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HIGH COURT OF CHHATTISGARH, BILASPUR

WPT No.4373 of 2011

M/s. Niket Udyog Ltd., A Limited Company registered under the Companies Act, having its registered office at Bregoan Growth Centre, Tahsil Sausar Distt. Chhindwara (MP) (previously at Shailendra Nagar, Raipur) Through its Authorized Signatory Shri Ramanand Tiwari

---- Petitioner

Versus

1. State of Chhattisgarh through the Secretary, Department of Commercial Tax, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (CG)
2. Additional Commissioner Commercial Tax, Raipur (CG)
3. Assistant Commissioner Commercial Tax, Raipur (CG)

---- Respondents

And

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---- Respondents

For Petitioner	:	Mr.Ashish Shrivastava and Mr.Soumya Rai, Advocate
For Respondents	:	Mr.Gary Mukhopadhay, Govt.Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

04/04/2018

1. The petitioner herein has invoked the jurisdiction of this Court under Article 226 of the Constitution of India questioning the common order dated 28.12.2010 passed by the Additional Commissioner, Commercial Tax, Raipur under the Chhattisgarh Commercial Tax Act, 1994 (hereinafter called as “the Act of 1994”) as well as the Central Sales Tax Act, 1956 (hereinafter called as “the Act of 1956”) in Revision Case No.34/RYP/2009 (State) and No.30/RYP/2009 (Central) for the period from 1.4.1999 to 31.3.2000 and in Revision Case No.35/RYP/2009 (State) and No.31/RYP/2009 (Central) for the period from 1.4.2000 to 31.3.2001.

2. Since common question of law and fact is involved in these writ petitions, they are heard together and are being disposed off by this common order.

3. The petitioner Company being a manufacturer of Oxygen and Nitrogen gases in liquid gas form at its factory situated at Boregaon, District Chhindwara entered into an agreement with M/s Aurobindo Pharma Ltd., Hyderabad for supply of liquid Nitrogen at its work at Ballaram, District Medak (Andhra Pradesh) as well as for installation of storage tank as per agreement dated 5.8.1994. As per agreement, liquid storage tank of

11450 litres capacity with associated equipments would be supplied and installed by the petitioner to the said company (M/s. Aurobindo Pharma Ltd.) as per second party's basic data and approved drawings on facility charge basis. The liquid Nitrogen gas after being transported to the purchaser by trucks would be emptied through pipes into the storage tanks located at purchaser's site and rent of this storage tank will be paid by the purchaser to the petitioner company. So far as the price is concerned, agreement provided ₹ 5.80 per cubic meter. The price was exclusive of excise duty, sales tax and other taxes etc.

4. At the time of assessment, the petitioner submitted computation of turnover under the Act of 1994 and the Act of 1956 showing the sales, total of bills and deducting the delivery charges showing them to be separately charged in the bills, but the same was rejected by the Assistant Commissioner. The claim of freight charges separately from the party amounting to ₹ 42,89,238.82 and included in the turnover was rejected and held that it was a part of sale price, which was assailed in revision before the revisional authority. The revisional authority remanded the matter for fresh assessment. After giving an opportunity to the petitioner in the fresh assessment, claim was disallowed and order passed in original assessment was maintained. Again revisions were preferred, which were dismissed leading to filing of these writ petitions.

5. Mr.Ashish Shrivastava, learned counsel for the petitioner, would submit that sale price has been defined in Section 2(h) of the Act of 1956 and Section 2 (u) of the Act of 1994 respectively and if freight charge is charged separately, then it would not be a part of sale price and therefore, in sale price it cannot be included and no tax liability can be fastened upon the petitioner company. He would further submit that both the authorities have committed jurisdictional error in including freight charges as a part of sale price and assessed the tax liability contrary to law as there is separate provision for charging transportation charges in the agreement and separate charges for transportation have been raised in the bills submitted by the petitioner company, therefore, the impugned orders passed by the assessing officer and affirmed by the revisional authority are liable to be set aside.

6. Mr.Gary Mukhopadhay, learned Government Advocate for the respondents/State, would submit that the impugned orders passed by the assessing officer and affirmed by the revisional authority are just and proper and no interference is called for in exercise of jurisdiction under Article 226 of the Constitution of India and the writ petitions are liable to be dismissed.

7. I have heard leaned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. The question for consideration would be whether if the cost of freight or delivery charged separately, then it be included in the part of sale price or not ?

9. In order to answer the question raised at the Bar, it would be appropriate to notice Section 2(h) of the Act of 1956 which reads as under:-

> "2(h) "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:
>
> Provided that in the case of a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, the sale price of such goods shall be determined in the prescribed manner by making such deduction from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sale price for the purposes of this clause."

Definition contained in Section 2(h) of the Act of 1956 is pari-materia to the provisions contained in Section 2(u) of the Act of 1994.

10. Agreement clause provides for transportation as under:-

> "(a) That the First Party shall charge from the Second Party at the rate of Rs.2.45 p (Rupees Two and paise fourty five only) per cum towards transportation of Liquid Nitrogen to the Second Party's work at Bollaram (Miyapur), through transport tankers.
> (b) That the measurement of quantity of Liquid Nitrogen supplied by the First Party to the Second Party will be made on weighment basis, by weighing the tanker of the First Party before and after the supply to the Second Party at their premises and the conversion factor will be as follows:
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> > 1 (one) kg of Liquid Nitrogen = 0.879 cum of Nitrogen gas at standard temperature of 27 Degree Centigrade and one atmospheric pressure. The multiplying factor shall be 0.879 x net weight of Liquid Nitrogen transferred from the transport tank to calculate the quantity of gas in CUM.
>
> (C) The Second Party shall give despatch schedule to the First Party and accordingly the First Party shall make despatches and the Second Party shall see that transport tanker of the First Party is unloaded immediately on arrival. If the transport tankers are detained for more than six hours by Second Party - the Second Party shall pay detention charge at the rate of Rs.200/- (Rupees Two Hundred only) for every hour or part hereof in excess of the aforesaid six hours without any demur."

