

NOTE ON SALES IN THE COURSE OF EXPORT U/S 5(1) AND 5(3)

Article 286 of the Constitution of India prohibits the states from levying sales tax on the sales in the course of export as well as import and sales in the course of interstate trade. Therefore, Central Sales Tax Act, 1956 was enacted and section 5 was so framed as to define these three types of sales in the exclusive domain of the Parliament. While sales in the course of import and export are fully exempt from whole of tax, interstate sales are made taxable under entry 92 of Seventh Schedule to the Constitution.

Section 5(1) defines the sale in the course of export as follows:-

“A sale or purchase of goods shall be deemed to take place in the course of 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.”

This can be titled as direct export. The movement of goods out of the country is a must. The sale may precede or succeed such movement. There is a difference between ‘sale for export’ and ‘sale in the course of export’. The case of Mohammed Serajuddin v. State of Orissa (36 STC 136)(SC) is a landmark decision on the issue. State Trading Corporation was alone authorised to export the goods and the appellants had to route the exports through it. There were back to back contracts with foreign parties. One contract was not possible to be executed without the other. In spite of this fact, the apex court held that the contract of the appellants with STC was an independent contract and not exempt as in the course of export. There was no privity of contract between the foreign buyer and the appellants. One of the judges did dissent from this view and held that both the contracts were integrated and one was not possible without the other. The same view was reiterated in the case of State of Punjab vs. New Rajasthan Minerals Syndicate (36 STC 378)(SC).

However, the Supreme Court has taken a liberal view in the later judgements when two sales are integrally connected with each other. In the case of State of Maharashtra vs. EMBEE Corporation (107 STC 196)(SC), it was held that importation of goods is integrally connected with sale to D. G. S. & D. Foreign dealer was shown as supplier in the tender. License obtained on the import recommendation certificate issued by the D. G. S. & D. The sales to D. G. S. &

D. were held as sales in the course of import. Thus, the theory of integrated sales emerged. The expression “occasions the movement” means “moves by reason of sale” and the sale preceding the actual export also can be treated as part and parcel of the export transaction. This view is confirmed in the case of M/s Tata Iron and Steel Co. Ltd. vs. State of Maharashtra (25 VST 27)(SC) wherein two sales were held as inextricably linked with each other and treated as in the course of import. What applies to sale in the course of import applies to sale in the course of export with equal force.

Movement of goods prior to actual export.

In the case of M/s Nipha Exports pvt. Ltd. vs. State of Haryana (108 STC 337)(P & H), the appellants had registered office at Calcutta and factory/branch at Faridabad in Haryana. The goods were purchased at Haryana and sent to H.O. in Calcutta which was exported from there. Purchase tax was levied holding the movement of goods from Haryana to Calcutta was not in the course of export. It was held that goods were bought only with an intention to export them and the movement of goods from Haryana to Calcutta was construed as in the course of export.

Sale by transfer of documents of title

The sale in the course of export also can be effected by endorsement and /or delivery of documents of title. This can be explain with the help of facts in the case of Deputy Commissioner (C.T.) Vs. Salem Magnesite Pvt. Ltd.(42 STC 285)(MAD). In this case, one Wilson & Co., acting on behalf of its overseas principals, purchased goods from the assessee, the price being payable F.O.R. Madras and ownership in the goods was to pass to Wilson & Co. only on the assessee handing over the bills of lading in the name of Wilson & Co. and payment were made from and account opened in the name the assessee by Wilson & Co. on presentation of B.L. along with the invoices. The payment was actually made at least four days after the ships had sailed from the port. It was held that (i) by merely taking the bill of lading in the name of a person, it can not be said that the document of title is with that person (ii) The document of title always relates to some movable or immovable property and only evidences title (iii) In the present case, title would pass as per agreement only on making payment and therefore, bill of lading would become a document of

title to the goods transferring title to Wilson & Co. only on payment being made by the latter. As the transfer of documents of the title to the goods took place only after the ship had crossed the Indian frontiers, the sale was an export sale.

Thus, once the goods cross the customs frontiers the sale can be effected by endorsement of B.L. and qualifies as sale in the course of export.

Penultimate sales for Export u/s 5(3)

Due to the decision in Mohammad Serajuddin's case (Cited Supra), the large number of dealers were affected since they were compelled to make the sales to canalising agency such as State Trading Corporation in order to export the goods. To facilitate the export in such cases, section 5(3) was inserted with effect from 01/04/1976. This section was devised to mitigate difficulties of small scale and medium scale manufactures and traders who had to depend upon export houses for their experience in the export trade. It must borne in mind that only a sale or purchase preceding the sale in the course of export u/s 5(1) qualifies as penultimate sale/ purchases hence, exempt. Refer, decision of Sovereign Spices V/s. State of Kerala (110 STC 429) (Ker). The section reads as under:-

“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.”

Three condition for exemption u/s 5(3)

In order to avail the exemption u/s 5(3) the following three conditions have to be fulfilled. Refer, George Mayjo Co. Vs. State of Andhra Pradesh (46 STC 41)(AP).

