
(2000) 01 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Sales Tax Revision No. 701 of 1999

Commercial Taxes Officer

APPELLANT

Vs

Prakash Udhyog

RESPONDENT

Date of Decision : 14-01-2000

Acts Referred:

Rajasthan Sales Tax Act, 1994 — Section 2(27)

Citation : (2002) 126 STC 372 : (2000) 2 WLN 509

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : Sangeet Lodha, for the Appellant; Sumeet Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—The question which has been addressed to this Court for determination is whether production of the stone ballast (gitti) by breaking the large stones amounts to manufacturing, so as to make the respondent unit entitled to claim benefit of exemption from payment of tax under the New Sales Tax Incentive Scheme, 1989 (hereinafter called the "Incentive Scheme") in the light of definition of "manufacture" given in the Rajasthan Sales Tax Act, 1994 which governs the present case.

2. The respondent, Prakash Udhyog, had made an application on November 17, 1997 under the Incentive Scheme for the purpose of sanctioning issue of eligibility certificate for exempting its new industrial unit which started commercial production and has applied for eligibility certificate on November 17, 1997. The new unit was shown to be engaged in the production of "stone, grits/chips" for which large stones are used as raw material. "Stone grits" is known commonly in this part of the country as "gitti" which is a colloquial expression for ballast or metal used for laying pathways or roads. It is required of such material that the stones do not exceed required maximum size, and do not be of smaller than the minimum size. In other words, the commodity known as gitti has to be of size within such variable limits, so that it can be used as such. The process

required to get "gitti" is to grind or crush large sized stone's to required sizes. So also chips is still finer small pieces of stone of various types for use in laying floor or used in concrete structure and laying bitumen road layer. The material which is used for shaping them in gitti or chips are uncut and unsized stone which are otherwise unusable in any work.

3. The District Level Screening Committee referred to its decision in Volkem India Limited, in which it was stated to have held that where there is no change in the physical properties of the end-product of raw material, it does not amount to manufacture but only amounts to processing. Following the same it declined to accept the process of stone crushing or grinding as activity of manufacturing and rejected the application in its meeting held on March 5, 1998.

4. Aggrieved by the aforesaid order, the assessee preferred an appeal before the Rajasthan Tax Board which found after considering the factual aspect in the light of definition of "manufacture" that the assessee is purchasing boulders or large size of stones as raw material under declaration in form No. S.T. 17 and therefrom, by applying the mechanical process the commodity known as gitti and chips are produced which are distinct commercial commodity than the raw material used therein. Such activity is an activity of manufacturing. It also referred to the fact that the decision of the State Level Screening Committee in the case of Volkem India Limited that the commodity involved was processed to "wallstone night coalsit" which is altogether a different commodity, was in the context of the provisions of the statute and its marketing conditions. The case is distinguishable and cannot ipso facto be applied to the present case without discerning the facts of that case, without adverting to the same, by merely referring to the fact of making a decision. It was also found from the notings on the record in relation to present case that all the officers of the Industrial Department and the members of the Screening Committee were throughout considering the production of grits (gitti) and chips as an activity of manufacturing and in fact District Level Screening Committee has been, until decision in present case, sanctioning issue of eligibility certificates to such units for grant of benefit under the incentive scheme. Merely because the Director of Industries have sent a note to the District Level Screening Committee inviting the attention to the case of Volkem India Limited, the D.L.S. Committee has taken different course in the present matter without considering the facts of Volkem India Limited which were entirely different and held that the decision was not justified. Accordingly, the Board allowed the appeal and directed the D.L.S. Committee to issue eligibility certificate to the applicant-dealer within two months.

5. Aggrieved with the aforesaid order of the Tax Board dated September 24, 1998, the Revenue has preferred this" revision before this Court.

6. Heard learned counsel for the parties.

7. Learned counsel for the Revenue urged with some emphasis that the decision

of the Rajasthan High Court in *C.T.O. v. Bhonri Lal Jain* reported in [1994] 94 STC 118, does not appear to lay down the law correctly and it requires reconsideration. It was argued that in view of the law laid down in the various decisions it is essential that as a result of processing of goods, a new commodity different in nature and shape with different physical and chemical properties must come into existence which could be treated differently from the parent raw material. Relying on the decision of the Bombay High Court in *Commissioner of Sales Tax v. Mahalaxmi Stores* [1995] 97 STC 601 in which the court concerned with the same question relating to the very same commodity, namely, "gitti", has held that though the activity may be called a processing activity, but it does not result in bringing in existence any new commercially different commodity which is subject to tax under a different entry of the Schedule prescribing rates on different commodities, but continues to fall in the same entry, viz., stone. Therefore, moulding of stones to size of gitti cannot be considered an activity of manufacture which is a principal condition of entry to benefits of New Sales Tax Incentive Scheme. He places reliance on number of decisions of the Supreme Court, viz., *Deputy Commissioner of Sales Tax v. Pio Food Packers* [1980] 46 STC 63, *State of Maharashtra v. Shiv Datt & Sons* [1992] 84 STC 497, *Bahri Steel Wires Vs. Additional Commercial Tax Officer and another, Krishna Chander Dutta (Spice) Private Limited Vs. Commercial Tax Officer and Others*, and *Assistant Commercial Taxes Officer Vs. Sitaram Badrilal*,

8. Mr. Mehta, learned counsel for the non-petitioner, on the other hand, urged that the matter is squarely covered by the decision of this Court in *C.T.O. v. Bhonri Lal Jain* [1994] 94 STC 118 in respect of the commodity with which we are concerned. In view of a binding decision of this Court, the contrary decisions of other courts are not of much assistance and no reason appears to take a different view. In fact other courts have also taken the same view of the matter as this Court. He placed reliance on two decisions of the Madhya Pradesh High Court, namely, *G.R. Kulkarni v. State* [1957] 8 STC 294 which has been approved and reaffirmed by a Full Bench reported in *Kher Stone Crusher v. General Manager District Industries Centre* [1990] 79 STC 149.

