
(2008) 03 AHC CK 0026
In the Allahabad High Court

M.R. Soap Pvt. Ltd.

APPELLANT

Vs

Commissioner of Trade Tax

RESPONDENT

Date of Decision : 03-03-2008

Acts Referred:

Uttar Pradesh Sales Tax Act, 1948 — Section 11, 22

Citation : (2008) 18 VST 362

Hon'ble Judges : Vikarm Nath, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vikram Nath, J.—This sales tax revision u/s 11 of the U.P. Sales Tax Act, 1948 (hereinafter referred to as, "the Act") has been filed by M/s. M.R. Soap Private Limited, Lower Bazar, Modinagar, Ghaziabad (hereinafter referred to as, "the dealer") assailing the judgment of the Sales Tax Tribunal, Bench-II, Ghaziabad, dated January 25, 1994 whereby the second appeal of the dealer was dismissed.

2. The present revision arises out of the proceedings u/s 21 of the Act relating to assessment year 1986-87. The dealer is a manufacturer of soap. With regard to the relevant assessment year it submitted its returns and the assessing authority vide order dated February 28, 1989 accepted the account books of the dealer and found that only an amount of Rs. 4,326 was due as tax.

3. Subsequently proceedings u/s 22 of the Act for rectification of the assessment order were initiated on the ground that the rate of tax applied on the sales of imported "spent bleaching earth" by the dealer was at a lower rate. It may also be noted that the proceedings u/s 22 of the Act had been initiated for both the years, i.e., assessment years 1985-86 and 1986-87. According to the assessing authority the rate should have been eight per cent whereas in the regular assessment the tax had been calculated at four per cent. The reason for this was that the "spent bleaching earth" according to the dealer was a mineral and therefore, under the Notification No. 6075, dated October 1, 1983 it was covered

by entry "all kinds of minerals" and therefore taxable at four per cent whereas according to the assessing authority it had wrongly been taxed as mineral and in fact it should have been taxed as unclassified goods at eight per cent. The proceedings u/s 22 of the Act were ultimately quashed by the High Court on the ground that the assessment order passed by the assessing authority had merged into the appellate order passed in appeal filed by the dealer and therefore the assessing authority had no jurisdiction to initiate proceedings u/s 22 of the Act.

4. It would be relevant to mention here that the notice u/s 22 of the Act had been issued on September 19, 1990. It is also not in issue that the notice u/s 22 of the Act was used for the same reason as for which the present proceedings u/s 21 of the Act had been initiated, i.e., for correcting the rate of tax applied on the sale of "spent bleaching earth". In the proceedings u/s 22 of the Act the dealer has participated and ultimately the High Court by order dated December 6, 1990 had held that the proceedings were without jurisdiction. It may be relevant to mention here that these proceedings u/s 22 which came to the High Court were in respect of the previous assessment year, i.e., 1985-86, whereas the relevant assessment year 1986-87. The assessing authority subsequently passed an order on February 16, 1991 that in view of the order passed by the High Court on December 6, 1990 for the assessment year 1985-86 the proceedings u/s 22 of the Act for the relevant assessment year be dropped.

5. Thereafter on March 4, 1991 the assessing authority directed issue of notice u/s 21 of the Act.

6. From the order sheet it is apparent that at the time of issuing of notice u/s 21 of the Act no reason was recorded by the assessing authority. However, in the order sheet dated August 30, 1991 the assessing authority mentioned that the representative of the dealer appeared and he was informed that the rate of tax applied on the sale of "spent bleaching earth" was four per cent whereas actually it should have been eight per cent and therefore he may submit his explanation as to why the rate of tax be not corrected. The dealer submitted his explanation. The assessing authority by order dated August 31, 1991 held that the rate of tax applied was lower as what should have been actually applied and accordingly passed an order that on the sale of the "spent bleaching earth" the tax is to be calculated at the rate of eight per cent. It accordingly raised a demand of Rs. 84,240 vide order dated August 31, 1991. Aggrieved by the same the dealer preferred an appeal, which was dismissed by the Deputy Commissioner (Appeals) vide judgment and order dated December 26, 1991. The dealer thereafter filed a second appeal before the Tribunal which was also dismissed by the order impugned in this revision on January 25, 1994. Aggrieved the present revision has been filed.

