

AFR**Court No. - 59****Case :- SALES/TRADE TAX REVISION No. - 1239 of 2012****Applicant :- M/S Star Paper Mills Limited****Opposite Party :- The Commissioner, Commercial Taxes****Counsel for Applicant :- Shubham Agrawal, Bharat Ji Agrawal****Counsel for Opposite Party :- C.S.C.****With****Case :- SALES/TRADE TAX REVISION No. - 1240 of 2012****Applicant :- M/S Star Paper Mills Limited****Opposite Party :- The Commissioner, Commercial Taxes****Counsel for Applicant :- Shubham Agrawal, Bharat Ji Agrawal****Counsel for Opposite Party :- C.S.C.****With****Case :- SALES/TRADE TAX REVISION No. - 134 of 2016****Applicant :- M/S Star Paper Mills Ltd.****Opposite Party :- The Commissioner, Commercial Tax****Counsel for Applicant :- Shubham Agrawal****Counsel for Opposite Party :- C.S.C.****With****Case :- SALES/TRADE TAX REVISION No. - 135 of 2016****Applicant :- M/S Star Paper Mills Ltd.****Opposite Party :- The Commissioner, Commercial Tax****Counsel for Applicant :- Shubham Agrawal****Counsel for Opposite Party :- C.S.C.****Hon'ble Yashwant Varma, J.****Heard learned counsel for the revisionist and Shri B.K.****Pandey, learned Standing Counsel for the opposite party.**

These four revisions raise the issue of taxability of burnt coal under the provisions of the U.P. Value Added Tax Act 2008¹. With the consent of learned counsel for parties CTR No. 1239 of 2012 is treated as the lead revision. While CTR No. 1239 of 2012 relates to Assessment Year 2002-03, CTR No. 134 of 2016 pertains to Assessment Year 2005-06, CTR 135 of 2016 relates to Assessment Year 2004-05 and CTR No. 1240 of 2012 pertains to the Assessment Year 2002-03.

The revisionist is stated to be engaged in the manufacture of paper. For the purposes of energising its furnace, it uses wood, waste pulp, coal and furnace oil. According to it in the process of manufacturing paper and at the end of the manufacturing operation a residue of coal is left over which is then sold by the revisionist. Admittedly this residual article in Assessment Years 1999-2000, 2000-01, 2001-02 was treated to be an article falling under the entry of "*coal including coke in all its form....*" and thus taxed at the rate of 4%. From Assessment Years 2002-03, the Department has changed its position and has held that this residual article is liable to be treated as "*unclassified*" and therefore taxable at the rate of 10%. This shift in the view of the Department is based primarily on two decisions of the Court

¹ 2008 Act

rendered in **Commissioner of Sales Tax Vs. Modi Spinning & Weaving Mills**² and **Commissioner of Sales Tax Vs. British India Corporation Limited**³.

In CTR 1239 of 2012, the Tribunal has treated the product to be coal dust and therefore exigible to tax as an unclassified item. It has taken the position that coal dust would not stand covered under the entry “*coal including coke in all its forms...*” and in light of the decisions rendered by the Court in **Modi Spinning & Weaving Mills** and **British India Corporation** has proceeded to levy tax at the rate of 10% upon the revisionist. In TTR No. 135 of 2016, the assessing authority has chosen to describe the article as burnt coal and therefore, levied tax at the rate of 10%. The Tribunal in the concerned Assessment Year has proceeded to take a decision that the product is cinder/coal ash/burnt coal. In STR No. 134 of 2016 the assessing authority has chosen to describe the article as coal ash.

As noted herein above, the Department in three assessment years had accepted the stand of the revisionist that the product in question was coal in partially burnt form and that such burnt coal continued to retain combustible properties and was

2 2004 NTN (VOL 25)-958

3 2004 NTN (VOL 25)-1230

therefore liable to be taxed at the rate of 4%. Along with the revision, the revisionist has also brought on record certification to indicate that the residual article does not completely lose all its combustible properties and retains a calorific value which enables it to be put to uses similar to that of coal.

Sri Agrawal, learned counsel appearing for the revisionist has submitted that coal dust is a commodity which has been accepted to be taxable at the rate of 4% by the Department itself. He further submitted that even in the decision of this Court in **British India Corporation**, the learned Single Judge had proceeded to hold that coal dust was liable to be treated and classified under the entry relating to coal and that it was distinct and different from coal ash. He submitted that on a plain reading of the observations made in **British India Corporation** it is clear that the residual commodity described by the Tribunal as “coal dust” was not liable to be treated as an unclassified item. Sri Agrawal then drew the attention of the Court to the decision in **Modi Spinning** to submit that in the said decision the issue which essentially arose for consideration was whether “coal cinder” would be liable to be treated as an unclassified item. It was his submission that the said decision could not have been

