

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.170 of 2018

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M/S Durga Bricks a partnership firm having its place of business at & P.O. -Bishanpur, within the District of Kishanganj (Bihar) through its one of the partners Bimal Mittal, son of Sri Lalit Kumar Mittal, resident of Ward No. 12, N.H- 31, Tegharia, Kishanganj, Pin- 855107.

... .. Appellant/s

Versus

1. The State of Bihar through the Principal Secretary- cum-Commissioner of Commercial Taxes, Commercial Taxes Department, Bihar, Patna.
2. The Joint Commissioner of Commercial Taxes (Appeals), Purnea Division Purnea.
3. The Commercial Taxes Officer, Kishanganj Circle, Kishanganj.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Aamir Hayat, Advocate
Mr. Ramesh Kumar Agrawal, Advocate

For the Respondent/s : Mr. Vikash Kumar, SC 11

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 05-10-2023

The question of law arising in the above appeal is one of classification and is framed as follows :-

Whether the stone chips, stone boulders and sand dealt with by the assessee in execution of a works contract with the Government would be covered under Entry 53 of Schedule III of the Bihar Value Added Tax Ordinance, 2005 exigible to tax at the rate of 4% or by the residuary provision under Section 14 of the



Ordinance, exigible to 12.5% tax?

2. Sri Aamir Hayat, learned counsel appearing for the appellant would contend that the assessee was a works contractor from whom tax at the rate of 4% was deducted and later a demand was made for enhanced tax at the rate of 12.5%. It is the contention of the assessee that he has been paying royalty under the Bihar Minor Mineral Concession Rules, 1972 and that the materials dealt with by the assessee being stone chips, stone boulders and sand, used in the works contract of construction of a road, is covered under the definition of a 'minor mineral' as available in the Mines and Minerals (Development and Regulation) Act, 1957 (for brevity, 'the MMDR Act'); which is also covered by the definition of 'minerals'. The said items are covered under Entry 53 in Schedule III of VAT Ordinance applicable to the assessment year 2005-06 which speaks of '*Ores and minerals*'. Subsequent notifications are also referred to by the learned counsel for the assessee to show that the clear intention of the legislature was to include the subject items within the definition of '*Ores and minerals*' for the relevant assessment year 2005-06.



3. Sri Vikash Kumar, learned counsel appearing for the State would, however, refute the contentions totally. It is argued that 4% tax deducted from source is as per the provisions of the taxing statute and that does not determine the tax payable insofar as the accretion of goods in the works contract, which has to be as per the schedules or under the residuary provision in Section 14. '*Ores and minerals*' by its natural connotation does not include sand, stone chips and stone boulders. '*Ores and minerals*' are found under the Schedule of Industrial Inputs and the specific items dealt with by the assessee are used only in construction activities. The classification under the tax enactment cannot go by the definition in the MMDR Act; which is a central legislation. At the relevant year only '*ores and minerals*' were included under Schedule III in which cannot be included the subject items. The subject items, not anywhere mentioned in the Schedules I to IV, fall under the residuary clause as provided under Section 14 of the VAT Act; exigible to tax at the rate of 12.5%. The subsequent concession given by the State legislature, including the subject items in Schedule III does not disclose the intention of the legislature in the relevant assessment year, but on the other hand, reveals the State



Government's decision to make the subject items exigible to tax at a lower rate in the subsequent years, which clearly postulates the higher levy in the relevant assessment year.

4. As far as 4% tax deducted at source, we are of the opinion that it does not necessarily indicate the rate applicable for the subject materials; dealt with by the assessee. The provision is insofar as the proceeds of the works contract being deducted with tax at source at the rate of 4%. This does not decide the rate of tax applicable to the various goods used in the works contract; for which the rate would be as per the schedules in the Act or if not figuring thereunder as per Section 14.

