

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

HON'BLE SRI JUSTICE MANOJ KUMAR TIWARI

AND

HON'BLE SRI JUSTICE RAVINDRA MAITHANI

COMMERCIAL TAX REVISION NO. 44 OF 2022

BETWEEN:

Prabhagiya Vipnan Prabandhak Uttarakhand Forest
Development Ramnagar Revisionist.

And

Commissioner Commercial Tax Uttarakhand, Dehradun

....Respondent.

With

COMMERCIAL TAX REVISION NO. 23 OF 2013

(DECIDED REVISION)

BETWEEN:

Prabhagiya Vipnan Prabandhak Uttarakhand Van Vikas Nigam
.....Revisionist.

And

Commissioner Commercial Tax Uttarakhand, Dehradun

....Respondent.

With

COMMERCIAL TAX REVISION NO. 45 OF 2022

BETWEEN:

Prabhagiya Vipnan Prabandhak Uttarakhand Revisionist.

And

Commissioner Commercial Tax Uttarakhand, Dehradun

....Respondent.

Presence:

Mr. V.K. Kaparuwan, learned counsel for the revisionist.

Mr. J.P. Joshi, learned Additional Advocate General assisted by Mr. Mohit Maulekhi and Ms. Puja Banga, learned Brief Holders for the State- respondent.

Judgment Reserved on: 14.06.2023

Judgment Delivered on: 11.07.2023

The Court made the following:**COMMON JUDGMENT:**(per Hon'ble The Chief Justice Sri Vipin Sanghi)

This reference has been made to the Larger Bench by the Division Bench *vide* order dated 21.04.2023. Insofar as, it is relevant, the order of reference reads as follows:-

"4. The question of law which arises for consideration in the present revision is whether Mandi Fees charged by the Mandi could be treated as a part of sale price under Section 2(42) of the Uttarakhand Value Added Tax Act.

5. The revisionist places reliance on a judgment rendered by a Co-ordinate Bench of this Court in Commercial Tax Revision No.23 of 2013, dated 22.04.2022. The Co-ordinate Bench has held in Paragraph Nos.14 to 16 of the said judgment as follows:-

"14. Looking from another angle, the term 'sale price' has been defined under Sub-Section 42 of Section 2 of the Uttarakhand VAT Act, 2005. It reads as follows:-

*(42) "**Sale Price**" means the amount of valuable consideration received or receivable by a dealer for sale of any goods and shall include any sum charged for anything done by the dealer in respect of goods at the time or before the delivery thereof, excise duty, special excise duty or any other duty or tax but shall not include-*

(a) any sum allowed by the seller of goods to the purchaser as cash discount, commission or trade discount according to normal trade practice, at the time of sale of goods;

(b) the cost of outward freight or delivery or the cost of installation in cases where such cost is separately charged;

(c) the amount of tax under this Act, if separately charged by the dealer;

Explanation.- For the purpose of this sub-section "Sale Price" includes;-

(a) in relation to the delivery of goods on hire purchase or any other system of payment by installments, the total amount of valuable consideration including deposit or other initial payment in order to complete the purchase or the acquisition of the property in goods. It includes hire charges, interest and other charges incidental to such transaction, but does not include any sum payable as penalty or as compensation or damages for breach of agreement;

(b) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hire charges received or receivable for such transfer of right to use goods but does not include any sum payable as a penalty or as compensation or damages for breach of agreement;

(c) in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, the valuable consideration paid or payable to a person for the execution of such works contract, less the actual amount representing labour and such other charges as may be prescribed, but does not include any sum payable as a penalty or as compensation or damages for breach of agreement;

(d) the amount of duties paid or payable under Central Excise Act, 1944, or Customs Act, 1962, or U.P. Excise Act, 1910, as applicable in Uttarakhand, in respect of such goods at the time of clearance of the goods from bonded warehouse, whether such duties are paid or payable by or on behalf of the seller or by any other person;

