# E.I.D. Parry (I) Ltd vs Asst. Commr. Of Commercial Taxes And Anr on 17 December, 1999

## Equivalent citations: AIR 2000 SUPREME COURT 551, 2000 (2) SCC 321, 2000 AIR SCW 86, 1999 (7) SCALE 567, (1999) 10 JT 145 (SC), 2000 (1) SRJ 468, 2000 (1) LRI 175, 1999 (10) JT 145, (2000) 117 STC 457, (2000) 49 KANTLJ(TRIB) 12, (1999) 10 SUPREME 418, (1999) 7 SCALE 567

## Bench: G.T. Nanavati, V.N. Khare

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           CASE NO.:
Appeal (civil)  7517-18 of 1998

PETITIONER:
E.I.D. PARRY (I) LTD.

RESPONDENT:
ASST. COMMR. OF COMMERCIAL TAXES AND ANR.

DATE OF JUDGMENT: 17/12/1999

BENCH:
G.T. NANAVATI & V.N. KHARE

JUDGMENT:
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JUDGMENT 1999 Supp(5) SCR 466 The Judgment of the Court was delivered by NANAVATI, J. Leave granted.

These eight appeals arise out of three different judgments of the Madras High Court in Writ Petition Nos. 15530-31 of 1995,15532-35 of 1995 and 15705-15706 of 1995. S.L.P. (C) Nos. 4973-4974 of 1997 are against the decision in Writ Petition Nos. 15530-31 of 1995, S.LP. (C) Nos. 5589-92 of! 997 are against the decision in Writ Petition Nos. 15532-35 of 1995 and S.L.P. (C) Nos. 5441-52 of 1997 are against the decision in Writ Petition Nos. 15705-15706 of 1995.

The appellant in the appeals arising out of S.L.P, (C) Nos. 4973-74 of 1997 and S.L.P. (C) Nos. 5589 to 5592 of 1997 is Thiru Arooran Sugars Ltd. (hereinafter referred to as `Arooran Sugars'). Arooran Sugars is engaged in manufacturing sugar in its units at Vadapathimangalam and Tirumandankudi. The Madras Sugar Factories Control Act, 1949, (hereinafter referred to as `the Act*) the Rules framed thereunder and the Sugar Control Order, 1966 apply to its sugar manufacturing activity. In order to provide incentives to sugarcane growers and to ensure sufficient supply of sugarcane of good quality it has been announcing every year planting subsidy payable to those sugarcane growers who are able to grow, for the immediately following crushing season, that variety of sugarcane which it requires. For the year 1990-91 it had announced on 5.11.1989, planting subsidy payable to those sugarcane growers who were willing to plant Co.C.661. For those growers who were to plant that

variety in December, 1989 and January, 1990 the subsidy was to be paid at the rate of Rs. 800 per acre and for those who were to plant in February, June and July, 1990 it was to be paid at the rate of Rs. 600 per acre. On the basis of that announcement willing cane growers had entered into agreements with it. Pursuant to those agreements the sugarcane growers were supplied seeds by it and the cane growers after sowing and raising die crops had offered the same for sale to it in the prescribed manner. One of the terms of the agreement was mat sugarcane was to be delivered at the factory gate by the sugarcane growers. Price as fixed by the Central Government was to be paid against delivery of sugar cane. Though the sale contemplated by the Act was `factory gate sale' and under the agreements also the obligation of the sugarcane growers was to deliver sugarcane at the factory gate, in view of the general advice of the Tamil Nadu State Government, which was in the nature of administrative instruction, it did subsidise freight/transport charges. For the year 1990-91 the advice was that the sugarcane growers should bear transportation charges up to the distance of 30 kms. and for the distance beyond 30 kms. the charges should be borne by the sugar manufacturers. In its sales tax return for that year it did not include the amounts paid as planting subsidy and transport subsidy in its taxable turnover as according to it the same were not includible therein. The Assistant Commissioner of Sales Tax did not agree with it and assessed tax after including these amounts. Against that order and the demand raised on its basis the appellant preferred an appeal to the Deputy Commissioner but it was dismissed. The appellant then preferred an appeal to the higher appellate authority. For the years 1991-96 also it had followed the same pattern. Same view was taken by the Sale Tax authorities and against the order passed it had filed appeals and they were pending when on 6.11.1996 to avoid recurring of such situation every year it filed six writ petitions in the Madras High Court, seeking a declaration that words `aggregate*, `or delivered or supplied or otherwise disposed,' `either directly or through another', and `account of others' in the definition of the term `turnover' as contained in Section 2

