(2009) 10 P&H CK 0118

High Court Of Punjab And Haryana At Chandigarh

Case No: GSTR No. 7 of 1997

United Oil Mill Machinery and Spare (P) Ltd.		APPELLANT
	Vs	
State of Haryana		RESPONDENT

Date of Decision: Oct. 27, 2009

Acts Referred:

- Central Excise Rules, 1944 - Rule 173
- Central Sales Tax Act, 1956 - Section 5, 5(1), 5(3)
- Contract Act, 1872 - Section 10, 2

Citation: (2010) 34 VST 32

Hon'ble Judges: M.M. Kumar, J; Jaswant Singh, J

Bench: Division Bench

Judgement

Jaswant Singh, J.

In pursuance of order dated 21.1.1997 passed by this Court in GST Reference No. 1 of 1989, the Sale Tax Tribunal, Haryana Chandigarh (for brevity "the Tribunal") has drawn the statement of the case and has framed following questions of law for opinion of this Court:

i) Whether in the facts and circumstances of the case, the insertion of Sub Section 3 in Section 5 of the Central Sales Tax Act was declaratory in nature and if so, whether the Tribunal was justified in rejecting the Petitioner''s claim of exemption of the sales, as being in the course of export out of the territory of India?

ii) Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the sales of Petitioner made to foreign buyers could not be said to be sale in the course of export out of the territory of India within the meaning of Section 5 of the Central Sales Tax Act?

According to the statement of case, the Petitioner is a registered dealer engaged in the business of manufacture and sale of oil machinery and spare parts at Ballabgarh, District Faridabad under the Haryana General Sales Tax Act, 1973 (for brevity "1973 Act"). In the returns filed under the Central Sales Tax Act, 1956 (for brevity "1956 Act"), for the assessment year 1975-76, the Petitioner claimed deduction of an export sale of Rs. 7,95,000/ - made to M/s. Egyptian Salt and Soda Company, Alexendria (Egypt) (for brevity "Egyptian Firm") concerning sale of two cotton oil seed expellers. The case of the Petitioner is that M/s. United Engineering (Eastern) Corporation, Calcutta (for brevity "Calcutta Firm") had negotiated for supply of two cotton seed oil expellers to the Egyptian Firm for a sum of Rs. 6,36,000/ -. Calcutta Firm realizing that it could not meet the order, forwarded the name of the Petitioner-firm to the Egyptian Firm for the supply of the said machines. Thereafter Petitioner on its own term struck a bargain for the supply of two machines to the Egyptian Firm for a price of Rs. 7,95,000/ -. Accordingly, two aforesaid machines were supplied by the Petitioner-firm to the Egyptian Firm by way of export bill dated 5.11.1975 and challan of even date. Petitioner, to support its export sale under Sub Section (1) of Section (5) of 1956 Act, relied on shipping documents such as bill of lading, certificates of origin, form A.R-4-A issued by the Central Excise Department, a letter dated 22.2.1974 from the Calcutta Firm to the Petitioner-firm, a letter dated 2.3.1974 from the Petitioner-firm to the Egyptian Firm and a letter dated 1.4.1974 written by Egyptian Firm to the Petitioner-firm.

2. Assessing Authority passed an ex parte order dated 27.3.1978 disallowing the deduction of export sale of Rs. 7,95,000/ - on the basis that the goods were exported through an agent i.e. Calcutta Firm. Reliance was also placed on the guidelines laid down by Hon''ble the Supreme Court in the case of Mohd. Serajuddin v. The State of Orissa (1975) 36 S.T.C. 136

3. On appeal before the Joint Excise and Taxation Commissioner (Appeals) Rohtak Circle, Rohtak, the plea of the Petitioner that it was an export sale was rejected vide order dated 18.3.1981 and it was held that the transaction in question was an interstate sale in between the Petitioner-firm and the Calcutta Firm attracting tax liability under 1973 Act. The order of the Assessing Authority was upheld, however, liberty was given to the Petitioner-firm for procuring and furnishing ''C-forms'' from the Calcutta Firm to claim lower rate of tax and for such purpose, the case was remanded back to the Assessing Authority by setting aside the same.

