

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 12.07.2019

Judgment Delivered on : 25.07.2019

WA No. 24 of 2017

(Arising out of Order dated 07.12.2016 passed by the learned Single Judge in WPC No. 5838 of 2008 and other connected cases)

- Kasturchand Bafna S/o Late G. H. Bafna, Aged About 60 Years Proprieter-
M/s Aanand Enterprise, Padmanabhpur, District Durg Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary Department Of Commercial Taxes, Dau Kalyan Singh Bhavan, Raipur Chhattisgarh
2. Deputy Commissioner, Department Of Commercial Tax, District Durg Chhattisgarh
3. Commercial Tax Officer, Circle I V, Durg, District Durg Chhattisgarh
4. Bhilai Steel Plant, Through Its General Manager, Bhilai, District Durg Chhattisgarh

---- Respondents

WA No. 64 of 2017

- M/s Prakash Trading Company Through The Partner Deepak Gupta, R/o 97- A/10-11, Nehru Nagar, East Bhilai., Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary, Commercial Tax Department, Mantralaya, Raipur, Chhattisgarh
2. Deputy Commissioner Of Commercial Tax, Durg., District : Durg, Chhattisgarh
3. Commercial Tax Officer, Circle 1, Durg. , District : Durg, Chhattisgarh
4. General Manager, Bhilai Steel Plant, Bhilai, District Durg. As Necessary Party, District : Durg, Chhattisgarh

---- Respondents

WA No. 65 of 2017

- M/s Rathi And Company Through The Partner Mohan Lal Rathi, R/o M I G 77, Padmanabhpur, Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary, Commercial Tax Department, Mantralaya, Raipur., Chhattisgarh
2. Deputy Commissioner Of Commercial Tax, Durg., District : Durg, Chhattisgarh

3. Commercial Tax Officer, Circle I, Durg. , District : Durg, Chhattisgarh
4. General Manager, Bhilai Steel Plant, Bhilai. As Necessary Party, District : Durg, Chhattisgarh

---- Respondents

WA No. 68 of 2017

- M/s Prabhat Shankar Agrawal Through The Proprietor Prabhat Shankar Agrawal, R/o 39/4, M. L. Nehru Nagar, East Bhilai, District Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Commercial Tax Department, Mantralaya, Raipur. , Chhattisgarh
2. Deputy Commissioner Of Commercial Tax, Durg.
3. Commercial Tax Officer, Circle II, Durg. , District : Durg, Chhattisgarh

---- Respondents

WA No. 71 of 2017

- M/s Prabhat Shankar Agrawal Through The Proprietor Prabhat Shankar Agrawal, R/o 39/4, M. L. Nehru Nagar, East Bhilai. Distt. Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Commercial Tax Department, Mantralaya, Raipur. , Chhattisgarh
2. Deputy Commissioner Of Commercial Tax, Durg.
3. Commercial Tax Officer, Circle II, Durg. , District : Durg, Chhattisgarh

---- Respondents

WA No. 72 of 2017

- M/s Prabhat Shankar Agrawal Through The Proprietor Prabhat Shankar Agrawal, R/o 39/4, M.L. Nehru Nagar, East Bhilai, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Commercial Tax Department, Mantralaya, Raipur, Chhattisgarh, Chhattisgarh
2. Deputy Commissioner Of Commercial Tax Durg
3. Commercial Tax Officer, Circle-II, Durg

---- Respondents

WA No. 73 of 2017

- M/s Prabhat Shankar Agrawal Through The Proprietor Prabhat Shankar Agrawal, R/o 39/4, M.L. Nehru Nagar, East Bhilai, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Commercial Tax Department, Mantralaya, Raipur, Chhattisgarh, Chhattisgarh
2. Deputy Commissioner Of Commercial Tax Durg
3. Commercial Tax Officer, Circle-II, Durg

---- Respondents

WA No. 74 of 2017

- M/s Kishan Lal Chopra Aged About 45 Years Through Proprietor Prem Chopra, S/o Shri Kishan Lal Chopra, New Khursipar, Bhilai, District Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commerical Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh
2. The Deputy Commissioner, Department Of Commerical Tax, District Durg, Chhattisgarh
3. The Commercial Tax Officer, Circle-IV, Durg, District Durg, Chhattisgarh,
4. Bhilai Steel Plant, Through Its General Mananger, Bhilai, District Durg, Chhattisgarh

---- Respondents

WA No. 76 of 2017

- Mines And Quarry Owners Welfare Association A Society Registration Act, 1973 Having Registration No. 1342 Of 1993, Represented Through Kastoor Chand Bafna, Secretary Of The Association Having Office At M M 28 Padmanabhpur, Durg Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary, Commercial Tax Department, Mahanadi Bhavan, Mantralaya, Naya Raipur, Distt. Raipur, Chhattisgarh
2. The Deputy Commissioner, Commercial Tax Durg, District Durg (C.G.)
3. The Commercial Tax Officer, Circle 4, And All Other Circles, Durg (C.G.)
4. Bhilai Steel Plant, Through The General Manager, Bhilai, District Durg (C.G.)

---- Respondents

WA No. 77 of 2017

- M/s Surendra Kumar Chopra Through Proprietor Virendra Chopra, S/o Late Shri Surendra Chopra, Aged About 46 Years, New Khursipar, Bhilai, District Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur (C.G.)
2. The Deputy Commissioner, Department Of Commercial Tax, District Durg, Chhattisgarh
3. The Commercial Tax Officer, Circle-Iv, Durg, District- Durg, Chhattisgarh
4. Bhilai Steel Plant, Through Its General Manager, Bhilai, District, Durg, Chhattisgarh

---- Respondents

WA No. 78 of 2017

- M/s Rathi And Company Through The Partner Mohan Lal Rathi, R/o M I G 77, Padmanabhpur, Durg, District Durg Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretaray, Department Of Commercial Taxes, Mahanadi Bhavan, Mantalaya, Naya Raipur, Distt. Raipur, Chhattisgarh
2. Deputy Commissioner Of Commerial Tax, Durg, District Durg (C.G.)
3. Commercial Tax Officer, Circles-1, Durg, Chhattisgarh
4. General Manager, Bhilai Steel Plant, Bhilai, Durg, As Necessary Party Distt. Durg Chhattisgarh

---- Respondents

WA No. 80 of 2017

- Kusum Mineral Properties Through Proprietor Bhikham Chand Jain, S/o Late Shri Nemichand Jain, Aged About 65 Years, Malviya Nagar, Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Raipur Chhattisgarh
2. The Deputy Commissioner, Department of Commercial Tax, Distt. Durg (C.G.)
3. The Commercial Tax Officer, Circle I V, Durg, Distt. Durg, Chhattisgarh
4. Bhilai Steel Plant, Through Its General Manager, Bhilai, Distt. Durg (C.G.)

