**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**STREV No.29 of 2010**

(An application under Section 24 (1) of the Orissa Sales Tax Act, 1947)

***M/s. Utkal Moulders*** .... ***Petitioner***
***A proprietory concern of Utkal***
***Mouldkings Pvt. Ltd., Kuarmunda,***
***Dist: Sundargarh, represented***
***through its Chief Executive,***
***Sri Satish Ajmera***

*-versus-*

***State of Orissa represented by the*** .... ***Opposite Party***
***Commissioner of Sales Tax, Orissa,***
***Cuttack***

Advocate (s) who appeared in this case:-

For Petitioner : Mr. Siddhartha Ray, Advocate

For Opposite Party : Mr. S.S. Padhy,
Additional Standing Counsel

**CORAM: THE CHIEF JUSTICE**
**JUSTICE B. P. ROUTRAY**

**JUDGMENT**
**30.03.2021**

***Dr. S. Muralidhar, C.J.***

1. By an order dated 22nd September 2015, this Court formulated the following substantial question of law for consideration in the present petition:

> *"The Petitioner having separately charged freight in the sale bill whether the Tribunal is legally correct in holding*

*that it is part of sale price and the Petitioner is not entitled to claim deduction of freight?"*

2. The background facts are that the Petitioner is a manufacturer of cast iron goods and is also engaged in the trading of iron and steel goods. The Petitioner is a registered dealer under the Orissa Sales Tax Act, 1947 (OST Act) and the Central Sales Tax Act, 1956 (CST Act).

3. The Department of Telecommunications (DoT), Maharashtra Telecom Circle, Mumbai floated a tender on 30th April 1998, for supply of "cast iron socket-Socket 'B'." Clause 9 of the Bid Document stipulated the bid price. Clause 9.1 required the bidder to quote a basic unit price and other component prices individually in terms of the Schedule given in Section (iii). Clause 9.2 (i) provided that the bidder should quote the excise duty, sales tax, insurance, freight and other taxes paid or payable item wise. Clause 9.2 (ii) stipulated that the bidder had to quote the price as per the price schedule given in Section (iii) Part 3 for all the items given in the schedule of requirements. Clause 9.3 provided that the price quoted by the bidder would remain fixed during the entire period of the contract and should not be subjected to variation of any account.

4. Section (iii) Part-3 specified the separate items which were to be quoted by the bidder as under:

(1) Basic Unit price
(2) Excise Duty
(3) Sales Tax
(4) Freight
(5) Any other levy

(6) Unit price inclusive of all levies and charges

(7) Discount

(8) Total dues accounted price

5. It is stated that in its bid, the Petitioner specifically gave the break up price quoted by it for supply of Socket-B in the following manner:

| | |
|---|---|
| Basic Unit Price exclusive of all levies and charges but inclusive of packing, forwarding and insurance | : Rs.261.70/- |
| Excise @ 15 % | : Rs.39.26/- |
| Sales Tax @ 4 % | : Rs.12.04/- |
| Freight | : Rs.45.00/- |
| Unit Price inclusive of all levies and charges | : Rs.358.00/- |

6. The above quote was per unit of the C.I. Socket-B. The total quotation was for 50,000 Nos. aggregating to Rs.1,79,00,000/-.

7. The Petitioner's bid was accepted. The DoT visited the Petitioner's factory, inspected the goods and earmarked them. In terms of the conditions attached to the bid, the sale was complete at that stage.

8. The Petitioner then raised its invoices by showing separately the freight, excise duty and C.S.T. components in accordance with Section (iii) Part-3 of the tender conditions.

9. On 24th April 1999, an inspection report was submitted by the STO, Investigation Unit, Rourkela alleging that the Petitioner had evaded tax during 1999-2000 on freight charges of Rs.1,49,576/- on the total freight collection of Rs.37,39,393/-. On this basis, the assessment proceedings were initiated under Rule 12 (5) of the CST (Orissa) Rules. The Petitioner offered an explanation that the goods had been delivered ex factory to the common carriers. The claim of deduction on account of outward freight, separately charged in the sales bills, was allowable as a deduction in view of the definition of sale price contained under Section 2 (h) of the CST Act.

