
(2007) 02 AHC CK 0189
In the Allahabad High Court

The Commissioner, Trade Tax

APPELLANT

Vs

S/S D.C.M. Limited, Daurala Sugar Works

RESPONDENT

Date of Decision : 22-02-2007

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11

Citation : (2008) 14 VST 27

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—Present three revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the orders of Tribunal dated 28.07.1997 and 29.10.1997 relating to the assessment years, 1984-85. 1985-86 and 1986-87.

2. In all the three years one common question, namely, whether the supply of Mustard Oil by M/S Shree Durga Industries, Fatehabad Road. Agra was the sale on principal to principal basis or after the manufacturing of such oil by M/S Shree Durga Industries, Fatehabad Road, Agra, the opposite party had made the first sale therefore, liable to tax.

3. For the assessment year 1985-86 apart from the aforesaid question, one more question has been raised whether the Tribunal was justified in holding the turnover of plant and machinery to be non-taxable inspite of the fact that the said plant and machinery was manufactured and sold within the State of U.P.

4. In all the three years, the dealer/opposite party (hereinafter referred to as "Dealer") claimed to have purchased oil. manufactured by M/S Shree Durga Industries, Fatehabad Road. Agra, on principal to principal basis under the agreement dated 09.01.1985 and sold the same within the State of U.P. Exemption was claimed on the sale of such Mustard Oil. purchased from M/S Shree Durga Industries, Fatehabad Road. Agra, on the ground that the dealer

was neither manufacturer nor importer of such oil and, therefore, such oil was not liable to tax in the hand of the dealer. Assessing authority on the basis of the terms of the agreement dated 09.01.1985 held that M/S Shree Durga Industries. Fatehabad Road. Agra had manufactured the oil as per the directions of the dealer and the first sale after the manufacture of oil was made by dealer company and. therefore. held the dealer liable to tax. The view of the assessing authority has been upheld in first appeals. Tribunal by the impugned order deleted the tax. Tribunal held that the dealer had purchased the oil on principal to principal basis in terms of the agreement and the first sale was made by M/S Shree Durga Industries. Fatehabad Road, Agra after the manufacturing of oil and not by the dealer.

5. With regard to another question relating to the assessment year. 1985-86 only the brief facts are; the dealer had entered into a contract dated 07.12.1984 with M/S Ram Ganga Fertilizer Ltd., Gajraula. which was subsequently modified on 10th February. 1985 for Rs. 89 lacs. Under the contract, the dealer had to supply equipment, machinery etc. The contract was admittedly executed during the year under consideration. As against the total contract amount a sum of Rs. 17,25,000/- was received in advance in the year, 1984-85. a sum of Rs. 64,84,507/- was received in the year, 1985-86 and the balance amount of Rs. 2,87,770/- was received in the assessment year. 1986-87. Dealer claimed that plant and machinery worth Rs. 11,46,300/- was purchased within the State of U.P. and machinery for Rs. 30.40.593/- was supplied from outside the State of U.P. to M/S Ram Ganga Fertilizer by way of subsequent inter state sales in respect of which Form E-1 and C were furnished. The supply of machinery for Rs. 80.934/- was made from Delhi office in the course of inter state sales against Form C. Apart from this, the machinery for Rs. 7,32,173/- was provided by M/S Ram Ganga Fertilizer. Gajraula for the use in the manufacture. Out of the balance amount of Rs. 39 lacs, a sum of Rs. 11 lacs related to the designing and engineering. Rs. 25 lacs for erection of plant and Rs. 3 lacs towards operation of the plant and machinery and, thus, none of the amount was liable to tax. Assessing authority held that the dealer had purchased various items and thereafter manufactured plant and machinery at site and, thus, plant and machinery have been sold after its manufacturing within the State of U.P. Assessing authority, accordingly levied the tax on the entire amount of Rs. 89 lacs treating it as sale consideration of the plant and machinery.