(e) the price of packing material in which goods sold are packed;

15. Thus, it is clear though specifically there is no mention that market fees will be excluded from the sale

price, it is apparent that the following sums are included in the sale price: (i) the sum charged for anything done by the dealer in respect of goods at the time or before the delivery thereof; (ii) excise duty; (iii) special excise duty or any other duty or tax but shall not include: (a) any sum allowed by the seller of goods to the purchaser as cash discount, commission or trade discount according to normal trade practice, at the time of sale of goods; (b) the cost of outward freight or delivery or the cost of installation in cases where such cost is separately charged; and (c) the amount of tax under the Act, if separately charged by the dealer.

16. Thus, it is clear that any sums that are paid prior to the delivery, or at the time of delivery, are included in the sale price, but such sums which are allowed by the seller of the goods to the purchaser, or outward freight or delivery etc. are excluded, including tax under the Act. Thus, we are of the opinion that in view of the Hon'ble Supreme Court in M/s Anand Swarup Mahesh Kumar (supra), the sale price shall not include the Mandi Shulk that is collected by the Nigam and deposited with the funds of the Committee. We are further of the opinion that the view taken by the learned Single Judge in M/s Ashok Kumar v. State of Uttarakhand and others; Civil Misc. Writ Petition No. 681 of 2009 decided on 01.09.2010 is not a correct view."

6. Consequently, the said revision preferred by the assessee was allowed by this Court.

7. Prima facie, it appears to us that the said decision rendered by this Court requires reconsideration. We say this because the definition of the expression 'sale price', contained in Section 2 (42) clearly states that the sale price means the amount of valuable consideration received or receivable by a dealer for sale of any goods, which shall also include elements of excise duty, special excise duty, 'or any other duty or tax'.

8. The Mandi shulk collected by the dealer is passed on by the dealer as a part of its sale price to the purchaser. In fact, a perusal of Paragraph No.15, and the earlier part of

Paragraph No.16, as quoted hereinabove, shows that the Division Bench also took notice of the aforesaid provision. However, the Division Bench went on to hold that the sale price shall not include Mandi Shulk that is collected by the Nigam and deposited with the funds of the Committee, for which we find no justification.

9. Accordingly, we refer the judgment of the Division Bench in Commercial Tax Revision No.23 of 2013, dated 22.04.2022, for fresh consideration to a larger Bench.”

2. Learned counsel for the revisionist has placed the judgment of the Division Bench judgment of this Court in ***Commercial Tax Revision No.23 of 2023, Prabhagiya Vipran Prabandhak Uttarakhand Van Vikas Nigam v. Commissioner, Commercial Tax, Uttarakhand, Dehradun***, decided on 22.04.2022. He submits that, while deciding the said CTR, this Court has relied upon the judgment of the Supreme Court in ***M/s Anand Swarup Mahesh Kumar v. Commissioner of Sales Tax, (1980) 4 SCC 451***, wherein the Supreme Court- while dealing with a case arising out of the U.P. Sales Tax Act, 1948, examined the nature of charge i.e. market fees payable by the purchaser under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (U.P. Act No.XXV of 1964) (*hereinafter referred to as the 'Adhiniyam'*). While considering the issue whether the market fees and *dami* payable to the Commission Agent operating within the market area established under the Adhiniyam, could be included in the turnover of purchases of the appellant firm, (which was carrying on the business as a

dealer defined in the U.P. Sales Tax Act, 1948), (for the purpose of the U.P. Sales Tax Act, 1948), the Supreme Court held that the market fee or Mandi Shulk could not be included in the turnover of purchases of the dealer.

