

(1981) 12 GUJ CK 0002
In the Gujarat High Court
Case No : Sales Tax Reference No. 23 of 1979

The State of Gujarat

APPELLANT

Vs

Bhikhubhai and Sons

RESPONDENT

Date of Decision : 22-12-1981

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 10, 13, 15, 2, 2(26)

Citation : (1982) 50 STC 243

Hon'ble Judges : P.D. Desai, J;B.K. Mehta, J

Bench : Division Bench

Advocate : J.R. Nanavati, Government Pleader, instructed by H.V. Chhatrapati, of Bhaishanker Kanga and Girdharlal, for the Appellant;

Judgement

Desai, J.—The assessee is a dealer registered under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act"). The assessee, in the course of its business, purchase coal as well as semi-burnt or half-burnt coal commonly known as kolshi. In the present case, we are not concerned with that part of the assessee's business activity which is concerned with the purchase and sale of coal and we need not, therefore, dilate on that aspect. So far as kolshi's constituents are concerned, the Tribunal has described the said article in the course of its order as "nothing but a part of unburnt coal along with the ash of the remaining part of burnt coal". After purchasing kolshi, the assessee subjects the same to the process of sieving and the unburnt portion of the coal is thereby separated from the ash. The assessee then sells both the articles separately.

2. During the year 1973-74, which is the relevant year of account, the assessee had purchased kolshi from the registered dealers. In the course of the assessee's assessment to sales tax for said accounting period, the Sales Tax Officer allowed the sales of unburnt coal as well as of ash to be deducted u/s 7(ii) of the Act on the ground that they were resales of goods purchased by the assessee from registered dealers. However, in suo motu revision, the Assistant Commissioner of Sales Tax, after affording to the assessee an opportunity of

being heard, revised the assessment u/s 67 of the Act and disallowed the deduction in respect of the sales of ash to the tune of Rs. 14,380 on the ground that kolshi and ash were two distinct commercial commodities and that sales of ash could not be regarded as resales of kolshi purchased by the assessee from registered dealers. The Assistant Commissioner of Sales Tax consequently directed that the sales of ash should be included in the assessee's turnover of sales and that sales tax should be levied on such sales at the rate prescribed under entry 13 of Schedule III to the Act.

3. The assessee, feeling aggrieved by the decision of the Assistant Commissioner of Sales Tax, carried the matter in revision before the Gujarat Sales Tax Tribunal (hereinafter referred to as "the Tribunal") u/s 67 of the Act. The Tribunal allowed the revision application holding that the sales of ash were deductible from the assessee's turnover of sales in view of the fact that they were resales of goods that were purchased by it from the registered dealers without doing anything to them amounting to or resulting in manufacture. The reasoning of the Tribunal in support of its conclusion finds an apt expression in the following words :

"Firstly, it may be mentioned that what has been purchased by the applicant is kolshi. Kolshi is nothing but half-burnt coal along with the ash of the burnt part of coal. It can, therefore, easily be said that what the applicant purchased is two commodities, namely, half-burnt coal and ash though both these commodities were purchased in a combined form. Besides this, the applicant has not done anything to the goods which amounts to manufacture. This is because, the applicant has separated the ash portion and the coal portion of half-burnt coal through the sieve and this separation of half-burnt coal and ash cannot be considered to be a process of manufacture."

4. The Tribunal, having regard to its conclusion aforesaid, ordered the refund of the excess amount of sales tax paid by the assessee pursuant to the revisional order of the Assistant Commissioner of Sales Tax.

5. At the instance of the State of Gujarat, the Tribunal has stated a case in respect of the following two questions of law for the opinion of this Court :

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that the assessee's activity of separating ash from semi-burnt coal by a process of sieving, did not amount to or result in the "manufacture" of ash within the meaning of the definition of "resale" given in clause (ii) of section 2(26) of the Gujarat Sales Tax Act, 1969 ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal was right in law in holding that the opponent's sales of ash to the extent of Rs. 14,381 were resales of goods purchased from registered dealers, and therefore, entitled to deduction from the opponent's turnover of sales under clause (ii) of section 7 of the Gujarat Sales Tax Act, 1969 ?"

6. It would be convenient at this stage to set out the relevant statutory

provisions. Section 7, in so far as it is relevant for the purposes of this case, reads as under :

"7. There shall be levied a sales tax on the turnover of sales of goods specified in Part A of Schedule II at the rate set out against each of them in column 3 thereof, but after deducting from such turnover, -

(i)

(ii) resales of goods purchased by him from a registered dealer,

(iii)

(iv)"

7. Section 2 is the definition section. Clause (26) of section 2 is in the following terms :

"(26) "resale" for the purposes of sections 7, 8, 10, 13 and 15 means a sale of purchased goods :-

(i) in the same form in which they were purchased, or

(ii) without doing anything to them which amounts to, or results in, a manufacture, or

(iii) being goods specified in entries 1 to 3 in Part A of Schedule II in entries 1 to 6 in Part B of Schedule II without doing anything to them which takes them out of the description thereof in those entries,

and the word "resell" shall be construed accordingly."

