
(2018) 10 UK CK 0107

In the Uttarakhand High Court

Case No : Writ Petition No. 873, 725, 727, 728, 874, 876 , 877, 965, 1459, 3111, 3112, 3160, 3241 Of 2015, 1363 Of 2016

New Tarai Stone Crusher & Others

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 30-10-2018

Acts Referred:

Uttarakhand VAT Act, 2005 — Section 2(o), 4

A.P.Sandalwood and Red Sanderswood Transit Rules, 1969 — Rule 3, 4, 5, 6, 7

Citation : (2018) 10 UK CK 0107

Hon'ble Judges : Alok Singh, J

Bench : Single Bench

Advocate : Arvind Vasisth, D.S. Patni, Piyush Garg, Pankaj Purohit, Mohit Mauleki

Final Decision : Disposed Off

Judgement

Alok Singh, J.

1) First and foremost, it needs to be mentioned here that earlier, a similar issue was raised by some similarly situated stone crusher units by means of filing a Writ Petition No.1365 of 2014 (M/S), titled as M/s Himalaya Stone Industries & others vs. State of Uttarakhand & others, before the coordinate bench of this Court, which was dismissed vide judgment and order dated 07.10.2014 on the ground, inter alia, that the Notification dated 02.05.2013 had not been assailed in the aforesaid petition and, therefore, the question as to whether the sand and grits changes its character after being processed in the crusher cannot be answered. The relevant portion of the judgment dated 07.10.2014 is reproduced hereinbelow:-

"21. Prior to issuance of notification dated 2nd May, 2013, there was specific exclusion clause in Entry no.94 of Schedule II (B), excluding boulders and grits and sand obtained by crushing by the stone crusher, but after the issuance of notification, exclusion clause is omitted in Entry no.94 of Schedule II(B). The Uttarakhand VAT Act has seven Schedules and in every Schedule, there is the

name of the item and the rate of tax leviable against that item, are mentioned. If any item is not included in any of the Schedule mentioned, then the tax leviable of such item will be 13.5%. Since the items processed by the petitioners are not covered by any entry, they have been asked to pay tax at the rate of 13.5%. The argument of learned Senior Advocate for the petitioners that State has not jurisdiction to levy the tax in excess of 5% in respect of the goods, which are covered by Schedule II of the Act, cannot be accepted in view of notification dated 2nd May, 2013, as in a taxing Act it is not possible to interpret the language which does not follow from the plain reading of the statute words. This cannot be done unless it is held that all the sand and bazri, which are obtained from the river bed material, whether by screening the same with water or by crushing the same, continues to be the river bed sand and bazri? The petitioners expect from the Court to decide the question whether the sand and bazri, which is obtained after crushing river bed material also continues to be known as river sand or river bazri? In other words whether even after processing by crushing it retains its character? And in such event, tax, as given in the Schedule, is required to be given. In the present case, relief sought is in the nature of mandamus restraining the respondents from charging VAT in excess of 5% on the sale of river sand and river bazri. The petitioner has neither challenged the notification dated 2nd May, 2013 nor the notice dated 19.06.2013 issued by respondent no.3. In such situation, question raised by the petitioners, cannot be answered."

2) Feeling aggrieved by the said judgment, appellants (Himalaya Stone Industries) preferred a Special Appeal No.64 of 2015 before the Division Bench of this Court. It appears that in the meanwhile, several writ petitions have also been filed seeking a writ of mandamus restraining the State from charging VAT in excess of 5% on the sale of river sand and river bazri, which are screened with water by separating other materials or are otherwise processed in crusher, in accordance with Schedule II (B) of the Act, 2005. It was also prayed to issue a writ of mandamus restraining the State from imposing VAT @ 13.5% treating the goods, viz. river sand and river bazri which are screened with water by separating other materials or are otherwise processed in crusher, as unclassified item.

