

(2013) 01 GAU CK 0022

In the Gauhati High Court

Case No : Writ Petition (C) No's. 1430, 1438 and 1440 of 2009

Hindalco Industries Ltd. and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 29-01-2013

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 10(1)(a), 105, 105(1), 105(2)

Citation : (2013) 58 VST 341

Hon'ble Judges : A.K. Goel, C.J.; A.K. Goswami, J

Bench : Division Bench

Advocate : Ashok K. Saraf, D. Baruah, Miss N. Hawelia, M.L. Gope, S. Chetia and A. Goyal, for the Appellant; R. Dubey, Standing Counsel, Finance and Taxation and D. Saikia, for the Respondent

Judgement

1. These three writ petitions raise common questions of law and facts and as such, they were heard together and are being disposed of by this common judgment and order. In these writ petitions, assessment order dated January 6, 2008 (sic January 6, 2009), passed by the Superintendent of Taxes, Unit D, levying taxes and interest and consequent demand notice dated January 19, 2009 are under challenge. W.P. (C) No. 1430 of 2009, W.P. (C) No. 1438 of 2009 and W.P. (C) No. 1440 of 2009, relate to assessment years 2006-07, 2007-08 and 2008-09, respectively, with corresponding demand of Rs. 18,24,900, Rs. 17,14,824 and Rs. 3,82,860. Also under challenge is the order dated November 21, 2008 passed by the Commissioner of Taxes, Assam, respondent No. 2, in exercise of powers u/s 105 of the Assam Value Added Tax Act, 2003, for short, "the Act", clarifying that aluminium rolled products such as sheets, plates and foils shall not come under SI. No. 26 of the Second Schedule to the Act, and that such products shall be taxable at the rate of 12.5 per cent. The petitioners also pray for a direction that aluminium rolled products such as sheets, plates, foils fall within the purview of SI. No. 26 of the; Second Schedule to the Act and, therefore, liable to be taxed at the rate of four percent.

2. The petitioner-company is engaged in the business of manufacturing and dealing in aluminium and its products and is registered under the provisions of the Act. The petitioners paid tax at the rate of four per cent on the sale of aluminium rolled products manufactured by it treating the same to be covered under entry 26 of the Second Schedule to the Act. On June 27, 2008, the jurisdictional Superintendent of Taxes, namely, respondent No. 3, upon inspection of documents and papers in the premises of the petitioners, seized certain documents and papers on the ground that the petitioner-company had accounted the sales derived from aluminium sheets, wire rods at lower rate of tax than actually chargeable rate of tax thereon, resulting in under declaration of tax liability during the relevant periods. Respondent No. 3 served notice dated July 10, 2008, requiring the petitioners to appear before him on July 29, 2008 and to show cause why the turnover of the petitioners for the relevant periods shall not be charged at the rate of 12.5 per cent instead of four per cent and as to why proceedings for levying correct amount of recoverable tax along with interest and penalty as per the Act shall not be initiated against the petitioners.

3. The petitioner-company had filed a petition u/s 105 of the Act before respondent No. 2, seeking clarification, as to why the aluminium ingots, wire rods and rolled products and extrusions should not fall within the ambit of entry 26 of the Second Schedule to the Act. By the impugned order dated November 21, 2008, respondent No. 2 gave his clarification. On the basis of the said clarification, assessment order was passed and demand notice was issued, as have already been taken note of.

4. We have heard Dr. A.K. Saraf, learned senior counsel for the petitioners and Mr. R. Dubey, learned. Standing Counsel, Finance Department, appearing for the respondents.

