

(1995) 11 MAD CK 0048

In the Madras High Court

Case No : T.C. No's. 1041 and 1042 of 1993

S.R. Asaithambi

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 03-11-1995

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 5

Tamil Nadu General Sales Tax Act, 1959 — Section 32

Citation : (1995) 11 MAD CK 0048

Hon'ble Judges : K.A. Thanikkachalam, J;Govardhan, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The assessee is the revision petitioner. The assessment years involved in these tax case revisions are 1975-76 and

1976-77. The assessee is a dealer in granite stones carrying on business at No. 12, Third Street, Gopalapuram, Madras and is having head office

at Dharmapuri. For these two assessment years 1975-76 and 1976-77 assessments have been originally completed by the assessing officer,

Dharmapuri. While doing so, the assessing officer had granted exemption on handling charges, dressing, polishing and transport charges for granite

stones sold by them allegedly to exporters. Transport charges incurred prior to delivery by the assessee and collected subsequently from the

exporters have also been exempted in the assessment orders of the assessing officer passed on January 18, 1979. On verification of the connected

records, the Deputy Commissioner came to the conclusion that the assessing officer has committed mistakes in allowing pre-sale charges. Hence

the Deputy Commissioner, while exercising the suo motu powers u/s 32 of the Tamil Nadu General Sales Tax Act brought to tax in the assessment

year 1975-76 the charges for transporting, handling and dressing amounting to Rs. 7,97,422.80. Similarly, for the assessment year 1976-77 the

Deputy Commissioner brought to tax the charges for transporting, handling and dressing amounting to Rs. 6,93,303.36.

2. The Deputy Commissioner (Commercial Taxes) found the following charges have been incurred by the assessee prior to the delivery of granite

stones to the exporters and the same has been exempted from the turnover wrongly by the assessing officer :

1975-76 1976-77

Rs. Rs.

Polishing charges ... 749 3,609.45

Dressing charges ... 4,30,689 ...

Handling charges ... 40,665 ...

Transport charges ... 3,25,320 6,41,713.34

(Handling transport).

According to the Deputy Commissioner, the agreements entered into between the assessee and the exporter were not produced for scrutiny. The

Deputy Commissioner pointed out that the appropriation of goods as per section 2(h), the sale of goods takes place only on delivery in the case of

unascertained goods. It was pointed out by the Deputy Commissioner that in the present case all the expenditures incurred for transport, handling

and polishing were only pre-sale expenditure. The Deputy Commissioner went through the letters exchanged between the Mass International and

Gem Granites in which it was indicated that the transport, handling and dressing charges shall be undertaken by the assessee as specified by the

exporters - rates were also specified. The responsibility of the goods till the time of delivery to the exporters vested with the assessee and there

was also a risk of rejection of goods, if found not satisfactory. Relying on the decisions in Mehar Baba Brick Works Vs. State of Tamil Nadu, and

Tawakkal Tanning Co. Vs. The State of Tamil Nadu, the Deputy Commissioner held that the pre-sale charges were includible in the sales

turnover. The Deputy Commissioner negatived the claim of exemption u/s 5(3) of the Central Sales Tax Act on the ground that the assessee did

not produce the sale agreement, bill of lading in respect of exports to establish

that granite stones supplied to exporters were sold only to foreign buyers. Hence the Deputy Commissioner has rejected both the contentions of the assessee and taxed the turnover at Rs. 7,97,422.80 in the assessment year 1975-76. Likewise, for the assessment year 1976-77 a turnover of Rs. 6,93,303.36 representing handling, transporting, dressing etc., collected prior to the date of delivery of goods were included in the sales turnover and taxed.

3. Aggrieved, the assessee filed appeals before the Sales Tax Appellate Tribunal who has held that dressing and polishing charges have been collected as a composite sum along with the sale consideration under agreement with exporters, and hence this would come within the mischief of section 2(h) and is exigible to sales tax. In so far as the handling and transport charges are concerned, the Tribunal held that they would also be taxable as sales turnover in view of section 2(h) of the Central Sales Tax Act. In so far as the freight charges are concerned, the Tribunal pointed out that the assessee had included freight and handling charges along with sale consideration as one lump sum amount, and therefore the same are chargeable to tax. Accordingly, the Tribunal upheld the Deputy Commissioner's order in revising the order made by the assessing officer.

4. Before the Tribunal exemption was claimed with regard to penultimate sales made to exporters as per the provisions of section 5(3) of the Central Sales Tax Act. The Tribunal held that for the assessment year 1975-76 the sales made by the assessee to the exporters do not qualify for exemption u/s 5(1) of the Central Sales Tax Act, since the exemption u/s 5(3) of the Central Sales Tax Act was introduced only from April 1, 1976. In so far as the assessment year 1976-77 is concerned, the Tribunal held that the sales turnover is not eligible for exemption u/s 5(3) of the Central Sales Tax Act.

