

A CEMENT MARKETING CO. OF INDIA LTD.

v.

ASSTT. COMMISSIONER OF SALES-TAX, INDORE & ORS.

October 30, 1979

B [P. N. BHAGWATI AND R. S. PATHAK, JJ.]

Madhya Pradesh General Sales Tax Act 1958, S2(o) & Central Sales Tax Act 1956 S2(h)—'Sale Price'—Sale of cement under Cement Control Order—amount of 'freight'—whether part of 'sale price' includible in taxable turnover of the assessee.

C *Madhya Pradesh General Sales Tax Act 1958, S43 & Central Sales Tax Act 1956, S9(2)—'false' return—Bona fide belief of assessee that the amount of 'freight' did not form part of the 'sale price' and not includible in the taxable turnover—penalty whether leviable.*

D The assessee (appellant) effected certain transactions of sale of cement in accordance with the provisions of the Cement Control Order. The amount of freight which was included in the 'free on rail destination railway station' price and which was paid by the purchaser was deducted from the price shown in the invoices sent to the purchasers. The assessee proceeding on the basis that the amount of freight did not form part of the sale price and was not includible in the taxable turnover did not show it in the returns submitted by it.

E The Assistant Commissioner of Sales Tax took the view that having regard to the provisions of the Cement Control Order, the amount of freight formed part of the sale price and was includible in the taxable turnover of the assessee, and passed two orders of assessment, one under the Central Sales Tax Act, 1956 and the other under the Madhya Pradesh General Sales Tax Act, 1958, including the amount of freight in the taxable turnover of the assessee and levying tax upon it and also imposing heavy penalty on the assessee on the ground that the assessee had failed to disclose in its returns the amount of freight as forming part of the taxable turnover.

F In appeals to this Court on the questions of : (1) inclusion of the amount of freight in the taxable turnover of the assessee and (2) imposition of penalty for not showing the amount of freight as forming part of the taxable turnover in the returns,

G HELD : 1. (i) The amount of freight formed part of the sale price within the meaning of the first part of the definition of that term in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and Section 2(h) of the Central Sales Tax Act, 1956' and was rightly included in the taxable turnover of the assessee. [1101E]

H (ii) In *Hindustan Sugar Mills v. State of Rajasthan* [1979] 1 SCR 276 this Court held that by reason of the provisions of the Cement Control Order, 1967, which governed the transactions of sale of cement entered into by the assessee the amount of freight formed part of the sale price within the meaning

of the first part of the definition of that term contained in Section 2(p) of the Rajasthan Sales Tax Act, 1954 and Section 2(h) of the Central Sales Tax Act, 1956 and was includible in the taxable turnover of the assessee. The said decision must equally apply under the Madhya Pradesh General Sales Tax Act, 1958, as the definition of 'sale price' in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 is materially in the same terms as Section 2(p) of the Rajasthan Sales Tax Act, 1954. [1101C-E]

2(i) The Assistant Commissioner of Sales Tax was not justified in imposing penalty on the assessee under Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and section 9 sub-section (2) of the Central Sales Tax Act of 1956 as the assessee could not be said to have filed 'false' returns when it did not include the amount of freight in the taxable turnover shown in the returns. [1103C, B]

(ii) Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty requires that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. The Section being penal in character, unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. [1102D, 1102H]

(iii) Where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty. [1102F]

Hindustan Steel Ltd. v. State of Orissa, 25 S.T.C. 211, referred to.

In the instant case, the assessee did not include the amount of freight in the taxable turnover under a bonafide belief that the amount of freight did not form part of the sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of 'sale price' in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and Section 2(h) of the Central Sales Tax Act, 1956, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. It cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to tax. This was a highly arguable contention. The belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be malafide or unreasonable. It cannot, therefore, be said that the assessee filed 'false' returns necessitating imposition of penalty. [1102A-D,E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 191-193 of 1978.

Appeals by Special Leave from the Judgment and Order dated 28-12-77 of the Assistant Commissioner of Sales Tax, Indore in R. C. No. IND/1/X/XIX/5 in case No. 118/72-73 for the period 1-8-71 to 31-7-72, R. C. No. IND/I/1344 (Central) in Case No. 84/72-73 for the period 1-8-71 to 31-7-72 and R. C. No. IND/I/X/XIX/5 (TOT)

- A** in Case No. 118/72-73 for the period 15-11-71 to 31-7-72 and rectified by orders dated 7-1-1978.

V. S. Desai (CA 191/78), *B. R. Agarwala* and *P. G. Gokhale* for the Appellant.

- B** *S. K. Gambhir* for the Respondent.

The Judgment of the Court was delivered by

BHAGWATI, J.—These appeals by special leave raise common questions of law and it would be convenient to dispose them of by a single judgment.