10. However, the STO rejected the Petitioner's explanation and raised an additional demand of Rs.1,36,956/- by the impugned assessment order (Annexure 4). Aggrieved by the said order, the Petitioner filed an appeal which came to be dismissed by the Assistant Commissioner of Commercial Taxes, Sundargarh Range, Rourkela by an order dated 11th April, 2002. It was held in the said order that the contract in question clearly mentioned that the prices were inclusive of excise duty, sales tax, freight, packing and also "FOR destination". Thus, it was held that it was a contract of sale where the cost of freight was a part of the sale prices and the purchaser i.e. the DoT had not undertaken any obligation to pay freight incurred by the selling dealer. Therefore, the selling dealer i.e. the Petitioner would not be entitled to any deduction towards freight despite showing it separately in the sale invoice.

11. Thereafter, the Petitioner went before the Orissa Sales Tax Tribunal, Cuttack (the Tribunal) with S.A.35 (C) of 2002-03 against the above order. By an order dated 5th October 2009, the Tribunal

dismissed the appeal holding that the transportation charges, even though shown separately in the bill, was includible in the sale price. It was held therein that in the instant case the place of sale was the consignee's place and hence, transportation cost incurred was the inward transportation cost of the Petitioner, but not outward transportation cost to be reimbursed by the DoT.

12. Mr. S. Ray, learned counsel for the Petitioner submitted that the definition of sale price under Section 2 (h) of the CST Act made it clear that the sale price excluded the cost of freight of delivery where such cost was separately charged. He further referred to the clauses in the contract which made it clear that the sale was completed inside the Petitioner's factory, once it was inspected by the DoT and the goods to be sold were earmarked for purchase. He pointed out that the Petitioner had transported the goods to the site of the DoT at the latter's behest, after the sale was complete. Accordingly, the freight was charged separately and could not be included in the sale price. In support of his contention that even when the freight is shown as a uniform per unit price, it would still be not includible in the sale price. Mr. S. Ray relied on the decision of the Supreme Court in ***State of Karnataka and another v. Bangalore Soft Drinks Pvt. Ltd. (2000) 117 STC 413 (SC)***. He also placed reliance on the decisions in ***Shree Rani Sati Mining Traders v. Sales Tax Officer (1983) 53 STC 322 (Orissa)***; ***Orient Paper Mills Ltd. v. State of Orissa (1975) 35 STC 84 (Orissa)***; ***Greaves Chitram Ltd. v. State of Tamil Nadu (1996) 100 STC 411***; ***Ramco Cement Distribution Co. Pvt. Ltd. v. State of Tamil Nadu (1993) 88 STC 151 (SC)***; ***The State of Karnataka v. Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. (1984) 57 STC 81 (Karnataka)***;

***Commissioner of Sales Tax, U.P. v. Rai Bharat Das and Bros. (1988) 71 STC 277 (SC)***; ***Black Diamond Beverages v. Commercial Tax Officer, Central Section Assessment Wing, Calcutta (1997) 107 STC 2019 (SC)***; ***Commissioner of Sales Tax v. Gill and Company Ltd. (1974) 33 STC 536 (MP)*** and ***Hindustan Sugar Mills v. State of Rajasthan (1979) 43 STC 13 (SC).***

13. On the other hand, Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Party-Department, referred to certain passages in the impugned order of the Tribunal which held that in the present case the sale was complete when the delivery took place at the site of the DoT. He referred to the observations of the Tribunal that it was highly unlikely that irrespective of the distance of the site of the purchaser, the freight charge would be the same and therefore, the freight charge was actually a part of the sale price itself. He drew attention to the clauses of the bid documents which according to him required the delivery be made at the purchaser's site.

