

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

**SALES TAX REFERENCE NO.1 OF 2007**  
**IN**  
**REFERENCE APPLICATION NO.12 & 13 OF 2001**

M/s. Jitendra R. Gandhi ..Applicant

Versus

The Commissioner of Sales Tax,  
Maharashtra State, Mumbai ..Respondent

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Mr. P.V. Surte a/w. Mr. S.P. Surte i/b. P.V. Surte & Co. for the Applicant.  
Mr. V.A. Sonpal, Special Counsel, for the Respondent – State.

CORAM : S.C. DHARMADHIKARI &  
SUNIL P. DESHMUKH, JJ.

RESERVED ON : 14<sup>th</sup> January, 2015

PRONOUNCED ON : 26th February, 2015

JUDGMENT: [PER SUNIL P. DESHMUKH, J.]

1. The questions which have been referred to pursuant to provisions of Section 61 of the Bombay Sales Tax, 1959 are as under :

- (i) Whether on the facts and circumstances of the case and on a true and correct interpretation of the provisions contained in Sections 57 and 55 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in holding

that the Administrative Asstt. Commissioner was legally justified in assuming the revisional jurisdiction under section 57, despite the appeals against the very assessment orders being pending under section 55 before the Appellate Asstt. Commissioner who was his co-ordinate authority ?

- (ii) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of the provisions contained in the 1979 Scheme of Incentives and the Notification Entry 136 under section 41 of the Bombay Sales Tax Act, 1959, the Tribunal was legally justified in holding that the appellant was not entitled to the exemption benefits in the context of manufacture of brass sheets for the reason of the brass sheets being not specifically mentioned in the class of manufactured goods as specified in the eligibility certificate?

2. The facts giving rise to the present reference may be succinctly given as under.

The assessee M/s. Jitendra R. Gandhi was engaged in the manufacture of and sale of stainless steel utensils, aluminum utensils, milk cans etc. and is a registered dealer under the relevant provisions of the

Bombay Sales Tax Act, 1959 (for short, "the Bombay Act"). The manufacturing unit of the assessee is situated at MIDC, Kherdi in Taluka–Chiplun, District–Ratnagiri which has been declared as a backward area for the purposes of grant of sales tax incentives, under the Package Scheme of Incentive, 1979. Under the same, the assessee has been granted Eligibility/Entitlement Certificate, conferring benefits of exemptions pursuant to Notification Entry 136 under Section 41 of the Bombay Act for the period 1986 to 1995 and did not have any monetary ceiling because his was a small scale unit. The eligibility certificate was issued on 4.6.1986 by the Development Corporation of Konkan Ltd. (DCKL) which referred to class of the goods/products manufactured in the unit to which the benefits could be availed, namely,

- (i) Domestic stainless steel utensils,
- (ii) Hospital equipment wares, furniture made of S.B. Strips and sheets,
- (iii) Melting rolling of aluminum and aluminum alloys into terms of sheets, strips, circle product,
- (iv) Aluminum utensils, household wares, outum, milk cans and rolling for mill for copper.

3. The assessee during the period from 23.10.1987 to 31.3.1989 and 1.4.1989 to 31.3.1990 inter alia, manufactured and sold brass sheets

and claimed benefit of exemption under the Eligibility/Entitlement certificate held by the unit. Brass sheets being not referred to specifically in the class of manufactured goods in said certificate, the Sales Tax Officer disallowed claim of exemption and assessed sales tax dues in respect of manufacture and sale of brass sheets during the period.

4. The assessee, however, persisted with claiming benefit contending brass is an alloy of copper and as such it should be considered to be covered by the term "copper" appearing in class of goods considered for exemption pursuant to the Eligibility certificate. The Sales Tax Officer had acceded to the request of the assessee and dropped the demand/proposal levying sales tax in respect of the manufacture and sale of brass sheets. Accordingly the assessment orders dated 1.11.1991 in respect of aforesaid periods resulted into refunds.

5. However, being aggrieved by certain other disallowances, appeals were preferred by the assessee before Assistant Commissioner of Sales Tax (Appeals), Kolhapur Division, Kolhapur.

6. Along side, the Assistant Commissioner of Sales Tax (Administration-I), Kolhapur Division, Kolhapur issued notices dated 10.6.1992 proposing revision of the assessment orders in respect of both the periods referred to herein above.

