Bharat Heavy Electricals Ltd. vs State Of Andhra Pradesh on 23 February, 1996

Equivalent citations: [1996]102STC345(AP)

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Bench: P. Venkatarama Reddi

JUDGMENT

P. Venkatarama Reddy, J.

1. Bharat Heavy Electricals Limited (hereinafter referred to as "BHEL"), Ramachandrapuram, Hyderabad, is the petitioner in all these tax revision cases preferred under section 22 of the Andhra Pradesh General Sales Tax Act read with section 9(2) of the Central Sales Tax Act. The appeals in the Tribunal arose out of the revisional orders passed by the Deputy Commissioner of Commercial Taxes for the assessment years 1977-78, 1978-79, 1979-80 and 1980-81 and the appellate orders passed by the Deputy Commissioner (Appeals) for the years 1983-84, 1984-85 and 1985-86. Those appeals before the Deputy Commissioner were preferred against the provisional assessment orders for the said three years. For the assessment years 1977-78 to 1980-81, the Deputy Commissioner set aside the assessments made by the Commercial Tax Officer, Sangareddy, who accepted the returns of the petitioner with slight modifications and as a result of such revision, the Deputy Commissioner enhanced the turnover. The provisional assessments for the three years aforementioned were done on the same lines as the revisional authority had done. The Tribunal, in effect, partly allowed the appeals. The revised assessment orders made by the Deputy Commissioner were set aside and the cases were remanded to the Deputy Commissioner to determine the turnovers in the light of the findings given in that judgment. A further direction was given to take into consideration the Government's notification exempting the production of "C" and "D" forms and also to consider certain "C" forms filed before the assessing authority and the Tribunal.

2. As far as the appeals against the provisional assessment orders are concerned, the Tribunal set aside the provisional assessments and directed final assessments to be made in the light of the findings and directions contained in the judgment. A further direction was given to consider the question of subjecting the transactions held to be taxable as inter-State sales at a lower rate on production of "C" and "D" forms. The State has not preferred any T.R.Cs. assailing the Tribunal's order to the extent it granted relief to the assessee. The assessee alone has filed these T.R.Cs. questioning the Tribunal's order in so far as it denied relief to it. The undisputed facts are these :

3. The petitioner-company is a Central Government undertaking. The main business activity of the petitioner is to manufacture the equipment and material relating to power plants or the packages

connected therewith and to instal and commission them. The major manufacturing divisions of the petitioner-company are situate in Haridwar, Jhansi, Bhopal, Bangalore, Ramachandrapuram (near Hyderabad), Ranipet and Trichy. It has its head office-cum-registered office in New Delhi. The contracts undertaken by the petitioner are of the nature of divisible works contracts. The equipment is manufactured as per the specific design and requirements of the customers. The offer/bid is given and the contracts are generally finalised by the petitioner's Delhi office. Normally, the formal agreements incorporating the terms and conditions already agreed upon are entered into long after the tender is accepted and the execution of contract is started. The letter of intent which is issued by the customer after tender negotiations gives the green signal for the commencement of work by the petitioner.

4. A power plant contract normally consists of the supply of equipment covering two main packages, namely, "boiler (steam generator) package" and "turbo generator package". Broadly speaking, the contracts are separate or divisible contracts, distinctly providing for supply of equipment including spares and erection and commissioning. The price of each and every component part and material is not specified or agreed upon. After the contract is finalised, different production units of the company are entrusted with the responsibility of supplying/installing a particular package which goes to make up the power plant. The responsibilities of the respective units are fixed either in the letter of intent/formal agreement and/or discernible from the subsequent internal correspondence. For instance, as far as boiler package is concerned, the responsibility for execution is fastened on Trichy unit (Tamil Nadu State). The responsibility to supply turbo generator package is normally placed on the Hyderabad unit. Jhansi unit undertakes the responsibility for the generator main connection. Bhopal unit executes the work relating to switchgear. The primary task of producing or assembling the material/equipment rests on the concerned executing unit. However, the executing unit often requests the other sister units of the company to supply components either in assembled or unassembled form for the purpose of accomplishing the contract, thereby off-loading the manufacture of some components of the package on other units/divisions. The sister units send certain component parts to the executing unit and some of the component parts - assembled or unassembled - are directly sent by the sister unit to the customer's place in the other State. For instance, the Trichy unit which is entrusted with the production programme and supply of boiler package procures the components and materials pertaining to bowl mill through Hyderabad unit. The parts sent by Hyderabad unit to Trichy are assembled or incorporated into distinct components of the package and then despatched by Trichy unit to the work sites of the customers to fulfil the contracts of its choice. The bowl mill equipment is also directly sent by Hyderabad unit to the inter-State customer. The customer takes delivery, perhaps notionally, and handsover the goods to BHEL representative at site for the purpose of installation into the plant. Whenever a sister unit supplies the component parts/equipment to the executing unit or despatches the same directly to the customer's site at the instance of the executing unit, a debit note is raised by the sister unit on the executing unit showing approximate cost of each item and the same is reflected in the accounts of the respective units. The sister units do not raise any invoices directly on the customer nor do they realise payments from the customer. It is only the executing unit which raises the invoices and realises the price periodically as per the terms agreed upon. The stage, proportion and basis of price payable is agreed upon in the contractual terms. All the units of the company are registered under the respective local Sales Tax Acts as well as the Central Sales Tax Act. The details of invoices raised

by the executing units are furnished to the sales tax authorities and these invoices include the value of the materials supplied by the sister units directly to the customers as well. The executing units treat the despatches made by the sister units, either to it or to the customer directly as stock transfers from one unit of the company to another. "F" forms, as required by section 6-A of the Central Sales Tax Act read with the Rules, to evidence the stock transfers were being obtained and filed by the executing units concerned. The executing unit pays the Central sales tax on the basis of invoices for all the despatches of components/equipments made to the customers' place to the sales tax authority of the concerned State in which the executing unit is registered.