4. Petitioner, however, chose to file an appeal before the Tribunal against order dated 18.3.1981 passed by the Joint Excise and Taxation Commissioner (Appeals), Rohtak Circle, Rohtak. Learned Tribunal noticed that even though the goods were sold to the foreign buyer (Egyptian Firm) directly by the Petitioner-firm, however, in view of the contents of the letter dated 1.4.1974, relied upon to establish a privity of contract between the Petitioner firm and the Egyptian Firm, it could not be held to be a case of direct export to the foreign buyer but was actually a case of export

through the Calcutta Firm. Thus, the Tribunal vide order dated 2.3.1987 upheld the orders passed by the lower authorities in disallowing such transaction as an export sale.

5. Aggrieved against the order dated 2.3.1987 passed by the learned Tribunal, the Petitioner filed an application for making reference to this Court on the aforesaid/reproduced two questions of law arising out of the order dated 2.3.1987. Learned Tribunal, however, vide its order dated 18.3.1988 referred the questions of law framed at (i) only. Petitioner then approached this Court by filing GSTR No. 1 of 1989 praying for reference of questions of law framed at (ii) as well. This Court vide its order dated 21.1.1987 directed the Tribunal to refer the question (ii) as well and hence the aforesaid two questions have been referred for adjudication of this Court along with the statement of case.

6. Learned Counsel for the Petitioner-firm/dealer has contended that keeping in view the material placed on record, there could be only one irresistible inference that the transaction was a direct export sale between the Petitioner-firm and the foreign buyer (Egyptian Firm) and covered under Sub Section (1) of Section 5 of 1956 Act thus entitling the Petitioner to claim deductions. He further submitted that there was no agreement or privity of contract between the Petitioner-firm and the Calcutta Firm, who, at best, in the facts of the case, could be construed to be acting as a guarantor of payment in view of the explained circumstances/procedural difficulties faced by the Egyptian Firm. Therefore, it was argued that the authorities have erroneously construed the material on record to record a finding that there was no direct export sale between the Petitioner-firm and the foreign buyer (Egyptian Firm). It was further argued that the reliance on Mohd. Serajuddin''s case (supra) is wholly misplaced.

7. Learned Counsel has also argued that though Sub Section (3) of Section (5) of 1956 Act was inserted in 1956 Act w.e.f. 1.4.1976 extending the benefit of export sale to a penultimate transaction of export sale, however, the same being clarificatory and declaratory in nature would also cover the case of the Petitioner.

8. On the other hand learned Counsel for the Respondents have contended that case of the Petitioner cannot be held to be direct export sale to the foreign buyer but was actually an export through Calcutta firm. He has further contended that there is no privity of contract between the Petitioner firm and the Egyptian Firm and thus the Petitioner is not entitled to claim deduction of export sale of Rs. 7,95,000/ - for the assessment year 1975-76.

9. We have heard learned Counsel for the parties and perused the record with their able assistance. In our analysis of the material placed on record, we have come to the conclusion that question No. (ii) deserves to be answered in favour of the Petitioner-Assessee and therefore, we do not feel the necessity to delve into the issue at question No. (i).

10. It would be relevant to reproduce Sub Section (1) and the inserted Sub Section (3) (with effect from 1.4.1976) of Section 5 of 1956 Act, which reads as under:

5. When is a sale or purchase of goods said to take place in the course of import or export-(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) xx xx xxx xxx

[(3)] Notwithstanding anything contained in Sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.]

Sub Section (1) of Section 5 of 1956 Act was authoritatively interpreted in Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, and Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, . The crucial test for sale purchase to be in the course of export, which was laid down in Nilgiri Plantations'' case (supra) as well as in Coffee Board''s case (supra), is whether there were independent transactions or only one transactions, which occasioned movement of goods in the course of export. It was propounded that to occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it. Where the export is result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated with a breach of the obligations arising by statute/contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export.

It is not in dispute that the above reproduced Sub Section (3) of Section 5 of 1956 Act was inserted by an amendment vide Act No. 103 of 1976 w.e.f. 1.4.1976, after the decision of Hon''ble the Supreme Court in Mohd. Serajuddin''s case (supra), when it was realized by the Parliament that the artisans/persons, who were manufacturing the goods sought to be exported, were not getting the benefit of exemption from payment of sale tax/CST because of the system of canalization of exports through the statutory State Trading Corporation By insertion of Sub Section (3) of Section 5 of 1956 Act, the penultimate sales by such artisans/persons were also sought to be covered in the definition of sale in the course of export.

