
(1991) 07 MAD CK 0092

In the Madras High Court

Case No : Tax Case No's. 1296 to 1298 of 1981

Dalmia Cement (Bharat) Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 15-07-1991

Acts Referred:

Central Sales Tax Act, 1956 — Section 2

Citation : (1991) 07 MAD CK 0092

Hon'ble Judges : Kanakaraj, J;A.S. Anand, J

Bench : Division Bench

Advocate : S.V. Subramaniam, for the Appellant; Chitra Venkataraman, Additional Government Pleader (Taxes), for the Respondent

Judgement

Kanakaraj, J.—The assessee in all the tax cases is the same, but they relate to three assessment years, viz., 1973-74, 1974-75 and 1975-76. In all the assessment years, the assessee is seeking to exclude from the taxable turnover, packing charges, labour charges and excise duty. So far as excise duty is concerned it relates only to the year 1975-76, and the inclusion of the same is not seriously disputed by the learned counsel for the petitioner. Accordingly, we omit to consider the claim relating to excise duty.

2. The assessing authority held that packing charges and the labour charges for packing were eligible for exemption under a Notification G.O.Ms. No. 3291, Revenue, dated October 1, 1960 only up to January 30, 1974. Therefore in the assessment year 1973-74 he had included the turnover under these headings for the period from January 30, 1974 to March 31, 1974. The assessing authority held that packing charges and labour charges for packing would certainly attract liability because these charges are incurred by the dealers in respect of goods sold at the time or before the delivery thereof. He therefore held that these charges properly formed part of the sale price u/s 2(h) of the Central Sales Tax Act, 1956. The Appellate Assistant Commissioner confirmed the said assessment and in doing so he recorded a finding that the magnesite are supplied in terms of

numbers of bags because naked magnesite cannot be sold as such. It is common knowledge that dead burnt magnesite would get hardened and become unfit for use if it is exposed to moisture. Necessarily therefore magnesite has to be packed in some container and sold. The sale price therefore includes the value of the packing materials (gunny bags) in which magnesite is packed. The value of the gunny bags used in packing the magnesite goes into the price of the magnesite sold. On further appeal to the Tribunal it was held that the packing charges are pre-sale charges and they cannot be equated to delivery charges. The packing charges come within the definition of "sale price", they being incurred at the time or before the delivery thereof. The Tribunal also recorded a finding that the petitioners had not proved with records that packing charges were incurred after the sale was over. It is under these circumstances, the assessee has come up on revision, making the very same claim before this Court.

3. Mr. S. V. Subramaniam, learned counsel for the petitioner, refers to a sample copy of the order placed on the assessee for the supply of dead burnt magnesite. It is seen from the said copy of the order that the delivery by the assessee is at the despatching railway station which in this case happened to be Karuppur/Salem railway station. It is also seen from another order dated January 16, 1975, that the terms of delivery were f.o.r. Karuppur railway station, that the goods should be packed in single gunny bag and properly marked at no extra cost. If double gunny bags were to be used an extra cost of 50 paise per metric tonne was provided. There is one significant clause in all the despatch advices and invoices which reads as follows :

"Our responsibility ceases the moment consignment is handed over to the carrier and a R.R./L.R. is obtained for the goods. Claims for delay, shortage, damage to or loss of goods in transit should be made by the buyers against the carrier direct."

These terms of the contract clearly show that the sale was at the boarding railway station and the delivery was at the railway station. Mr. Subramaniam sought to contend that the assessee had shown the packing charges and the labour charges separately in their invoices and therefore they are eligible for deduction under the second part of the definition "sale price" u/s 2(h) of the Central Sales Tax Act. According to him, the goods are earmarked as soon as the supply order is received. The entire argument is based on certain observations made in *Ramco Cement Distribution Co. (P.) Ltd. v. State of Tamil Nadu* [1982] 51 STC 171 . In that case the assessee had sold cement, sale and distribution of which were subject-matter of the Control Order. The question was whether the assessee could claim deduction in respect of freight charges and packing charges from the total turnover. The Division Bench of this Court held that by reason of the provisions of the Control Order, which governs the transaction of sale of cement, the amount of freight charges formed part of the sale price within the meaning of the first part of the definition of that term and was includible in the turnover of the assessee. The argument is that but for the Control Order the

decision might have been otherwise. In our opinion, it cannot be deduced from the said decision that in all other cases the contention of the assessee that the packing charges and the labour charges for packing should be excluded from the turnover, had been accepted. On the other hand there is enough authority to conclude against the assessee on the facts of the present case.