3) During the pendency of the said Special Appeal No.64 of 2015, petitioners/appellants sought permission to amend the writ petition seeking incorporation of the prayer for quashing the Notification dated 02.05.2013. Ultimately, vide order dated 11.04.2018, the appellants were permitted to withdraw the aforesaid Special Appeal as well as Writ Petition filed before this Court with liberty to institute the writ petition on the same and similar grounds as advised. That is how, the present bunch of writ petitions are being taken up and are being decided by this judgment.

4) As all the above-mentioned petitions have arisen out of the common issue, hence, all petitions are being taken up together and are being decided by this

common verdict.

5) For the sake of convenience, the facts of Writ Petition No.873 of 2015 (M/S) is being taken as a leading case. The petitioner seeks following relief, among others:

"(a) Issue a writ, order or direction in the nature of mandamus restraining and prohibiting the respondents from charging VAT in excess of 5% on the sale of river sand and river bazri which are screened with water by separating other materials or are otherwise processed in crusher, in accordance with Schedule II B of the VAT Act.

(b) Issue a writ, order or direction in the nature of mandamus restraining and prohibiting the respondents from imposing VAT at the rate of 13.5% treating the aforesaid goods viz. river sand and river bazri which are screened with water by separating other materials or are otherwise processed in crusher, as unclassified item.

(b-a) Or in the alternative be pleased to issue a writ order or direction in the nature of mandamus / direction declaring the Notification No.541/2013/55 (120)/XXVII(8) 2001 dated 02.05.2013 as discriminatory, ultra -vires, unconstitutional, illegal and against the law laid down by the Hon'ble Apex Court."

6) The facts of the case, in a nutshell, are that the petitioner is a registered dealer under the Uttarakhand VAT Act, 2005 and is carrying on business of sale of stone grits, sand, bazri etc. and is paying tax at the prescribed rate on the sales. The petitioner purchases river bed materials from the Uttarakhand Forest Development Corporation and the Forest Department after paying due royalty and other charges for the same. The Uttarakhand Forest Development Corporation, after charging amounts, including certain taxes, permit the petitioner to obtain bed materials, which contains sand, bazri and boulders. After collecting the same from the river bed materials, they are sold by the petitioner after screening with water or after processing in crusher. The boulders, which are obtained from river bed, are converted into small bazri/grits by the petitioner.

7) Before proceeding further, it would be appropriate to reproduce the relevant provisions of the Uttarakhand VAT Act, 2005 (hereinafter referred to as the Act, 2005). Sub-section (2)(b) of Section 4 of the Act, 2005 reads as under :-

"4. Rate of Tax -(2) (b) Subject to the provisions of section 3, a dealer shall be liable to pay tax on his taxable turnover -(i) At every point of sale at the rate hereafter provided:

(a) In respect of goods specified in Schedule II (A) 1 percent;

(b) In respect of goods specified in Schedule II (B) 5 percent;

(c) In respect of goods specified in Schedule II (C) at the rate specified therein;

(d) In respect of goods other than those included in any [13.5 percent] of the Schedules."

8) Perusal of sub-section (2)(b) of Section 4 of the Act, 2005 reveals that a dealer shall be liable to pay tax @ 5 percent in respect of goods specified in Schedule II (B) and so far as the goods other than those included in any of the Schedules are concerned, a dealer shall be liable to pay tax @ 13.5 percent.

9) At this present juncture, it is necessary to incorporate the Old Entry 94 of Schedule II (B), which is extracted as under:

Sl. No.

Item

Rate of tax

Entry

94

River sand and grit excluding (a) boulders and (b) grit and sand manufactured by stone crushers

4 %

Schedule - II (B) (94)

10) The aforesaid Old Entry 94 was substituted by Notification No.04/XXVII(8)/2006 dated 21.01.2006 in the following terms:

Sl.No.