6. Heard learned Counsel for the parties.

7. To adjudicate the first issue which relates to the levy of tax on the Mustard Oil manufactured by M/S Shree Durga Industries. Fatehabad Road. Agra in pursuance of the agreement dated 09.01.1985. it is useful to refer the entire agreement as such.

MEMORANDUM OF AGREEMENT

An agreement made this Ninth day of January 1985, between Shriram Food &

Fertilizer Industries, Shivaji Mary, New Delhi-110015, a unit of DCM Limited, a company incorporated under the Indian Companies Act having its registered Office at Bara Hindu Rao, Delhi 110006 (hereinafter called the "Company" which expression shall include its successors and assigns) of the one part and Shree Durga Industries, Agra, a proprietary firm (hereinafter called the "Firm" which expression shall include its successors and assigns) of the other parts.

WHEREAS the Company is renowned manufacturer of vegetable products and edible oils in India and has agreed to market the Mustard Oil manufactured by the Firm in its factory at Fatehabad Road, Village Tora, P.O. Kalal Kheria, Agra, U.P. under all or any of the brand names "Panghat", "Rath", "palki" and "Jawan" etc which are the registered trade marks of the Company.

AND WHEREAS the Firm has agreed to sell the Mustard Oil manufactured by it in its factory at Fatehabad Road, Village Tora, P.O. Kalal Kheria, Agra to the Company for marketing by the Company under its brand names.

1) PRODUCT

The product covered by this agreement shall be "Filtered Mustard Oil", quality or purity of which will be in accordance with the standards laid down hereinafter and packed in 15kg, 5kg, 2kg and 1kg both in tin or any other suitable containers as per the requirement of the Company.

PURITY AND QUALITY

The product shall be obtained from good quality Mustard seeds by the process of expression (a blend and Kolhus and Expeller) only and will be in accordance with the standard of quality or purity as per specifications which are as follows:

S. Characteristics Specifications. No. 1. Description. Mustard Oil shall be the oil obtained by a process of expressing clean and sound mustard seeds of "brassica compestris (yellow brown sarson) or Mirassica fumes (Labi, rai or toria) or a mixture of these seeds. It shall be free from admixture with any other oil or substance and from sediments or suspended matter. It shall also be free from rancidity. It shall also be free rancidity. It shall also be free from added flavouring or colouring matter. 2. Colour in 1/4 cell on 50 Lavibond Scale, Expressed as Y+ 5R, Not deeper than. 3. Refractive index at 40 C. 1.464 to 1.4663. 4. Specific gravity 0.900 to 0.910 5. Saponification value 172 to 176. 6. Idoine value 98 to 108 (wija method. 7. Acid value-Ma 1.5 8. Unsaponifiable matter. 1.0 9. Natural essential oil 0.30 to 0.60 percent by mass (as allylisothiocynate. 10. Bellier, Turbidity Temp 36.5 C.Max. 11. Test for Agremone oil. Negative. 12. Test for Hydrocynic acid Negative. 13. Free fatty acid as Oleic acid 3.0 14. Moisture and insoluble 0.25 impurities percent by Mass, Max. But, the Firm will ensure that under no circumstances, the quality or purity of the product will fall below the standards prescribed for Mustard Oil under the Prevention of Food Adulteration Act, 1954 read with the Prevention of Food Adulteration Rules nor its constituents fall outside the limits of variability

permissible under the said Act and the Rules.

3) MANUFACTURER

The product will be manufactured at Fatehabad Road, Village Tora, P.O. Kalal Kheria, Agra and the entire process of manufacturing including any process incidental or ancillary to it shall be carried out by the Firm and the product so manufactured will be supplied in the sealed containers by the Firm to the Company.

4) WARRANTY AND NOMINATION UNDER THE PREVENTION OF FOOD ADULTERATION RULES.

Since the Firm is the duly licensed manufacturer of the product from whom the Company will be purchasing it, the Firm shall give a written warranty in the Form-IV-A prescribed under Rule 12-A of the PFA Rules to the Company. since the Company will be marketing the product in the same State as supplied by the Firm, it has been agreed by the Firm to assume full responsibility in a prosecution under the PFA Act for an offence pertaining to the sale of the said product. The Firm shall nominate, in the prescribed manner, any of its Managers or the persons incharge for purposes of Prevention of Food Adulteration Act and intimate to the Company the name of the persons so nominated alongwith the written consent of the person.

