

(1984) 09 CAL CK 0010
In the Calcutta High Court
Case No : Civil Rule No. 5918 (W) of 1981

Indian Explosives Ltd. and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 11-09-1984

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 8
Constitution of India, 1950 — Article 133, 136, 226, 32
Industries (Development and Regulation) Act, 1951 — Section 18G, 2, 25

Citation : (1986) 62 STC 61

Hon'ble Judges : Tarun Kumar Basu, Acting C.J.

Bench : Single Bench

Advocate : Subrata Roy Choudhury, Biswarup Gupta, Bhaskar Gupta and Amiya Narayan Mukherjee, for the Appellant; Narottam Chatterjee and Shib Kumar Majumdar for respondent Nos. 1 and 2 and T.K. Basu and Sudhangsu Sil, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Basu, Ag. C.J.

1. The facts relating to the present application may be briefly noted.
2. Petitioner No. 1, Indian Explosives Limited (hereinafter referred to as IEL), manufactures fertilizers at its factory in Panki, Kanpur. The essential raw material required for such manufacture is naphtha. Naphtha during the relevant time was manufactured by the Indian Oil Corporation (hereinafter referred to as IOC) inter alia at its Barauni refinery in Bihar.
3. From September, 1969, naphtha was being supplied by IOC to IEL through a pipe-line connecting the Barauni refinery of IOC with the factory of IEL at Kanpur. The terms and conditions of such supply were recorded in an agreement between IEL and IOC dated 9th February, 1970. The agreement was effective from September, 1969, and was in force till 31st December, 1980.

4. Clause 5 of the agreement is very material for the purpose of the present application. The relevant portions of that clause may be set out hereinbelow :

Price

5. The price or prices of naphtha shall be determined in accordance with the pricing formula laid down by the Government of India or as allowed by the Government of India from time to time in respect of :

(i) naphtha produced indigenously and

(ii) imported naphtha.

6. The price or prices so charged shall be exclusive of transfer charges [chargeable in accordance with clause 7(ii) of this agreement] excise duty and all other taxes and levies, which shall be recovered by the seller from the buyer at actual rates prevailing and levied by concerned agencies from time to time."

7. The material portion of clause 7(ii) referred to above is in the following terms :

7(ii) The cost of transferring naphtha by pipe-line from the point of its manufacture to the fence of the fertilizer factory shall be assumed to be the same as the railway freight for the equivalent distance as applicable from time to time for naphtha and shall be borne by the buyer.

8. In March, 1974, the State of Uttar Pradesh assessed IOC to sales tax for the assessment year 1969-70 under the State Act on total turnover of IOC including therein the sale of naphtha by IOC to IEL under the abovementioned agreement. This was challenged by IEL in an application under Article 226 of the Constitution of India filed in the High Court at Allahabad.

9. On 27th August, 1975, the Allahabad High Court construed the agreement and held that the sale of naphtha as aforesaid was an inter-State sale attracting Central sales tax (Indian Explosives Ltd. Vs. Commissioner, Sales Tax and Others,). The High Court quashed the order of assessment in so far as it related to the assessment under the State Act. An application filed by the Commissioner of Sales Tax, U.P., under Article 133 of the Constitution of India in the Allahabad High Court was rejected. An application made by the Commissioner thereafter under Article 136 of the Constitution of India in the Supreme Court was also dismissed on contest.

10. In August, 1977, IEL filed a suit in this Court being Suit No. 515 of 1977 for perpetual injunction restraining IOC from demanding or realising sales tax under the U.P. sales tax laws in respect of supplies made under the agreement. The suit is still pending. The State of Bihar is not a party to that suit.

11. On 29th June, 1978, an assessment was made by the Bihar sales tax authorities assessing the sales made by the IOC to IEL under the Central Sales Tax Act including therein the transport and delivery charges.

12. Sometime in 1979 the IOC and its Managing Director filed a writ petition

under Article 32 of the Constitution of India in the Supreme Court. In the petition both the State of Bihar and the IEL were made parties and the petitioner claimed an adjudication on the question as to which sales tax under the Central or State law was payable in view of the conflicting orders of the State of Bihar and of the State of U.P.

13. On 10th September, 1979, the Supreme Court delivered its judgment in the abovementioned writ petition. The Supreme Court held that the sales under the abovementioned agreement were sales in the course of inter-State trade and were subject to Central sales tax and not the State sales tax. The decision of the Supreme Court is in the case of Indian Oil Corporation Ltd. and Another Vs. Union of India (UOI) and Others, . At paragraph 10 of the judgment the following observation occurs :

Counsel for the 5th respondent sought to raise a question regarding the justification of treating freight as part of the sale price, but that is not a matter that arises for consideration on the present writ petition filed by IOC.

14. It is because of the fact that this question mentioned above was kept open by the Supreme Court that the present petition has been filed in this Court.