---- Respondents

WA No. 81 of 2017

- Modi Industries Through Proprietor Dharmendra Kumar Modi, S/o Premchand Modi, Aged About 53 Years, S M- 50, Padmanabhpur, Durg, District Durg Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur Chhattisgarh
2. The Deputy Commissioner, Department Of Commercial Tax, Distt. Durg Chhattisgarh
3. The Commercial Tax Officer, Circle- IV, Durg, Distt. Durg Chhattisgarh
4. Bhilai Steel Plant, Through Its General Manager, Bhilai, District Durg Chhattisgarh

---- Respondents

WA No. 82 of 2017

- M/s Rathi And Company Through The Partner Mohan Lal Rathi, Aged 64 Years R/o Mig 77, Padmanabhpur, District -Durg, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Secretary, Commercial Tax Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh
2. The Deputy Commissioner, Commercial Tax Durg, District Durg, Chhattisgarh
3. Commercial Tax Officer, Circles-1, Durg, Chhattisgarh
4. General Manager, Bhilai Steel Plant, District Durg, As Necessary Party Chhattisgarh

---- Respondents

WA No. 83 of 2017

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

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh
2. The Deputy Commissioner, Commercial Tax, Durg, District Durg, Chhattisgarh
3. Commercial Tax Officer, Durg Circle-I, 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

---- Respondents

WA No. 84 of 2017

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

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur Chhattisgarh
2. The Deputy Commissioner, Commercial Tax, Durg, District Durg, Chhattisgarh
3. Commercial Tax Officer, Durg Circle- I, 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, Through The General Manager, Ispat Bhawan, Bhilai, District Durg, Chhattisgarh

---- Respondents

WA No. 85 of 2017

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

---- Appellant

Versus

1. State Of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mahanadi Bhawan, Mantralaya, Naya Raipur Chhattisgarh
2. The Deputy Commissioner, Department Of Commercial Tax, District Durg Chhattisgarh
3. The Commercial Tax Officer, Circle- Iv, Durg, Distt. Durg Chhattisgarh
4. Bhilai Steel Plant, Through Its General Manager, Bhilai, District Durg Chhattisgarh

---- Respondents

WA No. 601 of 2018

- M/s Niket Udyog Ltd. A Limited Company Registered Under The Companies Act. Having Registered Office At Boregoan Growth Centre, tahsil Sausar District- Chhindwara, Madhya Pradesh (Previously At Shailendra Nagar, Raipur)

---- Appellant

Versus

1. State of Chhattisgarh Through The Secretary, Department Of Commercial Tax, Mantralaya, Dau Kalyan Singh Bhawan, New Mahanadi Bhawan, Naya Raipur, Chhattisgarh.
2. Additional Commissioner Commercial Tax Raipur, Chhattisgarh.
3. Assistant Commissioner Commercial Tax, Raipur, Chhattisgarh.

---- Respondents

WA No. 620 of 2018

- M/s Niket Udyog Ltd. A Limited Company Registered Under The Companies Act, Having Registered Office At Boregaon Growth Centre, Tahsil Sausar District Chhindwara, (MP)

---- Appellant

Versus

- State of Chhattisgarh Through The Secretary, Department of Commercial Tax, Mantralaya, Dau Kalyan Singh Bhawan Now Mahanadi Bhawan Naya Raipur District Raipur Chhattisgarh.
- Additional Commissioner, Commercial Tax Raipur Chhattisgarh.
- Assistant Commissioner, Commercial Tax, Raipur Chhattisgarh.

---- Respondents

For respective Appellants :	Shri Neelabh Dubey, Mrs. Smiti Sharma and Shri Soumya Rai, Advocates
For Respondents-State :	Shri Satish Chandra Verma, Advocate General and Shri Gagan Tiwari, Deputy Govt. Advocate
For Respondent-BSP :	Dr. N.K. Shukla, Senior Advocate assisted by Shri Arjit Tiwari, Advocate

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. JUDGMENT

P.R. Ramachandra Menon, Chief Justice

1. Interference declined by the learned Single Judge in the writ petitions filed by the Appellants/Assesses against the proceedings taken by the Departmental Authorities in causing reassessment of the tax payable under the relevant provisions of Chhattisgarh Vanijyik Kar Adhiniyam, 1994 (hereinafter referred to as, 'the Act, 1994') is put to challenge in these appeals.

2. The basis for the challenge is mainly on three grounds;
 - (A) That, the freight charges do not form part of the 'sale price' defined under Section 2(u) of the Act, 1994 and hence not taxable;
 - (B) That, 'mere change of opinion' of the Assessing Officer is not a ground to initiate reassessment proceedings in terms of Section 28 of the Act, 1994 and further;
 - (C) That, if at all any tax is to be paid on the freight charges as well, by virtue of the specific terms agreed between the Appellants/ Suppliers/ Dealers and the Respondent-Bhilai Steel Plant (BSP) / Buyer, it has to be shifted to the shoulders by the Respondent-BSP.
3. The legal and factual aspects are allegedly not considered by the learned Single Judge properly. It is stated that a mistake has been committed in placing undue reliance on the verdict passed by the Apex Court in ***Hindustan Sugar Mills Vs. State of Rajasthan & Others***¹, where the finding was based on the 'control orders' issued by the State which governed the field and not applicable to the cases in hand by virtue of very nature of the commodities sold and transported.
4. The Appellants are engaged in the trade of selling Dolomite, Quartzite, Runner Sand, Silica etc. On satisfaction of the credentials, an agreement has been executed between the Appellants and the Respondent-BSP for the sale of Dolomite, specifically agreeing to the unit sale price ex-mines, the royalty / cess payable, the rate and the quantum of tax to be satisfied and also the 'freight charge', to be billed separately and to be borne by

¹ (1978) 4 SCC 271

the Buyer. It was accordingly, that the goods were being sold and transported by the Appellants and due payments were being effected by the BSP without any complaint.

