
(2005) 09 AHC CK 0057
In the Allahabad High Court
Case No : Trade Tax Revision No. 633 of 1996

The Commissioner, Trade Tax	Vs	APPELLANT
S/S. Krishna Trading Company		RESPONDENT

Date of Decision : 02-09-2005

Acts Referred:

Central Sales Tax Act, 1956 — Section 5
Constitution of India, 1950 — Article 286, 286(1), 286(1)(6)
Uttar Pradesh Sales Tax Act, 1948 — Section 21

Citation : (2005) 09 AHC CK 0057

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : C.S.C, for the Appellant;

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The present revision is at the instance of the Commissioner of Trade Tax against the order of the Trade Tax Tribunal, Gorakhpur passed in Second Appeal No. 183 of 1995.

2. The dealer opp. party carried on the business of purchase and sale of Kirana, spices, dry fruits etc. In the original assessment proceedings for the assessment year 1986-87 the account books of the dealer were accepted and the claim of exemption on export sale made to Nepal worth Rs. 7,030.72 was granted on the basis of custom certificates submitted by the dealer. On verification, these custom certificates were found to be forged. Notice u/s 21 of the U.P. Sales Tax Act to reassess the escaped turnover was issued. The assessing Authority after affording an opportunity of hearing to the dealer opp. party reassessed the escaped turnover and enhanced the tax liability vide order dated 14th of November, 1994. The said order was modified in appeal by the Deputy Commissioner (Appeals), Sales Tax, Gorakhpur. The Tribunal, in further appeal has set aside the aforesaid order on the ground that the goods having been reached to Nepal, it is export sale is exempt. Secondly it is a case of change of

opinion.

3. Heard the counsel for the parties and perused the record.

4. The learned standing counsel for the department submitted that the dealer Opp.party has failed to establish the genuineness of the custom certificates and that the sales were made in the course of export to Nepal. The goods were not dispatched from Gorakhpur to Nepal. The goods were dispatched from Gorakhpur to Nautanwa through. Transport Agency. According to him the necessary ingredients to establish the sale in the course of export are missing in the present case. It is not sufficient that the goods have ultimately went out of the country. It is essential that the sale made by the dealer Opp.party should be intimately connected with the movement and export and must result in crossing the border of the country and run a channel. Sale and movement of goods outside the country must be connected with each other and if interlinked then only it can be said that the sale is in the course of export. The learned counsel for the dealer Opp. party supported the order of the Tribunal.

5. Before proceeding further it may be noted that on earlier occasions the first appellate authority remanded the matter to the assessing authority with certain directions to find out as to whether the sale in question was export sale or not. The directions have been summarized in the assessment order. The appellate authority has found that the sale of goods in question by the applicant to Nepali dealer is established. It is also established that the goods were brought from Gorakhpur to Nautanwa and from Nautanwa it was carried to Bhairva through the Agent. The first appellate authority specifically required the assessing authority to find out as to whether the movement of goods from Gorakhpur to Nautanwa and from Nautanwa to Nepal was in the course of export sale. In other words, the assessing authority was required to record a finding on the basis of the evidence as to whether the goods were sold by the dealer/opposite party to Nepal dealer under stipulation that the goods would cross the Indian border and would reach Nepal. In the light of the directions given by the first appellate authority, the assessing authority issued a show cause notice to the dealer/opposite party and required clarification in respect of the transactions in question, on the following points.

(i) In the return form No. 4 the dealer/opposite party has not disclosed any export sale;

(ii) There is no continuity. The custom certificate issued from the Custom Office Bhairva (Nepal) does not show the continuity of the sale and export of the goods in question.

(iii) Why the claim of export sale worth Rs. 5,70,301. 12 be not rejected in as much as no evidence has been produced to show that the sale movement and export, resulting into crossing of the territory of India, were not inter linked with each other and form a channel.

6. In reply to the show cause notice, the dealer/opposite party produced certain documents purporting to be purchase orders placed by the Nepal dealers. The assessing authority rejected the documents on the ground that they were fabricated documents and were prepared after initiation of reassessment proceedings. It was pointed that the alleged purchase orders were prepared on plain papers and they did not contain the name of the dealer/opposite party. The assessing authority recorded a finding that there was no purchase order after rejecting the alleged purchase orders as fabricated one. The second circumstance which has been taken into consideration by the assessing authority is that there is no evidence to show as to who paid the transportation charges of the goods transported from Gorakhpur to Nautanwa. In the absence of any evidence, the assessing authority further found the theory that the goods were retired at Nautanwa and were despatched to Nepal through agent is bogus. It is to be noted that there is no evidence to show that any commission was paid by the dealer/opposite party to any such agents. It is further pointed out that the goods were not despatched to Nepal immediately after they were received at Nautanwa from the Transporter. By way of illustrations it is mentioned in the assessment order that the goods through bill No. 55, dated 14th April, 1986 was transferred through transporter on 14.4.1986 and was delivered on 2.7.1986. Thus, the goods were in the custody of the transporter for three months, but there is nothing to show as to who paid the wharfage for this period. The position in respect of other transactions, as mentioned in the reassessment order is more or less the same. On these findings the assessing authority found that the goods were purchased by the Nepali Dealer, but definitely they were riot sold in the course of export sale. The above finding was confirmed by the first appellate authority. The Tribunal allowed the appeal on the following two points.

(1) From the original assessment order it is clear that the assessing authority was satisfied that the goods sold were covered by the custom certificate and the sales were made in the course of export sale, therefore, the initiation of the proceedings u/s 21 of the Act amounts change of opinion, which is not permissible in law.

(2) In the course of export sale only this much is necessary to determine as to whether the goods have actually crossed the custom barrier of India or not on the basis of Form B and payment of cess Duty. It is established that the goods actually crossed the Indian Custom Border.