5) PERIOD

This agreement will be effective from 9th January, 1985 to 23rd April, 1991.

The Company will have the option to renew the agreement upto a period of 5 (five years) on the revised terms and conditions mutually agreed upon.

6). USE OF TRADE MARK"

The Company shall be marketing the Mustard Oil Procured from the Firm under its own trade marks "Panghat", "Rath"), "palki" and Mawan" etc. This, however, should not be construed to mean either the permission/licensing/assignment of trade marks to the Firm in any manner and the property in the said trade marks which consists in the exclusive right to use the trade marks in relation to edible oils (including Mustard Oil) will continue to be vested in the company. The Firm hereby undertakes not to use or allow others to use these trademarks in relation to the product manufactured by them.

7. Rules and Regulations

The Firm has agreed to comply with all the legislative requirements and the Rules and Regulations promulgated by the Government (Central and State) and the Local Bodies for manufacture and supply of the Product.

8. Mode of Supply and Delivery

The product will be dispatched by the Firm as per the advice of the authorized

officials of the Company to various destinations through such carriers or transporters as approved. It is further agreed that the Firm will dispatch the product in such quantities in goods and sound containers, properly packed with saw-dust and or other suitable dunnaging material to avoid any transit losses.

9. Right to sell the Product to any other party

It is agreed that the Firm will have the right to supply the product to any other party covered by this agreement after first meeting the requirements of the Company to the tune of 300MT per month or any other quantity as may be mutually agreed from time to time. It is, however, specifically understood that the trade mark of the Company or its publicity material shall not be used in any manner in connection with the supply of the product to other parties.

10. Price

The sale of the product from the Firm to the Company will always be on "Principal to Principal" basis on the price to be determined as per the following formula:

The Firm will charge the price per MT of filtered Mustard Oil on the following basis to arrive at the net price of the product payable to the Firm:

I) Variable Cost Cost of Naked Oil

Since the average oil recovery for purposes of this agreement is presumed to be 35%, the Firm shall charge the cost of the seeds on that basis and follow the procedure more elaborately stated under Clause III (a) hereinafter.

The calculation of naked oil cost will be made as under:

Rs. Tonne of Oil

- Cost of seed (raw material) Rs. (equivalent to 2857 kgs)
- Milling charges Rs. 857.00. .
- Sub-Total
- Less deduction on account of Rs. (equivalent to sale of Cake 1800 kgs) . Sub Total Rs. .
- Service charge @ 4% Margin Rs. .
- @ Rs. 222/MT to the miller
- Cost of naked oil (S. Tax paid) Rs. .

II) Fixed Expenses - Ag-mark expenses Rs. 45.00 - Dunnage Rs. 75.00 - Interest on investment Rs. 75.00 - Filling, Tikli Soldering & Rs. 30.00 Labelling and Loading etc. - Excise cess Rs. 50.00 ----- Rs. 275.00 -----

III) Packing Cost - Tin Containers as stipulated in (e) below.

a) Cost of Seed

The Firm will procure mustard seeds through nominated Mandis at auctions through Commission Agents at the prevailing price not exceeding the maximum declared price for that particular day. A detailed account of purchases will be maintained by the Firm. These accounts will be available for inspection by the authorized officials of the Company. For determining the cost of seed weekly average purchases of the seeds will be taken into account. For this purpose, the Firm will send the information in form Annexure "A" on a weekly basis. The Firm will be compensated pro-rate for extra- moisture content in the seeds in excess of 5.5%.

b) Interest on Investment

This is being allowed as fixed expenses on the presumption that there shall be a minimum stock of 10 days production requirement of seeds in the factory godown (s) of the Firm. In the event the stock level is observed to be below this minimum level by more than 7.5% in any weeks during the month, pro-rate deduction will be made in the said fixed expenses for the whole month.

c) Remuneration

Since the Firm is entitled to sales tax exemption upto 23rd April, 1988, the Firm will charge the service charge @ 4% (four percent) of the cost of naked oil upto 23rd April, 1988 and no sales tax is leviable.