11. It is also well settled that in case of Reference Proceedings before this Court eliciting its opinion on ''any question of law'' arising out of an order of the Tribunal, this Court is not authorized to take cognizance of any new fact or evidence over and above the statement of case on facts sent to it for opinion by the Tribunal. It has

been so held by Hon''ble the Supreme Court in The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, and Commissioner of Income Tax, West Bengal Vs. Premji Bhimji,

12. Keeping in view the aforesaid legal position, our findings on issue No. 2 are as under:

Shipping documents such as bill of lading, certificate of origin, certificate of origin, form A.R-4-A issued by the Central Excise Department, letter dated 22.2.1974 from the Calcutta Firm to the Petitioner, letter dated March 2, 1974 from the Petitioner to the Egyptian Firm and letter dated 1.4.1974 written by the Egyptian Firm to the Petitioner are cumulative facts. From the facts on record, it is clearly discernible that the Calcutta firm had no role in export but had helped in initiating contract between the Petitioner and Egyptian Firm and stood as surety for payment due to the reasons that letter of credit had already been opened in their favour by the Egyptian Firm and this was a case of direct export sale out of territory of India by the Petitioner firm and not a case of export through Calcutta Firm. The property in goods i.e. 2 machines was never transferred to the Calcutta Firm.

Before proceeding any further, it would be advantageous to refer to the following provisions of the Indian Contract Act, 1872 (hereinafter referred to as "Contract Act"). Section 2(h) of the Contract Act defines that an agreement enforceable by law is a contract. Section 10 of the Contract Act envisages what agreement are contract and which reads as under:

10. What agreements are contracts- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Keeping in view the provisions of the Contract Act and Sub Section (1) of Section 5 of 1956 Act reproduced hereinabove, we are to see whether the sale of two cotton-seed oil expellers by the Petitioner to Egyptian Firm could be termed a sale in the course of export out of territory of India within the meaning of Section 5 of the 1956 Act.

13. This is a matter of record that the aforesaid two cotton-seed oil expellers were supplied by the Petitioner to the Egyptian Firm in pursuance of export bill dated 05.11.1975 and challan of even date. A reference in this regard may be made to Form A.R.4-A under Rule 173-0 of Central Excise Rules 1944 issued by the Superintendent Central Excise, S.R.P V, Faridabad to the Petitioner firm. Prior to it there is a letter dated 22.02.1974 of the Calcutta Firm to the Petitioner and thereafter letter dated 02.03.1974 by the Petitioner firm to the Egyptian Firm. Then

in response there is a letter dated 01.04.1974 by Egyptian Firm to the Petitioner, which absolutely makes a chain of events establishing that there is a valid contract of export sale between the Petitioner and the Egyptian firm. The said letter dated 1.4.1974 has already been reproduced by the Excise and Taxation Commissioner(A), Rohtak in his order dated 18.3.1981 and a perusal of same makes it abundantly clear that there was a privity of contract between the Petitioner firm and the Egyptian firm and the sale is emanating from the letter dated 1.4.1974 and the same for ready reference is reproduced inextenso as under:

111 F. EXP. DEPTT.

AG/FB

Messers/United Oil Mill Machinery and Spares Private Ltd,

D-298, Defence Colony, P.O.B 3353, New Delhi-3, INDIA. Dear Sirs,

We have received your letter about the manufacture of two Nos. Cotton Seed Oil Expeller for Rs. 7,95,000/ -. As you must be aware, that we have already established the L/Credit for Rs. 6,36,000/ - in favour of United Engineering (Eastern)

Corporation, Calcutta, who have expressed their inability to manufacture and ship the expellers by the Scheduled date vide their letter dated 15.2.1974. However, as already desired by you we are enhancing the L/Credit value to Rs. 7,95,000/ - shortly and shall be advising you accordingly.

We may add here that since the letter of credit has already been opened for Rs. 6,36,000/ - we can only enhance the same and not open a fresh L/Credit in your favour for Rs. 7,95,000/ - as the charges for a fresh L/Credit are very heavy and due to restrictions prevailing in our country we cannot ask for another import license for the same particular item for which we have already established the L/Credit. However, for your convenience we are requesting our Bankers to accept "THIRD PARTY B/LADING ACCEPTANCE" in which case you can ship the machinery direct to us. As regards financial implications for recovering the invoice value you may deal direct with M/s. United Engineering (Eastern) Corporation, Calcutta.

