

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 5838 of 2008**

Order Reserved on : 01/12/2016

Order Passed on : 07/12/2016

- Kasturchand Bafna, age 60 years, S/o late GH Bafna, Proprietor – M/s Aanand Enterprise, Padmanabhpur, District Durg (CG)

---- Petitioner**Versus**

1. State Of Chhattisgarh, through Secretary, Department of Commercial Tax, Dau Kalyan Singh Bhawan, Raipur (CG)
2. Deputy Commissioner, Department Of Commercial Tax, Distt.-Durg, C.G.
3. Commercial Tax Officer, Circle IV, Durg, District Durg (CG)
4. Bhilai Steel Plant Through: Its General Manager, Bhilai, Distt.-Durg, C.G.

---- Respondent**And****WPC No. 136 Of 2007**

- Mines And Quarry Owners Welfare Association, A Society of Mines and Quarry Owners registered under Society Registration Act, 1973 having registration No.1342 of 1993, represented through Kastoor Chand Bafna, Secretary of the Association having office at MM 28 Padmanabhpur, Durg (CG)

---- Petitioner**Vs**

1. State Of Chhattisgarh, Through the Secretary, Commercial Tax Department, D.K.S. Bhawan, Mantralaya, Raipur, District Raipur (CG)

2. The Deputy Commissioner, Commercial Tax Durg, District Durg (CG)
3. The Commercial Tax Officer, Circle-4, and all other Circles, Durg (CG)
4. Bhilai Steel Plant, Bhilai, Through the General Manager, Bhilai, District Durg (CG)

---- Respondent

And

WP No. 3982 Of 2006

- M/s Prakash Trading Company, Through the Partner Deepak, Gupta, resident of 97-A/10-11, Nehru Nagar, East Bhilai

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg
3. Commercial Tax Officer, Circle I, Durg
4. General Manager, Bhilai Steel Plant, Bhilai, District Durg

---- Respondent

And

WP No. 3976 Of 2006

- M/s Rathi & Company, through the Partner Mohan Lal Rathi, resident of MIG 77, Padmanabhpur, Durg

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur

2. Deputy Commissioner of Commercial Tax, Durg.
3. Commercial Tax Officer, Circle I, Durg.
4. General Manager, Bhilai Steel Plant, Bhilai, District Durg

---- Respondent

And

WP No. 3980 Of 2006

- M/s Rathi & Company, through the Partner Mohan Lal Rathi, resident of MIG 77, Padmanabhpur, Durg.

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg.
3. Commercial Tax Officer, Circle I, Durg
4. General Manager, Bhilai Steel Plant, Bhilai, District Durg.

---- Respondent

And

WP No. 3981 Of 2006

- M/s Rathi & Company, through the Partner Mohan Lal, resident of MIG 77, Padmanabhpur, Durg (CG)

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg.
3. Commercial Tax Officer, Circle I, Durg.

4. General Manager, Bhilai Steel Plant, Bhilai, District Durg.

---- Respondent

And

WP No. 6010 Of 2006

- M/s Prabhat Shankar Agrawal, Through the Proprietor Prabhat Shankar Agrawal, resident of 39/4, M.L. Nehru Nagar, East Bhilai, District Durg (CG)

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur
2. Deputy Commissioner of Commercial Tax, Durg, District Durg.
3. Commercial Tax Officer, Circle II, Durg, District Durg

---- Respondent

And

WP No. 6011 Of 2006

- M/s Prabhat Shankar Agrawal, through the Proprietor Prabhat Shankar Agrawal, resident of 39/4, M.L. Nehru Nagar, East, Bhilai

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg, District Durg.
3. Commercial Tax Officer, Circle II, Durg, District Durg

---- Respondent

And

WP No. 6012 Of 2006

- M/s Prabhat Shankar Agrawal, through the Proprietor Prabhat Shankar Agrawal, resident of 39/4, M.L. Nehru Nagar East, Bhilai, District Durg (CG)

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg, District Durg
3. Commercial Tax Officer, Circle II, Durg, District Durg.