7. The questions of law sought to be raised by means of the present revision as framed by the dealer-applicant are as follows:

(i) Whether, on the facts and in the circumstances of the case, the Tribunal is

legally justified in validating the initiation of proceeding u/s 21?

(ii) Whether there was any material to justify the initiation of proceeding u/s 21 on March 4, 1991?

(iii) Whether the initiation of proceeding u/s 21 was based on any material and inasmuch as in any case, on account of change of opinion?

(iv) Whether the levy of tax u/s 21 on spent earth as unclassified items is based on any relevant material, on account of change of opinion?

(v) Whether the spent earth is liable to tax as a mineral or as an unclassified items?

8. I have heard Sri Krishna Agrawal, learned counsel for the dealer-applicant and Sri B.K. Pandey, learned Standing Counsel representing the Department.

9. Sri Krishna Agrawal, learned counsel appearing for the dealer, has made elaborate submissions both on the validity of the proceedings u/s 21 of the Act as also on the merits of the case that "spent bleaching earth" was not liable to be taxed at eight per cent but was liable to be taxed only at four per cent, treating it to be mineral and covered by the Notification No. 6075, dated October 1, 1983.

10. On the question with regard to the validity of reassessment proceedings the argument on behalf of the dealer is two-fold. Firstly, there was no material on record which would justify the action of the assessing authority to issue notice as under law prior to issuance of the notice there should be existing material on the basis of which the assessing authority ought to be satisfied of the reasons to believe in the issue of notice for re-opening of the assessment. Great stress has been laid on the order-sheet of the proceedings u/s 21 of the Act which has been filed as annexure 3 along with the revision.

11. Second argument is that u/s 21 of the Act, there could not have been any change of opinion recorded by the assessing authority as it is not permissible. The assessing authority should have taken other remedy open to it but not change his opinion in reassessment proceedings on an issue decided by him. According to Sri Agrawal the assessing authority had discussed the applicability of the rate of tax applicable to various items. In particular he has referred to "acid oil" and therefore, according to him, the assessing authority must have applied his mind on the applicability of rate of tax on "spent bleaching earth" also.

12. Further he has relied upon the following decisions in support his contention with regard to the validity of the reassessment proceedings:

(i) Commissioner, Trade Tax, U.P. Lucknow v. Mishra Auto Sale Sonbhadra reported in [2006] 30 NTN 251.

(ii) Palco Lining Company and Another Vs. The Sales Tax Officer,

(iii) Commissioner of Income Tax Vs. Kerala State Cashew Development Corporation,

13. With regard to the merits of the matter Sri Agrawal has submitted that "bleaching earth" which is also commonly known as "Fuller's earth" is a mineral. It is used in textile industry, fulling of wool, bleaching and clarifying petroleum and vegetable oil manufacturers for cleaning/refining. For the sake of convenience the commodity is being referred to as the "bleaching earth" and its modified form as "spent bleaching earth". The "bleaching earth" has a property of absorbing grease oil, dense impurities and then, before, becomes useful for vegetable oil manufacturers. The vegetable oil manufacturers thereafter sell the said used "bleaching earth" which had lost its capacity to absorb. It is purchased by soap manufacturers. This product sold by the vegetable oil manufacturers is commercially and in common parlance known as "spent bleaching earth". Further Sri Agarwal submits that the "spent bleaching earth" is nothing but "bleaching earth" and retains its composition as "bleaching earth" and therefore, is a mineral covered by entry in the Notification No. 6075, dated October 1, 1983. He has further submitted that there was no dispute that the "bleaching earth" is a mineral and therefore "spent bleaching earth" even if it had lost its capacity to absorb, is still "bleaching earth" with its basic composition remaining the same and therefore should be treated as a mineral and accordingly taxable at the rate of four per cent only.

14. In support of his contention he has relied upon the following decisions:

(i) Commissioner of Central Excise v. Markfed Vanaspati and Allied Industries reported in [2003] 1 RC 157.

