(2005) 01 AHC CK 0190

Allahabad High Court

Case No: None

Minerals and Metals Trading Corporation of India Limited		APPELLANT
	Vs	
Trade Tax Tribunal and Another Commissioner, Trade Tax Vs Minerals and Metals Trading Corporation of India Limited		RESPONDENT

Date of Decision: Jan. 20, 2005

Acts Referred:

- Uttar Pradesh Trade Tax Act, 1948 - Section 11

Citation: (2008) 11 VST 370

Hon'ble Judges: Rajes Kumar, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Rajes Kumar, J.
These six revisions u/s 11 of the U.P. Trade Tax Act, 1948 (hereinafter referred to as "the Act") are directed against the order of Tribunal dated March 30, 1996 relating to the assessment years 1987-88, 198-89 and 1989-90. Revision Nos. 915, 916 and 917 of 1996 have been filed by the Commissioner of Trade Tax.

2. Dealer is a company, constituted under the Indian Companies Act, 1956 and is a Government of India Corporation, working under the Ministry of Commerce, Union of India, New Delhi, and engaged in the business of importing minerals from outside the country and selling the same. For the assessment years in dispute dealer claimed to have imported and sold copper rods, nickels, lead, zinc, etc. For the aforesaid assessment years assessing authority passed the assessment orders under Rule 41(7) and levied the tax on the turnover of the aforesaid goods at 2.2 per cent treating them as "metal". Assessment orders for the assessment year 1987-88 was passed on August 29,1991, assessment order for the assessment year 1988-89

on February 24, 1992, and for the assessment year 1989-90 on May 23, 1992. Assessing authority initiated the proceedings u/s 22 of the Act on the ground that during these assessment years, dealer had sold imported copper wire rod and nickel strips, which were wrongly taxed at 2.2 per cent while in accordance to the decision of the apex court in the case of Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh reported in [1981] 48 STC 411 : [1981] UPTC 1249 and in view of the decision of this Court in the case of Commissioner of Sales Tax v. Gulati and Co. reported in [1982] 4 STL All 16 non-ferrous metal, means metal in primary form. It is further observed that in the case of Hindustan Aluminium Corporation Ltd. Vs. State of Uttar Pradesh and Another, aluminium rod has not been treated as aluminium metal in primary form. Dealer filed reply. In reply, it was stated that aluminium rod and nickel strip were metal in primary form. It was submitted that the copper wire rod was primary form of electrolytic copper, which was being manufactured by the manufacturer by melting in different grades in the various manufacturing units. It was also explained that in ASTM specification Standard B-5-89 it is stated that electrolytic, top-pitch copper wire bars is included in cakes, slabs, billets, ingots and ingots bars and it is used as raw material by the manufacturer of wire. Likewise at per Standard B-115-83 electrolytic cathodes copper is included in copper wire and bars. With regard to the nickel it was stated that from the nickel various grades of nickel cathode are manufactured and they are classified as ASTM-B39-79-DIN-1701-150-6283-1979-995 and commonly they are called as square and strips. Further stated that dealer sell it in its primary form and they are primary metal. Assessing authority, however, not accepted the plea of the dealer and levied the tax on the turnover of imported copper wire at 4.4 per cent and on the turnover of imported nickel strips at 8.8 per cent. Dealer filed appeals before the Deputy Commissioner (Appeals), Trade Tax, Moradabad. Deputy Commissioner (Appeals) rejected all the three appeals. Dealer filed second appeals before the Tribunal, which were allowed by the impugned order. Before the Tribunal, applicant submitted that on the facts and circumstances, proceedings u/s 22 of the Act was not justified and both copper rod and so-called nickel strips were primary metal and, therefore, they were liable to tax at 2.2 per cent as metal. Tribunal justified the initiation of the proceedings u/s 22 of the Act on the basis of the decision of the apex court in Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh [1981] 48 STC 411 : [1981] UPTC 1249. Tribunal further held that perusal of the sample and photograph shows that the copper wire rod was in primary form and held that its turnover is liable to tax at 2.2 per cent as metal. However, with regard to the nickel strip Tribunal held that dealer failed to adduce any evidence to show that nickel strip was metal in primary form. Against the impugned order dealer as well as Commissioner of Trade Tax filed the present revisions.