5. It is the contention of the State of Andhra Pradesh that the petitioner is liable to pay Central sales tax on the cost of goods despatched from Hyderabad to the customers in other States as well as to the sister units, namely, Trichy, etc., inasmuch as the inter-State movement of the goods pursuant to the contracts of sale had commenced in the State of A.P. The stand of the petitioner is that the executing unit at Trichy, etc., had already paid Central sales tax in the other State, i.e., Tamil Nadu, etc., and there is no further liability to pay the tax again in Andhra Pradesh State on the very same goods. It is pointed out that even in cases where the Hyderabad unit is the executing unit and the material is despatched by the sister units at the instance of the Hyderabad unit directly to the customers or to Hyderabad for the purpose of onward transmission after assembling, the Central sales tax is paid in Andhra Pradesh State notwithstanding the fact that the movement of the goods commended from the units located in other States. Thus, it is submitted that the petitioner-company has been following consistent practice and at no point of time, the A.P. sales tax authorities demurred to the payment of Central sales tax in this State on such transactions. According to the petitioner, it is only after the Commissioner of Commercial Taxes issued a circular dated December 21, 1984 to the subordinates in regard to exemptions claimed on branch transfers that the assessments were reopened.

6. The Tribunal framed the following points for consideration :

> "(1) Whether the products manufactured by the appellants are not goods falling within the scope of Central Sales Tax Act ?
>
> (2) Whether the supply materials by any one unit of the BHEL in compliance with the contract entered into by the head office at Delhi cannot be treated as a sale between it and the customer and therefore cannot be included in its turnover ?
>
> (3) Whether the goods manufactured and transferred to other units to comply with the contract entered into, amount to movement in pursuance of a contract of sale and therefore liable to inter-State sales tax or they are only movement of goods between units of the same company and therefore not liable to any tax ?
>
> (4) Whether the payment of Central sales tax at the place where the invoices are raised without any demand but voluntarily, protects the company from paying the tax in the State where it is to be paid according to the Central Sales Tax Act ?

(5) Whether the turnover even it treated as inter-State sales, is not liable to more than 4 per cent tax even without production of 'C' or 'D' forms in view of G.O. issued by the Government ?"

Question No. 1 has not been argued before us and the correctness of the Tribunal's finding thereon has not been questioned. Question No. (3) was decided in favour of the petitioner. However, it has come up for consideration before us incidentally. The Tribunal itself granted relief as far as question No. (5) is concerned.

7. The Tribunal after noticing the salient features of a typical contract, while discussing point No. (2) summarised the undisputed pattern of transactions as follows (vide paragraph 26 of the Tribunal's order) :

"(1) Contract is entered into by the New Delhi office which is not the manufacturing unit but is the head office;

(2) After entering into contract, it indicates to the respective branches, the goods to be manufactured and also the specifications in regard thereto and the places to which they have to be transported including the details of the contract entered into with the particular customer;

(3) Respective units manufacture the goods as per the specifications in the contract and part of the goods are transported to other units for being assembled with the items being manufactured by the said other units and some of the products are directly sent to the place of the customer, invoices being raised by units as indicated by the head office;

(4) No goods move to the head office;

(5) The contract of sale or agreement of sale in these cases precedes the manufacture itself."

With regard to question Nos. (2) and (3) which were the principal questions urged in the appeals, the Tribunal concluded as follows :

"(3) In regard to goods transported outside the State by the appellant :

(i) So far as the goods transferred to other units of the BHEL and incorporated into machinery or equipment manufactured by the other unit whereby the article transferred from the appellant unit loses its identity are concerned, they shall be treated as inter-unit transfers not liable to any sales tax;

(ii) So far as the goods transferred by the appellant directly to the place where the plants have to be erected according to the contract, though administratively

> controlled and invoices raised by other units in regard thereto, shall be liable to tax under Central Sales Tax Act within the State of A.P. provided the site of erection of the plant is outside the State of Andhra Pradesh. The raising of bills or invoices shall not be the relevant consideration, but the consideration shall be the manufacture and movement of goods in compliance with the terms of the contract and the place of supply to the customer."

Thus, the Tribunal made a distinction between the intermediary goods which were despatched to the executing units from Hyderabad and sent by the executing unit to the inter-State customer after assembling the same into some other component parts and the equipment and materials directly sent to the customer of the other State at the instance of the executing unit. The former category of transactions were held to be not inter-State sales and therefore held not to be taxable by the sales tax authorities of the Andhra Pradesh State. As regards the second category of transactions, the Tribunal affirmed the findings of the sales tax authorities that they constitute inter-State sales for which the tax under Central Sales Tax Act is chargeable in the A.P. State.

8. The typical contract referred to by the Tribunal is the contract entered into with National Aluminium Company Limited (for short, "NALCO"), Bhubaneshwar, another public sector undertaking. The documentation as regards this contract is complete and both sides have referred to these contractual documents to substantiate their respective points of view. Hence, we would like to analyse and set out in detail the salient features and the pattern of transactions relevant to this contract. Although the Tribunal commented that the contract with NALCO was entered into almost at the fag end of the last of the relevant assessment years, this comment seems to be unwarranted because it is specifically mentioned in the agreement as well as the letter of intent that the effective date of contract shall be June 3, 1982. In the letter and the acceptance letter, substantially the same terms and conditions are contained. What has been already agreed upon is formally incorporated in this agreement which, of course, came to be executed much later. Hence, without any inhibition, we can refer to the terms of the agreement dated March 15, 1985, entered into between BHEL and NALCO at the appropriate juncture.