5. On filing return, the assessment was finalized by the Commercial Tax Officer fixing the taxable turnover in terms of Section 2(w) of the Act, 1994, and showing the tax and such other payments to be effected in this regard. There was no grievance for the Appellants in any manner, but the things took a different turn when the Assessing Officer, based on some audit objection, sought to issue a notice, proposing reassessment in terms of Section 28 of the Act, 1994, for the reason that the 'freight charges' escaped assessment and it was to be included as part of the 'sale price'. The Appellants filed objections which however, came to be turned down and the reassessment proceedings were finalized. This was challenged by availing the statutory remedy, but it did not turn to be fruitful, ultimately leading to the writ petitions.
6. The prayers were vehemently opposed from the part of the State/Revenue contending that the 'freight charges' were from part of 'sale price' as borne by the terms of the agreement. Admittedly, the said portion had not suffered any tax in the original round of assessment and was never shown as part of the turnover by the Assessors. The mistake came to the notice of the Assessing Officer only on raising objections in the internal audit. Immediately on coming to know of the same, notice was issued proposing to effect reassessment in terms of Section 28 of the Act, 1994. It was after affording an opportunity of hearing to the

Appellants/Assesses, that the proceedings were finalized, which hence was stated as strictly in conformity with the relevant provisions of the law and the facts disclosed from the materials on record.

7. During the course of hearing before the learned Single Judge, both the sides sought to rely on verdicts passed by the Apex Court and different High Courts in support of their contentions. After appreciating the rival contentions, the relevant provisions of law and the binding precedents, the learned Single Judge held that the version of the Appellants / Writ Petitioners / Assesses that the 'freight charges' would stand excluded by virtue of the second limb of the definition of 'sale price' under Section 2(u) of the Act, 1994 was not correct or sustainable. The observation made by the Apex Court in this regard in ***Hindustan sugar*** (supra) was specifically adverted to; besides referring to the law declared by the Apex Court in ***India Meters Limited Vs. State of Tamil Nadu***². The observation of the Apex Court in paragraphs 18, 19 and 38 of the said decision were also extracted, to hold that 'freight charge' was definitely to form part of the 'sale price' and that the second limb of the definition under Section 2(u) of the Act, 1994 would never be applicable to the cases of the Assesses. The learned Single Judge also held that, it was never a case of 'change in opinion', but a clear case of escape of assessment, which was held as squarely coming within the purview of Section 28 of the Act, 1994 and hence that the Assessing Officer had rightly invoked the jurisdiction to fix the liability. It was accordingly, that interference was declined and writ petitions were dismissed as per the

² (2010) 9 SCC 423

common judgment dated 07.12.2016, which is under challenge in the appeals preferred by the different Assessses / Writ Petitioners.

8. Mr. Neelabh Dubey, learned counsel for the Appellants, led the arguments on behalf of the Appellants, as supported by Mr. Soumya Rai, learned counsel who appeared for the other Appellants / Assessses. The learned Advocate General addressed the Court on behalf of the State /Department and was assisted by Mr. Gagan Tiwari, Deputy Government Advocate. Arguments were addressed on behalf of the Respondent-BSP by Dr. N.K. Shukla, the learned Senior counsel.
9. As mentioned already, the sum and substance of the submissions made by the learned counsel for the Appellants is that, freight charges having been billed separately, will never come within the purview of 'sale price' as defined under Section 2(u) of the Act, 1994; that the reassessment was only on the basis of a 'change of opinion' of the Assessing Officer and was not satisfying the requirement under Section 28 of the Act, 1994 and further that, if at all, any tax was to be satisfied in respect of the freight charges, by virtue of the specific terms of the agreement executed between the Suppliers and the Buyer, it was to be satisfied by the Respondent-BSP/Buyer and never by the Suppliers/ Dealers/Appellants. It was also pointed out that the issue involved and projected by the Appellants stands virtually covered by the ruling rendered by a Division Bench of this Court in Writ Petition 72 of 2017 and the only difference is that the Assessee therein was a different Company and the assessment year was a different one.

10. According to the learned Advocate General, Annexure-P/4 agreement in WP No. 6010 of 2006 (from which WA No.68 of 2017 has been preferred) clearly reveals the factual aspects as to the scope of the bill for payment. Clause 12 clearly segregates the total amount payable, splitting it into 'four' different parts such as ;

(a)	Basic price Ex-mines Mandia/Balaghat/ Jabalpur inclusive of Royalty & LW cess	= Rs. 248.58 per M/T
(b)	Sales/Commercial Tax @ 4% against Form 33	= Rs. 9.94 ,,
(c)	Surcharge on Coal Tax @ 15%	= Rs. 1.46 ,,
(d)	Freight by road on pre-paid door delivery basis	= Rs. 362.05 ,,
	Landed Cost	= Rs. 622.03 per M/T

Obviously, no tax was worked out on the 'freight charges', despite it was surely to form part of the 'landed cost'. The agreement further stipulated that 'door delivery' was to be effected and it was for the Dealer to meet the task of loading, unloading, transportation and stacking at the premises of the Buyer. All these activities were included in the total landed cost. Under Section 28 (1) of the Act, 1994, three circumstances are envisaged to facilitate reassessment and since no tax was assessed on the 'freight charges', it was a case of escapement of tax and hence the proceedings for reassessment are stated within the four walls of law. The intention of the contracting parties is stated as more clear from 'Clause 15' of Annexure-P/4 agreement, to effect the supply on 'door delivery basis' and hence that the sale will be completed on effecting delivery at the door of the Purchaser; which therefore will take in the freight charges as well, within the 'sale price'. It is further pointed out that definition of the

term 'sale price' in the present Act and that contained in the statute considered by the Apex Court in the case of ***Hindustan Sugar*** (supra) are exactly similar and hence the said dictum will govern the issue herein as well, which stands in favour of the Revenue.

11. Dr. Shukla, learned Senior counsel for the Respondent-BSP (Buyer), submits that the Appeals are not maintainable by virtue of the clear mandate in the proviso to Section (2) of the Chhattisgarh High Court Rules, 2006; the challenge against the order of the Tribunal virtually being in exercise of the power under Article 227 of the Constitution of India. The attempt of the Appellants/Assesses to shift the liability to the shoulders of the Respondent-BSP is seriously disputed and deprecated, referring to the specific clause dealing with 'Escalation' as provided under Clause 14 of the agreement clearly mentioning the exceptional circumstance under which it would be borne by the BSP i.e. when the rate of cost is varied and not under any other circumstance including escalation of the freight charges. The learned Senior counsel points out that the BSP was never a party to the adjudication proceedings before the Assessing Officer or the Revisional Authority; but was brought into the field for the first time only in the writ petitions. Specific reference is made to the pleadings and prayers, to contend that no specific pleading or prayer has been raised against the Respondent-BSP. Referring to the prayers in Writ Petition (T) No. 5454 of 2009 (from which WA No. 85 of 2017 has been preferred), the learned Senior counsel submits that the prayer is only to direct the Respondent-BSP to return the amount recovered, whereas no amount has been paid to the BSP and as such,

no amount is to be returned by the BSP as well. The learned Senior counsel also points out that since the BSP was made a party to the proceeding only before this Court, no interest can be claimed against the BSP and no amount is to be paid by the BSP under any circumstance. As far as the BSP is concerned, it was only a “contractual obligation” between the Appellants/Suppliers and the BSP/Buyer and there is no statutory liability and that the claim is highly barred by limitation as well. It is also brought to the notice of this Court that, at no point of time, was there any demand from the Appellants/ Assessors to the Respondent/BSP claiming any amount under any head as involved in the present case and hence no liability can be sought to be shifted to the shoulders of the Respondent-BSP.

