Rajasthan Tax Board,Ajmer

Appeal No.1903/2016/Jaipur
Appeal No.1904/2016/Jaipur
M/s Genus Power Infrastructure Limited
Jaipur — Appellant

Vs

(1)The Appellate Authority III, Commercial Taxes, Jaipur
(2)The Commercial Taxes Officer, Special Circle 11, Jaipur — Respondent

S.B.
Shri Sunil Sharma,Member

Present:

Mr. Alkesh Sharma, Advocate for the Appellant
Mr R K Ajmera, Deputy Government Advocate for the Respondent

Order date 31.08.2016

ORDER

Aggrieved by the twin orders even dated 12.02.2016 passed by the Appellate Authority, III, Commercial Taxes, Jaipur,(for short, "Appellate Authority), rejecting stay applications inasmuch as tax and interest in two separate assessment orders dated 17.06.2016 for year 2010-11was concerned, the Appellant Company has filed stay applications in both the cases: in short, both the assessment orders dated 17.06.2016 were made by the Commercial Taxes Officer, Special Circle 11, Jaipur (for short," the Assessing Authority"), one under section 25 of the Rajasthan Value Added Tax Act, 2003, (for short, " the Act"), read with section 38(4) of the Act; and, the other, under section 9 of the Central Sales Tax Act,1956 (for short, " the CST Act") read with section 38(4) of the Act respectively. The appellant has preferred two stay applications seeking injunction against recovery of (i) tax at Rs.2,53,535/- and interest at Rs.1,74,940/- levied in the aforesaid assessment order passed under section25 of the Act read with section 25, 55 and 61 of the Act, and (ii) against tax at Rs.95,533/- and interest at Rs.65,918/- in the aforesaid assessment order passed under section 9 of the CST Act read with section 25, 55 and 61 of the Act.

The brief facts of the case are that the Appellant Company is engaged in business of manufacturing, supplying, and entering into contacts for supply of transformers and energy meters to the electricity power companies within the State and other States. In the impugned cases related to supply(sale) of such goods under a contract, the Assessing Authority found that even as the Appellant Company charged freight and insurance in the invoices raised in respect of such sales, both under Value Added Tax (VAT) and Central Sales Tax (CST), it did not collect VAT/ CST thereon. A perusal of the conditions laid down in the contract revealed that ownership of goods remained vested in the seller-respondent until the goods, also insured by the respondent seller, had reached the site of the purchaser and that responsibility of the freight payment had to be solely borne and discharged by the seller respondent. Therefore, in the eyes of the respondent, the appellant company was under obligation of the contract to transport the goods at the f. o. r destination bearing cost of insurance, freight and all the safety risk of the goods during transit. Since the appellant did not charge VAT and CST on the freight and insurance on the invoices of sales, within the State and inter-State sales, relating to the impugned contract, the appellant was alleged to have evaded due tax on freight and insurance. Hence, levy of evaded tax, interest and penalty in the impugned assessment orders.

Mr. Alkesh Sharma, the learned counsel for the appellant, opened up the arguments that the Assessing Authority, in the facts and circumstances of the case, could not rightly make distinction between the types of contracts: one, where the price is only f. o. r destination and the other, where the delivery is f. o. r destination. In case of the appellant, it is only the price which is f. o. r destination and not the delivery of goods. In support of his argument, relying upon the decision

of the Hon'ble Supreme Court in case of M/s Hindustan Sugar Mills Limited, and putting his views across during the hearing, he said that the Hon'ble Court had laid down law with regard to the sales subject to strict supervision of the Control Order, fastening liability to pay freight on the seller in spite of the fact that as per agreements between the parties the freight was payable by the buyer. However, where the goods were not subject to Control Order and as per the terms of the contract the buyer had agreed to pay freight in addition to the sale price then freight would not form part of the sale price. He contended that the Assessing Authority failed to take cognizance of the aforesaid landmark judgment which, *inter alia,* distinguished "price only f. o. r destination" contracts from "delivery only f. o. r destination" contracts. In instant case it is price only which is f. o. r destination and not the delivery of the material goods.

Arguing strongly against levy of interest, Mr. Alkesh said that the whole exercise in this regard was a nullity, because levy of tax itself being illegal no question of levy of interest did arise, and therefore the interest could not be levied anterior to the passing of the impugned order as such a view was explicitly taken by the Hon'ble Supreme Court in case of M/s J K Synthetics Limited reported in 94 STC 422. Therefore, he argued, the levy of the interest could not be countenanced. Summing up arguments, learned counsel of the appellant sought under section 38 (4) of the Act stay of recoverable demand of tax and interest in the aforesaid impugned orders.