9. At the outset it may be stated that the decided cases furnish guidelines for the purpose of examining the issue in each case on its own "whether the process involved in each case results in a manufacture of new and distinct commercial commodity". The general principle is that where the article produced is treated by those who deal in it, as distinct in identity from the commodity which has been subjected to any process, manual or mechanical, through which the original commodity passes, which may vary from one case to another, through several stages and process With each process the original commodity suffers some change. Every miniscule change does not bring into existence a distinctly recognisable and tradable new commodity but it is only such change in series of changes which takes the commodity to a point where it ceases to be known as the original commodity or raw material but instead is recognised as a distinct article of distinct use and utility that the process can be said to be a

manufacturing processing. It also depends upon the expression used in the relevant statute and the object of such statute determines the sphere of enquiry into question "when an activity can be said to result in manufacture". It is also relevant to consider to what use, the commodity in its original shape can be and is ordinarily put and the use to which the commodity in its altered shape or form as a result of processing applied to it, can be put. If the commodity in its original shape and altered shape, without there being any change in the physical properties of the commodity, can be put to the same use, notwithstanding change of form it cannot be termed as an activity of manufacture. At the same time, without there being change in the physical properties, two commodities, namely, the original commodity to which processing has been applied and the processed commodity are not substitute for each other in use but each is put to distinct use for distinct object, and is understood as two distinct commodities in the commercial field where the commodity is traded, it is to be held to be a case of an activity of manufacture. Tersely put it may be called test of functional utility.

10. In each case, the question has to be examined independently, keeping in view the purpose for which the interpretation has to be made, the expression used in the relevant statute ; use to which the commodities can be put in its original form and in its altered form ; the distinct recognition by the persons who trade in them, where the question arises in the context of tax on the event of sale of commodity. No one single test can be said to be conclusive so as to formulate a straitjacket formulas to find the answer.

11. However, as will be seen later in this discussion through the various precedents, in the context of sales tax statutes, and definition of "manufacture" given in various State sales tax laws, one common thread appears to have been woven through the principles enunciated in reaching its conclusion by the courts has been the test of functional utility, and the distinctive identity of the concerned commodities by those who trade in it ; known as commercial parlance test.

12. The basic facts which are before us in the present case are that the assessee purchases large stone boulders or stone pieces of uneven sizes and dimensions as a raw material and by crushing or grinding them through the use of machinery at the unit in question the end-product in the form known as gitti or chips is obtained. The name of product spelt in application in its chaste English is given as stone "grits and chips".

The definition of "manufacture" u/s 2(27) of the Act of 1994 reads :

" "Manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."

At this juncture, it may be apposite to note the definition of "manufacture" given in the repealed Act of 1954 which has been substituted by the new Act of 1994. Under the old Act of 1954, the term was defined as :

" "Manufacture" includes any process or manner of producing, collecting, extracting, preparing or making any goods but does not include such manufactures or manufacturing processes as may be notified by the State Government."

13. There is a common expression used under both the enactments that manufacture includes every process of goods but "shall not include such process that has been notified by the State Government". While the new Act used one simple determinative test that every processing activity which brings into a commercially different and distinct commodity is to be treated as an activity of manufacture unless excepted by the notification of the State Government, under the old Act, while no reference was made to bring into existence a commercially different and distinct commodity but emphasis was laid in the manner of processing by enumerating the various processes, namely, producing, collecting, extracting, preparing or making any goods ; it included even the process of collecting. Nonetheless the basic ingredient of bringing into existence a distinct commodity was still considered to be inherent in expression "manufacture". It may be noticed that the decisions referred to by both the learned counsel relates to period prior to the coming into force of the new Act of 1994 in the light of the old definition of "manufacture" which was in pari materia in the States of Maharashtra, Madhya Pradesh and Rajasthan. The question, therefore, has to be examined whether processing of boulder or large pieces of stones of uneven sized dimensions into gitti or chips results in bringing into existence a commercially different and distinct commodity, with distinct functional utility.