However, effect from 24th April, 1988, till the expiry of the agreement or from the earlier date following the date on which sales tax exemption benefit is withdrawn by the government, the Firm will be entitled to chare by way of remuneration a fixed sum of Rs. 22.00 per MT of filtered mustard oil actually supplied to the Company (subject to a maximum of Rs. 50000.00 per month on the existing capacity of 225 MTR) and the same shall constitute an element of price. Sales Tax will be charged at the rate convenient at actual w.e.f. 24.4.1988. The oil supplied by the Firm will always be regarded as tax paid oil and any liability on account of sales tax arising during the period of exemption which is currently upto 23rd April, 1988, will be to the Firm's account.

d) Sale of Cake

the Firm will be responsible for sale of cake under their brand names, at the best available prices in the market and proceeds thereof shall be deducted from the total cost/price of the product.

A detailed account of sales will be maintained by the Firm. These accounts will be available for inspection by the authorized official (s) of the Company. For determining the deduction on account of sale of cake, weekly average sales price of cake will be taken into account. For this purpose, the Firm will send the information in forms Annexure-A-1 on weekly basis, to the Company. Sales tax exemption benefit in respect of sale of cake, in any, in future, will be retained by

the Firm.

e) Cost of containers

The Firm will be supplying the product in containers of specifications approved by the Company. Initially, the packing will be in 15kg. containers which will be procured by the Firm from the open market at Agra and actual cost currently being Rs. 17.00 per tin (unprinted) will be charged by the Firm. This will form an element of price of product. At the option of the Company, or their approved supplier. For containers actually supplied by the Company no cost on account of tin containers will be allowed to the Firm

NOTE

The cost of the container, is based on the current prices in the open market. However, any variation in container prices will be approved by the Company and allowed to the Firm. Similarly, escalation will also be allowed in respect of variation in the excise/cess duty on oils and electricity charges/duty at actuals.

11. Terms of Payment

Payment in respect of dispatched effected by the Firm will be realized by presenting their bills alongwith proof of dispatch to our nominated bankers at Agra who will make the payment on our behalf through D.D. payable at Agra. The terms and conditions with the bank will be as settled by the Company.

12. Selling price

The Company will be at liberty to work out its own reselling price of the product after adding all expenses, such as, freight, local taxes, trade margins(mark-up), transit losses or any other incidental expenses and the Firm will have no control whatever over fixation of reselling price by the Company.

13. Ag-Mark Certification

The Firm will arrange at its own cost and expenses for Ag-mark certification of the product covered under this agreement. The Company will be entitled to reject the product which does not bear Ag-mark certification or the standard of quality or purity of which is not as per Ag-mark specifications.

14. MAINTENANCE AND VERIFICATION OF RECORDS AND INSPECTION OF STOCKS AND QUALITY

The Firm will maintain proper records relating to the dispatches, purchases of seeds and sale of cake etc., as also other records as are required to be maintained under different laws e.g. Excise Law, Sales Tax Law, Income Tax Law etc. For proper implementation of the agreement the Company shall be entitled to require the firm to maintain such other records and accounts in a particular manner. These records will be available for inspection by the officials of the company. The Firm shall extend full cooperation to the various officials of the company for verification of accounts, stocks, quality of the product as often as it

is deemed necessary or proper by the company.

15. Labels and publicity materials

The Company will approve the layout of the labels to be put on the container and my publicity material in connection with the sale of the product.

All date, literature and information provided to the firm will be considered "proprietary data" for the duration of this agreement.

16. Damages

In the event of the Firm not being able to fulfil the obligations undertaken by it, including the supplies of requisite quantities of the product on the instructions of the authorized officials of the Company, it shall be liable to pay the Company the damages and/or losses suffered by it on that account.

17. Agreement Disclosure

That the terms and conditions of this agreement will not be disclosed in any manner by either party without the written consent of the other party.