7. In response to aforesaid notices issued by the Assistant Commissioner of Sales Tax (Administration-I), the assessee replied that brass being alloy of copper is clearly covered by the generic term "copper", it being major component of brass. The Assistant Commissioner (Administration) was not persuaded by the explanation given and as such went on levying tax on sales as well as purchase in respect of the manufactured brass sheets etc. albeit granting set off under Rule 41F of the Bombay Sales Tax Rules, 1959 in the context of the purchase tax liability. Consequently interest under Section 36(3)(b) was also levied. Resultantly Rs.1,80,060/- for the period 23.10.1987 to 31.3.1989 and Rs.2,95,420/- for the period 1.4.1989 to 31.3.1990 were demanded. The aggrieved assessee went in appeal against aforesaid orders. Under his order dated 1.11.1994, the Deputy Commissioner (Appeals) dismissed the appeals upholding the

orders passed in the revision. The aforesaid dismissal orders were subject matter of Second Appeals bearing Second Appeal No.1633 and 1634 of 1994. The second appeals came to be decided on 22.12.2000 maintaining the orders passed in the revision resulting in confirmation of the disallowance of exemption in respect of manufacture and sale of brass sheets. The Tribunal, however, was pleased to grant partial remission in interest for both the periods.

8. The Tribunal was moved by the assessee making Reference Application Nos.12 and 13 of 2001 seeking reference on the questions as referred to in the applications. The Tribunal after hearing the parties has granted the request making reference to this court on the questions which have been referred herein above.

9. The learned counsel Mr. Surte on behalf of the assessee vehemently submits that initiation and culmination of the revisional proceedings at the instance of the co-ordinate authority is wholly misconceived since the matter is pending in appeal before the authority of same peer. The appellate authority is in seisin of the order. It is an error

apparent to have take up proceedings in revision by the Assistant Commissioner (Administration).

10. The relevant provisions sections 55 and 57 read as under :

“55. Appeals.-- (1) An appeal, from every original order, not being an order mentioned in section 56 passed under this Act or the rules made thereunder, shall lie –

(a) if the order is made by a Sales Tax Officer, or any other officer subordinate thereto, to the Assistant Commissioner;

(b) if the order is made by a Senior Assistant Commissioner or an Assistant Commissioner to the Deputy Commissioner;

(c) if the order is made by a Deputy Commissioner, Additional Commissioner, or Commissioner, to the Tribunal.

(2) In the case of an order passed in appeal by an Assistant Commissioner, or by a Deputy Commissioner, a second appeal shall lie, at the option of the appellant, either to the Commissioner or to the Tribunal.

(3) Every order passed in appeal under this section, shall subject to the provisions of section 57, 61 and 62 be final.

(4) Subject to the provisions of section 60, no appeal shall be entertained unless it is filed within sixty days from the date of the communication of the order appealed against.

(5) The Appellate Authority or the Tribunal, as the case may be, may, while admitting the appeal, pending the disposal of the appeal, stay the order appealed against, subject to such conditions or restrictions as may be deemed necessary including a direction for depositing of a part or whole of the disputed amount by the appellant.

(6) All second appeals and applications filed before the coming into force of section 14 of the Maharashtra Tax Laws (Levy and Amendment) Act, 2001, (Mah. 22 of 2001), in so far as the said appeals are filed against any order passed in first appeal directing payment to be made of any sum

with or without security for admission of the first appeal, shall abate:

Provided that, such abating of the second appeal shall not affect the stay order, if any, granted by the Appellate Authority or the Tribunal against the original order, against which first appeal has been filed and is pending.

(7) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers :--

- (a) in an appeal against an order of assessment, it may confirm, reduce, enhance or annul the assessment; or it may set aside the assessment and refer the case back to the assessing authority for making fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; and the assessing authority shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;
- (b) in an appeal against an order imposing a penalty, or interest the appellate authority may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty or interest;
- (c) in any other case, the appellate authority may pass such orders in the appeal as it deems just and proper;

Provided that, the appellate authority shall not enhance an assessment or a penalty or interest, or reduce the amount of drawback, step-off or refund of tax, unless the appellate has had a reasonable opportunity of showing cause against such enhancement or reduction.

**57. Revision.--** (1) Subject to the provisions of section 56 and to any rules which may be made in this behalf, --

- (a) the Commissioner may, of his own motion, call for and examine the record of any order passed (including an order passed in appeal) under this Act or the rules made thereunder by an officer or person subordinate to him and pass such order thereon as he thinks just and proper:

Provided that, no notice in the prescribed form shall be served by the Commissioner under this clause after the expiry of three years from the date of the communication of the order sought to be revised and no order in revision shall be made by him hereunder after the expiry of five years from such date.

