

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

SALES TAX REFERENCE NO. 6 OF 2009

WITH
SALES TAX REFERENCE NO. 68 OF 2009

The Commissioner of }
Sales Tax }
Maharashtra State, 8th floor, }
Vikrikar Bhavan, Sardar }
Balwant Singh Dhodi Marg, }
Mazgaon, Mumbai - 400 010 } Applicant

versus

M/s. Bhima Sahakari Sakhar }
Karkhana Ltd. } Respondent

Mr. S. K. Nair - A Panel Counsel for the
applicant in STR/6/2009.

Ms. Uma Palsuledesai - AGP for the
appellant in STR/68/2009.

Mr. C. B. Thakar for the respondent in
both appeals.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- AUGUST 16, 2016

ORAL JUDGMENT:- (S. C. Dharmadhikari, J.)

1) This reference by the tribunal vide its order dated 24th November, 2006 seeks, according to the tribunal, opinion and answer by this court on a question of law. That question, as framed in the order of reference dated 24th November, 2006 in Reference Application Nos. 105 and 106 of 2006 reads as under:-

“Whether on the facts and the circumstances of the case, the Tribunal was justified in holding that the sale of 'bagasse' is a tax free sale under section 5 of the Bombay Act covered under schedule entry A-44?”

- 2) Since this question is common to both these references, we would take the facts from Sales Tax Reference No. 6 of 2009.
- 3) The tribunal had before it two appeals being Second Appeal Nos. 558 and 869 of 2005. It delivered a common judgment therein on 24th February, 2006.
- 4) The Revenue sought a reference of the above question because, according to it, the respondent dealer is a co-operative society manufacturing sugar. It is duly registered under the Bombay Sales Tax Act, 1959 (for short “the BST Act”). The respondent has maintained books of accounts, which are duly audited. These books were produced in the assessment proceedings. No discrepancies were noticed. The assessing officer took the figures from the books of accounts and passed the assessment order. The tribunal was approached because there were two issues, on which the assessment order and the first appellate order was adverse to the dealer. The first one is of levying tax on the sales of bagasse at 13% and rejecting the contention that it is a tax free commodity. The only point before the tribunal was whether this levy on sales of bagasse at 13% is in accordance with law. The tribunal heard the rival contentions.

The respondent dealer contended that it is manufacturing sugar. It is purchasing sugarcane for the purpose of manufacturing sugar. The sugarcane is crushed and juice is taken out. Even after the juice extracted and taken out, some of it still remains in the residuary of the sugarcane. The Allahabad High Court in the case of *Dhampur Sugar Mills Limited vs. Commissioner of Sales Tax, U. P. Lucknow*¹ has held that bagasse is a residue of sugarcane left after its processing and does not become a different commodity. The SLP against this judgment was rejected by the Hon'ble Supreme Court of India.

5) The Revenue, on the other hand argued that bagasse is a different commercial commodity. Once it is a different and distinct commodity known to the commercial world, then, the judgment and order of the Allahabad High Court would not be applicable and is distinguishable. The tribunal had before it Entry - 44 of Schedule 'A' appended to the BST Act. That entry reads thus:-

Serial No.	Description of goods	Conditions and exemptions, subject to which exemption is granted	Period
44	Sugarcane, Khandsari sugar and Palmara sugar.	Except when sold under a brand name in sealed, capsuled or corked containers.	01/10/1995

6) The argument was whether the word “sugarcane” can also include “bagasse”. Schedule 'A' is titled as “Goods, the sale or purchase of which is free from all taxes”.

7) As far as the U. P. Sugarcane (Purchase Tax) Act, 1961 is concerned, there, a specific exemption from tax on sugarcane was provided. While dealing with such an issue, the Allahabad High Court held that:-

“..... The learned counsel for the assessee has argued on the 2nd point that the bagasse being the residue of the sugarcane should not be treated as a different commodity exigible to the sales tax but the learned Tribunal has committed an error of law by treating it as a different commodity attracting liability of sales tax. He has further submitted that the revisionist had paid purchase tax on the purchase of sugarcane out of which bagasse has been left out in the manufacturing process and no tax on sale of bagasse can be levied under the U. P. Sales Tax Act in view of the bar created by section 13 of the U. P. Sugarcane (Purchase Tax) Act, 1961.

The learned Standing Counsel has however submitted that the bagasse is a commodity different from sugarcane and as such it attracts sales tax on its sale under the Act. Therefore the substantial question arising for consideration is whether the bagasse will be treated as a different commodity exigible to sale tax under the Act.