9. NALCO, Bhubaneshwar, issued a tender notice on August 1, 1981, for manufacture and supply of equipment to install 5 Nos. of 120 M.W. captive power plant for their Aluminium Smelter Complex at Angul, Orissa State. Pursuant to this tender, BHEL, Delhi, sent up its offer to NALCO. NALCO issued a letter of intent on June 3, 1982. As per the letter of intent, the units shall be made ready for commercial operation according to the time schedule ranging between March, 1985 and November, 1986. The description of the contract as discernible from the internal order issued by the head office of BHEL is "design, engineering, manufacturing, assembly/re-assembly, test, packing, transportation to site, comprehensive insurance". The petitioner-company started executing the work by carrying out manufacturing operations through its several units after the letter of intent was issued communicating the acceptance of the offer made by BHEL and incorporating the technical specifications and the terms and conditions. However, as already stated, the formal agreement was entered into much later, i.e., on March 15, 1985, by which date, perhaps, a substantial portion of the contract was completed.

10. We will now refer to the terms of that formal agreement. The scope of contract is mentioned as "design, engineering, manufacture, shop testing and despatch of equipment f.o.r. works/f.o.r. sub-supplier's works/port of entry including supplying drawings, data, test certificates, etc." This is what is known as supply contract. The contract for the erection and commissioning of the power plant has been separately but contemporaneously entered into. However, we are not concerned with that contract. The contract price for the manufacture and supply equipment is Rs. 295,37,55,444. The same is bifurcated into supply of equipment - Rs. 272,46,444 (f.o.r. works/sub-supplier's works); supply of structurals for power house building - Rs. 13,26,00,000 (f.o.r. works/sub-supplier's works) and supply of initial spares - Rs. 9,65,20,000 (f.o.r. destination). A further price break-up for the supply of equipment and the division responsible for execution is given as under :

Description of Supplier's Total price f.o.r works/sub-supplier equipment division works/Port of entry responsible ----------

Main Additional Total equipment item (rupees in (rupees in lakhs) lakhs)

Boiler package Tiruchy 10613.4141 217.91 10831.3241 Turbo-generator Hyderabad 9618.1732 21.36667 9639.53887 package Generator and Jhansi 475.8940 ... 475.8940 unit aux.

transformer.

Generator main Jhansi 178.510 ... 178.510 connection 6.6 KV Bhopal 477.20 ... 477.20 switchgear.

Generator Bhopal 177.3208 7.29167 124.61247 control/relay boards.

Non-BHEL Project 5265.545 253.75 5519.275 equipment management group ----------

Total ... 26746.0561 500.29834 27246.35444 _____ The various items of equipment for the power plant are set out for five steam generators with integrated milling plant consisting of vertical bowl mill feeders, fans, pipings, ductings, etc.,; five turbo generator sets with H.P.-L.P. by-pass system with all necessary controls and instruments; steam condensor with air-attraction system; chemical feed equipment; E.O.T. cranes with all accessories and controls; diesel generating sets at clause 4.2.0 provides for raising price adjustment invoices along with all taxes and duties for 100 per cent value of monthly "shipment" effected. There is a price variation formula for supplies vide clause 4.3.0. Clause 6 deals with terms and mode of

payment. The contract price of equipment specified above is payable in three stages as follows :

(i) 10 per cent as interest-free advance along with the order.

(ii)(a) 85 per cent together with 100 per cent taxes and duties against despatches through an irrevocable and divisible letter of credit to be opened at respective units of the supplier responsible for supplying the equipment.

(b) The 85 per cent progressive payment for boiler and turbo generator package supplied from Trichy and Hyderabad units shall be made on pro rata tonnage basis derived from dividing the contract break-up prices by the total design weight of boiler and turbo generator materials respectively.

The rate applicable for billing purposes is Rs. 30.30 paise per kg. for boiler material and Rs. 213.70 paise per kg. for turbo generator materials.

(c) For supplies from Jhansi and Bhopal units, the 85 per cent progressive payment shall be made on unit basis or any other suitable basis to be indicated by the supplier prior to commencement of despatches.

(iii) Balance 5 per cent on commissioning of each unit of TG set and boiler but not later than 12 months from the date of despatch of last substantial consignment.

(iv) For structural steel, 10 per cent is payable as interest-fee advance along with the order and the balance 90 per cent is payable against design, procurement and despatch through an irrevocable and divisible letter of credit to be established by the purchaser. Payment shall be made for steel material pro-rata at the notional rate of Rs. 7,890 per tonne based on the total estimated weight.

Copies of invoices and photo copy of railway receipt/lorry receipt or bill of lading, pre-despatch clearance certificate/inspection report and test certificate, if any, shall be submitted to the bank and various departments of NALCO, Angul, for the purpose of claiming payment through letter of credit, vide clause 8.1.0. As per clause 8.2.0, the materials shall be consigned to the Materials Manager, NALCO, Captive Power Plant, Angul and the original R.R./L.R. shall be sent by the supplier directly to the site office for arranging prompt delivery of materials from the carriers. Clause 3.3.0 enjoins that the "title of all the plant and equipment and materials shall pass on to the purchaser in accordance with INOC terms" and transfer of ownership to the purchaser shall be simultaneous provided that such passing of title, risk and property to the purchaser shall not otherwise absolve or dilute the responsibility of the supplier under this contract. Other clauses in the agreement provide for guarantee bond, warranty, liquidated damages, etc., which need not be adverted to.