5. Dr. Saraf submits that clarification of respondent No. 2 that aluminium rolled products such as sheets, plates and foils did not come under entry 26 of the Second Schedule to the Act and, therefore, are taxable at the rate of 12.5 per cent, meaning thereby, that they fall in SI. No. 1 of the Fifth Schedule to the Act is grossly erroneous and placing reliance on a decision of the apex court in Kalidas Sheet Metal Industries P. Ltd. Vs. State of Kerala, ; contends that having regard to the items in entry 26, it would be apparent that the entry is much wider and more comprehensive compared to entries 116A and 116D of the First Schedule to the Kerala-General Sales Tax Act, 1963 which were the subject-matter of the aforesaid decision and that the apex court had rejected the contention that "copper" and "brass" would not take within its sweep "copper sheet" and "brass sheet". The learned senior counsel also places reliance on the judgment of the apex court in the case of The State of Madhya Bharat (Now The State of Madhya Pradesh) and Others Vs. Hiralal Ji, , where the apex court had rejected the contention that expression "iron and steel" means iron and steel in the original condition and not iron and steel in the shape of bars, flats and plates. It is submitted by him that the impugned order dated November 21, 2008,

displays total non-application of mind inasmuch as no reasoning whatsoever has been assigned as to why aluminium rolled products would not come under entry 26 of the Second Schedule, save and except saying that in a number of cases, it had been held that aluminium rolled products are different from aluminium and extrusions, without referring to even a single such purported decided case. It is also contended that process of rolling of aluminium under high temperature does not result in any change or character or use of the basic metal, and is in no way different from extrusions.

6. In absence of any affidavit filed, Mr. R. Dubey, learned counsel appearing for the respondents, supports the impugned order of respondent No. 2 by placing reliance on the decisions of the apex court in Hindustan Aluminium Corporation Ltd. Vs. State of Uttar Pradesh and Another, and Steel Stores and Another Vs. Commissioner of Taxes and Others, , to contend that the authoritative pronouncements in the cases referred to will clinch the issue in favour of the Revenue.

7. The Act came into force with effect from May 1, 2005. Section 10(1)(a) of the Act provides that every dealer, who is liable to tax, shall be liable to be taxed under, the Act on the taxable turnover in respect of the goods specified in the Schedules appended at the rates specified therein. In the instant case, we are required to consider Schedule II and Schedule V. Schedule II deals with goods taxable at the rate of four per cent at every point of sale of such goods within the State. Schedule V deals with all other goods not covered by the First, Second, Third and Fourth Schedules as well as works contract and lease transactions. For ready reference, SI. No. 26 of the Second Schedule and SI. No. 1 of the Fifth Schedule, with which we are concerned, are reproduced hereinbelow:

8. It will also be appropriate to quote below the order dated November 21, 2008 of respondent No. 2 for ready reference:

ORDER

Dated the 21st November, 2008

No. CTS-70/2007/153: M/s. Hindalco Industries Ltd., N.S. Road, Fatasil, Guwahati-9, filed an application u/s 105 of the Assam Value Added Tax Act, 2003 and sought clarification of rate of tax on aluminium rolled (aluminium sheet), wire rods and aluminium extrusions.

Sri Radheshyam Sharma, advocate appeared on behalf of the petitioner and placed his submissions. He submitted that entry at SI. No. 26 of the Second Schedule appended to the Assam Value Added Tax Act, 2003 reads as "ferrous and non-ferrous metals and alloys, non-metals such as aluminium, copper, zinc and extrusions of these". Therefore, the word "aluminium" would cover aluminium in its primary form, i.e., ingots/wire rods that are directly cast out of mother metal, the words "extrusions of those" would mean secondary products of aluminium like sheet, plate, foil, etc.

The submission of the petitioner perused. The entries at SI. No. 26 include aluminium and its extrusions. The item represented by the petitioner includes aluminium sheets, aluminium wire and rods and aluminium extrusions. In a number of court cases, it is clarified that aluminium rolled products are different from aluminium and it also does not come under "extrusions". Hence it is clarified that aluminium rolled products such as sheets, plates and foils shall not come under entry at SI. 26 of the Second Schedule therefore taxable at 12.5 per cent. However, aluminium ingots and extrusions like wire and rod shall be taxable at four per cent as per, the said entry.

9. As the learned counsel for the parties has relied on certain decisions with regard to the interpretation that is to be given, to SI. No. 26 of the Second Schedule, it will be appropriate, at the outset, to take note and cull out the judicial opinions from the authorities cited.

