
(2019) 04 BOM CK 0070

In the Bombay High Court

Case No : Sales Tax Reference No. 50, 51 Of 2009, Reference Application No. 19, 20 Of 2007

M/s Bombay Dyeing & Mfg. Co. Ltd

APPELLANT

Vs

Commissioner Of Sales Tax

RESPONDENT

Date of Decision : 16-04-2019

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 3, 33, 35, 41, 41(1), 41(2), 43D, 55, 61, 62

Citation : (2019) 04 BOM CK 0070

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : A.S. Rao, Mangesh Patel, V.A. Sonpal, Uma Palsuledesai

Judgement

B. P. Colabawalla, J

1. By these two Sales Tax References, the Fourth Bench of the Maharashtra Sales Tax Tribunal (for short, the "MSTT") has referred the following Questions of Law for an opinion of this Court under section 61 of the Bombay Sales Tax Act, 1959 (for short the "BST Act"). These References have been preferred at the instance of the applicant (original appellant before the 3rd Bench of the MSTT). The Questions of Law referred for our opinion are as under:-

(I) Whether on the facts and circumstances of the case, and having regard to the appellate powers in Section 55 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in not adjudicating on the point relating to levy of tax on Exim Scrips, merely because the ground in that regard was not mentioned in the Second appeal memo and that the appellant had not made any specific prayer to seek permission for raising additional ground in that regard?

(II) Whether on the facts and circumstances of the case, and on a true and correct interpretation of the provisions in Section 41 (2) of the Bombay Sales Tax Act, 1959 and in Notification entry 39 under Section 41 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in holding that plastic powder is not a

chemical, and that therefore the appellant has committed any contravention by issuing declarations of T/TT Forms against his purchases of plastic powder, so as to attract the purchase tax liability under Section 41 (2)?

2. As far as Question (I) is concerned, the same arises for financial years (for short "F.Y.") 1993-94 and 1995-96. As far as Question (II) is concerned, the same arises only for F.Y. 1993-94.

3. Before we deal with the aforesaid Questions, we would like to set out a few facts. The applicant is engaged in the manufacture of textiles, made-up textile articles, ready-made garments etc., and is duly registered under the provisions of the BST Act as well as the Central Sales Tax Act, 1956 (for short the "CST Act"). The applicant has two divisions, viz., the Textile Division located at Prabhadevi and Naigaon, Mumbai and a D.M.T. Division located at Patalganga in Raigad District. For both these Divisions, the applicant has been maintaining separate books of accounts and has been filing separate returns.

4. The applicant was assessed for F.Y. 1993-94 under the BST Act and the CST Act vide assessment orders dated 31st March, 1997 passed by the Senior Assistant Commissioner of Sales Tax (Assessment). The assessment under the BST Act resulted in a refund of Rs.1,71,40,038/- while that under the CST Act resulted in an extra demand of Rs.1,79,63,670/-. The refund under the BST Act was adjusted by the Assessing Authority towards the demand under the CST Act.

5. Being aggrieved by the assessment orders on various points including, but not limited to, levy of purchase tax, the applicant filed appeals against the said assessment orders before the Appellate Deputy Commissioner of Sales Tax (Appeals-II), Mumbai. Both these appeals were subsequently decided by the Appellate Deputy Commissioner by passing orders dated 31st October, 2001. The Appellate Deputy Commissioner gave partial relief in tax liability and consequential interest. As a result of his order, the amount of refund under the BST Act got increased to Rs.2,06,83,818/- and similarly, the quantum of additional demand under the CST Act got reduced to Rs.1,76,18,894/-. Still not satisfied with the partial relief granted in the first appeals, the applicant filed second appeals before the MSTT and which were registered as Second Appeal Nos. 2361 and 2362 of 2001.

6. Similarly, the applicant was also assessed for F.Y. 1995-96 under the BST Act and the CST Act vide assessment orders dated 31st March, 1999 passed by the same Assessing Authority as mentioned earlier. The assessment under the BST Act resulted in a refund of Rs.55,62,066/- while that under the CST Act resulted in an extra demand of Rs.41,63,227/-. The refund under the BST Act was adjusted by the Assessing Authority towards the demand under the CST Act. These assessment orders (for F.Y. 1995-96) were also resisted on similar grounds, by filing appeals before the same Appellate Deputy Commissioner as mentioned above. Both these appeals were also subsequently decided by the Appellate Deputy Commissioner by passing orders dated 31st October, 2001, by

virtue of which the appeal under the BST Act was partly allowed and the appeal under the CST Act was dismissed. Against both the orders passed by the Appellate Deputy Commissioner, the applicant filed second appeals before the MSTT and which were registered as Second Appeal Nos. 2360 and 2360-A of 2001.

