(1995) 10 MAD CK 0044

In the Madras High Court

Case No : Tax Case Revision Petition No''s. 4 and 5 of 1984

State of Tamil Nadu APPELLANT

Vs

Dalmia Cement (Bharat) Ltd. RESPONDENT

Date of Decision : 25-10-1995

Acts Referred:
Central Sales Tax Act, 1956 — Section 2

Citation : (1995) 10 MAD CK 0044

Hon'ble Judges : T. Jayarama Chouta, J;K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The department is the petitioner in both these revisions. These revisions relate to the assessment years 1966-67 and 1967-68. The assessee is M/s. Dalmia Cement (Bharat) Ltd., Dalmiapuram. They are dealers in manufacturing and selling cement. For the assessment year 1966-67 and in the assessment year 1967-68 ending with December 31, 1967, the assessing officer included the freight charges amounting to Rs. 79,43,992 and Rs. 47,53,709 respectively in the total turnover for assessment purpose. On appeal, the Appellate Assistant Commissioner confirmed the order of assessment made by the assessing authority in both these assessment years for consideration. Aggrieved, the assessee filed appeals before the Appellate Tribunal in both the assessment years under consideration.

2. The Appellate Tribunal allowed the appeal filed by the assessee, in both the assessment years under consideration and deleted the additions made by the assessing officer by holding that when the Cement Control Order of the Central Government was not in force, the abovesaid two amounts were not liable to be included in the turnover since the freight charges do not form part of the sale price.

3. Aggrieved, the department is in revision before this Court in both these assessment years under consideration.

4. The point for consideration is whether the freight charges are liable to be assessed and are to be included in the total turnover for the assessment year under consideration.

5. During the whole of the assessment year 1966-67 and up to December 31, 1967 and in the assessment year 1967-68, the Cement Control Order was not in force. If the Cement Control Order was not in force the parties are bound by the contract.

6. The freight charges are liable to be included in the sale price for the period of assessment when the provisions of the Cement Control Order of the Central Government was in force. As otherwise the parties are bound by the contract in the matter of inclusion of freight charges in the total turnover. Authorities for these proposition are contained in Ramco Cement Distribution Co. (P.) Ltd. Vs. The State of Tamil Nadu, It was confirmed by the Supreme Court in Ramco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu 1993 88 STC 151 SC at page 158.

7. The learned Additional Government Pleader (Taxes) appearing for the department submitted as under : In these two assessment years under consideration, the Cement Control Order was not in force. The parties are bound by the agreement entered into between them in the matter of payment of freight charges. The sale price collected by the assessee from his customers includes freight charges as a component in the sale price. Therefore, the freight charges of Rs. 79,43,992 in the assessment year 1966-67 and Rs. 47,53,709 in the assessment year 1967-68 are included in the total turnover in the respective assessment year under consideration. According to the learned Additional Government Pleader (Taxes), section 2(h) of the Central Sales Tax Act, would go to show that the freight charges collected as a component in the sale price would form part of the sale price. Therefore, freight charges are includible in the sales turnover. In order to support her contention, reliance was placed upon the decision reported in Shaw Wallace and Company v. State of Tamil Nadu (printed at page 112, infra); 1992 2 MTCR 268. The learned Additional Government Pleader (Taxes) further submitted that the return submitted by the assessee for the assessment years under consideration would go to show that the sale turnover shown by the assessee included the freight charges and from the total sale turnover the freight charges were deducted and the balance was shown as turnovers for the purpose of tax in the two assessment years under consideration. Therefore, according to the learned Additional Government Pleader (Taxes), inasmuch as the assessee collected freight charges under the contract as part of the sale price, the freight charges are also includible in the turnover for assessment purposes.

8. On the other hand, the learned counsel appearing for the assessee while supporting the order passed by the Tribunal contended that in these two assessment years under consideration, the Cement Control Order was not in force and therefore, the parties are bound by the contract executed between

themselves. According to clauses 4 and 10 of the agreement, between the parties, the freight charges are payable separately and they are not included as a component with the sale price. Even in the bills, the freight charges are shown separately and, therefore, the freight charges are not included in the total turnover for tax purposes.