(r) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as the `Tamil Nadu Sales Tax Act' and the Explanation (2)(ii) thereto are ultra vires Entry 54 of List II of the 7th Schedule of the Constitution and, therefore, subsidies and expenses incurred by the sugar manufacturers or paid to the sugarcane growers both prior to or collateral to the sugarcane agreements or after the sale and transfer of property in sugarcane from the growers to the manufacturers are outside the charging provisions of Section 3(2) of the Sales Tax Act and also for a mandamus restraining the sales-tax authorities from re-covering purchase tax by including the amounts paid as planting and transport subsidies in its taxable turn over. It had also filed some Appeals and Tax Cases but it is not necessary to refer to them.

The appellant in the other two appeals is E.I.D. Parry (I) Ltd. (hereinafter referred to as `Parry'). Parry is also engaged in manufacturing sugar. The facts relating to Parry are also similar to the facts of Arooran Sugars except that the assessment years involved are different.. Challenging the assessment orders it filed Writ Petition Nos. 15705-15706 of 1995 in the High Court as by that time others had filed writ petitions raising the same questions in the High Court. Like Arooran Sugars it also questioned the validity of die above referred expressions in Section 2 (r) and sought a similar mandamus.

The two writ petitions filed by Arooran Sugars were heard along with some other Tax Ceases by a Full Bench of the Madras High Court, as there were conflicting decisions of that Court on some of the points involved in those cases. They were dismissed by a common judgment. Other petitions filed by Arooran Sugars were dismissed later on following the judgment delivered by the Full Bench. The writ petition filed by Parry were also dismissed following the Full bench judgment in Arooran's case.

In these appeals the appellants are pressing only three points. They are

(i) whether planting subsidy paid by the appellants the cane growers can be said to be a part of the price of sugar cane purchased by it from them and can legitimately be included in the turnover of the appellants; (ii) whether the transport subsidy charges in excess of 30 kms. paid by the appellants to third party lorry owners for transporting sugarcane pursuant to the State Governments's direction can be aggregated with the price of sugarcane and included in the turnover of the appellants; and (iii) whether levy of penalty was justified in view of the facts and circumstances of these cases.

It was contended by the learned counsel for the appellants that planting subsidy given by the appellants to the cane growers was by way of an incentive to the cane growers for planting a particular variety in the stipulated months preceding the planting season. The agreements made in that behalf were anterior in point of time to the agreements of sale and being unrelated to the sale and supply of sugarcane were independent though collateral agreements. The planting subsidy were paid per acre of land and there was no obligation on the grower to grow sugarcane on particular plot of land even after accepting the subsidy. There was not contractual certainty that the grower would grow the agreed variety of sugarcane or that he would sell all the produce of that land to the appellants. The planting subsidy being unrelated to the sale of sugarcane could not have been treated as a part of the price for which the goods were bought and, therefore, could not have been rightly included in the turn over of the appellants for determining their purchase tax liability. On the other hand the contention raised on behalf of the Sales tax Authorities/respondents was that the act of giving planting subsidy for growing sugarcane followed by an agreement for sale of the sugarcane by the grower constituted one single transaction and the planting subsidy being an amount paid in relation to the goods purchased had been rightly regarded as a part of the price of sugar cane and included in the turnover of the appellants. As regards the transport subsidy, the contention of the appellants was that the transport charges were in fact paid by the appellants to third party lorry owners for transporting sugarcane beyond the distance of 30 kms (20 after 1992-93) in view of the Government's directions.