11. Certain debit notes raised by the petitioner (Hyderabad unit) while despatching the materials/equipment to Trichy or direct to NALCO have been placed before us. One of the debit notes is raised soon after the despatch of one bowl mill to the Materials Manager, NALCO, Angul. The work order No. L.R./R.R. number, packing slip number, despatch advice number are all

mentioned in the debit note in addition to the value of the bowl mill. The excise duty payable is also shown in the debit note. Some copies of loading advice, packing list, R.Rs./L.Rs. have also been placed before us. The invoices raised on NALCO by the Trichy unit which is the executing unit relating to boiler components despatched by Hyderabad, Ranipet and other units with the price worked out on pro rata tonnage basis are on record. Central sales tax is also included in those invoices. The certificates and details regarding payment of Central sales tax from time to time by Trichy unit in regard to the despatches from Hyderabad are also filed.

12. The next contract which we would like to briefly refer is the contract entered into with National Thermal Power Corporation Ltd. (for short, "NTPC") for setting up a super-thermal power project at Farakka (West Bengal). NTPC awarded the contract to BHEL on the terms and conditions contained in its letter of intent dated May 15, 1981 and its ward letter dated June 4, 1984. A formal agreement evidencing the terms and conditions of the contract was entered into on May 1, 1985. There is a specific recital in the agreement that the contract had taken effect from May 15, 1981. The scope of contract is two-fold. (1) Supply portion consisting of engineering, design, manufacture including shop testing and packing and despatch from contractor's manufacturing works/place of despatch of equipment and materials as per bid documents including supply of spares and special tools for steam generator package on f.o.r. Farakka site basis. (2) Erection portion covering transportation to site, transit insurance, unloading and handling at site, storage, erection, testing and commissioning of equipment to be supplied under the contract. Thus, it is a divisible works contract consisting of supply of equipment as well as erection and commissioning of the two packages stated above. The total contract price for turbo generator package is Rs. 429 millions and for steam generator package, it is Rs. 8,12,727,181 and the itemwise price break-up for supply and erection portions is given in the letter of intent. The terms of payment for T.G. package are : 15 per cent initial advance; 20 per cent interim advance; 40 per cent on proof of despatch of material; 15 per cent on receipt of material at site and 10 per cent on successful completion of unit. For steam generator package, the agreement provides for 20 per cent initial advance, 55 per cent on proof of despatch of material, 15 per cent on receipt of material at site and 10 per cent on successful completion of unit. On receipt of letter of intent, the T.P.G. (Commercial Division) of BHEL, New Delhi, sent a communication to various units indicating the allocation of works and apportioning the contract price amongst the units. It is clear therefrom that Trichy unit is entrusted with the responsibility of execution of steam generator package, Haridwar unit is responsible for the entire turbo generator package excepting those items allocated to Hyderabad and other units. As far as Hyderabad unit is concerned, it has to supply H.P. heaters, boiler feed pumps, various pipings and valves covered in the system, etc. This was followed up by an internal order issued on May 23, 1981 fixing the responsibility on various units and mentioning the essential features of contract, despatch instructions, terms of payment, commencement of trial operations, etc. In the minutes of meeting held between the representatives of BHEL, Trichy and BHEL, Hyderabad, on 19th and 20th of May, 1983, it was agreed that BHEL, Hyderabad, will meet the bowl mill requirements (five in number) for setting up the second unit at Farakka during the year 1983-84. It is seen from the contract agreement and the letter of intent that the responsibility for execution is not placed on any particular unit as is the case with the NALCO contract. However, allocation of responsibility was in the nature of an internal arrangement made by the head office of the petitioner. But, the reasonable presumption that should be drawn in the light of correspondence and despatch documents, that NTPC must be well aware of the division of

responsibility as regards steam generator and turbo generator packages between the various units. The documents relating to despatch of boiler/steam generator equipment such as bowl mills by Hyderabad unit as per the request of the Trichy unit are filed. They include loading advice, packing list, debit note raised by the Hyderabad unit on Trichy unit and the invoice raised by Trichy unit on NTPC which covers the components/equipment sent by Hyderabad unit directly to Farakka. The name of the consignee as per the railway receipt is Chief Erection Manager, NTPC, Farakka and the freight is pre-paid. The certificate regarding payment of Central sales tax confirms the payment of Central sales tax on the invoice value by the Trichy unit in respect of the components despatched by Hyderabad unit.

13. The Tribunal mentioned at paragraph 8 of its order that copies of eight agreements including the two agreements with NALCO and NTPC (which we have discussed above) were filed. It is commented by the Tribunal that the agreement with Maharashtra State Electricity Board for supply of 210 M.W. steam Generating unit and turbo generator for Nasik Thermal Power Station is an unsigned and undated agreement. The agreement in the same form has been filed before us and the learned counsel submits that they are not in a position to secure the original agreement. The debit notes and despatch documents relating to this contract have been filed before us. Five more agreement copies filed in the Tribunal are those relating to the contracts with Bihar State Electricity Board (Thermal unit at Muzafarpur), Gujarat Electricity Board (Thermal Power Station at Wanakbori), Star Paper Mills, Sahranpur, Assam Electricity Board (Power plant at Bongaigaon) and the agreement with I.O.C. New Delhi. It was commented by the Tribunal that agreements with Bihar State Electricity Board and Assam State Electricity Board are in incomplete form and the said agreements do not contain stipulation of responsibility of individual units or raising of invoices by individual units. Apart from copies of these agreements, no other documents relating to these five contracts have been filed before us or before the Tribunal.