Subject to the above terms and conditions may treat the order as confirmed and with the manufacture of the expellers as specifications given in your letter dated 2.3.1974.

Yours faithfully,
The Egyptian Salt and Soda Company.

Sd/-

14. Perusal of communication dated 1.4.1974 sent by the Egyptian Firm to the Petitioner proves in no uncertain terms that the contract of export sale of two Cotton Seed Oil Expellers has emanated from this particular letter and had in all

safety concluded with the export of the machines by the Petitioner to the Egyptian Firm and receipt of consideration through the Calcutta Firm. Keeping in view the above reproduced provisions of the Contract Act, it cannot be even suggested that the contract between two parties was not legally valid. It is not disputed that the movements of two aforesaid expellers was occasioned by the aforesaid letter dated 1.4.1974 from the Egyptian Firm. It is also not disputed that the entire amount of sale proceeds paid by Egyptian Firm was remitted to the Petitioner firm by the Calcutta Firm. There is nothing placed on record to suggest otherwise. It also can be legitimately inferred from the material placed on record, especially from the above reproduced letter dated 1.4.1974 that there was novation of the initial contract between the Calcutta Firm and the Egyptian Firm and the same was substituted by a new contract between the Petitioner firm and the Egyptian Firm. It further cannot be disputed that there was no privity of contract between the Petitioner and the Calcutta Firm, and property in the goods was never transferred to the Calcutta Firm. Therefore, in our considered opinion, the sale of two Cotton Seed Oil Expellers by the Petitioner firm to the Egyptian Firm is in the course of export out of the territory of India as it is established that there is only one contract i.e. between the Petitioner firm and the Egyptian Firm and the movement of two aforesaid machines was occasioned by that contract. The transaction fully satisfies the test laid down by Hon''ble the Supreme Court in Nilgiri Plantations'' case (supra) and Coffee Board''s case (supra).

15. The judgment relied upon by the Assessing Authority in case of Mohd. Serajuddin''s case(supra) is not applicable to the facts of the present case because the facts therein were entirely different as although the sale between the Appellant Serajuddin and the Corporation and the export by the Corporation to foreign buyer constituted one integrated transaction, however, there were separate contracts between the Petitioner-Serajuddin and the State Trading Corporation (statutory export agency) as well as between the State Trading Corporation and the foreign buyer. But in the present case there is direct contract between the Petitioner and the Egyptian Firm. There is nothing on record to even suggest that Calcutta Firm has played a role of export agency. Letter dated 1.4.1974 written by the Egyptian Firm has clearly explained and supported the entire case of the Assessee that under what circumstances original order placed to the Calcutta Firm did not materialise and then order was placed to the Petitioner for supply the two cotton oil seed expellers with the given mode of payment by giving the reasons that charges for fresh letter of credit were very heavy and due to restrictions in their country it was not possible to ask for another import license for the same machines/oil expellers for which a letter of credit had already been opened.

16. It is not disputed on record that two oil expellers were shipped directly by the Petitioner firm to the Egyptian Firm and this fact has been taken note of by the learned Tribunal in its order dated 2.3.1987. Merely because payment has come through Calcutta Firm, it cannot be inferred much less concluded that there was no

contract of sale in the course of export between the Petitioner and the Egyptian Firm. In our opinion, in the facts of the case, the Calcutta Firm at best can be said to be acting as a guarantor of the payment of the consideration for the export sale of two said oil expellers to the Egyptian Firm.

17. Therefore, in our considered view, the findings recorded by the learned Tribunal that there was no direct sale in the course of export between the Petitioner firm and the Egyptian Firm within the meaning of Section 5 of 1956 Act is perverse and not based on correct appreciation of facts on record.

18. Consequently, in view of the aforesaid discussion, law point No. (ii) is decided in favour of the Petitioner-Assessee and it is held that in the facts and circumstances of the case, Tribunal was not justified in holding that the sales of Petitioner made to foreign buyers could not be said to be sale in course of export out of the territory of India within the meaning of Section 5 of 1956 Act. Issue No. (i) was not gone into in view of our finding on issue No. (ii).

19. Reference is answered accordingly in favour of the Petitioner-Assessee and against the revenue authorities.