The transport charges being not the amounts charged by the growers nor being the amounts paid to them were really in the nature of post sale expenses and, therefore, could not have been lawfully treated as part of the price and included in the turnover of the appellants. The contention of the respondents, on the other hand, was that under the agreements of sale the cane growers had to deliver sugarcane at factory premises and the arrangements made by the appellants for transporting sugarcane by engaging private lorries were for the purpose of enabling the cane growers to deliver sugarcane speedily and at specified times. As transportation charges were paid by the appellants

with a view to help or assist the sugarcane growers they were really a part of the price for which sugarcane was bought by the appellants and were, therefore, rightly included in the taxable turnover of the appellants. On the question of penalty it was contended that the law on these two points was not clear as there were conflicting decisions and, therefore, there was no justification for levying any penalty as the appellants had bona fide not included in their returns the amounts of planting subsidy and transport charges in the turnovers shown in their returns. The contention of the respondents was that after the decision of the Madras High Court in Kallakurichi Co- operative Mills Ltd. v. State of Tamil Nadu, [60 STC 113] the appellants should have included the amounts of planting subsidy and transport subsidy in turnover and as they had failed to do so full amount of penalty was legally imposed upon them.

In order to consider the rival contentions, legal provisions, in the context of which they arise shall have to be seen.

The manufacturers of sugarcane in the State of Tamil Nadu are governed by the Madras Sugar Factories Control Act, 1949 and the rules framed thereunder and also by the Sugar (Control) Order, 1966. No sugarcane can be crushed in any factory without a licence. Section 8 of the Act requires the occupier of every factory to submit to the Sugarcane Commissioner on or before the specified date, an estimate, in the prescribed form and manner of the quantity of sugarcane required by that factory during the crushing season immediately following. The Sugarcane Commissioner, after taking into consideration the estimate and several material circumstances, has thereafter to declare an area to be a reserved area for such factory for a specified season. Under Section 10, a grower in a reserved area is expected, before the close of each planting season, to make an offer to sell to the occupier of the factory for which the area has been reserved, such quantity of sugarcane grown by him as may be specified, but not exceeding the quantity specified for such grower by the Sugarcane Commissioner or the authorised Inspector. The offer is required to be made in the form prescribed by Rule 11 (6-A). On an offer being made the occupier of the factory is required to enter into an agreement with the grower for purchase of all the sugarcane offered by him and that agreement is also required to be entered into in the form prescribed by Rule 11(7). The occupier is entitled to refuse to enter into such an agreement where sugarcane is offered for delivery during the period in respect of which he has already entered into agreements with other growers in the reserved area, for the purchase of required quantity of sugarcane for that period. Section 11 prohibits sale of sugarcane grown by the grower in the reserved area to any person other than the occupier of the factory unless such an occupier has refused to buy sugarcane exercising his rights under the proviso to sub-section (2) of Section 10. Section 11 also prohibits the occupier of the factory from refusing to purchase any sugarcane offered to him under Section 10( IX except in terms of the proviso to Section 10(2). It also prohibits export of any sugarcane out of the reserved area except where sale of sugarcane to a person other than the occupier of the factory permitted. Section 11-A provides that it shall be open to any grower, other than a cooperative society, who owns within the reserved area not more than five acres of land growing sugarcane, either himself to crush sugarcane grown by him for the purpose of making `Gur' within the same reserved area or to sell it for that purpose. Section 12 empowers the Government to fix price that die occupier of the factory shall be bound to pay for any sugarcane purchased by him.

Sugarcane (Control) Order, 1966 define `price' to mean the price or the minimum price fixed by the Central Government from time to time for sugarcane delivered to a sugar factory at the gate of the factory or at the sugarcane purchasing centre. Clause 3 of the Order empowers the Government to fix minimum price of sugarcane which the producer of sugar has to pay to the growers of sugarcane. Clause 5(a) of the Order provides for payment of additional price for sugarcane, as may be determined by the Central Government or the State Government, as the case may be.