14. It would be appropriate in the first instance to address oneself to the question in the light of definition of the new Act. The relevant entry, in the Schedule prescribing different rates of tax, reads "the building material". In the first place it has to be, noticed that "stone" and "building material" are not synonyms. "Stone" in the context as commodity is much wider expression than "building stone" and quite different from the expression "building material". Stone in its ordinary sense means a piece of rock or hard mineral substance, other than metal, of a small or moderate size. In this sense every stone is a mineral substance but not necessarily usable in building activity so as to be called a building stone a specie of building material. Stones of different form and size having different characteristics, depending on its mineral contents and sizes, are distinctly known as distinct commodity. A piece of stone of a definite form and size, usually artificially shaped, used for special purpose is known distinctly. The building stone is that piece of stone of distinct size and shape that is used as a part of building or element of building. However we are concerned with considering expression "building material". It is not an expression equivalent to building stone. It denotes collective expression for every material used in construction of a building or any other structure, not necessarily a mansion or house. For various kinds of building activity different articles of variable characters are needed, which may include stone for laying foundation and structuring of walls ; slabs for laying roofs and floors ; ballast, metal or gravel for

laying pathways ; bitumen for surfacing roads ; mortar for cementing-masonry work ; lime and cement for plasters ; marble slabs and tiles for decorating floor or walls. So on and so forth. In this context each article which is used for different part of and different class of building activity is broadly and collectively expressed as "building material", though each by itself constitutes a distinct commodity in trading field. It is common knowledge that in common and commercial parlance stone in its different forms is not considered to be the same commodity for the purpose of trading and has distinct use to which it can be put. Notwithstanding in all its forms retaining the basic physical characters of a sandstone or a marble-stone or lime-stone, the different types of stones carry different and distinct identity for the purpose of trade for obvious reason of distinct utility in the field of construction work, though fall in the category of building material.

15. The stone is primarily considered to be a mineral. But different kinds of stones are identifiable as distinct commodity with different physical properties. All stones are not necessarily known as building stones nor all building stones can be classified as same mineral. Thus it becomes relevant to consider when the entry in Schedule is neither "stone" simpliciter nor "building stone" as a specie of stone, but is "building materials", whether all building materials whatever be its use as building material is to be considered one and same commodity, or each commodity having distinct function as building material are to be treated distinct from each other. The former is negated by the entry itself which describes form of the building materials distinctively. Such distinction is neither to restrict the scope of building material to be included in general expression by exhaustively enumerating the list, nor it expands the meaning by including something which otherwise would not fall in such expression.

16. In this connection, it may be of some relevance to know how the stone as a mineral in its different form has been treated under the Mining Laws. The stones as a mineral is governed by the statutes regulating mining. The Mines and Minerals (Regulation and Development) Act, 1957 u/s 14 provides that Sections 5 to 13 dealing generally with regulating quarry leases and mining leases, or other mineral concessions do not apply to the minor minerals. In this connection "minor minerals" has been defined u/s 3(e) of MMRD Act of 1957, as under :

" "Minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the official gazette, declare to be a minor mineral."

17. This definition gives first inclination that stone of all kinds do not fall within the category of building stone but building stone has been classified as a distinct commodity than the stones of other kind on the basis of their use for different purpose. Use to which a particular mineral is put, renders it a distinct commodity for different treatment, is further emphasised from expression used in connection with sand. "Ordinary sand other than used for prescribed purposes" only has

been included in the ambit of minor minerals. This is only an indication that "building stones" are categorised as one commodity for the purpose of its identity as a distinct mineral, within the broad term mineral stone.

18. The Rajasthan Minor Mineral Concession Rules, 1986, while prescribing rate of royalty has used different expression for denoting different kinds of stones falling in the category of building stones. These expressions classify goods with reference to distinctive use of particular dimensional stones known in the market by different nomenclatures. The said Rules further classify different types of stones used, in masonry work as different building material, viz., masonry stones like limestone, granite, rhyolite, schist, auartizite as distinct mineral from sandstone within the broad category of building stone as minor mineral for the purpose of prescribing rate of royalty. In the Schedule appended with the aforesaid Rules different expressions have been used which are relevant for our purposes. Different kind of stones, depending upon their size, shape and dimensions are identifiable by different nomenclatures is apparent from use of expressions such as slabs, patti, katla, ashlor, millstone, flooring and roofing stone, etc. Altogether, different expressions have been used for identifying yet another type of such stones under a separate entry at S.No. 7. It has prescribed separate rate of royalty in respect of other stones used as khanda ballast, road metal, fatchara, gitti grit, papera, crusher dust, gravel jhajhara, etc. All kinds of stone used in different types of masonry work are categorised as masonry stone. The different expressions denote names by which different type of masonry stone as "building material" is known. Their utility in masonary work as building material is also different. "Khanda" is used for different purpose than ballast or road metal is used. Likewise chips and gitti are used for different purposes.

19. The different expressions used in the Minor Mineral Concession Rules, 1986 in respect of building stones, a minor mineral, which is a building material of the general specie, identify differently each article as a different commodity based on their use in the construction activity for the purpose of treating them differently for levy of royalty. It is but one instance for showing that every stone of unspecified size and dimension is not identifiable as a building material of specific use. Stones in different sizes, dimensions and shape are identifiable as distinct commodity from each other amongst group of commodities which constitute building material. While the raw material at quarry site is identifiable as stone or building stone (stone that can be used in construction work) but when it is given different shape, size by applying some process or processes, it becomes specific items of building material. Like a block, patti or ashlor which is used as masonry stone in construction of wall or pillar, etc., cannot be used as a substitute for gitti or ballast or road metal or chips for the purpose of laying road or vice versa.