18. Arbitration

All disputes between the parties hereto arising out of this agreement or in relation thereto regarding the interpretation of any clause hereof for the decision of which no express provision has hereinbefore been made shall be referred to an arbitrator appointed by the Federation of Indian Chambers of Commerce and Industry (FICCI), New Delhi, and the provisions of the Indian Arbitration Act for the time being in force shall be applicable to such reference. The decision so given shall be final and binding upon the parties.

19. All disputes or difference will be decided subject to the jurisdiction of New Delhi/Delhi.

INWITNESS WHEREOF the parties hereby affix their signatures to this agreement.

Witnesses

1. _____ 1. FOR ON BEHALF OK SURINAM _____ FOODS & FERTILISER INDUSTRIES 2. _____ A UNIT OF DCM LIMITED _____

(AUTHORISED OFFICIAL)

1. _____ 1. FOR ON BEHALF OF SHRIRAM _____ DURGA INDUSTRIES : AGRA 2. _____ (PROPIETRO)

8. Perusal of the agreement shows that M/S Shree Durga Industries. Fatehabad Road. Agra agreed to sell the Mustard Oil manufactured by it to the dealer on principal to principal basis. Agreement was to supply 300 MT mustard oil per month and as per Clause 9 it was open to M/S Shree Durga Industries.

Fatehabad Road, Agra to sell the excess quantity manufactured by it to any other party. Oil Cake obtained in the course of manufacturing remained the property of the manufacturer. As per Clause 16 in the event of non-fulfillment of the obligations, the firm was held liable for damages. Merely because as per the agreement, the manufacturer was instructed to manufacture oil of a specified quality and for the determination of the selling price, cost of the oil seed and the expenses etc was taken into account, it cannot be said that the supply of Mustard Oil by M/S Shree Durga Industries, Fatehabad Road, Agra to the dealer company was not the sale on principal to principal basis. The oil-seed and the oil manufactured from the oilseed were always remained the property of M/S Shree Durga Industries, Fatehabad Road, Agra and the title on the aforesaid goods never vested with the dealer company before the sale of oil. In the circumstances, on the basis of the agreement, it cannot be said that M/S Shree Durga Industries, Fatehabad Road, Agra had manufactured oil on job work basis on behalf of dealer company and after manufacturing of such Mustard Oil, dealer company had made first sale and, therefore, liable to tax being manufacturer as defined under the Act. The view of the Tribunal is, accordingly, upheld.

9. Now coming to the second question for the assessment year, 1985-80. I do not find any error in the order of the Tribunal. Perusal of the order reveals that the contract was a divisible contract for the supply of the material and labour in the form of designing, engineering, commissioning and operation. So far as supply of equipment and machinery is concerned, it was established that some of the machinery have been purchased within the State of U.P. some of the machinery have been supplied by way of subsequent inter state sales and some of the machinery have been supplied directly by way of inter state sales from the 1 lead Office. All these supplies were either of U.P. purchased goods or the inter State sales, thus, were not liable to tax under the U.P. Trade Tax Act. Assessing authority without any basis and material held that the plant and machinery have been manufactured inside the State of U.P. and thereafter supplied to the contractee. This view of the assessing authority is without any basis. However, even assuming that contract was a composite contract and the supply of plant and machinery were after erection and commissioning, the nature of the contract would be the works contract. u/s 3-F of the Act, the works contract was held liable to tax w.e.f. 01.05.1987 by the Notification dated 27th April, 1987 and, thus, even if the entire contract is to be treated as a composite works contract, the value of the goods involved in the execution of the works contract is not liable to tax during the year under consideration. It may be mentioned that the assessing authority has patently erred in levying the tax on the entire contract amount at Rs. 89 Lacs. which could not be taxed by any stretch of imagination. This amount was not the value of the plant and machinery but the value of the entire contract inclusive of designing etc. In this view of the matter, the order of the Tribunal is upheld.

10. In the result, all the three revisions have no merit and are, accordingly, dismissed.