7. The legality and propriety of the aforesaid two findings is to be examined in the present revision.

8. In the original assessment proceedings the dealer/opposite party produced certain custom certificates on the basis thereof the claim of export sales was accepted by the department. Subsequently on verification with the Custom Office, Bhairva it transpired that the custom certificates produced by the dealer/opposite are forged documents. Since the custom certificate on the basis of which the claim of export sale was accepted in the original proceedings could not

be verified, the reassessment proceeding were initiated. Opportunity to establish the correctness and genuineness of those certificates was afforded to the dealer/opposite party by the department but it failed to prove it. In such circumstances it is difficult to say that it is a case of change of opinion, as held by the Tribunal. The department on enquiry came into possession of fact that the custom certificate on the basis of which the exemption was granted to the dealer/opposite party in the original proceedings was wrongly granted. The genuineness and correctness of the custom certificate was not examined in the original assessment proceedings and the certificates were taken on their face value. The dealer/opposite party produced the custom certificates which on their face purport to be genuine documents. Accordingly the claim of export sale was accepted. But subsequently the department discovered it to be otherwise. In view of the subsequent development, namely, that the Custom Officer of Bhairva denied issuance of any such custom certificate to the dealer/opposite party, in my opinion it does not amount change of opinion. Therefore, the finding of the Tribunal on the above issue is legally incorrect and can not be sustained.

9. Coming to the second finding it may be noted that the Tribunal has failed to appreciate the difference in between "a sale in the course of export" and "a sale for export". It is firmly established that a sale in the course of export predicts a connection between the sale and export, the, two activities, namely, sale and export are so intricately or so intimately connected that two can not be voluntarily interrupted without breach of the contract.

10. In order to appreciate the view taken by the Tribunal it is necessary to refer to Section- 5 of the Central Sales Tax Act, which reads as under:

5. When is 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."

11. The phrase "In the course of export" in fact has been borrowed from Article 286 of the Constitution. Supreme Court has considered this matter in number of cases including in Ban Gorm Nilgiri Plantation Company v. Sales Tax Officer 15 STC 753. It has laid down following principles of law on page 759:

" A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that 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 one 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 himself or through the agent purchases goods within the territory of India and exports 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 be 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. "

12. Reliance was also placed on the following observation in *State of Bihar and Ors. v. Tata Engineering and Locomotive Co. Ltd.* 27 STC 127:

"The expression in the course of appearing in Article 286(1)(b) came up for consideration in *State of Travancore Cochin v. Bombay Company Limited*. There in this Court held that whatever else may or not fall within Article 286(1)(b) of the Constitution, sales and purchases which themselves occasion in export or import of the goods as the case may be out of or into the territory of India come within the exemption. In that case this Court further observed that a sale by export 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 and or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form 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. Even in cases where the property in the goods passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey from the State, the sales must be regarded as having taken place in the course of the export and therefore exempt under article 286(1)(b). The same exposition of law is true of clause (2) of article 286 as it stood prior to its amendment on 11th September, 1956"

13. It was also urged that passing of title in Indian Territory was immaterial. Whether the title passed in Indian Territory or foreign territory, according to the learned counsel, did not make any difference as for deciding whether the sale was in course of export, what had to be seen was whether the sale had occasioned the export. Attention was drawn to Commissioner of Sales Tax v. Dhampur Sugar Mills Limited and Anr., 26 STC 65 where the sale was held to be in course of export although the delivery of goods was made to foreign buyers within Indian territory. In this connection learned counsel relied on following observation in Union of India v. K.G. Khosla Co. Ltd. 1979 UPTC 751 "that a sale which occasions movement of goods from one State to another is a sale in course of inter state trade, no matter in which State the property in the goods passes.

14. The aforesaid decisions along with other decisions have been considered by the learned Single Judge of this Court in the case of Commissioner of Sales tax v. Ganeshilal and Sons 1981 UPTC Page 128 and has held that from the language of Section- 5 of the Central Sales Tax Act it is clear that it a sale in the course of export only which is exempt and not "sale for export". When can a sale said to be in the course of export or for export depends on the variety of circumstances. The export means taking out something out of the Country across the Custom barriers. The word " course " means "sequence ", process, a patch"" in which anything moves. The sequence of movement should be preceded by sale and must result in export to attract Section- 5. The sale, movement and 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 the course of export.

15. In view of the above discussion, it cannot be said that the sales made by the dealer Opp.party were made in the course of export to Nepal. There is nothing on record to show that the sales made by the dealer Opp.party were part of the movement of goods from India to outside India and was interlinked and connected with the crossing of border of the country. The dealer Opp.party transported the goods from Gorakhpur to Nautanwa. At Nautanwa, it was open to the Nepali dealer after taking the delivery to deal with the goods in the manner, he likes. In this view of the matter even if the sale has been made with the intention that the goods sold shall be taken out of Indian and the goods ultimately crossed the border, these by themselves do not result in sale in the course of export. It is the sale which must occasion the export. Resultantly the sales made by the dealer opposite party to Nepali purchasers at Gorakhpur, cannot termed as sales made in the course of export sales.

16. The upshot of the above discussion is as follows:-

(i) It was not a case of change of opinion, as the custom certificates relied Upon by the dealer/opposite party in the original assessment proceedings proved to be forged documents.

(ii) The sale of goods to Nepali dealer at Gorakhpur cannot be treated as sale made in the course of export sale, as the Nepali dealer was not under a contractual obligation to necessarily carry the goods to Nepal.

17. In the result the order of the Tribunal cannot be sustained. The same is hereby set aside. The revision is allowed and the appeal filed by the dealer Opp.party before the Tribunal stands dismissed with cost of Rs. 1,000/- (Rupees one thousand only).