

(2004) 10 AHC CK 0131
In the Allahabad High Court
Case No : C.M.W.P. No. 9634 of 1989

Indian Telephone Industry Ltd.

APPELLANT

Vs

Cess Appellate Committee, U.P. Pollution Control Board and
Another

RESPONDENT

Date of Decision : 05-10-2004

Acts Referred:

Water (Prevention and Control of Pollution) Cess Act, 1977 — Section 2, 3(2)

Citation : (2005) 1 AWC 280 : (2005) 1 JCR 63 : (2005) 1 UPLBEC 17

Hon'ble Judges : M. Katju, Acting C.J.; Sunil Ambwani, J; K.N. Ojha, J

Bench : Full Bench

Advocate : Ashok Mohiley, for the Appellant; H.N. Tripathy and SC, for the Respondent

Final Decision : Allowed

Judgement

M. Katju, A.C.J.

1. This Full Bench has been constituted by order of Hon'ble the Acting Chief Justice dated 22.9.2004, since the Division Bench hearing this petition did not agree with the view of another Division Bench in M/S. Agra Engineering Industries v. Union of India, writ petition No. 2289 of 1980, decided on 16.5.1996.

2. Heard learned Counsel for the parties.

3. The petitioner, Indian Telephone Industry, Allahabad is a Government of India undertaking with a factory at Naini, Allahabad. This factory is engaged in the manufacture of telephone and telecommunication instruments. The petitioner contended that the said factory does not come within the Schedule Industries mentioned in the Schedule of the Water (Prevention and Control Pollution) Cess Act, 1977 (hereinafter referred to as the Act).

4. Parliament has enacted the aforesaid Act to provide for the levy and collection

of Cess on water consumed by persons carrying on a schedule industry. Schedule I refers to various industries. Item No. 1 in Schedule I is "Ferrous metallurgical industry" and item No. 2 is "Non-ferrous metallurgical industry." The Cess Officer under the aforesaid Act made assessments vide different orders for the periods between April, 1982 to September, 1988 which were received by the petitioner. Photocopy of one of such assessment orders is Annexure-3 to the Writ Petition. Aggrieved the petitioner filed an appeal u/s 13, which has been rejected by the impugned order. Hence, this petition.

Under Section 3(2) of the Act Cess is payable by:

- (a) every person carrying on any specified industry;
- (b) every local authority.

The words "specified industry" mean any industry specified in Schedule I vide Section 2(c) of the Act. The question is therefore whether the petitioner industry is an industry specified under Schedule I. The Assessing Officer as well as the appellate authority has held that the petitioner industry is a non-ferrous metallurgical industry. The petitioner's contention is that its industry is telephone industry and is not non-ferrous metallurgical industry. True copy of one of the petitioner's appeal is Annexure-5 to the writ petition. The petitioner's contention is that the Act does not apply to the petitioner factory as it is not a specified industry under Schedule I of the Act and it is not a non-ferrous metallurgical industry. The petitioner has urged that it is not the use of raw material in the manufacturing process which determines the nature of the trade but the finished product produced by the Company which determines the nature of the trade. The petitioner has relied on the decision of this Court in *Imperial Electric Trading Co., Aligarh Vs. Industrial Tribunal (II), U.P., Allahabad and Others*, The petitioner submitted that it manufactures telephone equipments and does not extract metals from their ore and hence it cannot be galled a metallurgical industry.

5. A counter-affidavit has been filed and we have perused the same. It is alleged in paragraph 3 of the same that the petitioner comes under the purview of the 1977 Act and hence is liable to pay Cess. The respondents have relied on the Division Bench decision of this Court in *M/s. Agra Engineering Industries v. Union of India*, Civil Misc. Writ Petition No. 2289 of 1980, decided on 16.5.1996.

Webster's Third International Dictionary defines Metallurgy as follows:

"Metallurgy-A science and technology that deals with the extraction of metals from their ores, refining them and preparing them for use and includes processes (as allowing rolling and heat treating) and also the study of the structure and properties of metal."

Similarly Oxford English Dictionary defines Metallurgy as follows:

Metallurgy-The art of working metals comprising the separation of them from other matters in the ore, smelting and refining, often in a narrower sense the

process of extracting metals from their ores."

The New Encyclopedia Britanica 1.5th Edition Vol. II defines Metallurgy as follows:

"Metallurgy-Metallurgy is the science of extracting metals from their ores, refining, purifying and working them, mechanically or otherwise to adopt them to use. It is also concerned with the chemical and physical properties of metals, their atomic and crystalline structure, the, principles of combining them to form alloys, the means for improving or enhancing their properties for particular applications, and the relations between the properties, structures and uses. Further, it includes the thermal and mechanical processing of metals as materials of manufacture."

6. A perusal of the above definition indicates that it is really extracting metals from their ores which is called metallurgy. Making of telephone equipment by no stretch of imagination can be called metallurgy. The petitioner does not extract metal from ores, and merely because it uses metal in its manufacture of telephone and equipments this does not mean that the petitioner is engaged in metallurgy.