14. In addition to the agreements referred to by the Tribunal, certain documents relating to contract entered into with U.P. State Electricity Board for supply of boiler and turbo generator auxiliaries for Tanda Thermal Power Station have been filed before us. It appears that a copy of relevant agreement was also filed in the Tribunal. The documents reveal that the final price agreed upon is Rs. 91.50 crores and progressive payments to the extent of 75 per cent of the said value was to be paid against despatches on pro rata tonnage basis. For boiler auxiliaries, the pro rata rate is Rs. 18.90 per kg. and for turbo generator auxiliaries it is Rs. 105.25 per kg. Some of the documents evidencing despatch of material from Bangalore/Trichy unit to the Executive Engineer, Thermal Power Project, Tanda, and the raising of debit note by Bangalore/Trichy unit on Hyderabad are filed. So also, the despatch documents and debit notes raised by Hyderabad unit in respect of materials sent by Hyderabad unit to U.P. State Electricity Board, Tanda, at the instance of Bangalore/Trichy units are filed. It is stated in the certificate filed that in respect of such material despatched from Bangalore/Trichy to Tanda at the instance of BHEL, Hyderabad, the Central sales tax is paid by the petitioner (Hyderabad unit).

15. For all the relevant assessment years, there are altogether forty-eight contracts. It is not necessary for us to refer to the terms of various agreements other than those to which we have already referred and the documents related to them. The fact that the documentation is not

complete in respect of all the contracts and some of the agreements are in incomplete shape does not make material difference for the purpose of this case inasmuch as both the parties have not disputed the salient features of the contracts and the pattern of transactions which, according to the counsel for the petitioner as well as the respondent, are substantially similar to the two contracts which we have referred to in detail earlier. It is also true that there is no specification of a particular unit of BHEL responsible for execution of the contract in those agreements nor any documents are filed before us which throw light on this aspect. But, having regard to the admitted fact that the disputed transactions and turnover related only to cases where the goods are supplied directly to the customers at the instance of some other executing unit and there is no no dispute that such supplies were made by the petitioner-unit either on the instructions of head office or at the instance of executing unit, the said omission is of no consequence and it need not be taken serious note of.

16. The points that have to be resolved in these tax revision cases are : Whether the inter-State movement of goods from Hyderabad unit of the petitioner-company to the customers/purchasers of other States at the instance of the head office or the executing unit fall within the scope of section 3(a) of the Central Sales Tax Act, and if so, the A.P. State being the State from which the movement had commenced is entitled to levy and collect the Central sales tax to the exclusion of other States notwithstanding the fact that Central sales tax was paid by the concerned executing unit of BHEL to the State in which that unit is located.

17. Before embarking on a further discussion, we would like to take note of the settled legal position as regards the concept of inter-State sale under the Central Sales Tax Act. Section 3 spells out what an inter-State sale is. It says that a sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce if the sale or purchase occasions the movement of goods from one State to another or is effected by transfer of documents of title to the goods during their movement from one State to another. The first authoritative exposition of section 3 of the Central Sales Tax Act which was introduced in the year 1956 is to be found in Tata Iron and Steel Co. Ltd. v. S. R. Sarkar . The Supreme Court after pointing out that the two clauses of section 3 are mutually exclusive and that a mere contract of sale which does not result in transfer of property occasioning movement of goods from one State to another does not fall within the terms of section 3(a), laid down :

> "In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto; clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

We are not concerned in this case with clause (b) of section 3. The classic passage that the inter-State movement must be the result of a covenant or an incident of contract of sale was repeated and reiterated by the Supreme Court in the number of cases. In Commissioner of Sales Tax v. Allwyn Cooper [1970] 25 STC 26 (SC) the test applied was whether the performance of contract necessarily involved the movement of the goods across the State frontier.

18. The principle laid down in Tata Iron and Steel Company's case was further elucidated and clarified by Mathew, J., by laying down the following propositions in Oil India Ltd. v. Superintendent of Taxes .

> "(1) a sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in the goods passes;
>
> (2) it is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement; and (3) it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."

The learned Judge added that it was held in a number of cases that if the movement of goods from one State to another is the result of a covenant or an incident of the contract of sale, then the sale is an inter-State sale. What was said in Union of India v. K.G. Khosla and Co. Ltd. is quite apposite in the context of the case on hand :

> "..... But it can also be an inter-State sale, even if the contract of sale does not itself provide for the movement of goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract."

While referring to the decision in State of Bihar v. Tata Engineering & Locomotive Co. Ltd. , Chandrachud, C.J. observed :

> "If a contract of sale contains a stipulation for such movement, the sale would, of course, be an inter-State sale. But it can also be an inter-State sale, even if the contract of sale does not itself provide for the movement of goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract.
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> .....
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> The question as regards the nature of the sale, that is whether it is an inter-State sale or an intra-State sale, does not depend upon the circumstances as to in which State the property in the goods passes. It may pass in either State and yet the sale can be an inter-State sale."