9. We have heard the learned counsel appearing for the assesses, as well as the learned Additional Government Pleader (Taxes).

10. The fact remains that in the assessment years 1966-67 and 1967-68, the assessee collected Rs. 79,43,992 and Rs. 47,53,709 respectively under the head "freight charged". According to the assessee, the Cement Control Order was not in force during the whole of the assessment year 1966-67 and till December 31, 1967, in the assessment year 1967-68. When the Cement Control Order was not in force, the freight charges cannot be included as a part of the price so as to enable the department to include the sale price along with the freight charges, as total turnover for tax purposes. According to the department, it is no doubt true that during the assessment years under consideration, the Cement Control Order was not in force and the parties are bound by the contract. The returns filed by the assessee for these assessment years under consideration would go to show that the freight charges were collected as part of the sale price, and therefore the freight charges are also included in the total turnover for tax purposes. Section 2(h) of the Central Sales Tax Act reads that "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.

11. In the case of Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer, Kurnool 1960 11 STC 827, the Supreme Court while considering the scope of rules 5(1) and 18(2) of the Madras Central Sales Tax (Turnover and Assessment) Rules, 1939, held that in order to claim the deduction under rule 5(1)(g), the freight should (i) have been specified and charged for by the dealer separately, and (ii) the same should not have been included in the price of the goods sold. Where a dealer specified in the bill of sale the total amount of the price of the goods sold, then deducted from this amount the railway freight and showed the balance as the sum on which sales tax was computed, as the dealer had charged a price inclusive of the railway freight, he would not be entitled to the deduction under rule 5(1)(g).

12. In Shaw Wallace and Company''s case (printed at page 112 infra); 1992 2 MTCR 268 stated supra, on facts, this Court held that inasmuch as the assessee sold the goods for a price including the cost of freight, then the freight forms part of the sale price and the same is liable to tax.

13. In Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979 43 STC 13, the Supreme Court while considering section 2(p) of the Rajasthan Sales Tax Act (29 of 1954), and section 2(h) of the Central Sales Tax Act (74 of 1956) held as follows :

"The exclusion clause in the second part of the definition of ''sale price'' 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 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 out of the definition of ''sale price''. The exclusion clause is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part has no application."

In Ramco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu 1993 88 STC 151, the Supreme Court held that for the purpose of the Central Sales Tax Act freight charges cannot be deducted from the controlled price to arrive at the turnover of the dealer producing cement. Admittedly in the assessment years under consideration, the Cement Control Order was not in force. Therefore, the parties are bound by the contract entered into between themselves in the matter of collecting the freight charges.

15. In the assessment year 1966-67 the Cement Control Order was not in force from April 1, 1966 to December 31, 1967. The freight charges formed part of the sale price under the Central Sales Tax Act only when the provisions of the Cement Control Order was in force. Inasmuch as during the assessment year 1966-67 there was no Cement Control Order of the Central Government in force, it necessarily follows that the freight charges for the assessment year 1966-67 cannot form part of the sale price and is not liable to be included in the sale price for the purpose of assessment. Therefore, the authorities below were not correct in inclusion of the freight charges with the sale price for the assessment year 1966-67. On appeal, the Tribunal came to the conclusion that the assessee is entitled to for exemption of the entire freight charges which comes to Rs. 79,43,992 from assessment, which cannot be included in the turnover inasmuch as the freight charges do not form part of the sale price during the abovesaid relevant period, when Cement Control Order was not in force. Therefore, the Tribunal held that in the assessment year 1966-67, the assessee is entitled to deduction of addition of Rs. 79,43,992 and accordingly, the Tribunal allowed the appeal filed by the assessee in the assessment year 1966-67.

16. With regard to the appeal relating to the year 1967-68 total freight charges come to Rs. 56,35,314. Out of the same, a sum of Rs. 8,81,605 forms part of the freight charges for the period from January 1, 1968 to March 31, 1968, the period during which the Cement Control Order was not in force, is not liable to be

included in the turnover since the freight charges do not form part of the sale price. When the Cement Control Order was in force, the freight charges form part of the sale price and therefore includible in the turnover. For the abovesaid reasons, the Tribunal came to the conclusion that the assessee is eligible for exemption for a sum of Rs. 47,53,709, from the disputed turnover and only the sum of Rs. 8,81,605 which forms part of the railway freight charges is liable to be included in the turnover during the assessment year 1967-68.

