

(1983) 01 OHC CK 0020

In the Orissa High Court

Case No : O.J.C. No"s. 336 and 337 of 1979

Shree Rani Sati Mining Traders

APPELLANT

Vs

Sales Tax Officer and Others

RESPONDENT

Date of Decision : 17-01-1983

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2(h), 5(2)(A)(a)(iii)

Citation : (1983) 53 STC 322

Hon'ble Judges : R.N. Misra, C.J.;R.C. Patnaik, J

Bench : Division Bench

Advocate : R. Mohanty, R. Sharma, A.C. Mohanty and K. Patnaik, for the Appellant; Standing Counsel (C.T.), U.K. Misra and S.C. Lal, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, C.J.—Challenge in these applications is to the orders of assessment made by the Sales Tax Officer, Rourkela Circle, Uditnagar, opposite party No. 1, in respect of periods 1976-77 and 1977-78.

2. The petitioner is a registered dealer under the Orissa Sales Tax Act (hereinafter referred to as the "Act") bearing registration No. RL-2394 and deals in dolomite and limestone after raising them from its mines. It furnished returns as required under the Act for the two periods. The Sales Tax Officer on a verification of its accounts found that the assessee had sold minerals to M/s. Hindustan Steel Ltd.; but omitted to pay sales tax on that part of the turnover which represented transport charges from the pit-head to the work site. Though the Sales Tax Officer found that the assessee had separately charged the freight, he did not agree to exclude the same by holding :

But the contention of the dealer is not acceptable in view of the facts that transport charges incurred by him were prior to delivery of goods to the purchaser. Thus transport charges would form part of sale price in the instant case. In this connection, decision of the Honourable Supreme Court in Dyer

Meakin Breweries Ltd. Vs. State of Kerala, and Dyer Meakin Breweries Ltd. Vs. State of Kerala, that all the expenditure incurred by the appellant towards freight and handling charges was incurred prior to the sale and was a component of the price for which the goods were sold and the appellant was not entitled to the deduction claimed. It is further observed by the Honourable Supreme Court keeping in view the provisions under Rule 9(f) of the Kerala General Sales Tax Rules, 1963, that-

It is not intended to exclude from the taxable turnover any component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the goods available to the intending customer at the place of sale.

In view of this, transport charges incurred before delivery at work site inside the plant would be included in the sale price of the goods.

The petitioner has contended that the transport charges charged separately were not assessable to tax and the Sales Tax Officer clearly went wrong in including the same in the assessable turnover of the petitioner.

3. No counter has been filed on behalf of the State or the Sales Tax Officer but the Steel Authority of India, opposite party No. 3, the purchaser, has filed a counter-affidavit. The main plea in the counter-affidavit is that the Steel Authority of India was not a necessary party and should not have been impleaded.

4. Section 4 of the Act makes provision for incidence of taxation. Gross turnover is the basis of liability and that term has been defined in Section 2(dd) as "the total of turnover of sales and turnover of purchases". "Turnover of sales" has been defined in Section 2(i) to mean :

The aggregate of the amounts of sale prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods other than those declared u/s 3-B effected or made during a given period.

Sale price" was denned in Section 2(h) of the Act as :

The amount payable to a dealer as valuable consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof, other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

The words "other than the cost of freight or delivery or the cost of installation when such cost is separately charged" were omitted by the Orissa Sales Tax (Amendment) Act (3 of 1976). The same Amendment Act inserted the following provision in Section 5(2)(A) of the Act :

In this Act, the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom :-

(a) his turnover during that period on-

(i)

(ii)

(iii) the cost of outward freight or of delivery or the cost of installation for the purpose of sale or supply of goods by the dealer when such cost is separately charged.

The Orissa Act 3 of 1976 has, therefore, taken the words from the definition of "sale price" and has put them as admissible deduction from taxable turnover. There is no dispute that sales tax is payable on the taxable turnover and taxable turnover is arrived at by deducting the admissible items as provided in Section 5(2)(A) of the Act from the gross turnover.