15. Two issues have been raised in the present writ petition. First, whether the Central sales tax is payable on transportation charges for naphtha; and second, whether Central sales tax is payable on the excise duty charged by IOC to IEL.

16. It may be noted that the second question was not pressed at the time of the hearing by IEL.

17. Before I go into the controversy raised in the petition it may be noted that the following pleadings were used by the parties :

(i) Writ petition filed by IEL and a shareholder verified an affidavit affirmed by the shareholder on the 22nd July, (sic) 1981.

(ii) Supplementary affidavit filed by IEL with leave of court affirmed by Samarjit Ghosh on the 10th April, 1981.

(iii) Affidavit-in-opposition of IOC affirmed by Himadri Kanti Lahiri on the 9th May, 1984.

(iv) Affidavit-in-opposition of the State of Bihar and respondent No. 2 affirmed by Om Prakash Sultania on the 7th May, 1984.

(v) Affidavit-in-reply of the writ petitioners affirmed by Samarjit Ghosh on the 29th May, 1984.

(vi) Supplementary affidavit on behalf of the writ petitioners filed with leave of court and affirmed by Samarjit Ghosh on the 27th June, 1984.

18. The State of Bihar did not pray for any leave to affirm any further affidavit-in-reply to the second supplementary affidavit of the petitioners and this was

recorded by me in an order dated the 19th June, 1984. IOC asked for leave to file a supplementary affidavit in reply to the IEL's second supplementary affidavit and such leave was recorded in my abovementioned order dated the 19th June, 1984. No such affidavit has however been filed. It has been recorded by order dated 23rd July, 1984, that the IOC does not admit any of the allegations made in the second supplementary affidavit of IEL.

19. The relevant provisions of the Central Sales Tax Act (hereinafter referred to as the Act) may be noted. Central sales tax is leviable at the specified rate on "turnover" of a dealer u/s 8 of the Act. "Turnover" has been defined in Section 2(j) of the Act to mean the aggregate of the "sale prices" received and receivable by a dealer in respect of the sales of any goods in course of inter-State trade or commerce made during the prescribed period" and determined in accordance with the provisions of the Act and the Rules made thereunder.

20. Section 2(h) of the Act defines "sale price" as follows :

"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 cases where such cost is separately charged.

21. The only question that arises for determination in this case is whether the the cost of freight or delivery of naphtha can be included in the "sale price" or not for the purpose of its exigibility to sales tax under the Act.

22. Mr. Bhaskar Gupta appearing on behalf of the petitioner relied on a decision of the Supreme Court in the case of Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, . In that case the company sent goods to outstation customers by railway "freight to pay". It made out an invoice at the catalogue rate and the customers paid the amount of invoice less the freight for realising the railway receipt and took delivery of the goods on payment of the railway freight. The result was that the net amount received by the company was catalogue rate less the railway freight charged in respect of the goods transported to the destination. In a sample invoice which was relied upon by the State of Andhra Pradesh in that case, the company had made out the invoice at the catalogue rate deducting discount therefrom, charged sales tax on the balance and thereafter they deducted the railway freight. The question that arose for consideration was whether the deduction in respect of railway freight would be allowed for assessment of sales tax under the provisions of the Andhra Pradesh General Sales Tax Act, 1957. It may be noted that the provisions of the Andhra Act are very similar to the provisions of this Act. The Supreme Court laid considerable emphasis on clauses IV and XVI of the contract, which are in the following terms :

Clause IV. The price of the said production supplied to the stockists would be the

current general gross list price charged by the company free as on railway less such discount as may be fixed by the company from time to time.

Clause XVI ...in the case of consignment sold free on railway destination, the railway freight shall nevertheless be payable by the stockists at the destination and the amount of freight shown on the railway receipt should be deducted from the invoice of the company.

23. Dealing with the question for consideration the Supreme Court observed as follows:

If clause IV stood alone the price charged by the company may be deemed to be the catalogue rate less the discount payable to the purchasers. But by clause XVI the purchasers clearly undertook to pay the railway freight which was deducted from the invoice made out by the company. By clause XVI the company received the catalogue rate less the railway freight as price of the goods sold...In our judgment, under the terms of the contract there is no obligation on the company to pay the freight, and under the terms of the contract the price received by the company for sale of goods is the invoice amount less the freight.

...

24. It was held that the form in which the invoice is made out is not determinative of the contract between the company and its customers.