17. It remains to be seen that the provisions of the Cement Control Order have a overriding effect not only on the terms of the contract between the parties as regards the sale of cement, but also on the definition of the "sale price" defined in section 2(h) of the Central Sales Tax Act. Under the provisions of the Cement Control Order, it was the producer who was liable to pay the freight charges, though he might be able to recover it from the purchaser as part of the sale price. By virtue of the provisions of the Cement Control Order freight charges formed part of the definition "sale price" within the meaning of the first part of the definition contained in section 2(h) of the Central Sales Tax Act. Therefore, freight formed part of the sale price under the Central Sales Tax Act and was liable to be included in the sale price for the purpose of assessment. On the other hand, freight paid by a dealer in despatch of the goods to the customers cannot be included in the sale price for the purpose of sales tax under the Central Sales Tax Act in terms of the definition "sale price" u/s 2(h) of the Act. Therefore, freight will have to be excluded from the sale price, for the computation of sales tax under the Central Sales Tax Act.

18. In Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh 1969 24 STC 487, the Supreme Court while considering the provisions of section 2(r) of the Andhra Pradesh General Sales Tax Act (6 of 1957) held that the State would not seek to levy tax on railway freight if it was not made part of the price.

19. Clause 4 of the terms and conditions of the business states as under :

"prices shall be charged, as ruling on the date of despatch of the goods and the company shall not be responsible for any variation in prices. The price of the cement supplied to the buyers shall be the current general gross list price charged by the company, free on rail less such discount as may be fixed by the company from time to time. But the terms and the times of delivery and the payments therefore shall be in the absolute discretion of the company who may vary the same from time to time. Each despatch shall be a separate contract."

Clause 10 of the terms and conditions of the business states as under :

"The conditions of any railway receipt shall be binding on the buyer and the date of delivery shall mean the date of the railway receipt and in the case of consignments sold free on rail destination, the railway freight shall be nevertheless payable by the buyer at the destinations."

20. In the assessment year 1966-67 there was no Cement Control Order. In such

a case, the assessee is bound by the terms and conditions of the business. As per clause 4 and clause 10 of the terms and conditions of the business, prices charged by the assessee is free on rail. It was further stated that the railway freight shall nevertheless be paid by the buyer at the destination. Therefore, the freight charges were collected along with the sale price as part of the sale price. Therefore, the assessee used to deduct the freight charges from the total price collected from the assessee and shown the balance as taxable income. Therefore, in the assessment year 1966-67 the assessee collected freight as part of the sale price and in such a case, the freight forms part of the sale price. Therefore the Tribunal was not correct in setting aside the order passed by the Appellate Assistant Commissioner, in bringing the freight charges of Rs. 79,43,992 to tax as part of the sale price. Accordingly, we set aside the order passed by the Tribunal in granting the relief to the extent of Rs. 79,43,992 and restore the order passed by the Appellate Assistant Commissioner in the assessment year 1966-67.

21. In the assessment year 1967-68 the Tribunal held the Cement Control Order was not in force till December 31, 1967 and it came into force from January 1, 1968 onwards. Thus the Cement Control Order was in force from January 1, 1968 to December 31, 1968, in the assessment year 1967-68. According to the Tribunal when the Cement Control Order was in force the freight charges are taxable as part of the sale price and when the Cement Control Order was not in force the freight charges is not taxable, since it does not form part of the sale price. We have already seen that during the period when Cement Control Order was not in force, the assessee is governed by the contract. Therefore, the order passed by the Tribunal in granting exemption for a sum of Rs. 47,53,709 stands set aside and the order passed by the Appellate Assistant Commissioner is restored and, accordingly, the freight charges of Rs. 56,35,314 forms part of the sale price and, therefore, taxable.

22. In that view of the matter, the orders passed by the Tribunal in both the assessment years are set aside and the revisions filed by the department are allowed. No costs.

23. Petition allowed.