5. '*Ores and minerals*' in its natural connotation does not include stone chips, boulders and sand. We cannot also go by the definition of 'minor minerals' under the MMDR Act which is for the purpose of regulation and development of mines and minerals and not for making such goods exigible to tax. To determine the rate of tax applicable to a particular goods, subject to sale or deemed sale under a works contract, we have to go by the provisions in the tax enactment and not by the definition in any other enactment; even if the other enactment enforces a levy which in the



present case is of royalty; totally distinct and different from the levy of tax on sale of goods or deemed sale in a works contract. The subject items do not fall under the definition of '*ores and minerals*' in the relevant assessment year.

6. The Tribunal had dealt with the reliance placed on a decision in *Banarsi Dass Chadha and Bros v. Ltt. Governor, Delhi Administration, AIR 1978 SC 1587*, wherein the Hon'ble Supreme Court had categorically held that the word 'mineral' is an elastic word whose meaning depends upon the setting in which it is used. There cannot be a definition ferreted out without looking into the context of its use and in the present case, the definition under the MMDR Act would be of no use to determine the tax liability, which has to go by the tax enactment. The Tribunal held that the boulders, stone chips and sand for the purpose of taxation under the VAT Act in the relevant year, would be as unspecified goods at the rate of 12.5%.

7. We have to also look at the various amendments made as pointed out by the learned counsel for the appellant. In the year 2006, by S.O. 30 dated 01.04.2006, the Schedules were amended and under Schedule III entry 119 was brought in, which deals with 'sand and grit' and in Entry 85 after '*ores*



and minerals’ the words ‘*other than those specified elsewhere in this Schedule*’ were added and retained. By the said amendment brought to the Schedule of the VAT Act in the year 2006, it cannot be deemed that the intention of the legislature at the time of promulgation of the Ordinance was to include stone chips, boulders and sand within the definition of ‘*ores and minerals*’. As we noticed ‘*ores and minerals*’ have a definite connotation and stone and sand would not come under it, in normal parlance. The amendment providing exclusion from ‘*ores and minerals*’ in Entry 85, while adding another entry for ‘*sand and grit*’ only emphasizes the understanding of the legislature that they are quite different in nature and content; otherwise ‘*sand and grit*’ could have been included under Entry 85. By a subsequent amendment the earlier intention of the legislature cannot be inferred; especially since to clarify the intention at the earlier point, the legislature could have brought in the amendment, with retrospective effect.

8. Further, in 2007, by S.O.77 dated 13.09.2007, Entry 143 was added on which read as, “*Stone chips, stone boulders and ballast*”. The stone chips, stone boulders and ballast in the prior year of 2006 would be covered under the



residuary clause while '*sand and grit*' were exigible to tax at the lower rate of 4%, since the latter was specifically included under the Schedule.

9. We have also seen S.O.527 of 2013 whereby Entry 85 was amended by way of substitution and the following was incorporated, '*ores and minerals excluding stone chips, stone boulders and ballast which is not specified anywhere in this Schedule*'. Serial No.143 added by S.O.77 dated 13.09.2007 also stood deleted. Again, the stone chips, stone boulders and ballast were to be covered under the residuary entry.

10. We are of the definite opinion that in the relevant assessment year, '*ores and minerals*' did not include stone chips, stone boulders and sand which were dealt with by the assessee, which has to be taxed under the residuary rate of tax at 12.5%. The subsequent amendments of the schedule only indicates the intention of the legislature at that point, to be applied prospectively and it cannot be related back to an earlier year. We have to remind ourselves that the legislature had the power to make retrospective amendment, which obviously was not done. The notifications were all prospective and hence the common parlance meaning of the



term has to be understood unless there is an anomaly. No reliance can be placed on the definition in other enactments which are not in the nature of a taxing statute.

11. We answer the question of law against the assessee and in favour of the revenue. The appeal stands rejected.

(K. Vinod Chandran, CJ)

Partha Sarthy, J I agree.

Sunil/-

(Partha Sarthy, J)

AFR/NAFR	
CAV DATE	25.09.2023
Uploading Date	05.10.2023
Transmission Date	

