(2004) 11 AHC CK 0187

In the Allahabad High Court

Case No : Trade Tax Revision No''s. 2245, 2246, 2247, 2248 and 2257 of 2004

Marble Men — APPELLANT

Vs

Commissioner, Trade Tax — RESPONDENT

Date of Decision : 09-11-2004

Acts Referred:

Central Sales Tax Act, 1956 — Section 5
Constitution of India, 1950 — Article 286, 286(1)
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 2

Citation : (2004) 11 AHC CK 0187

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : Manish Goyal, for the Appellant;

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—These five revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") arising from the order of the Tribunal dated 31.08.2004 for the assessment years 1997-98, 98-99, 99-2000, 2000-01, 2001-2002.

2. Brief facts of the case are that the applicant carried on the business of sale and purchase of marble goods, paper messie, brassware''s etc. Books of account have been accepted. During the years under consideration, applicant had sold marble to the foreign tourists against foreign currency and claimed exemption as export sale. Assessing authority had not accepted the plea of the applicant and treated the sales as intra-State sales and levied tax under the Act. Admittedly, the marble goods were purchased from unregistered dealers and, therefore, assessing authority treated the applicant as the manufacturer, in view of the admitted definition of the "Manufacturer? u/s 2 (ee) of the Act. First appeals filed by the applicant were rejected. Tribunal has also rejected the second appeals.

2. Heard learned counsel for the parties.

3. Tribunal held that the disputed sales as claim by the applicant as counter sale

to the foreign tourists against foreign currency is not covered under the definition "in the course of export sale" within the purview of Section 5 of the Central Sales Tax Act and the applicant is not entitled to get any benefit in this regard. Tribunal for coming to the aforesaid conclusion relied upon the decision of this Court in the case of CST v. Ganeshi Lal And Sons, reported in 1981 UPTC 128 and in the case of CST v. Marble Emporium, reported in 1989 STJ 739

4. Learned counsel for the applicant submitted that counter sale to the foreign tourists was made under the stipulated conditions and a declaration was taken on the sale voucher by the foreigners as "that the goods purchased shall not be gifted or sold in the territory of India." He submitted that for export sale, it is not necessary to prove the actual movement of goods outside the country. He submitted that since the sales were made to the foreign tourists with the declaration that it would not be gifted or sold in the territory of India. The presumption would be that they have exported the goods outside the country and, therefore, it was export sale. He farther submitted that to be export sale, it is not necessary to prove the actual movement of the goods outside the country and relevant ingredient is the agreement between the parties. In support of his contention he relied upon the decision of the Apex Court in the case of State of Travencore-Cochin and others v. Bombay Company Ltd., reported in AIR 1952 SC 366, State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, , Full Bench decision of this court in the case of National Carbon Co. Vs. Commissioner of Sales Tax, U.P., . Learned Standing Counsel submitted that the delivery of the goods have been admittedly given at the counter of the shop to the foreign tourists and there was no agreement between the foreign buyers for taking away the goods outside the country and no evidence have been adduced that the goods have been transported outside the country. He submitted that the sale was intra-State sales and in view of the amended definition of Section 2(ee) of the Act, applicant has been rightly subjected to tax as manufacturer. In support of his contention he relied upon the decision of this court in the case of CST v. Ganeshi Lal And Sons, reported in 1981 UPTC 128 and in the case of CST v. Rajesh Spices Company, Varanasi, reported in 2004 UPTC 995. He submitted that all the judgments of the Apex Court, cited by learned counsel for the applicant have been considered by this Court in the case of CST v. M/s Ganeshi Lal & Sons (Supra) and it has been held by this Court that the sales made at the counter to the foreign buyers against the foreign currency is intra-State sales and not sale in the course of export.

5. I have perused the order of Tribunal and the authorities below.

6. I find no force in the argument of learned counsel for the applicant. Admittedly, sale was made at the counter of the shop to the foreign tourists, delivery of the good was given at the counter itself. Sale against the foreign currency has not relevancy. As per the applicant itself sale was under the stipulated condition and a declaration was taken from the foreign buyers on the sale voucher namely, that the "goods purchased shall not be gifted or sold in the

territory of India." The above declaration does not amount to any agreement I relating the transportation of the goods outside the country. There was no assurance for the transportation of the goods outside the country. Admittedly, no evidence was filed by the applicant to prove that the goods had been actually transported outside the country. Therefore, the sale can not be said to be in the course of export. For the sale in the course of export two conditions are necessary firstly, there must be an agreement for the purchase and sales and secondly, it may be followed by the transportation of the goods outside the country. In the present case, second condition is not fulfilled. Therefore, it can not be said to be a sale in the course of export. Decisions cited by learned counsel for the applicant does not help in the matter.

Section 5 of the Central Sales Tax Act reads as follows:

"When in a sale or purchase of goods said to take place in the course of import or export - (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in subsection (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

7. In the case of State of Travencore-Cochin and Ors. v. Bombay Company Ltd., reported in AIR 1952 SC 366 , Apex Court held as follows:

"We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under Article 286(1)(b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export, A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export from parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Art. 286(1)(b). That clause, indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned."