12. Based on the rival submissions as above, the first question to be considered is whether the 'freight charges' stand excluded from the purview of 'sale price' as defined under Section 2(u) of the Act, 1994 for fixing the 'taxable turnover' as defined under Section 2(w) of the Act, 1994. For easy understanding, it will be appropriate to extract Section 2(u) of the Act, 1994 as given below :

"Section 2(u) - **sale price** means the amount payable to a dealer as valuable consideration for the sale of any goods less any sum allowed as cash 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."

13. Obviously, the above definition contains two parts. The first part represents the amount payable to a Dealer as valuable consideration for the sale of the goods, minus any sum by way of cash discount, as per ordinary trade practice, but it takes in any sum charged for anything done by the Dealer in respect of the goods at the time or before delivery as an inclusive item. From this inclusion, some exclusion is carved out in respect of the cost of freight / delivery or the cost of installation when such cost is separately charged. From the above, it is clear that the exclusion from the inclusive part will be applicable only if the sale is complete at the first instance itself and the second step as to the transportation/ installation, is agreed to be undertaken as a distinct part separable from the former one. To put it more clear, if the sale is complete Ex-mines, once it crosses the gates of the Seller, leaving the ownership and control over the goods at the hands of the Purchaser (though the transportation is arranged by the Seller), the freight charges payable may not come within the purview of the sale price. But when the ownership and possession over the goods is still retained with the Supplier/Dealer and the consideration is payable only on delivery at the doors of the Purchaser based on the weight disclosed at the destination (which alone shall be the basis for effecting the payment as agreed), it very much forms part of the sale price; though the transportation cost to be shown separately has been agreed to be paid by the Purchaser on receipt of the goods at the destination. The factual position in the instant case is more discernible from the specific terms of the agreement as contained in Clauses 8, 13, 14 and 17 of Annexure-P/4 agreement in Writ

Petition No.3982 of 2006 (forming the subject matter of Writ Appeal No. 64 of 2017). The said Clauses have been referred to by the learned Single Judge in paragraph 7 of the common judgment. We find it appropriate to have the same extracted for easy reference :

“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 royalty & LWC.	: Rs. 149.04
b) Sales/Commercial Tax @ 4%	: Rs. 5.96
c) Freight by road on pre-paid door delivery basis	: Rs. 95.00

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 (fro road supplied). 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.”

14. Clause 8 of the agreement says that the 'weighment' will be done at the Purchaser's weigh bridge, which alone shall be final for the purpose of payment, with appropriate extent of modification, if the despatch is by Rail. This shows that the ownership over the goods remains with the Dealer/Supplier, till it is delivered after 'weighment' at the destination i.e. at the doors of the Purchaser (BSP) who is liable to effect the payment only in respect of the quantity delivered at the door, irrespective of the contents of the bill. The position becomes more clear from the contents of paragraph 13 of the agreement which gives the breakup figures of the landed cost per metric ton. After giving the unit price of the commodity inclusive of royalty and LWC (Labour Welfare Charges) under Clause (a) and sales / commercial tax @ 4% worked out under Clause (b), the freight by road on pre-paid door basis delivery is separately given, totalling the 'landed cost', per ton, as mentioned therein. Since the freight by road was on pre-paid door delivery basis and it also included as part of the landed cost, it will definitely constitute as part of the 'sale price' as defined under Section 2(u) of the Act, 1994, despite which the sale / commercial tax has been admittedly worked out and paid only on the unit price without including the said element.
15. Coming to the Escalation Clause (paragraph 14 of the agreement), it clearly speaks about the fact that the price of the contract shall remain firm during the pendency of the contract and no escalation would be payable on any ground whatsoever, including freight (for road supplies), however, conceding payment due to change in the statutory levies as mentioned therein. Under paragraph 17 of the agreement, the onus on

the part of the Dealer/Supplier to transport the materials by truck from the Supplier's mines to the BSP/Purchaser, also arranging the loading, unloading into bunkers and proper stacking of the material in the bed is clearly stipulated, also alerting that the transportation charges would be paid only to the supplier along with the bills and never directly to the transporter. Even a cursory look at the above specific terms agreed between the parties shows that the Purchaser would become the owner of the goods supplied by the Dealer/Supplier only on effecting the supply at the purchaser's end, and hence the sale will be complete only at the destination of the Purchaser and never before.

16. The sale of a movable property is complete when the sale consideration is passed on and the property is handed over to the Purchaser. This, going by the terms of Annexure-P/4 agreement, does never take place when the Dolomite is sent by the Dealer in the truck to the BSP, but only when it is delivered at the destination, followed by the payment of consideration with reference to the weight / quantity delivered at the door of the BSP.
17. Nature of the transaction as discussed above i.e. as to when the Purchaser becomes the owner of the goods and the question who is having control and ownership over the goods in transit were specifically adverted to by the Apex Court in ***Hindustan Sugar*** (supra). The point considered was whether the 'sale price' would include freight charges as well and what would be the position, when the 'control orders' issued by the Government with reference to the nature of the commodity and its transaction are attracted. The scrutiny done by the Apex Court is with

reference to the definition of the 'sale price' as it contained under Section 2(p) of the Rajasthan Sales Tax Act, 1954 as extracted in paragraph 7 therein. The said provision and the two distinct parts of the said definition noted in paragraph 7 are extracted below :

“7. 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 cost 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. ”

18. It is very pertinent to note that the definition of the term 'Sale Price' under Section 2 (p) of the Rajasthan Sales Tax Act, 1954 dealt with by the Apex Court is exactly similar, as defined under Section 2(u) of the Act, 1994 involved in the present case. The illustration given by the Apex Court with regard to two different situations as to when the sale is complete, is quite evident from paragraphs 8 & 9 of the above judgment. We find it appropriate to extract the relevant portion of said two paragraphs for easy understanding of the case.

"8. Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'. So also, the amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item as is usually in case, forms part of the 'sale price'. It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition.