---- Respondent

And

WP No. 6013 Of 2006

- M/s Prabhat Shankar Agrawal, through the Proprietor Prabhat Shankar Agrawal, resident of 39/4, M.L. Nehru Nagar East, Bhilai, District Durg (CG)

---- Petitioner

Vs

1. State Of Chhattisgarh, through the Secretary, Commercial Tax Department, Mantralaya, Raipur.
2. Deputy Commissioner of Commercial Tax, Durg, District Durg
3. Commercial Tax Officer, Circle II, Durg, District Durg.

---- Respondent

And

WPT No. 5454 Of 2009

- Chopra Construction Company Through Proprietor Rakesh Chopra, S/o Shri Ved Prakash Chopra, Aged About 32 Years, New Khursipar, Bhilai, Distt.-Durg (Cg)

---- **Petitioner**

Vs

1. State Of Chhattisgarh, through the Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (CG)
2. The Deputy Commissioner Department Of Commercial Tax, Distt.-Durg (Cg)
3. The Commercial Tax Officer Circle IV, Durg, Distt.-Durg (Cg)
4. Bhilai Steel Plant Through Its General Manager, Bhilai, Distt.-Durg (Cg)

---- **Respondent**

And

WPT No. 5453 Of 2009

- Kusum Mineral Properties Through Proprietor Bhikham Chand Jain, S/o Late Shri Nemichand Jain, aged about 65 years, Malviya Nagar Durg, Distt. Durg (Cg)

---- **Petitioner**

Vs

1. State Of Chhattisgarh, through the Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (CG)
2. The Deputy Commissioner, Department Of Commercial Tax, Distt. Durg (Cg)
3. The Commercial Tax Officer, Circle IV, Durg, Distt. Durg (Cg)
4. Bhilai Steel Plant Through Its General Manager Bhilai, Distt. Durg (Cg)

---- **Respondent**

And

WPT No. 5455 Of 2009

- M/s Kishan Lal Chopra Through Proprietor Prem Chopra, S/o Shri

Kishan Lal Chopra, Aged About 36 Years, New Khursipar, Bhilai,
Distt.-Durg (Cg)

---- **Petitioner**

Vs

1. State Of Chhattisgarh, through the Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (CG)
2. The Deputy Commissioner Department Of Commercial Tax, Distt.-Durg (Cg)
3. The Commercial Tax Officer Circle IV, Durg, Distt.-Durg (Cg)
4. Bhilai Steel Plant Through Its General Manager, Bhilai, Distt.-Durg (Cg)

---- **Respondent**

And

WPT No. 5456 Of 2009

- M/s Surendra Kumar Chopra, through Proprietor Virendra Chopra, S/o late Shri Surendra Chopra, aged about 37 years, New Khursipar, Bhilai, District Durg (CG)

---- **Petitioner**

Vs

1. State Of Chhattisgarh, through the Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (CG)
2. The Deputy Commissioner, Department Of Commercial Tax Distt. Durg (Cg)
3. The Commercial Tax Officer, Circle IV, Durg, Distt. Durg (Cg)
4. Bhilai Steel Plant Through Its General Manager Bhilai, Distt. Durg (Cg)

---- **Respondent**

And

WPT No. 6779 Of 2008

- Modi Industries Through Proprietor Dharmendra Kumar Modi, S/o Premchand Modi, Aged About 44 Years, SM-50, Padmanabhpur, Durg, Distt.-Durg (Cg)

---- Petitioner**Vs**

1. State Of Chhattisgarh, through the Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (CG)
2. The Deputy Commissioner Department Of Commercial Tax, Distt.-Durg (Cg)
3. The Commercial Tax Officer Circle IV, Durg, Distt.-Durg (Cg)
4. Bhilai Steel Plant Through Its General Manager, Bhilai, Distt.-Durg (Cg)

---- Respondent**And****WPT No. 154 Of 2016**

- M/s Prakash Trading Company Through Its Partner Deepak Gupta Aged About 59 Years, S/o Late Shri Bhola Nath Gupta, R/o 97-A/10-11, Nehru Nagar, East, Bhilai, District Durg Chhattisgarh

---- Petitioner**Vs**

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Office Of Commissioner Commercial Tax, Behind Raj Bhawan, Civil Line, Raipur District Raipur Chhattisgarh
2. The Deputy Commissioner Commercial Tax, Durg, District Durg Chhattisgarh
3. Commercial Tax Officer, Durg Circle 1, Ward A Durg, District Durg Chhattisgarh
4. Chhattisgarh Commercial Tax Tribunal, Through Its President D

