

(2000) 03 AHC CK 0026

In the Allahabad High Court

Case No : Trade Tax Revision No's. 478 and 479 of 1999

I.T.C. Agro-Tech Limited

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 03-03-2000

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 2, 22

Citation : (2000) 120 STC 402

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Advocate : Bharat Ji Agrawal and Piyush Agrawal, for the Appellant; S.P. Kesarvani, for the Respondent

Final Decision : Allowed

Judgement

P.K. Jain, J.—The revisionist is a public limited company engaged in the business of manufacture and sale of refined edible oils manufactured from sunflower and mustard. It has its registered office in Secunderabad (State of Andhra Pradesh) and various depots in different States including the State of Uttar Pradesh, The goods are received in the depots and sold through such depots.

2. In the assessment year 1994-95 ex parte assessment order was framed and tax liability was determined at the rate of 10 per cent. The assessment proceedings were reopened u/s 30 of the U.P. Trade Tax Act, 1948 (hereinafter called "the Act") and books of accounts were accepted, tax liability was imposed at the rate of 2.5 per cent. Similarly assessment for the assessment year 1995-96 was completed and tax liability was imposed at the rate of 2.5 per cent. However, the assessing authority later on felt that rate of tax was wrongly applied to the turnover of the assessee in both the assessment years and, therefore, issued notices u/s 22 for rectification of the error. The notices were contested by the dealer mainly on the ground that the oils sold by the dealer are covered by entry 31, clause (a) of the Notification No. ST-3366 dated September 28, 1993, on which the rate of tax was 2.5 per cent inclusive of additional tax. It

was also the contention of the assessee that rectification u/s 22 was not permissible merely on the basis of change of opinion. The assessing authority placing reliance upon the decision of this Court as affirmed by the honourable Supreme Court in B.P. Oil Mills Ltd., Agra v. Sales Tax Tribunal [1998] 111 STC 188 ; 1998 UPTC 1020 levied the tax at the rate of 10 per cent.

3. First appeals and second appeals filed by the dealer were dismissed hence, these two revisions:

4. Sri Bharat Ji Agrawal, learned Senior Counsel, assisted by Sri Piyush Agrawal, learned counsel appearing for the revisionist and Sri S.P. Kesarvani, learned Standing Counsel appearing for the revenue have been heard.

5. Submission of Sri Agrawal is that this was not a case of mistake apparent on the face of record and the question whether the goods sold by the dealer were covered by clause (a) or clause (b) of entry 31 of the notification was a contentious question which required application of mind and decision of the question whether refined sunflower oil and refined mustard oil were not covered by the entry of mustard oil and sunflower oil. His next submission is that even after refining mustard oil and sunflower oil do not lose their identity as such and unless such oils are excluded from clause (a) of entry 31 the same cannot be taxed under clause (b) of entry 31. His submission is that the decision in M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others, has been wrongly interpreted and applied by the authorities to the case of the revisionist. Sri S.P. Kesarvani has, however, contended that the reasoning in the judgment of the Tribunal shows that the dealer had accepted before the Tribunal that the present case fell within the purview of Section 22. It is next submitted that in M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others, it was held that the process of refining amounts to manufacturing and the commodity produced becomes a different commercial commodity, therefore, it would not be covered by entry 31(a) and it would be covered by entry 31(b) which provides for taxability of other kinds of oils which are not covered by entry 31(a) of the notification. It is submitted that the authorities below have rightly applied the decision in the case of M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others,

Before the rival submissions are considered in the light of the material on record it would be proper to reproduce entry 31 of Notification No. ST-2-3366/XI-9(186)-92 which came into effect from April 1, 1993.

AMENDMENT

In the list to the aforesaid notification No. 31, the following serial column-wise shall be substituted, namely:

Sl. No.

Description of goods

Point of tax

Rate of tax

1

2

3

4

31

(a)

Mustard oil, groundnut oil, linseed oil, til oil, soyabean oil, sunflower oil, rice bran oil, mahua seed oil, niger seed oil, mango seed oil, watermelon oil, maize oil, cotton seed oil, safflower oil, kusum oil, tumba seed oil, neem seed oil, rapeseed oil, tobacco seed oil, karanja oil, castor seed oil and palsa oil.