We may then take a case where a dealer transports goods from his factory to his place of business and sells them at a price which is arrived at after taking into account 'freight and handling charges' incurred by him in transporting the goods. The amount of 'freight and handling charges' included in the price would obviously be the part of the 'sale price', because it would be payable by the purchaser to the dealer as part of the consideration for the sale of the goods. The same would be the legal position even if the 'freight and handling charges' are shown separately in the bill and added to the price of the goods, for the character of the payment would remain the same. Since 'freight and handling 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 charged to the purchaser. The amount of 'freight and handling charges' would be.

payable by the purchaser not under any statutory or other liability 'out as part of the consideration for the sale of the goods and it would, therefore, Form part of 'sale price' within the meaning of the first part of the definition. This position is also well settled having regard to the decisions of this Court in **Dyer Meakin Breweries Ltd. v. State of Kerala**³.

9. We may now take another example which is very much near to the one which we have already discussed. The dealer may, instead of transporting the goods from his factory or his place of business and selling them there, enter into a contract of sale F.O.R.. destination railway station. Where such a contract is made, the seller undertakes an obligation to put the goods on rail and arrange to have them carried to the destination railway station at his expense. The delivery of the goods to the purchaser in such a case is complete at the destination railway station and till then the risk continues to remain with the dealer. The freight is payable by the dealer since he has to arrange for the goods to be carried by rail to the destination railway station at his expense and there is no obligation on the purchaser to pay the freight. The purchaser is concerned only to pay the agreed price for the delivery of the goods at the destination railway station. The agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to what is the amount of freight. Even if there is any fluctuation in the amount of freight, since the making of the contract, the purchaser would have no concern, because he is liable to pay only the agreed price which includes the freight, whatever it be. The dealer may, in such a case, pay the freight and charge the agreed price to the purchaser, or he may obtain a railway receipt on the basis of "freight to pay" and request the purchaser to pay the freight at the time of taking delivery of the goods from the railway at the destination railway station and give the purchaser credit for the amount of the freight against the agreed price. The latter would merely be a convenient mode of paying the agreed price. Since it is the obligation of the dealer to deliver the goods free on rail destination railway station, the dealer is liable to pay the freight between him and the purchaser and the purchaser can very well refuse to accept the railway receipt which is not "freight pre-paid" but "freight to pay". But he may, ordinarily as a reasonable businessman he would, accept such railway receipt and pay the amount of freight on behalf of the dealer. When the purchasers pay the amount of freight in

³ (1970) 3 SCC 253

such a case, it would be; as part of the agreed price and not as freight vis-a-vis the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of "sale price" and fall within the first part of the definition."

19. Applying the above vital distinction and the legal position to the given set of facts and circumstances, it is clear point blank that the sale was to be completed only on effecting the door delivery in the premises of the Purchaser/BSP and that the payment of consideration was to be based on the weight taken at the premises of the Purchaser and never before. As such, the freight paid / agreed to be paid was to form part of the 'sale price' defined under Section 2(u) of the Act, 1994 and in turn, it will have a bearing in the turnover defined under Section 2(w) of the Act, 1994. The submission of learned counsel for the Appellant that the law declared by the Apex Court in ***Hindustan Sugar*** (supra) was with reference to the effect of the "control order" issued by the Government and hence it stands on the different footing, does not have any pith or substance. It is with reference to the legal position mentioned therein, that the learned Single Judge has decided the *lis* involved in the present case, which according to us is correct and proper.
20. With regard to the second ground raised i.e., as to 'reassessment', it is relevant to note the nature of contentions raised by the Appellants/Assesses in these cases. It is stated that all the materials were very much available with the Adjudicating Authority at the time of original assessment itself and that there was no instance of any suppression or non-disclosure of the full materials necessary for the

assessment by virtue of which no reassessment proceeding could have been initiated, pursued or finalized by the Adjudicating Officer.

21. The undisputed fact remains that the Appellants/Assesses did not show the freight charges as part of the turnover, presumably in view of the terms of the agreement as contained in 'Clause 13' as extracted above, giving the split up figures. Tax was sought to be worked out, as agreed by the parties, only with reference to the 'Unit Price' ex-mines, inclusive of Royalty and LWC (Labour Welfare Cess). It was thereafter that the freight charge was agreed to be added to fix the 'landed cost' at the doors of the Purchaser, it being door delivery. When the assessment was finalized in the original round, whether the freight shown separately was actually to be a part of the 'sale price' was never a point subjected to scrutiny and hence there was no occasion for the Adjudicating Officer to express any view/opinion in this regard. Since no such opinion was ever formed or expressed, apparently there cannot be any instance of 'change in opinion'. Later, the information as per report of the audit team, that there was an escape of assessment to the extent as mentioned under Section 28 of the Act, 1994 gave the reason to believe for invoking the power under Section 28 of the Act, 1994 by the Adjudicating Officer. In other words, it is not a case of mere change in opinion, but an instance of satisfaction recorded as to the factum of escape of assessment, necessitating remedy by invoking the power and procedure under Section 28 of the Act, 1994. Whether the said course pursued by the Adjudicating Officer, affirmed by the Statutory Authority and upheld by the learned Single Judge is correct or not is the question.

22. It is contended that 'audit objection' can never be a ground to hold it as a piece of information or to hold that the Assessing officer has reason to believe that any portion of the turnover has escaped from assessment, to be subjected to reassessment under Section 28 of the Act, 1994. In support thereof, reliance is sought to be placed mainly on the verdict passed by the Apex Court in ***M/s. Indian & Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi***⁴ and ***State of Uttar Pradesh & Ors. Vs. M/s. Aryaverth Chawl Udyoug & Ors.***⁵ and the judgments rendered by the Division Bench of Delhi High Court in ***BLB Limited Vs. Assistant Commissioner of Income Tax***⁶, Telangana and Andhra Pradesh High Court in ***Kumar's Metallurgical Corporation Ltd. Vs. Joint Commissioner of Income-Tax (Assessment)***⁷ and High Court of Madhya Pradesh at Jabalpur in ***Orient Paper Mills Ltd. Vs. Commissioner of Sales Tax***⁸.
23. The point considered by the Apex Court in ***M/s. Indian & Western Newspaper Society*** (supra) was whether the view expressed by an Internal Audit Party of the Income Tax Department on a point of law be regarded as 'information' for the purpose for initiating proceeding under Section 147 (b) of the Income Tax Act, 1961. The matter came up for consideration before the Apex Court, pursuant to a reference made by the Income Tax Appellate Tribunal directly under Section 257 of the Act, 1961, as the 'opinion' expressed on the question was divided among various High Courts. The Assesse in the said case, which was a