7. When all the aforementioned four second appeals were fixed for hearing, the applicant sought permission to raise an additional ground relating to levy of sales tax on the surrender of Exim Scrips. This additional ground was with reference to the second appeals that were filed pertaining to the F.Y. 1995-96. The additional ground sought to be raised was thus:-

"That the lower authorities have erred in levying sales tax on surrender of Exim Scrip and therefore such levy be set aside in view of the judgment of the Hon'ble Tribunal in the case of M/s Agra Engineering Works (Second Appeal No. 185 of 1997, dated 30/4/2002)".

8. It was submitted on behalf of the applicant that since this is a pure question of law, it could be raised at any time in the appeal proceedings and therefore the said additional ground be allowed to be raised before the MSTT.

9. This was however vehemently opposed by the revenue. It was pointed out that this ground was never taken up either in the first appellate proceedings or even in the grounds before the MSTT. According to the revenue, the adjudication on this ground involved verification of the relevant documents and therefore the said ground could not be allowed at such a late stage of the proceedings.

10. Hearing the parties on this preliminary issue, the MSTT opined that the applicant had not given any details of the particular transactions, the levy in respect of which was now disputed through the additional ground. It recorded that the assessment order for the period 1995-96 was also silent as regards whether any such transactions had been assessed to tax. It was also not clear as to whether the transaction, if any, in respect of the Exim Scrips constituted any surrender or sale. Having regard to these facts, the MSTT agreed with the revenue that adjudication in the context of this ground would involve verification of relevant evidence so as to ascertain the true nature of the transactions and therefore there was no case made out to allow this additional ground to be raised at such a late stage. The MSTT therefore declined to entertain the additional ground. Question (I) reproduced by us earlier arises from this additional ground.

11. Be that as it may, the MSTT thereafter went on to examine the other grounds that were raised in the appeals. One of these grounds was the levy of purchase tax under Section 41(2) in respect of the purchases of "Polythene Plastic Powder" (for short "P.P. powder") against declarations in Form T/TT made under Notification Entry 39 issued under Section 41 of the BST Act. After hearing the parties on this issue, the MSTT upheld the action of levy of purchase tax by the lower authorities. The reasoning of the MSTT on this issue can be found from Paragraphs 12 to 15 of its order dated 8th December, 2006. In a nut-shell, the

MSTT held that it is only, (i) machinery and its components/parts/accessories and (ii) Dyes and chemicals which were allowed to be purchased by a textile mill at the concessional tax rate of 6% against declarations in Form T/TT under Notification Entry 39 issued under section 41 of the BST Act. No other goods were allowed to be purchased against declarations in Form T/TT. In the facts of the present case, the applicant had issued T/TT Forms in respect of purchases of P.P. powder. The P.P. powder was neither machinery nor was it Dyes and chemicals and therefore the applicant was not entitled to issue T/TT Forms against the purchase of P.P. powder and therefore contravention of the said Form attracted levy of purchase tax under Section 41(2) of the BST Act, was the finding. In coming to this conclusion, the MSTT referred to and relied upon two decisions passed by the earlier Bench of the MSTT in the case of M/s Rajpal Plastics and M/s Century Plastics, which unequivocally held that plastic powder is not a "chemical". If it is not a chemical, then the applicant was not entitled to issue declarations in Form T/TT in respect of purchases thereof. The issue whether P.P. powder is a "chemical" or not is the subject-matter of Question (II), and reproduced by us above.

12. After the order dated 8th December, 2006 was passed by the MSTT, the applicant preferred four Rectification Applications (being Rectification Application Nos. 16, 17, 18 and 19 of 2007) and two Reference Applications (being Reference Application Nos. 19 and 20 of 2007). A common order came to be passed by the Fourth Bench of the MSTT dated 13th October, 2008 disposing of all the above Rectification Applications as well as the Reference Applications. All the Rectification Applications filed by the applicant were dismissed by the Fourth Bench of the MSTT. As far as the Reference Applications are concerned, they were disposed of by referring the Questions of Law reproduced by us earlier for an opinion of this Court.

13. In this factual backdrop, Mr A.S. Rao, the learned Advocate appearing on behalf of the applicant, submitted that in the facts of the present case, the MSTT being the last fact finding authority under the BST Act, ought to have allowed the applicant to agitate the additional ground regarding levy of Sales Tax on the surrender of Exim Scrips. He submitted that having regard to the appellate powers of the MSTT under Section 55 of the BST Act, the MSTT was certainly empowered in allowing the applicant to raise the additional ground, and if necessary, even allowing it to lead additional evidence in support of that ground. Mr. Rao submitted that the MSTT could not have perfunctorily come to the conclusion that since adjudication of this ground would involve verification of relevant evidence so as to ascertain the true nature of the transactions, and since the same was not on record, there was no case to allow this additional ground at such a late stage. He submitted that if given an opportunity, the applicant could certainly have produced the relevant material to show that a substantial part of the Exim Scrips were not sold but surrendered by the applicant to the DGFT (Director General of Foreign Trade) and which would then not be exigible to tax. Mr. Rao submitted that if the Exim Scrips are surrendered

