. Thus only this final price which would be received or

receivable by ONGC and no more. In essence, therefore, additional component other than the final price never entered the turnover. Merely

because its precise computation was differed at a later point of time, would not change the situation.

16. Perhaps it is a misnomer though consistently so referred to as Government of India as well as by ONGC, to term this component as discount.

A discount is reduction in catalogue price for any reason recognised by the trade. In the present case, there is no prefixed price which as per the

trade practice is reduced by a discount given by the seller to the purchaser. It is a case where under a price control regime under the directives of

Government of India, ONGC is obliged to sell its products at lesser than the market price. These terms are determined even before the sale. Initial

invoices at the time of actual supply of petroleum products by ONGC were merely provisional. They were based on provisional price fixation by

the Government. They were never meant to reflect final sale consideration for the goods sold. They were always subject to adjustment once the

Government of India finally declared the reduced rate of specified petroleum products. Comparing the invoiced price with the finalised price after

adjustment, was a complete fallacy. Even invoiced price whenever based on provisional price fixed by the Government, was always below the

market price which the ONGC could have fetched.

17. Merely because such adjustments were made post sale, would not change the situation. Firstly, because even before the sale it was always

clear that ONGC would charge and OMCs would be obliged to pay only such price as Government of India may finally fix. Merely because its

precise computation was deferred, since it required taking into consideration complex economic and other factors, would not mean that this was a

case of waiver of the sale price by ONGC. We therefore, would have to clearly distinguish this case from a case where a seller for whatsoever

reason forgoes a part of the sale consideration receivable from the purchaser after the sale is completed. In such a case, the State''s contention of

under-realisation of the sale price or waiver by way of bad debt would be well received. In the present case, event of charging reduced price from

OMCs was pre-decided. Be it in the form of discount or in form of reduced sale price, ONGC would receive only such sale price as Government

of India would fix for a quarter. All along the invoices were raised on provisional basis. Term ""provisional"" is described in Advanced Law Lexicon

by P. Ramanatha Aiyar (3rd edition Reprint 2009) as ""temporary, preliminary; tentative; taken or done by way of precaution or ad interim. Not

final, temporary in nature"". Thus when ONGC raised invoices at the time of actual supply of petroleum products to OMCs, price indicated there

was merely provisional, temporary, and ad hoc and always subject to finalisation once the Government of India issued final directives of the rate of

petroleum products. Nothing prevented the seller from selling products below the cost price unless prohibited by some law either voluntarily or

under compulsion. It is this price realised which would be the sale price and not its cost price. Merely because it is determined later does not

change this because each invoice was provisional and was thus subject to positive or negative adjustment.

18. This is precisely how the Division Bench of the Madhya Pradesh High Court in case of M/s. Gail India Ltd. Vs. State of M.P. and Others, ,

has viewed the situation. The court held and observed as under (page 170 in 72 VST):

16. In the present case, the provisional invoice price and final price both are controlled by PPAC. The petitioner has no liberty to fix price. The

change in sale price is due to the directions and fixation of price by PPAC because the domestic LPG is being sold to a consumer on a subsidized

price and shortfall has been made good by the manufacturing companies and oil marketing companies on sharing basis as directed by MOP and

NG and also partly from the contribution of Central Government through issue of oil bonds. Hence in our opinion, the sale price of LPG in the case

of the petitioner would be the price fixed by the petitioner after deduction in primary invoice on the basis of credit notes issued subsequently

because that was the price, which was released by the petitioner effectively and fixed under the price fixation mechanism. The authority committed

an error of law in disallowing the deductions from total turnover on the basis of credit notes issued to oil marketing companies which had resulted

reduction in the turnover and liability of tax of the petitioner.

19. In case of IFB Industries Ltd. Vs. State of Kerala, , the Supreme Court observed that there is nothing in the Kerala General Sales Tax Act or

Rules made thereunder which would provide that a discount in order to qualify for exemption must be shown in invoice itself.