(b)

Provided further that, the period of limitation of five years shall not apply in a case where the point or points involved in the revision proceedings is the subject matter of any proceedings pending before the Tribunal, High Court or Supreme Court; and in such a case it shall be competent for the Commissioner to decide the revision proceedings within eighteen months from the date of notice of hearing served on the assessee after the conclusion of the proceedings in the Tribunal, High Court or, as the case may, Supreme Court.

(1A) Notwithstanding anything contained in this section or any other provisions of this Act, where the State Government or the Commissioner has initiated any proceedings before an appropriate forum, against a point which is decided against the State by judgment of the Tribunal, then the Commissioner may pass an order in revision or may issue a notice as provided in this section and pass an order in revision, as he thinks fit, as if the point was not so decided against the State, but shall stay the recovery of the dues including interest and penalty, if any, in so far as they relate to such point until the decision by the appropriate forum.

(2) No proceedings in revision under this section shall be entertained upon application.

(3) No order shall be passed under this section which adversely affects any person, unless such person has been given reasonable opportunity of being heard."

11. Mr. Surte places reliance on a decision of the Supreme Court reported in **1979 STC (Vol.43) 307 Santoshi Tel Utpadak Kendra vs. The Deputy Commissioner** in Civil Appeal No.968 of 1978 arising from a Judgment of this Court. He refers to following extracts from said decision.

"Now the sub-section speaks of an "appellate authority both in the first appeal and the second appeal". It is quite clear, therefore, that the appellate powers detailed in Clause (a) have the same amplitude in a second appeal as in a first appeal. An appellate authority disposing of a first appeal has power to enhance the assessment. So has appellate authority in a second appeal. We may also point out that when an appellate authority is considering a second appeal a "first appellate"

order, it is examining an order which can be broadly described as an order of assessment. It is a final order disposing of an appeal which, in a sense, is a continuation of the assessment. A second appeal against such an order is an appeal against an order of assessment.

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It is evident then that in a second appeal under Sub-section (2) of Section 55 of the Bombay Sales Tax Act. the Tribunal has power to enhance the assessment. That being so, plainly it is open to the Revenue to invoke that power in a pending second appeal filed by the dealer before the Tribunal. The High Court is in error in concluding that the power to enhance an assessment can be discovered only in the revisional jurisdiction of the Commissioner and nowhere else. The compulsion which drove the High Court to the construction placed by it on Sub-section (1) of Section 57 of the Act does not have substance, and the entire sub-stratum underlying the High Court judgment must give way.

On the view which finds favour with us we cannot approve of the law laid down on the point in *Motor and Manufacturers Ltd.* (supra) nor do we see any overlapping of, or conflict in, the powers of the Commissioner and the Tribunal inferred in *Oriental Rubber Industries Pvt. Ltd.* (supra). As regards the observation of this Court in *Amritlal Bhogila* (supra), that was not a case where a subordinate authority sought to exercise its revisional jurisdiction over an order pending in appeal before a superior authority. No support can be derived by the respondent from that case. For the same reason, *Ramlal Onkarmal v. Commissioner of Income Tax, Assam* reported in [1962] 44 I.T.R. 578 decided by the Assam High Court, *Kelpunj Enterprises v. Commissioner of Income Tax, Kerala* reported in [1977] 108 I.T.R. 294 decided by the Kerala High Court, and *Russell Properties (P) Ltd. v. A. Chowdhury* reported in [1977] 109 I.T.R. 229 decided by the Calcutta High Court, placed before us by the respondent have no relevance.

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In the result, the appeal is allowed, the judgment dated 5th July, 1978 of the High Court is set aside, and the order dated 29th October, 1977 of the Tribunal and the revisional proceedings before the Deputy Commissioner, including the orders made by him, are *sahqued*. The appellant is entitled to its costs.”

12..           He submits taking into account aforesaid it is easily discernible that the judgments and orders of the Tribunal in second appeals are not compatible with the dictum appearing under aforesaid observations. He submits that while the Assistant Commissioner (Appeals), Kolhapur is seized of assessment orders dated 01/11/1991 in respect of two periods 23/10/1987 to 31/3/1989 and 1/4/1989 to 31/3/1990, a coordinate authority would not tread upon same assessment orders, being considered by another authority of the same peer. Therefore, according to him the Assistant Commissioner (Administration) Kolhapur had been in error in revising the assessment orders dated 1/11/1991.