to the authorities, then the same is not exigible to sales tax and that according to him is covered by a decision of the Supreme Court in the case of Commercial Tax Officer and Ors vs. State Bank of India and Anr [(2016) 10 SCC 595]. In these circumstances, Mr. Rao submitted that Question (I) be answered in the negative and in favour of the applicant and against the revenue. If so answered, then, this issue, namely, relating to Exim Scrips, be remanded back to the MSTT for a fresh adjudication after allowing the applicant to lead additional oral and/ or documentary evidence to show and establish that the Exim Scrips were not sold but were in fact surrendered to the DGFT and would therefore not be exigible to any sales tax.

14. As far as Question (II) is concerned, Mr. Rao submitted that P.P. powder is nothing but a "chemical". It is obtained from petroleum products when crude oil refining process takes place. It is obtained by a chemical process known as polymerization. The P.P. powder is thus a synthetic chemical and a synthetic raisin. It would therefore be a "chemical" as contemplated in Notification Entry 39 issued under Section 41 of the BST Act and would therefore be exigible to a concessional tax rate as contemplated therein. This being the case, Mr. Rao submitted that Question (II) also be answered in the negative and in favour of the applicant and against the revenue.

15. On the other hand, Mr. Sonpal, the learned counsel appearing on behalf of the revenue, submitted that there was no merit in any of the contentions canvassed by Mr. Rao. Mr. Sonpal submitted that as far as Question (I) is concerned, firstly the MSTT was fully justified in not entertaining the additional ground for the simple reason that the adjudication of that ground was not purely a question of law, but was a mixed question of law and fact. For adjudicating that ground, the necessary material would have to be produced by the applicant before the MSTT before a finding thereon is rendered. This was admittedly lacking in the present case. In support of this argument, Mr. Sonpal brought to our attention several paragraphs of the order of the fourth bench of the MSTT dated 13th October, 2008 and under which the present References have been made. In particular, Mr. Sonpal brought to our attention Paragraphs 19, 20 and 21 thereof. He submitted that even in the order of MSTT referring the above mentioned Questions of Law to this Court, the MSTT had examined the documents and evidence produced on record and came to the conclusion that at least a certain number of Exim Scrips were in fact sold by the applicant and therefore were exigible to tax. Even with reference to some of the other Exim Scrips, which the applicant alleged were by way of a surrender to the Joint DGFT, apart from relying upon some cheque receipt entries (being the alleged amount of premium received towards the alleged surrender of the Exim Scrips), nothing else was produced. It is in these circumstances that even in the referral order (dated 13th October, 2008) the Fourth Bench of the MSTT opined that merely on the basis of these documents, the impugned claim could not have been legally allowable unless other supporting documents relating to the particular transactions were produced, verified and appreciated. It opined that the relevant

documents available on the record were not sufficient for adjudication of this particular point and it would have certainly required a leading and appreciation of additional evidence. No such additional evidence was ever sought to be produced before the MSTT, was the submission. In these circumstances, Mr. Sonpal submitted that there was no question of now remanding the matter back, allowing the applicant to go back to the MSTT and lead additional evidence on this issue. This is more so, according to Mr. Sonpal, considering that even before the MSTT, it was submitted by the applicant that it be allowed to raise the additional ground as the same was purely a question of law. He submitted that now for the first time it is sought to be contended that it is not merely a question of law but the applicant be allowed to lead additional evidence to establish that the Exim Scrips were surrendered to the DGFT and therefore not exigible to sales tax. Mr. Sonpal submitted that this exercise cannot be allowed at this stage, especially considering that the evidence that was on record before the authorities below, was examined by the MSTT in its order dated 13th October, 2008 and after carrying out this exercise, it came to the conclusion that there was not enough evidence to adjudicate this issue. He therefore submitted that the MSTT was fully justified in not allowing the applicant to raise the additional ground in second appeal without there being any material evidence to give a proper adjudication on the said ground. Consequently, Mr. Sonpal submitted that Question (I) be answered in the affirmative and in favour of the revenue and against the applicant.