Appearing on behalf of the respondent Revenue, Mr. R. K, Ajmera, learned Deputy Government Advocate, fiercely contested the appellant's claim for its supplies to be considered "f. o. r price destination" instead of as "f. o. r delivery destination". He argued that at pages 9 and 8 of the aforesaid assessment orders of the the VAT and the

CST respectively there had been given a list of twenty five decisions quoted by the appellant company to buttress its argument against sustainability of tax incidence on freight and insurance in such contractual transactions in which freight was claimed to have been paid by the sellers, but this list did not give reprieve to the appellant from being charged with tax on freight and insurance, for the payment of freight in those cases was made on behalf the purchasers.

In instant cases, there was a explicit contract for transportation of goods f. o. r destination to the buying dealer's sight with the Appellant seller incurring all transit risks, which in this case made freight and insurance indispensable components of the sale price in tune with definition of sale price under sub section 36 of the section 2 of the Act or under section 3(h) of the CST Act, as the case may be.

Further, Mr. R K Ajmera, the learned Deputy Government Advocate, pleaded that the contract under consideration unmistakably informed that " f. o. r destination price" was inclusive of freight and insurance, and that dispatch of freight paid, duly insured consignments only by road transportation were inbuilt contractual obligations on part of the appellant seller. He cited in his favour the Hon'ble Supreme Court's decision in case of the State of Andhra Pradesh V/s A P Paper Mills Ltd,, dated 03.01.2005, wherein, according to him, it was held by their Lordships that freight and insurance would count part of sale price of the goods. Opposing the stay applications, he said there was no *locus standi* to grant stay of recovery of tax and interest in the impugned cases.

After going through the judgments (supra) and pondering over rival contentions of the parties to the issue, and record placed before the bench, the bench finds that controversy involving the instant cases

centres round the issue of whether freight and insurance in contract would be considered part of sale price and consequently liable to tax.

It was noticed that observation of the Assessing Authority in the aforesaid assessment orders that the appellant company had in fact paid freight and for insurance transit risk cover that was showed in its books of accounts, but refrained from adding these sums to sale price of goods thus allegedly declaring less sales' figures in the Returns finally resulting in receipt of short tax to the government exchequer --was not well countered.

It is appropriate to mention here that the Hon'ble Rajasthan High Court, while deciding a similar matter, in cases of M/s Indian Oil Corporation Limited Vs the Assistant Commissioner Commercial Taxes, Special Circle, Rajasthan in STR Petition No.1/2011 and others, dated 20.03.2015,expounded clearly in what circumstances in contract based transactions freight would be included in sale price. The relevant excerpts of the above decision are given herein below:

"Brief facts are that the petitioner is an Oil Company and is a Public Sector Undertaking of the Union of India. During the year under reference, the petitioner-assessee sold diesel to the Railways. The dispute revolves on a short point about the diesel being delivered by Road through containers by the petitioner-assessee to the Railways at the delivery point and whether the freight should be included as part of the sales turnover or not. While the mode of transport was either through Railways or by road but in so far as the mode through Railways is concerned, there is no dispute. The dispute noticed above and raised by the respondent-Revenue finds support and all the three authorities in unison have come to the conclusion that in so far as the freight by road is concerned, it forms part of the sales turnover for the purposes of levy of

sales tax and freight is required to be included in the sales turnover and thus sales tax is required to be levied."

"On a conjoint reading of the aforesaid clauses entered into by and between the parties, in my view, as per terms and conditions in the contract, when the seller was required to deliver the goods at the destination after taking into consideration the transit risk and all other liability namely; delivery charges plus sales tax plus octroi duty plus local tax/levies etc, in transit and at destination on the corporation selling price to the general trade on the date of delivery for each supply ..... It was the duty of the assessee to deliver the goods at the destination. Therefore, in my view, the Tax Board has rightly come to the conclusion that the freight is includable in the sale price and accordingly, in my view, the tax Board was justified in coming to the conclusion to which it has reached."

"Thus, in view of the categorical finding of fact by all the authorities in unison that the assessee was unable to lead any evidence of the freight being charged separately and having been paid separately, in view of the terms, quoted herein above and judgments of Hon'ble Apex Court in Hindustan Sugar Mills and India Meters Ltd; in my view, the Tax Board has rightly come to the conclusion that the freight is part of the turnover and sales tax is leviable on the part of the freight."

Against the background of above facts and circumstances prevailing in the matter under consideration here and in light of the foregoing decision of the Hon'ble Rajasthan High Court in cases of M/s Indian Oil Corporation Limited (supra) both the stay applications are rejected.

Order pronounced.

(Sunil Sharma)
Member