252/253, Devendra Nagar, Raipur District Raipur Chhattisgarh

5. Bhilai Steel Plant, Bhilai, Through The General Manager, Ispat Bhawan, Bhilai, District Durg Chhattisgarh

---- Respondent

And

WPT No. 156 Of 2016

- M/s Prakash Trading Company Through Its Partner Deepak Gupta Aged About 59 Years, S/o Late Shri Bhola Nath Gupta, R/o 97-A/10-11, Nehru Nagar, East Bhilai, District Durg Chhattisgarh

---- Petitioner

Vs

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Office Of Commissioner, Commercial Tax Behind Raj Bhawan, Civil Line, Raipur, District Raipur Chhattisgarh
2. The Deputy Commissioner Commercial Tax, Durg, District Durg Chhattisgarh
3. Commercial Tax Officer, Durg Circle 1, Ward A Durg, District Durg Chhattisgarh
4. Chhattisgarh Commercial Tax Tribunal, Through Its President D 252/253, Devendra Nagar, Raipur District Raipur Chhattisgarh
5. Bhilai Steel Plant, Bhilai, Through The General Manager, Ispat Bhawan, Bhilai, District Durg Chhattisgarh

---- Respondent

For Petitioners : Shri Rajeev Shrivastava and Shri Jitendra Pali, Adv.
 For Respondent/State : Shri UNS Deo, Govt. Advocate.
 For Respondent/BSP : Dr. N.K. Shukla, Sr. Advocate with Mr. Shailendra Shukla & Miss Priya Mishra, Shri Ashish Shrivastava and Shri Animesh Verma and Shri Kasif Shakeel, Advocates.

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

1. In the present batch of writ petitions, the seminal issue falling for consideration is whether the freight charges for transporting dolomite by the petitioners to the respondent/Bhilai Steel Plant (for short 'the BSP') would be a part of sale price and hence exigible to commercial tax or not.
2. Facts of the case, briefly stated, are that the petitioners are carrying on business of selling dolomite, quartzite, runner sand and silica. They have entered into an agreement with the BSP for sale of dolomite, however, as per the petitioners, they have entered into separate contract concerning freight charges. While filing return for the relevant assessment years (assessment years being different in some writ petitions), the petitioners did not include the freight charges in the taxable turnover of the sale price impliedly seeking exemption or deduction. The Assessing Officer (AO) completed the assessment proceeding without including the freight charges in the taxable turn over. The petitioners were subsequently issued notices for initiating escapement proceeding under Section 28 of the Chhattisgarh Vanijyik Kar Adhiniyam, 1994 (for short 'the Act, 1994') on the ground that the freight charges have escaped the

assessment. In the subsequent re-assessment, all the petitioners were held liable to pay commercial tax on the taxable turn over by including the freight charges. The Revision Application preferred by the petitioners before the Deputy Commissioner, Commercial Tax has also been dismissed by a detailed order.

3. Shri Rajeev Shrivastava, learned counsel for the petitioners would submit that since a separate agreement for freight charges has been entered with the BSP, the said freight charges is not a part of the sale price. He would also contend that escapement proceeding under Section 28 of the Act, 1994 can be initiated only on satisfaction of the conditions prescribed therein, which is not satisfied in the present case. Referring to Rule 48 (1)(g) of the Vanijyik Kar Niyam, 1995 (for short 'the Rules, 1995') read with Form-47 thereof, he would further submit that the AO has to state reasons in the notice as to why escapement proceedings are to be initiated. But in the present case the proceedings have been initiated on the basis of audit objection and not on the basis of satisfaction of the AO. It is further argued that the department having not preferred any appeal or revision, the original assessment order has attained finality, therefore, the escapement proceedings are in the nature of review of the original assessment which is not permissible in law as there is no provision of review. He would

lastly submit that if the freight charges are included as a part of sale price, it should be borne by the BSP and not by the petitioners. He would refer to the judgments in the matters of **Tarlochan Dev Sharma Vs. State of Punjab and Others**¹, **Bharat Agriculture & Mechanical Engineering Co. Vs. State of Bihar and another**², **Indure Limited Vs. Commissioner of Sales Tax, Cuttack, Orissa and others**³, **Dr. Smt. Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and others**⁴, **Laduram Ramniwas Vs. State of M.P. and Others**⁵, **Straw Products Ltd. Vs. Commissioner of Sales Tax, M.P.**⁶, **Shree Rani Sati Mining Traders Vs. Sales Tax Officer, Rourkela Circle, Uditnagar and Others**⁷, **Indian Explosives Ltd. And Another Vs. The State of Bihar and Others**⁸, **Commissioner, Trade Tax, U.P., Lucknow Vs. Indian Aluminium Cable Co. Ltd.**⁹. No other argument has been raised by the petitioners.