⁴ (1979) 4 SCC 248

⁵ 2014 SCC Online SC 1205

⁶ (2012) 343 ITR 129

⁷ [2018] 406 ITR 386 (T & AP)

⁸ [1983] 54 STC 195 (MP)

professional organization of Newspapers, also owned a conference hall and rooms which were being let out on rent. In respect of the relevant Assessment Years, the rental income was assessed as 'income from business'; but later the Internal Audit Party opined that the rental income ought to have been assessed as 'income from the property' and not as 'income from business'. Based on the said opinion of the Audit Party, the Income Tax Officer treated it as the basis for reassessment under Section 147 (b) of the Act, 1961; which however was disagreed by the Appellate Assistant Commissioner, in appeal. But, on taking up the matter before the Tribunal, the appellate order was set aside and view of the Income Tax Officer was restored. On applying for reference, the Tribunal, taking note of the difference of opinion between the High Courts on the point, referred the question to the Apex Court and the matter was dealt with accordingly. After a threadbare analysis of the relevant provisions of law, the Apex Court observed in paragraph 12 of the verdict (supra) that, although the Audit Party does not possess the power to pronounce on the law, it nevertheless drew the attention of the Income Tax Officer to it. On applying the law to the given set of facts and circumstances, it was observed by the Apex Court that the course pursued by the Income Tax Officer did not disclose 'any reason to believe' to invoke the power under Section 147 (b) of the Act, 1961. It was in the said circumstance, that the Apex Court observed in paragraph 20 that opinion of an Internal Audit Party of the Income Tax Department on a point of law cannot be regarded as 'information' within the meaning of Section 147 (b) of the Act, 1961; thus, answering the reference in the

'negative', to be in favour of the Assessee and against the Revenue. The above decision does not come to the rescue of the Appellants/Assesses.

24. In ***M/s. Aryaverth Chawl Udyoug*** (supra) the Apex Court has considered the sustainability of the initiation and finalization of the reassessment under Section 2(p) of the Uttar Pradesh Trade Tax Act, 1948 (for short, "the Act, 1948"). The assessee, a registered Dealer under the State and Central Acts, was engaged in the business of rice in the State of Uttar Pradesh, who consumed the paddy purchased within the State, to manufacture of the rice at their rice mills and selling the same within outside the State. As per Section 14 of the Central Sales Tax Act, 1956 (for short "the Act, 1956") 'rice' and 'paddy' were declared goods, being goods of special importance, and were liable to be taxed at the point of first purchase, under the relevant notification issued in this regard. The assessee claimed set off under Section 15 (c) of the Act, 1956 in respect of Purchase Tax already paid on the purchase of paddy within the State of Uttar Pradesh against the tax liability created under the Act, 1956; which was allowed by the Assessing Authority as per assessment order dated 31.12.2003. Years later, the Commissioner of Trade Tax, Uttar Pradesh issued a Circular dated 29.03.2007 to the effect that Section 15 (c) of the Act, 1956 would not contemplate setting off the tax liability on paddy purchased within the State of Uttar Pradesh, with the tax liability on the interstate sale of rice and that no deduction was permissible, in turn directing the assessment orders to be revived and pursued. Since the stipulated period for initiating proceedings under Section 21(1) of the Act, 1948 had lapsed, sanction was sought for and obtained, followed by

a notice under Section 21(2) of the Act, 1948 as to why the reassessment be not effected. The assessee sought to challenge above Circular and the notice by filing necessary proceedings, also contending that the proposed reassessment (under Section 21 of the Act, 1948) was merely based on 'change in opinion' and hence bad in law. The High Court upheld the circular and the show cause notice, but interdicted the reassessment proceedings, holding that it was only on the basis of a 'change of opinion'. This was taken up by the State before the Apex Court, where the scope of Section 21 for reassessment was subjected to detailed scrutiny. After referring to the provision of law and the precedents, the Apex Court held that, if an Assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it was not a valid reason under the law for reassessment (paragraph 30). It was further held in paragraph 31, that in case there be a change of opinion, there must necessarily be a 'nexus' (to be established) between the 'change of opinion' and materials available before Assessing Authority. Discovery of an inadvertent mistake or non-application of mind during the assessment would not be a justifiable ground to re-initiate proceedings under Section 21 of the Act, 1948, on the basis of change in subjective opinion and it was accordingly held that there was no reason to interfere with the verdict passed by the High Court. Applying the said law to the given case, it is clear that opinion as to whether 'freight' was part of the 'sale price' or not, was never considered or expressed by the Adjudicating Authority in the original assessment orders in the instant case and hence the said verdict

is not attracted.

25. There cannot be any dispute that a mere change of opinion cannot be the ground of reassessment as held by the Apex Court in ***Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.***⁹. The scope and applicability of the power and procedure under Section 147 of the Income Tax Act, 1961 (for short, “the Act, 1961”) was elaborately considered and it was held that even after amendment of the statute w.e.f. 01.04.1989 (by virtue of which, the power is much wider), significance of the word “reason to believe” would still stand highlighted and that the Assessing Officer cannot reopen assessment “merely on the basis of change in opinion”; adding further that the Assessing Officer has no power to review, though he has power to reassess. It was applying the said law, that the Division Bench of the Delhi High Court held in ***BLB Limited*** (supra) (paragraph 11) that, if in the course of original assessment proceedings, the Assessing Officer has considered and examined a particular aspect, the said aspect cannot be made a ground to reopen and initiate reassessment proceedings; in turn, quashing the reassessment notice issued to the Assessee. Here again, it is to be noted that the question whether freight paid/ agreed to be paid in the instant case would form part of the 'sale price' was never a point considered by the Assessing Officer and no opinion was expressed by him; by virtue of which, it is not a case of mere “change in opinion”.
26. In the case dealt with by the Division Bench of the Telangana and Andhra Pradesh High Court in ***Kumar's Metallurgical Corporation Ltd.*** (supra),