3. The submission is that the Supreme Court examined Section 17(iii)(b) of the Adhiniyam which empowered the Market Committee to levy and collect market fees payable on transactions of sale of specified agricultural produce in the market area. The manner of realization of market fees, as stipulated in Section 17(iii)(b) of the Adhiniyam, after the amendment by virtue of U.P. Act No.7 of 1973, w.e.f. 12.06.1973, was as follows:-

"(1) if the produce is sold through a commission agent, the commission agent may realize the market fee from the purchaser and shall be liable to pay the same to the Committee;

(2) if the produce is purchased directly by a trader from a producer the trader shall be liable to pay the market fee to the Committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realize it from the purchaser and shall be liable to pay the market fee to the Committee; and

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee to the Committee".

4. The Supreme Court upheld the submission of the appellant-assessee that when a dealer (who in that case was a Commission Agent) is permitted, by law, to collect the market fees from the purchasers, which he is liable to pay to the Market Committee, such market fees cannot form part of

the consideration for sale, and therefore, cannot be included in the turnover of purchases for the purpose of levy of tax under the U.P. Sales Tax Act, 1948.

5. In ***M/s Anand Swarup Mahesh Kumar*** (supra) the appellant placed reliance on the judgment of the Supreme Court in ***Joint Commercial Officer Division II. Madras-2 etc. v. Spencer & Co. etc. etc., (1975) 2 SCC 358***, wherein it was held that the Sales Tax which a seller of foreign liquor was liable to pay under Section 21-A of the Madras Prohibition Act, 1937 did not form part of the turnover on which sales tax could be levied under the Madras General Sales Tax Act, 1959, because the seller was statutorily entitled to recover the sales tax payable by him from the purchaser.

6. After examining Section 21-A of the Madras Prohibition Act, 1937, and taking note of the observations made by the Supreme Court in ***Spencer & Co.*** (supra), the Supreme Court held in Paragraph No.15 of its judgment in ***M/s Anand Swarup Mahesh Kumar*** (supra), as follows:-

"15. We do not find any substantial difference between Section 21-A of the Madras Prohibition Act 1937 and Section 17(iii)(b) (1) of the Adhiniyam. Whereas the levy under Section 21-A of the Madras Prohibition Act, 1937 was, sales tax payable to the State Government, under Section 17(iii)(b)(1) of the Adhiniyam, the levy in question is market fees payable to the Market Committee and secondly whereas the former question stated that "every person or institution which sells foreign liquor.....shall collect from the purchaser and pay over to the

Government.....”, the latter provision states that that “if the produce is sold through a commission agent, the commission agent may realize the market fees from the purchaser and shall be liable to pay the same to the Committee”. The levies in both the cases are statutory although under the Madras Prohibition Act, 1937, it is a tax payable to the Government and under the Adhiniyam, it is a fee payable to a Market Committee which is a statutory body. The only distinguishing feature between the two laws is that whereas the Madras Act provides that every person who sells foreign liquor shall collect sales tax from the purchaser, the Adhiniyam provide that the commission agent may realize the market fees from the purchaser. The use of shall in the former case and of may in the latter case is not of much consequence in so far as the question involved in the present case is concerned because in both the cases the seller or the commission agent who is liable to pay the tax or the fee, as the case may be, is entitled statutorily to realize from the purchaser and wherever a dealer is authorized by law to do so, the tax or fee realized by him from the purchaser cannot be treated as part of the turnover for purposes of levy of sales tax. The contention of the appellant that market fees payable under the Adhiniyam cannot be included in the turnover of purchases has, therefore, to be upheld”.

7. Learned counsel for the revisionist, therefore, submits that the Supreme Court having already ruled on the nature of levy under Section 17(iii)(b) of the Adhiniyam, and having come to the conclusion that the same cannot be included in the turnover of the dealer, the Division Bench rightly held that the Mandi Shulk did not form part of the 'sale price', as defined in Section 2(42) of the Uttarakhand Value Added Tax Act, 2005.