5. Before us, the learned counsel appearing for the assessee submitted that the Tribunal was not correct in confirming the order passed by the Deputy Commissioner in taxing the turnovers at Rs. 7,97,422.80 for the assessment year 1975-76 and a turnover of Rs. 6,93,303.36 for the assessment year 1976-77 representing handling, transporting, dressing charges, etc., collected prior to the delivery of sale of goods. The learned counsel for the assessee submitted that the Tribunal was not correct in holding

that any sums charged for anything done by the dealer in respect of the goods can only relate to something done by the dealer in respect of the goods sold at the time or before its delivery. According to the learned counsel, Explanation (2) to the definition of section 2(r) has to be read along with the definition of "sale" and not independently. It was further submitted that the charges for handling, transport and dressing were collected separately towards independent services, and therefore, could not be included in the taxable turnover. As alternative submission, the learned counsel appearing for the assessee submitted that the sales of granite stones were made to the exporters, viz., Chennai Enterprises, Galaxy Enterprises and Mass International. The abovesaid concerns were regular exporters of granite stones to Japan and possessed export orders while ordering for the purchases from the assessee. Hence, it was a sale in the course of export and therefore, it is exempted u/s 5(3) of the Central Sales Tax Act from the assessment year 1976-77 onwards. It is stated that all documents, books of accounts, and vouchers have been produced before the lower authorities. The learned counsel also took us through the paper book containing xerox copies of sale invoices, purchase orders of exporters, bill of lading, etc.

6. On the other hand, the learned Additional Government Pleader (Taxes) submitted that the assessee is not entitled to ask for exclusion of turnovers relating to handling, transporting dressing charges, etc. The Additional Government Pleader pointed out that all these expenditures were incurred before delivery and hence constituted parts of its turnover. Therefore, according to the learned Additional Government Pleader (Taxes) all charges incurred in respect of granite blocks, like handling, dressing and transport would come under the purview of the latter portion of section 2(h) of the Act.

7. We have already set out the facts in detail with regard to the charges incurred under the heads, handling, dressing and transport, etc. Admittedly there has been no agreement entered into with the exporters for the supply of granite stones. In the absence of written contract, we are guided by the terms and conditions agreed between the parties in the letters exchanged or order forms as in the invoices. Therefore, we have got to gather from the attendant circumstances as to the nature of the expenditure incurred by

way of handling, dressing and transport, etc. The purchase orders of M/s. Galaxy Enterprises and Mass International are available in the paper book. There has been specific mention of the terms and conditions in respect of transport, handling and dressing charges. It is clearly indicated that these operations on the black granites have to be carried out before delivery. The conditions and specifications are :

1. Transport : To be delivered at Madras - Rs. 400 extra per cubic metre towards transport charges as per our discussions.
2. Handling : Rs. 50 as fixed for per cubic metre for loading/unloading.
3. Dressing : After our inspection, the blocks should be separated and dressed as per specifications be marked as per instructions Rs. 530 per cubic metre extra.

It was also indicated that the black granite stones should not have cracks, patches or defects and payments would be made against delivery. These terms and conditions of purchase orders would go to show that the charges agreed towards transport, handling and dressing were only in respect of operations to be carried out on granite blocks before delivery. Therefore, the Tribunal came to the conclusion that the charges relating to transport, handling and dressing would be caught by the mischief of section 2(h) of the Act. It was pointed out that these charges have been charged together with the sale price of granite stones.

8. According to the facts arising in the present case as agreed between the assessee and the exporters, operations have been performed on the granite blocks as specified and also under their supervision. The assessee had not filed copies of sale invoices to find out whether the charges for handling, polishing and transport have been collected in one lump sum along with the sale price or separately. It was noted from the sale statement filed by the assessee that the assessee has collected one lump sum amount towards sale consideration, sales tax, surcharge, polishing, transport, handling and dressing charges. These have been later split up and exemption had been claimed before the taxing authorities. Thus, it can be seen that the assessee has charged one lump sum towards services rendered by way of transport, handling, dressing, etc., along with the sale price in the sale bill. All charges collected by the assessee along with the sale price for putting the goods in a deliverable state, would amount to sales turnover.

This was the view expressed by the Supreme Court in Commissioner of Sales Tax, U.P. v. Rai Bharat Das & Bros. 1988 71 STC 277.

Therefore, the dressing and polishing charges, which were collected as a composite sum along with the sale consideration under agreement with the exporters would fall within the mischief of section 2(h) and is exigible to sales tax.

9. in so far as the handling and transporting charges are concerned, in the contract, it is clearly mentioned that with regard to the transport, the

charges will be borne by the assessee and the amount will be reimbursed later along with the sale consideration. The specification that the blocks

should be without cracks or any other defects and that the process of dressing and polishing will be supervised by the headquarters clearly

indicates that the responsibility of the goods vested on the assessee till that time the assessee delivered the goods to the exporters. The condition

that the payment will be made immediately after delivery shows that the goods would be delivered to the satisfaction of the exporters and if there is

any defect, the goods are liable to be rejected by the exporter. It was pointed out that at the time of placing orders, the goods are not in existence.