20. Once this conclusion is reached that each expression in respect of stone as mineral in its usable forms as building stone is known by different name and has a distinct functional utility in the buildings work it is not difficult to further conclude that where by applying some process to the stones of larger or uneven

dimensions they are brought to the form of different dimensional stones for the purpose of making them fit for different use in construction activity and are traded distinctly--the two commodities are to be treated distinct in their nature and characteristic as a building material, for the purpose of trading. The raw stone in the form of block at the quarry site has to be put to different processes for making it marketable as slab or patti, or khanda, or gitti or ballast or chips, etc. So also the waste stones of large and uneven dimension, by grinding or crushing are brought to a definite range of shape and dimension to be used as metal which is known in the masonry jargon as gravel, gitti or chips, ballast, metal or grits. All these commodities are known in the commercial world by different names and traded for the different purposes, as distinct commodity from one another. No one can make a mistake of buying khanda for gitti and "gitti" for patti as building stone.

21. While the basic mineral is known technically as "building stone", in its different distinctly usable forms, each is known by different name not as "stone" nor as "building stone" but as one of the building material, having a distinct name, character and use.

22. U.S. Supreme Court in *Anheuser-Busch Brewing Association v. United States* 207 U.S. 556 laid down the test ;

".....Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary..... There must be transformation ; a new and different article must emerge, "having a distinctive name, character or use"."

The above view has been quoted with the approval by the Supreme Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v : Pio Food Packers* reported in [1980] 46 STC 63. The court said :

"The generally prevalent test is whether the article produced is regarded....., by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another.....".

23. It must be noticed that where a new and different article emerge, having a distinct name, character or use, and being so distinctly traded by those in the context of whose dealing the commodity's identity as distinct from another is to be considered, it has ordinarily been construed a process of manufacture. That is the expression used in the definition of manufacture under the Act of 1994, when it says manufacture includes every processing of goods which bring into existence a commercially different and distinct commodity.

24. Word "gitti" appears to be aberration of English word "grits", the word in fact used by the dealer in connection with his production in his application for grant

of eligibility certificate.

25. In the context of building material, the word "grits" has been described in Oxford English Dictionary as "sand, gravel, small stones". The meaning of gravel has been assigned, a mixture of coarse sand or small wall or small use of paths and road and as aggregate. Thus the commodity stated as a grits is identified as a small moulded stones that can be used as a mixture in the building activities. The same thing is not conveyed by the expression "stone".

26. I am, therefore, of the opinion that the rough stone of unspecified size and dimensions is commercially a distinct commodity than the commodity which comes into existence with the result of processing into the large stones a form of specified distinct building material which is used for altogether different purposes as one of the building materials by the builders and traders.

27. If the test of commercial parlance is to be applied then bringing into existence such a different commodity for a use to which it could not have been used unless brought to required shape and size by applying same process, such processing is an activity of manufacture. So tested the process of crushing the boulders into the different sizes of stones which can be identified as a gitti and chips, certainly amounts to a process of manufacture, which produces different commodity than the raw material which is subjected to the process in question.

28. This Court in Bhonri Lal Jain's case [1994] 94 STC 118 was concerned with the case whether the assessee in question was a dealer in stones. He had excavated stones from mines and thereafter cutting was to be applied to such stones in different forms. He has sold the stones. The assessee after excavating the minerals has converted them into big blocks by applied some cutting and sold the blocks against form No. S.T. 17 to another registered dealer. By notification dated March 23, 1963, the point of tax has been shifted to the second dealer. The assessee who has applied such process to the stones quarried by and converted them into blocks claimed that he is a manufacturer and sale by him to the registered dealer was covered by the notification referred to above and the point of tax is shifted to the second registered dealer who has purchased the goods from him. Revenue thought otherwise and was of the view that even after applying of the process of converting the raw stones into the blocks it retained the basic identity of the stone as a stone with no change in its physical property and the process did not amount to result in manufacture. The court observed that :

"There must be a different commodity brought into existence by process, manual, mechanical or chemical which may not even be the transformation of the original commodity. It must be known differently in common and commercial parlance."

29. The court applied the test of being a different commercial commodity in common parlance namely in commercial world the trading community treats the blocks of stones of specific sizes and dimension brought in existence by cutting

and edging distinct from raw material, the rough stones at the quarry site on which process has been applied and reached the conclusion that the article in question was as a result of a manufacturing process.

30. Learned counsel for the petitioner has urged strenuously that the decision requires reconsideration in the light of decisions of the Supreme Court and other High Courts. However, I am of the opinion that in Bhonri Lal Jain's case [1994] 94 STC 118 (Raj), the commodity in consideration was not the same with which we are concerned and the ratio to which the court alluded is well-established as will be presently seen. It would be profitable to refer to two decisions of the Madhya Pradesh High Court referred to by the learned counsel for the respondent in support of his contentions which are in respect of the same processing that brings into existence "gitti".

