(2009) 04 MAD CK 0436

In the Madras High Court

Case No : Tax Case (Revision) No''s. 432, 433, 435, 436, 464, 519, 530, 537 and 587 of 2006

Asiatic Oxygen Limited APPELLANT

Vs

The State of Tamil Nadu RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:
Constitution of India, 1950 — Article 366(29A)
Tamil Nadu General Sales Tax Act, 1959 — Section 38, 3A

Citation : (2009) 04 MAD CK 0436

Hon'ble Judges : M.M. Sundresh, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : V. Ramachandran for Anita Sumanth, for the Appellant; Haja Naziruddin, Spl. G.P., for the Respondent

Judgement

K. Raviraja Pandian, J.—Not satisfied with the common order of the Sales Tax Appellate Tribunal (Main Bench), Chennai dated 29.8.2002 made in S.T.A. Nos. 759 of 2000, 534 of 2000, 1027 of 1999, 1011 of 1999, 757 of 2000, 1010 of 1999, 1243 of 1999, 1012 of 1999 and 1083 of 2000 relating to the assessment years 1993-94, 1994-95, 1991-92, 1989-90, 1995-96, 1988-89, 1996-97, 1990-91 and 1996-97 respectively bringing the so called demurrage charges or cylinder holding charges for taxation u/s 3-A of the Tamil Nadu General Sales Tax Act (hereinafter referred to as "TNGST Act"), the present revisions in T.C.Nos.432, 433, 435, 436, 464, 519, 530, 537 and 587 of 2006 have been filed u/s 38 of the TNGST Act.

2. The only question for consideration before us in these cases is,

Whether the amount received by the assessee, which is termed as "demurrage or cylinder holding charges" is exigible to tax u/s 3-A of the TNGST Act?

3. As the point to be resolved in these cases is one and the same and the argument advanced is common by the parties, for the purpose of narration of

facts, T.C.No.519 of 2006 is taken up as a typical case. The assessees are manufacturers and dealers of industrial gas and medical oxygen by filling in cylinders. After use of the gas, the empty cylinders were to be returned to the assessee. A period is specified for return of the empty cylinder. If the cylinder were not returned within the specified period, for the extra period of retention of the cylinders, additional charges were levied, which were termed as "cylinder holding charges or demurrage charges" by the assessee. The assessing officer has taken the view that the container i.e., cylinder is part of the sale of gas and the extra amount paid by the purchaser of gas for retention of the cylinder beyond the specified period has to be regarded as the price paid for the gas purchased. Thus the extra amount charged was taken as increase in the sale price of gas by the assessing officer and the turnover of demurrage charges was brought to tax. On appeal, the first appellate authority modified the turnover relating to demurrage charges among other turnovers. The assessee carried the matter on further appeal to the Sales Tax Appellate Tribunal and contended that the Orissa High Court in its sister concern''s case i.e., Asiatic Gases Ltd. Vs. State of Orissa and Others, considered an identical issue with reference to the identical terms of the agreement and held that "possession and custody of the cylinders by the customers for 14 days was permissible but beyond 14 days was without authority for which the assessee was charging certain amount. In other words, after 14 days, there was no permission for keeping in possession and custody of the cylinder. Therefore, the consideration received was by way of penalty. The term "transfer of the right to use" denotes an agreement between two parties. Here, there was an agreement of transfer of right to use the cylinders for the first 14 days only. Beyond 14 days, the detention was without authority or in total disregard of the terms of the contract and inasmuch as there was no transfer of right to use the cylinders beyond the free loan period of 14 days. The amount received by the assessee on account of the delay in return of cylinders by the purchaser could not be held to be taxable." However, the Tribunal found that the cylinder holding charges collected by the assessee was nothing but hire charges and the hire charges are liable to tax u/s 3-A of the TNGST Act and held the issue against the assessee. Hence, the revision is filed by the assessee.

4. Mr. V. Ramachandran, learned Senior Counsel appearing for the assessee reiterates the argument, which was focussed before the Tribunal.

5. On the other hand, the learned Government Pleader argued to sustain the order passed by the Tribunal.

6. Of course, it is true that the Orissa High Court in respect of the assessee''s sister concern i.e., Asiatic Gases Limited v. State of Orissa (2001) 121 STC 405, referred to above, by giving reasons, which are extracted in the previous paragraphs has held that the demurrage charges or cylinder holding charges received by the assessee can partake the character of the penalty levied for illegal retention beyond the agreed period. Such amount could not be held to be taxable. But the subsequent development is that the said decision in Asiatic

Gases Ltd. Vs. State of Orissa and Others, was carried on appeal to the Apex Court by the State of Orissa in the case of State of Orissa and Anr. v. ASIATIC Gases Ltd. (2007) 7 VST 531, wherein the Apex Court had upset the decision of the High Court by holding that "the medical-oxygen/industrial gases could not be sold without the containers. The property in goods (oxygen/gas) could not be passed to the customers without such containers. Therefore, containers constituted an integral part of the medial oxygen and industrial gases. Section 2(g)(iv) of the Orissa Sales Tax Act provided that the sale shall mean any transfer of property in goods for cash or defer payment or for any other valuable consideration and that it shall include transfer of the right to use such goods for any purpose, whether or not for specified period for cash, deferred payment or any other valuable consideration. Hence the amount collected by the assessee would come within the purview of sale price, in particular, towards transfer of right to use the goods, which is the second limb of Section 2(g)(iv), as such taxable.

7. The facts of the present case are identical as that of the assessee''s sister concern case considered by the Supreme Court in the above judgment. The only variance is that in regard to the Orissa Sales Tax Act, the definition of sale in Section 2(g)(iv) included in itself the transfer of right to use the goods. However, in Tamil Nadu Sales Tax Act, a separate provision Section 3-A of the TNGST Act has been incorporated pursuant to the 46th amendment to the Constitution of India whereby Article 366(29A) has been amended and deemed sale concept has been introduced and one of the deemed sales is transfer of right to use the goods. The cylinder is a goods. The amount received by the assessee as cylinder holding charges or demurrage charges towards user of the cylinders is nothing but the amount collected for transfer of right to use. It is useful to refer the last few sentences of the Supreme Court in (2007) 7 VST 531 thus:

In the present case as stated above the cylinders filled with medical oxygen/ industrial gas were loaned to the customers. The loan was free from payment of charges for 14 days. The over-retention charges were levied after 14 days. In the circumstances the levy was on the transfer of the right to use the goods for consideration.

8. For the foregoing reasons and in the light of the law enunciated by the Supreme Court in the above said judgment, which has also taken into consideration the other judgment of the Supreme Court in the case of Aggarwal Brothers v. State of Haryana (1999) 113 STC 317, the issue has to be decided that the so called cylinder holding charges collected by the assessee are exigible to tax u/s 3-A of the TNGST Act, which is a charging provision for levy of tax for the transfer of right to use the goods for consideration. Therefore, the revisions are dismissed.