8. Clause (16) of section 2 is in the following terms :

"(16) "manufacture" with all its grammatical variations and cognate expressions, means producing, making, extracting, collecting, altering, ornamenting, finishing or otherwise processing, treating, or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed."

9. Rule 3 of the Gujarat Sales Tax Rules, 1970, sets out in different clauses various "manufactures and manufacturing processes" which are not to be included within the meaning of the word "manufacture" for the purposes of clause (16) of section 2. It is not necessary to set out the contents of the said rule as the process of sieving kolshi with a view to separating the unburnt portion of coal from the ash is not one of the processes specifically included in rule 3.

10. It would be pertinent to point out here that "coal including coke in all its forms but excluding charcoal" is the article covered by entry 1 of Schedule II, Part A, on the sales of which sales tax is leviable u/s 7 at the specified rate. Ash is not specifically included in any of the entries in the different schedules appended to the Act. The revenue has, therefore, subjected the sales to ash made by the assessee to sales tax u/s 10 by treating the said article as having

been comprehended within the residuary entry 13 of Schedule III.

11. Now, in that case, it does not appear to have been in dispute that kolshi purchased by the assessee was "coal" within the meaning of entry 1 of Schedule II, Part A. It also does not appear to have been in dispute that kolshi was purchased from registered dealers. In view of the provisions of section 7(ii) read with section 2(26), the assessee would be entitled to deduct from its turnover of sales, resales of kolshi if such kolshi is purchased from a registered dealer and it is resold : (i) in the same form in which it was purchased, or (ii) without doing anything to it which amounts to, or results in, a manufacture, or (iii) without doing anything to it which takes it out of the description thereof in entry 1 of Schedule II, Part A, because kolshi, as earlier pointed out, is treated as "coal" within the meaning of entry 1 of Schedule II, Part A. Somewhat different question arises, however, in the context of the sales of ash and the question is : Can it be said that when the assessee sold ash after separating it from kolshi by the process of sieving, what it sold was the very article which it had purchased from registered dealers and which articles were "coal" within the meaning of entry 1 of Schedule II, Part A ? The question, in other words, is : "Whether the assessee who having purchased kolshi from the registered dealers separated ash therefrom and sold the ash, resold kolshi in the same form in which it was purchased or without doing anything to the same which takes it out of the description of "coal" in entry 1 of Schedule II, Part A ?" Be it noted in this connection that each one of the conditions laid down in section 2(26), which defines the word "resale", is disjunctive in character and that, therefore, if it is shown that any one or more of the said conditions is not satisfied, there would be no "resale" within the meaning of section 7.

12. "Coal", according to Webster's New Twentieth Century Dictionary, Unabridged Second Edition, means "a black, combustible mineral solid resulting from the partial decomposition of vegetable matter away from air and under varying degrees of high temperature and great pressure over a period of millions of years; used as a fuel and in the production of coke, coal gas, water gas, and many coal-tar compounds". Coal, within the meaning of entry 1 of Schedule II, Part A, would bear the same meaning. Any article to be "coal" must, therefore, be combustible and usable as a fuel. Even in the popular parlance, only that article would be called "coal" which has the abovementioned properties. "Ash", according to the same dictionary, means "the white or grayish power left of something after it has been burned". The word is understood in the popular parlance in the same way. Accordingly, "ash" is the leftover of a substance which is inflammable and which has been burned.

13. Now, as earlier pointed out, what the assessee purchased in the instant case was kolshi and after subjecting it to the process of sieving and after separating in that manner the two constituent elements of kolshi, the assessee sold the said two constituents, namely, unburnt coal and ash, separately. In the context of section 7(ii) and the sale of ash, what has to be seen is whether the assessee,

who had purchased kolshi, had resold the same article. Even without the definition of the word "resale" contained in section 2(26), it would not have been possible to hold that there was a resale of the same commodity which the assessee had purchased. Kolshi and ash are two distinct commercial commodities. Ash would not be identified as kolshi and vice versa by those who deal in the said articles. Besides, while one of the constituent of kolshi, namely, unburnt coal, still retains its combustible property and is, therefore, capable of being used as a fuel, the other constituent of kolshi, namely, ash, being the leftover of an inflammable substance which has been burned, no longer retains such property. Kolshi, which contains both the abovenamed constituents having distinct properties, thus, has a different attribute or quality than ash which is separated from it and which is no longer inflammable, and that attribute or quality clearly distinguishes kolshi from ash. For these reasons, even in the absence of the definition of the word "resale", it would not have been possible to regard ash as kolshi and to allow deduction of the sales of ash from the turnover of sales of the assessee u/s 7.