31. In G.R. Kulkarni v. State reported in [1957] 8 STC 294, the question referred to the Madhya Pradesh High Court was quarrying and breaking boulders into stone is manufacturing within the meaning of Section 2(i)(a) of the Act. The assessee was a railway contractor who took on contracts of digging and preparing of gitti (metal) and collecting it at the railway sidings according to his contracts and who sold this metal for construction of roads and as ballast, etc. The short question, therefore, was whether the breaking of boulders into metal (gitti) is a process of manufacture. The division Bench headed by Justice Hidayatullah, Chief Justice, as he then was, observed about the test to be applied in each case :

"It is obvious enough that the process of manufacture from one article to another changes and there are so many different processes in existence that to take the analogy of any single manufacturing process is likely to cause confusion. It is better therefore to apply one's mind to the exact process employed by which one article is shaped into another and to see whether the purposes of the Act are satisfied. Now, in the present case the act of quarrying results in the accumulation or extraction of a large heap of big stones. Those stones may well be marketable, and if they are sold the process would be not one of manufacture but one of quarrying. After that stage is reached and the person who has won the stones attempts to break them, may be by manual labour, into sizeable stones for sale as gitti, he is shaping the stone into an object of a different size. Now, the word "manufacture" has got various shades of meaning. There may be manufacture of a complicated object like the super-constellation, or there might be manufacture of a simple object like a toy kite The essence of manufacture is the changing of one object into another for the purposes of making it marketable. The stones which are won in the process of quarrying may be sold without fashioning them into something else. If they are so sold they would not be manufactured but merely delivered from the quarry-head. When they are broken into metal or gitti there is some process, manual though it may be, for the purpose of shaping the stones into another marketable commodity."

The court further said commenting on the character of commodity known as

"gitti" that :

".....making of metal for the purposes of ballast and road is a well-known trade and occupation and is a very fruitful source of income to one who shapes larger stone into smaller ones of a pre-determined size. It is well-known that metal has to be within a particular size. Each piece cannot be smaller than a designated size nor above another designated size. The size therefore determines the skill necessary to fashion the stone. In *Kent v. Astley*, LR 5 QB 19, Cockburn, C.J., dealing with the case of preparing slates after quarrying said that it was a manufacturing process. There also the slate blocks which were won were merely split into sheets with the use of a hammer and chisel or wedges. The entire process was manual. We do not see any distinction between the fashioning of slate from a block and the fashioning of a graded size metal from a big block or boulder of stone. The essential condition is the same, viz., that there is an expenditure of some skill in fashioning an object of a different size and shape, ready for a commercial deal. In the present case, the man who manufactures metal is manufacturing a new article which has got a different price and that price includes the labour which goes into its manufacture.

We are satisfied, therefore, that the process indulged in to shape stones into metal is a manufacturing process and therefore the assessee was within the definition (i) of Section 2 of the Act."

32. In my opinion, the above decision succinctly states the process involved in the manufacture of commodity known as gitti or metal to bring into existence. The commodity known as gitti or metal from the raw stones of different sizes can on detailed analysis of process be named as manufacturing process under the Sales Tax Act. I am in respectful agreement with the same.

33. This decision of the division Bench of the Madhya Pradesh High Court again came for consideration before a Full Bench of that High Court in *Kher Stone Crusher v. General Manager, District Industries Centre, Jabalpur* reported in [1990] 79 STC 149 , on the correctness of *G.R. Kulkarni Vs. The State*, being doubted in another decision of the Madhya Pradesh High Court in *Bheraghat Mineral Industries Vs. Divisional Deputy Commissioner of Sales Tax*, The Full Bench approved the ratio of decision in *G.R. Kulkarni Vs. The State*, referred to above by distinguishing the case on the fact of the *Bheraghat Mineral Industries Vs. Divisional Deputy Commissioner of Sales Tax*, which was in respect of commodity known as dolomite. As noticed in the *G.R. Kulkarni Vs. The State*, , itself that to take analogy of an other manufacturing process with the process with which the court is concerned is likely to cause confusion and is better to be avoided. The Full Bench distinguished the case of *Bheraghat Mineral Industries Vs. Divisional Deputy Commissioner of Sales Tax*, for that reason.

34. The Bombay High Court in This reference appears to be to the decision of *Commissioner of Sales Tax, Maharashtra State v. Mahalaxmi Stores* [1995] 97 STC 601 (Bom).--Ed. *Revlon Commercial Co. Ltd. v. Commissioner of Commercial*

Taxes reported in [1995] 97 STC 598 has taken a note on various decisions of the Supreme Court particularly in *State of Maharashtra v. Shiv Datt & Sons* [1992] 84 STC 497, *Deputy Commissioner of Sales Tax v. Pio Food Packers* [1980] 46 STC 63, [1981] 47 STC 124 (*Chowgule & Co. Pvt. Ltd. v. Union of India*) and [1986] 63 STC 239, (*Sterling Foods v. State of Karnataka*), and the entry in the Schedule C was "building material" and has held that :

"Applying the tests laid down by the Supreme Court, it is obvious that the process of crushing boulders to obtain stones of smaller sizes termed as "gitti" cannot be regarded as a process of manufacture. The taxable item is "stone". Boulders and "gitti" are different sizes of the same. Breaking of boulders, which are pieces of stones of bigger size, into pieces of relatively smaller size known as "gitti" does not alter the nature and character of stone. They remain stone."

35. I with utmost respect regret my inability to persuade myself to follow the conclusion reached. At the outset, it may be noticed that in reaching its conclusion the court has equated the expression "stone" with the "building material", the expression actually used in the Schedule of rates under the Bombay Act. Moreover, as will be presently seen the conclusion to which I have reached in respect of the commodity in question, as was reached by the Madhya Pradesh High Court in two decisions referred to above in no way initiate against the ratio laid by various decisions of the apex Court and this Court.