10. In *Kalidas Sheet Metal Industries P. Ltd. Vs. State of Kerala*, , in challenge was the view taken by the High Court of Kerala at Emakulam upholding the finding of the taxing authorities that copper sheets and brass sheets in which the appellant dealt with fell within the ambit of entries 116A and 116D, which provided tax at the rate of eight per cent on the total turnover of copper and brass, respectively. The contention advanced by the appellant was that entries 116A and 116D took within its sweep only virgin copper and brass in solid form and, therefore, copper sheets and brass sheets are unclassified items taxable at the rate of five per cent. The apex court, noting that in ordinary temperature and pressure, copper and brass, which are metals, occur in solid form and commercially, these metals are produced in rolling mills in the form of sheets, circles, ingots, strips or rods and available in the market in any of the above form only, rejected the contention that copper sheets and brass sheets are distinct and separate items from copper and brass. The apex court had also distinguished *Hindustan Aluminium Corporation Ltd. Vs. State of Uttar Pradesh and Another*, , by observing that notifications issued by the Government from time to time were pointer to the fact that the expression "metal" had been generally employed to refer to the matter in its primary sense or in other words, metal in the form in which it was marketable as a primary commodity and in that backdrop, the subsequent forms evolved from primary form and constituting distinct commodities, which are marketable, were regarded as new commercial commodities.

11. The analysis above logically takes us to the factual matrix in *Hindustan Aluminium Corporation Ltd. Vs. State of Uttar Pradesh and Another*, . The appellant therein was carrying on business of manufacturing and dealing in aluminium metal and various aluminium products. In terms of a notification dated December 1, 1973 issued u/s 3A(2) of the U.P. Sales Tax Act 1948, turnover in respect of goods set forth, namely, all kinds of minerals and ore and alloy except copper, tin, zinc, nickel or alloy of those metal only, in item No. 6 of the attached Schedule, was liable to be taxed at all points of sale at 3 1/2 per

cent. On May 30, 1975, a notification was issued under the same enactment in which item 1 of the Schedule had included all kinds of minerals, ores; metals and alloys except those not included in other notification issued under the Act, and tax at the rate of two per cent was prescribed by the notification. By the notification dated May 30, 1975, notification dated December 1, 1973 was amended and item No. 6 was deleted. Prior to these two notifications also, there were number of notifications issued on the related entries. The jurisdictional assessing authority applied rate of three per cent and two per cent under notification dated December 1, 1973 and notification dated May 30, 1975, respectively, to aluminium ingots only and treated the remaining products as unclassified items attracting sales tax at seven per cent. In a writ petition filed against the provisional assessment, which was subsequently amended to challenge the final assessment order also, the High Court had held that aluminium ingots, wire bars and billets would fall in the category of "metals and alloys", and that rolled products prepared by rolling ingots and extrusions manufactured from billets must be regarded as different commercial commodities. In regard to some items, taking the view that further, enquiry was necessary, the High Court directed the assessing authority to re-examine the matter. Appeal was preferred before the apex court against that part of the judgment refusing relief in regard to rolled products and extrusions. While reiterating that there cannot be any doubt that a word describing a commodity in a sales tax statute should be interpreted according to its popular sense and must be construed not in their scientific or technical sense but as understood in common parlance, the apex court said that the said principle will hold good only when where a context exists between the scientific and technological connotation of the word on the one hand and its understanding in common parlance on the other Their Lordships held that expression requiring interpretation in the case in hand was to be construed with the inference that could be drawn from the particular arrangement of the entries in the notification. Thus, emphasis was laid on deriving the intent from a contextual scheme. It was noted that from the notifications brought on record, it was clearly discern-able that the notifications followed the scheme that one clause dealt with the metal in its original saleable form and another separate clause dealt with fabricated forms in which it was saleable as a new commodity. In the aforementioned background, it was concluded that aluminium rolled products and extrusions are regarded as distinct commercial items from aluminium ingots and billets in the notifications issued under the U.P. Sales Tax Act.

12. In *The State of Madhya Bharat (Now The State of Madhya Pradesh) and Others Vs. Hiralal Ji*, , the apex court, on a comparison of notifications dealing with the relevant entries, had held that "iron and steel" will include bars, flats and plates, rejecting the contention of "the State to the contrary. It was held that raw materials of iron and steel, which was exempted from tax, do not cease to be raw materials if they were processed and given the shape of bars, flats and plates for convenience of sale.

