
(1998) 10 AP CK 0022

In the Andhra Pradesh High Court

Case No : TRC No. 23 of 1994 and batch

ITC Bhadrachalam Paperboards Limited Secunderabad

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 06-10-1998

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 6
Central Sales Tax Act, 1956 — Section 14

Citation : (1998) 6 ALD 443

Hon'ble Judges : Y.V. Narayana, J; Motilal B. Naik, J

Bench : Division Bench

Advocate : Mr. K. Srinivasa Murthy, for the Appellant; Spl. Government Pleader for Commercial Taxes, for the Respondent

Judgement

Motilal B. Naik, J.—All these six Tax Revision Cases arise out of the common order passed by the Sales Tax Appellate Tribunal, Hyderabad, dated 18-10-1993. As the petitioner-company is same and the common questions of law to be adjudicated are also same in all these revisions, they are heard together and are being disposed of by this common judgment.

2. TRC No.23 of 1994 is filed against TA No.192 of 1992, TRC No.24 of 1994 is filed against TA No.194 of 1992, TRC No.25 of 1994 is filed against TA No.325 of 1992., TRC No.26 of 1994 is filed against TA No.322 of 1992, TRC No.27 of 1994 is filed against TA No.191 of 1992 and TRC No.30 of 1994 is filed against TA No.321 of 1992.

3. The petitioner-Company has raised the following common questions of law for a decision by this Court, viz.,

(1) Whether coal and coal-ash (cinder) are to be treated as the same commodity or as different commodities for the purpose of taxation under the APGST Act, 1957?

(2) Whether coal-ash is a product of the petitioner's industrial unit and whether

the sale of "coal-ash" by the petitioner is eligible for exemption under G.O. Ms. No.606, dated 9-4-1981?

(3) Whether the Sales Tax Appellate Tribunal erred in law stating that the judgment of the Supreme Court in *India Carbon Ltd. v. Superintendent of Taxes. Gowhati*, (1971) 28-STC-603 is not applicable to the facts of the present case?

(4) Whether coal-ash is taxable under entry (1) of the Third Schedule to the Andhra Pradesh General Sales Tax Act, 1957 or under the Seventh Schedule?

Facts in brief are as under:

The petitioner-Company, M/s. Bhadrachalam Paper Boards Limited is engaged in manufacturing paper, paper boards etc. It had purchased eucalyptus wood and casurina wood from various unregistered dealers during the relevant assessment years and used the same for manufacturing paper, paper boards, etc. It had also sold coal-ash (cinder) which was obtained after the coal was burnt when used as fuel for the purpose of manufacturing the paper board etc.

4. The assessing authority during the assessment years 1982-83, 1983-84, 1984-85 and 1986-87 granted exemption on the turnovers relating to sale of coal-ash on the ground that coal and coal-ash are one and the same commodity and the sale of coal-ash by the petitioner-Company is only a second sale. The Deputy Commissioner (CT), Warangal, however, revised the orders of the assessing authority and withdrew the exemption granted by the assessing authority by holding that coal-ash is commercially a different commodity from that of coal and as such the sale of coal-ash amounts to first sale in the hands of the petitioner-Company and is liable to be taxed.

5. As against the said order of the Deputy Commissioner, Warangal, the petitioner-Company has preferred TA Nos.191, 195, 193, 192 and 194 of 1992 respectively, inter-alia, contending that coal and coal-ash are one and the same commodity and are not two different commodities. It was further contended that the petitioner-Company had purchased coal from registered dealers and sold the coal-ash obtained from such coal which was burnt as fuel and as such, the sale of coal-ash amounts to second sale in its hands eligible for tax exemption. In TA Nos.191, 195 and 193 of 1992 which relate to the assessment years 1982-83, 1983-84 and 1984-85 respectively, the petitioner-Company has further contended that the sale of coal-ash is eligible for exemption under G.O. Ms.No.606, Revenue, dated 9-4-1981. On an elaborate consideration of the matter, the Sales Tax Appellate Tribunal, Hyderabad, by its order dated 18-10-1993 held as under:

(1) Coal and coal-ash are two different commodities and as such, the contention that sale of coal-ash is not liable to be taxed being second sale is rejected.

(2) Coal-ash cannot be considered as a product of the petitioner's industrial unit in terms of G.O. Ms. No.606, Revenue, dated 9-4-1981 and therefore, the petitioner-Company is not entitled for tax exemption under the said G.O.