7. In M/s. Imperial Electric Trading Company v. Industrial Tribunal (supra), the learned Single Judge held ;

"It is not the raw-material used in the manufacturing process which determines the nature of the trade, but the finished goods produced by the Company that is determinative of the nature of the trade carried on by the company. To quote an instance, it is well known that sand is the raw-material used in the manufacture of glass and glasswares. But a concern engaged in quarrying sand, cannot be said to be carrying on the same trade as a concern engaged in the manufacture of glass and glasswares. Aluminium is a metal which is used for the manufacture of utensils and is also used in the manufacture of aeroplanes and other aeronautical parts. It would be absurd to say that the manufacture and sale of aluminium-ware is the same as the manufacture of aeroplanes and aeronautical parts."

8. We are in respectful agreement with the aforesaid observation of the learned Single Judge. However, a Division Bench of this Court in M/s. Agra Engineering Industries v. Union of India (supra) has taken a view that an industry which is engaged in the manufacture of fan blades from aluminium sheet has to be treated as non-ferrous metallurgical industry. With respect we disagree with this view. In our opinion it cannot be said that the production of fan blades from aluminium is metallurgical industry. Our view gets support from the decisions of the Supreme Court in Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. and Others, ; M/s. Saraswati Sugar Mills v. Haryana State Board JT 1991 (4) SC 220 : 1993 (66) FLR 313 (SO), and the decision of Patna High Court in Tata Engineering and Locomotive Co. Ltd., Jamshedpur Vs. State of Bihar and Others, etc.

9. The view, which we have taken, has also been taken by another Division Bench of this Court in *M/s. Geep Industrial Syndicate Ltd. Allahabad v. Cess Officer, U.P. Water Pollution Prevention and Control Board, Lucknow and Ors.*

10. In the aforesaid decision the facts were that the petitioner was a public Limited Company carrying on the business of manufacture and marketing of batteries (dry cells) and miniature lamps and torch. The question was whether the industry was covered under Schedule I of the Act. The Division Bench observed :

"The question is whether the petitioner's industry which processes the metal and by giving it shape manufactures torch cases is an industry covered under Schedule I of the Act. In the Schedule I electrical industry or light electrical industries do not find place. If the petitioner purchases metal from the market and gives only shape to it and makes flashlight cases, this processing does not change the nature of the metal but in common parlance it would be understood as torch or flashlight case and not metal. The Apex Court in *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others*, while considering entry No. 15 of Schedule I of the Act, has held that in manufacture some thing is brought into existence which is different from that which originally existed in the sense that the thing produced, by itself is a commercially different commodity whereas in the case of processing, it is not necessary to produce a commercially different article. If the end product produced by the industry is not mentioned in the Schedule I, then it will not be liable to Cess under the Act. In order to bring an industry within any of the entries in Schedule I, it has to be seen what is the end product produced by that industry. This decision has been followed by the Apex Court in *Britannia Industries Ltd. vs. T. N. Pollution Control Board*, (2000) 9 SCC 68 , wherein the appellant before the Apex Court manufactured biscuits, bread and cakes. It used wheat, flour, milk, powder, sugar and vanaspati. The appellant's industry was assessed to Cess under the entry 15 of Schedule 1. The authorities under the Act held that the appellant used ingredients wheat, sugar and vanaspati which were vegetables while milk powder was an animal produced and by mixing and processing, these biscuits etc. were manufactured. The Apex Court held that wheat flour which was used by the appellant in the manufacture of biscuits, bread and cakes is not a vegetable product. Wheat in common parlance is not understood to be a vegetable, Milk powder can be said to be the result of processing of an animal product, namely, milk, but it cannot be said to be an animal product. They are utilised as ingredients for manufacturing altogether a different product, biscuit, bread and cakes, Therefore, it was held that the industry of the appellant was not covered by Schedule I of the Act.

On the basis of the aforesaid decisions of the Apex Court, it is clear that it is not the raw material or the ingredients used by an industry in the manufacturing process, but it is the final product that is relevant for the purpose of tax under the Act. In common parlance torch is considered to be a source of light and not a metal. The petitioner is producing torches, batteries (dry cells) and miniature

lamps which come under the electrical or light electrical industry but electrical industry does not find mention in Schedule I. Since the electrical industry has not been mentioned in Schedule I the petitioner's industry is not covered by the Act and is not liable to pay any Cess on the water consumed by it.

In view of the aforesaid decisions of the Apex Court, we find that the Division Bench decision of this Court in *Agra Engineering Industry (supra)* is no longer a good law. The petitioner also manufactures batteries (dry cells) by using chemicals as raw material but entirely a different commodity is produced which in common parlance is known as battery and not chemical, therefore, it is not covered in Schedule I of the Act. We hold that it is not the raw material or ingredients used by the industry that would determine the nature of industry. It is the end product as understood in common parlance that would be the decisive factor in coming to the conclusion about the nature of industry. The products manufactured by the petitioner industry would fall in light electrical industry and would not fall in Schedule I of the Act. The petitioner is not liable to pay Cess on the water consumed by it. The petitioner had deposited Cess under the interim order dated 4.5.1982, therefore, he is entitled for refund."

11. We fully agree with the aforesaid Division Bench decision and we disagree with the view taken in *M/s. Agra Engineering Industries v. Union of India*.

12. In view of the above the petition is allowed and the impugned order of the Appellate Committee dated 18.2.1989 Annexure-10 to the writ petition as well as the assessment orders under the Act are quashed. Respondents are directed not to demand water Cess from the petitioner. Any amount paid/deposited by the petitioner towards water Cess shall be refunded to it within two months from today with 10% per annum interest from the date of payment to the date of refund.