The assessing officer relied upon two decisions of the Supreme Court to come to his conclusion against the assessee. The first case is that of *Dyer Meakin Breweries Ltd. Vs. State of Kerala*, . The assessee there was a manufacturer of liquor and the manufacture was carried at various places in U. P. and Haryana States, transported from the breweries and distilleries to its place of business in Ernakulam and sold there. When selling the liquor to the customers, the assessee made separate bills for ex-factory price and for freight and handling charges. It claimed that the amount charged for freight and handling charges incurred by it in transporting the goods from the breweries and distilleries to the warehouse at Ernakulam had to be deducted under Rule 9(f) of the Kerala General Sales Tax Rules, 1963, for computing the taxable turnover. The court held that all the expenditure incurred by the assessee towards freight and handling charges was incurred prior to the sale and was a component of the price for which the goods were sold and the assessee was not entitled to the deductions claimed. The rule relied upon provided :

In determining the taxable turnover, the amount specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of the dealer....

(f) all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of goods sold ;

(i) freight ;

(ii) charges for packing and delivery.

The court negatived the assessee's plea by holding :

It is common ground that the sale of the liquor took place in Ernakulam. The company arranges to transport liquor for sale from the factories to its warehouse at Ernakulam. It was not brought for any individual customer. All the expenditure incurred is prior to the sale and was evidently a component of the price for which the goods were sold. It is true that separate bills were made out for the price of

the goods ex-factory and for freight and handling charges. But, in our judgment, the Tribunal was right in holding that the exemption under Clause (f) of Rule 9 applies when the freight and charges for packing and delivery are found to be incidental to the sale and when they are specified and charged for by the dealer separately and expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories to the warehouse of the company is not admissible under Rule 9(f). Rule 9(f) seeks to exclude only those charges which are incurred by the dealer either expressly or by necessary implication for and on behalf of the purchaser after the sale when the dealer undertakes to transport the goods and to deliver the same or where the expenditure is incurred as an incident of sale. It is not intended to exclude from the taxable turnover any component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the goods available to the intending customer at the place of sale.

The other case is that of *D. C. Johar & Sons (P.) Ltd. v. Sales Tax Officer, Ernakulam* [1971] 27 STC 120 (SC). The assessee there was a dealer in foreign liquor but was not a producer or manufacturer thereof. It purchased goods in other States and transported them to its place of business in Ernakulam and claimed exemption of freight and packing and delivery charges by raising separate bills for those items while selling the goods in Ernakulam. The court applied the same principle as in the aforesaid case and held that no support was available for the claim.

Apart from these two authorities, the learned standing counsel relied upon a later decision of the Supreme Court in *Hindusthan Sugar Mills Vs. State of Rajasthan and Others*, , where the court took the view that where the sale of a commodity by the producer was governed by a Control Order under the scheme of which the freight was to be paid by the producer and then was to be recovered from the purchaser, the amount of freight formed part of the "sale price" notwithstanding any term or condition of the contract between the producer and the purchaser to the contrary. In such a case, when the producer paid the freight, he did so because, as between him and the purchaser, he was liable to pay the freight and he then recovered it as part of the price and it could not be said that the obligation to pay the freight was on the purchaser and the producer paid it on behalf of the purchaser and then recovered it by way of reimbursement. That principle was reiterated in the case of *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, .

The facts of these cases are completely distinguishable. In the instant case, from the assessee's place of business, the goods, which constituted ores, were carried to the site of the purchaser and delivery was effected there. There being a weigh-bridge within the premises of the purchaser physical appropriation was following weighment. But when the ores were shifted from the assessee's pit-head, they were already earmarked for supply to the purchaser against existing contracts and there was a continuous supply by the assessee against existing contracts to

the purchaser under this process. This factual difference goes a long way to support the assessee's stand.

That apart, the provision in Section 5(2)(A)(a)(iii) as incorporated by Orissa Act 3 of 1976 makes the claim of deduction admissible where the cost of onward freight or delivery is separately charged. That has been done in the instant case. The unreported decision of this Court in O. J. C. No. 1746 of 1978 (V. K. Loll v. Sales Tax Officer, Rourkela Circle) (see *infra*) also supports our conclusion.

We are, therefore, inclined to agree with the submissions advanced on behalf of the assessee that the Sales Tax Officer went wrong in refusing to allow the deduction claimed by the assessee towards freight or delivery charges.

5. The writ applications are allowed and the demand for that portion has got to be struck down. No costs.

R.C. Patnaik, J.

6. I agree.