13. In *Steel Stores and Another Vs. Commissioner of Taxes and Others*, , in view of the various, notifications issued, by the, Government the question that had emerged for consideration was the location of aluminium plane sheets and the entry to which it "could be said to have been lodged during the period January 1, 2000 to February 18, 2002 for correct assessment of tax. While the assessee contended that it would be in entry 45(b) of the Second Schedule, the Revenue wanted the court to accept that it was encompassed in entry 2 of residuary Schedule III. The learned single judge noted the events leading to the controversy as follows (page 256 in 34 VST):

26. To reiterate, prior to the issuance of the notification dated January 27, 2000, aluminium sheets were entered in entry 10 of the Fourth Schedule to the Act. Entry 45(b) in the Second Schedule did not mention aluminium therein. It was only by the notification dated January 27, 2000 with effect from February 1, 2000 that aluminium was incorporated in entry 45(b) as one of the non-ferrous metals and their alloys as referred to therein excluding, however, the finished goods made therefrom. Significantly, aluminium sheets were withdrawn from entry 10 of the Fourth Schedule and were substituted by aluminium corrugated sheets. No specific entry for aluminium sheets was provided. Whereas entry 45(b) under the Second Schedule remained the same, aluminium plain sheets were added to aluminium corrugated sheets in entry 10 of the Fourth Schedule vide the notification dated February 15, 2002 "with effect from February 19, 2002.

14. In absence of any overwhelming evidence that the aluminium plane sheets could be decisively held to be a finished product emanating from the primary metal aluminium and the situs ascribed to it in successive notifications, it was held that during the relevant period, it ought to be regarded as included in entry 45(b) of the Second Schedule and taxable at the rate of four per cent.

15. Section 105(1) of the Act provides for; determination of any disputed questions, arising otherwise than in a proceeding pending before an appeal-late authority or an Appellate. Tribunal or a court, by the Commissioner, including, amongst others, as to whether or not any goods is taxable, and if taxable, the point at which" and the Schedule under which it is taxable and the rate thereof. The section provides that the Commissioner may, in his discretion, ask an officer appointed to" assist "him to make such enquiries as he considers necessary for the "decision of the question Section 105(2) provides that any registered dealer of any association of trade, commerce, industry may apply in the prescribed form for determination of such questions and the Commissioner shall, after giving the applicant a reasonable opportunity of being heard, "make an order determining such question.

16. Giving of reason is an indispensable sine qua non in quasi-judicial adjudications. We are in agreement with the learned senior counsel for the petitioners that the order dated November 21, 2008 cannot be treated to be a reasoned order. An omnibus, observation has been made that in a number of

cases aluminium rolled products had been held to be different from aluminium and, that it also did not come under extrusions. In *Steel Stores and Another Vs. Commissioner of Taxes and Others*, , this court had held that aluminium sheets, which are rolled products, in the absence of any evidence, cannot be said to a finished product. The contention of the petitioners that in the context of entries in entry 26 of the Second Schedule, the words "extrusions of those" would mean secondary products of aluminium like sheets, plates, foils, etc. had also not been gone into.

17. There is no manner of doubt that aluminium is a metal. Yet in entry 26, aluminium has been dubbed as a non-metal. So also copper and zinc. There is obviously a mistake.

18. Treating any taxable commodity for tax under a taxing statute as a residuary item has to be mandated by legislative intent as well as necessitated by the textual context. It is neither a matter of routine nor of course. Such a course is permissible only if the commodity or the item is not amenable to any other classification.

19. For the reasons above, we set aside and quash the order dated November 21, 2008 as well the assessment order and "the consequential notice of demand. Respondent No. 2 will now pass a reasoned order on the application of the petitioners after affording an opportunity of being heard to the petitioners. The entire exercise shall be completed within a. period of three months from today. Consequential actions, be taken on the outcome of such adjudication. The writ petitions are allowed to the extent indicated above. No costs.