4. Per contra, Shri UNS Deo, learned State Counsel would vehemently oppose the submission on contention that the issue is settled by the Supreme Court in the matters of **Black Diamond**

1 (2001) 6 SCC 260

2(2007) 38 TLD 34

3 (2007) 38 TLD 50

4 AIR 1987 SC 2186

5 (1996) 102 STC 240

6 (1987) 65 STC 20

7 (1983) 53 STC 322

8 (1986) 62 STC 61

9 (1999) 115 STC 444

Beverages and Another Vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others¹⁰ and Hindustan Sugar Mills Vs. State of Rajasthan &Others¹¹

wherein it is held that freight charges are included in the sale price, therefore, the Writ Petitions deserve to be dismissed.

5. Dr. N.K. Shukla, learned Senior Advocate, Shri Ashish Shrivastava and Shri Kasif Shakeel, learned counsel appearing for the BSP would submit that under clause-5 of the agreement the BSP would be liable to pay any additional amount only when there is escalation in tax and not in cases of re-assessment as a result of escapement proceeding.
6. In order to appreciate the rival contentions, I feel it necessary to refer to relevant clauses of the agreement/purchase order, which has been filed as part of Annexure-P/4 in W.P. No.3982/2006.
7. Clauses-6, 7, 8, 13, 14 and 17 of the agreement being relevant need reproduction which are as follows:-

**“6. Consignee : AGM I/C (RAW MATERIALS),
SAIL, BHILAI STEEL PLANT, BHILAI**

**7. Delivery Schedule : To be supplied minimum @
1600 tonnes per month. This will constitute the
basis for assessing the delivery performance of the
seller. In case the seller fails to supply the quantity**

¹⁰ (1998) 1 SCC 458

¹¹ (1978) 4 SCC 271

as per monthly schedule indicated above in any month, the backlog quantity is to be completed in the next month alongwith the scheduled quantity for that month. If the seller still fails to complete the quantity in the 2nd month, the unsupplied quantity shall be reduced from the overall A/T quantity. Repeation of such failures shall result in shortclosure of the A/T and diversion of the balance quantity.

8. WEIGHMENT : Weighment done at BSP weigh bridge shall be final for the purpose of payment. However in case of despatch by Rail if wagons escape weighment at BSP or at both ends, RR weight shall be final for payment.

13. Price : The break-up of landed cost per tonne is as under:-

a) Ex-mines rate per tonne inclusive of : Rs.149.04
royalty & LWC.

b) Sales/Commercial Tax @ 4% : Rs.5.96

c) Freight by road on pre-paid door : Rs.95.00
delivery basis

Landed cost per tonne	: Rs.250.00
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The above ex-mines rate per tonne is inclusive of royalty @ Rs.25/- per tonne and Labour Welfare cess @ Rs.0.50 per tonne.

14. ESCALATION : The price of contract shall remain firm during the currency of contract and as such no escalation is payable on any account whatsoever including freight (for road supplies). However, any change in the statutory levies viz. Royalty, Sales Tax and Labour Welfare Cess during the pendency of the contract shall be borne by the Buyer as per actuals against documentary evidences/Govt. notification. However, for supply

by Rail, the freight would be payable as per actuals against RR's.

17. FREIGHT : The transportation of the materials by truck from the supplier's mines to Bhilai Steel Plant on door delivery basis is to be arranged by the seller including loading, unloading into bunkers and proper stacking of the material in the bed. The transportation charges shall be paid to the seller alongwith the bills and will not be paid to the transporter directly in any case. In case of despatch by Rail, freight to be pre-paid by Seller and billed separately for reimbursement.”