- C** The assessee effected certain transactions of sale of cement in accordance with the provisions of the Cement Control Order during the assessment period 1st August, 1971 to 31st July, 1972 and in the course of the assessment of the assessee to sales tax under the Madhya Pradesh General Sales Tax Act, 1958 and Central Sales Tax Act, 1956,
- D** a question arose whether the amount of freight which was included in the 'free on rail destination railway station' price, but which was paid by the purchasers and hence deducted from the price shown in the invoices sent to the purchasers, formed part of the sale price so as to be liable to be included in the taxable turnover of the assessee. The assessee, proceeding on the basis that the amount of freight did not
- E** form part of the sale price and was not includible in the taxable turnover did not show it in the returns, but the Assistant Commissioner of Sales Tax took the view that having regard to the provisions of the Cement Control Order, the amount of freight formed part of the sale price and was includible in the taxable turnover of the assessee and on
- F** this view, he passed two orders of assessment, one under the Central Sales Tax Act, 1956 and the other under the Madhya Pradesh General Sales Tax Act, 1958, including the amount of freight in the taxable turnover of the assessee and levying tax upon it and also imposing heavy penalty on the assessee on the ground that the assessee had failed to disclose in its returns the amount of freight as forming part of the
- G** taxable turnover. The same position obtained also in regard to the assessment period 15th November, 1971 to 31st July, 1972 and a similar order bringing the amount of freight to tax and imposing heavy penalty on the assessee was passed by the Assistant Commissioner of Sales Tax under the Madhya Pradesh General Sales Tax Act, 1958. Since the question as to whether in respect of transactions of sale of
- H** cement governed by the Cement Control Order, the amount of freight formed part of the sale price and was liable to be included in the taxable turnover of the dealer, was pending decision in this Court, the assessee

preferred appeals directly to this Court by special leave against the Orders of assessment made by the Assistant Commissioner of Sales Tax. The assessee challenged in the appeals not only the inclusion of the amount of freight in the taxable turnover of the assessee, but also the imposition of penalty for not showing the amount of freight as forming part of the taxable turnover in the returns.

So far as the first question is concerned, namely, whether the amount of freight formed part of the sale price and was includible in the taxable turnover of the assessee so as to be exigible to sales tax, it stands concluded by a recent decision given by this Court in *Hindustan Sugar Mills v. State of Rajasthan & Ors.*⁽¹⁾ It has been held by this Court in that case that by reason of the provisions of the Cement Control Order, 1967, which governed the transactions of sale of cement entered into by the assessee with the purchasers, the amount of freight formed part of the sale price within the meaning of the first part of the definition of that term contained in sec. 2 (p) of the Rajasthan Sales Tax Act, 1954 and section 2(h) of the Central Sales Tax Act, 1956 and was includible in the taxable turnover of the assessee. The definition of 'sale price' in section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 is materially in the same terms as section 2(p) of the Rajasthan Sales Tax Act, 1954, and this decision must therefore equally apply under the Madhya Pradesh General Sales Tax Act, 1958 and it must be held that the amount of freight formed part of the sale price within the meaning of the first part of the definition of that term in section 2(o) of the Madhya Pradesh General Sales Tax Act 1958 and section 2(h) of the Central Sales Tax Act, 1956 and was rightly included in the taxable turnover of the assessee.

We may point out that the observations made by this Court in the Order dated 31st August, 1979 allowing the Review Application of the assessee in *Hindustan Sugar Mills* case (supra) are equally applicable in the present case and the State will do what is fair and just to the appellant as indicated by this Court in that Order.

The next question that arises for consideration is whether the Assistant Commissioner of Sales Tax was right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its returns. The penalty was imposed under section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and section 9 sub-section (2) of the Central Sales Tax Act, 1956 on the

(1) [1979] 1 S.C.R. 276.

- A** ground that the assessee had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Now it is difficult to see how the assessee could be said to have filed 'false' returns, when what the assessee did, namely, not including the amount of freight in the taxable turnover was under a bonafide belief that the amount of freight did not form part of the sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of 'sale price' in section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and section 2(h) of the Central Sales Tax Act, 1956, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. This was the reason why the assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now, it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the Court and the belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be malafide or unreasonable. What section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in *Hindustan Steel Limited v. State of Orissa*⁽¹⁾ where it has been held that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....." It is elementary that section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the re-
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(1) 25 S.T.C. 211.

sult would be that even if the assessee raises a bonafide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been intended by the Legislature.

We are, therefore, of the view that the assessee could not be said to have filed 'false' returns when it did not include the amount of freight in the taxable turnover shown in the returns and the Assistant Commissioner of Sales Tax was not justified in imposing penalty on the assessee under section 43 of the Madhya Pradesh General Sales Tax, 1958 and section 9 sub-section (2) of the Central Sales Tax Act, 1956.

We accordingly reject the appeals in so far they are directed against the inclusion of the amount of freight in the taxable turnover of the assessee but allow the appeals in so far as they relate to imposition of penalty of freight in the taxable turnover of the assessee but allow the appeals in so far as they relate to imposition of penalty and set aside the Orders passed by the Assistant Commissioner of Sales Tax imposing penalty on the assessee.

There will be no order as to costs of the appeals.

N. V. K.

Appeals partly allowed.