(1981) 07 AHC CK 0013

In the Allahabad High Court

Case No : Sales Tax Revision No. 729 of 1980

Commissioner, Sales Tax APPELLANT

Vs

Vinod Coal Syndicate RESPONDENT

Date of Decision : 15-07-1981

Acts Referred:
Uttar Pradesh Sales Tax Act, 1948 — Section 11(1)

Citation : (1982) 51 STC 24

Hon'ble Judges : R.R. Rastogi, J

Bench : Single Bench

Advocate : R.R. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

R.R. Rastogi, J.—This is the Commissioner''s revision u/s 11(1) of the U.P. Sales Tax Act. The respondent-assessee, M/s. Vinod Coal Syndicate, deals in coal. For the assessment year 1975-76, the assessee disclosed his taxable turnover at Rs. 6,16,629.90. The assessing authority did not accept the accounts and the disclosed turnover for various reasons. The main reason was that the assessee had not included the amount of freight inward in the turnover of sales of coal. The assessing authority hence made a best judgment assessment determining the taxable turnover at Rs. 7,20,000.

2. The assessee''s appeal having failed he went up in revision. The Additional Judge (Revisions), Varanasi, accepted the assessee''s contention and held that since freight charges were paid by the principals directly, the same were not liable to be included in the sales of coal. As a result the disclosed turnover has been accepted. Aggrieved, the Commissioner has filed the present revision.

3. Before taking up the contentions of the parties it would not be out of place to mention the modus operandi of the assessee''s business. The assessee used to procure orders for supply of coal. He imported coal from the collieries which are situated outside Uttar Pradesh against form XXXI. The coal was brought by

trucks engaged by the assessee and on his instructions the trucks were unloaded at the business premises of the principals concerned. The cash memo issued by the assessee mentioned the price of coal, his commission and sales tax. The amount of freight inward is not mentioned in the cash memo. Sometimes it so happened that the intending purchaser refused to take delivery of the coal. That coal was unloaded at the assessee''s own depot and inward freight paid in respect thereof was included by the assessee in the sale price of coal. There is no dispute in the present case in regard to the out-turn in respect of such sales. The dispute is confined to the includibility of freight in the sale price of coal unloaded by the carriers directly and the freight inward in respect whereof was paid by the purchasers concerned.

4. The controversy involves tried as feels firstly the import and ambit of the expression "turnover" and secondly when the property in the goods passes to the purchaser. According to the learned standing counsel since the assessee imports coal against form XXXI and issues the cash memos at his depot and further the coal is brought by the carriers engaged by the assessee, the goods remain his property till delivery is taken by the purchaser. It was, further, submitted that the expression "turnover" as defined in Section 2(i) of the Act, embraces in its scope inward freight as well, whether or not separately charged in the invoices. On the other hand it was contended on behalf of the assessee by his counsel, Sri R.R. Agarwal, that the question whether inward freight directly paid by the purchaser can be included in the turnover of the dealer would depend on the terms of the agreement between the parties. If the obligation to pay freight is of the purchaser then it cannot form part of the sale price. According to the learned counsel an oral agreement can be spelt out in the present case from the fact that freight was paid by the purchaser directly to its carrier and secondly in the earlier year the accounts were accepted by the assessing authority itself when the modus operandi by the assessee was the same.

5. On a careful consideration I am of the opinion that the contentions of the learned standing counsel should prevail. The expression "turnover" as defined in Section 2(i) of the Act means "the aggregate amount for which goods are supplied or distributed by way of sale or are sold, by a dealer either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration". The proviso to this clause is not relevant for the present purpose and hence it is omitted. There were two explanations to this clause. Explanation I was omitted with effect from 26th May, 1975, by the U.P. Sales Tax (Amendment and Validation) Ordinance promulgated by the Governor on 22nd May, 1975, which was replaced by U.P. Act No. 38 of 1975. Clause (i) of Explanation II which is relevant for the present purpose reads :

Subject to such conditions and restrictions, if any, as may be prescribed in this behalf,-

(i) 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, other than cost of freight or delivery, or cost of installation or the amount realised as sales or purchase tax, when such cost or amount is separately charged.