Item

Rate of tax

Entry

94

River sand, grit & boulders

4%

Schedule-II (B) (94)

11) By the aforesaid Notification issued in 2006, grit and boulders, which were excluded in old Entry, were also added / included. Thereafter, by the impugned Notification No.541/2013/ 55(120)/XXVII(8)/2001 dated 2nd May, 2013, the Entry 94 of Schedule II (B) has, now, been substituted, which is to the following effect:-

Sl.No

Item

Rate of tax

Entry

94

River sand and River Bazri

5%

Schedule-II (B) (94)

12) By the impugned notification issued in the year 2013, 'River sand and River Bazri' have been specified in Entry 94 of Schedule II (B). Now, the assessing authority is compelling the stone crushers to deposit the tax @ 13.5% as the goods, which are being sold by the petitioner after crushing process, come under the goods other than in any of the Schedules. Per contra, the stone crushers contend that the goods, which are being sold by them, come within the ambit of Schedule II (B) and, therefore, the assessing authority can levy tax @ 5 percent only instead of 13.5%. The case of the Stone crushers is that the assessing authority cannot demand the VAT @ 13.5% on the sale of sand and bazri, which are obtained from the river bed material by either screening or crushing, as even after the said process, the same remains 'river sand' and 'river bazri'. In the process undertaken by the stone crusher units, the river sand and river bazri are screened with water and, after the process of crushing them, the boulders are crushed into different pieces/sizes, but it remains the same 'river sand' and 'river bazri'. The petitioner contends that once the stone crusher unit purchases river bed materials (i.e. river sand and river bazri) from the Forest Development / competent authority after paying due royalty and other charges (i.e. @ 5%) for the same and the petitioner after crushing boulders into different pieces/sizes (i.e. gitti, small stones, stone chips, etc.), the Government cannot levy tax @ 13.5% with the aid of sub-section 2(b)(d) of Section 4 of the VAT Act and on the ground that the gitti, small stones, stone chips, etc. (which came into existence after crushing boulders) do not come under the purview of the goods specified in Schedule II (B).

13) Keeping in view the above, this Court deems it proper to frame the following questions in order to adjudicate the matter in a proper manner : -

"(i) Whether the river sand and river bazri after being crushed in the crusher remains the same commercial commodity or it emerges into a new commercial commodity?

(ii) If both the commodities are one & same and no new commercial commodity comes into existence, then, as to whether the assessing authority can make any classification between the same commercial commodity and whether the assessing authority can levy different rate of tax on same commercial commodity?"

14) At the first flush, the claim of the State Government appears to be alluring and plausible while looking at Entry 94, but on a closer scrutiny, it cannot be

accepted for the reasons, which will be dealt with in the ongoing paragraphs.

15) Hon'ble Supreme Court in the case of Commissioner of Sales Tax, U.P. vs. Lal Kunwa Stone Crusher (P) Ltd., AIR 2000 SC 1161 had an occasion to deal with a question as to whether gitti, stone chips and dust continue to be stone or on crushing stone boulders into gitti, stone chips and dust different commercial goods emerge so as to attract tax on their sale. It was held by Hon'ble Supreme Court in Lal Kunwa's case (supra) that the stone, gitti and articles of stones are all of similar nature though by size they may be different and even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, yet it cannot be presumed that Entry 40 of the notification is intended to describe the same as not stone at all. It was also held that in fact, the term 'stone' is wide enough to include the various forms, such as, gitti, kankar, stone ballast. The view expressed in Lal Kunwa's case (supra) has also been followed in State of Maharashtra vs. Mahalaxmi Stores, (2003) 129 STC 79, wherein the issue was as to whether the Tribunal was justified in holding that crushing of boulders resulting in metal of different sizes ordinarily known as Gitti does not amount to manufacture or not. Hon'ble Supreme Court has held as follows :-

"5.But it may be pointed out that every type of variation of the goods or finishing of goods would not amount to manufacture unless it results in emergence of new commercial commodity. In the instant case, the very nature of the activity does not result in manufacture because no new commercial commodity comes into existence."

16) In the case of Ayurveda Pharmacy & another vs. State of Tamil Nadu, (1989) Supp. 4 SCC 165, the sales tax @ 30% on sale of a class of medical preparations, viz., Arishtams and Asavas, having greater alcoholic content was challenged on the ground of being discriminatory as all other medical preparations were taxable at a lower rate of 7%. Hon'ble Supreme Court has held as follows:-

"6. It is open to the Legislature, or the State Government if it is authorized in that behalf by the Legislature, to select different rates of tax for different commodities. But, where the commodities belong to the same class or category, there must be a rational basis for discriminating between one commodity and another for the purpose of imposing tax."