8. The above quoted terms of the agreement would manifest that the consignee is AGM, In-charge (Raw Materials), SAIL, BHILAI STEEL PLANT, BHILAI. The quantity of dolomite mentioned in clause-2 of the agreement is to be weighed at Bhilai Steel Plant weigh bridge which shall be final for the purposes of payment. However, in case of despatch by Rail, if wagons escape weighment at BSP or at both ends, RR weight shall be final for payment. Sampling and Analysis are to be done at BSP and shall be final for all purposes with further stipulation that random samples shall be collected before unloading from the trucks. The break-up of landed cost per tonne has been provided in clause-13 which includes freight by road on pre-paid door delivery basis. The landed cost is thus inclusive of freight by road. The said landed cost has been made firm under clause-14 (Escalation) which provides that the price of contract shall remain firm during the

currency of contract and as such no escalation is payable on any account whatsoever including freight. However, any change in the statutory levies viz. Royalty, Sales Tax and Labour Welfare Cess during the pendency of the contract shall be borne by the buyer as per actuals against documentary evidence/Govt. Notification. However, for supply by Rail, the freight would be payable as per actuals against RR's.

9. More importantly **clause-17 dealing with Freight** emphatically provides that transportation of the materials by truck from the supplier's mines to Bhilai Steel Plant on door delivery basis is to be arranged by the seller including loading, unloading into bunkers and proper stacking of the material in the bed. The transportation charges shall be paid to the seller along with the bills and will not be paid to the transporter directly in any case.
10. Thus, the freight charges has been made and included as part of sale price or landed cost in express terms. The landed cost is also arrived at on door delivery basis to mean ex-destination and not ex-mines.
11. The issue as to when freight charges would be a part of sale price has been dealt with by the Supreme Court in catena of decisions.
12. Referring to the definition of sale price under Section 2(u) of the

Act, 1994, it has been urged by the petitioners that the definition of sale price in the West Bengal Sales Tax Act with which the Supreme Court was dealing with in the matter of **Black Diamond** (Supra) was altogether different, therefore, the ratio in the case of **Black Diamond** (Supra) is not applicable in the case at hand.

13. The argument would prima facie compel this Court to have a peep into the definition under the West Bengal Sales Tax Act, as has been mentioned in the judgment of **Black Diamond** (Supra) to compare it with the definition of sale price in the Act, 1994. Of-course two definitions are different, however, in the matter of **Hindustan Sugar Mills** (Supra), the Supreme Court was dealing with the definition of sale price in the Rajasthan Sales Tax Act, which is in *pari meteria* with the definition of sale price in the Act, 1994.

14. Section 2(u) of the Act, 1994 defining sale price is reproduced hereunder:-

““*Sale price*” means the amount payable to a dealer as valuable consideration for the sale of any goods less any sum allowed as case discount according to ordinary trade practice but inclusive of 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;

Explanation.- Where goods are sold on hire purchase or any system of payment by instalments, the sale price of such goods shall be exclusive of insurance charges, interest and hire charges and such other charges as may be prescribed.”

15. In para-7 of the judgment in the matter of **Hindustan Sugar Mills** (Supra), the Supreme Court reproduced the definition of sale price in the Rajasthan Sales Tax Act. The said para-7 containing definition of sale price in the Rajasthan Sales Tax Act is reproduced hereunder:-

“7. Though we are concerned in these appeals with assessments made under both Rajasthan Sales Tax Act, 1954 and Central Sales Tax Act, 1956, it would be sufficient to refer only to the provisions of the Rajasthan Sales Tax Act, 1954, since the material provisions of both the Acts are identical. Section 3 of the Rajasthan Sales Tax Act, 1954 provides that every dealer whose turnover in the previous year exceeds a certain limit shall be liable to pay tax on his taxable turnover, subject to the provisions of that Act. “Taxable turnover” is defined in Section 2(s) to mean that part of the “turnover” which remains after deducting the aggregate amount of proceeds of certain categories of sales and “turnover”, according to Section 2(t), means “the aggregate of the amount of sale prices received or receivable by a dealer in respect of the sale or supply of goods...” The definition of 'sale price' is given in Section 2(p) and according to that definition, it 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 case where such costs is separately charged.

This definition is in two parts. The first part says that 'sale price' means the amount payable to a dealer as consideration for the sale of any goods. Here the concept of real price or actual price retainable by the dealer is irrelevant. The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer.”