19. In English Electric Company of India Ltd. v. Deputy Commercial Tax Officer , the Supreme Court was dealing with a case where the Bombay branch of the company received the order, transmitted the same to the Madras factory with an instruction to despatch the goods direct to the buyer after manufacture, it was held that the steps taken from the beginning to the end by the Bombay branch

in co-ordination with the Madras factory showed that the Bombay branch was merely acting as an intermediary between the Madras factory and the Bombay buyer and that it was the Madras factory which, pursuant to the covenant in the contract of sale, caused the movement of goods from Madras to Bombay and, therefore, the inter-State movement from Madras to Bombay was the result of the contract of sale. The fact that there was no contract between the Madras factory and the Bombay buyer was held to be of no consequence. It was observed that the appellant-company was a single entity which carried on business through its different branches and the branches are not independent and separate entities. It was pointed out that :

> "..... if in the course of inter-State movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have taken place in the course of inter-State trade or commerce as such a sale or purchase occasioned the movement of goods from one State to another."

It was further observed that the presence of an intermediary such as the seller's own representative or branch office who initiated the contract does not make material difference. Their Lordships concluded that the sale was an inter-State sale but not a sale at Bombay and, therefore, upheld the Central sales tax assessed and collected by the sales tax authorities of Tamil Nadu.

20. The same principles were reiterated in Sahney Steel and Press Works Ltd. v. Commercial Tax Officer .

21. In the light of the settled legal position, it cannot be and it has not been seriously disputed that the movement of goods from the Hyderabad unit of the petitioner-company direct to the customer's site in the other State are inter-State sales pursuant to the contracts entered into by BHEL with the customers/purchasers. The fact that the contracts were entered into with the head office or the unit having overall responsibility for execution is a different one or that the executing unit itself raises the invoices and realises the price from the customers does not in any way detract from the position that the inter-State movement of goods from Hyderabad is pursuant to and a necessary consequence of the contract of sale. In the instant case, the goods are tailor-made, manufactured according to certain specifications and designs and the components/equipment which go into the plant are directly despatched by the Hyderabad unit to the customer in the other State and the goods are received from the common carrier by the customer's representative. The movement of such goods from Andhra Pradesh to other States cannot but be ascribed to contracts of sale entered into by the head office of the petitioner-company of which the petitioner is part and parcel. The fact that the contract was not entered into with Hyderabad unit or that the inter-State movement had taken place at the instance of another unit of the same company does not make material difference. It is to be noted that for the value of the goods despatched, the debit note is sent by Hyderabad unit to the executing unit. It may be that the customer does not pay the amount directly to the Hyderabad unit which manufactures and despatches the goods. But in the light of the settled proposition that the branches and head office constitute one single legal entity, it does not matter by whom the billing is done or to whom the payment is made by the customer.

22. The learned Additional Solicitor-General however tried to cast a doubt on this aspect of the case by calling in aid the findings recorded by the Tribunal in the context of the other category of transactions (inter-unit transfers) in respect of which relief was granted by the Tribunal. The Tribunal observed at paragraph 27 :

> "We feel that when a part is manufactured and sent for being assembled in an equipment being manufactured by another unit for being supplied to the customer, the product which is transferred from unit to unit for that purpose cannot be said to be a transfer in pursuance of the contract with the purchaser, as the contract must be deemed to be for purchase of the finished product and not for the parts which are used for assembling that unit."

It is contended by the learned Additional Solicitor-General that in the case of inter-unit transfer as well as direct despatches to the inter-State customers, the finished products as such is not despatched but it is only parts or equipment forming part of the plant despatched and therefore, on principle, there is no basic difference between the two types of transactions. We cannot, however, endorse the line of approach adopted by the Tribunal though the Tribunal's conclusion with regard to the first category of transactions can be justified for different reasons. The Tribunal missed to note that the plant and equipment which is the subject-matter of contract such as boiler package or turbo generator package is incapable of being manufactured and despatched as a finished unit. Necessarily, the equipment/components or assembled units have to be despatched to the customer's site and installed there. The contract does not contemplate the despatch of a readymade finished product to the customer's place for instantaneous use in the power-plants, etc. On the other hand, it is clear from the terms of the contract, especially the price payment clause, that the components and parts forming part of the larger package should be supplied from time to time by BHEL. It is not at all possible to transfer the finished product such as "boiler package" at a time. It may be noticed that the Tribunal itself has given a different reasoning for excluding the inter-unit transfers from the taxable net at paragraph 29, sub-para 3. The Tribunal rightly puts it on the ground that the article transferred from the petitioner unit to the executing unit (Trichy, etc.) loses its identity as it is incorporated into a larger component or equipment.

23. There is yet another closely allied reasoning to say that the goods sent to Trichy or other executing unit does not stand on the same footing as those sent direct to the customer's site. In the case of the former, there is interruption of movement and the snapping of inextricable bond that should exit between the inter-State movement and the contract of sale. In regard to the goods sent to Trichy unit (or other executing units), the despatch therefrom to inter-State customer takes place after assembly or processing and it is the sole concern of that unit. Trichy unit can even retain the goods for itself and divert them for any other use. There is nothing to indicate that the goods sent by Hyderabad unit to Trichy or other units are earmarked for any particular contract. The Hyderabad unit had no inkling of their ultimate utilisation and whether, how and when the goods will be moved to the customer's place by Trichy unit. As far as Hyderabad unit is concerned, it is a case of pure and simple stock transfer to another unit under "F" forms. At best, the inter-State movement, or to put it in other words, the inter-unit movement to Trichy can only be said to be for the purpose of fulfilling the contract but not in the course of fulfilment of the contract of sale - a distinction recognised in

Tata Engineering & Locomotive Co's case . The movement to Trichy in our opinion is not a necessary consequence of the contract nor is it incidental to the contract that goods of this nature should first be moved to Trichy. As already observed, there is no inextricable and uninterrupted bond between the contract and the movement of goods to Trichy or other sister units of the petitioner. We have, therefore, no hesitation in rejecting the argument of the learned Additional Solicitor-General that when once the Tribunal held that there was no inter-State sale of goods sent to other units, by parity of reasoning, the movement from Hyderabad to customers' sites in other States should not have been treated as inter-State sales.