In support of his contention Mr. Bharat Ji Agarwal has cited a decision in the case of *Commissioner of Sales Tax, U. P. v Parag Ice and Oil Mills* [1991] 80 STC 403; 1991 UPTC 815 in which the honourable Supreme Court considered the nature of the residue of groundnut oil and held that the residue left after going through the process of the acids and chemicals, continues and remains to be the groundnut oil and is taxable at 1 per cent.

He has further cited a decision of a division Bench of this Court in the case of *Kisan Sahkari Chini Mills Limited, Gadarpur, Nainital v. State of Uttar Pradesh* STI 1989 All.

294. In this case the specific question regarding nature of bagasse was considered and this Court has held that so far as bagasse is concerned, it is the residue from the milling process of the sugarcane. It consists of body, fibre, some unextracted juice and 40-50 per cent of the water.

The learned Tribunal while holding that bagasse is a different commodity attracting liability of sales tax on its sale, has not correctly followed the decision in the case of *Deputy Commissioner of Sales Tax v. Pio Food Packers* [1980] 46 STC 63. In my opinion, the finding recorded by the learned Tribunal that bagasse is a different commodity is not correct. The bagasse is a residue of the sugarcane left after its processing and continues to be the residue of the sugarcane and does not become a different commodity, if its juice, sucrose and water contents are squeezed out of sugarcane.

Section 13 of the U. P. Sugarcane (Purchase Tax) Act, 1961 reads as follows:

“13. No sale or purchase tax under any other Uttar Pradesh Act shall be payable in respect of any transaction of sale or purchase of sugarcane in respect of which a tax is payable under this Act, anything contained in the U. P. Sales Tax Act, 1948 to the contrary notwithstanding.”

It is clear from bare provisions of section 13 that the U. P. Sales Tax Act does not apply to sugarcane and no tax either on sale or purchase of sugarcane is exigible under the U. P. Sales Tax Act. If tax on purchase of sugarcane has already been paid by the assessee under the U. P. Sugarcane (Purchase Tax) Act, 1961, the residue of the sugarcane if sold, cannot be subjected to sales tax. The learned Tribunal has committed an error of law by holding that bagasse will be attracting liability of sales tax under the Act. This finding is also liable to be set aside. I hold that bagasse being the residue and the result of the sugarcane after its processing is not exigible to sales tax under the Act even on its sale.

.....”

8) The tribunal, while passing the order on the second appeals, held as under:-

“.....

9. It further appears that the department has filed SLP against that judgment, which was also rejected by the Supreme Court. There is no other decision of our High Court or any other High Court wherein contrary view has been taken than the view taken by the Allahabad High Court. Mr. Akhade was unable to satisfy us as to why the meaning of Baggasee explained by the Allahabad High Court should not be accepted, and as to why the same is not applicable in the context of the Bombay Act. It is our considered view that the Baggasee is a residue of the sugarcane left after the processing and continues to be residue of the sugarcane and certainly not be a different commercial commodity if juice sucrose and water contents are squeezed out of sugarcane. It is also rightly pointed out by Mr. Ghanekar that in the case of M/s. Kisan Sahakari Chini Mills Ltd. (STI 1989 All. 294), the Allahabad High Court held that so far as Baggasee is concerned, it is the residue from the milling process of the sugarcane. It consists of body fibre, some un-extracted juice and 40:50 percent of water. We have no hesitation to hold that this reasoning is quite applicable to our case. It does not appeal that the said reasoning is to be ignored only on the ground that it is under a different Act. In fact, the point is not with regard to interpretation of the particular provision as to why the particular commodity in question is tax free. Point is regarding understanding the nature of particular commodity, Once it is understood that the Baggasee is residue of sugarcane left after the processing and continues to be residue of the sugarcane, and it is not a different commercial commodity, then it will have to be treated as sugarcane for ascertaining whether it is exigible to tax or not. It is needless to say that once it is held as residue of the sugarcane, then it is certainly goes under the description of the sugarcane mentioned in entry 44 of schedule A appended to the Bombay Act, and will have to be held as tax free. The levy on the same will have to be set aside. Once the levy of tax on the Baggasee is set aside, the appellant will be entitled for refund. On the basis of out of pocket theory, the appellant will be entitled for grant of remission in interest under section 36(3)(a) of the Bombay Act.”