6. Assailing the above findings of the Sales tax Appellate Tribunal, Hyderabad, the petitioner-Company has filed these Tax Revision Cases raising the four questions of law for a decision from this Court.

7. On behalf of the petitioner-Company, Sri K. Srinivasa Murthy, learned senior Counsel submitted that the petitioner-Company is engaged in manufacture of paper, paper-boards etc., and it had purchased eucalyptus and casurina wood for manufacturing paper, paper boards etc., in its factory. The petitioner-Company also purchases coal and uses the same for generating steam which is used in the manufacture of paper and paper-board. Coal is burnt in the boilers and the coal-ash (cinder) which is unburnt residual coal coming out of the boilers, is disposed off by the Company. Counsel contended that the coal which was purchased by the petitioner-Company and the coal-ash which is sold by it are to be construed as one and the same commercial commodity and as such the sale of coal-ash in the hands of the petitioner-Company is only a second sale. He further contended that the company also purchased eucalyptus and casurina wood pieces for the purpose of pulping the same for manufacture of its products. According to the Counsel, the Company treated such purchases as "firewood" and discharged tax accordingly. While laying emphasis on the contention that coal and coal-ash are one and the same commodity, Counsel has drawn our attention to the meaning given to the word "coal" in Blackies Concise Dictionary, New Edition, Page-134, wherein the word "coal" is defined as a piece of wood or other combustible substance burning or charred; charcoal; a cinder, usually and sold black substance found in the earth, largely employed as fuel. According to the learned Counsel, even as per the Oxford English Dictionary, at page-330 and 331, the word "coal" is defined as a piece of carbon glowing without a flame, a piece of burnt wood that is capable of combustion without flame, cinder, ashes. Learned Counsel has nextly contended that coal and coal-ash (cinder) are nothing but coal. According to the learned Counsel, coal includes coke in all its forms and therefore, the residue left after burning of coal is coal-ash which is nothing but coal, even though it cannot be used as fuel.

8. It is nextly contended that the sale of coal-ash is exempted from payment of tax in terms of G.O. Ms. No.606, dated 9-4-1981 for a period of five years from the date of commencement of production by an industrial unit and the petitioner-Company is entitled for such benefit provided in the said G.O. Learned Counsel has further contended that eucalyptus and casurina wood purchased from the unregistered dealers by the petitioner-Company has been treated by the assessing authority during the relevant assessment years as unclassified goods and subjected the same to tax at the rate applicable to unclassified goods, which according to the learned Counsel, is impermissible. Learned Counsel contended that the wood purchased by the petitioner-Company was used as raw-material in the manufacturing process and it is liable to be taxed only under entry 64 of First Schedule of the APGST Act, 1957 at 3% and such wood cannot be treated as unclassified goods. In support of his contentions, learned Counsel has also taken us to the following decisions reported in *India Carbon Limited v. Superintendent*

of Taxes, Gauhati, 28 STC 603, Binod Mills Company Limited, Ujjain v. Commissioner of Sales Tax, 29 STC 413, P. Chitta Reddi v. the State of Andhra Pradesh, 24, STC 317, State of Andhra Pradesh v. Narsing Industries, 101 STC 294, State of Bihar and others v. Universal Hydrocarbons Co. Ltd., 96 STC 204, the Commissioner of Sales Tax, Madhya Pradesh v. M/s. Jaswant Singh Charan Singh, AIR 1967 SC 1455, and in Commissioner of Sales Tax, Lucknow v. Marwah and Co., 43 STC 435.

9. On the contrary, learned Special Government Pleader for Taxes, appearing on behalf of the respondent in all these revisions has contended that coal and coal-ash are two different commodities and the Deputy Commercial Tax Commissioner was justified in holding that the sale of coal-ash by the petitioner-Company amounts to first sale at the hands of the petitioner-Company as the coal-ash is a different commodity. Learned Special Government Pleader for Taxes has supported the revisional order of the Deputy Commercial Tax Commissioner and also the impugned order passed by the Sales Tax Appellate Tribunal. Learned Government Pleader further contended that the manufacturing activity of the petitioner-Company being paper and paper board, the sale of coal-ash by the petitioner-Company cannot be brought within the purview of G.O. Ms. No.606 to treat coal-ash as a product seeking exemption. He nextly contended that the petitioner-Company purchased eucalyptus and casurina wood from the unregistered dealers to be used as raw-material for manufacturing paper and paper-board and as such it cannot be treated as fire wood but is only a timber. According to the learned Special Government Pleader, the wood purchased by the petitioner-Company has rightly been assessed u/s 6-A of the APGST Act by treating it as unclassified goods. He justified the impugned order passed by the Sales Tax Appellate Tribunal and pleaded that no questions of law have arisen for adjudication by this Court. In support of his contentions, the learned Special Government Pleader for Taxes has cited the following decisions reported in TVLK.A.K. Anwar and Company v. State of Tamil Nadu, 26 APSTJ 64, G. Venkatakrishnaiah and Brothers, Hindupur v. the State of A.P., 15 APSTJ 269, Rajasthan Roller Flour Mills Association v. State of Rajasthan, 91 STC 409, and in Om Refrigeration and Electricals, Secunderabad v. State of Andhra Pradesh, 23 APSTJ 149.