⁹ (2010) 2 SCC 723

the Appellant/Assesse, who was engaged in the trade of pig iron had gone for public issue in the relevant assessment year. The issue was oversubscribed and the excess application money obtained was kept in short-term deposits in various Banks and earned interest of more than Rs.1 crore. The Appellant/Assesse claimed deduction of Rs. 85.60 lacs being the expenditure incurred by way of interest, advertisement, business promotion, printing and stationery, share application forms, travelling and other expenses and the Assessing Officer allowed the deduction. But, later the Assessing Officer effected reassessment under Section 147 of the Act, 1961 on the basis of an audit objection, which was put to challenge contending that there was no new material, but for a change in opinion. Various rulings rendered by the Apex Court including ***Kelvinator of India Ltd*** (supra) were sought to be relied on. After detailed discussion of the facts and figures, the Bench observed that insofar as it was not the case of Assessing Officer that the reassessment was necessitated on account of a fresh information, either with regard to the facts or law received by him, he was denuded of the jurisdiction to initiate reassessment proceedings, merely because previous assessment order was passed ignoring the existing judgments or materials. It was also held that, non-noticing of existing judgment would squarely fall under the categories of oversight, inadvertence or mistake committed by the Income-tax Officer, but those reasons would not constitute a justifiable ground under Section 147(b) of the Act, 1961 for initiating reassessment proceedings. It was further observed that the Assessing Officer had misguided himself by placing reliance on the judgment in ***Kalyanji Mavji***

and Co. Vs. CIT¹⁰ ignoring the subsequent judgments in **M/s. Indian & Eastern Newspaper Society** (supra) and **A.L.A. Firm Vs. CIT**¹¹ which did not approve the view in **Kalyanji Mavji and Co.** (supra) in respect of the point involved. We are of the view that the said judgment does not advance or support the case of the Appellants/Assesses in the instant case, in view of the clear difference in the factual aspects discussed already.

27. The learned counsel for the Appellants/Assesses also sought to place reliance on the judgment of a Division Bench of the High Court of Madhya Pradesh at Jabalpur, rendered in **Orient Paper Mills Ltd.** (supra). Ofcourse, it was a case involving the very same statute i.e. the Madhya Pradesh General Sales Tax Act, 1958. The learned counsel submits that the Bench has held in paragraph (6) that the law declared by the Apex Court in **Hindustan Sugar** (supra) was a case relating to sale of cement under the 'control order' and that the Supreme Court had held in the said case that in view of the special provision contained in 'control order', the freight formed part of the sale price; whereas in the case before the Madhya Pradesh High Court was not governed by any 'control order'; in turn answering the question that the freight charged by the Assesse in the bill and actually paid by the Purchaser at the destination did not form part of the sale price. But, here, it is very relevant to note that the Bench had referred to the different situations of sale and the burden to transport the materials, to infer whether the 'freight' would form the part of the sale price. In the said context, the specific Conditions as

¹⁰ [1976] 102 ITR 287 (SC)

¹¹ [1991] 189 ITR 285 (SC)

borne by the terms of contract, particularly Conditions No. (6) & (7) involved in the said case were extracted in paragraph 3, as reproduced below.

“(6) All goods ordered shall be despatched by goods train. All additional costs for despatch of goods by any other means shall be borne by the buyer. All risks including damages, loss, pilferage, theft, fire accident, etc., shall pass on to the buyer with the delivery of goods to carrier or his agent and the company shall in no way be responsible for any or all loss or damage notwithstanding that the goods were not despatched on carrier's risk.

(7) Demurrage incurred on the consignment due to non-payment, late payment or late delivery of the documents are to be borne by the buyer. In case the documents are not retired, the company shall hold the buyer responsible for all other consequences arising thereof.”

The Bench proceeded to hold that the different nature of the two sale situations had been considered by the Apex Court in **Hindustan Sugar** (supra) itself and as observed in paragraphs 9 and 10 of the said judgment, 'freight' will not form part of the sale price, if the sale was complete in a case where the goods were entrusted to the Buyer/ Purchaser, to be transported at the latter's risk and cost; whereas it will form part of the sale price, if the sale was to be completed only at door step of the Buyer. The discussion in paragraph 5 is quite exhaustive and hence we find it appropriate to extract it below :

“5. The law applicable on the point has recently been clarified by the Supreme Court in *Hindustan Sugar Mills v. State of Rajasthan* MANU/SC/0335/1978 : AIR 1978 SC 1496. In a case of a contract of the description f.o.r. destination railway station, the freight is part of the consideration payable to the seller and forms part of the price. In this class of contracts, the delivery is complete at the

destination railway station and the risk till then continues to remain with the selling dealer. The freight is also paid by the selling dealer as he has to arrange for the delivery at the destination railway station. The other class of cases is where the price is only f.o.r. destination railway station but the contract of sale is really not f.o.r. destination railway station. In this class of contracts although the price stipulated is f.o.r. destination railway station, the delivery is complete when the goods are put on rail and the risk also passes to the purchaser thereafter, making the railway the agent of the purchaser. The freight in this class of cases is payable by the purchaser though the price agreed upon is f.o.r. destination railway station. The price of the goods receivable in such cases is thus the f.o.r. destination price less the amount of freight payable by the purchaser. Both these types of cases have been discussed in paragraphs 9 and 10 of the judgment in *Hindustan Sugar Mills v. State of Rajasthan* MANU/SC/0335/1978 : AIR 1978 SC 1496. The question before us, therefore, is whether the case before us falls in the first or the second category. Having considered the terms of the contract contained in the sale note, we are of the opinion that although the price charged was f.o.r. destination railway station, the contract was not f.o.r. destination railway station. A reading of Clauses (6) and (7) of the sale note which are reproduced above go to show that all risks including damages, loss, pilferage, theft, fire accident, etc passed on to the buyer with the delivery of goods to the carrier and the assessee was thereafter in no way responsible for any loss or damage. Similarly, demurrage incurred on the consignment due to non-payment, late payment or late delivery of the documents was to be borne by the buyer. The aforesaid terms make it clear that the delivery of the goods was complete at the loading station when the goods were delivered to the carrier. We have earlier stated that the freight was invariably deducted from the price in the bills and was paid by the buyer as the railway receipts were obtained "freight to pay". Thus, on a correct appraisal of the contract, freight included in the f.o.r. destination price was payable by the buyer as the goods were carried by the carrier from the loading station to the destination station as the agent of the buyer. In these circumstances, as held by the Supreme Court in *Hindustan Sugar Mills v. State of Rajasthan* MANU/SC/0335/1978 : AIR 1978 SC

1496 and in the case of Hyderabad Asbestos Cement Products Ltd. v. State of A.P. MANU/SC/0596/1969 : [1969] 24 STC 487 (SC), the freight paid by the purchasers cannot be said to form part of the sale price. The conclusion reached by us is further supported by the decision of the Orissa High Court in Orient Paper Mills Ltd. v. State of Orissa [1975] 35 STC 84 (MP). It is true that the sales tax in the bills was charged on the price which included the freight, but that was also the case in Hyderabad Asbestos Cement Product Ltd.'s case MANU/SC/0596/1969 : [1969] 24 STC 487 (SC) and this circumstance by itself cannot lead to the inference that freight formed part of the sale price.”