(ii) Commissioner of Sales Tax v. Chela Ram Tulsidas reported in [1980] UPTC 1238.

(iii) Mineral Sales Corporation Vs. Commissioner of Sales Tax,

(iv) Mini Fertilizer (Pvt.) Ltd. Vs. Commissioner of Sales Tax,

(v) 1985 ECR 1962

15. Sri B.K. Pandey, learned Standing Counsel representing the department, has submitted that the judgment of the Tribunal does not suffer from any infirmity and has referred to the various findings recorded by the assessing authority as also the Tribunal.

16. With regard to the argument on maintainability of the proceedings under s 21 of the Act, it has been urged that it was not only the assessing authority who had reasons to believe from before the date of issuing notice under s 21 of the Act but in fact the dealer was also aware of the reason for which the notice under s 21 of the Act has been issued. Sri Pandey has referred to the order sheet filed by the dealer and has submitted that in fact proceedings under s 21 of the Act were initiated only when the Department failed in correcting the applicability of the rate of tax in the proceedings under s 22 of the Act. The order sheet and the dated on which the orders have been passed also show that there was a continuity. He has further submitted that the assessing authority under Sections 21 and 22 of the Act was

the same and therefore, he was well aware as to why the notice u/s 21 of the Act was issued. In this regard he has also referred to the findings recorded by the assessing authority while passing the order u/s 21 of the Act that the notice u/s 22 of the Act was issued for the same reason.

17. With regard to the submission on behalf of the dealer regarding change of opinion, Sri Pandey has referred to regular assessing order and submits that there was no discussion or application of mind by the assessing authority with regard to the rate of tax applicable on the sale of "spent bleaching earth". The only discussion was with regard to the rate of tax of "acid oil"

18. He has further referred to the finding recorded by the Tribunal that the assessing authority while passing the assessment order had not applied his mind and therefore, submits that the submission made on behalf of the dealer with regard to change of opinion cannot be accepted. According to him, the change of opinion would occur only where the assessing authority had applied his mind while passing regular assessment order on a particular issue and if there is no application of mind it cannot be said that there is any change in the opinion.

19. Sri Pandey has further submitted with regard to the merits of the matter that there is no issue that "bleaching earth" is a mineral. But the moment "bleaching earth" loses its capacity or its property to absorb for the reason that in refining/cleaning of the oil certain quantity of oil remains permanently absorbed in the "bleaching earth" it cannot be said that it still remains in the same form as it was taken out from the earth. It does not remain a mineral any longer.

20. He has referred to the dictionary meaning of the "bleaching earth" as also the word "spent" given in the New Oxford English Dictionary. According to the dictionary meaning the word "spent" means used up completely, exhausted, worn out, exhausted of the active or effective power, no longer active, effective or serviceable.

21. Thus, once the "bleaching earth" had lost its capacity or property for which it was being used by the "vegetable oil manufacturers" and it had retained certain amount of oil, the "bleaching earth" had not only lost its property but its composition is also changed. He, therefore, submits that "spent bleaching earth" thus, cannot be treated to be a mineral. In support of his submission he has relied upon the decision of this court in the case of Commissioner of Sales Tax v. British India Corporation Limited reported in [2008] 11 ST 265 : [2004] UPTC 898.

22. Having given my anxious consideration to the various submissions of the learned counsel for the parties, I now proceed to deal with the various submissions.

23. So far as the issue with regard to the validity of the proceedings u/s 21 of the Act are concerned what is required under law is that where assessing authority has reason to believe (i) that the whole or any part of the turnover had

escaped assessment to tax, (ii) whole or any part of the turnover had been under-assessed, (iii) whole or any part of the turnover has been assessed to tax at the rate lower than that at which it was assessable under this Act, (iv) deductions or exemptions have been wrongly allowed in respect of the whole or any part of the turnover, it may after issuing notices and making such inquiry, as it may consider necessary, assess or reassess the dealer to tax according to law.