The provisions disclose that the Act makes provisions for ensuring adequate supply of sugarcane to the sugar factories by reserving an area for such factory and by regulating/prohibiting transactions of sale, purchase, export and import of sugarcane into or from the reserved area. These provisions and the provisions regarding fixing of price by the Government also safeguard the interest of the cane growers within the reserved area. The Act, however, does not make it compulsory for a land holder within the reserved area to grow sugarcane only. The obligations under the Act arise only if the land holder grows sugarcane within the reserved area. Thus, there is no statutory obligation to grow sugarcane in the reserved area. Again this Act does not cast any obligation on the sugar factories to pay to the cane grower any amount other than the price fixed for it either by the Government or under the agreement between the sugar factory and the cane grower. As a matter of fact even though the State Government has the power under the Act to fix price of sugarcane it has not done so, probably because minimum price is being fixed by the Central Government from time to time under the Sugarcane (Control) Order, 1966. The prescribed form in which sugarcane grower has to make an offer to sell sugarcane grown by him to the factory discloses that the offer is to sell sugarcane "at inspection and weighment at the factory". The prescribed form of agreement also discloses that sugarcane has to be delivered by the grower at the factory premises and the factory has to pay to the grower statutory or controlled price for the accepted quality of sugarcane. It is not in dispute that offers were made by the sugarcane growers and required agreements between the sugar cane growers and the appellants were made in the prescribed forms. It is also not indispute that under the agreements of sale and purchase the amounts paid as planting and transport subsidies were not to be deducted from the purchase price. In fact, neither the Act nor the rules nor the agreements refer to planting subsidy or transport subsidy. Though the obligation of the cane growers under the agreements was to deliver sugarcane at factory premises and thus bear the expense of bringing sugarcane to the factory premises, part of it was borne by the appellants, like other sugar factories, because of the administrative directions given by the Government. Neither under any provision of law or under the agreements the appellants were required to pay to the cane growers and part of the freight for the distance beyond 30 kms. from the place of the cane growers. According to the appellants they were merely waiving their right under the agreements to receive delivery of sugarcane free of transportation cost at the factory premises. The private lorry owners were paid freight upto the distance of 30 kms. (later on 20 Kms.) by the cane growers and for the remaining distance the freight was paid by the appellants. No new agreements were entered into between the appellants and the cane growers in that behalf. In the context of this legal and factual position what we have to consider is whether for the purposes of the Sales Tax Act the amounts paid as planting subsidy and transport subsidy can be included in the `turnover' or the aggregate amount for which sugarcane was bought by the appellants from the cane growers.

The Sales Tax Act provides for levy of tax on sale or purchase of goods. The amount of tax is to be determined on the basis of `taxable turnover* i.e. the turnover on which a dealer is liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed. The relevant part of the definition of the term `turnover' as contained in Section 2(r), is as under:

> "turnover" means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, "

XXX XXX XXX Explanation (2) Subject to such conditions and restrictions, if any, as may be prescribed in this behalf-CD (Omitted)

(ii) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of, or before the delivery thereof;

XXX XXX XXX XXX XXX XXX The Act does not define `price' but defines `sale' as under:-

> `Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes-
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> XXX XXX /. XXX Number of decisions were cited at the bar to indicate what can be and what cannot be the component of sale price for the purpose of sales tax legislation. This Court in Hindustan Sugar Mills v. State of Rajasthan, [1979] 1 SCR 276, has held that sale price would include all the amounts which are payable by the purchaser for the sale of goods. Sale price will be inclusive of excise duty and while so holding it observed as under :
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> "Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The `sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to re-imburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be paid of the `sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchases would be liable to pay the amount of excise

> duty to the dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the `sale price'."