17) Hon'ble Supreme Court in Ayurveda Pharmacy's case (supra) also held that it was not satisfied with the reason given by the State for imposition of a higher rate of tax on a commodity belonging to the same class or category, i.e. medicinal preparation.

18) Hon'ble Apex Court in Mauri Yeast India Private Limited vs. State of Uttar Pradesh & another, (2008) 5 SCC 680 has dealt with a question as to whether 'yeast' could be covered by the entry 'chemicals of all kinds' or not. Hon'ble Apex Court held that if there is a conflict between two entries wherein one leading to

the tariff entry and another to the residuary entry, the former should be preferred. It was also held as follows:

"57. Common parlance or commercial parlance test, we may notice has been applied recently in HPL Chemicals Ltd. v CCE stating : (SCC p.220, para 31)

31. It was submitted by the learned Senior Counsel appearing for the Revenue that the goods were classifiable under Heading 38.23 (now 38.24) as 'residual products of the chemical or allied industries, not elsewhere specified or included' which was the last item covered by Heading 38.23. The said Heading 38.23 is only a residuary heading covering residual product of chemical or allied industries 'not elsewhere specified or included'. In the present case since the goods were covered by a specific heading i.e. Heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down Rule 3(a) of the Interpretative Rules set out above. As per the said Interpretative Rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description. This position is also well settled by a number of judgments of this Court. Reference may be made to Bharat Forge and Press Industries (P) Ltd. v CCE (1990) 1 SCC 532. It was observed in para 4 inter alia as under:

4. The question before us is whether the Department is right in claiming that the items in question are dutiable under Tariff Entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residual item.

58. In our opinion, "yeast" is a chemical within the meaning of the entry in question."

19) Hon'ble Supreme Court in the case of State of Uttarakhand & others vs. Kumaon Stone Crusher in Civil Appeal No.14874 of 2017 decided on 15.09.2017 has dealt with a similar issue wherein M/s Kumaon Stone Crusher filed a petition before this High Court for quashing the order dated 14.06.1999 issued by the Conservator of Forest and order dated 01.06.1999 issued by the Divisional Forest Officer directing for making recovery and levy of Transit Fee upon the finished item of stone i.e. stone grits, stone chips etc. from M/s Kumaon Stone Crusher. The case of Kumaon Stone Crusher was that its stone crusher which collects the boulders from the bank of a river, which is a forest, Transit Fee is charged and paid. After taking the boulders to the crushing centre and involving manufacturing process, boulders are converted into the commercial commodity, namely, stone grits & chips, and it was pleaded that after it becomes a commercial commodity, it ceases to be as 'forest produce' and no Transit Fee can be charged and recovered thereafter. This Court, after hearing the parties, took a view that after river bed material is converted into the washed and single pea

gravel and bajri after involving manufacturing process, a new commercial commodity comes into existence and same ceases to be a forest produce. When the matter came up before Hon'ble Supreme Court, the stand of the State of Uttarakhand in the aforesaid Civil Appeal No.14874 of 2017 are as follows:

"VI. Submissions with regard to the judgment of Uttarakhand High Court.

52. As noted above both the State of Uttarakhand and State of U.P. have challenged the judgment of Uttarakhand High Court. Shri Dinesh Dwivedi, learned senior counsel questioning the judgment dated 01.07.2004 of Uttarakhand High Court in M/s. Kumaon Stone Crusher vs State of Uttarakhand, submits that boulders crushed into grits retain same characteristic that is forest produce. By obtaining grits, stone chips and dust no new material is obtained. Challenging the judgment of Uttarakhand High Court in M/s. Gupta Builders dated 26.06.2007, it is submitted that the mere fact that royalty has been paid by the writ petitioners in accordance with the Uttar Pradesh Minor Mineral (Concession) Rules, 1963 as adopted in Uttarakhand by Uttarakhand Minor Minerals (Concession) Rules, 2001 shall have no effect on the entitlement of the State to levy transit fee. The judgment of the High court that no transit fee can be levied on the minerals is erroneous. It is further submitted that the High Court erred in adopting a very restrictive meaning of word 'forest' whereas the forest has to be understood in a wide sense. It is contended that Forest Act, 1927 and MMDR Act, 1957 operate in different fields. In so far as the case of the writ petitioners is that transit fee is being charged for second transit also. It is submitted that transit pass has its destination and after it reaches its destination, the pass comes to an end, the transit fee can be validly charged.