10. In the wake of these divergent submissions, we now proceed to examine the questions of law raised by the petitioner-Company, as indicated above.

Questions 1 and 3: Insofar question No. 1, as indicated above as to whether coal and coal-ash (cinder) are to be treated as one commodity or two different commodities, though the learned Counsel for the petitioner-Company has taken us to several decisions (supra) in support of his contentions we are afraid, we cannot reach to the conclusion that coal and coal-ash are one and the same commodity. Learned Counsel specifically laid emphasis on India Carbon Limited's case (supra) and contended that coal and coal-ash are one and the same commodity. We are afraid, the said decision has no application to the facts of the

present case and in no way helps to determine the classification of the goods "coal" and "coal-ash". In the said decision, the Supreme Court was considering whether "petroleum coke" can be considered as one of the forms of coke. The Clause "coal including coke in all its forms" mentioned in clause (1) of Section 14 of the Central Sales Tax Act, fell for consideration before the Supreme Court in that decision and the Supreme Court held that "Petroleum coke" is one of the forms of coke and cannot be excluded from item 1 of Section 14 of the Central Sales Tax Act. The question whether coal and coal-ash are one and the same commodity or two different commodities had not fallen for consideration before the Supreme Court. Entry I of III Schedule of the APGS Tax Act also mentions "coal including coke in all its forms". The said entry also does not mention that the term "coal" includes "coal-ash". A Division Bench of this Court in P. China Reddi's case (supra) while dealing with the question whether burnt cinders are "coal" or "coke" within the meaning of item I of Schedule V of the APGST Act, has categorically held as under:

".... In our view also, cinders cannot be said to be coal in the popular sense of the term, though they may be the end-products of coal after a great part of the energy therefrom has been spent."

By holding so, the Division Bench of this Court in the above decision has declared that cinders are not "coal" or "coke" within the meaning of item 1 of Schedule IV of the APGST Act, 1957. A Full Bench of the Madhya Pradesh High Court reported in *Hukumchand Mills Ltd. v. Commissioner of Sales Tax*, 71 STC-101, while reversing the earlier decisions of the same High Court that "coal" includes "coal-ash" has in no uncertain terms held that coal is converted into coal-ash after it is burnt and coal undergoes a manufacturing process before becoming coal-ash and is a bye-product of coal and that, therefore, coal and coal-ash cannot be treated as same goods but are two different goods. The Supreme Court in *Rajasthan Roller Flour Mills Association's case* (supra) has categorically declared that commodities other than those specified cannot be introduced into the relevant provisions on the ground that they are derived from the primary commodities. In the present case, Entry 1 of III Schedule of the APGST Act refers to "coal including coke in all its forms". However, the said entry does not mention that "coal" includes "coal-ash". Though the learned Counsel for the petitioner-Company strenuously tried to contend before us that "coal" and "coal-ash" are nothing but one and the same, in the absence of any mention in Entry 1 of III Schedule of the APGST Act to say that "coal" includes "coal-ash" and in the light of the pronouncement of the Supreme Court in the decision cited 91 STC 409 (supra), we are not inclined to accept the contention of the Counsel for the petitioner-Company that "coal" and "coal-ash" are nothing but one and the same.

11. Having regard to the above discussion and in the light of the law laid down by this Court in the decision 24 STC 317 (supra) and the Supreme Court in the decision 91 STC 409 (supra), we are inclined to hold that coal and coal-ash are commercially two different commodities and therefore, the sale of coal-ash

amounts to first sale in the hands of the petitioner-Company. We are also inclined to hold that the Sales Tax Appellate Tribunal is justified in holding that the decision in India Carbon Ltd.'s case (supra) is not applicable to the facts of the present case. Accordingly, we decide question Nos.1 and 3 against the petitioner-Company.