So also, the amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item as is usually the case, forms part of the `sale price'. It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition. [See M/s George Oakes (Pvt.) Ltd, v. The State of Madras & Ors., (XII STC 476) and Hindustan Sugar Mills v. State of Rajasthan, [1979] 1 SCR 276. Weighing charges have also been held to be a part of the sale price of the goods where the goods were required to be weighed before they were sold and delivered for completing their sale. Sarju Pd. Pritam Lai v. Judge, Revisions, Sales Tax, UP. (XIV STC 884). So also, the transport charges have been held to be a part of the sale price by this Court in the case of S,C. Johar & Sons (P) Ltd v. Sales Tax Officer, Ernakulam, (27 S.T.C. 120). The amount paid by the sugar mills to the sugarcane suppliers as `khodki charges* for the purpose of keeping the land on which sugarcane had been grown in good condition have also been held to be a part of the consideration for the sugarcane sold by the cane growers to the sugar mills for the reason that they were paid in lieu of sugarcane supplied by the seller to the sugar mills. Hiranyakeshi S.S.K. Niyamit v. State of Karnataka, (42 S.T.C. 184). So also, the freight and handling charges payable by the purchaser not under the statutory liability but as a part of the consideration for the sale of goods have been held to be a part of the sale price Hindustan Sugar Mills v. State of Rajasthan, [1979] 1 SCR 276. In Black Diamond Beverages v. CXO-, [1997] 107 S.T.C. 219, this Court has held that when the venue of the sale was the place of the buyer and the time of sale was the point of delivery, the delivery charges would contribute an addition to the cost of tile goods and would clearly be component of the price charged from the purchaser and would be part of the sale price as defined in Section 2 (d) of the West Bengal Sales Tax Act, 1954. When the manufacturer of refrigerators sold refrigerators with one year service warranty on which the customers had no option, the charges for the one year warranty were held includible in the sale price since there was no sale without it. State of A.P. v. Hyderabad Allwyn Ltd, (1970) 78 STC 56. In Remco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu and other connected matters 88 STC 151, this Court has held that freight charges could not be deducted by the producing dealer in computing taxable turnover of cement for the purposes of the Sales Tax Act as under

> the Cement Control Order the freight charges were to be met by him and he was entitled to a consolidated price irrespective of the freight he might have incurred. In that case this Court has also held that packing charges also could not be deducted from the taxable turnover for the purposes of the Sales Tax Act unless it was shown that they were not included in the sale price of the goods sold.
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> The learned counsel for the appellants, however, relied upon the decisions in I. State of Orissa v. Utkal Distributors (P) Ltd, [17 S.T.C. 320], II. Cauvary Sugars and Chemicals Ltd v. The Joint Commercial Tax Officer, [29 S.T.C. 1], HI. Thiru Arooran Sugars Ltd. v. Deputy Commercial Tax Officer, Mannargudi and Ors., [71 S.T.C. 444] and IV. State of Tamil Nadu v. Kothari Sugars & Chemicals Ltd, [101 S.T.C. 197], wherein it has been held that where the sale price is statutorily fixed no other amount

paid by the purchaser could be added in his turnover for the purpose of assessing the purchase tax. In the case of Utkal Distributors P. Ltd., this Court has held that the Central Sales Tax paid by the assessee at the time of purchase and realised from the customers under the statutory provisions did not form part of the price paid by the customers to the assessee, as the valuable consideration for the sale was only the price fixed by the Government. This Court took that view because the controlled stock-holder was not entitled to charge a price higher than that fixed by the Government of India and thus the valuable consideration for the sale was the price fixed by the Government of India and did not include the central sales tax. In Cauvery Sugars and Chemicals Ltd., the question that arose before the Madras High Court was whether on sugarcane levied on a sugar manufacturer under the Madras Sugar Factories Control Act could form part of a sugar manufacturer's purchase turnover of sugarcane under the Madras General Sales Tax Act, 1959. It was held that as the cess was paid by the sugar manufacturer in discharge of its own statutory liability it could not form part of its purchase turnover. In Thiru Arooran Sugars Ltd., the madras High Court held that the amounts paid by the sugar mill pursuant to the directive of the Director of Sugar could not be called the agreed price, as the agreement was only to pay the controlled or statutory price and the sugar mill had paid the price fixed under clauses 3 and 5-A of the Sugarcane (Control) Order. The Madras High Court took that view because there was no agreement between the cane grower and the manufacturer to pay a price higher than the minimum statutory price. In Kothari Sugars & Chemicals Ltd., this court has held that an amount paid in excess of the minimum cane price fixed under clauses 3 and 5-A of the Sugar (Control) Order paid by the purchaser to the grower of sugarcane could not be added to the price of sugarcane. This Court held so because there was no agreement between the parties to pay a higher price and the only agreement was to pay a price fixed under clauses 3 and 5-A of the Sugar (Control) Order.