16. As far as Question (II) is concerned, Mr. Sonpal submitted that to determine whether P.P. powder is a "chemical" or otherwise, one has to apply the common parlance test. If this test is applied, then, it certainly cannot be contended by the applicant that the purchases of P.P. powder is a "chemical" and would therefore be exigible to the concessional tax rate as contemplated in Notification Entry 39 issued under Section 41 of the BST Act. He submitted that in fact this question has been considered in detail by another Bench of the MSTT in the case of Rajpal Plastic Industries vs. State of Maharashtra [1994 Vol.9 Maharashtra Tax Journal 513]. It is, following this decision of the MSTT in Rajpal Plastic Industries that the MSTT has come to the conclusion that P.P. powder purchased by the applicant was not a "chemical" and therefore the applicant could not have availed of the concessional tax rate against declarations in Form T/TT under Notification Entry 39 issued under Section 41 of the BST Act. In these circumstances, he therefore submitted that even Question (II) be answered in the affirmative and in favour of the revenue and against the applicant.

17. We have heard the learned Counsel for the parties at length and have perused the papers and proceedings in both the Sales Tax References. We have also carefully gone through the orders passed by the MSTT dated 8th December, 2006 and 13th October, 2008 respectively. As mentioned earlier, there are two Questions of Law that have been referred to us for our opinion and which have been reproduced by us earlier. We shall come to our findings with reference to both these questions separately.

18. As far as Question (I) is concerned, it relates to whether the MSTT was justified in not adjudicating the point relating to levy of tax on Exim Scrips merely because a ground in that regard was not mentioned in the second appeal or even raised in the first appellate proceedings. On this issue, we find considerable force in the arguments canvassed by Mr. Sonpal. On going through the order passed by the MSTT on 13th October 2008, we find that the Fourth Bench of the MSTT has considered this issue in quite some detail, albeit, whilst dealing with the Rectification Applications filed by the applicant. The relevant portion of the order of the MSTT dated 13th October, 2008 reads thus:-

"It can thus be seen that the Third Bench, on consideration of all the relevant facts and circumstances of the case, and on perusal of the relevant records including the supplementary paper books titled Part I and Part II submitted by the appellant in the course of hearing in the second appeals, had taken a conscious decision not to entertain the ground relating to the levy of tax on the transactions of Exim Scrips as also to uphold the levy of purchase tax u/s. 41 (2) as also the disallowance of set-off u/s 43D. The question is whether, with there being such conscious decisions, the impugned judgment can be said to contain any apparent mistake rectifiable under section 62 of the Bombay Act. It is a settled position of law that an additional ground, the adjudication whereon requires perusal, verification and appreciation of relevant evidence, cannot be entertained in an appeal. In this regard, we also made efforts to go through the relevant assessment records to see whether the relevant evidence in support of the appellant's claim relating to Exim Scrips is available in the assessment records. In this regard, the revenue has placed before us, the assessment record for the period 1993-94. No record for the Financial year 1995-96 has been produced before us on the ground of its not being readily traceable.

20. The assessment record relating to the Financial year 1993-94 produced before us contains in all seven files, out of which, one file is the assessment file maintained by the Department and the other six files are Division-wise files prepared and submitted by the appellant in the assessment proceedings, which contain statements of sales/purchases, declarations, other relevant documents like transport receipts, sale bills etc. in respect of a few transactions. We have carefully gone through all these files, but they do not contain any documents to conclusively show that the impugned transactions of Exim Scrips are of surrender to the Government of India or the Designated bank. On the contrary, in the statements of sales, appearing at page 29 of the file relating to Textile division, the said transactions of Exim Scrips have been specifically shown to be "Exim Scrips sold". Even in the Assessment order, the transactions are categorically mentioned to be sales of Exim Scrips. Though the said levy was challenged in the first appeal, same was upheld on the basis of the Madras High Court judgment in the case of M/s P.S. Apparel (supra) and this Tribunal's judgment in the case of M/s Selective Chemicals (supra). Against the confirmation of tax-liability, no ground was raised in the second appeal memo. It is thus crystal clear beyond any doubt that the said assessment records do not contain any documents to

conclusively show that the impugned transactions constitute surrender of Exim Scrips. In that view of the matter, it is absolutely clear that adjudication on the said point in the second appeal before the Tribunal would have certainly involved perusal, verification and appreciation of additional evidence, and that is why, the Tribunal declined to adjudicate on the said point. The Tribunal's action in this regard seems to be supported by its earlier judgments like the case of M/s Shree Swami Samarth Shetkari Vinkari Sahakari Soot Girni Ltd. (Second Appeal No.173 and 174 of 1995 and Miscellaneous Application No. 152 of 1998 decided on 19.12.1998).

