

(2004) 05 AHC CK 0001
In the Allahabad High Court

Commissioner of Sales Tax	Vs	APPELLANT
Modi Spinning and Weaving Mills		RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 3AA, 4

Citation : (2008) 11 VST 259

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—Raising a short controversy the present revision has been filed by the Commissioner of Sales Tax against the order dated June 20, 1992 passed by the Tribunal in Second Appeal No. 28 of 1989 connected with 346 of 1989 for the assessment year 1981-82 (U.P.). The point of law involved in the revision is as follows:

Whether the Sales Tax Tribunal was legally justified in holding that coal cinder sold by the dealer is taxable at the rate of 4 per cent despite the fact that it is an unclassified commodity and it ought to be taxed accordingly?

2. The Tribunal in its order under revision has held that sales of coal cinder is liable to be taxed as coal. The department treated the cinder coal as unclassified item and levied the tax at the rate of 8 per cent. The Tribunal has followed the order given by it in other appeals and has held that cinder is taxable as coal at the rate of four per cent.

3. Heard the counsel for the parties and perused the record.

4. The dispute relates to the assessment year 1981-82. Before advertng to the precedents it is desirable to notice the relevant notifications. The notification No. 8448 of October 1, 1975 issued u/s 3AA of the U.P. Sales Tax Act, 1948 provides that with effect from October 2, 1975 the turnover in respect of the goods

specified below shall be liable to be taxed at the point of sale to the consumer at the rate of four per cent:

(1) Coal including coke in all its forms, but excluding charcoal.

(2) to (6) ...

5. In supersession of the aforesaid notification the Notification No. 5782, dated September 7, 1981 was issued. It provided as follows:

1. Coal including coke in all its forms, Sale to consumer 4 per cent. but excluding charcoal.

6. Thereafter Notification No. 3685 dated July 31, 1986 was issued which provided as follows:

1. Coal including coke in all its forms but M or I 4 per cent. excluding charcoal.

7. The earliest case on the point of this Court is Mahabir Singh Ram Babu v. Assistant Sales Tax Officer [1962] 13 STC 248. The coal was exempted at the relevant time from sales tax by reason of notification No. 911 dated March 31, 1956 issued u/s 4 of the U.P. Sales Tax Act. This Court held that properly speaking cinder is not coal. It pointed out that there is basic difference between coal and cinder is that coal is a mineral as it is dug out of the bowels of the earth without any thing more being done to it. Cinder, on the other hand is not coal because cinder is got only after something has been done to coal namely after coal has been burnt. If coal is completely burnt, and all combustible property of coal has escaped into that atmosphere, what is left is ashes which are no longer capable of burning. Where all the combustible property of coal has not completely escaped into the atmosphere, the residue which is left and which may still be capable of combustion and which may serve many of the purposes which are served by burning coal, is not "coal" but "cinder".

8. The same view has been taken by the Madras High Court in the case of M. Varadarajulu Naidu Vs. The State of Madras and Another, This view has been reiterated in K. Venkataraman and Co. v. Deputy Commercial Tax Officer, Coimbatore IV [1972] 30 STC 57 (Mad). The Madras High Court has followed the judgment of this Court given in the case of Mahabir Singh Ram Babu [1962] 13 STC 248 (Mad) . It has also followed a judgment of the Supreme Court given in Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, The Supreme Court has held that charcoal is included in the definition of coal.

9. Again the said controversy was raised before this Court in the case of International Chemical Industries v. Commissioner of Sales Tax [1998] 27 STR 167. A learned single Judge of this Court on the basis of the earlier judgment referred to above came to the conclusion that the commercial understanding of the word "coal" did not include "cinders". The most important distinction to be made between the coal and the cinders is that coal is a mineral product but cinders is not a mineral product but is burnout product of a mineral product. In

this very case the learned single Judge distinguished the another judgment of this Court given in the case of Commissioner of Sales Tax v. Modi Industries [1997] 105 STC 436 : [1997] UPTC 374 on the ground that in that case the controversy related to the cinder ash and coal ash. The Tribunal in fact in the said case had decided that cinder ash and coal ash are the same thing in commercial parlance. This case was distinguished on the ground as it was not dealing with the cinders and coal which are different commodity, one is a mineral product and the other is burn out product of a mineral product.