20) After noticing the submissions of parties, Hon'ble Apex Court in the aforesaid civil appeal framed the following issue and held as under:-

"ix. Whether by Manufacturing process / chemical Treatment as claimed by the writ petitioners, the forest produce loses its character of forest produce."

64. In CST vs Lal Kunwa Stone Crusher (P) Ltd., (2000) 3 SCC 525, the Court was considering liability of Trade Tax on stone chips, gittis and stone ballast. The question raised before the Court was, as to whether, the stone gittis, sand chips and dust continue to be stone grits, chips and dust or after crushing them, they get converted into a new commercial products, so as to attract the tax on their sale. The case of dealer was that at the time of purchase of goods sales tax has been paid hence, goods emerging out of same are not liable to be taxed again. This Court held that the word 'stone' is wide enough to accept various forms of grits, gitti, kankar and ballast hence, no tax was leviable on the sand chips, grits and dust etc. In para 5 following was held :

"5. The view taken by the Tribunal as affirmed by the High Court is that the goods continue to be stone and they are not commercially different goods to be identified differently for the purposes of sales tax. The decision relied on by the minority view in the Tribunal in Reliable Rocks Builders & Suppliers vs State of

Karnataka turned on the concept of consumption of goods for the purpose of bringing into existence new goods. In that case the Court was not concerned with an entry of the nature with which we are concerned in the present case. Where the dealer had brought into existence new commercial goods by consuming the boulders to bring out small pieces of stones, it was held that such activity attracted purchase tax. In the present case, however, stone, as such, and gitti and articles of stones are all of similar nature though by size they may be difference. Even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, yet it cannot be presumed that Entry 40 of the notification intended to describe the same as not stone at all. In fact the term "stone" is wide enough to include the various forms such as gitti, kankar, stone ballast. In that view of the matter, we think that the view taken by the majority of the Tribunal and affirmed by the High Court stands to reason. We are, therefore, not inclined to interfere with the same."

65. The above judgment held that the nature and character of the stone remains the same, even after, crushing the boulders into small stones, dust etc. Reliance by the writ petitioners is also placed on judgment in (2003) 3 SCC 122, *Tej Bahadur Dube (Dead by Lrs.) vs. Forest Range Officer F. S. (S.W.)*, Hyderabad. In the above case, the appellant was charged for violation of Rule 3 to 7 of the A.P. Sandalwood and Red Sanderswood Transit Rules, 1969. The assessee was found transporting finished sandalwood products. He was charged with the violation of aforesaid rules. Assessee's case was that he has obtained permission of the authorities for converting sandalwood purchased by him into various types of handles which are ultimately used in other sandalwood handicrafts. This Court held that sandalwood products which have been converted into such products after obtaining proper permission was not prohibited, in para 6 following was held :

"6. As noticed above, the original appellant was a holder of a licence to deal in and stock sandalwood. From the material on record, it is seen that the said appellant had obtained necessary permit from the competent authorities for converting the sandalwood purchased by him into various types of handles which are ultimately used in other sandalwood handicrafts which permission was valid up to 31.12.1982 period covering the period of seizure. The appellant had contended that it is pursuant to the said permission he had converted the sandalwood pellets into handles to be used in the other sandalwood artifacts and he had informed the authorities concerned about such conversions as per Exts. P-18 to P-27. It is also the case of the appellant that concerted sandalwood artifacts or parts thereof do not require any transit permit and it is only sandalwood in its original form or chips and powder of sandalwood which requires a transit permit. The trial court has agreed with this submission of the appellant. We also notice under the Rules and the Act what is prohibited is the transportation of sandalwood as defined in Section 2 (o) of the Act been converted into such products after obtaining proper permission from the