20. In case of Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam Vs. Advani Oorlikon (P) Ltd., the Supreme

Court in context of trade discount held and observed that though section 2(h) of the Central Sales Tax Act permits deduction of sums in the nature

of cash discount and makes no reference to sums allowed by way of trade discount, the trade discount would not form part of the turnover since it

does not enter into the composition of sale price. It was observed as under (pages 34 and 35 in 45 STC) :

6. Under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are

sold by the assessee. In a case where trade discount is allowed on the catalogue price, the sale price is the amount determined after deducting the

trade discount. The trade discount does not enter into the composition of the sale price, but exists apart from and outside it and prior to it. It is

immaterial that the definition of "sale price" in section 2(h) of the Act does not expressly provide for the deduction of trade discount from the sale

price. Indeed, having regard to the circumstance that the sale price is arrived at after deducting the trade discount, no question arises of deducting

from the sale price any sum by way of trade discount.

21. Merely because for computation of royalty payable to the State, it is the full and not discounted price which is taken into account would not

alter the situation. As is well known the royalty is paid to a State for exploitation of the natural resources located in the State. The Government of

India had specifically provided that for the purpose of computing the royalty, it would be the full and not the discounted rate which would be taken

into consideration. The appellate authority and the Tribunal were unduly influenced by this factor. This dichotomy therefore, would not in any

manner throw any light on the nature of transaction between the ONGC and OMCs.

22. We may now refer to the decisions cited by learned Advocate General. In case of Madras Fertilisers Limited Vs. Asst. Commissioner

(Assessment), Agrl. Income Tax and Sales Tax Dept. and Another, , the apex court did observe that there may be cases where the buyer may

become entitled to an extra allowance for some service unconnected with the sale of goods and in such cases, such discount would not qualify for

deduction in the determination of taxable turnover. Such are not the facts in the present case.

23. In case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, , the seller had given discount to the purchaser for

repurchase of tyres since the earlier lot suffered from some defect. It was observed that the purchaser would have refused or accept such

arrangement and insist on cash refund which the assessee was bound to accept. In such a case, such refund would not amount to trade discount.

24. In case of Commnr. of Central Excise, New Delhi Vs. M/s. Vikram Detergent Ltd., , relying on the decision of the Supreme Court in case of

Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, , the Supreme Court rejected the claim for damage discount which

was given in order to compensate the buyer for damaged goods which was admittedly on account of damages suffered after removal of goods

from factory.

25. In case of Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another, , the court found that the sale price was as per original

contract price. The remission was given later on through credit notes and that too in lump sum. This was so done after the purchaser had taken

delivery of goods. Only the obligation to pay the contract price remained. It was further held that remissions were not by reducing the rates agreed

to in the contract but through credit notes and that too in lump sum. It was therefore, held that this was not a case of novation or recession of the

contract. It was on such basis that the claim for deduction from the turnover of the component of price forgone by seller was rejected.

26. The observations of the Tribunal that ""the OMCs are liable to pay the sale price to the appellant as per the invoices raised against them. They

might have paid less sale price only because of the fact that they were given compensation for their agreeing not to increase the price of crude oil,

PDS kerosene and domestic LPG to the consumers with the increase of international oil prices"", are based on no materials and only on conjectures

and in any case, not in any manner relevant to the controversy on hand. Further the observation that ""such a practice adopted by the appellant

under the mandate of the Central Government is virtually amounting to restrictive trade practice and an artificial determination of sale price which is

prohibited under the Competitions Act"", with respect, was not borne out from any material on record. We wonder whether the Tribunal accused

the Central Government of restrictive trade practice by providing for an artificial determination of the sale price of the PDS kerosene and LPG for

domestic use. In what manner the same was prohibited under any law is not demonstrated. In any case, such price fixation was never under

challenge before the Tribunal. In the result, the question is answered in the affirmative, i.e., in favour of appellant and against the Revenue.

Judgment of the Tribunal is to the above extent reversed. All appeals are allowed and disposed of.