read as determinative of the issue which arose before the Tribunal. Elaborating upon his above submission, Sri Agrawal then invited the attention of the Court to the decision of a learned Single Judge in **Mahabir Singh Ram Babu Vs. Assistant Sales Tax Officer**⁴ to submit that all subsequent decisions have proceeded to decide the issue based upon the principles enunciated in this judgment. This decision, Sri Agrawal points out, was dealing with the commodity “cinder” and not coal dust. He further submitted that this decision itself is based upon an understanding that the items or commodities mentioned in the Schedule were liable to be understood bearing in mind their intrinsic character and nature. He submitted that **Mahabir Singh Ram Babu** proceeded on the premise that coal is a mineral which is extracted from earth while cinder is not. The submission was that the decision proceeded on a fallacious line of reasoning and must be held to be impliedly overruled in light of the observations made by the Supreme Court in **CST MP Vs. Jaswant Singh Charan Sigh**⁵ wherein the Court had in unambiguous terms held that the fact that coal was a mineral product would not be decisive of the issue and that while interpreting items in statutes like the Sales Tax Act, resort

4 1962 (XIII) STC 248

5 1967 (XIX) STC 469

should not be had to a scientific or technical meaning of the term but to their popular meaning or meaning attached to them by those dealing in them, thus essentially reiterating the “commercial use” or “common parlance” test. Sri Agrawal stressed upon the following observations as appearing in **Jaswant Singh Charan Singh:-**

“.....Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well-settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms' but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense.”

Sri Agrawal also stressed upon the findings returned by the Department itself in Assessment Years 1999-2000, 2000-01 and 2001-02 to submit that since they themselves had treated the article as liable to be classified as falling under the generic entry of coal, these decisions were clearly binding upon the Department and no material existed which warranted a change in opinion. He relied upon the observations as made by the Supreme Court in **Bharat Sanchar Nigam Ltd. Vs. Union of India**⁶ in aid of his above submission.

6 (2006) 3 SCC 1

Sri Pandey, the learned Standing Counsel on the other hand submits that the authorities below do not appear to have applied their mind or returned categorical findings with regard to the intrinsic characteristics of the residual commodity. In his submission, the decisions rendered by the authorities represented in the instant revisions clearly establish that the authorities have chosen to describe the residual article in different terms. He submits that if the article which the assessee is stated to sell be coal ash or cinder, the decisions in **Modi Spinning** and **British India Corporation** would clearly apply and in view thereof the decision of the respondents to tax the article at the rate of 10% cannot be faulted.

The primary decision on which subsequent proceedings appear to be based is the one rendered by a learned Single Judge in **Mahabir Singh Ram Babu**. As noted herein above, the learned Single Judge in that decision proceeded to base his conclusions on the ground that coal was a mineral which was extracted from earth while all other articles including cinder or ash were not. The learned Single Judge in the said decision while considering the question as to whether cinder would be liable to be treated as coal proceeded to note that where all

combustible properties of coal are spent away and lost, the residual product could not be classified or placed in the same company as the article coal. It is this decision which was subsequently relied upon in both **Modi Spinning** and **British India Corporation**. It becomes relevant to note that **Modi Spinning** was a decision on the issue of whether “coal cinder” was liable to be taxed as coal. It was in this context that the learned Single Judge proceeded to reiterate the conclusions recorded in **Mahabir Singh Ram Babu** and held that cinder could not be taxed as coal. It is also relevant to note that in **Modi Spinning** the Court proceeded to further note that in the facts of that case the assessee had not brought on record any evidence to show that the commodity sold by it had retained any combustible properties. Insofar as **British India Corporation** is concerned, the said decision was dealing with the taxability of “coal ash”. However, even in this decision the following pertinent observations came to be made by the Court in respect of “coal dust”. The observations in this context read thus:-

“2.In that case the Court was dealing with the item “Coal dust”. It has been held that the coal dust is also mineral known as coal, but in a different shape. Various articles have been reduced by friction or use to a very small size so as to render the coal into dust. The coal is not treated or processed

in order to produce coal dust. Factually it was found on the basis of affidavit that coal dust is sold for burning bricks just as coal is used for such purpose. It is clear that coal dust has the same combustible property as coal has. In this view of the matter it was held that coal dust is included within the word coal as used in Entry 33 of the Notification dated 31.3.1956. But here the commodity involved is the coal ash. There is nothing on record to show that this coal ash can be used and has the same combustible property as the coal has. The coal ash is the residue left after the coal is burnt.”

More importantly, the Court must advert to a decision rendered by a Division Bench of this Court in **District Co-operative Development Federation Ltd. Vs. CST**⁷. This decision too was dealing with the issue of whether “coal dust” was liable to be taxed as coal. The Division Bench took note of the decision of the Supreme Court in **Jaswant Singh Charan Singh** and proceeded to make the following pertinent observations:

“.....Where all the combustible property of coal has not completely escaped into the atmosphere, the residue, which may still be capable of combustion and which may serve many of the purposes which are served by burning coal, is not coal, but cinder. It was also held that when the Legislature used the word coal" in the notification, it was using that word in the sense in which it is, strictly speaking, used and understood in the English language.