24. We shall now deal with the more controversial question. The learned Additional Solicitor-General contends that the Central sales tax having been paid by the sister units, viz., Trichy, etc., in the other States on the very same goods despatched from Hyderabad to the customers directly, the sales tax authorities of Andhra Pradesh have no jurisdiction to demand and collect the tax once again on this transaction. It is pointed out that section 9(1) of the Central Sales Tax Act confers authority on the Central Government and the Central Government alone to levy the tax on the sales of goods effected in the course of inter-State trade and the State Governments are empowered to collect that tax as agents of the Central Government. If, therefore, the tax is paid by one of the units of BHEL to the State in which it is located under the bona fide impression that the inter-State sales were effeced by it although the movement commenced elsewhere, the other State has no jurisdiction to collect any more tax on the very same transactions. It is also pointed out that the appropriate State to collect tax could as well be the Tamil Nadu or other States where the executing unit has its place of business.

25. Reliance is placed on the judgment of the Bombay High Court in Commissioner of Sales Tax v. Barium Chemicals Ltd. [1981] 48 STC 121. In that case, the main place of business of the assessee-company was situate at Khammam in the State of Andhra Pradesh. The company was not having any place of business in the State of Maharashtra though the company registered itself as a non-resident dealer under the Bombay Sales Tax Act. Apart from the fact that there is a basic difference in facts, the doubts expressed therein as regards the connotation of "appropriate State" and the ultimate proposition laid down therein cannot be sustained in the light of the judgment of the Supreme Court in State of Uttar Pradesh v. Kasturi Lal Har Lal . The Supreme Court affirmed the decision of the Allahabad High Court in Kasturi Lal Har Lal v. State of U.P. [1972] 29 STC 495 which was dissented from by the Bombay High Court in the aforementioned case. The Division Bench of the Bombay High Court found an apparent inconsistency between sub-section (1) and sub-section (2) of section 9. But, with great respect to the eminent Judges who constituted the Division Bench, we are unable to share that view, either going by the plain language employed or by the spirit and intendment of the provisions. The relevant portions of sub-sections (1) and (2) of section 9 are as follows :

> "9. (1). The tax payable.... on sales of goods..... whether such sales fall within clause (a) or clause (b) of section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced.

> (2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax..... as if the tax or penalty payable by such a dealer under this Act is a tax or penalty under the general sales tax law of the State;....."

It is crystal clear that the tax is liable to be collected in the State from which the movement of the goods commenced. It is that State alone which as the authority to collect the tax on behalf of the Government of India. If the theory of "agency" propounded by the learned Judges of the Bombay High Court is to be invoked, the "movement State" is constituted the sole agent for the collection of tax. This provision was introduced with a view to avoid uncertainty that was prevailing prior to the amendment of the provision with retrospective effect in 1969 and the stretching of jurisdiction by more than one State to collect the tax on behalf of the Government of India. In the face of this clear provision, it would be futile to contend that not merely the movement State but also any other State where the assessee has a place of business in entitled to collect the Central sales tax. The words "in accordance with the provisions of sub-section (2)" occurring in section 9(1) which were adverted to by the Bombay High Court do not have any bearing on the competence or jurisdiction of the identified State, that State being the State from which the movement commenced. When once the movement State is located, its exclusive competence to collect the tax gets crystallised. It would then be impermissible to look to the definition of the "appropriate State" and then conclude that any State conforming to the definition of "appropriate State" is entitled to collect Central sales tax although it is not the movement State. The words "in accordance with the provisions of sub-section (2)" have been advisedly used only to refer to the machinery and procedure to be adopted for the collection of tax by the State from which the movement of the goods commences.

26. The controversy emerging from the view point expressed in Barium Chemicals case [1981] 48 STC 121 (Bom) is no longer res integra in view of the decision of the Supreme Court in State of Uttar Pradesh v. Kasturi Lal Har Lal . In that case the Supreme Court clarified that the words "appropriate Government" occurring in sub-section (2) of section 9 must necessarily refer to the State which by section 9(1) has been conferred jurisdiction to collect the tax, on a harmonious construction of the two provisions. Sabyasachi Mukharji, J., as he then was speaking for the Supreme Court observed :

> "It is clear from the analysis of the scheme of the Act that the Central Government imposes tax and it is by the Central Government the tax is imposed for inter-State sale but it is collected by the Government in accordance with the provisions of sub-section (2) of section 9 of the Act in the State. It will be clear from sub-section (2) of section 9 that the 'appropriate State' imposes and collects the tax on behalf of the Government of India. The question is which is the 'appropriate State' in a transaction of the nature or the type with which we are concerned where tax on inter-State sale was sought to be imposed. In order to be a sale or inter-State transaction the sale must occasion the movement of goods. Here in the instant case, it appears that there were railway receipts which were endorsed in favour of the parties in U.P. It is by that endorsement that title was transferred to the purchasers and that transaction

> occasioned the movement of the goods, in other words, caused inter-State sales to take place, namely, the sale which occasions the movement of goods from one State to another from the State of Bihar to the State of U.P."