11. In the matter **Hindustan Sugar Mills v. State of Rajasthan & Others**[1], the Supreme Court reproduced

1 (1978) 4 SCC 271

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:
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> ....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."
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> (Emphasis supplied)

12. In the later part of the judgment, Their Lordships after considering its earlier judgments on the issue held 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, 20 proviso to that clause and Clause 11 of the Control Order be satisfied? How would it be possible to give effect to Clause9 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."

13. In a recent judgment in the matter of **India Meters Limited v. State of Tamil Nadu**[2] the Supreme Court relied upon **Hindustan Sugar Mills** (supra) held as under:-

"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 in the bill and added to the price of the goods, the character of payment would remain the same. Since freight

2 (2010) 9 SCC 423

> 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.
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> 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."

14. Not only this, a co-ordinate Bench of this Court speaking through Prashant Kumar Mishra, J. in **Kasturchand Bafna v. State of Chhattisgarh and others (WPC No.5838 of 2008),** considering the definition of Section 2(u) of the Act of 1994 has held as under:-

> "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.
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> 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.”

Aforesaid judgment i.e. **Kasturchand Bafna** (supra) squarely applies to the facts of the present case against the petitioner.

15. Not only this, the High Court of Madhya Pradesh in the matter of **Birla Jute & Industries Ltd. v. Coal India Ltd. & others.**[3] considering the definition of Section 2(O) of the M.P. General Sales Tax Act, 1958 has clearly held that if the company is entitled to recover all expenses from the purchaser for selling the goods then every amount which the purchaser is liable to pay before the sale is computed or before the property is passed on to him would be included in the sale price. It was observed as under:-

> "11. The Court is required to see whether the expenses are incurred by the purchaser after the property in goods was transferred to him or the expenses are required to be paid by him to the selling dealer which the selling dealer suffered before transferring the property in goods to the purchaser. If the goods are delivered to the purchaser and the property in the goods passes to him, thereafter he is required to carry the goods to a different place then infact he himself is suffering the expenses and is incurring the expenditure towards freight of his own goods because he had already purchased the goods and the property in the goods has already passed to him, but in a case where the selling dealer has to transport the goods for the delivery to the purchaser and the purchaser is required to pay the transportation charges separately, then it cannot be argued that the transportation charges have been separately charged, therefore, the same are not includible in the sale price. The court has to consider as to whether the property in goods passed before the expenses were suffered by the seller or subsequent to the sufferance of the expenses. If the expenses have to be suffered by the seller before the property in the goods is passed to the purchaser, then the seller is entitled to recover that amount of

3 (1998) 31 VKN 156

transport either as the transportation charges or can merge the same in the sale price. In either of the case, he is requiring the transportation charges with which the purchaser has nothing to do. The purchaser is required to pay the cost of the goods and the transportation charges which is an element of the sale price. In the matter of Deputy Commissioner of Sales Tax Vs K P Moideenkutty[4] the Supreme Court was required to consider a case regarding payment of the transportation charges. In the said case the assessee was a dealer in fire wood, he had contracted with the purchaser for purchase and sell of fire wood. The High Court on consideration of the material on the record, reached to the conclusion that there is abundent material on record which has been referred to by the Tribunal itself and by the Appellate Assistant Commissioner to show that in the cases under consideration the transport charges were specified and charged for separately under the rule. The Supreme Court agreed with the finding and reasoning of the High Court. From the said judgment, it does not appears to what were the terms of the contract and on what material the High Court found that there was abundent material on record for favour of the assessee. In the matter of Narani Rao Vs Commissioner of Commercial Tax[5], the High Court of Karnataka has held that before including or deducting the freight into the taxable turnover or sale price, certain factors are required to be considered. In the said case there was an agreement for sell of silica sand fixing price per ton at extraction site, the selling dealer undertook to transport the material as purchasers agent. The freight was charged and paid for separately. The High Court appreciated the terms of the agreement held that the sale was complete at extraction site, the freight charges were post sale expenditure and the same were, therefore, taxable."

16. Submission of the learned counsel for the petitioner that merely because freight charge is specified and

4 (1993) 90 STC 36
5 (1994) 93 STC page 247

separately charged without including such amount it would not be included in the sale price has been answered by the Supreme Court in **Dyer Meakin Breweries Ltd. v. State of Kerala**[6] and followed by the High Court of Madhya Pradesh in **Birla Jute & Industries Ltd.** (supra), which aptly applies to the facts of the present case.

17. In view of the aforesaid legal position, decision rendered by this Court in **Kasturchand Bafna** (supra) and decision rendered by the High Court of Madhya Pradesh in **Birla Jute & Industries Ltd.** (supra), I have no hesitation to hold that both the authorities are justified in including freight charges as a part of sale price and imposed tax liability on the petitioner company. I do not find any jurisdictional error in the impugned orders passed by the assessing officer and affirmed by the revisional authority.

18. Accordingly, the writ petitions deserve to be and are hereby dismissed leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-

6 (1970) 26 STC 248