The learned counsel for the appellants also relied upon some decisions wherein it has been laid down that if any amount is paid by the purchaser to the seller of goods de hors the agreement of sale, then such amount could not be included in his turnover for the purpose of assessing purchase tax. In Srinivasa Timber Depot v. Dy, Commercial Tax Officer, (1969) 23 S.T.C. 158, a case arising under the Madras Genera] Sales Tax Act, the Madras High Court held that the object of the Act is to levy a general tax on the sale or purchase of goods in the State and it is, therefore, clear that what could legitimately be brought to tax under the Act is the aggregation of the consideration for the transfer of property in the goods and service charges can not be equated to the consideration for transfer of property in the goods. Taking this view it held that the charges paid on a percentage basis by customers for picking out or selecting timber from the timber depots described as lot cooly charges and shown separately in the bills cannot form part of the turnover of the dealer. This view was reaffirmed by the Madras High Court in State of Madras v. Srinivasa Timber Depot, (1974) 33 S.T.C. 423. In an appeal against the said judgment this Court in State of Madras v. Srinivasa Timber Depot, 80 S.T.C. 393 (Supreme Court) while dismissing

> the appeal observed that "After hearing learned counsel for the parties we are of the opinion that the High Court placed reliance on its earlier judgment in Srinivasa Timber Depot v. Deputy Commercial Tax Officer, 23 STC 158, in holding that lithe lot cooley charges are collected de hors the sale and such charges do not form part of the turnover. This view has held the field in the State of Tamil Nadu for the last 21 years, which is consistent with the provisions of the Tamil Nadu General Sales Tax Act, 1959. We find no good reason to take a different view. This appeal fails and is accordingly dismissed, but there will be no order as to costs." In Hyderabad Asbestos Cement Products Ltd.

v. State of Andhra Pradesh, 24 S.T.C. 487, a case on which heavy reliance was placed by the appellants, the facts were that the appellant company had sold cement at catalogue rate and thereafter deducted railway freight. It had sent goods to out-station customers by rail under railway receipts with freight to pay. It made out invoices at the catalogue rate and the customers paid the amount of invoices less freight for releasing the railway receipts and took delivery of the goods on payment of the railway freight. The result was that the net price received by the company was the catalogue rate less railway freight charged in respect of the goods transported to the destination. As under the Contract of Sale there was no obligation on the part of the company to pay the freight and the price received by the company for the sale of goods was the invoice amount less freight charges, this Court held that the freight was not part of sale price and could not be included in the turnover of the company.

The learned counsel for the appellants had also drawn our attention to the decision in Sakthi Sugars Limited and Ors. v. Deputy Commercial Tax Officer, Bhavani and Ors., 23 S.T.C. 232, but the question raised therein was quite different. In that case the sugar mills advanced monies to the ryots, who supplied sugarcane to them, to enable the ryots to purchase the sugarcane setts from the owners of the seed plots and this advance was adjusted in the price to be paid by the mills to the ryots of the sugarcane supplied and the ryots gave promissory notes for the amounts advanced. It was held by the Madras High Court that the mills were only financiers and could not be deemed as dealers in sugarcane setts under the provisions of the Madras General Sales Tax Act, 1959. This decision is, therefore, of no help to the appellants. So also the case of Esso Petroleum Co. Ltd. v. Customs and Excise Commissioners, (1975) 1 W.L.R. 406 is not helpful to the appellants. Esso Petroleum, suppliers of and dealers in petrol, got manufactured special coins and advertised that they would distribute those coins free to any motorist buying petrol from Esso Filling station and dealers on the basis of one coin for every four gallons of petrol and gave the coins as advertised. The question that arose for consideration in that case was whether the coins were goods chargeable to purchase tax under the Purchase Tax Act, 1963. It was held that the coins were produced for general distribution as free gifts to motorists who bought petrol and not for sale and, therefore, they were not liable to purchase tax. Thus, the giving of coins was held to be in pursuance of a collateral agreement but it was not regarded as a part of transaction of sale of petrol.