Applying the reasons given by the learned Judges in the referred judgment, as contained in paragraph 5, we are of the view that the facts and circumstances mentioned in the present case clearly demonstrate that the freight forms part of the sale price as defined under Section 2(u) of the Act, 1994.

28. With regard to the submission made by the learned counsel for the Appellants/Assesses that the issued is covered by the judgment dated 26.11.2018 passed by a Division Bench of this Court in Writ Appeal No. 697 of 2018 and connected cases, we find it difficult to accept the said proposition. As evident from paragraph 6 of the said judgment, the question which came up for consideration before the learned Single Judge was whether the Chhattisgarh Entry Tax (Amendment) Act, 2014, which was made effective from 01.04.2014 defining to the word “Market Value”, will have prospective effect or whether such amendment could be used retrospectively to reopen assessments already made, in exercise of the power under sub-section (1) of Section 22 of the Chhattisgarh Value Added Tax Act, 2005. Placing reliance on the verdict passed by the Apex

Court in ***Kelvinator of India Limited*** (supra) it was held that the concept of “change in opinion” is an inbuilt safeguard in all reassessment proceedings, otherwise power to reassess would become power to review and it would give arbitrary power to the Assessing Officer to open concluded assessment on mere change in opinion. There is no dispute that, there cannot be any reassessment merely on “change of opinion”. According to us, the said judgment does not come to the rescue of the Appellants/Assesses in any manner, in view of the black and white difference in the factual context.

29. Coming to the law declared by the Apex Court, which was cited and relied on from part of the State/Revenue in ***M/s. Larsen & Toubro Ltd. Vs. State of Jharkhand and Ors.***¹², the Court was examining the scope of the word “Information” used in Section 19 of the Bihar Finance Act, 1981 (for short , 'the State Act') and it was held that the said term is used in the widest amplitude and should not be construed narrowly. The point for consideration as dealt with in paragraph 4 of the said judgment was whether, on the information given by the audit team of the Auditor General, Bihar, the Assessing Authority was satisfied that reasonable ground existed to believe that a part of the turnover of the appellant-Company had escaped assessment within the meaning of Section 19 of the State Act; based on which the assessing officer could re-open the assessment. The contention of the appellant/Assesse was that an 'audit objection' could not be construed as 'information' within the meaning of Section 19 of the State Act and would only remain as 'change in opinion'.

¹² 2017 SCC Online SC 347

The contention of the State was that the Assessing Authority had not revised the assessment merely on the basis of audit report and that it had satisfied itself before revising the same, while rejecting part of the audit objection and thus applied its mind properly and further that audit objection in the said case was of course a piece of information; adding further that the word 'information' used in the said section was of widest amplitude. After detailed discussion, also with reference to case law including that of a three member' Bench in ***M/s. Indian & Eastern Newspaper Society*** (supra) it was clearly observed in paragraphs 27 and 28 as follows :

“27. The contention whether finding the information from the very facts that were already available on record amounts to information for the purpose of Section 19 of the State Act, it would be sufficient to refer to a judgment of this Court in ***Anandjiharidas & Co. vs. S.P. Kasture***¹³ wherein it was held that a fact which was already there in records doesn't by its mere availability becomes an item of “information” till the time it has been brought to the notice of assessing authority. Hence, the audit objections were well within the parameters of being construed as ‘information’ for the purpose of section 19 of the State Act.

28. The expression ‘information’ means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after bearing on the assessment. We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re-opening of assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor assessing authority proceeded, were same. The question still is as to whether in the present case, the assessing authority was satisfied or not.”

¹³ AIR 1968 SC 565

However, based on the observation that the question still would be whether, in the present case, the Assessing Authority was satisfied or not, a decision was rendered as contained in paragraphs 30 and 31 holding that it was not so, and hence decided against the Revenue. The finding in paragraphs 27 and 28, as above, clearly supports the State/Revenue in the instant case.

30. With regard to the third point i.e. if at all there is any additional burden to satisfy the tax on the freight as well (treating the same as part of the 'sale price' defined under Section 2(u) of the Act, 1994), by virtue of the terms of the agreement, it has to be satisfied by the Respondent-BSP/Purchaser itself and not by the Appellants/Dealers; there is a strong objection from the part of the Purchaser/BSP, as put forth by the learned counsel, that no such prayer or pleading has ever been raised in these proceedings.
31. We have gone through the averments in the writ petitions and the prayers, which virtually supports the stand taken by the Respondent-BSP/Purchaser. No specific prayer is raised to shift the liability, if at all any, from the shoulders of the Appellants/Suppliers to the Respondent-BSP/Purchaser and no grounds have been raised with specific pleadings in this regard. That apart, the issue involved herein was only between the Adjudicating Authority and the Assesses /Suppliers with regard to the tax liability, in which the Respondent-BSP/Purchaser was never a party either before the Adjudicating Authority or the higher forum; who infact came to be impleaded in the party array only in the writ petitions. In the above situation, we find considerable force in the submission made on

behalf of the Respondent-BSP/Purchaser to the effect that the submission now made before this Court on behalf of the Appellants/Assesses to cause the liability to be shifted to the shoulders of the Respondent-BSP/Purchaser is not liable to be entertained. It is ordered accordingly. However, we make it clear that we are not adjudicating the issue as to the relative rights/duties between the Supplier and Purchaser based on the terms of the Annexure-P/4 agreement in these proceedings and it is left open, to be pursued by the aggrieved parties before the appropriate forum, in accordance with law, if the same is otherwise sustainable.

32. As mentioned already, the basic question is whether the freight charges paid / agreed to be paid in the instant case would form part of the 'sale price' (in view of the specific terms of the agreement stipulating payment of the 'landed cost' on door delivery basis), defined under Section 2(u) of the Act, 1994. The question whether freight was forming part of the sale price was never subjected, considered or any opinion was expressed in this regard by the Adjudicating Officer in the first round of the proceedings. This escape of assessment was found by the Audit Department, which was taken as a piece of 'information' by the Adjudicating Officer, who on application of mind, held that there was 'reason to believe' that it had escaped assessment; in turn leading to the proceedings under Section 28 of the Act, 1994. Thus, the order passed by the Adjudicating Officer, which has become final, based on the interference declined by the statutory authorities and affirmation of the said proceedings by the learned Single Judge of this Court, is perfectly

within the four walls of the law and it is not assailable under any circumstances. We do not find any merit in the appeals and they are dismissed accordingly.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

chandra