10. The learned Counsel for the dealer-opposite party has strongly placed reliance upon the aforesaid judgment given in the case of Commissioner of Sales Tax v. Modi Industries [1997] 105 STC 436 (All) : [1997] UPTC 374 for the reasons given by this Court in the case of International Chemical Industries [1998] 27 STR 167 (All). I am of the view that the said case is distinguishable and is not of any help to the dealer-opposite party. In support of the argument the learned Counsel for the dealer-opposite party has placed further reliance upon another judgment given in the case of Commissioner, Sales Tax v. Modi Paun Ltd. [1999] 114 STC 132 (All). It appears that the attention of learned Judge to the earlier judgments of this Court on the point were not drawn and the said judgment is per incuriam. The attention of the court was not drawn towards the judgment of Mahabir Singh Ram Babu [1962] 13 STC 248 (All) and the other pronouncements noticed above. There is an additional reason for not accepting the said judgment as it is distinguishable on facts also. In that case the finding recorded by the departmental authority was that cinder ash as sold by the assessee has sufficient amount of burning capacity and the same may be treated as coal of low quality. The assessee, in that case submitted a certificate from recognised institute showing that the cinder ash contained 59 per cent burning capacity. In that view of the matter cinder ash was considered as low quality coal. These facts are missing from the case in hand.

11. In this connection the following quotation from Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others, is relevant.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

12. A learned single judge again followed the judgment given in the case of Mahabir Singh Ram Babu [1962] 13 STC 248 (All) in the case of Commissioner of Sales Tax v. Fertilizer Corporation of India [2001] 33 STR 440. It has been held that by no stretch of imagination coal ash can be treated as coal. Coal ash and

coal are two different commodities. An argument was sought to be raised by the dealer-opposite party that the Commissioner of Sales Tax in the proceedings u/s 35 of the Act has held that cinder is coal ash and is liable to be taxed as such at the rate of 4 per cent. This argument has no merit. It has been held in the aforesaid case, namely, Commissioner of Sales Tax v. Fertilizer Corporation of India [2001] 33 STR 440 that the decision given by the Commissioner of Sales Tax in the proceeding u/s 35 of the Act, cannot be held to be binding on the Tribunal or on this court. There is an additional reason to hold that the cinder is not coal. The Supreme Court in the case of Indian Carbon Limited Vs. Superintendent of Taxes, Gauhati and Others, was called upon to interpret Clause (i) of Section 14 of the Central Sales Tax Act which reads as follows:

Coal including coke in all its forms.

13. The Supreme Court while interpreting the above entry has made the following observations:

...The language of Clause (i) of Section 14 is clearly wide and coal has been stated to include coke in all its forms. It is not denied that petroleum coke is one of the forms of coke. Therefore, on a plain reading of the aforesaid Clause it is incomprehensible how petroleum coke can be excluded from its ambit. It may be that the Clause mentions coal only and then declares that that word shall include coke in all its forms. That shows that the object of the words which follow coal is to extend its meaning..."coke is the refuse left after destructive distillation of coal, shale-oil and is called petroleum coke, metallurgical coke or pitch coke, to indicate its source or origin; but all these are carbonaceous materials used for the same purpose and having same properties, more or less, main being--mixed carbon, volatile matters, ash and moisture". See Indian Carbon Limited Vs. Superintendent of Taxes, Gauhati and Others, .

14. The Supreme Court has interpreted the words "in all its forms" relates to coke and not to "coal". Its observation that Clause mentions coal only and then declares that word shall include coke "in all its forms" are very important for deciding the issue in hand. Meaning thereby phrase "in all its forms" relate to coke and not to "coal". This interpretation was given by the Supreme Court in year 1971.

15. The same conclusion may be reached from another angle. In this context it may also be remembered that this Court in the year 1962 held that the cinder is not coal. Thereafter, the notification was superseded by another notification issued on September 7, 1981 and the same phrase was repeated, namely "coal including coke in all its forms". It must be assumed that while issuing the two notifications referred to above, the State Government was aware about the interpretation placed by this Court on the word "coal" and "cinder" in the case of Mahabir Singh Ram Babu [1962] 13 STC 248 (All) . The Supreme Court in the case of F. S. Gandhi (Dead) by LRs. Vs. Commissioner of Wealth tax, Allahabad, , has held that in such circumstances Parliament must be taken to have used the

said words to bear the meaning which has been put upon them by the Supreme Court in its earlier judgment. The Supreme Court was dealing with a case under the Wealth Tax Act and in that connection the above observations of the Supreme Court were made, which are fully applicable to the present case also.

16. Recently, the Supreme Court in Union of India (UOI) Vs. Ahmedabad Electricity Co. Ltd. and Others, , has made some observations, which apparently do support to the argument of the dealer. But if the judgment is read as a whole, it would be clear that it was examining a different controversy. The case was under the Central Excise Act. The assessee was using coal as a fuel for generating steam. Coal converted into cinder and the department sought to levy excise duty on the production of cinder. In this connection it was observed that the department has itself described it as unburnt part of coal and "cinder" is coal of reduced quality. These observations should be understood in the context of facts and controversy involved in that case. The Supreme Court was not considering of interpreting a taxing entry under the U.P. Sales Tax Act.

17. In the result the order of the Tribunal on this point cannot be sustained, the revision is allowed as observed above. The Tribunal shall pass a consequential order u/s 11(8) of the U.P. Sales Tax Act.