Our attention was also invited to the decision of this Court in State of Tamil Nadu v. Kothari Sugars & Chemicals Ltd., 101 S.T.C. 197, wherein it has been held that "Where, without any contractual or statutory basis the sale price of sugarcane is fixed at an amount higher than the minimum cane price

fixed under clause 3 and the additional cane price fixed under clause 5-A, any sum paid by the purchaser to the grower as advance prior to fixation of the additional cane price under Clause 5-A, to the extent that it is in excess of the additional cane price fixed later, cannot form part of the price of cane sugar". While so holding this Court further observed that for treating the entire amount paid by the purchaser as the price of sugarcane, it must be found proved as a fact that the higher price including the excess amount was paid as price of the sugarcane under the agreement between the grower and the purchaser irrespective of the lower amount being fixed as the aggregate of the price fixation under clauses III and 5(a) of the Control Order. This Court also, after referring to the two decisions of the Karnataka High Court in Pandavapura Sahakara Kakkare Kharkhane (P) Ltd. v. State of Myssore, 32 S.T.C. 104, and Tungabhadra Sugar Works Ltd. v. State of Karnatatka, 93 S.T.C. 561 observed that where the substance of the transaction between the purchaser and the cane growers was for payment of the enhanced price for the sugarcane supplied and the amount paid in excess of the statutory price was paid under the contract and not either as an ex gratia payment or towards advance then that amount has to be treated as price of the sugarcane supplied.

What transpires from the above case law is that the amounts paid by way of consideration by the purchaser to the seller of goods in pursuance of the contract of sale can legitimately be regarded as purchase price while calculating the turnover for the purposes of sales tax legislation. What can legitimately be brought to sales tax or purchase tax is the aggregation of the consideration for the transfer of property. All the payments should have been made pursuant to the contract of sale and not de hors it. Any amount paid as ex gratia payment or as an advance cannot be the component of the purchase price and therefore can not legitimately be included in the turnover of the purchasing dealer. Whether one of the components of the purchase price goes to the coffers of the seller or not will not cease to be so if it is necessary for completing the same. Thus the total amount of consideration for the purchase of goods would include the price strictly so called and also other amounts which are payable by the purchaser or which represent the expenses required for completing the sale as, the seller would ordinarily include all of them in the price at which he would sell his goods. But if the sale price is fixed statutorily then the only obligation of the purchaser under the agreement would to pay that price only and no other amount can be included in the purchase price even if the same is paid by the purchaser to the seller.

Therefore, what is now required to be considered is whether the planting subsidy and the freight subsidy given by the appellants to the sugarcane growers were given by way of consideration for sale of the sugarcane. The answer to this question also calls for the examination of the true nature of the transaction between the appellants and the sugarcane growers and the object of the payments made as planting subsidy and freight subsidy. We have earlier pointed out that in the State of Tamil Nadu, because of Madras Sugar Factories (Control) Act there are certain restrictions on the transactions of sugarcane in reserved areas. A grower of sugarcane in the reserved area cannot sell any sugarcane grown in that area except to the specified sugar manufacturer. He is required to enter into an agreement by making an offer to the specified sugar mill for sale of the sugarcane grown by him. Pursuant to this offer the sugar mill has to enter into an agreement with him for purchasing of the sugarcane offered by him. The Sugarcane (Control) Order, 1966 controls distribution and movement and also the purchase price of sugarcane. As neither the Madras Sugar Factories (Control) Act nor the Sugarcane (Control) Order provide for any agreement between the sugarcane grower and the

purchaser i.e. the sugar mill for giving planting subsidy or freight subsidy it was contended by the learned counsel for the appellants that the agreements which the appellants have entered into with the cane growers in respect of planting subsidy are independent though collateral contracts and, therefore, they have nothing to do with the sale or purchase of sugarcane. It was submitted that the invitation to cane grower to plant a particular variety and claim the amount of subsidy per acre if planted in the stipulated month precedes the planting and growing of sugarcane. Acceptance of that offer by the grower also precedes growing of sugarcane and the statutory offer which the grower is required to make under Section 10 (1) of the Madras Sugar Factories (Control) Act. It was also submitted that even after taking planting subsidy the cane grower may or may not plant that specified variety and even if he plants and grows sugarcane as per the said agreement he may not sell the whole or part of the sugarcane grown by him to the sugar factory as he is entitled to consume the sugarcane or process it into jaggery if its holding is small in area.