21. In the present Rectification proceedings, Mr. Gami has submitted copies of a few documents which are claimed to have been submitted by the appellant in the assessment proceedings. One of these documents is a statement of sales in respect of Exim Scrips/REP Licences for the financial year 1995-96. Therefrom it is seen that in December 1995, the appellant had effected the sales of Exim Scrips of Rs.17,35,209/- (gross). In this statement, the sale price has been shown at Rs.16,68,470/- (Net), and sales tax @ 4% has been separately shown at Rs.66,739/-. It therefore appears that in respect of these transactions, the appellant had collected tax @ 4% though same is now being claimed as exempt from tax. The next document submitted by Mr. Gami is a Statement of sales of Exim Scrips effected in the year 1993-94, according to which, the sales of Exim Scrips were effected at Rs.6,47,542/-, Rs.2,03,904/- and Rs.99,454/- in the months of October, 1993, January 1994 and March 1994 respectively. This is the same statement, which has been referred above as the one appearing in the assessment record for the period 1993-94. This statement categorically indicates the Exim Scrips as 'sold'. The next document submitted by Mr. Gami is a statement of Exim Scrips. It is mentioned therein that out of the total sales of Exim Scrips of Rs.9,50,900/- effected in the year 1993-94, the amount of Rs.6,47,542/- is by way of surrender to the Joint Director General of Foreign Trade, while balance amount of Rs.3,03,358/- is in respect of the sales of Exim Scrips to one M/s Agarwal Traders of Bombay. It is therefore obvious that in fact some of the transactions of Exim Scrips are not by way of surrender but are admittedly by way of sales to certain non-Governmental parties. The documents submitted by Mr. Gami also include copies of certain cheque-receipt entries in support of the receipt of cheques from the Joint Director General of Foreign Trade being the amount of premium received from the DGFT. However, merely on the basis of these documents, the impugned claim according to us, could not have been legally allowable unless the other supporting documents relating to the particular transactions were produced, verified and appreciated.

In short, in our considered view, the relevant documents available in the records are not sufficient for adjudication on the particular point and it would have certainly required leading and appreciation of additional evidence. As mentioned earlier, the Rectification Application has been moved mainly on the footing that the impugned judgment has been passed without taking into consideration the supplementary paper books titled Part I and Part II submitted in the course of

hearing in the second appeal. However, as asserted above by the author of the present judgment, the said supplementary paper books were duly perused and considered while passing the impugned judgment, and the appellant's contentions on the merits of the issue regarding the levy of tax on Exim Scrips were not required to be considered and discussed, because on the facts of the case, the Tribunal felt so disposed as not to entertain the ground regarding the levy of tax on the Exim Scrips. The Tribunal on the facts of the case and on perusal of the relevant records including the supplementary paper books, has taken a conscious decision not to entertain the ground relating to levy of tax on Exim Scrips as also to uphold the lower authorities actions regarding levy of purchase tax u/s. 41 (2) and set-off u/s 43D. There is therefore no apparent mistake rectifiable u/s 62 and hence we do not feel inclined to allow the Rectification Applications.

As mentioned above, we have come to the conclusion that the impugned judgment which is given on due consideration of all the relevant records including the supplementary paper books submitted in the second appeal proceedings contains a conscious and well-considered decision. There is therefore no apparent mistake rectifiable u/s 62. The Rectification Applications are therefore found liable for rejection."

(emphasis supplied)

19. As can be seen from the aforesaid Paragraphs, the MSTT (Third Bench) on a consideration of all the relevant facts had taken a conscious decision not to entertain the additional ground relating to levy of tax on the transactions of Exim Scrips. Thereafter, the fourth bench of the MSTT itself examined the files for the relevant financial years. It perused the files submitted by the applicant in the assessment proceedings which contain statements of sales/purchase, declarations and other relevant documents like transport receipts, sales bills, etc. On going through all these files, the fourth bench of the MSTT opined that they did not contain any documents to conclusively show that the Exim Scrips were surrendered to the Government of India or the Designated bank. On the contrary, in the statements of sales, the said transactions of Exim Scrips have been specifically shown to be "Exim Scrips sold". Even in the assessment order, the transactions were categorically mentioned to be "sale" of Exim Scrips. After examining all this material, the MSTT opined (in the referral order) that it was beyond any doubt that the assessment records did not contain any document to conclusively show that the impugned transactions constituted surrender of Exim Scrips and which was the additional ground that was sought to be raised by the applicant. In this view of the matter, it was absolutely clear that the adjudication on the said point before the MSTT would have certainly involved perusal, verification and appreciation of additional evidence and that is why the MSTT declined to adjudicate the said issue. This was for the simple reason that no material on this additional ground was ever produced. Over and above this, the MSTT in Paragraph 21 (reproduced above) also examined certain documents

which the applicant had claimed to have submitted in the assessment proceedings. On examining the documents mentioned in Paragraph 21, the MSTT found that in fact, at least part of the Exim Scrips, were admittedly sold by the applicant to one M/s Agrawal Traders of Bombay. As far as contention of the applicant regarding surrender of Exim Scrips is concerned, the MSTT opined that the documents submitted by the applicant in relation to certain cheque receipt entries in support of the receipt of cheques from the Joint DGFT, the MSTT was of the opinion that merely on the basis of these documents, the claim of the applicant that the Exim Scrips were surrendered to the Government could not have been legally allowable unless the other supporting documents relating to the particular transactions were produced, verified and appreciated. To put in a nut-shell, the MSTT was of the view that the relevant documents available on record were not sufficient for adjudication of the additional ground that was sought to be canvassed by the applicant. It would have certainly required leading of additional evidence.