M or I

2 per cent

(b)

Oils of all other kinds, including coconut oil and sandalwood oil and oils which are not covered by any other entry in this list or by any other notification issued under the Act.

M or I

8 per cent

It would further be relevant to state that entry 31 was further amended by notification dated May 15, 1995 being Notification No. TT-2-1085/XI-7(42)/86-U.P. which is also reproduced as below :

Sl. No.

Description of goods

Point of tax

Rate of tax

1

2

3

4

31

(a)

Oils of all kinds including demetholised oil, peppermint oil and unperfumed or unscented oil but excluding coconut oil, refined oil and such other oils as are covered by any other entry in this list or by any other notification issued under the Act.

M or I

2 per cent

(b)

Coconut oil

M or I

5 per cent

(c)

Refined oil

M or I

6 per cent

Then again the said entry was amended by Notification dated September 14, 1995 being Notification No. TT-2-2297/II-7(42)/86-U.P. which reads as follows :

la"kks/ku

mi;qZDr foKfIr dh vuqlwph esa ?e la[;k 31 dh izfof"V ds LFkku ij fuEufyf[kr izfof"V LrEHkokj j[k nh tk;sxh] vFkkZr&

?la? eky dk fooj.k dj LFky dj dh nj

31 ?d? ljlks dk rsy] ewaxQyh dk rsy] vylk dk rsy] lks;kchu dk rsy] o lwjteq[kh dk rsy] pkoy dh Hkwlh dk rsy] egqvk dh xqByh dk rsy] "kky ?"kk[k? dk cht dk rsy] ukbxj cht dk rsy] vke dh xqByh dk rsy] rjcqt dk rsy] eDdk dk rsy] dikl ds cht dk rsy] ISQyksoj rsy] dqlqe dk rsy] rqEck ds cht dk rsy] fuckSyh dk rsy] jsihlhM rsy] rEckdw ds cht dk rsy] dqjtk rsy] vj.Mh ds cht dk rsy] vkSj iyslk rsy] fdUrq buesa ifj"kkf/kr [kk] rsy "kkfey ugha gSA fu?;k?vk? 2 izfr"kr

?[k? ifj"kkf/kr [kk] rsy fu?;k?vk? 6 izfr"kr

?x? leLr vU; izdkj ds rsy ftlds vUrxZr ukfj;y dk rsy Hkh gS tks bl lwph dh fdlh vU; izfo"V esa ;k ,sDV ds v/khu tkjh dh xbZ fdlh vU; foKfIr ds vUrxZr u vkrk gksA fu?;k?vk? 8 izfr"kr

7. There is no dispute that the refined oil which the revisionist has been selling is manufactured from mustard oil and sunflower oil. It is also not disputed that the entire manufacturing is done before the oil is brought to the godowns of the dealer in the State of Uttar Pradesh. Mustard oil, sun-flower oil and for that matter all those oils which are described in entry 31(a) are taxable at the rate of

2 per cent and oils of all other kinds including coconut oil, sandalwood oil and which are not covered by any other entry of the list or by any other notification issued under the Act are taxable at the rate of 8 per cent. There cannot be dispute that the refined oil is a different commercial commodity--it can be produced from any oil which may be mustard oil, groundnut oil, palm oil, cotton seed oil or any other type of oil. The question is whether after refining the oil loses its character as mustard oil or sunflower oil. If it loses its character as mustard oil or sunflower oil, it would certainly be an oil not covered by any other entry in the list and it would be covered by clause (b) of entry 31. However, if it is found that after refining even though mustard oil or sunflower oil becomes a distinct commercial commodity but it does not lose its basic character of mustard oil or sunflower oil then it will remain to be mustard oil and sunflower oil for taxable purposes and would not be an oil "not covered by any other entry in the list". In the assessment, the assessing authority has categorically held that in the assessment year under consideration, the dealer had imported refined sunflower and mustard oils through various form 31. In Section 22 proceedings, the assessing authority, however, took the view that in Notification No. 3366 dated September 28, 1993 the oils were put in two categories and the refined oil was included in the second category, viz., "oils of other kinds". The assessee's contention that the decision in *Prag Ice and Oil Mills, Aligarh v. Commissioner of Sales Tax 1991 STD (U.P. Tribunal)* page 171 was not accepted on ground that the said decision was not applicable to the facts of the present case in view of subsequent decision of the High Court in *B.P. Oil Mills Limited, Agra v. Sales Tax Tribunal [1998] 111 STC 188 ; 1994 UPTC 1111*. The assessing authority was also of the view that it was not a case of change of opinion and it was simply a case of mistake in application of the entry, therefore, the mistake can be corrected u/s 22. The first appellate authority as well as the Tribunal affirmed the view taken by the assessing authority.