In support of this last submission not only the relevant provisions under the Act but the decision of this Court in Andhra Sugars Ltd. v. A.P. State, [1968] 1 SCR 705, was also relied upon. Apparently, the two agreements-one agreement in respect of planting subsidy and the other agreement for the sale of sugarcane appear to be independent but on a close scrutiny it can be noticed that they constitute one single transaction. In their petitions filed before the High Court the appellants have stated that the planting or varietal subsidy is by way of incentive to the cane grower. It is given to motivate the cane grower to grow sugarcane and subsequently sell the same to the sugar factory. Thus the reason why the appellants had given planting subsidy was to see that the cane grower plant the desired and improved variety of sugarcane and that too in the months suggested by the appellants so as to ensure stagger supply of sugarcane as per the crushing schedule. The object of the planting subsidy was to obtain the desired variety and quality of sugarcane at the time required by the appellants. It is also significant to note that as a matter of fact the planting subsidy was given by the appellants to the cane growers at the time of delivery of sugarcane by them. Though the appellants had described the payments by way of planting subsidy as deferred payments that cannot conceal the real nature of the transaction between the appellants and the cane growers. The planting subsidy was given by the appellants to the cane growers not by way of agrarian reform or a social welfare measure. The appellants had given planting subsidy as purchasers of sugarcane and as a part of the consideration for which the sugarcane was ultimately purchased by them. As rightly pointed out by the Madras High Court in State of Tamil Nadu v. National Co-operative Sugar Mills Ltd., (1992) 86 STC 22 giving of planting subsidy earlier and supply of sugarcane later were closely linked. The planting subsidy was relatable to the supply of sugarcane. If die whole deal between the appellants and the cane growers is examined they really constitute one contract of sale. Therefore, the sums paid by the appellant as planting subsidy to the cane grower were rightly treated as a part of the sale price and included in the taxable turnover of the appellants for the purpose of assessing the purchase tax liability.

For the same reasons we hold mat the transport subsidy was a part of the consideration for which sugarcane was sold by the sugarcane growers to the appellants. Though the agreements between the parties provided for delivery by the sugarcane growers at the factory gate and though the transport charges paid by the appellants were not to the sugarcane growers but to third party lorry owners, they were made for securing regular supply of sugarcane as per the requirements. Though payments

were made at the instance of Government of Tamil Nadu they also became a part of the implied agreement between the appellants and the sugarcane growers. They were not post-sale expenses. Those amounts were paid to ensure scheduled delivery of sugarcane. The sale of sugarcane became complete only thereafter. Those payments can be regarded either as payments made on behalf of the sugarcane growers or payments made in modification or variation of the earlier agreements entered into by the sugarcane growers for selling sugarcane. In either case they could legitimately be regarded as the components of the sale price as the sellers would have otherwise included those amounts in the sale price.

But so far as levy of penalty is concerned, we do not think that the Sales Tax Authorities were justified in levying it. Till the judgment of the Madras High Court, on 15.7.1991, in Perambalur Sugar Mills Ltd v. State of Tamil Nadu, (1992) 86 S.T.C. 17, the correct position of law within the State of Tamil Nadu was not free from doubt. Even thereafter, the Sales Tax Tribunal had in subsequent orders held that transport subsidy was not includible in the taxable turnover. Such a view held by the Tribunal till 19.3.1993. It appears that on bona fide belief that planting and transport subsidies were not includible in the taxable turnover, the appellants had not included those amounts in their turnover and for that reason non- inclusion of these two items in the turnover do not seem to be intentional. Though we have now held that the appellants were not right in not including the amounts of planting subsidy and transport subsidy in the taxable turnover, considering the facts and circumstances of the case, it would not be correct to say that they had acted deliberately in defiance of law or that their conduct was dishonest or they had acted in conscious disregard of their obligation under the Sales Tax Act The Sales Tax Authorities were, therefore, wrong in passing the orders of penalty and upholding the same. The High Court also, in our opinion, committed an error in upholding the orders of penalty. In the result, these appeals are partly allowed. The order of the High Court and the orders of the Sales Tax Authorities imposing and upholding levy of penalty are set aside. Only to that extent the appellants succeed and their appeals are allowed. The judgment of the High Court in respect to the planting subsidy and transport subsidy is upheld. In the facts and circumstances of the case, there shall be no order as to costs.