20. We find that the applicant never made any application for leading any additional evidence to substantiate its claim that the Exim Scrips were in fact surrendered to the Government and were not sold. In fact, in the order of MSTT dated 8th December, 2006, it was specifically contended by the applicant that since the additional ground is a pure question of law, it could be raised at any time in the appeal proceedings and therefore the MSTT ought to have entertained the additional ground. Having found that the additional ground was not a pure question of law, but required additional documents and evidence which needed to be verified, produced and appreciated, we do not think that the MSTT was unjustified in not entertaining the additional ground regarding surrender of Exim Scrips. If the applicant did not bring any material before the MSTT to substantiate its claim that it had surrendered the Exim Scrips to the Government and therefore was not exigible to tax, the MSTT necessarily could not have entertained the aforesaid ground as there was no material brought on record to render a finding thereon. In these circumstances and peculiar to the facts of this case, we find that the MSTT was legally justified in not adjudicating on the point regarding levy of tax on Exim Scrips. In these circumstances, we have no hesitation in answering Question (I) in the affirmative and against the applicant and in favour of the revenue.

21. As far as the judgment of the Supreme Court in the case of Commercial Tax Officer and Ors (*supra*) is concerned, and on which heavy reliance was placed by Mr. Rao, we fail to understand how this judgment can be of any assistance to the applicant. It is true that this judgment, *inter alia*, lays down the proposition that when Exim Scrips are surrendered, the same are not exigible to tax. However, if they are purchased from a third party or sold to a third party, the same would be exigible to tax. There is no quarrel with the aforesaid proposition. However, unless the factual foundation for the same is laid before the MSTT, it is only then that the MSTT can adjudicate upon the said issue and apply the ratio of the aforesaid decision of the Supreme Court. In the facts of the present case, as

noted earlier, the factual foundation itself was not laid before the MSTT. In fact, no application was also made to lead any additional evidence or produce additional documents to lay the factual foundation that the Exim Scrips were in fact surrendered to the Government and not transferred to non-Governmental Authorities. This being the case, we find that this decision of the Supreme Court will not carry the case of the applicant any further.

22. This now leaves us only to deal with Question (II) reproduced earlier. This relates to the interpretation of the provisions of Section 41 of the BST Act, read with Notification Entry 39 issued under Section 41 of the BST Act. To understand the controversy, it would be apposite to reproduce section 41 which reads thus:-

"SECTION 41 . EX EMPT ION -----

(1) Subject to such conditions as it may impose, the State Government may, if it is necessary so to do in the public interest, by notification in the Official Gazette, exempt any specified class of sales or purchases from payment of the whole or any part of any tax payable under the provisions of this Act any notification issued under this section may be issued so as to be retrospective to any date not earlier than the 1st January 1960.

(2) Where any dealer or person has purchased any goods under a declaration given by him under any of the notifications issued under this section and -

(a) any of the conditions subject to which such exemption was granted, or

(b) any of the recitals or the conditions of the declaration, are not complied with, for any reason whatsoever, or, in any other case, where such dealer or person was not entitled to issue such declaration, then without prejudice to the other provisions of this Act such dealer or person shall be liable to pay purchase tax on the purchase price of the goods so purchased, and the purchase tax shall be levied at the rate set out against each of such goods in column 4 of Schedule B and C, notwithstanding that such dealer or person was not liable to pay tax under section 3, and accordingly the dealer or the person who has become liable to pay purchase tax under this sub-section shall file a return in the prescribed form to the prescribed authority within a prescribed time and shall include the purchase price of such turnover in his return, and pay the tax in the prescribed manner. The tax due from any such dealer or person shall be assessed or reassessed under section 33 or 35, as the case may be :

PROVIDED that, the amount of tax (if any) paid by the dealer or such person to a Registered dealer on such purchases, on which he has become liable to pay purchase tax under this sub-section, shall be set-off against the purchase tax so leviable.

Proviso added by Mah. 18 of 1994, s. 3(17)(2), w.e.f. 1-4-1994 [PROVIDED FURTHER that, if the dealer or the person liable to pay purchase tax as aforesaid has been assessed to purchase tax and if he has paid such tax, then the dealer from whom such goods are purchased shall be exempted from payment of tax on

sales of such goods to the extent such purchase tax has been paid.]

(3) If the Commissioner has reason to believe that any person is liable to pay tax under sub-section (2), the Commissioner shall, after giving him a reasonable opportunity of being heard, assess the amount of tax so due."