(Emphasis supplied)

16. In the later part of the judgment, the Supreme Court after considering its earlier judgments on the issue held in paras- 15 & 17 thus:-

“15. We are of the views that the former, and not the latter, represents the correct legal position. If the obligation to pay the freight were on the purchaser and in fact the purchaser paid the freight, as happened in both the cases before us in respect of every transaction of sale of cement, the amount of freight would obviously be deducted from the F.O.R. destination railway station price in the invoice and only the balance would be realised by the assessee. There would be no question of the assessee realising the amount of freight from the purchaser because the purchaser would have paid the freight in discharge of his own liability and the assessee would have no claim to recover it from the purchaser. Then how would the terms of Clause 9,

proviso to that clause and Clause 11 of the Control Order be satisfied? How would it be possible to give effect to Clause 9 if what is realised by the assessee is not the F.O.R. destination railway station price but that price less the amount of freight? How would the assessee claim to be entitled to be reimbursed under the proviso to Clause 9 if he has not incurred any expenditure on the freight? The entire statutory scheme would become unworkable. The scheme of the Control Order clearly proceeds on the basis that the freight is payable by the producer and he recovers it from the purchaser as part of the F.O.R. destination railway station price. The provision in the contract that the delivery to the purchaser shall be complete as soon as the goods are put on rail and payment of the freight shall be the responsibility of the purchaser is wholly inconsistent with the scheme of the Control Order and must be held to be excluded by it. The Control Order is paramount : it has overriding effect and if it stipulates that the freight shall be payable by the producer, such stipulation must prevail, notwithstanding any term or condition of the contract to the contrary. The conclusion is, therefore, inevitable that the amount of freight forms part of the 'sale price' within the meaning of the first part of the definition.

17. We must, therefore, hold that, by reason of the provisions of the Control Order which governed the transaction of sale of cement entered into by the assessee with the purchasers in both the appeals before us, the amount of freight formed part of the 'sale price' within the meaning of the first part of the definition of that term and was includible in the turnover of the assessee.”

(Emphasis supplied)

17. The principles laid down in the matter of **Hindustan Sugar Mills**

(Supra) have been approved and relied by the Supreme Court in its

later decision in the matter of **Black Diamond** (Supra), **E.I.D.**

Parry (I) Ltd. Vs. Asstt. Commr. Of Commercial Taxes and Another¹², State of A.P. Vs. A.P. Paper Mills Ltd.¹³, Neyveli Lignite Corporation Ltd. Vs. Commercial Tax Officer, Cuddalore and Another¹⁴, Commissioner of Central Excise Lucknow, U.P. Vs. Chhata Sugar Co. Ltd.¹⁵, Commissioner of Central Excise, Delhi Vs. Maruti Udyog Ltd.¹⁶ and Tata Iron and Steel Co. Ltd. Vs. Collector of Central Excise, Jamshedpur¹⁷.

18. In a recent judgment in the matter of **India Meters Limited Vs. State of Tamil Nadu¹⁸**, the Supreme Court has relied on **Hindustan Sugar Mills** (Supra) to hold thus in paras-18, 19 & 38:-

“18. When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of “turnover”.

19. The learned counsel for the State of Tamil Nadu submitted that freight and insurance charges are included in the sale price of the goods. Even if freight and insurance charges are shown separately

12 (2000) 2 SCC 321

13 (2005) 1 SCC 719

14 (2001) 9 SCC 648

15 (2004) 3 SCC 466

16 (2002) 3 SCC 547

17 (2002) 8 SCC 338

18 (2010) 9 SCC 423

in the bill and added to the price of the goods, the character of payment would remain the same. Since freight and insurance charges represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price to the purchaser. The amount of freight and insurance charges would be payable by the purchaser not under any statutory or other liability but as part of the consideration for the sale of the goods and would therefore, form part of the sale price.

38. We may reiterate that in this case, there was a specific contract entered into by and between the parties and according to the relevant clause of the contract, the ownership of the goods will remain with the supplier till they are delivered at the destination station. In view of the clear clause of the contract, no other view is possible. In our considered view, the High Court was totally justified in affirming the judgment of the Tribunal. No interference is called for.”