24. In the present case the admitted position is that in the proceedings u/s 22 of the Act the issue was the same as has been taken for initiating the proceedings u/s 21 of the Act, i.e., with regard to assessment to tax at a rate lower than that at which it was assessable under the Act. It was not in issue that the assessing authority in the proceedings u/s 22 of the Act and in the proceedings u/s 21 of the Act was the same authority. From the order sheet it also appears that it was only when the proceedings u/s 22 of the Act were dropped that the proceedings u/s 21 of the Act were initiated. Therefore, it cannot be said that the assessing authority did not have any reason to believe that the whole or part of the turnover had been assessed to tax at a rate lower than that at which it was assessable.

25. Moreover, even the assessee knew and had knowledge with regard to the applicability of lower rate of tax. There is no requirement under law that the assessing authority should record reasons in writing before issuing notice. What is required is that the assessing authority should have reason to believe that any of the four conditions elaborated above existed. In the present case, the reasons were very much available on record from the previous proceedings u/s 22 of the Act and therefore, it cannot be said that on the date of issuing the notice u/s 21 of the Act, the assessing authority had no material on record to form its opinion with regard to the applicability of lower rate of tax. Thus, the first limb of the argument with regard to the validity of the proceedings u/s 21 of the Act cannot be accepted.

26. The second limb of the argument with regard to the validity of the proceedings u/s 21 of the Act is that it amounted to change of opinion. This argument also cannot be accepted. From a perusal of the assessment order it cannot be noticed that the assessing authority had applied its mind or had made any discussion with regard to the rate of tax to be applied on the sale of "spent bleaching earth". The argument with regard to change of opinion could have been urged only where the assessing authority after applying its mind had held that the lower rate of tax would be applicable and thereafter, in the proceedings u/s 21 of the Act it had proposed to apply higher rate of tax. The learned counsel for the dealer has not been able to show from the assessment order that any such discussion has actually been made by the assessing authority. This submission also fails and is accordingly rejected.

27. I have gone through the three authorities relied upon by the Sri Agrawal in support of his submissions regarding the validity of the proceedings u/s 21 of the Act. None of them is of any help to the dealer:

(i) In the case of Mishra Auto Sales [2006] 30 NTN 251 the court held that the "reason to believe" is to be formed on the basis of material on record and not pretence, as in the said case the alleged informations had been received from the banks in the month of September, 1989 much after issuance of notice u/s 21 of the Act on March 27, 1989 and therefore could not constitute material for issue of notice.

(ii) In the case of Palco Lining Company and Another Vs. The Sales Tax Officer, the assessing authority had examined the matter on merits in the regular assessment and had concluded that the articles sold by the dealer were exempt from tax. In such circumstances the court was of the view that in the subsequent reassessment proceedings it was not open to the assessing authority to change its opinion and impose tax on such articles sold by the dealer. This is not the case here at hand. As already held there is no discussion on merits by the assessing authority with regard to rate of tax applicable to sale of "spent bleaching earth" in the regular assessment.

(iii) In the case of Commissioner of Income Tax Vs. Kerala State Cashew Development Corporation, the matter arose out of reassessment proceedings under the Income Tax Act, 1961 where recording of reasons for initiating reassessment is mandatory u/s 48 of the said Act. The present case is under the U.P. Sales Tax Act, 1948 which does not require recording of reasons. What is required is that there should be material on record justifying the assessing authority to believe that any of the condition for initiating reassessment proceedings exists. As already recorded there was material on record justifying the reason to believe in the present case.

28. Now, coming to the question on merits as to whether "spent bleaching earth" is to be treated as a mineral in order to cover it by Notification No. 6075, dated October 1, 1983 and accordingly liable to four per cent tax, Sri Krishna Agarwal, learned counsel for the dealer, in this regard has referred to the definition of "mining" as given in the Encyclopaedia Britannica, which reads as follows:

Mining and quarrying : Mining in a broad sense is the excavation of valuable mineral materials from the earth's crust and includes minerals of organic origin, such as coal and petroleum.

