
(2016) 02 SC CK 0188
In the Supreme Court Of India
Case No : Civil Appeal No. 1799 of 2010

BOC India Ltd

APPELLANT

Vs

Commissioner of Comm. Taxes

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Citation : (2016) 93 UPTC 326

Hon'ble Judges : Shiva Kirti Singh And R.K. Agrawal, JJ.

Bench : Division Bench

Advocate : Mr. Dhruv Mehta, Senior Advocate, Mr. Rajesh Kumar, Mr. Gaurav Kumar Singh, Mr. Rakesh Chaurasiya, Advocates, for M/s Mitter & Mitter Co, for the Appellants; Mr. Soumik Ghosal, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

1. Heard Mr. Dhruv Mehta, learned senior counsel appearing for the appellant and Mr. Soumik Ghosal, learned counsel appearing for the respondents.
2. This appeal is directed against the judgment and order dated 19th January, 2009 in WPTT No.55 of 2008. The High Court dismissed the writ petition preferred by the appellant and affirmed the order of the West Bengal Taxation Tribunal which had disallowed the appellant's claim that certain charges which it had received from the Indian Iron and Steel Company Limited (IISCO) at Burnpur on account of supply of industrial gases through pipeline be treated as facility charges and be kept out of sale price for the purpose of Bengal Finance (Sales Tax) Act, 1941 (for short "the 1941 Act").
3. The High Court has extracted the definition of "sale price" in the relevant Act and has thereafter relied upon a judgment of this Court in Black Diamond Beverages and Another v. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others [(1998) 1 SCC 458].
4. On behalf of the appellant, an attempt was made to distinguish that judgment by pointing out that Black Diamond Beverages (supra) arose out of a subsequent

Act, viz., the West Bengal Sales Tax Act, 1954 (for short "the 1954 Act") wherein the term "sale price" has been defined in Section 2(d).

5. No doubt, the aforesaid submission is factually correct, but it does not affect the outcome of this case because in *Black Diamond Beverages (supra)*, in paragraph 9, this Court noticed that first part of Section 2(h) of the 1941 Act defined "sale price", with which we are presently concerned, as well as the first part of Section 2(d) of the 1954 Act as also the first part of Section 2(p) of the Rajasthan Act, 1954 are similar. It was also noticed that the first part of such provisions were interpreted by this Court in the case of *Hindustan Sugar Mills v. State of Rajasthan & Others* [(1978) 4 SCC 271]. This view also runs totally against the appellant's case.

6. In order to avoid any scope for confusion, we would like to extract paragraphs 9 and 16 of the judgment in the case of *Hindustan Sugar Mills (supra)*, which are as follows:

"9. We may now take another example which is very much near to the one which we have already discussed. The dealer may, instead of transporting the goods from his factory or his place of business and selling them there, enter into a contract of sale F.O.R. destination railway station. Where such a contract is made, the seller undertakes an obligation to put the goods on rail and arrange to have them carried to the destination railway station at his expense. The delivery of the goods to the purchaser in such a case is complete at the destination railway station and till then the risk continues to remain with the dealer. The freight is payable by the dealer since he has to arrange for the goods to be carried by rail to the destination railway station at his expense and there is no obligation on the purchaser to pay the freight. The purchaser is concerned only to pay the agreed price for the delivery of the goods at the destination railway station. The agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to what is the amount of freight. Even if there is any fluctuation in the amount of freight, since the making of the contract, the purchaser would have no concern, because he is liable to pay only the agreed price which includes the freight, whatever it be. The dealer may, in such a case, pay the freight and charge the agreed price to the purchaser, or he may obtain a railway receipt on the basis of freight to pay and request the purchaser to pay the freight at the time of taking delivery of the goods from the railway at the destination railway station and give the purchaser credit for the amount of the freight against the agreed price. The latter would merely be a convenient mode of paying the agreed price. Since it is the obligation of the dealer to deliver the goods free on rail destination railway station, the dealer is liable to pay the freight as between him and the purchaser and the purchaser can very well refuse to accept the railway receipt which is not "freight pre-paid" but "freight to pay". But he may, ordinarily as a reasonable businessman he would, accept such railway receipt and pay the amount of freight on behalf of the dealer. When the purchasers pay the amount of freight in such a case, it would be as part of the

agreed price and not as freight vis-a-vis the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of "sale price" and fall within the first part of the definition.

16. This renders it unnecessary to consider the second part of the definition, but the latter clause of the second part was strongly relied upon on behalf of the assessee to support the exclusion of the amount of freight from "sale price" and hence we must proceed to consider it. The second part enacts an inclusive clause. It says that "sale price" includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged." Therefore, "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof" is to be regarded as part of "sale price", even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery thereof and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, "other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of "sale price". But if the State is able to show that the particular amount falls within the first part of the definition and is, therefore, part of the "sale price", the exclusion clause cannot avail the assessee to take the amount in question out of the definition of "sale price". Here on the view taken by us, the amount of freight forms part of the "sale price" within the meaning of the first part of the definition and it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. The exclusion clause is, therefore, irrelevant and cannot be called in aid by the assessee. We may point out that even if the exclusion clause were read as an exception to the first part of the definition which, as we have pointed out, cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is obvious that the expression "cost of freight is separately charged" is used in contradistinction to a case where the cost of freight is not separately charged but is included in the price. It is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate

item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part have no application."

7. In the light of law so well enunciated in the aforesaid paragraphs, which has been followed by the High Court, we find no merit in this appeal and hence it is dismissed. No costs.