

**S. Kumar Ltd. Vs. Additional Commissioner of Sales Tax and ors.**

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**Court :** Madhya Pradesh

**Decided On :** Dec-14-2004

**Reported in :** 2005(1)MPLJ352; (2007)6VST412(MP)

**Judge :** S.K. Seth, J.

**Appellant :** S. Kumar Ltd.

**Respondent :** Additional Commissioner of Sales Tax and ors.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**S.K. Seth, J.**

1. This order shall also govern disposal of W.P. No. 280 of 1998 as a common question of law involves in both cases.
2. A short but an interesting point is involved in both these cases. The question is what would be the rate of sales tax payable on the sale of coal ash (cinders). The assessment period is from October 1, 1987 to September 30, 1988.
3. Petitioner, a registered dealer under the provisions of the M.P. General Sales Tax Act, 1958 (for short, 'the Act'), carries on business of manufacture and sale of textile items. It has a factory located in industrial area now at Dewas. Petitioner

purchased coal for use in the factory. That coal is burnt in the boiler and half burnt coal in the form of 'coal ash' is discharged from the boiler. The petitioner sold the coal ash. The controversy is what would be the rate of tax payable on the sale of the coal ash. According to the petitioner the sales tax is payable at the rate of four per cent under entry 1 of Part IV of Schedule II of the Act. The contention of the petitioner that the sales tax is payable at the rate of four per cent on the sale of coal ash was negated by the Revenue and an assessment order was framed on March 29, 1996 holding that the coal ash is not covered under entry 1 of Part IV of Schedule II but under entry 1 of Part VI of Schedule II of the Act and as such the sales tax was payable at the rate of 12 per cent. The assessment order was framed relying upon a Full Bench decision of this Court reported in *Hukumchand Mills Ltd. v. Commissioner of Sales Tax, M.P.* [1988] 71 STC 101 (MP) : [1987] MPLJ 570 (hereinafter referred to as 'Full Bench'). The assessment order was upheld in the revision by the Additional Commissioner, Commercial Tax, vide order dated October 24, 1997. It is against these two orders March 29, 1996 and October 24, 1997 the present writ petition has been filed.

4. Even after notice, the respondents in either of the cases have filed no reply and it is submitted that the matter can be argued even without the reply as it involves purely a legal question with regard to the interpretation of entry 1 of part IV of Schedule II of the Act, which reads as under:

Coal including coke in all its forms but excluding charcoal

5. Shri G.M. Chaphekar, learned Senior Counsel for the petitioner, submitted that the aforesaid entry was already considered by the division Bench of this Court and it was held that coal includes coal ash also. In support of this contention he has placed reliance on a decision reported in *Binod Mills Co. Ltd. v. Commissioner of Sales Tax, M.P.* [1972] 29 STC 413 (MP), and also on the decision in the case of *Commissioner of Sales Tax, M.P. v. Samrathmal Dhoolchand* decided on December 23, 1969, reported in [1972] 29 STC 418 (MP)(App.). Shri Chaphekar further submitted that the decision in *Samrathmal Dhoolchand's* case [1972] 29 STC 418 (MP)(App.), directly covers the issue involved in the present petitions, as the court was concerned with the rate of tax on the sale of coal ash. Shri

Chaphekar pointed out that even after the decision in Hukumchand Mills case [1988] 71 STC 101 (MP)[FB]; [1987] MPLJ 570, once again the question of the rate of tax on sale of coal ash came up for consideration in Mansingh Oil Mills Pvt. Ltd. v. Additional Regional Assistant Commissioner of Sales Tax [M.P. No. 1891 of 1983, decided on September 8, 1992]. It was again held that rate of tax on the sale of coal ash would be four per cent. It is in this background Shri Chaphekar submitted that the authorities below have erred in law while framing the impugned assessment order which has been maintained in revision.

6. On the other hand Shri Amit Agrawal, learned Government Advocate for the respondents, submitted that coal and coal ash are two different commercial goods therefore justified levy of sales tax at the rate of 12 per cent. In support of this contention he placed reliance on decisions reported in P. Chitta Reddi v. State of Andhra Pradesh [1969] 24 STC 317 (AP), I.T.C. Bhadrachalam Paperboards Limited v. State of Andhra Pradesh [1999] 114 STC 58 (AP) and ITC Bhadrachalam Paper Boards Ltd. v. State of A.P. [2002] 126 STC 541 (SC). He therefore, submitted that no interference is warranted either with the assessment order or the order passed in revision.

7. The key to resolve the controversy involved in the present cases lies in the question as to meaning of expression 'in all its forms' occurring in entry 1 of part IV of Schedule II of the Act. Careful perusal of the decision in Binod Mills' case [1972] 29 STC 413 (UP), reveals that it is based upon a view taken in Samrathmal Dhoolchand's case [1972] 29 STC 418 (MP) [App], and latter decision is based on the law laid down by the Supreme Court in Commissioner of Sales Tax, Madhya Pradesh, Indore v. Jaswant Singh Charan Singh [1967] 19 STC 469. After noticing the well-recognised tests, it was held by the Supreme Court as under:

The result emerging from these decisions is that while construing the word 'coal' in entry 1 of Part III of Schedule II the test that would be applied to what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute, being one levying a tax on goods, must, in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in

common parlance. Viewed from that angle, both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include 'charcoal' in the term 'coal'. It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would be in ordinary parlance as also in their commercial sense be spoken as coal.