14. The above submissions have been considered. The Clauses relevant for the purposes of the issue that arises for consideration as far as the bid price is concerned are Clause 9.1 to 9.5 which read as under:

> *"**9. BID PRICES:***
> *9.1 The Bidder shall give the total composite price inclusive of all levies & taxes, packing, forwarding, freight and insurance. The basic unit price and other component price need to be individually shown indicting the goods it proposes to supply under the contract as per price schedule given in Section III. Prices of incidental services, if any, should be quoted. The offer shall be firm in Indian Rupees. No foreign exchange will be made available by the Purchaser.*

*9.2 Prices indicated on the Price Schedule shall be entered in the following manner:*

*(i) The price of the goods shall be quoted inclusive of all levies, taxes and suitable required packing for safe and easy transportation. Excise Duty, Sales Tax, Insurance, freight and other taxes already paid or payable shall also be quoted separately, item wise.*

*(ii) The Supplier shall quote as per price schedule given in Section III Part III for all the items given in schedule of requirement.*

*9.3 The prices quoted by the Bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non-responsive and rejected.*

*9.4 The unit prices quoted by the Bidder shall be in sufficient detail to enable the Purchaser to arrive at prices of goods/equipment/system offered.*

*9.5 Unless otherwise stated the rates shall be quoted on F.O.R. DESTINATION in the States of Maharashtra and Goa in fully packed condition (where packing is prescribed in the Technical Specification) and duly marked."*

15. From the above Clauses, it is plain that the bidder was required to separately indicate the components of excise duty, sales tax, insurance and freight. The rate was to be quoted on FOR Destination in the States of Maharashtra and Goa.

16. Clause 9.7 which is also important reads as under:

*"9.7 The price approved by the department for procurement will be inclusive of levies & taxes, packing, forwarding, freight and insurance as mentioned in Para*

> *9.1 above. Break-up in various heads like Excise Duty, Sales Tax, Insurance, Freight and other taxes paid/payable required under clause 9.2(i) is for information of the Purchaser and any change in these shall have no effect on price during the scheduled period of delivery."*

17. It is also plain from Clause 21.2 that the 'unit price' was the determining factor. As far as the delivery is concerned, Clause 6.1 of Section VI of the General (Commercial) conditions of contract reads as thus:

> *"6.1 Delivery of the goods and documents shall be made by the Supplier in accordance with the terms specified by the Purchaser in its Schedule of Requirements and Special Conditions of Contract and the goods shall remain at the risk of the Supplier until delivery has been completed. The delivery of the items/goods shall be to the ultimate consignee as given in the purchase order."*

18. The above clause therefore makes it clear that the delivery had to take place as per the conditions indicated in the purchase order (PO). Looking at the PO as far as the present case is concerned, Clause 4 (a) reads as thus:

> *"04. <u>Delivery</u>*
> *(a) The delivery shall be deemed to have been completed on the day material has been offered for inspection to concerned OA as per the practice in vogue over several years in respect of supplies being made to CGMTS, Calcutta."*

19. The above Clause makes it clear that once the material is offered for inspection, the delivery shall be "deemed to have been completed" on that very date. This is a critical factor in understanding the stage at which the delivery of goods took place in order to complete the sale.

20. In the considered view of the Court, this essential factor appears to have been lost sight of by the STO, the appellate authority as well as the Tribunal.

21. Mr. S.S. Padhy, learned Additional Standing Counsel for the Opposite Party-Department placed heavy reliance on the following observations of the Tribunal in the impugned order:

> *"The Unit price mentioned in the order itself is composite in nature without any break ups. Although the Bid documents submitted by the appellant in case of Mumbai order contained basic unit price, excise duty, Sales Tax, freight any other levy or charges and unit price inclusive of all levies and charges as Rs.261.70, Rs.39.26, Rs.12.04, Rs.45/-, Nil, and Rs.358.00 respectively. The insurance charges are borne by the appellant till the goods are received by the consignee. The appellant was responsible for all kinds of losses i.e. loss due to theft, damage, shortages till before receipt of entire quantity of stores in good condition by the consignee. As would seen from the terms and conditions of the purchase order placed on the appellant the purchasers are not concerned about how much freight is incurred by the appellant in making goods available at the designated places and so also not concerned about any losses in theft, any loss or damage effected to the goods in between the place of origin and the place of receipt. No rate specification for the cost of goods, the central excise, sales Tax and freight cost in the purchase order where the rate given as fixed and final including all expenses. The division of the composite price under different Heads like Unit cost, excise and sales Tax and transportation in the Bid documents submitted by the appellant himself is a self act having no impact or influence on the purchaser at all who only make payment at the rate of unit price. The study of the terms and conditions of the purchase order leads to an unambiguous conclusion that the transport cost is not a*