13.           Mr. Surte further submits that the revisional authority was in error in declining the benefit of exemption in respect of manufacture and sale of brass sheets during the two periods referred to herein above earlier. He submits that the class of goods makes reference to copper. Brass is an alloy of copper and zinc and major component of the same is copper and as such, brass sheets would qualify to be considered as product of copper making the assessee eligible for exemption, copper being referred to under eligibility

certificate.

14. Mr. Surte makes an attempt to impress upon that since eligibility/ entitlement certificate makes reference to “rolling for mill for copper”, the phrase will have to be liberally construed. Basic intention underlying the granting of exemption from levy of sales tax under the eligibility certificate should not be watered down by any inadvertent erroneous description occurring under the same. The situation calls for liberal approach carrying forward the object of giving incentive to promotion of industrial activity in backward area.

15. Reliance is placed on Supreme Court Judgment reported in *Kalidas Sheet Metal Industries P. Ltd. vs. State of Kerala*. In the said case, the assessee's contention was that Entry No.116A and 116D under Kerala General Sales Tax Act, 1963 referred to “copper” and “zinc” and not copper sheets and brass sheets which according to the assessee would fall under unclassified item, taxable at the rate of 5% and not at 8% as assessed under Entry No.116A and 116D. *However, the Supreme Court* had considered that copper and brass are metals occurring in solid form and are

commercially treated in the form of sheets, strips, rods etc., and are available in market in one of these forms and as such reference to “copper” in the certificate would take within its fold brass sheets and as such chargeable under entry No.116A and 116D at the rate of 8% and not at the rate of 5% claimed by the assessee.

16. Mr. Sonpal, on the other hand, appearing for the department opposing the contentions and arguments on behalf of the assessee submits that jurisdiction and power of the revisional authority is independent of appellate powers of another authority of the same peer. He submits that the maintainability of proceedings in revision in the facts of the present case is not affected by preference of appeal by the assessee against the assessment orders dated 01/11/1991 of the Assessing Officer. He submits that the appeal before coordinate authority is not decided.

17. Mr. Sonpal distinguishes the case of Santoshi Tel Utpadak Kendra vs. Dy. Commissioner reported in 1979 (Vol43) STC 307 and submits that said decision is on altogether different set of facts. He points out in that case against two assessment orders by the Assistant Commissioner

pursuant to Section 33 of the Bombay Sales Tax Act, 1959 and the penalties imposed, the assessee had filed appeals under Section 55 to the Commissioner who had decided the same by a common order reducing the quantum. Not being fully satisfied the assessee had filed second appeals before the Maharashtra Sales Tax Tribunal. During the pendency of appeals before the Tribunal the Dy. Commissioner Nagpur issued notices to the assessee seeking explanation as to why the orders passed by the Assistant Commissioner should not be revised under Section 57 of the Bombay Act. The assessee objected to the exercise of revisional powers by the Dy. Commissioner during the pendency of the second appeals before the Tribunal. However, the objection was overruled by the Dy. Commissioner against which the assessee filed two appeals before the Tribunal and Tribunal had dismissed the appeals. The assessee had then filed writ petition before this Court, against rejection of its preliminary objection and the orders passed by the Tribunal dismissing his appeal. He, therefore, submits that in the state of such facts the Supreme Court had decided the case of *Santoshi Tel Utpadak Kendra* (supra). He further points out that in the present case such a situation has not arisen at all. No matter had been pending before the superior

authority at appellate stage as in said case. He thus submits that the decision of Supreme Court in *Santhosi Tel Utpadak Kendra (supra)* would have no application in the facts of the present case.

18. He submits that there is no embargo in the facts and circumstances of the present case on the exercise of revisional powers by the Assistant Commissioner (Administration), Kolhapur. He therefore, states that no point in the objection to exercise of revisional powers under Section 57 of the Assistant Commissioner (Administration) and submits that there is no error committed by the Assistant Commissioner and was absolutely justified in exercising revisional powers under Section 57. The pendency of appeal before the Appellate Authority does not have any effect on the exercise of his revisional power. He also refers to few decisions of the Tribunal in the case of *M/s. Span Diagnostics Ltd. Vs. State of Maharashtra, Surendra Tubes and Steels Pvt. Ltd. vs. State of Maharashtra and M/s. Mardia Steels Ltd. vs. State of Maharashtra*. He points out that in the case of *Span Diagnostic* the situation was similar to relevant facts in the present case where appeal against the assessment was pending before the appellate

authority and the revision by coordinate authority had been initiated which had been questioned on similar ground as in the present case. The Tribunal had held that exercise of revisional power was proper.