29. In continuation of the same he has further referred to a book titled "refining of oil and fats (for edible purpose)" by A.C. Anderson and published by Pergamon Press Ltd., London 1953 and has placed strong reliance on the passage quoted as follows ; in particular the last sentence under the Chapter "Bleaching by Absorption":

Absorbents.- The most important absorbent used in bleaching fats and oils is bleaching earth or clay, natural bleaching earth, otherwise known as Fuller's earth from its ancient use in the "fulling" or scouring of wool, comprises various earths or clays consisting basically of a hydrated silicate. The mineralogical characteristics of these earths have been discussed by Kerr. (128) and Nutting

(129).

Attempts have been made to correlate the chemical composition of earths with their bleaching ability, but without success. An earth almost devoid of absorptive capacity may be almost identical in composition with very active earth; hence these materials can be evaluated only by actual tests. The earths used for bleaching fatty oils are the same as those used in...slightly different form and in much greater volume for the bleaching of petroleum products....

30. What can be inferred from the above passage is that there may be different forms of earth used in bleaching of different goods. This refers to different forms of earth extracted. Thus, the "bleaching earth" extracted having slightly different form may be used for bleaching of different goods. But the fact remains that the "bleaching earth", in whatever form it may be, is extracted from the earth. Whatever is extracted from the earth is a mineral and it remains as such till the time it retains its composition and properties intact.

31. Before considering the arguments I now proceed to examine the use of "bleaching earth" and "spent bleaching earth". Bleaching earth, is basically hardened silicate composed mainly of alumina, silica, iron oxides, lime, magnesia and water. It is also commonly referred to as hydrous silicate of alumina and is found in its original form in the surface of the earth. It may be of different compositions depending upon from where it is being excavated. It has the property to absorb impurities like petty oil, grease and basic colour. Its main use is in textile industries and also in the vegetable oil industry. With its repeated use by the vegetable oil manufacturers its property/capacity to absorb reduces as the impurities get absorbed and reduce its capacity to further absorb. This product which has lost its capacity to further absorb is what is referred to as "spent bleaching earth" or "spent fuller's earth". The word "spent" is used as an adjective to indicate that it is no longer capable to further purify or absorb the impurities. In other words, its capacity to absorb the impurities has been exhausted. The bleaching earth itself gets impure on account of the impurities having been absorbed by it.

32. The impurities so absorbed by the "bleaching earth" serves a different purpose for the soap manufacturers. They purchase "spent bleaching earth" from vegetable oil manufacturers and use it for manufacturing of soap. What is primarily done is to extract the oil absorbed in the "spent bleaching earth" and utilise it in the manufacture of soap. The "spent bleaching earth" along with solvents is treated to a certain temperature whereafter the oil contents surface and is accordingly extracted for use by soap manufacturer.

33. The question here is as to whether "spent bleaching earth" still remains a mineral or falls in the category of unclassified items. According to Sri Agarwal the entry under the Notification No. 6075 is "all kinds of minerals" and, therefore, "spent bleaching earth" would also fall in the said category as the category is very wide and would cover all kind of minerals. Mineral may be of many kinds

and that is why the entry is wide, but the question is whether a mineral having lost its capacity or its property would still remain a mineral or would be something other than a mineral.

34. The definition of "mineral" as given in Webster's English Dictionary is an organic substance occurring naturally in the earth and having a consistent and distinctive set of physical properties (e.g., colour, hardness and crystalline structure) and a composition that can be expressed by a chemical formula. So what is essential for a mineral is that, it should occur naturally in the earth and should have a consistent and distinctive set of physical properties which include its colour, hardness and crystalline structure.

35. In the present case we find that "bleaching earth" is a mineral as it is naturally found in the earth and it has a consistent distinctive set of physical properties but after it is excavated and has undergone the process in vegetable oil manufacturing its physical properties which also includes its property to absorb is found to have diminished and exhausted. It is for this reason that after being used by vegetable oil manufacturer, it is referred to as "spent bleaching earth". The "bleaching earth" having lost its capacity to absorb is sold in the open market and is commercially known as "spent bleaching earth". Its physical properties having changed ; it cannot be said to be holding the same properties as it held at the time it was excavated from the earth.