8. On the other hand, the submission of Mr. J.P. Joshi, learned Additional Advocate General, is that the Supreme Court, while deciding the case of **M/s Anand Swarup**

Mahesh Kumar (supra), was concerned with the provisions of the U.P. Sales Tax Act, 1948. Section 2(gg) thereof, defined the expression 'purchase price' differently and narrowly, when compared to the definition of 'sale price', contained in Section 2(42) of the Uttarakhand VAT Act. He submits that, therefore, the Division Bench erred in proceeding to decide the CTR No.23 of 2013, without examining and appreciating the aforesaid difference in the language used in Section 2(gg) of the U.P. Sales Tax Act, 1948, which defines the expression 'purchase price', and the language used in Section 2(42) of the Uttarakhand VAT Act, 2005, which defines the expression 'sale price'.

9. Section 2(gg) of the U.P. Sales Tax Act, which has also been extracted in the judgment of the Supreme Court in **M/s Anand Swarup Mahesh Kumar** (supra), reads as follows:-

"2 (gg) purchase price means the amount of valuable consideration paid or payable by a person for the purchase of any goods, less any sum allowed by the seller as case discount according to trade practice and shall include any sum charged for anything done by the seller in respect of the goods at the time of or before, delivery thereof, other than the cost of freight of delivery or the costs of installation when such cost is separately charged."

10. On the other hand, Section 2(42) of the Uttarakhand VAT Act, 2005, which defines 'sale price', reads as follows:-

"2(42) **"Sale Price"** means the amount of valuable consideration received or receivable by a dealer for sale of any goods and shall include any sum charged for anything done by the dealer in respect of goods at the time or before the delivery thereof, excise duty, special excise duty or any other duty or tax but shall not include-

- (a) any sum allowed by the seller of goods to the purchaser as cash discount, commission or trade discount according to normal trade practice, at the time of sale of goods;
- (b) the cost of outward freight or delivery or the cost of installation in cases where such cost is separately charged;
- (c) the amount of tax under this Act, if separately charged by the dealer;

Explanation.- For the purpose of this sub-section "Sale Price" includes;-

- (a) in relation to the delivery of goods on hire purchase or any other system of payment by installments, the total amount of valuable consideration including deposit or other initial payment in order to complete the purchase or the acquisition of the property in goods. It includes hire charges, interest and other charges incidental to such transaction, but does not include any sum payable as penalty or as compensation or damages for breach of agreement;
- (b) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hire charges received or receivable for such transfer of right to use goods but does not include any sum payable as a penalty or as compensation or damages for breach of agreement;
- (c) in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, the valuable consideration paid or payable to a person for the execution of such works contract, less the actual amount representing labour and such other charges as may be prescribed, but does not include any sum payable as a penalty or as compensation or damages for breach of agreement;
- (d) the amount of duties paid or payable under Central Excise Act, 1944, or Customs Act, 1962, or U.P. Excise Act,

1910, as applicable in Uttarakhand, in respect of such goods at the time of clearance of the goods from bonded warehouse, whether such duties are paid or payable by or on behalf of the seller or by any other person;
(e) the price of packing material in which goods sold are packed;"

11. Learned Additional Advocate General further submits that a learned Single Judge of this Court had interpreted Section 2(42) of the Uttarakhand VAT Act in ***M/s Ashok Kumar v. State of Uttarakhand & others, Civil Misc. Writ Petition No.681 of 2009***, decided on 01.09.2010, and held that the Mandi Shulk realized by the Commission Agent or Arhatiya in the transaction of sale or purchase of agricultural produce, formed part of 'sale price' under Section 2(42) of the Uttarakhand VAT Act. The learned Single Judge dealt with the submission of the assessee premised upon ***M/s Anand Swarup Mahesh Kumar*** (supra). The submission of the learned Brief Holder appearing for the State, was taken note of in Paragraph No.11 by the learned Single Judge, which reads as follows:-

"Learned Brief Holder appearing on behalf of the State has urged that Uttaranchal Value Added Tax Act, 2005 (Act No.29 of 2005) has been amended by Act No.05 of 2008, and definition of 'Sale Price' has been included under Section 2 sub-section 42 of the Act and nowhere it has been mentioned therein that market fee collected by the dealer shall be excluded for the purposes of levy of tax. Learned Brief Holder also submitted that plain reading of definition of 'Sale Price' clearly point out towards 'any other duty' which denotes to 'any other shulk' in Hindi version and market fee collected by the dealer/ commission agent is covered under this head".