8. In the case of National Carbon Company v. Commissioner of Sales Tax, U.P., reported in AIR, 1969 Alld., 205 goods was admittedly transported to Nepal.

9. The phrase "in course of export", in fact has been borrowed from Article 286 of Constitution of India. Before enactment of Central Sales Tax act it came up for consideration in number of cases before Hon''ble Supreme Court. In Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, on page 759, various decisions were reviewed and it was held:

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated thai the connection between the two cannot be voluntarily interrupted without breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as on in the course of export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India. There are a variety of transactions in which a sale of a commodity is followed by export thereof. At one end are transactions in which there is a sale of goods in India for foreign consumption. For instance the foreign purchaser either by him self or through the agent purchases goods within the territory of India and export the goods and even if the seller has the knowledge that the goods are intended by the purchaser to be exported, such a transaction is not in the course of export for the seller does not export the goods, and it is not his concern as to how the purchaser deals with the goods. Such transaction without more cannot he regarded as one in the course of export because etymologically "in the course of export" contemplates an integral relation or bond between the sale and the export."

10. In Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, , it was held :

"The phrase "sale in the course of export" comprises in itself three essentials : (i) that there must be a sale (ii) that goods must actually be exported, and (iii) the sale must be a part and parcel of the export. Therefore either the sale must take place when the goods are already in the process of being exported which is established by their having already crossed the custom frontiers, or the sale must occasion the export. The word ''occasion'' is used as a verb and means ''cause'' or ''to be the immediate cause''. Read in this way the sale which is to be regarded as exempt is sale which causes the export to take place or is the immediate cause of the export. The export results from the sale and is bound up within it. The word ''course'' in the expression ''in the course of means ''progress or process of or shortly ''during''. The phrase expanded with the meaning reads ''in the progress or process of ''export'' or ''during export''. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held."

11. In the case of CST v. Ganeshi Lal And Sons, reported in 1981 UPTC 128, fact of the case was that the sale was made to the foreign tourists visiting this country against foreign exchange under Export Promotion Scheme on printed vouchers that the article shall not be sold in India. This Court considered various decisions of Apex Court and this Court including the cases cited by learned counsel for the applicant and held as follows:

"The question therefore is whether the three essential ingredients which go to make a sale in course of export are established in this case and the sale can be said to be in course of export. From the language of Section 5 it is clear that it is sale in course of export only which is exempt and not sale for export. When can a sale said to be in course of export or for export depends on variety of circumstances. Export means taking out something out of country acrosses the custom barrier. The work ''course'' means ''sequence'', process, a patch in which anything moves''. The sequence or movement should be preceded by sale and must result in export to attract Section 5. The exemption is contemplated, of only that sale which occasions the export. The sale, the movement and the export must result in crossing of goods outside the country and must run in a channel. They must be connected with each other and inter-linked then only it can be said to be in course of export. In J.V. Gokal and Co. (Private) Ltd. Vs. The Assistant Collector Sales-tax (Inspection) and Others, the Supreme Court while considering the phrase ''in course of import'' observed:

"The course of the import of the goods may he said to begin when the goods enter their import journey i.e. when they cross the custom barrier of the foreign country and end when they cross the customs barrier of the importing country."

The decision in National carbon Co. and Dhampur Sugar Mills cannot be of any assistance. They were cases relating to export to Nepal and Mahe, erstwhile French territory, where there was no mode of transport therefore the goods had to be handed over in Indian territory.

In the instant case it is true that buyer is foreigner, the purchases have been made against foreign currency and there is total prohibition on sale of goods in India. But do these give rise to sale which can be said to be in course of export. What is meant by sale in course of export has been explained above. The making of sale in pursuance of Export Promotion Scheme or in accordance with terms and conditions mentioned therein do not make a sale in course of export. The sale may have been made with intention that goods sold shall be taken out of India. And the goods may ultimately cross the Indian border. But these by themselves do not result in sale in course of export. It is the sale which must occasion the export. Can it be said the sale occasioned export ? No, because all the stages of sale namely agreement, settlement, price and delivery have been traveled. The sale is complete in all respects. Title to the goods passes immediately. The seller retains no control over it. There is no link between agreement to sell and export. They do not form part of the same transaction. The sale is independent of export. The three ingredients which go to make a sale in course of export do not remain inter-linked with each other. In a sale which is in course of export or import it must form part of the same transaction. The prohibition to sell in India or the checking of goods at custom barrier have nothing to do with sale. These were conditions of sale. Their breach does not effect the sale. It may land the purchaser in difficulty but that has nothing to do with seller. He is out of picture. Penal action under Gold Control Act do not make the sale for export in course of export. There is no bond between contract of sale and actual exportation. The sale by assessee therefore cannot be considered to be in course of export. These were sale made for export. These were sales made for export. They fell in the illustration given in Nilgiri Plantation''s case at 759 which has been quoted earlier in the judgment."

12. In the result, all the revisions fail and are accordingly, dismissed.