14. When the question is considered in the light of the definition of the word "resale" given in section 2(26), the conclusion reached above is reinforced, as earlier pointed out, the there conditions laid down in section 2(26) are disjunctive in character. Even if one of the conditions therein laid down is not satisfied, there would be no "resale" within the meaning of section 7. For the purposes of the present case, we may focus attention on conditions (i) and (iii). Condition (i) is that the resale of the purchased goods must be in the same form in which they were purchased. This condition is apparently not satisfied because it is not possible to hold that the sale of ash was the sale of kolshi in the same form in which it was purchased. Condition (iii), in so far as it is relevant for the present purposes, requires that the purchased goods must have been sold without doing anything to them which takes them out of the description of the said goods in entry 1 of Schedule II, Part A. What the assessee, in the instant case, purchased was kolshi, which is "coal" within the meaning of entry 1 of Schedule II, Part A. In order to satisfy this statutory condition, the assessee must be shown to have resold the same article without doing anything which takes the said article out of the description of "coal" in entry 1 of Schedule II, Part A. In other words, "coal" must have been resold as "coal" without doing anything to it which would so alter its character or composition that it would no longer answer the description thereof contained in entry 1 of Schedule II, Part A. Kolshi which is coal is not resold, in the instant case, without doing anything to it. Indeed, kolshi is not resold at all; what is sold is ash which is not combustible and which is extracted from kolshi after subjecting the same to the process of sieving. It would thus appear that conditions (i) and (iii) of section 2(26) are not satisfied in the present case and that, therefore, there is no "resale" within the statutory meaning of the said word.

15. Looking at the matter either way, we are of the view that the sales of ash made by the assessee could not have been allowed as a deduction from the

assessee's turnover of sales u/s 7(ii). The contrary view of the Tribunal, which has considered the matter from an angle totally different from the one from which we have viewed the question, is apparently erroneous. The Tribunal confined its attention solely to the consideration of the question whether the process of separation of ash from half-burnt or unburnt coal by subjecting Kolshi to the operation of sieving amounted to or resulted in a "manufacture" within the meaning of condition (ii) laid down in section 2(26). It failed to consider whether, even if condition (ii) was satisfied, conditions (i) and (iii) were also satisfied. It would not be unreasonable to assume that the said omission was occasioned on account of the Tribunal's failure to comprehend that each one of the conditions laid down in section 2(26) is disjunctive in character and that if the assessee failed to satisfy any one or more of the said conditions, there would be no resale within the meaning of section 7(ii). We do not wish to express our opinion on the question precisely determined by the Tribunal, namely, that the process of sieving applied to kolshi, with a view to separating half-burnt or unburnt coal and ash does not amount to or result in a manufacture. We cannot help observing, however, that the reasoning of the Tribunal that what the assessee had purchased was kolshi which was a composite article consisting of two commodities, namely, half-burnt or unburnt coal and ash, and that therefore, when the assessee sold ash after subjecting kolshi to the process of sieving, it resold the same goods which it had originally purchased, is apparently erroneous. Kolshi and ash are two distinct commercial commodities. Even though ash, before being extracted or separated from kolshi, might have been a constituent part of kolshi, there would be no justification in holding that ash is kolshi. In *State of Punjab and Others Vs. Chandu Lal Kishori Lal and Others*, the Supreme Court held that though cotton in its unginned state contained cotton seeds, it would not be correct to say that cotton seeds which are separated from cotton by a manufacturing process are cotton itself or part of the cotton. According to the Supreme Court, they were two distinct commercial goods though before the manufacturing process, the seeds might have been a part of the cotton itself and there was no warrant for the contention that cotton seeds are not different from cotton. On a parity of reasoning, the Tribunal's view point set out above appears to be difficult to sustain.

16. It is true that in *Commissioner of Sales Tax v. Deoki Nandan Pandey* [1980] 45 STC 145 Guj a learned single Judge of the Allahabad High Court has taken the view that sifting of ash and pieces of burnt coal of different sizes for sale of the same by the assessee, who had entered into a contract with the railways for the removal of coal ash from the railway yard, could not be regarded as a manufacturing process within the meaning of section 2(e-1) of the U.P. Sales Tax Act, 1948. The precise question which we have decided in the context of the first and third conditions incorporated in the definition of the word "resale" in section 2(26) did not arise for consideration in that case. The court there really considered an altogether different question upon which herein we have chosen not to express any opinion, namely, whether the separation of ash from kolshi by

the sieving process is a manufacture within the meaning of the said term as defined in the Act. We do not think, therefore, that the decision in Deoki Nandan Pandey's case [1980] 45 STC 145 guj can be of any assistance.

17. For the foregoing reasons, we are of the view that the assessee was not entitled to claim a deduction in respect of the sales of ash from its turnover of sales u/s 7(ii) of the Act. We, therefore, answer the questions referred to us as follows :

Question No. (1) : Not required to be answered in view of the answer to question No. (2). Question No. (2) : In the negative, that is to say, in favour of the revenue and against the assessee.

18. There will be no order as to the costs of the reference.

19. Reference answered accordingly.