19. He submits that class of goods under the eligible/entitlement certificate refers to specific products and does not refer to brass. He refers to that while there is specific reference to sheets, strips etc. of aluminum and aluminum alloy, there is no such reference in respect of sheets, strips from copper and much less brass. In such a case it will have to be taken into account that it would not be proper to widen the scope of products to include brass sheets in order to accommodate assessee. He refers to decisions of the Tribunal in the case of *Nagpur Gas Domestic Appliances vs. State of Maharashtra and Mukat Tanks and Vessels P. Ltd. vs. State of Maharashtra*. He submits that decisions relied on by the assessee are of no avail having been rendered on different facts and circumstances.

20. Mr. Sonpal places reliance in the case of *Commissioner of Central Excise, Jaipur vs. Mewar Bartan Nirmal Udyog (2010) 13 SCC 753* in support of the submission that brass sheets though containing copper would

not qualify for claim of exemption from levy of sales tax. In aforesaid case, question was being considered whether trimmed and untrimmed circles of brass would fall under SL. No.200 of Sub Heading 74.09 containing goods other than trimmed or untrimmed circles of copper intended to be used for manufacture of utensils attracting nil rate of duty. In that case brass appears to have been considered different from copper. It was considered as goods would fall under entry SL. No.200 carrying nil rate of duty and not SL. No. 201 in respect trimmed or untrimmed circles of copper intended to be used for handicrafts. He therefore, submits that brass cannot be considered as an item of copper in any way. In the very same citation, the Supreme Court has observed in Paragraph 7 as under.

“7. We may also point out at this stage that it is well settled position in law that exemption Notification has to be read strictly. A notification of exemption has to be interpreted in terms of its language. Where the language is plain and clear, effect must be given to it. While interpreting the exemption notification, one cannot go by rules of interpretation applicable to cases of classification under the Tariff. Tariff items in certain cases are required to be interpreted in cases of classification disputes in terms of HSN, which is the basis of the Tariff.”

21. From the factual position and the submissions advanced, it emerges that while the Sales Tax Officer had accepted the contention of the

assessee about brass sheets being eligible for exemption from levy of sales tax.

22. As Assessing Officer had accepted the contention of the assessee for exemption of brass sheets from levy of sales tax without there being its specific reference in the eligibility certificate, the revisional authority appears to have called for and examined the matter and has come to a conclusion that brass sheets manufactured and sold by the assessee would not be eligible to exemption from levy of sales tax under the 1979 Package Scheme of incentives and notification entry No.136 under Section 41 of Bombay Sales Tax Act, 1959..

23. The Assistant Commissioner in exercise of the powers pursuant to Section 57(1) had proceeded with the revisional proceeding and has passed order in the same. The revision is an independent power of an authority calling for and examining record and orders passed by an officer subordinate and to pass such order as he may think just and proper. Appeal by the assessee had been filed since him being not satisfied by certain other disallowances. As such, orders in respect of certain other disallowances in

the appeal pending before the Assistant Commissioner of Sales Tax, Kolhapur would be hardly a matter which concerns the matter in revision. There is no decision by the appellate authority in said appeal which has been filed by the assessee aggrieved by other disallowances and much less there is any matter pending before higher authority to which to revisional authority is subordinate.

24. As such, exercise of revisional powers by the co ordinate authority would not be trammled by pendency of appeal. Decision in *Santoshi Tel Utpadak Kendra* (supra) would hardly have any application in the present set of facts and circumstances. Tribunal is justified in holding that there is no error in exercise of powers u/s. 57 by the revisional authority. First question is answered in the affirmative.

25. In the present facts, it is not disputed that the list of products under the eligibility /entitlement certificate does not make reference to sheets or other products by strips, rods circles etc. of brass like the one the case of aluminum appearing in the list under the eligibility certificate. Moreover, in the absence of copper sheets being listed, the contention that brass sheets

being its alloy qualify for exemption from levy of sales tax under the eligibility/entitlement certificate cannot be sustained. As such there does not appear to be any substance in the contention with regard to claim for exemption from levy of sales tax for brass sheets. The judgments those have been relied on by the assessee would hardly have any application in the present facts and circumstances and would not govern the present matter.

As such, the second question also stands answered in the affirmative.

26. Reference stands decided accordingly against the assessee and in favour of the revenue. However, there shall be no order as to costs.

**(SUNIL P. DESHMUKH, J.)**

**(S.C. DHARMADHIKARI, J.)**