36. It may also be added here that "spent bleaching earth" is not "bleaching earth" as excavated but is full of impurities including grease, oil and colours and therefore, it is "bleaching earth" plus the absorbed impurities.

37. This "spent bleaching earth" becomes relevant for soap manufacturers only on account of the absorbed impurities, gained from the process involved in the vegetable oil manufacturing. For soap manufacturers "bleaching earth" as excavated from the earth is of no use but after being used by the vegetable oil manufacturers it becomes useful for them in the manufacturing of soap as they extract the oil and impurities absorbed in it and use it in the manufacturing of soap.

38. From the above discussion, it is difficult to hold that the "spent bleaching earth" would still remain a mineral, in view of the accepted definition of "mineral" as it has lost its properties existing at the time of excavation.

39. The reliance placed by the counsel for the dealer in the case of Chela Ram Tulsidas [1980] UPTC 1238 is of no help for the reason that it does not deal with "spent bleaching earth". The said decision only decided that the "bleaching earth" is a mineral. The question as to whether "spent bleaching earth" is a mineral or not was not an issue in the case of Chela Ram Tulsidas [1980] UPTC 1238.

40. The next decision relied upon by the counsel for the dealer in case of Markfed Vanaspati and Allied. Industries [2003] 1 RC 157 was with regard to a case under the Central Excise Tariff Act, 1985. In the said case the apex court was of

the view that "spent bleaching earth" remained earth even after processing. To hold that "spent bleaching earth" would be an excisable commodity, what was essential was that there should have been some manufacturing process. The apex court held that there was no manufacturing activity under the Trade Tax Act. Under the Trade Tax Act manufacturing is not essential. What is to be seen is whether the goods which is being traded is covered by the entry of "all kinds of mineral". The apex court was not dealing with the definition of "mineral" but was interpreting as to whether "spent bleaching earth" was a mineral or not under the Tariff Act. Further the entry at item 1507 was residue resulting from the treatment of fatty substances. In that view the apex court tested the said product as to whether it would fall in the said entry or not. It was essential to test it within the twin tests of manufacture and marketability before any goods would fall in the tariff entry. The said decision is therefore of no help to the dealer.

41. The judgment in the case of Mineral Sales Corporation Vs. Commissioner of Sales Tax, has no application to the facts of the present case as in that case certain minerals, e.g., emery, dolomite, alumina, etc., were sold in powder form or in the form of minute particles. There was no change in their composition or properties, whereas in the present case the property of "bleaching earth" had been exhausted and "spent bleaching earth" was capable of shedding oil contents which was not present in "bleaching earth". Further the judgment in the case of Mini Fertilizer (Pvt.) Ltd. Vs. Commissioner of Sales Tax, related to "sulphur rocks" being transformed into "sulphur rolls" and the court held that there was no change in the quality and character of the two items. Lastly, the case of 1985 ECR 1962 is also of no help for the reason that it related to proceedings under the Central Excise and Salt Act, 1944 where manufacturing has a pivotal role. Further in the said case the question was whether "spent earth" arising after "activated earth" is used by manufacturer would amount to a new product involving manufacturing. This is not the question here as already discussed while dealing with the case of Markfed Vanaspati and Allied Industries [2003] 1 RC 157.

42. On the hand, this court in the case of British India Corporation Limited [2008] 11 VST 265 : [2004] UPTC 898 held that "coal ash" obtained as a residue from burning coal was not the same item as "coal" as the properties of the two products were quite different. The "coal ash" did not have combustible property like "coal" and would therefore, upon sale, be taxed as an unclassified item and not as "coal" at a lower rate of tax. Similar, is the present issue where "spent bleaching earth" obtained after "bleaching earth" has been used in refining of vegetable oils, having lost its property of absorption, would be a different commodity and therefore taxable as an unclassified item.

43. In the present case as has been held above, "spent bleaching earth" does not remain a mineral as it has lost its originality as excavated and also its physical properties have changed and therefore the view taken by the Tribunal appears to be correct. No question of law as such arises warranting interference in revisional jurisdiction.

44. Revision lacks merit and it is accordingly dismissed.

45. There shall, however, be no order as to costs.