12. The learned Single Judge then proceeded to consider the issue in Paragraph Nos.15 to 20 of his judgment, which read as follows:-

"15- It is also pertinent to mention here that in the definition of "Sale Price" it has been specifically mentioned that cash discount, commission or trade discount, cost of outward freight or delivery or the cost of installation in case where such cost is separately charged and the amount of tax under this Act, if separately charged by the dealer, shall not include, but nowhere it has been mentioned that market fee (Mandi Shulk) would not be included in the "Sale Price".

16- Learned counsel for the petitioner further contended that a fee cannot be deemed to be a tax. In support of his contention learned counsel has cited before me the case of Sri Krishna Das vs. Town Area Committee, Chrgaon, reported in (1990) 3 Supreme Court Cases 645. The Hon'ble Apex Court in paragraph 22 of the above cited case has observed that a fee is not ordinarily considered to be a tax. However if the object of the fee is to provide general revenue of the authority rather than to compensate it, and the amount of the fee has no relation to the value of the services, the fee will amount to a tax.

17- Therefore, it is quite clear that a fee may be termed as a tax, where the fee is to provide general revenue of the authority rather than to compensate it, and the amount of fee has no relation to the value of the services, the fee will amount to tax. The respondents in their counter affidavit has specifically stated that the Mandi Shulk is charged in the sale memo/bill forms which is an integral part of the Sale Price and the same should be included in the sale price for calculation and charging of tax under the Value Added Tax. It does mean that Mandi Shulk is to provide

general revenue of the authority. Therefore, the submission of learned counsel for the petitioner in this regard is not tenable.

18- So far as the observations made by the Hon'ble Apex Court in the case of M/s Anand Swarup Mahesh Kumar v. The Commissioner of Sales Tax, reported in AIR 1981 Supreme Court 440, (supra) is concerned, as stated earlier, the question before me is to the effect that whether the definition of "Sale Price" given under Section 2(42) of Uttarakhand (The Uttaranchal Value Added Tax Act, 2005) Amendment Act, 2008, includes the market fee (Mandi Shulk) or not, therefore, the observations of Hon'ble Apex Court cannot be taken into account to solve the controversy before this Court.

19- It will not be out of place to mention here that the petitioner has not challenged the validity of the definition of 'Sale Price' given under Section 2 of Sub-section 42 of the Act, rather he has sought the relief for the quashment of impugned circular, in which the respondent No.1 has made interpretation to this effect that Mandi Shulk is included in the 'Sale Price'.

20- Therefore, in view of discussion made above, and in the peculiar facts and circumstances of the case, I find that the petitioner is not entitled to get the relief sought by him in the instant writ petition and the same is liable to be dismissed."

13. Mr. Joshi submits that, even though the judgment in **M/s Ashok Kumar** (supra) was cited before the Division Bench, which decided CTR No.23 of 2013, and even though, in Paragraph No.15, the Division Bench observed that there is no specific mention in Section 2(42) of the Uttarakhand VAT Act that market fees will be excluded from the 'sale price', the

Division Bench merely relied upon ***M/s Anand Swarup Mahesh Kumar*** (supra) to conclude that 'sale price' shall not include Mandi Shulk that is collected by the Nigam and deposited with the funds of the Committee. Even though, the Division Bench held that ***M/s Ashok Kumar*** (supra) was not correctly decided, the reasoning adopted by the learned Single Judge in ***M/s Ashok Kumar*** (supra) was not dealt with, and turned down, for any better reasons.