19. In the case before me, the petitioners have strongly relied upon second part of the definition of 'sale price' to argue that it excludes the amount of freight charges from the sale price.
20. Similar argument has been considered by the Supreme Court in **Hindustan Sugar Mills** (Supra) in para-16 of the judgment. It is held therein that not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by inclusive clause. The cost of freight or delivery or the cost or installation certainly represents an amount

charged for transportation or installation of the goods at the time of or before the delivery thereof and would, therefore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, “other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged”. This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause 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 the 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 in question out of the definition of 'sale price'. The Supreme Court further held in categorical terms that in case, the amount of freight forms part of the 'sale price' within the meaning of the first part of the definition and it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. The exclusion clause is, irrelevant and cannot be called in aid by the assessee.

21. In the present case also, clause-13 of the agreement provides

break-up of the landed cost per tonne of dolomite which includes freight by road on pre-paid door delivery basis. Thus, the freight charges were already included in the 'sale price' by express agreement entered between the parties, therefore, I must rely upon **Hindustan Sugar Mills** (Supra) to hold that first part of the definition would apply in the present case also and the exclusion clause is irrelevant and cannot be called in aid by the petitioners.

22. In **Hindustan Sugar Mills** (Supra), the Supreme Court has further observed that even if the exclusion clause were read as an exception to the first part of the definition which, according to the Supreme Court, cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is obvious that the expression “.....cost of freight.....is separately charged” is used in contradistinction to a case where the cost of freight is not separately charged but is included in the price. It 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 have no application. Therefore,

by issuing separate bills, the petitioners cannot escape the rigor of first part of the definition which they have made operative for themselves by including the freight charges as part of the 'sale price' under Clause-13 of the agreement.

23. The petitioners have also argued that the present is not a case of escape assessment because the petitioners have prepared separate bills to claim freight charges which have been excluded from the purview of assessment and thus, it is not a case where they have escaped assessment but it is a case of conscious deletion by the Assessing Officer.

24. I am not convinced with this argument because the assessment order has only referred to separate billing of freight charges by the petitioners but it has not dealt with the issue as to whether the freight charges are part of 'sale price' or not so as to conclude that it cannot be included in the taxable turn over. There being no finding to this effect by Assessing Officer, it is a case where there is omission or escape to deal with the issue by the Assessing Officer and Section 28 has rightly been invoked for initiating escapement proceeding.

25. Further argument of the petitioners that the assessment order having attained finality, escapement proceeding would amount to

review of the earlier assessment order deserves to be dismissed for the same reason as discussed in the preceding paragraph.

26. Submission has been made to the effect that the AO has not stated reasons in the notice as to why escapement proceedings are required to be initiated, therefore, the notice does not suffice the requirement under Section 28 of the Act, 1994.
27. This Court has gone through the record of three leading cases i.e. WP No.3982/2006, WPC No.136/2007 & WPC No.5838/2008 and some other writ petitions to find out copy of the notice under Section 28 of the Act, 1994. However, the record does not contain any such notice. Therefore, this argument is not dealt with.
28. The petitioners have made last ditch effort to avoid payment of tax on freight charges on the plea that even if freight charges are included in the 'sale price' it is for the BSP to bear the burden and not the petitioners.
29. This argument has no foundation in law or in agreement between the parties. As a matter of fact, clause-14 of the agreement runs squarely contrary to what the petitioners have tried to canvass. In the said clause of the agreement, the parties have bound themselves that the price of contract shall remain firm during the currency of contract and as such, no escalation is payable on any amount

whatsoever including freight (for road suppliers), however, any change in the statutory levies viz. Royalty, Sales Tax and Labour Welfare Cess during the pendency of the contract shall be borne by the buyer as per the actuals against the documentary evidence/Government notification. Admittedly, there is no change in the statutory levies like Royalty, Sales Tax and Labour Welfare Cess. It is a case where freight charges were part of 'sale price' but it escaped assessment, therefore, liability which fallen on the assessee on the date of assessment for the relevant year has been saddled on him and they have not been made liable to any additional statutory levy. Thus the last submission of the petitioners also deserves to be and is hereby rejected.

30. For the foregoing, all the Writ Petitions are sans substance, they deserve to be and are hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

Barve

HEADLINES

Freight charges are part of sale price, therefore, it is to be included in the taxable turnover under the CG VAT Act.