25. Mr. Narottam Chatterjee appearing for the State of Bihar relied on a decision of the Supreme Court in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, . In that case the assessee manufactured cement and sold it to purchasers both inside and outside the State of Rajasthan. The sale of cement at the relevant time was controlled by the provisions of the Cement Control Order, 1967, which was issued by the Central Government in exercise of the powers conferred by Section 18G and Section 25 of the Industries (Development and Regulation) Act, 1951. Clause 7 of the Control Order provided that the ex factory prices admissible to the producers for the different varieties of cement shall be as specified in the schedule and the schedule as it stood at the material time specified retention price of Rs. 161.40 per metric ton for cement manufactured by all producers other than those mentioned as items 1 to 5 which included the assessee. The maximum price at which a producer should sell cement was prescribed in clause 8 which said that no producers shall sell any other variety of cement at a price exceeding Rs. 214.65 per metric ton free on railway, destination railway station plus excise duty paid thereon. The Cement Control Order ensured that cement was available throughout country at a uniform price.

26. The contract which the assessee had with the purchasers provided, inter alia, that although the price of cement was on the basis of f. o. r. destination railway station, the consignments would be despatched "freight to pay" and credit accorded in the bill for the cement of freight payable.

27. The question that arose for consideration was whether the amount of freight deducted from the f. o. r. destination railway station price in the invoices made out by the assessee and paid by the purchasers formed part of the "sale price" within the meaning of the Rajasthan Act and Section 2(h) of the Central Act. The High Court was of the view that the freight formed part of the sale price and was therefore includible in the total turnover.

28. The Supreme Court held that the scheme of the Control Order was that the freight was payable by the purchaser and he recovered it from the seller as part of the f. o. r. destination railway station price. The provisions to the contrary in the contract was inconsistent with the scheme of the Control Order and must be held to be excluded by it, the Central Order being statutory and paramount and having overriding effect. It was held that by reason of the provisions of the Central Order, the amount of freight formed part of the sale price within the meaning of the Rajasthan Act and the Central Act and was includible in the turnover of the assessee.

29. Mr. Bhaskar Gupta appearing for the petitioner submitted that the principles which emerged from the cases is that if the freight is an unidentifiable part of the sale price and the sale price is composite in nature the freight is paid by the purchaser as a part of the consideration for the sale and it formed a part of the sale price. In such cases, the freight cannot be excluded while assessing the total turnover of the seller. But when having regard to the terms of the contract between the buyer and the seller the freight is separately charged and is identifiable and it does not form an unidentifiable part of a composite sale price, freight cannot be included in determining the turnover of the seller. It was pointed out that the Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh,) has been affirmed by the Supreme Court in the Hindustan Sugar Mills case 1978 Tax LR 2258 discussed above.

30. It was further pointed out that the Hindusthan Sugar Mills Vs. State of Rajasthan and Others, was reviewed by the Supreme Court although on a different point and the review judgment is reported in Hindustan Sugar Mills Vs. State of Rajasthan and Others, .

31. Mr. Bhaskar Gupta also relied on a decision by a Division Bench of the Madhya Pradesh High Court in the case of Commissioner of Sales Tax v. Gill and Co. Ltd. reported in 1974 Tax LR 1943 where the principle has been enunciated as follows :

Thus what is necessary for a freight to constitute sale price is that it should not be separately charged and it should be part of the total price that the assessee may charge to the customer. In this connection, we might further observe that the bill by itself will not be conclusive of this question in some types of cases at least.

...

32. Ultimately, it depends on two factors :

- (i) as to what was the agreement between the assessee and the purchaser and
- (ii) whether the freight was separately charged or whether it was part and parcel of the sale price which the customer paid to the assessee-dealer.

33. Another decision of a Division Bench of the Orissa High Court in the case of Orient Paper Mills Ltd. v. State of Orissa reported in [1975] 35 STC 84 Ori : 1974 Tax LR 2224 was relied upon by Mr. Gupta for the same proposition.

34. Applying the above principles to the facts of the present case it was submitted by Mr. Gupta that the clauses of the contract between the IEL and IOC particularly the last sub-paragraphs of clause 5 and clause 7 thereof clearly indicate that the freight charged in the instant case is an identifiable and separate element. It does not form part of the composite sale price unlike the price fixed under the Cement Control Order which is a uniform price throughout the country. This, it was submitted, is the basic difference between the instant case and the Hindustan Sugar Mills case 1978 Tax LR 2258. It was pointed out that the price of naphtha is not controlled. On the contrary, the transportation charges are charged in addition to the price of naphtha as fixed by the Government. In the first supplementary affidavit filed on behalf of IEL reference has been made to the recommendation of the oil prices committees and the resolutions adopted by the Central Government on such recommendation. This clearly goes to show that the transportation charge for naphtha by pipe-line has always been treated as separate and identifiable and charges in addition to the selling price and is therefore not a part of the sale price.

35. IOC in their affidavit-in-opposition have, it was submitted, after some hesitation in the initial paragraphs clearly admitted in paragraph 22 that "excise duty has to be included in the selling price and cannot be disputed by the petitioner whereas the transfer and delivery charges are extra charges and they can be excluded from the levy of sales tax".