14. We have considered the submissions of learned counsels, examined the judgment of the Supreme Court in ***M/s Anand Swarup Mahesh Kumar*** (supra), the judgment of the learned Single Judge of this Court in ***M/s Ashok Kumar*** (supra), and the judgment of the Division Bench in CTR No.23 of 2013. We have also carefully examined the language of Section 2(gg) of the U.P. Sales Tax Act, 1948 which defines 'purchase price', and compared it with the definition of 'sale price' contained in Section 2(42) of the Uttarakhand VAT Act.

15. There can be no doubt that the Supreme Court in ***M/s Anand Swarup Mahesh Kumar*** (supra) drew a distinction between the levy of tax/ duty, which the dealer/ seller can statutorily pass on to the purchaser, and the levy of tax/ duty, which the dealer or seller is not statutorily entitled to pass on to the purchaser (though he may pass it on to the purchaser), and concluded that the levy of tax which can

statutorily be passed on to the purchaser, cannot form part of the 'purchase price', within the definition of that expression found in Section 2(gg) of the U.P. Sales Tax Act. However, that is not the issue before us. The real issue is whether, the Mandi Shulk, which the dealer is entitled to statutorily recover from the purchaser, falls within the definition of expression 'sale price' contained in Section 2(42) of the Uttarakhand VAT Act, or not.

16. As noticed above, the expression 'sale price' defined in Section 2(42) of the Uttarakhand VAT Act is a very widely defined expression, which means the amount of valuable consideration received or receivable by a dealer for sale of any goods, and shall include any sum charged for anything done by the dealer in respect of goods at the time or before the deliver thereof, excise duty, special excise duty or '*any other duty or tax*'. The expression '*any other duty or tax*', in our view, is clearly broad enough to include the Mandi Shulk, which is nothing but a duty which the dealer is statutorily entitled to recover from the purchaser. Merely because it is statutorily recoverable by the dealer from the purchaser, it does not cease to be '*any other duty*' within the meaning of 'sale price' defined in Section 2(42) of the Uttarakhand VAT Act.

17. That being the position, in our considered view, Mandi Shulk levied under Section 17(iii)(b) of the Adhiniyam

would fall within the definition of the expression 'sale price', as defined in Section 2(42) of the Uttarakhand VAT Act, and would be treated as a part of sale price of the goods.

18. We are, therefore, of the view that the decision of the Division Bench in CTR No.23 of 2013 is not the correct view. The Division Bench has not examined the aforesaid issue, and it failed to notice the difference in the language of 'purchase price' contained in Section 2(gg) of the U.P. Sales Tax Act, 1948, and the language of 'sale price' contained in Section 2(42) of the Uttarakhand VAT Act. On the other hand, the decision of the learned Single Judge of this Court in ***M/s Ashok Kumar*** (supra), in our view, lays down the correct position in law. The learned Single Judge, while deciding ***M/s Ashok Kumar*** (supra) has appreciated the difference in the definitions of 'purchase price' and 'sale price' as defined in the U.P. Sales Tax Act, 1948 and the Uttarakhand VAT Act respectively. We, accordingly, overrule the decision of the Division Bench in CTR No.23 of 2013, dated 22.04.2022.

19. In the light of the aforesaid, we do not find any reason to interfere with the impugned judgment dated 30.10.2021, rendered by the Commercial Tax Tribunal, Uttarakhand, Haldwani Bench, in Second Appeal No.26 of 2019 (year 2006-07)(Prov.) under Section 25(6), and Second Appeal No.27 of 2019 (year 2006-07) (Central) under Section 9(2) of the Uttarakhand VAT Act, 2005, "*M/s Divisional Sales*

*Manager, Uttarakhand Forest Development Corporation,
Ramanagar vs. Government of Uttarakhand”.*

20. Accordingly, the revisions are dismissed.

21. Pending application, if any, also stands disposed of.

(VIPIN SANGHI, C.J.)

(MANOJ KUMAR TIWARI, J.)

(RAVINDRA MAITHANI, J.)

Dated: 11th July, 2023

NISHANT