- 1) There must have been pre-existing agreement or order to sell the specific goods to a foreign buyer.

- 2) The last purchase referred to in section 5(3) must have taken place after that agreement with the foreign buyer was entered in to.
- 3) The last purchases must have been made for the purpose of complying with the pre-existing agreement or order and the goods are actually exported.

The landmark judgment in the case of Consolidated Coffee Limited Vs. Coffee Board (46 STC 164) which comments upon each aspect of section 5(3). It is observed that the Parliament intended to prescribe that the obligation to export arising only from such agreement or order would afford the inextricable link so as to constitute the penultimate sale, a sale in the course of export. It cannot include an agreement with a local party containing a covenant for export.

Those goods-Significance

The expression “Those goods” appearing in section 5(3) suggests that the goods exported are the same goods which are purchased. In other words, the goods purchased cannot be subjected to any process which amounts to manufacture. It does not mean that no process can be carried out on the goods so purchased. Only when such processing results in to change in the identity and character of the goods, the claim u/s 5(3) cannot be allowed. The case of Dy CST Vs. Sheth Brothers (52 STC 40)(Ker) can be referred wherein process of “garbling” was undertaken on the pepper. “Garbling” involves only the work of stone picking, dust removing, washing, drying, oil polishing, grading, packing etc. It does not change the character of the pepper and hence, the claim u/s 5(3) was held allowable.

Shrimps, Prawns and Lobsters were purchased to fulfil pre-existing export contract. These were exported after processing such as cutting heads and tails, peeling, Deveining and cleaning/ freezing them for export. The goods were held as same for the purpose section 5(3). Refer, Sterling Foods Vs. State of Karnataka (63 STC 239) (SC).

This concept of “same goods” is radically changed in the case of State of Karnataka Vs. Azad Coach Builders Pvt. Ltd.(36 VST 1)(SC). It is held by

the larger bench of the SC that sale u/s 5(3) is allowable as penultimate sale when it is inextricably connected with export out of India. The facts of this case are that the dealer was a manufacturer of bus bodies in the State of Karnataka. T was an exporter and manufactured chassis of motor vehicles. On receipt of orders from foreign buyers for buses, the exporter in turn placed orders on the dealer for the bus bodies to be fitted on the chassis supplied by it. The buses were then exported by T. The Supreme Court held that the sale transaction between the dealer and the exporter were inextricably connected with the export of the goods outside India. The communication between the foreign buyer and the exporter revealed that the foreign buyer wanted the bus bodies to be manufactured by the dealer under the specifications stipulated by the foreign buyer. The bus bodies constructed and manufactured by the dealer could not be of any use in the local market. When transaction between the local dealer and the exporter and the transaction between the exporter and foreign buyer were inextricably connected with each other, the “same goods” theory had no application. Although “same goods” theory is not discarded by this judgment, it is also recognised that the sale which is effected in compliance with export order and is inextricably connected with it also must be held as covered by section 5(3).

Packing Material

In the case of Packwall Industries (P)Ltd Vs. State of Tamilnadu (51 STC 329)(MAD), it was held that packing materials such as corrugated boxes heavy duty containers, duplex boards etc. used for packing sea food are not eligible for exemption u/s 5(3) since they were not the subject matter of export order. In other words what was exported was sea food and not packing materials. However, recently the Courts have changed the stance and interpreted the expression “for the purpose of complying with the agreement or order” as including even packing materials.

In the case of Kusum Laminating and Packaging Industries Vs. State of Tamilnadu (101 STC 476) (MAD), polythene bags and gunny bags used for packing barium sulphate which was ultimately exported. The identity of the goods exported was established with regard to the polythene

bags sold by the petitioner. This case was followed in Chettiar Industrial Corporation Vs. State of Tamilnadu (113 STC 334)(MAD) recognising the fact that packing materials are invariably used for the purpose of exporting any goods and export may become impossible without the packing materials

H form

The CST Act has also provided for a mechanism through which the penultimate sale can be proved. Prior to 13/05/2005, H form was not mandatory. Rule 12(10)(a) of the Central Sales Tax (Registration and Turnover) Rules 1957, prior to 13/05/2005 used the word “may” therein. It was interpreted to mean that dealer had an option to produce H form to prove his claim of exemption u/s 5(3) if he was able to prove it with the help of other evidence that goods were actually exported, and then the claim was allowable. Refer, Dhampur Sugar Mills Ltd Vs. CST (67 STC 440)(All).

However after 13/05/2005, Rule 12(10) (a) was substituted and H form became mandatory. This was also due to fact sub section (4) was inserted in section 5 w.e.f. 13/05/2005, and H form was made mandatory. The dealer is now under obligation to furnish H form and supporting evidences in order to gain exemption u/s 5(3).

Conclusion :-

The policy of the Govt. is to promote exports and sales in the course of export assume importance. The above principles can be taken as guidelines to determine whether the dealer earns exemption on his sales or not.

Thanking You,

Yours Faithfully,

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