It will be seen that "coal" is not a word of art. It is not a scientific terra. It is a popularly known commodity. It has not

7 1970 (XXVI) STC 464

been found by the authorities below that in the commercial world, coal dust has different uses or is popularly known as a commodity different from coal. Coal dust is also the mineral known as coal, but in a different shape. The various particles have been reduced by friction or use to a very small size so as to render coal into dust. Coal is not treated or processed in order to produce coal dust. It has come in the affidavits that coal dust is sold for burning bricks just as coal is used for such a purpose. It is clear that coal dust has the same combustible property as coal has. It is used for similar purposes as coal. We doubt if, in the popular sense, one would say that coal dust is not the same commodity as coal. In our opinion, coal dust is included within the word "coal" as used in entry 33 of the notification dated 31st March, 1956. We answer the question referred to us in the affirmative and in favour of the assessee. The assessee would be entitled to its costs which are assessed at Rs. 100. The fee of the learned counsel is also assessed at the same figure.”

The Division Bench proceeded to hold that “coal dust” has the same combustible properties as coal and is put to similar uses. It consequently held that "coal dust" would stand included within the meaning of the expression “coal” as used in the concerned notification. This Court therefore, has two decisions namely **British India Corporation** as well as **District Cooperative Development Federation** which hold that “coal dust” is liable to be taxed in the company of coal and cannot be treated as unclassified items. The judgments of the Court in **Mahabir Singh Ram Babu, Modi Spinning** and **British India**

Corporation cannot be understood or applied without bearing in mind the particular commodity which fell for consideration in those decisions. As noted above, in **Modi Spinning** the commodity in question was “coal cinder” while in **British India Corporation**, the commodity which fell for consideration was “coal ash”. **Mahabir Singh Ram Babu** again was a decision which was testing whether “cinder” was liable to be taxed at the same rate as coal. In neither of the these three decisions therefore the issue of “coal dust” was raised or answered except to the extent noted herein above in **British India Corporation**. As the observations extracted herein above in **British India Corporation** would establish that insofar as the commodity “coal dust” is concerned, it answered the issue in favour of the revisionist.

While it is true that **Mahabir Singh Ram Babu** and **Modi Spinning** proceeded on the basis of coal being a mineral and therefore, liable to be tested accordingly and that this premise may be rightly contended to be at variance with what was held by the Supreme Court in **Jaswant Singh Charan Singh**, this Court need not dilate on this aspect further since, as noted above, these two decisions must be understood to being

restricted to apply to the commodity considered therein. As noted above, insofar as “coal dust” is concerned, the issue already stands answered in favour of the revisionist assessee in both **British India Corporation** as well as the binding verdict of the Division Bench in **District Cooperative Development Federation**.

The submission of Sri Pandey that the authorities below have chosen to describe the residual commodity in different terms really does not impress this Court inasmuch as the Tribunal in the last Assessment Year has in unambiguous terms noticed and held the commodity to be “coal dust”.

Additionally, this Court notes that the Department does not rest its decision on any evidence which may have established that the residual commodity had lost all its combustible properties. It is pertinent to note that it was the Department which was proceeding to reject the stand taken by the assessee that coal dust was not liable to be taxed at the rate of 4%. It was their contention that the commodity in question was liable to be taxed under the residuary entry. If that be the case, the onus clearly was not on the assessee alone. The Court must also note that insofar as the assessee was concerned, it had been its

consistent stand that the residual commodity had not lost all combustible properties and therefore, it was liable to be classified and taxed under the entry of “coal, including coke in all its forms...”

The Court lastly takes note of the fact that the Department itself in the three preceding Assessment Years had proceeded to accept the commodity to be taxable at the rate of 4%. While it is true that the principles of *res judicata* may not strictly apply to taxation assessments, insofar as generic issues inter partes are concerned, they must bind. In issues of classification, the Department cannot be permitted to vacillate unless there be new material and evidence which may justify or warrant a change in stance. It is these principles which have been enunciated by the Supreme Court in **Bharat Sanchar Nigam Limited** wherein it has been held that even though principles of *res judicata* may not apply but the theory of precedent or the precedential value of earlier pronouncements are binding inter partes. It would be pertinent to refer to the following observations as they appear in the decision of the Supreme Court in **Bharat Sanchar Nigam Limited:-**

“...The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.”

Accordingly and for all the reasons noted above, the revisions shall stand **allowed**. The orders of the Tribunal shall stand set aside with all consequential benefits to the assessee.

Order Date :- 10.10.2017

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