9) However, the Revenue contended that there is ground enough to refer the matter to this court for opinion and answer,

because there are materials to indicate that bagasse is understood as different and separate commodity than sugarcane. The tribunal, however, did not agree with the Revenue on this point and held that this is a factual matter. Neither in the assessment order nor in the appellate order there is any whisper in that behalf, therefore, there exists no ground to refer the matter to this court for consideration. However, strangely, para 12 of the order on the reference applications at pages 8 and 9 of the paper book reads as under:-

“12. However, the views expressed by various high courts on similar issues are required to be taken into consideration. It has been pointed out on behalf of the revenue that in the case of **M/s. Etikoppakka Co-operative Agricultural and Industrial Society Limited vs. Commercial Tax Officer (120 STC 608)**, it is held that sugarcane seedlings cannot be categorized as sugarcane. Factually, Sugarcane seedlings apparently are sugarcane which is cut into smaller pieces and sold as a seed for sugarcane. Even then considering the nature, characteristic and utility, the Andhra Pradesh High Court held that sugarcane seedlings are different commodity than sugarcane. It is also pointed out that the High Court of Punjab & Haryana in the case of **M/s. Jagraon Sugar Mills Limited (94 STC 98)** has held that, 'molasses and bagasse' according to the dictionary meaning are in the nature of 'by-product residue' in the process of manufacture of 'sugar'. According to him, a by-product cannot be termed as the same commodity from which or in the process of which the by-product is generated. It also appears that in the case of **M/s. Madurantakam Co-op. Sugar Mills (38 STC 238)**, the Madras High Court, on the tax enhancement petition filed by the revenue against the Tribunal order held the sale of 'bagasse' of Rs.16.84 lacs, as liable to tax. Now as there is no direct judgment of our high court on the present issue and as there is a possibility of different view than expressed by the Hon'ble Allahabad High Court in the matter of Dhampur Sugar Mills Ltd. (100 STC 434) relied

upon by the appellant, it will be in the fairness of things to refer the matter to the Hon'ble High Court for consideration. The purpose would be served by referring question No. (1)."

10) It is conceded that the above question has been referred in these circumstances. Mr. Nair learned special counsel appearing for the revenue would submit that whether section 5 of the BST Act is covered under Schedule Entry A-44, means that bagasse is tax free or not and that is the question. He would submit that from the order passed by the tribunal, both on the second appeals and the reference applications, it would be apparent that the bagasse is leftover of sugarcane after crushing and cannot be called as sugarcane. Mr. Nair submits that bagasse is known to the commercial world as distinct and different. It has different uses. It is used as fuel and raw material for manufacture of paper. It is a fibrous residue from the sugarcane after extracting cane juice and is used to produce steam and power for operation of factories. The bagasse is also used as a bio-fuel for manufacture of pulp. Mr. Nair, therefore, would submit that it is an ideal raw material for manufacture of different types of paper, news print etc. Mr. Nair has relied upon the definition of the word "sugarcane" as appearing in Oxford Dictionary to submit that it is a tall perennial grass cultivated in tropical and sub-tropical countries and forming the chief source of un-manufactured sugar.

Mr. Nair would submit that the Allahabad High Court judgment can have no application for it is under a different enactment. Similarly, the observations of the Hon'ble Supreme Court of India in the latest judgment in the case of *Union of India vs. DSCL Sugar Ltd.*² would have also no application. The Central Excise Act contemplates a levy or tax on manufacture and we are concerned with a different enactment, namely the BST Act. Before the Allahabad High Court, there was no evidence to show that in common parlance bagasse is understood as different and separate commodity than sugarcane.

11) However, according to Mr. Nair, there is enough evidence in the present case. In that regard, he relied upon the order of assessment dated 24th January, 2001 and particularly the portions of it where it refers to the sale of molasses and bagasse. Sales of molasses were disallowed, whereas the sales of bagasse were partially allowed. It is in these circumstances Mr. Nair would submit that it is not appropriate to hold that there is no material or evidence in this case. Therefore, all the judgments relied upon are distinguishable.

12) Mr. Nair has relied upon the following judgments:-

(i) *Union of India vs. DSCL Sugar Ltd.*, 2015 (322) E. L. T. 769 (S. C.).

² 2015 (322) E. L. T. 769 (S.C.)