4. We feel that the only question that has to be answered in this case is whether there was an agreement to sell the packing material, having regard to the facts and circumstances of the case and the nature of the goods. Thus is a pure question of fact and this question cannot be decided on the basis of fiction or surmise, nor can the question of fact be allowed to be lost sight of or side-tracked by copious citations. We have already pointed out that the delivery in this case is at the despatching railway station. The goods to be sold cannot be sold in a naked condition, but have to necessarily be packed in gunny bags or any other containers. The delivery is agreed to be at the railway station from where the goods are despatched. Having regard to the nature of the goods, there cannot be delivery without the gunny bags, since the magnesite was transported from the work site packed only in gunny bags. On these facts the sale is complete, the moment the goods are loaded at the despatching station in a deliverable state. The packing of the goods in this case in gunny bags is a necessary concomitant of the sale agreement. We are therefore clearly of the opinion that the packing charges and the labour charges for packing squarely come within the first part of the definition of the word "sale price" u/s 2(h) of the Central Sales Tax Act. The packing charges and the labour charges for packing are amounts payable to the dealer as a consideration for sale of the goods, viz., dead burnt magnesite and that concludes the issue against the assessee.

5. We may, however, advert to the repeated stress made by the learned counsel for the petitioner that the definition of "sale price" comprises of two parts and from the inclusive part certain amounts are carved out for deduction when the cost of freight or the cost of the delivery is separately charged. The repeated attempt of the counsel is that, inasmuch as the packing charges have been separately invoiced, the assessee is eligible for the deduction under the later part of the definition of the "sale price". We need only refer to *Hindusthan Sugar Mills Vs. State of Rajasthan and Others*, dealing with the definition of the word "sale price" and the exclusion clause in the later part of the definition on which much reliance is placed by the petitioner. To repel the argument the Supreme Court has observed as follows :

"This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion 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".

We have already pointed out in this case that the facts as culled out from the documents relied on by the petitioner, clearly established that the packing charges and the labour charges for packing come within the first part of the definition.

6. In *Dalmia Cement (Bharat) Ltd. v. State of Tamil Nadu* [1991] 81 STC 327 a Division Bench presided over by the Chief Justice has laid down the law succinctly and a speaking order has been passed while dismissing the tax case at the stage of admission which covers the issue. The Division Bench relied on *Commissioner of Sales Tax, U.P. Vs. M/s. Rai Bharat Das and Bros.*, and observed as follows :

"The packing of the cement was, to effectuate the sales and therefore the packing charges had to be included as an integral part of the sale price. The expression "any sum charged for anything done by the dealer in respect of the goods" in section 2(h) of the Central Sales Tax Act, 1956, squarely covers such cases where packing charges are an integral part of the sale price itself."

7. In *Deputy Commissioner of Sales Tax v. Raja Oil Mills* [1979] 43 STC 78 the assessee was dealer in copra, coconuts, etc. The turnover representing the value of gunny bags purchased from sundry persons and used for packing the copra sold in the course of inter-State trade or commerce, was included in the taxable turnover. It was urged on behalf of the assessee that a separate bill for the container or itemising the bill made out for the goods would by itself, be decisive of the question. It was pointed out that the proper way to look at such transactions would be to find out whether there was express or implied agreement between the parties to sell the goods along with the packing materials. In this case we have already pointed out that there is an implied agreement to sell the magnesite in gunny bags.

8. For all the reasons stated above we have no hesitation in upholding the concurrent findings of the assessing authority, Appellate Assistant Commissioner and the Tribunal and hold that for all the three assessment years the packing charges and labour charges for packing would rightly be included in the taxable turnover of the assessee. These revisions fail and they are dismissed. There will however be no order as to costs.

9. Petitions dismissed.