6. In this Sub-clause the words "cost of installation or the amount realised as sales or purchase tax, when such cost or amount is separately charged" were substituted for "cost of installation when such cost is separately charged", with complete retrospective effect from 1st August, 1958, except for the period, 4th November, 1974, to 28th May, 1975, by U. P. Act No. 11 of 1978. It would be seen that this definition of "turnover" consists of two limbs. The first limb is contained in the main clause itself while the second one is contained in the explanation. The exclusion clause contained in Sub-clause (i) of explanation II aforesaid would be attracted only when this inclusive clause is invoked by the department. It would not be attracted if reliance is placed on the main clause according to which the "turnover" means the aggregate amount for which goods are supplied or distributed by way of sale or are sold.

7. The definition of "sale price" as contained in Section 2(p) of the Rajasthan Sales Tax Act, 1954, which is in similar terms had come up for consideration before the Supreme Court in Hindustan Sugar Mills v. State of Rajasthan 1979 UPTC 37 (SC). According to that definition "sale price" means :

...the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of 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.

8. Analysing this definition it was observed that it was in two parts. The first part says that the "sale price" means the amount payable to a dealer as consideration for the sale of any goods. The concept of real price or actual price retainable by the dealer is irrelevant. The test is what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer.

9. It was further observed that the second part enacts an inclusive clause and 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". The exception carved out in this clause does not operate as an exception to the first part of the definition. It is confined only to the inclusive clause and takes out something which could otherwise be within the inclusive

clause. In other words, the exclusion clause can be availed of by an 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".

10. In my opinion while interpreting the scope of the expression "turnover" as defined in Section 2(i) of the Act these observations apply with full force. Here also the definition is in two parts. The first part says that "turnover means the aggregate amount for which goods are supplied or distributed by way of sale or are sold". In other words "turnover" means the amount payable to a dealer as consideration for the sale of any goods. Sub-clause (i) of explanation II enacts an inclusive clause. There is an exception carved out in this clause. The benefit of this exception can be taken by an assessee only when this inclusive clause is invoked by the department. Such is not the position in the present case. Therefore, the freight was payable to the dealer as consideration for the sale of goods sold and it shall have to be included in the sale price.

11. An attempt was made by the learned counsel for the assessee to distinguish the decision in Hindustan Sugar Mills'' case 1979 UPTC 37 (SC) on the ground that it is a decision on its own facts. I am not inclined to agree with the learned counsel because of the propositions of law elaborately enunciated therein and when the definition of the word "turnover" is in almost similar terms as is the definition of "sale price" given in Section 2(p) of the Rajasthan Sales Tax Act, the observations will have binding effect on this Court.

12. As noted above the modus operandi of the assessee''s business was accepted by the assessing authority. There are some important aspects of this modus operandi. One is that coal against orders procured by the assessee is imported by him against form XXXI and is brought by trucks engaged by him. The assessee issues the invoice at his depot. It is on his direction that the truck is unloaded at the business premises of the purchaser concerned. Another circumstance is that in the event of the purchaser refusing to take delivery, the coal is unloaded at the assessee''s own depot and in respect thereof he includes the freight in the sale price itself. On these facts, in my opinion, the amount of inward freight directly paid by the purchaser to the truck owners would represent a part of the aggregate amount payable by him to the assessee and thus would be a part of the turnover liable to tax in the hands of the assessee.

13. Reliance was also placed on behalf of the assessee on Commissioner of Sales Tax v. M.P. Traders 1980 UPTC 582 . That decision is based on its own facts and further the decision of the Supreme Court in Hindusthan Sugar Mills Vs. State of Rajasthan and Others, has not been considered therein. In my opinion, this decision, therefore, is not applicable to the instant case.

14. In the result, therefore, the revision succeeds and is allowed. The question raised is answered by saying that the amount of inward-freight is to be treated as a part of the sale price of coal liable to tax in the hands of the assessee. The Commissioner is entitled to costs which are assessed at Rs. 200.