Question No. 2:

Insofar as the second question of law as to whether coal-ash is a product of the petitioner's industrial unit and that the sale of "coal-ash" by the petitioner has to be given exemption under G.O. Ms. No.606, dated 9-4-1981, it is apt to refer to the said G.O. No.606, Notification No.III issued under the said G.O., exemption is granted for the sale of products of the industrial units set up on or after 17-12-1976 in the schedule areas from the tax payable under the APGST Act for a period of five years from the date of commencement of regular production by such industrial units. The contention advanced on behalf of the petitioner-Company is that "coal-ash" is also one of its products and as such, sale of "coal-ash" has to be given exemption in terms of G.O. Ms. No.606 dated 9-4-1981. We are not prepared to accept this contention advanced on behalf of the petitioner-Company. It is quite apparent that the main production activity of the petitioner-Company is the manufacture of paper and paper-boards and for the said purpose only the petitioner-Company is established. The main products manufactured by the petitioner-Company are paper and paper-boards. "Coal-ash" is only the leftover residue after burning the coal which was used as fuel for manufacturing paper and paper-boards. The petitioner-Company itself has stated that when coal is burnt as fuel in the manufacturing process to produce paper and paper-boards, coal-ash was obtained as residue of such burnt out coal. Therefore, we are inclined to hold that the petitioner-Company is not eligible for exemption of sale of "coal-ash" under G.O. Ms. No.606, dated 9-4-1981 as the "coal-ash" is not a product of the petitioner-Company. We answer this question No.2 also against the petitioner-Company.

Question No. 4:

This question relates to the taxability of coal-ash under Entry (1) of III Schedule or under the VII Schedule of the APGST Act, 1957. Counsel for the petitioner-Company contends that the petitioner-Company purchased eucalyptus wood and casurina wood from various unregistered dealers during the relevant assessment years and the said wood is firewood which is liable to be taxed under Entry 64 of First Schedule at 3% and such wood cannot be considered as unclassified goods and cannot be taxed at the rate applicable to such unclassified goods. It is further contended that even though the wood purchased by the petitioner-Company was used for manufacturing paper and paper-boards etc., still such wood has to be treated as only, firewood. In support of his contentions, learned Counsel has cited the decision reported in Mukesh Kumar Agarwal v. State of Madhya Pradesh, 68 STC 324, and in Jaswant Singh Charan Singh's case (supra). In the decision cited 68 STC 324 (supra), wood was purchased from the

Forest Department by the Appellant therein in auction and the said wood was described as "Eucalyptus firewood stacks" to be used as raw-material for pulp in the manufacture of fibre. The Department had contended that such wood has to be taxed as timber and not firewood. The Supreme Court rejected the contention of the Department on the ground that the nature of the goods cannot be determined by user test. However, we are of the view that this decision has no application to the facts of the case, so also the decision cited, 43 STC 435 (supra), by the learned Counsel for the petitioner-Company.

12. In the instant case, the department has treated the wood purchased by the petitioner-Company as "unclassified goods" and assessed the same to tax u/s 6-A of the APGST Act. The petitioner-Company has not produced any material showing that the wood purchased by it was only fire-wood. Even the invoices produced by it disclose that the sellers who are unregistered dealers are described as "debarked wood suppliers" and the wood is described as "debarked eucalyptus wood and casurina wood". There is no mention at any point of time that the wood purchased by the petitioner-Company is firewood. In the absence of any proof to indicate that the wood purchased by the petitioner-Company is firewood, the Department is justified in treating the same as "unclassified goods" and levying the tax as applicable to "unclassified goods". The Department contended that the petitioner-Company purchased timber and used it as raw-material for its manufacturing activity but not as fuel, which has been found favour with the Tribunal below. The Tribunal has also found that the wood purchased by the petitioner-Company is for the purpose of using the same as raw-material for the manufacture of paper and paper-boards and such purchase is to be treated as "unclassified goods". We are, therefore, inclined to hold that no question of law arises for adjudication on a finding of fact. Accordingly we hold that the finding that the eucalyptus and casurina wood purchased by the petitioner-Company has to be subjected to tax u/s 6-A of the APGST Act, by the Sales Tax Appellate Tribunal in the impugned order dated 18-16-1993 is just and proper. As discussed above, this question No.4 is also decided against the petitioner-Company.

13. Having regard to the above discussion, we see no merits in these TRCs and they are accordingly dismissed. No costs.