- (ii) Motipur Zamindary Co. (Private) Ltd. vs. The State of Bihar and Anr., 1962 STC Vol. XIII 1.
- (iii) Sakthi Sugars Limited and Ors. vs. Deputy Commercial Tax Officer, Bhavani and Ors., 1969 STC Vol XIII 232.
- (iv) Ramavatar Budhaiprasad vs. The Assistant Sales Tax Officer, Akola and Anr. 1961 STC Vol. XII 286.
- (v) Etikoppaka Co-operative Agricultural and Industrial Society Ltd. vs. Commercial Tax Officer, 2000 STC (Vol. 20) 608.
- (vi) M/s. Indo International Industries vs. Commissioner of Sales Tax, Uttar Pradesh, AIR 1981 SC 1079.
- (vii) Dhampur Sugar Mills Limited vs. Commissioner of Sales Tax, U. P. Lucknow, 1996 STC (Vol. 100) 434.

13) On the other hand, Mr. Thakar appearing for the dealer would submit that the tribunal has seriously erred in referring this matter for it is not a question of law. It was a mixed question and was clearly covered by the judgment of the Allahabad High Court. There is no justification for reference of this question as there is no material which was placed before the tribunal or even earlier before the first appellate authority to indicate that the market and the commercial world understand the product or the commodity distinctly. Once it is sugarcane, then, there is no question of it being brought to tax.

14) We have perused the entire paper book with the assistance of the both counsel. We find much substance in the contentions of Mr. Thakar and for the reasons indicated hereinbelow.

15) *Motipur Zamindary Co. (Private) Ltd.* (supra) was a decision on the point whether sugarcane falls within the “green vegetable” and is, therefore, exempted from sales tax under the exemption given by notification dated 28th August, 1947 issued under section 6 of the Bihar Sales Tax Act, 1947. The Hon'ble Supreme Court of India found that the meaning of the word “vegetable” in taxing statute is to be understood in common parlance denoting class of vegetables which are grown in a kitchen garden or in a farm and are used for the table. Seen in this light, the word “vegetable” cannot cover or include sugarcane.

16) We do not see how these observations of the Hon'ble Supreme Court of India can be seen de-hors the context and the facts brought for consideration. Similarly, in the case of *Sakthi Sugars Limited and Ors.* (supra), before the Madras High Court, the issue was whether sugarcane setts are equal to sugarcane and therefore exigible to tax under item 62 in the First Schedule to the Madras General Sales Tax Act, 1959. The sugar mill before the Madras High Court contended that it was not assessed to tax, but the revisional powers were invoked to revise the completed assessment. The revisional exercise attempted to include in the taxable turnover a particular sum representing the turnover in

sugarcane setts, which according to the Revenue was wrongly exempted from being brought to tax in the earlier order.

17) The Madras High Court held that the main point urged is one on facts. However, for the exercise of revisional jurisdiction and to consider the facts or factual point if lacking, then, the taxing authorities would not be able to assume jurisdiction. It is in that context the Madras High Court held thus:-

“ What is the jurisdictional fact that confronts us in this case? It is whether sugar-cane setts are sugar-cane, and if it is so established, then the revenue will have jurisdiction to assess the petitioners and the appellant and if not, the absence of the jurisdictional fact is apparent. This leads us to enquire as to what is a sugar-cane sett. Sugar-cane sett is a portion of cane stalk (cutting) such as is used for planting. It is a seedling which could be propagated and multiplied indefinitely from cuttings - See Encyclopaedia Britannica. Sugar-cane seed is very small, rather silky and rarely viable - See Van Nostrand's Scientific Encyclopaedia. It is said that sugar-cane seeds are so small that nearly 100 sugar-cane seeds would be required to equal the weight of a single wheat grain (Encyclopaedia Britannica). Therefore, propagation of sugar-cane is by cuttings 8 to 10 inches long known as “seeds”, made from the upper joints of old canes. They are placed in trenches and merely covered with soil. They begin to sprout in about two weeks and the crop is harvested in 10 to 20 months. See Chambers' Encyclopaedia. Thus sugar-cane can be conveniently classified as a genus of which sugar-cane sett is a specie. But yet it would be commercial and etymological perversity if sugar-cane setts are to be equated and understood as sugar-cane itself. Sugar-cane setts are botanical seeds from which spring sugar-cane. The physical and chemical properties of sugar-cane setts are entirely different from sugar-cane. The sucrose content in both varies. The physical appearance is different. The use to which one can be put is totally different from the use to which the other can be put. Even more, in mercantile contracts it cannot be said that sugar-cane sett is a