8. Submission of Sri Bharat Ji Agrawal is that the decision of honourable Supreme Court in *Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer, Kurnool [1960] 11 STC 827* and the division Bench decision of this Court in *Commissioner of Sales Tax, U.P., Lucknow v. Prag Ice and Oil Mills [1975] 35 STC 520* as affirmed by honourable Supreme Court vide its decision in *Commissioner of Sales Tax, U.P. v. Prag Ice and Oil Mills [1991] 80 STC 403* are directly on the controversy in question whereas the decision in the case of *B.P. Oil Mills Ltd., Agra v. Sales Tax Tribunal, Lucknow [1998] 111 STC 188 (All.)*; *1994 UPTC 1111* as affirmed by the Supreme Court in *M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others*, are on different question and do not relate to the question whether the refined oil would be covered by clause (a) or clause (b) of the entry 31 and, therefore, the authorities below have wrongly relied upon the decisions in the said cases. The facts in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, were that there was a provision in the Madras General Sales Tax Act that where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (1) of

the proviso to Section 3(5) of the said Act, he shall not be taxed again in respect of any sale of such goods effected by him. Rule 5(1) framed under the said provision of law provided that the tax shall be levied on the net turnover of a dealer.

9. Rule 18(1) provided that :

"Any dealer who manufactures groundnut oil and cake from groundnut and/or kernel purchased by him may, on application to the assessing authority having jurisdiction over the area in which he carries on his business, be registered as a manufacturer of groundnut oil and cake."

Rule 18(2) provided that :

"Every such registered manufacturer of groundnut oil will be entitled to a deduction under clause (k) of sub-rule (1) of Rule 5 equal to the value of the groundnut and/or kernel, purchased by him and converted into oil and cake if he has paid the tax to the State on such purchases."

10. The appellant being registered manufacturer of groundnut oil claimed deduction in the turnover equivalent to the value of purchases of groundnut but the taxing authority made distinction between raw, refined and hydrogenated oil and it granted deduction only in respect of purchase price of the groundnuts attributable to raw groundnut oil. It held that the appellant was not entitled to the deduction claimed in respect of the refined and hydrogenated oil for the reason that it was only unrefined or unprocessed groundnut oil that was connoted by the expression "groundnut oil" in Rule 5(l)(k) read with Rule 18(1) and (2) of the Madras General Sales Tax (Turnover and Assessment) Rules. The dealer having lost in appeal before the Sales Tax Appellate Tribunal approached the High Court. The High Court allowed deductions in respect of refined groundnut oil but it disallowed claim of the appellant to the deduction in regard to the sales turnover of hydrogenated oil. The High Court took the view that the exemption or deduction from the sale turnover under Rule 18(2), is on its terms applicable only to the sale of the oil in the form in which it is when extracted out of the kernal. When raw groundnut oil is converted into refined oil, there is no doubt processing but this consists merely in removing from raw groundnut oil that constituent part of the raw oil which is not really oil. The elements removed in the refining process consists of free fatty acids, phosphotides and unsaponifiable matter. It took the view that after removal of this non-oleic matter therefore the oil continues to be groundnut oil and nothing more. In case of hydrogenated oil which is prepared from refined oil by the process of passing hydrogen into heated oil in the presence of a catalyst (usually finely powdered nickel), two atoms of hydrogen are absorbed. A portion of the oleic acid which formed a good part of the content of the groundnut oil in its raw state is converted by the absorption of the hydrogen atoms into stearic acid and it is this which gives the characteristic appearance as well as the semi solid condition which it attains..... Though it continues to be the same edible fat that it was