3. Heard learned Counsel for the parties.

Learned Counsel for the dealer submitted that the dealer is a corporation of the Government of India and engaged in the business of importing and selling metal in

primary form. He submitted that assessing authority on consideration of the nature of the goods in the original assessment levied the tax at 2.2 per cent treating them as metal. He submitted that the orders have been passed in the year 1991 when the Division Bench decision in the case of Hindustan Aluminium Corporation Ltd. Vs. The State of Uttar Pradesh and Another, and the decision of the apex court in the case of Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh reported in [1981] 48 STC 411 : [1981] UPTC 1249 were available and, therefore, it cannot be said that while passing the original assessment orders aforesaid two decisions were not in the knowledge of the assessing authority. He submitted that the decision in the case of Commissioner of Sales Tax v. Gulati and Co [1982] 4 STL All 16 is not relevant to the issue. In that case dispute was relating to rate of tax on ice-cream cone and decision of the apex court in Hindustan Aluminium Corporation Ltd. [1981] 48 STC 411 : [1981] UPTC 1249 has been referred in different context. He submitted that in the proceedings u/s 22 of the Act, since it was the claim of the Revenue that the copper wire rod and so-called nickel strip were not metal in primary form, burden lies upon the revenue to establish, which they failed. He further submitted that in the case of Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh [1978] 41 STC 147 : [1977] UPTC 81, Division Bench of this Court has treated cast product as metal in primary form and in the cast product included wire rod and bars, therefore, so far as copper wire rod is concerned, it is held to be in a primary form by the Division Bench of this Court and there was no dispute in this regard before the apex court. Dispute before the apex court in the case of Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh [1981] 48 STC 411 : [1981] UPTC 1249 was only with regard to rolled product and extrusion. Claim of Hindustan Aluminium Corporation Limited was that even rolled product and extrusion were covered under the entry of "metal", which was not accepted by the apex court. He further submitted that neither in the decision of the Division Bench of this Court nor in the apex court nickel strip was the item in dispute and in none of the decisions nickel strip has been held not in primary form. Therefore, with regard to the nickel strip, Division Bench decision of this Court and the apex court were not relevant and could not be made basis for the initiation of the proceedings u/s 22 of the Act. He submitted that it was highly debatable whether the copper wire rod and so-called nickel strip were in a primary form or not, it needs investigation and, therefore, it was outside the purview of Section 22 of the Act, in as much as u/s 22 of the Act only mistake apparent on the face of record can be rectified and not those mistakes which requires investigation of fact and debate. Learned Standing Counsel submitted that order of Tribunal so far as it relates to initiation of proceedings u/s 22 of the Act and treating nickel strips as an unclassified item is concerned, is correct. He further submitted that Tribunal has erred in treating copper wire rod in its primary form while wire rod cannot be treated as metal in primary form.

4. I have perused the order of Tribunal and the authorities below.

Learned Standing Counsel has also produced the record of the Tribunal and the assessment records. In the assessment record, there is list of the'' purchases of the various items. List shows that at some places nickel bars, nickel strips and rods are mentioned and the copper wire rods are also mentioned. In the assessment record, sale invoices are also available, in which items sold are described as nickel strips as well as square bars. Annexure 6 of the revision is a purchase invoice issued in favour of the dealer, which describes the goods as 20000 MT primary nickel in the form of Cathdes "4  4" (unwrought and unalloyed) of LME registered brand. In the case of Hindustan Aluminium Corporation Ltd. Vs. The State of Uttar Pradesh and Another, question for consideration before the Division Bench was about the taxability of various types of aluminium products. The claim of the company was that the various products manufactured by the company were liable to tax as a metal. Division Bench of this Court held as follows:

...In the present case, it is not disputed that aluminium as a pure metal does not occur. It occurs in the form of bauxite. From bauxite, alumina is extracted, and thereafter alumina is by a manufacturing process converted into aluminium which is in a molten form. It hardly admits of any doubt that molten aluminium is not a saleable commodity. It becomes saleable only after it is given a particular shape. At this stage, we may also notice the contention raised on behalf of the State that the words ''metals and alloys'' as used in the notification only embraces alumina which is the basic metal. It might be that alumina is also a metal or a ''metal alloy''. In this case, we are not concerned with the tax on the sale of alumina. We are concerned with the sale of aluminium in its various forms. There is a basic difference between alumina and aluminium. Alumina is an oxide of aluminium while aluminium is a pure metal. This is borne out by the standard books of chemistry. This being so, it cannot be said that aluminium is not also a metal. The basic question in the case is as to whether only aluminium ingots, as has been held by the Sales Tax Officer, come within the description of the words ''metals or alloys'' as used in the notification, or other products also qualify. It appears from annexure ''C'' to the amendment application that the petitioner manufactures three types of aluminium products, (1) cast products; (2) rolled products and (3) extrusions. Cast products consist of (i) aluminium ingots, (ii) aluminium alloy ingots, (iii) wire bars (iv) prop-erzi redraw rods and (v) billets. Rolled products are obtained by rolling ingots, and extrusions are manufactured from billets. It can hardly be doubted that ingots and billets are saleable commodities as such. By subjecting them to further process of manufacture, i.e., either by rolling them or by processing them by the extrusion process, a new commercial commodity comes into existence, i.e., rolled products and extrusions. Thus, so far as rolled products and extrusions are concerned, since they are manufactured either from ingots or billets, they cannot come in the category of metals and alloys. They are new commercial commodities distinct from ingots and billets giving out the cast products. As regards cast products, we have already seen, as appears from annexure ''C'', they consist of aluminium ingots,

aluminium alloy ingots, wire bars, properzi redraw rods and billets. During the course of argument, it appeared that so far as aluminium alloy ingots, wire bars and billets are concerned, the process for manufacture of these items is similar to those of aluminium ingots. Standing counsel could not dispute this. There is no justification for treating aluminium alloy ingots, wire bars and billets as not coming within the description of ''metals and alloys''. The dispute so far as cast products are concerned centres round properzi redraw rods. We have already set out the process of manufacture of properzi redraw rods. Counsel for the State contended that as soon as molten metal is solidified into 12 sq. centimeter cross-sections, they assume the nature of a commercial commodity and, subsequently, when they are further processed by being fed into the properzi mill, another new commodity, properzi redraw rods, comes into existence. Parties do not appear to have led evidence on the point as to whether the solidified 12 sq. centimeter cross-sections are a commercial commodity at that stage. As such it would not be proper to decide in these proceedings as to whether properzi redraw rods fall within the description of ''metals and alloys'' without giving the parties a further opportunity to lead evidence in the matter. We, therefore, think it appropriate to direct the Sales Tax Officer to look into this aspect of the matter and decide whether properzi redraw rods come within the description of ''metals and alloys'', after considering the evidence, if any, which the petitioner may choose to lead and in the light of the principles laid down in the case of State of Tamil Nadu Vs. Pyare Lal Malhotra and Others, .

5. Perusal of the decision of the Division Bench shows that the cast product has been treated as the item covered under the entry of "metal" and the cast product has been held consists of aluminium ingots and wire bars, properzi redraw rods and billets. Therefore, as per the Division Bench decision wire rods is included under the entry of "metal". Therefore, view of the assessing authority that the wire rods were not treated in the primary form is not correct. Division Bench held that the rolled product and extrusion were not covered under the entry of "metal". Against the said order, Hindustan Aluminium Corporation filed appeal before the apex court. Apex court upheld the order of the Division Bench of this court, which is reported as Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh in [1981] 48 STC 411 : [1981] UPTC 1249. Apex court had not set aside the view of the Division Bench namely, that the wire rod bars were covered being cast product under the entry of "metal". In this view of the matter, initiation of the proceedings u/s 22 of the Act with the view that the copper wire rod and bars were not held in a primary form by the apex court is unjustified.