36. In *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*, the court was concerned with interpretation of term "manufacture" as envisaged under the Kerala General Sales Tax Act, 1963. The expression used u/s 5A(1)(a) of the said Act was "consumes such goods in the manufacture of other goods for sale or otherwise". The court opined that Section 5A(1)(a) of the Act envisages that consumption should be in the process of manufacture and the result must be the manufacture of other goods. The question for determination, in the context of definition was whether a commodity is consumed in the manufacture of another commodity. In other words, the three stages envisaged were firstly, the goods purchased should be consumed, secondly the consumption of such goods should be in the process of manufacture, and thirdly the result must be the manufacture of other goods for sale or otherwise. The commodity about which the court was concerned was the pineapple which was a fresh fruit and slices were cut for the purpose of selling. The conclusion to which court reached on facts was that when pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans, there is no consumption of the original pineapple fruit for the purpose of manufacture of different commodity. The case does not fall within Section 5A(1) (a) of the Kerala General Sales Tax Act.

37. In arriving at this conclusion, the court took note that a raw fruit was also used for the purpose of eating as the canned slice. Raw fruit is eaten only after removing inedible portions. So also pineapple sliced after removing inedible portions. Sugar is added as preservative for saving it from spoiling but basic

identity of pineapple remains as that of edible fruit. Canning is only for putting the same in convenient mode of selling. However, raw pineapple cannot be said to be consumed in producing different goods. This principle is often applied to find whenever a question arises in the context of edible commodities. However, the principle to which the court alluded, and which alone furnishes ratio of the case from which light can be taken was stated thus :

"The generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass."

38. We are not concerned with the case where the commodity in its original shape can be used in the same manner and for the same purposes as in the shape of end-product can be used nor the two products are so recognised to be same by the trade. The use for which the raw material, the large unevenly sized stones, could be placed would be entirely different in the present case than to use the end-product, viz., gitti or grits or chips can be put, as has been noticed by the division Bench of the Madhya Pradesh High Court in Kulkarni's case [1957] 8 STC 294 apart from the various expressions used in the Minor Minerals Concessions Rules, 1986.

39. Learned counsel for the Revenue has also placed reliance on another decision of the Supreme Court in Chowgule & Co. Pvt, Ltd. v. Union of India [1981] 47 STC 124. In this case, the assessee, a private limited company, was carrying on the business of mining iron ore and selling it in the export market after dressing, washing, screening and blending it. The entire activity of the assessee was broadly divisible into seven different operations, one following upon the other with which we are not presently concerned. The court found that the test for determining whether manufacture can be said to have taken place is :

".....does the processing of the original commodity bring into existence a commercially different and distinct commodity ?

40. On analysis of facts before it applying the above test the court reached its conclusion that :

"In the present case, applying the test, it would be clear that the blending of different qualities of ore possessing differing chemical and physical composition so as to produce ore of the contractual specifications cannot be said to involve the process of manufacture, since the ore that was produced could not be regarded as a commercially new and distinct commodity from the ore of different specifications blended together. What was produced as a result of blending was commercially the same article, namely, ore, though with different specifications than the ore which was blended and it could not be said that any process of manufacture was involved in blending of ore ; but that the blending of ore....."

41. It may be noticed that the principle which governs the settling of the question whether any process results in a manufacture of a new item has been the same as introduced under the new Act, namely, the process that brings into existence a commercial distinct commodity. It is a question of fact to be decided in each case. If the conclusion would be that the process resulted in bringing into existence a commercially distinct commodity the process shall be termed as "manufacturing" ; if not the conclusion would be otherwise. As the Supreme Court found on evaluating the facts of the case that no distinct commodity came into existence as a result of blending of ore, conclusion reached was that no manufacture resulted. The principle enunciated and applied in *Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others*, therefore, does not detract from the one applied in the facts of present case in reaching the conclusion.

42. In the case of *Sterling Foods v. State of Karnataka* [1986] 63 STC 239 kar , the apex Court was considering a case, like in the *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*, of food processing. The commodities in question were sea food like shrimps, prawns and lobsters. The process concerned was cutting of heads and tails, peeling, deveining, cleaning and freezing. The court considered that process involved does not make processed and frozen shrimps, prawns and lobsters any other commodity distinct from the commercially known commodity as shrimps, prawns and lobsters. In reaching its conclusion the apex Court reiterated the principle that the test for the purpose of determining whether a commodity subjected to processing retains its original character and identity is whether the processed commodity is regarded by the trade by those who deal in it as distinct in identity from the original commodity or it is regarded commercially and in the trade, the same as the original commodity.

43. In *State of Maharashtra Vs. M/s. Shiv Datt and Sons, etc.*, the respondent-dealers before the Court had purchased batteries from the manufacturers of such batteries and sold them. During manufacture the plates of the batteries were immersed in an electrolyte to keep them in charged condition. Before transporting them to the dealers, the manufacturers threw out the electrolyte and the plates were dried. The batteries retained some charge. Before selling the batteries the dealers again immersed the plates in the electrolyte and charged them for a substantial period. The question was whether the respondent-dealers were entitled u/s 8 of the *Bombay Sales Tax Act, 1959*, to deduction from their turnover of such part thereof as related to resale of the batteries on the ground that the goods sold by them were the same goods as the goods purchased from the manufacturers. The Appellate Tribunal held that the goods sold by the respondents were the same goods as the goods purchased by them and that they were entitled to the deduction. Thus the court was considering the case where a manufacture of the batteries, for the purpose for keeping the batteries in charging position in which only it can be used, kept the plates immersed in electrolyte. The plates were dried, only for the safety of the batteries during

transit though some charge still remained. The dealer has bought and put them again in charging conditions by reimmersing the plates in electrolyte, before selling the batteries. It is in the aforesaid circumstances, the court found affirming the decision of the Tribunal that recharging the battery cannot be said to be manufacturing process.