before the hardening, and its nutritional properties continue to be the same, it has acquired new properties in that the tendency to rancidity is greatly removed, is easier to keep and to transport. The High Court, therefore, held that the hydrogenated oil (or vanaspati) ceased to be groundnut oil by reason of the chemical changes. An argument was raised before the Supreme Court that the hydrogenated oil was no less groundnut oil than either refined or even unrefined oil. The fact that the quality of the oil had been improved does not negative its continuing to be oil and the materials before the departmental authorities and the court established that it continued to be oil and was nothing more. For the revenue, the argument was that the exemption applied only to the sale of the oil as it emerged from the presser and that any processing of the oil including refining, in order to remove even the impurities and free fatty acids took it out of the category of groundnut oil as used in the rule. The Supreme Court on consideration of the arguments advanced on both the sides held as follows :

"Nor is the learned Advocate-General well-founded in his submission that the processing of the oil in order to render it more acceptable to the customer by improving its quality would render the oil a commodity other than "groundnut oil" within the meaning of the rule. For instance, if the oil as extracted were kept still in a vessel for a period of time, the sediment normally present in the oil would settle at the bottom leaving a clear liquid to be drawn out. The learned Advocate-General cannot go so far as to say, that if this physical process was gone through, the oil that was decanted from the sediment, which it contained when it issues out of the expresser, ceased to be "groundnut oil" for the purposes of the rule. If the removal of impurities by a process of sedimentation does not render groundnut oil any the less so, it follows that even the process of refining, by the application of chemical methods for removing impurities in the oil, would not detract from the resulting oil being "groundnut oil" for the purpose of the rule. It may be mentioned that processes have been discovered by which even on extraction from the oil mill, the oil issues without any trace of free fatty acids. It could hardly be contended that if such processes were adopted what comes out of the expresser is not groundnut oil. The submission of the learned Advocate-General based on a contention that the Tribunal and the learned Judges of the High Court erred in holding that even refined groundnut oil was "groundnut oil" for the purpose of the rule, must be rejected". It was further held by the honourable Court that, "the benefit of the deduction from the turnover cannot be denied, unless the hydrogenated groundnut oil has ceased to be "groundnut oil". To be groundnut oil, two conditions have to be satisfied. The oil in question must be from groundnut and secondly the commodity must be "oil"". It was held that, "in its essential nature therefore no change has occurred and it remains an oil--a glyceride of fatty acids-- that it was when it issued out of the press".

The honourable Supreme Court also observed that :

"But neither mere absorption of other matter, nor inter-molecular changes

necessarily affect the identity of a substance as ordinarily understood. Thus for instance there are absorptions of matter and inter-molecular changes which deteriorate the quality or utility of the oil and it might be interesting to see if such additions and alterations could be taken to render it any the less "oil". Groundnut oil when it issues out of the expresser normally contains a large proportion of unsaturated fatty acids--oleic and linoleic--which with other fatty acids which are saturated are in combination with glycerine to form the glyceride which is oil. The unsaturated fatty acids are unstable, i.e., they are subject to oxidative changes. When raw oil is exposed to air particularly if humid and warm, i.e., in a climate such as obtains in Madras, oxygen from the atmosphere is gradually absorbed by the unsaturated acid to form an unstable peroxide (in other words the change involves the addition of two atoms of oxygen) which in its turn decomposes breaking up into aldehydes. It is this oxidative change and particularly the conversion into aldehydes that is believed to be responsible for the sharp unpleasant odour, and the characteristic taste of rancid oil. If nothing were done to retard the process the rancidity may increase to such extent as to render it unfit for human consumption. The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil".