authorities. Such converted sandalwood products under the Rules do not require any transit permit. We say so because the Rules referred to in these proceedings do not contemplate such transit permit is required. On the contrary, the respondent argues that even converted sandalwood products require transit permit because they remained to be sandalwood as contemplated under Section 2 (o) of the Act. In the absence of any specific rules or provisions in the Act to this effect, we are unable to agree with this argument. We are of the opinion that once sandalwood is subjected to a certain process from which a sandalwood product is lawfully obtained, then such products ceases to be sandalwood as understood in Section 2 (o) of the Act."

67. In this context, it is necessary to refer to a Three Judge Bench Judgment of this Court in Karnataka Forest Development Corporation Ltd. vs. Cantreads Private Limited and others (1994) 4 SCC 455. This Court had occasion to consider Karnataka Forest Act, 1963. Caoulchouc or latex covers natural covering sheets of various grades or not, was the question under consideration. After noticing the various dictionary meanings of caoutchouc, it was held that since processing does not result in brining out a new commodity but it preserves the same and rendered it fit for markets, it does not change its character hence, it remained a Forest Produce. Thus rubber sheets converted from caoutchouc continue to be a Forest Produce. In the above case, this court has also held that a 'test of commercial parlance' by considering entries in sales tax is not applicable while considering the definition of Forest Produce.

21) After discussing various case law, Hon'ble Supreme Court in the aforementioned civil appeal has held that the crushing of stones, stone boulders into stone grits, stone chips and stone dust does not result into a new commodity different from forest produce. It was held that the crushed materials continue to be stone and retain their nature of forest produce.

22) In the instant case, the case of the petitioner is that in the process undertaken by the stone crusher units, the river sand and river bazri are screened with water and, after the process of crushing them, the bazri/boulders are crushed into different pieces/sizes, but it remains the same 'river sand' and 'river bazri'. But, the State Government is compelling the stone crushers to deposit the tax @ 13.5% as, according to the State Government, the same comes under the goods other than in any of the Schedules. The assessing authority cannot demand the VAT @ 13.5% on the sale of sand and bazri, which are obtained from the river bed material by either screening or crushing them into small pieces, as even after the said process, the same remains 'river sand' and 'river bazri' .

23) In view of the foregoing discussion, this Court is of the opinion that the river sand and river bazri after being crushed in the crusher remains the same commercial commodity and it does not emerge into a new commercial commodity. After the process of crushing, the bazri / boulders are crushed into different pieces/sizes, but it remains the same 'river sand' and 'river bazri' and

both are of similar nature and no new commercial commodity comes into existence. If the new commercial commodity does not come into existence, the assessing authority can not levy rate of tax on same commercial commodity on which the tax @ 5% has already been levied as provided for the goods specified in Schedule II (B). Therefore, this Court is of the opinion that the assessing authority cannot have two stands in respect of the similar commodity. The Government can declare different rates in respect of different goods only, but it cannot levy different taxes in respect of similar nature of goods/commodities. No reasonable classification can be made between the same goods/commodity. Entry 94 of Schedule II (B) is bound to cover the stone, gitti, stone chips, stone ballast etc., which come into existence after crushing of boulders. The questions posed in para 13 are answered accordingly.

24) The aforesaid view is fully fortified by the decision of Hon'ble Supreme Court in Lal Kunwa's case (supra) wherein it has been held that the stone, gitti and articles of stones are all of similar nature though they may be of different sizes and even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, yet they all are 'stone' and hence not taxable as a separate commodity other than the boulders from which they were obtained.

25) The view expressed in this judgment is also abundantly fortified by the decision of Hon'ble Apex Court in Kumaon Stone Crusher's (supra), in which, it has been held that the crushing of stones, stone boulders into stone grits, stone chips and stone dust does not result into a new commodity different from forest produce and the crushed materials continue to be stone and retain their nature of forest produce.

26) In view of the observations made above, all the writ petitions are disposed of. No order as to costs.