44. In *Krishna Chander Dutta (Spice) Pvt. Ltd. v. Commercial Tax Officer* reported in [1994] 93 STC 180, the Supreme Court was considering the entries in the West Bengal Sales Tax Act, 1954 providing the rate of tax under that Act, which were "black and white pepper" and "turmeric". The assessee by applying the process of grinding converted them into powder, and selling the same. The case of the revenue was that the "black pepper powder" was different product from "black pepper" and likewise "turmeric powder" was a different commodity from "turmeric" because grinding of black pepper and turmeric involved a process of manufacturing and, therefore, if the processor who has purchased the whole turmeric or whole black pepper by suffering purchase tax, on the sale of "powder" the dealer is liable to pay tax once again on the new commodity sold by him. The assessee's case was that though the entry was "black pepper" and "turmeric" respectively but rest of the description in relevant Notification No. 885 dated May 1, 1955 suggested that black pepper or turmeric sold in any form is liable to tax at the same rate, as the same commodity, he cannot be considered to have brought into existence any new commodity so as to attract levy of tax again. Considering the expression used in entry and respective use to which the commodities are put by the purchasers and the expression used in notifications reached its conclusion as under :

"We are of the opinion that so far as whole black and white pepper and pepper powder are concerned, they are the same goods, whether applying the functional test or the test of common parlance I commercial parlance. The analogy of paddy and rice or of wheat and wheat powder is not apt. Nobody consumes paddy as it is. Similarly, no one eats whole wheat. They are consumed after milling them into rice or flour, as the case may be. But so far as the pepper is concerned, it is used equally in whole as well as powdered form. It is for this reason perhaps that the entry in Notification No. 885-F.T. dated May 1, 1955 speaks of "black and white pepper--whole, broken, ground or powdered or of any other form or description whatsoever". It is equally significant that the Notification No. 1915-F.T. dated May 10, 1963 refers to these commodities "as specified in Notification No. 885-F.T. dated 1st May, 1955". Black and white pepper "as specified in Notification No. 885" means black and white pepper, whether whole, powdered, broken or in any other form.

So far as turmeric and turmeric powder is concerned, the position is not identical, applying the functional test. But inasmuch as turmeric is also described in Notification No. 885 in the same manner as black and white pepper and also because Notification No. 1915 refers to it with reference to the said earlier notification, we are inclined to say that turmeric and turmeric powder must also

be treated as the same goods."

45. From the aforesaid it is clear that in all cases the vital question is whether a particular commodity is a result of manufacturing process or there is only superficial change in the principal commodity as a result of applying any processing without affecting its functional utility or its identity in commercial and common parlance. In considering this the expression used in the taxing statute, which provides the context, is always a relevant consideration. The entry in Krishna Chander Dutta (Spice) Private Limited Vs. Commercial Tax Officer and Others, was black and white pepper described in its every functional forms. The court found that the black pepper in its any form did not lose its identity or functional utility nor has lost its commercial or common parlance, identity in terms of a trading commodity therefore it was held to be same commodity. While finding that there is change in functional utility of "whole turmeric" when converted into powder form, yet in the light of expression used in relevant notification, the court found that in that case also its meaning in the context of statute cannot be different from black pepper. Very significantly the court distinguished the case of processing of paddy into rice and wheat into flour on the basis of functional utility of commodity before and after processing. In other words the question of change in nature of the commodity was tested on the touchstone of functional utility and not on the touchstone of change in physical or chemical properties only.

46. We are not concerned presently with the entry "stone" simpliciter as has been sought to be argued before us or as has been assumed by the High Court of Bombay, while reaching its conclusion in respect of the commodity as stone. The expression "stone" simpliciter may have given rise to a question whether stone at quarry head, and stone in any of its altered form when retains the same physical properties, can clarify it "stone" only for the purpose of taxing statute. But where expression used is "building material", stone in all different shape may classify as independently as distinct building material depending on its use. A dimensional stone used for the purpose of constructing particular parts of the building, namely, roofing walls is certainly a different building material from gitti or metal used for laying roads and pathways.

47. Learned counsel has also placed reliance on a decision of the Supreme Court reported in The State of Madhya Bharat (Now The State of Madhya Pradesh) and Others Vs. Hiralal Ji, The case concerns the levy of tax on iron and steel. The assessee has purchased scraps of iron and rolled the same into bars, flats and plates in the mills. The revenue contended that the bars, flats and plates are products of re-rolling of scrap iron and were goods "made from iron and steel" to attract tax under that head under the Madhya Pradesh General Sales Tax Act. The court found that "iron and steel" used as raw material for manufacturing other goods classified as "goods made from iron and steel" were exempted from taxation. So long as the commodity in question continued to be raw materials, as "iron and steel" they enjoy the exemption. Scrap iron purchased by the