The Supreme Court therefore held that

"both the refined oil and hydrogenated oil after processing the groundnut oil remain to be groundnut oil and, therefore, the dealer was entitled to benefit of Rule 18(2) and to consequent deduction".

11. This decision of the Supreme Court was followed by a division Bench of this Court in Commissioner of Sales Tax v. Prag Ice and Oil Mills [1975] 35 STC 520. Referring to the observations made by the Supreme Court in Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer [1960] 11 STC 827 (SC), the High Court held that :

"It may be remembered that the acids and chemicals that are added to the groundnut oil in order to prepare vegetable oil are added to it with a view to refine the oil. It becomes clearer and more acceptable as an edible oil; but the process of refining does not change the nature and character of the commodity. It remains groundnut oil."

12. Aggrieved by the decision of the division Bench in Commissioner of Sales Tax Vs. Prag Ice and Oil Mills, , the Commissioner of Sales Tax approached the Supreme Court by filing special leave petition. The Supreme Court dismissed the appeal filed by the Revenue and held that :

"The High Court following the judgment of this Court in Tungabhadra Industries Ltd. v. Commercial Tax Officer [1960] 11 STC 827, came to the conclusion that

the residue left, after going through the process of acids and chemicals, continues and remains to be the groundnut oil and is taxable at one per cent. We agree with the reasoning and the conclusions reached by the High Court."

Thus, the view taken by the Supreme Court in Tungabhadra Industries case [1960] 11 STC 827, as well as Prag Ice and Oil Mills [1991] 80 STC 403, was that refining or hydrogenation of the groundnut oil does not change the nature of the oil and only impurities are removed by refining or hydrogenation and in that process even if some other matter is absorbed that does not affect the identity of the substance as it is ordinarily understood. The groundnut oil will remain to be the groundnut oil. The case of the present dealer also the refining is done by chemical processes. The ordinary mustard oil and sunflower oil are treated with alkali to remove the acid present therein. The acid free oil so obtained are then bleached with absorbent cotton and/or activated carbon and are deodorized with steam. The ordinary oil is thus made acid-free, odour-free and colour-free by subjecting them to the aforesaid chemical processes which are transformed into refined oil.

13. As already pointed out above, the authorities below did not accept the claim of the revisionist in view of the decision of this Court in B.P. Oil Mills Ltd. [1998] 111 STC 188 ; 1994 UPTC 1111 which was affirmed by the honourable Supreme Court in B.P. Oil Mills Ltd. v. Sales Tax Tribunal [1998] 111 STC 188 ; 1998 UPTC 1020. It may be pointed out that the authorities below have misapplied the decision of this Court in B.P. Oil Mills Ltd. [1998] 111 STC 188 ; 1994 UPTC 1111 as affirmed by the honourable Supreme Court [1998] 111 STC 188 ; 1998 UPTC 1020 to the facts of the present case. In B.P. Oil Mills case entirely a different question was under consideration. The controversy was not whether the refined oil produced by the dealer was taxable under clause (a) or clause (b) of entry 31. The facts were that B.P. Oil Mills Limited purchased raw oil of different varieties such as linseed oil, coconut oil, mustard oil, soyabean oil, etc. These oils were purchased by the petitioner either on payment of sales tax in U.P. or they were manufactured by the petitioner itself. After refining the oil, the same were sold. The tax liability on the sale of oil was either by manufacturer or by importer. The dealer's claim was that as they purchased the oil after payment of tax, it cannot be re-taxed when it was sold after refining. The view taken by the tax authorities was that refining of the oil was processing of the oil which amounted to manufacture within the definition of the term as provided in clause (e-1) of Section 2 of the U.P. Sales Tax Act. When the matter went before the High Court it observed that dispute centres around the question as to whether the process of refining the ordinary oils amounts to manufacture for the purposes of the Act and the High Court held that the activity of refining amounts to manufacture. Reference was made to the division Bench decision in Commissioner of Sales Tax, U.P., Lucknow v. Kaderul Sehat Dawakhana, Sambhal, Muradabad and The Commissioner of Sales Tax Vs. Kaderul Sehat Dawakhana and Another, The division Bench in those cases has observed that :