> *post sales service done at the behest of the purchaser to be reimbursed from him as per the actual cost incurred."*

22. In the considered view of the Court, the discussion by the Tribunal, and the conclusion reached by it, overlooks the actual applicable clauses of the contract. In fact the Tribunal does not actually discuss Clause 6.1 read with Clause 4 (a) of the PO which would indicate what the intention of the parties was when they entered into the contract of sale and purchase as to the exact place of delivery of the goods in question. The definition of sale in Section 2(h) of the CST Act had to be understood in the context of the clauses of the contract. Here, once the sale was complete at the site of the inspection of the goods, which is the factory of the Petitioner, then the freight charge for further transportation of the goods to the purchaser's site would obviously not form part of the sale price. Therefore, it was being separately shown in the invoice.

23. Section 2(h) of the CST Act reads thus:

> *"sale price" means the amount payable to a dealer as consideration for the sale of any goods, less an 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 of the cost of installation in cases where such cost is separately charged."*

24. Having perused the sample of the invoices raised in the present case, which is not disputed by the DoT, it is seen that the Petitioner had indicated separately the freight charge of Rs.45/- . The Tribunal committed a serious error in understanding the freight charge to be

same freight charge irrespective of the distance between the factory of the Petitioner and the destination of the Purchaser. The crucial factor, which was missed, was that the rate was an uniform rate of Rs.45 "per piece" as this was for a supply of 50000 units. In almost identical facts, the Supreme Court in ***State of Karnataka v. Bangalore Soft Drinks Pvt. Ltd.*** (*supra*) held that despite there being a uniform rate per unit as freight charge that still would not be included in the sale price. The following observations in the said decision are relevant:

> *"No doubt, it is true that the revision petitioner has charged freight charges uniformly irrespective of the distance. For this the revision petitioner contended that it has charged uniform rate of Rs.4 per crate with a view to maintain a uniform price of their product throughout their territory of operation and charging of such equalized price is a common trade practice. The petitioner in support of his contention placed reliance on a decision of this Court in the case of Premier Breweries Ltd. v. State of Karnataka reported in [1984] 56 STC 14. In this decision, this Court has approved the charging of uniform rate of freight charges irrespective of distance of transportation. Therefore, the revision petitioner with a view to see that his products should be available for sale at all places at a uniform price, has charged the freight charges at uniform rate."*

25. In the considered view of the Court, since the Tribunal made a factual error as regards the place of delivery in terms of the Clauses of the Contract in the present case, it made a further error in distinguishing the above decision as not applicable to the facts. On the other hand, this Court finds that the said decision is squarely applicable to the fact in the present case.

26. The Tribunal also appears to have erred in not correctly applying the ratio of the decision in ***Hindustan Sugar Mills v. State of Rajasthan*** (supra). There again it was explained in detail by the Supreme Court what the purport of the definition of sale under Section 2 (p) of the Rajasthan Sales Tax Act, 1954, which corresponds Section 2(h) of the CST Act. The Supreme Court explained that the definition was in two parts as under:

> *"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."*

27. Thereafter, the Supreme Court proceeded to delineate the sample scenarios.

28. In the considered view of the Court, the legal position, as explained in ***Hindustan Sugar Mills and others v. State of Rajasthan and others*** (supra) and the ***State of Karnataka and another v. Bangalore Soft Drinks Pvt. Ltd.*** (supra) supports the case of the Petitioner is that in the instant case the freight charges are not includable in the sale price, which is amenable and therefore, has to be excluded while calculating the taxable turn over for the purposes of the OST Act.

29. For the aforementioned reasons, the question framed is answered in negative that is in favour of the Petitioner-assessee and against the Department by holding that the Tribunal was incorrect in holding that the freight shown in the sale bill separately is part of the sale price. It is held that the Petitioner is entitled to claim deduction of the freight charges from the taxable sales turnover.

30. The revision petition is accordingly disposed of.

***(Dr. S. Muralidhar)***
***Chief Justice***

***( B.P. Routray)***
***Judge***

*Orissa High Court, Cuttack,*
*Dated 30th March, 2021/S.K. Guin*