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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1799 OF 2010

BOC INDIA LTD. ...APPELLANT(s)

VERSUS

COMMISSIONER OF COMML.TAXES & ANR. ...RESPONDENT(s)

O R D E R

Heard Mr. Dhruv Mehta, learned senior counsel appearing for the appellant and Mr. Soumik Ghosal, learned counsel appearing for the respondents.

This appeal is directed against the judgment and order dated 19 th January, 2009 in WPTT No.55 of 2008. The High Court dismissed the writ petition preferred by the appellant and affirmed the order of the West Bengal Taxation Tribunal which had disallowed the appellant's claim that certain charges which it had received from the Indian Iron and Steel Company Limited (IISCO) at Burnpur on account of supply of industrial gases through pipeline be treated as facility charges and be kept out of sale price for the purpose of Bengal Finance (Sales Tax) Act, 1941 (for short â¬ Sthe 1941 Actâ¬ \235).

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The High Court has extracted the definition of â¬ Ssale priceâ¬ \235 in the relevant Act and has thereafter relied upon a judgment of this Court in Black Diamond Beverages and Another Vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others [(1998) 1 SCC 458].

On behalf of the appellant, an attempt was made to distinguish that judgment by pointing out that Black Diamond Beverages (supra) arose out of a subsequent Act, viz., the West Bengal Sales Tax Act, 1954 (for short â¬ Sthe 1954 Actâ¬ \235) wherein the term â¬ Ssale priceâ¬ \235 has been defined in Section 2(d).

No doubt, the aforesaid submission is factually correct, but it does not affect the outcome of this case because in Black Diamond Beverages (supra), in paragraph 9, this Court noticed that first part of Section 2(h) of the 1941 Act defined â¬ Ssale priceâ¬ \235, with which we are presently concerned, as well as the first part of Section 2(d) of the 1954 Act as also the first part of Section 2(p) of the Rajasthan Act, 1954 are similar. It was also noticed that the first part of such provisions were interpreted by this Court in the case of Hindustan Sugar Mills Vs. State of Rajasthan & Others [(1978) 4 SCC 271]. This view also runs totally against the appellant's case.

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In order to avoid any scope for confusion, we would like to extract paragraphs 9 and 16 of the judgment in the case of Hindustan Sugar Mills (supra), which are as follows:

â¬ S 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 as 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 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.

16. This renders it unnecessary to consider the second part of the definition, but the latter clause of the second part was strongly relied upon on behalf of the assessee to support the exclusion of the amount of freight from 'sale price' and hence we must proceed to consider it. The second part enacts an inclusive clause. It says that 'sale price' includes "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." Therefore, 'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof' is to be regarded as part of 'sale price', even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of

installation certainly represents an amount
charged for transportation or installation of
the goods at the time of or before the delivery
thereof and would, there fore, fall within the
inclusive clause on its plain terms but it is

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taken out by the exclusion clause, "other than
the cost of freight or delivery or the cost of
installation in case where such cost is
separately charged". This exclusion clause does
not operate as an exception to the first part
of the definition. It merely enacts an
exclusion out of the inclusive clause and takes
out something which would otherwise be within
the inclusive clause. Obviously, therefore,
this exclusion clause can be availed of by the
assessee only if the State seeks to rely on the
inclusive clause for the purpose of bringing a
particular amount within the definition of
'sale price'. But if the State is able to show
that the particular amount falls within the
first part of the definition and is, therefore,
part of the 'sale price', the exclusion clause
cannot avail the assessee to take the amount in
question out of the definition of 'sale price'.
Here on the view taken by us, the amount of
freight forms part of the 'sale price' within
the meaning of the first part of the definition
and it is not necessary for the State to invoke
the inclusive clause and in fact the State has
not done so. The exclusion clause is,
therefore, irrelevant and cannot be called in
aid by the assessee. We may point out that even
if the exclusion clause were read as an
exception to the first part of the definition
which, as we have pointed out, cannot be done,
it cannot avail the assessee. It is only where
the cost of freight is separately charged that
it would fall within the exclusion clause and
in the context of the definition as a whole, it
is obvious that the expression "cost of freight
is separately chargedâ¬ \235 is used in
contradistinction to a case where the cost of
freight is not separately charged but is
included in the price. It is not intended to
apply to a case where the cost of freight is
part of the price but the dealer chooses to
split up the price and claim the amount of
freight as a separate item in the invoice.
Where the cost of freight is part of the price,
it would fall within the first part of the
definition and to such a case, the exclusion
clause in the second part have no application.â¬ \235

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In the light of law so well enunciated in the
aforesaid paragraphs, which has been followed by the High
Court, we find no merit in this appeal and hence it is
dismissed. No costs.

.............................J.
(SHIVA KIRTI SINGH)
.............................J.
(R.K. AGRAWAL)
NEW DELHI
FEBRUARY 03, 201 6

ITEM NO.107 COURT NO.8 SECTION IIIA

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Civil Appeal No(s).1799/2010

BOC INDIA LTD. Appellant(s)

VERSUS

COMMISSIONER OF COMML.TAXES & ANR. Respondent(s)

Date : 03/02/2016 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH
HON'BLE MR. JUSTICE R.K. AGRAWAL

For Appellant(s) Mr. Dhruv Mehta, Sr. Adv.
Mr. Rajesh Kumar, Adv.
Mr. Gaurav Kumar Singh, Adv.
Mr. Rakesh Chaurasiya, Adv.
for M/s Mitter & Mitter Co.

For Respondent(s) Mr. Soumik Ghosal, Adv.
M r. Parijat Sinha, AOR

UPON hearing the counsel the Court made the following

O R D E R

The civil appeal is dismissed in terms of the signed order. No costs.

(SANJAY KUMAR-I) (JASWINDER KAUR)
AR-CUM-PS COURT MASTER

(Signed order is placed on the file)