"It is also evident that the expression "manufacture" covers within its sweep not only such activities carried on by a person which bring into existence a new commercial commodity different from the articles on which that activity was carried on but also such activities which do not necessarily result in bringing into existence an article different from the article on which such activity was carried on, for example, where an activity by way of ornamenting of goods is carried on, the ornamented goods may not be goods commercially different from the goods which had been subject to ornamentation. But then a manufacturing activity, as defined by Section 2(e-1) having been carried on in respect of goods originally produced the ornamented goods will have to be treated as a goods which have again been manufactured. Likewise where a goods known to the trade has been prepared or produced (i.e., brought into existence) but then certain changes are effected in it to adapt the same for a particular purpose it may despite some changes continue to be the same commercial commodity. But then if it has been so adapted for a particular purpose it has been subjected to a manufacturing process and the goods so adapted would again be a goods which for the purpose of the Act has been manufactured afresh."

It was also observed that,

"It is true that where an activity carried on is such which has the effect of bringing into existence a new commercial commodity it would fall within the ambit of the expression "manufacture" as used in the Act. But then, the way in which the expression has been defined in the Act, it would also cover within its sweep such activities where despite those activities the commercial identity of the concerned goods does not undergo a change. Legislative intendment clearly seems to be that whenever the goods are produced or made or subjected to process of the nature specified in Section 2(e-1) of the Act, they are to be treated as goods that have been manufactured."

14. In the instant case even though the oil has undergone the process of manufacturing, yet as held by the Supreme Court in *Tungabhadra Industries Ltd.* case [1960] 11 STC 827, the basic nature of the oil will remain to be the same, i.e., if sunflower oil and mustard oil is refined, it will continue to be mustard oil and sunflower oil. In *B.P. Oil Mills Ltd.* [1998] 111 STC 188, the Supreme Court had observed that :

".....where any commodity is subjected to a process or treatment with a view to its development or preparation for the market it would amount to processing. The nature and extent of processing may vary from case to case ; in one case the processing may be slight and in another it may be extensive; but in each process suffered, the commodity would experience a change. This Court further observed that whatever be the means employed for carrying out the processing operation, it is the effect of the operation on the commodity that is material for the purpose of determining whether the operation constitutes processing. Viewed in the context of the above meaning given to the word "processing" by this Court there cannot be any manner of doubt that the nature

and extent of the process to which the crude oil is subjected to to make it refined oil brings the latter within the meaning of the expression "goods manufactured" in Section 3(3)(b)(iii) of the Act so as to make the appellant liable to pay tax on its sale."

15. Referring to the decision in *Tungabhadra Industries case* [1960] 11 STC 827, the honourable Supreme Court observed that :

"The sole question that came up for consideration was whether consequent upon its conversion to hydrogenated oil by improving its quality groundnut oil lost its identity. In answering this question in the negative this Court held that refined groundnut oil (hydrogenated oil) continues to be groundnut oil notwithstanding that such oil does not possess the characteristic colour, or taste, odour, etc., of the raw groundnut oil. Indeed, the controversy in that case centred round the interpretation of the expression "groundnut oil" appearing in the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. Neither the expression "manufacture" nor the expression "processing" directly came up for interpretation in that case."