After the orders, the blocks are identified and separated. Then the blocks are polished and dressed under the supervision of the exporters. Hence

the Tribunal came to the conclusion that the goods involved are future goods or unascertained goods. In fact, in the present case, the sale itself

takes place only on delivery. Therefore, all charges collected by the assessee towards handling and transport constitute pre-sale charges and

would be taxable as sales turnover in view of section 2(h) of the Central Sales Tax Act. It was found from the records that the assessee had

included freight and handling charges along with the sale consideration as one lump sum amount.

10. The Supreme Court in Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13 held that when the dealer transporting the goods

from his factory or his place of business and selling them at a price, which is arrived after taking into account the freight and handling charges

incurred by him in transporting the goods, the amount of freight and handling charges included in the price would obviously be part of the sale

price. The freight and handling charges represented expenditure incurred by the dealer in making the goods available to the purchaser at the place

of sale and hence they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price charged to the purchaser.

11. In *Ramco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu* [1993] 88 STC 151 the Supreme Court, while considering "packing

charges", held that "packing charges" form part of "sale price" because the expression "any sum charged for anything done by the dealer in respect

of the goods" used in the definition in section 2(h) of the Central Sales Tax Act, 1956, squarely covers such charges, as packing is an integral

element of the transaction of sale and packing charges are an integral part of the sale price. It follows that these charges and the excise duty

thereon cannot be excluded from the turnover (of a dealer who produces cement) for purposes of the Central Sales Tax Act. The Supreme Court

further pointed out that when the Cement Control Order is in force, that would govern between the parties and if the Cement Control Order is not

in force, the parties are bound by the contract in the matter of understanding whether the freight charges form part of "sale price" or not.

Considering the facts arising on this aspect, in the light of the decision of the Supreme Court cited supra, we hold that there is not infirmity in the

order passed by the Tribunal in including transporting, handling and dressing charges as part of sales turnover in view of section 2(h) of the Central

Sales Tax Act.

12. The learned counsel appearing for the assessee by way of alternate submission, contended that the sale of granites to the exporters is the last

sale in the State, and therefore, since it is a penultimate sale, the assessee is entitled to exemption as per the provisions of section 5(3) of the

Central Sales Act. The Central Sales Tax Act which expressly exempted penultimate sale was introduced from April 1, 1976 or the sale to the

actual purchaser. Therefore, the assessee is not entitled to claim this exemption for the assessment year 1975-76, but the assessee can claim this

exemption for the assessment year 1976-77, subject to the conditions imposed. The conditions are enumerated in the decisions reported in

Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore, and [1985] 58 STC 338 (*Commissioner of Sales Tax v. Veekey Footwear*

and *Leather Industries*). They are as under :

1. There must have been a pre-existing agreement or order to sell the specific goods to a foreign buyer.
2. The penultimate sales must have taken place after the said agreement with the foreign buyer was entered into.
3. Sales effected should be for the purpose of complying with the said pre-existing agreement.

According to the department, in order to claim exemption with regard to penultimate sale u/s 5(3) of the Central Sales Tax Act, the assessee

should file form ""H"". This certificate should be filed contemporaneously so as to ascertain that the goods sold have been actually exported.

According to the learned counsel appearing for the assessee, the assessee has produced documents to show that the exporter has contract to

export granites to Japan. In pursuance of the agreement between the assessee and the exporter, granites were sold to the exporter and the

exporter exported the granites sold by the assessee to the foreign buyers. It was further submitted that it was not possible for the assessee to

produce the contract between the exporter and the foreign buyer in order to show that the exporter has exported the assessee's goods to the

foreign buyer. Learned counsel for the assessee submitted that the bills of lading were filed to show that the exporter exported granite stones to

Japan. All that the assessee has got to prove at the present juncture is that the goods sold by the assessee were exported by the exporter.

Normally the exporters would not reveal the contract between the exporter and the foreign buyers due to trade secret. According to the

department, since more often local sales are also made by some of the exporters and some times due to the defects, many granite blocks are

rejected, and therefore unless the assessee produces form ""H"", exemption u/s 5(3) of the Central Sales Tax Act cannot be granted. The assessee

in the paper book filed, included xerox copies of bills of lading to show that the exporter exported Indian dark black granite to the foreign buyers

at Japan. Xerox copies of invoices were also filed to show that goods were despatched ""on account"" of the foreign buyer at his risk to Japan. On

these documents, the assessee submitted that it can be inferred that the granite stones sold by the assessee to the exporters were exported to the

foreign buyers at Japan. But as pointed out by the department, the assessee should identify that it is the goods which were sold by the assessee to

the exporters, were exported to the foreign buyers. This can be established only by filing form "H". In the absence of any proof on the side of the

assessee that it is the granite stones that were sold by the assessee to the exporter were exported to the foreign buyers, it is not possible to give

exemption of penultimate sale as contemplated u/s 5(3) of the Central Sales Tax Act. Therefore, we have no other alternative but to accept the

order passed by the Tribunal in refusing to grant exemption with regard to penultimate sale u/s 5(3) of the Central Sales Tax Act for the assessment

year 1976-77. In that view of the matter, we are not inclined to interfere with the order passed by the Tribunal on this aspect.

13. In the result, both the tax cases (revision) are dismissed. No costs.

14. Petitions dismissed.