6. So far as nickel strips is concerned, the case of the dealer was that it was in a primary form. Since it was the case of the Revenue while initiating the proceedings u/s 22 of the Act that nickel strips were not metal in a primary form, burden lies upon the Revenue to prove its case. Perusal of the order u/s 22 of the Act and the Tribunal shows that the Revenue has failed to adduce any evidence that nickel strips were not in a primary form. Perusal of the assessment record shows that the dealer

had imported nickel in the form of strips, square and bars. One of the invoices, which is annexure 6 shows that it was referred as "20000 MT primary nickel in the form of cathode 4 &#65533; 4". Therefore, prima facie it appears that nickel strips and bars, which were imported and sold were primary nickel in the form of cathode. Decision of the apex court in the case of Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh in [1981] 48 STC 411 : [1981] UPTC 1249 and Commissioner of Sales Tax v. Gulati and Co. [1982] 4 STL All 16, which were made basis for initiating the proceedings u/s 22 of the Act were not relating to nickel strips. Therefore, in any view of the matter, it was doubtful whether item imported and sold by the dealer were not in a primary form. u/s 22 of the Act only mistake apparent on the face of record can be rectified. Those mistakes, which requires investigation and are doubtful, and where two opinions are possible cannot be said to be mistake apparent on record and are outside the purview of Section 22 of the Act.

7. In the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, , the honourable Supreme Court has held that the mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record.

8. In the case of Concrete Spun Pipe Works Vs. Sales Tax Officer, , the dealer was engaged in the business of manufacturing and selling reinforced cement spun pipe. Cement concrete spun pipe was taxed for the assessment years at the rate of 2 per cent. Later on notice u/s 22 was issued with the view that spun pipe fell under the description "sanitary fittings" and therefore, liable to tax at the rate of 7 per cent. Dealer filed the writ petition and challenged the notice u/s 22 which was quashed. The Division Bench held as follows:

The jurisdiction of the assessing authority u/s 22 is confined to the rectification of a mistake apparent on the face of the record of the assessment. It must be a mistake and it must be apparent on the face of the record. Clearly Section 22 does not envisage rectification of an error of judgment. The mistake must be apparent on the face of the record. It must be a mistake which will appear upon a glance at the record and not a mistake which emerges after a prolonged debate on the merits of the question. Section 22 was considered by Manchanda, J., in Sarin Textiles Mills v. Sales Tax Officer [1964] ALJ 671. That decision was affirmed in Special Appeal No. 679 of 1963 decided on 3rd January, 1964, by the Chief justice and R. Section Pathak, J. Since then the Supreme Court in Master Construction-Co. (P.) Ltd. v. State of Orissa [1966] 17 STC 360 considering the same point in a similar proceeding under the Orissa Sales Tax Rules, 1947, has observed:

There is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, elaborate arguments on questions of fact or law.

It is not disputed that it will be necessary for the Sales Tax Officer to apply his mind afresh for the purposes of determining whether the cement concrete spun pipes in question can be described as ''sanitary fittings'' and, therefore, whether the conclusion come to in the assessment order already made in respect of that turnover, is erroneous. We are of the opinion that in the circumstances of the case, it cannot be said that what the Sales Tax Officer proposes to do pursuant to the impugned notice amounts to a rectification of a mistake apparent on the face of the record. The Sales Tax Officer has no jurisdiction to take the proceeding u/s 22 of the Act and consequently the proceeding including the notice must be quashed.

9. In the result Revision Nos. 666, 667 and 668 of 1996 filed by the dealer Ire allowed and the Revision Nos. 915, 916 and 917 of 1996 filed by the Commissioner of Trade Tax are dismissed.