16. Thus the questions involved in the case of *M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others*, was quite different and distinct from the question involved in the present case. As already pointed out above, clause (b) of entry No. 31 of the notification provided exclusionary clause by mentioning "the oils which were not covered by any other entry". Once it is found that after refinement any kind of oil including mustard oil, sunflower oil for that matter remains to be the mustard oil or sunflower oil as the case may be then the liability for tax on the sale of such oil shall be covered by entry 31(a) of the notification. Entry 31(b) excludes those oils from its preview which are covered by any other entry. Therefore, the authorities below have wrongly taken the view that refined mustard oil and refined sunflower oil being a distinct commercial commodity were covered by clause (b) of entry 31 of the notification being covered by the expression "oils of all other kinds". They failed to take into consideration that the expression "oils of all other kinds" is qualified by the words "which are not covered by any other entry in this list". The decision in *M/s. B.P. Oil Mills Ltd. Vs. Sales Tax Tribunal and Others*, was wrongly applied to the facts of the present case. It may further be noticed that the Legislature amended the entry 31 of the notification by subsequent notification dated May 15, 1995 and September 14, 1995 and both the notifications provided a separate rate of tax for refined oil which was at the rate of 6 per cent. The subsequent amendment clearly disclosed that when the Legislature intended to tax the refined oil as a distinct commodity, it provided the exclusion clause in sub-clause (a) of entry 31 by mentioning but..... excluding refined oil in amendment dated May 15, 1995 and fdUrq buesa ifj"kksf/kr [kk] rsy "kkfey ugha gSA in clause (a) of amended entry 31 in notification dated September 14, 1995. The view taken by the authorities below, therefore, cannot be accepted.

17. The second question that comes up for decision is that in the facts and

circumstances of the present case, rectification u/s 22 was not permissible. Submission of Sri Bharat Ji Agrawal is that this was the case falling within the purview of Section 21 of the Act. Some times the scope of sections 21 and 22 may be overlapping but it is well-settled that where a mistake which is apparent on record may be rectified by applying the provisions of Section 22. However, when there are disputed question of fact and disputed question as to under which entry of a notification the particular item or goods is liable to tax, such controversy cannot be said to be a mistake apparent on record. The authorities below have wrongly held that the case was covered by the provisions of Section 22.

18. There are two division Bench decisions of this Court which may be referred in this regard. The first one is and the other is *Kakkar General Stores v. State of Uttar Pradesh* 1997 UPTC 56 . In the first case of *Concrete Spun Pipe Works Vs. Sales Tax Officer*, the facts were that the Sales Tax Officer making the assessment applied the rate of tax of 2 per cent to the turnover for the purposes of determining the tax liability. Subsequently in his view the spun pipes sold by the petitioner fell under the description of sanitary fittings and were liable to tax at the rate of 7 per cent. He proposed to rectify the assessment. Challenge to the jurisdiction of the Sales Tax Officer u/s 22 was made. It was held that "the jurisdiction of the assessing authority u/s 22 is confined to the rectification of a mistake apparent on the face of the record of the assessment. It must be a mistake and it must be apparent on the face of the record. Clearly Section 22 does not envisage rectification of an error of judgment.....It must be a mistake which will appear upon a glance at the record and not a mistake which emerges after a prolonged debate on the merits of the question". The High Court quashed the notice u/s 22 of the Act. In *Kakkar General Stores* case 1997 UPTC 56, the question arose whether the Tortoise brand mosquito coils could be taxed as unclassified item or as insecticides or pesticide. Originally the mosquito coils were treated as insecticides or pesticides but subsequently in the proceedings u/s 22 the tax authorities attempted to treat it as "agarbatti" taxable at the rate of 6.8 per cent. The High Court held that the controversy raised was whether such a case would fall u/s 22 of the Act or not. It was held that,

"Section 22 empowers the authority for the rectification of the mistake which is a mistake apparent on the record. The power is limited and is not wide as u/s 21 where the assessing authority is empowered to issue notice when he has reason to believe that the whole or any part of the turnover of the dealer has escaped assessment to tax or has been underassessed or has been assessed to tax at a rate lower than that at which it is assessable under the Act". The court, therefore, allowed the petition and quashed the notice u/s 22. In the instant case also a debatable question arose before the assessing authority if the refined oil was covered by entry 31(a) or 31(b) of the notification of 1993. Such question was a debatable question and, therefore, could not be said to be a mistake apparent on record. The view taken by the authorities below was not correct. For this reason also, the impugned order passed by the authorities below cannot be

sustained.

19. In view of the discussions made above, both the revisions are allowed. Order of the assessing authority as affirmed by the first appellate authority as well as the Tribunal are set aside and those passed in the original assessment order are restored.