36. In my view the contentions of Mr. Bhaskar Gupta are sound and should be accepted. I hold that, for the reasons which have been submitted by Mr. Gupta on behalf of the petitioner, the transportation charges of naphtha for the period of the agreement cannot be included in the computation of the sale price. It would follow that all sums recovered by the IOC from IEL as and by way of sales tax must be excluded from the computation of the turnover of the IOC. It would necessarily also follow that all the sums which have been recovered by the sales tax authorities of Bihar would be liable to be refunded.

37. That monies illegally collected by fiscal authorities are liable to be refunded in writ proceedings has been settled by the Supreme Court by a long line of cases and cannot now be disputed. The only question is whether it can be so done in the instant case.

38. Turning to the prayers in the present petition it is found that there is no

specific prayer for refund, Mr. Bhaskar Gupta drew my attention to prayer (e) of the petition which is in the following terms :

Appropriate writ, order or direction do issue for the production of all relevant records and for the protection for all rights of the petitioners and for granting the petitioners such reliefs as in the circumstances of the case shall be just.

39. It was the submission of Mr. Gupta that this prayer is wide enough to cover a prayer for refund.

40. I am unable to accept this submission of Mr. Gupta. In my view an order for refund can only be made by a writ of mandamus. As there is no writ of mandamus prayed for directing the refund, I am of the view that the petition as framed does not include a prayer for refund.

41. Mr. Gupta thereupon prayed for leave to file a second supplementary affidavit placing on record the relevant facts regarding refund and prayed for appropriate relief with regard thereto. As indicated above, such leave was granted to Mr. Gupta's client. IOL also asked for leave to file a supplementary affidavit in answer to the affidavit of the petitioner. Such leave was also granted. It was recorded on behalf of the State of Bihar that they did not want to file any further supplementary affidavit.

42. Pursuant to such leave the petitioner has filed a second supplementary affidavit. The IOC however has not filed any supplementary affidavit. In the supplementary affidavit a highly complicated procedure has been indicated for the eventual refund of sales tax to IEL. It has been prayed that all assessment orders passed by the State of Bihar on IOC in respect of sales of naphtha to IEL under the agreement dated 9th February, 1970, for the period between September, 1969, to the 31st December, 1980, in so far as it levies sales tax on" transportation or delivery charges be quashed and set aside. All appeals (if any) filed by IOC against any of these orders be permanently stayed in so far as it concerns the exigibility of sales tax on transportation or delivery charges but such appeals in respect of other matters may be proceeded with. It is prayed that the State of Bihar be directed to reassess on the basis of this judgment assessments already made and to refund to IOC all sums realised on account of Central sales tax on delivery or transportation charges of naphtha during the period of the agreement. There are certain other consequential prayers made with which I do not propose to deal for the reasons which will follow presently.

43. Although IOC has not filed any affidavit in answer to the second supplementary affidavit of the petitioner the prayer for refund in the manner shortly indicated above was vehemently opposed by learned counsel appearing on behalf of IOC. Although no satisfactory explanation was given on behalf of IOC why the affidavit-in-answer could not be filed, it was stated on instructions that there are certain disputes between IOC and IEL with regard to the computation of sales tax. In other words it was really a matter of accounting between IOC and IEL.

44. After giving my anxious consideration to the question of refund in this application I have come to the conclusion that the prayer for refund should not be allowed in this application for the following reasons. First, there is no prayer for refund in the petition as framed. No prayer has been made for the amendment of the petition. In my view, a prayer in a supplementary affidavit does not become a prayer in the petition.

45. Second and the principal reason is that there is no affidavit on behalf of IOC. It is the admitted position that the ultimate refund of sales tax with regard to transportation and delivery charges has to be made by IOC to IEL after IOC obtains the refund from the State of Bihar. It is, therefore, obvious that IOC will have to take the necessary steps for obtaining the refund from the State of Bihar. I certainly have the power to direct IOC to take the necessary steps because it is a party in this proceeding. It is however quite clear from the statement of the learned counsel for IOC that it is unwilling to do so by reasons of certain disputes between IOC and IEL. Unfortunately, the nature of the disputes has not been stated before me on oath. The result is that the court cannot apply its mind to those disputes.

46. For the above reasons, I am of the view that no order for refund should be made in this application. I make it clear however that the petitioner will be at liberty to make a fresh application for refund on proper materials and upon notice to the proper parties as and when advised.

47. In the result, this application succeeds and the rule is made absolute. There will be a writ in the nature of certiorari quashing the assessment orders made by respondents Nos. 1 and 2 on respondent No. 3 in so far as they include the cost of transportation or delivery charges. There will be a writ in the nature of mandamus directing respondents Nos. 1 and 2 to reassess all the assessment already made and to make future assessment in the light of the observations indicated above.

48. There will be no order as to costs.