8. In view of the expressed language, a very wide meaning has been ascribed to this entry. Thus, in the considered opinion of this Court, coal ash would be covered under entry 1 of Part IV of Schedule II and not under entry 1 of Part VI of Schedule II of the Act, which is residuary entry. It is well-settled that when a commodity is covered under a specific entry then for the purposes of determining the rate of tax, Revenue is not permitted to resort to the residuary entry. One has to draw distinction between exigibility of tax on a goods, i.e., taxability of a goods and the rate of tax payable on the sale of such goods. The Full Bench was not concerned with the rate of tax but with the question of taxability of unserviceable stores items including coal ash sold by the Hukumchand Mills after amendment in the definition of 'business'. The question was whether sales tax was exigible on the sale of unserviceable stores items or not. The Full Bench after noticing the change introduced in the definition of 'business' held that petitioner in Hukumchand Mills case [1988] 71 STC 101 (MP) [FB]; [1987] MPLJ 570, was liable to pay sales tax on sale of the unserviceable stores items. No doubt, the coal and the coal ash are two different commodities having different commercial values but the question in the present cases is what would be the rate of tax payable on the sale of coal ash. It is not disputed that the petitioner is liable to pay tax on the sale of coal ash. The question is only with regard to the rate of tax. In the considered opinion of this Court the test laid down by the Supreme Court in Commissioner of Sales Tax, Madhya Pradesh, Indore v. Jaswant Singh Charan Singh [1967] 19 STC 469, applies on all fours to the present cases. Even after the Full Bench decision, the division Bench in Mansingh's case [M.P. No. 1891 of 1983, decided on September 8, 1992-Madhya Pradesh High Court], took the view that rate of sales tax would be four per cent as the coal ash is covered by entry No. 1 of Part IV of Schedule II. The division Bench while deciding the aforesaid case distinguished the ratio

decidendi of the Full Bench and preferred to follow the earlier division Bench decisions reported in *Binod Mills Co. Ltd. v. Commissioner of Sales Tax, M.P.* [1972] 29 STC 413 (MP) and *Commissioner of Sales Tax, M.P. v. Samrathmal Dhoolchand* reported in [1972] 29 STC 418 (MP)(App). It may also be pointed out that for the assessment year 1989-90, the assessing officer had assessed the sales tax at the rate of 12 per cent following the Full Bench view. That order was set aside by the Deputy Commissioner, Ujjain Division, holding that the Full Bench in *Hukumchand Mills' case* [1988] 71 STC 101 (MP); [1987] MPLJ 570, is not for a proposition that the rate of tax payable on the sale of coal ash was at the rate of 12 per cent instead of four per cent. Despite the aforesaid order, the assessing officer for the period from April 1, 1990 to March 31, 1991 once again assessed the sales tax at 12 per cent. That order was challenged by the petitioner before this Court in Writ Petition No. 959 of 1995 [decided on August 7, 2001] and it was held by the learned single Judge that the ratio laid down in the Full Bench decision is inapplicable to the determination of rate of tax and it was held that the rate of tax would be at the rate of four per cent because the coal ash would fall under entry 1 of Part IV of Schedule II of the Act.

9. Now coming to decision relied upon by the learned Government Advocate, a careful perusal of the decision reported in *P. Chitta Reddi v. State of Andhra Pradesh* [1969] 24 STC 317 (AP), reveals that the question before the court was with regard to the taxability of the coal ash. Great emphasis was given on a decision reported in *I.T.C. Bhadrachalam Paperboards Limited v. State of Andhra Pradesh* [1999] 114 STC 58 (AP) and a division Bench decision of the Andhra Pradesh High Court given in *I.T.C. Bhadrachalam Paperboards Limited v. State of Andhra Pradesh* [1999] 114 STC 58 (AP), which has been disapproved by the Supreme Court in *ITC Bhadrachalam Paper Boards Ltd. v. State of A.P.* [2002] 126 STC 541. In the considered opinion of this Court in all those three cases, the question for consideration was about the taxability of coal ash as a separate merchandise and in none of those cases the question of rate of tax was involved. In the context and background of the facts of the cases in the aforesaid three decisions, the courts have held that the coal ash is a different commodity from coal, obviously for the purposes of taxability on the sale of coal ash.

10. In view of the foregoing discussion, I find that the impugned assessment order as well as the revisional order cannot be sustained in law and accordingly they are hereby set aside. The authorities below shall frame a fresh assessment order in accordance with law.

11. In the result, the writ petitions are hereby allowed. However, there shall be no order as to costs.

12. Let a copy of this order be kept in the record of W.P. No. 280 of 1998.

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