respondent was merely re-rolled into bars, flats and plates. They were processed for convenience of sale. [Like consideration in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, The raw materials were only re-rolled to give them attractive and acceptable forms. They did not in the process lose their character as iron and steel. The dealer sold (iron and steel) in the shape of bars, flats and plates and the customer purchased iron and steel in that shape and it was held that the bars, flats and plates sold by the assessee are "iron and steel" exempted under the notification. Once again the test the court applied was the common use to which the particular commodity in question could be put. Both the scrap iron as well as iron bars, flats and plates on conversion from scrap could be put to the same use, namely, as raw material to make goods therefrom, which in the market is known and traded as distinct from iron and steel and reached the conclusion that the iron scrap and more convenient form of that scrap produced through re-rolling in the shape of bars, flats and plates ; considering the entry which clearly indicates that the term "iron and steel" is used in contrast with goods made from iron and steel which justifies the conclusion that iron and steel in any form, where it can be used as raw material for making other goods, which can be said as product of iron or steel and not iron and steel itself, remains the same commodity. The consideration would have been different, had the articles produced of scrap were to be described distinctly for the purpose of taxing statute from each other. This case, also therefore, does not take the case of revenue any further.

48. The common thread running through the ratio of all the aforesaid decisions of apex Court is that in most cases the test of functional utility of the competing goods have been determinative in finding whether by applications of any process to the commodity its nature has altered to result in bringing into existence a new and distinct commodity known in commercial parlance for those who trade in its, so as it can be called "manufacture".

49. Learned counsel for the Revenue has placed much reliance on a decision of the Karnataka High Court in Bahri Steel Wires v. Additional Commercial Tax Officer reported in [1992] 84 STC 418, and contended that the entry in Schedule of rates is relevant and an important consideration in determining the question whether a new commercial commodity has come into existence through manufacturing process.

50. In the case of Bahri Steel Wires Vs. Additional Commercial Tax Officer and another, the court was concerned with reference to the scheme of Sections 14 and 15 of Central Sales Tax Act, 1956, after its amendment. Section 14 of the Central Sales Tax Act declares certain goods of special importance in the course of inter-State trade and commerce. Section 15 of the Central Sales Tax Act provides limitations on power of the State to levy tax in respect thereof. The object of these provision is to minimise the tax burden on the declared goods. The question which was before the court was whether goods falling in each distinct category of declared goods is different from the other or to be treated as

merely enumeration of one general description in which each can fall, for the purpose of deciding whether the sale of two distinct commodities had taken place as enumerated separately, or with reference to general description it can be treated as resale of the same commodity. It is in the setting of the Central Act which enumerated different articles and declared them to be the goods of special importance for the purposes of inter-State trade and commerce subject to certain restrictions on the power of State to levy to tax thereon, the court found that since enumeration of articles in Section 14 was for the specific purpose and was exhaustive in its nature, each article mentioned in each provision or sub-provision was a separate and distinct article for that purpose and if the two sales fall into two distinct categories specified in that provision itself, then it must be held to be related to two distinct commodities and the question of successive sale of the same commodity would not arise. I am unable to see any application of this principle to the facts of the present case which relates to altogether different issue. If at all it supports the case of the assessee inasmuch the case has to be examined in the light of expression used in Schedule "the building material" with illustrative description and not exhaustive description of the commodities which may fall in the category of "building material" and cannot be equated with expression "stone" or "building stone".

51. Lastly, learned counsel for the Revenue relied upon a decision reported in Assistant Commercial Taxes Officer, Ward A, Chittorgarh v. Sitaram Badrilal of this Court reported in [1986] 61 STC 258. That was a case in which commodity under consideration was polished stones. The court found that one of the important test which emerged from the decision of the Supreme Court is that even if labour is applied to a particular commodity but if that commodity essentially remains the same commercial article, this cannot be said that the produce which comes out after the application of the labour is a result of the manufacture. Relying on the test laid in an earlier decision of this Court in State v. Sahachari Udhyog Mandir [1986] 61 STC 30, the Court held that :

"Stones are polished but even after polishing those stones do not lose the original identity and a separate commercial article does not come into being for being marketable. Essentially, it is the same commercial commodity. The polished stones are nothing but product of stones which they were.....

.....

identity of so-called polished stones sold by the dealer-assessee had not been changed from what it had been when they were originally purchased."

52. The distinction between the case before this Court in Sitaram Badrilal [1986] 61 STC 258 and case before us is obvious. That was a case in which the same commodity was being sold in an un-polished and polished condition but was to be utilised for the same purpose. So far as present case is concerned, there is no doubt that the gitti or the road metal manufactured by subjecting the larger stones to some process have definite distinct utility in their use than the raw

material which has gone under the process of making them. The ratio of the case is the same, but facts were distinct.

53. As will be seen that undercurrent of ratio in all the cases discussed above can be explained tersely put in the words of this Court in the case of Sahachari Udhyog Mandir [1986] 61 STC 30 :

"whether by the process an altogether different commercial commodity for specific utility had come into existence."

54. Answer in each case will have to be reached in the light of facts and circumstances of that case depending upon the commodity, the process to which it is put, the use to which the goods in original form and to which in altered form can be put, the relevant scheme of the statute, in whose context the answer is to be found, so on and so forth applying the aforesaid test. In my opinion the process which is applied in the present case to large unspecified stones of all kinds results in altogether different commercial commodity for specific utility, distinct from the commodity that has undergone the process of crushing and grinding.

55. As a result of the aforesaid discussions, I find no force in this revision petition and the same is hereby dismissed. There shall be no order as to costs.