substitute for sugar-cane in the matter of performance or discharge of contracts involving supply or delivery of the one or the other of the commodities. If sugar-cane is asked for, can sugar-cane setts be supplied by a merchant and discharge by performance thus pleaded? It cannot be. No light is thrown in the Act as to what sugar-cane is. But the same being a word which is commonly used "it must be construed in its popular sense meaning that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it". See *Ramavatar Budhiprasad v. Assistant Sales Tax Officer* ((1961) 12 S.T.C. 286 at 288). We are therefore of the opinion that sugar-cane setts are not sugar-cane as is understood in commerce and trade. Fiscal enactments resulting in the imposition of sales tax or purchase tax on the sale or purchase of goods have to satisfy the cardinal test that the goods enumerated as subjects of taxation are those which are commercially and popularly understood as such. An arbitrary and naked attempt on the part of the revenue to rope in goods and commodities having a special signification of their own in commerce, into the net of taxation as if they are goods enumerated in the Schedules to the Act without establishing a substantial nexus between the two articles and without proof of their identity, has to be, and ought to be, discouraged. On the only ground that the articles sugar-cane setts and sugar-cane have a striking and phonetic resemblance, they are not the same articles or similar commodities. But that by itself does not tantamount to saying that one is equivalent to the other. Their properties are different; their user is different and they are understood by the common man and the commercial community in different and distinct ways. Thus, we find that sugar-cane setts are not classifiable as sugar-cane and therefore the respondent had no jurisdiction to issue the impugned notices and pass the impugned assessment orders. Even so the order of the Board of Revenue in T. C. No. 2 of 1968 is unsustainable."

18) It is in these circumstances and when sugarcane setts were attempted to be equated with sugarcane and noticing their usage, the Division Bench found that if sugarcane is asked for, sugarcane setts cannot be supplied by a merchant. It is in these circumstances that sugarcane setts are not sugarcane as is

understood in commerce and trade. We have no such material before us. Rather, ours is a case as close as could be found to the facts and circumstances in the Allahabad High Court judgment.

19) Even the judgment in the case of *Ramavatar Dudhaiprasad* (supra) was clear. The word “vegetable” in Item 6 of Schedule II of the C. P. and Berar Sales Tax Act, 1947 requires consideration not in any technical sense nor from the botanical point of view but as understood in common parlance. Having not been defined, it must be assigned the same meaning as is ordinarily understood, namely, “class of vegetables which are grown in a kitchen garden or in a farm and are used for the table”.

20) Thus, the issue was considered in distinct factual background. Before us, it is not disputed that section 5 of the BST Act refers to and covers such goods on which there arises no liability to pay tax. The sales and purchase of certain goods free from tax is what is provided by section 5. Therefore, so long as the conditions or exceptions, if any, set out against each of the goods specified in column 3 of the Schedule 'A' are satisfied, no tax shall be payable on the sales or purchases of the goods specified in that Schedule. What we have before us is the BST Act and we have definition of the term “goods” appearing in section 2(13). “Goods” means every kind of movable property (not being

newspapers, or actionable claim or money, or stocks, shares or securities), and includes growing crops, grass, and trees and plants (including the produce thereof) and all other things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. It is common ground that sugarcane is used to manufacture sugar. Therefore, ordinarily, the word "goods" as defined in section 2(13) would cover and include sugarcane. In the circumstances, whether bagasse is sugarcane or not was the controversy. It was, therefore, and in that context, held that so long as these are not identifiable and distinctly known goods to the commercial world, they cannot be brought to tax or if they are part and parcel of sugarcane or are a waste or a by-product when sugarcane is crushed, then, that cannot be brought to tax. It is in that context that all the factual circumstances were taken into consideration. It is in that context the common parlance test as to whether these are distinctly known goods to the market and particularly the commercial world was applied universally. It is in that context that several judgments and tests laid down therein as above were considered. Even the judgment of the Andhra Pradesh High Court in the case of *Etikoppaka Co-operative Agricultural and Industrial Society Ltd. vs. Commercial Tax Officer* (supra) can have no application.

21) We are of the opinion that once it has been consistently held that residue or waste of something like sugarcane does not amount to manufacturing a distinct product or goods known to the commercial world, then, we do not think that there was any need for referring the question to this court.

22) The question as proposed and referred by the tribunal cannot be termed as question of law. It was a mixed question. There was no ambiguity or vagueness nor there is any possibility of the question being answered differently. Therefore, having found that the Madras High Court was dealing with a different issue and controversy, based on its observations, it was not necessary to refer the question for opinion and answer of this court. We accordingly answer the question in favour of the dealer and against the Revenue.

23) The References are accordingly disposed of.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)