23. What Section 41(1) inter alia provides is that in public interest, the State Government may exempt any specified class of sales or purchases from payment of the whole or any part of any tax payable under the provisions of the BST Act. Then Section 41(2) stipulates that where any dealer or person has purchased any goods under a declaration given by him under any of the notifications issued under Section 41(1) and, (a) any of the conditions subject to which such exemption was granted; or (b) any of the recitals or the conditions of the declaration, are not complied with, for any reason whatsoever, or, in any other case, where such dealer or person was not entitled to issue such declaration; then without prejudice to the other provisions of the BST Act, such dealer or person shall be liable to pay purchase tax on the purchase price of the goods so purchased. How the purchase tax has to be levied is also thereafter set out.

24. Having analyzed the provisions of Sections 41(1) and 41(2), we now must apply it to the facts of the present case. In this regard, we may note paragraphs 10 to 15 of the order dated 8th December, 2006 passed by the MSTT on this issue and which read as under:-

"10. The first ground is regarding the levy of purchase tax on the purchases of Polythene Plastic powder (P.P. Powder) on Form T/TT for their alleged contravention. According to the lower authorities, it is only the (i) machinery and its components/parts/accessories and (ii) Dyes and chemicals which are allowed to be purchased by a textile mill at concessional tax rate of 6% against declarations in Form T/TT under the Notification entry 39 u/s 41 of the Bombay Act. No other goods are allowed to be purchased on T/TT Form. In the present case, the appellant has issued T/TT Forms in respect of his purchases of P.P. Powder. According to the authorities, the P.P. Powder is neither machinery nor dyes/chemical and therefore the appellant was not entitled to issue T/TT Form against the purchases of P.P. Powder. There is therefore contravention of T/TT form attracting levy of purchase tax u/s 41 (2) of the Bombay Act. In this regard, Mr. Gami submitted that during the relevant times, the learned Commissioner had passed several determination orders thereby holding the plastic powder as a chemical liable to tax at the concessional rate of 4% under the Notification entry 233 u/s 41 of the Bombay Act. In the light of this legal position, as laid down by the said determination orders, the appellant was legally entitled to issue T/TT Forms in respect of the purchases of P.P. Powder. In view thereof, according to him, there is no contravention of T/TT Forms, so as to attract the levy of purchase tax u/s 41 (2). He also pointed out that the T/TT Forms issued by the appellant have been disallowed in the hands of the concerned vendors and accordingly, sales tax has been levied in their assessments. He submitted that there is no warrant for such double taxation, and hence the purchase tax liability

imposed in the appellant's case may be deleted.

11. Mr. Gami's submissions in this regard were however, opposed by the departmental representative. He invited our attention to the assessment order in which the assessing authority while levying the said purchase tax liability has relied on this Tribunal's judgment dated 31.3.1994 passed in the case of M/s Rajpal Plastics and M/s Century Plastics. In the said judgment, the Tribunal has unequivocally held that the plastic powder is not a chemical. According to the departmental representative, if P.P. Powder is not a chemical, the appellant is certainly not entitled to avail the tax concession under the Notification entry 39 by issuing declarations in Form T/TT in respect of the purchases thereof. The departmental representative thus stood by the action taken by the lower authorities in this regard.

12. On careful consideration, we uphold the action taken by the lower authorities. It is true that the learned Commissioner had earlier passed determination orders in some cases thereby holding the plastic powder to be a chemical for the purposes of Notification entry 233 u/s 41. However, subsequently, in the case of M/s Rajpal Plastics and M/s Century Plastics (*supra*), the Tribunal has considered and examined in depth the question as regards whether the plastic powder can be called as a chemical. On careful consideration of all the factual and legal aspects of the matter, the Tribunal came to the conclusion that the plastic powder cannot be considered as a chemical. In these circumstances, the P.P. Powder being not a chemical is not eligible for the tax-concession under the Notification entry 39 u/s 41, and hence the issue of declaration in Form T/TT against the purchase of P.P. Powder would be legally impermissible. The appellant was thus not entitled to issue declaration in Form T/TT against his purchases of P.P. Powder.

13. It has to be noted here that upto the year 1988, no purchase tax u/s 41 (2) was leviable where the purchaser has issued the declaration without being entitled to issue it. However, by the Amendment Act No. IX of 1988, the provisions of Section 41 (2) were amended with a retrospective effect from 1.7.1981, as a result of which, such purchasers were made liable to purchase tax where they have issued the declarations without being entitled to issue them. In view of these clear provisions of law, the present appellant having issued declarations in Form T/TT against his purchases of P.P. Powder, without being entitled to issue them, has certainly committed a contravention thereby attracting purchase tax liability under Section 41 (2). Having regard to the facts of the case, and the relevant statutory provisions, we hold that the appellant is legally liable to pay purchase tax liability and hence the lower authorities are perfectly justified in levying the same.