The Supreme Court then made the following crucial remarks :

> "It was contended on behalf of the Revenue that in the State of Uttar Pradesh, the concerned Sales Tax Officer was fully competent to make the assessment. The High Court was of the view that this argument proceeded on an omission to consider the opening words of section 2 which is the definition clause, and which makes the definitions given thereunder subject to the context. Sub-section (1) of section 9 confers jurisdiction to make the levy and collection of the tax on the State where the movement of the goods commences, and so the determinative test for discovering the jurisdiction of a particular State, in an inter-State sale, is the place where the movement of the goods commences. The words 'appropriate Government' given in sub-section (2) of that section must necessarily refer to the State which by section 9(1) has been conferred jurisdiction to levy and collect the tax. The provisions must be harmonised." (Emphasis [Here italicised.] supplied).
>
> The law laid down by the Supreme Court in the aforementioned decision is a complete answer to the doubts raised by the Bombay High Court and the consequential view which it has taken.

27. Before we wind up the discussion on this aspect, it is but proper to refer to the observations made by the Bombay High Court to which pointed reference has been made on behalf of the petitioner :

> "The tax under the Act in respect of the transactions in question has already been assessed by the Central Government and has been paid to the Central Government. It has been assessed by the sales tax authorities of the State of Andhra Pradesh acting on behalf of the Government of India, and the tax was paid to the Central Government. In seeking once again to assess these transactions to tax under the Act the State of Maharashtra could not possibly act in its own right, because then its action would be wholly unconstitutional. It was acting on behalf of the Government of India. The tax having been once paid to the Government of India, in our opinion, it is not open to the Government of India to demand it again, whether through the same agency or another agency. The assessment which was made through the agency of the State of Andhra Pradesh has become final. It has become final not only for the the dealer but also for the assessing authority and it cannot be sought to be by-passed in the manner in which the Government of India has sought to do through the agency of the State of Maharashtra. To permit such an action would be to subject the same transactions to double taxation, a doctrine which cannot be incorporated into fiscal legislations without an express statutory provision to that effect."

The learned Judges of the Bombay High Court disapproved the principle laid down by the Madras High Court in Mohamed Ibrahim Hadhee v. State of Madras [1968] 21 STC 378 that "a plea that a wrong State has already assessed will be no answer to an appropriate State bringing to tax transactions liable to be brought to charge by that State." It was then observed by the Bombay High Court :

> "Even if the Government of India chooses to act through a wrong agency and collects the amount of tax due to it through such agency, it cannot turn round and say that though it had received the amount due to it, since the amount was not received through the proper agency, it will receive double the amount by collecting an identical amount of tax in respect of the same transactions through a proper agency."

With great respect, we are constrained to observe that the view expressed by the learned Judges of the Bombay High Court runs counter to the scheme of section 9 of the Central Sales Tax Act and stultify the purpose for which a define provision was introduced with retrospective effect in the year 1969. The rightful and authorised agent of Government of India is identified by section 9(1). If some other State assumes the role of an agent and proceeds to collect the tax, it will be out-stepping its jurisdiction. The fiction imported by the Division Bench of the Bombay High Court breaks down when once we appreciate that the acts of a State unauthorisedly donning the robe of an agent, need not be owned up by the Central Government and by a fiction, it cannot be treated that the Central Government has got the double benefit. True, an unjust or anamolous situation projects itself. But the only way to remove this anamolous situation would be to direct the State which has realised illegitimate revenue to disgorge that benefit. Whether we should give such a direction in this case is a matter which we will deal with in the connected writ petitions. We may also point out that if the view expressed by the Bombay High Court is to be countenanced, then, there will be virtually a scramble amongst the States to collect the Central sales tax in the first instance so that the first State which collects the tax will benefit. Such a situation would lead to a great uncertainty and unhealthy competition. We, therefore, express our respectful dissent from the view expressed by the Bombay High Court in Barium Chemicals case [1981] 48 STC 121, the ratio of which has been considerably whittled down by the judgment of the Supreme Court in State of U.P. v. Kasturi Lal Har Lal .

28. In the memorandum of tax revision case, it is commented that the summary statement prepared by the Tribunal indicating the transfers to and from other units contain certain factual errors especially with regard to the "figures of turnover not subjected to sales tax within the State of A.P.". An apprehension is expressed that the assessing authority, in course of reassessment pursuant to the Tribunal's direction, might feel itself bound by the figures in the said statement. Without going into the details in this regard, we would only observe that these aspects can be clarified before the assessing authority and the assessing authority need not be bound by the figures mentioned in the statement appended to the Tribunal's orders. The assessing authority is free to determine the correct turnover taxable under the Central Sales Tax Act in the light of the findings recorded and the directions contained in the decision of the Tribunal. This observation, we think is sufficient to dispel the apprehension of the petitioner.

29. The learned Additional Solicitor-General put forward an argument in passing that the movement of goods which has emanated from Andhra Pradesh State must, in truth and substance, be treated as a movement taking place from Trichy, etc., because the movement from Hyderabad is for and on behalf of the executing units at Trichy, etc. We find no substance in this contention which the learned counsel himself, realising the limitations of such argument, did not proceed to take to its logical end. The movement which is contemplated under section 9(1) is obviously the physical or factual movement but not a notional or fictional movement. There is no basis to dub that movement as one that emanated from a different State.

30. In view of the foregoing discussion, we confirm the orders of the Sales Tax Appellate Tribunal and dismiss the T.R.Cs. We make no order as to costs.