14. Mr. Gami has also pointed out that the selling dealers have also been assessed to tax on their sales of the very goods, and therefore there is a double taxation. In this regard, it has to be noted that if the particular goods are not eligible for the particular tax concession and if a declaration has come to be

issued against purchase thereof, then the seller is liable to sales tax on his sales and the purchaser is also liable to purchase tax on his purchases. Both these liabilities are without prejudice to each other. In other words, legally the taxes have to be assessed in the cases of both the seller as well as the purchaser. In order to avoid double taxation, it is provided in the proviso to Section 41 (2) with effect from 1.4.1994 that if the purchaser has paid the purchase tax, then the selling dealer shall be exempted from payment of tax on his sales. However, so far as the assessment of tax is concerned, it has to be made both in the cases of seller as well as the purchaser. This is the legal position as explained by this Tribunal through various judgments.

15. In view of the foregoings, the appellant's ground relating to levy of purchase tax u/s 41 (2) in respect of purchases of P.P. Powder on T/TT Form is not found allowable. Same is accordingly rejected."

(emphasis supplied)

25. As can be seen from the above paragraphs, the MSTT placed heavy reliance on an earlier decision of another Bench of the MSTT in the case of M/s Rajpal Plastic Industries (supra). We have carefully gone through the decision in the case of Rajpal Plastic Industries. We are in full agreement with the arguments canvassed by Mr. Sonpal that P.P. powder can never be termed as a "chemical" so as to fall within Notification Entry 39 issued under Section 41 of the BST Act. When one is to apply the common parlance test, it is clear the same cannot be described as a "chemical". It is not in dispute that plastic granules / powder is obtained from crude oil and in scientific terms would be a "chemical" obtained in refining of crude oil. It also cannot be disputed that plastics are produced in the chemical industry. Though plastics are products of petrochemicals, these are not chemical intermediaries. It is basically a raw material. In fact, it cannot be even seriously contended that P.P. powder is a chemical intermediary. This very idea cannot be acceptable even in common sense. An intermediary chemical is that which is used as a feed to react with another in order to produce a final product. It is obvious that P.P. powder is not so used. It is used only as a raw material and therefore by no stretch of the imagination can be said to be a "chemical". The plastic raw materials (in the present case P.P. powder) are not known for their chemical properties. There is a clear distinction between a chemical intermediary on the one hand and a chemical product used as a raw material directly for the manufacture of goods on the other. The latter is not a chemical or a pharmaceutical compound. In our opinion, as far as the chemical industry is concerned, these are final products (including P.P. powder), which are used in the plastic industry or in the textile industry as a raw material for manufacture of a variety of goods. We agree with Mr. Sonpal that it is not how a chemist or a scientist would understand the product to categorize it whether it is a "chemical" or otherwise. It is to be understood in common parlance, by trade, industry and the persons who deal and use it. These are the relevant factors to understand its meaning for the purposes of the BST Act. The common parlance test is now too

well settled for us to once again burden this judgment by reiterating several decisions of different High Courts as also that of the Supreme Court. Unless the provisions of the BST Act provide otherwise, a particular Entry in the BST Act should normally be interpreted by applying the common parlance test. Once we hold this, we have no hesitation in agreeing with the findings given by MSTT that P.P. powder cannot be termed as a "chemical" and therefore would not fall within Notification Entry 39 issued under Section 41 of the BST Act. This being the position, even Question (II) will have to be answered in the affirmative and against the applicant and in favour of the revenue.

26. The Questions of Law referred to us for our opinion are answered thus:-

QUESTION OF LAW

ANSWER

(I) Whether on the facts and circumstances of the case, and having regard to the appellate powers in Section 55 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in not adjudicating on the point relating to levy of tax on Exim Scrips, merely because the ground in that regard was not mentioned in the Second appeal memo and that the appellant had not made any specific prayer to seek permission for raising additional ground in that regard?

IN THE AFFIRMATIVE AND AGAINST THE APPLICANT AND IN FAVOUR OF THE REVENUE

(II) Whether on the facts and circumstances of the case, and on a true and correct interpretation of the provisions in Section 41 (2) of the Bombay Sales Tax Act, 1959 and in Notification entry 39 under Section 41 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in holding that plastic powder is not a chemical, and that therefore the appellant has committed any contravention by issuing declarations of T/TT Forms against his purchases of plastic powder, so as to attract the purchase tax liability under Section 41 (2)?

IN THE AFFIRMATIVE AND AGAINST THE APPLICANT AND IN FAVOUR OF THE REVENUE

27. Both the Sales Tax References are accordingly disposed of. No order as to costs.