

Mineral And Metal Trading Corporation vs R. C. Mishra And Ors on 7 April, 1993

Equivalent citations: 1994 AIR 1523, 1993 SCR (3) 12, AIR 1994 SUPREME COURT 1523, 1994 AIR SCW 1002, 1996 TAX. L. R. 251, 1994 TAX. L. R. 326, (1993) 4 JT 222 (SC), 1993 (3) SCC(SUPP) 29, 1993 (4) JT 222, (1993) 3 SCR 12 (SC), (1994) 206 ITR 58, 1993 (3) SCR 12, 1993 (115) CURTAXREP 54, (1993) 115 CURTAXREP 547, (1993) 69 TAXMAN 527, (1993) 114 TAXATION 358, (1993) 201 ITR 851, (1993) 65 ELT 474, (1997) 68 ECR 540

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, N Venkatachala, S. Mohan

PETITIONER:

MINERAL AND METAL TRADING CORPORATION

Vs.

RESPONDENT:

R. C. MISHRA AND ORS.

DATE OF JUDGMENT 07/04/1993

BENCH:

JEEVAN REDDY, B.P. (J)

BENCH:

JEEVAN REDDY, B.P. (J)

VENKATACHALA N. (J)

MOHAN, S. (J)

CITATION:

1994 AIR 1523 1993 SCR (3) 12

1993 SCC Supl. (3) 29 JT 1993 (4) 222

1993 SCALE (2) 643

ACT:

Income tax Act, 1961/ Tax credit Certificate (Exports)
Scheme 1965:

Section 280ZC/Paragraph 9--Tax credit
Scheme--Objective--providing additional incentive to
exporter--System barter--Real exporter--Who is.

HEADNOTE:

The Second Respondent (Ferro Alloys Corporation), manufac-

turer-exporter of ferro-manganese and chrome concentrates, entered into a number of agreements with foreign buyers for sale of the said commodity. The export was routed through the appellant to bring it within the system of private barter introduced by the Government of India with a view to encourage exports. The main objective of barter system was to provide a mechanism which would result in increased export of particular commodities which were ordinarily difficult to sell abroad where the selling countries were not able to get a foothold. This objective was sought to be achieved by linking them to exports of an equivalent or lesser value of essential commodities which in any event had to be imported. As far as purchase and sale contracts were concerned, M.M.T.C. insisted that there should be one contract of sale between the local supplier and the M.M.T.C. and another contract of sale by the M.M.T.C. to the foreign buyer on principal to principal basis.

It was agreed that Ferro Alloys should intimate the foreign buyer to enter into a direct contract with M.M.T.C. treating it as the seller. Also, the G.R.I. form prescribed by the Reserve Bank of India under the Rules framed under FERA was to be signed by M.M.T.C. showing it as the exporter and seller. Letters of credit were opened in the name of M.M.T.C. which was to be assigned to Ferro Alloys so that Ferro Alloys could receive the payment directly for the goods supplied to

13

M.M.T.C. The shipping documents also showed M.M.T.C. as the exporter.

The transactions were gone through. Dispute arose between the parties when the question of issuance of Tax Credit Certificate u/s 280ZC of the Income tax arose as to who could be said to have exported the goods and received the sale proceeds in the shape of foreign exchange. The matter was taken in appeal before the Government of India. It held that M.M.T.C. was the exporter for the purpose of S.280ZC. Ferro Alloys challenged the said order before the High Court by way of a Writ Petition. The High Court allowed the Writ Petition, and held that the real exporter was Ferro Alloys which earned and received the foreign exchange and M.M.T.C. got only its commission of 2% and nothing more. Aggrieved by the judgment of the High Court, M.M.T.C. preferred the present appeal.

Allowing the appeal, this Court,

HELD: 1. The entire export was done through M.M.T.C. in accordance with the system of barter. There is no half-way house; either it is not barter system or it is in accordance with the system of barter. This is an undisputed fact as, are the several statutory documents made out in the name of M.M.T.C. Thus M.M.T.C. is the exporter for the purpose of Section 280ZC of the Income tax Act, 1961. The entire system of barter and the several documents executed in that behalf including those required by statutory provisions

cannot be explained away as mere "external appearances". Ferro-alloys cannot come to M.M.T.C. when it is profitable to it and disavow it when it is not profitable to it. It cannot have it, both ways. The title to goods passed to M.M.T.C by virtue of the several documents executed between the parties. Indeed, that was the fulcrum of the entire scheme of Barter. (19-E-F).

2. This Court is not convinced with the alternative reasoning of the High Court that even if it is viewed that the title to the goods passed to M.M.T.C., even so Ferro-alloys must be held to be the real exporter, in view of the objective underlying Section 280ZC. If M.M.T.C. has acquired the title to the goods and is the exporter for all other purposes it is equally the exporter for the purpose of Section

14

280ZC. There can be no dichotomy of the nature propounded by the High Court. (19-H, 20-A).

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 372 of 1979. From the Judgement and Order dated 25.5.1978 of the Delhi High Court in Civil Writ Petition No. 1494 of 1973. Dr. N.M. Ghatate and D.N. Mishra (for J.B.D. & Co.) for the Appellant.

V.C. Mahajan, C. Ramesh and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. The appeal is preferred against the judgment of the Delhi High Court allowing the writ petition filed by the second respondent-M/s Ferro Alloys Corporation Ltd. The writ petition was directed against the judgment and order of the Government of India, Ministry of Finance, dated September 19, 1973 in an appeal preferred under paragraph (9) of the Tax Credit Certificate (Exports) Scheme, 1965.

The second respondent is the manufacturer-exporter of ferro- manganese and chrome-concentrates. During the year 1964-65 (from February 28, 1965 to June 5, 1965) the second respondent entered into a number of agreements with the foreign buyers for the sale of the aforesaid two commodities. The export was routed through the M. M.T.C. the appellant herein, to bring it within the system of private barter introduced by the Government of India with a view to encourage exports. It would be appropriate to notice the essential features of the barter system in vogue during the relevant period at this stage. The main objective behind the system was to provide a mechanism which would result in increased export of particular commodities which were ordinarily difficult to sell abroad and to destinations, in which the selling countries were not able to get a foothold. This objective was sought to be achieved by linking them to imports of an equivalent or lesser value of essential commodities, which, in any event, the country had to import. All barter proposals were scrutinized in the first instance by the M.M.T.C. and then by the Barter Committee. The essential stipulations were:

"(i) All imports made under barter deals were subject to such sale price and distribution control as were laid down by the Government and

(ii) All barter deals were to be routed through S.T.C./ M.M.T.C. unless otherwise decided upon by barter committee."

As and when approval was given by the Government of India, a letter of indent used to be issued by the M.M.T.C. to the bartering firm or the local supplier, as the case may be. (In this case, there was no bartering firm. Ferro Alloys was directly sending the goods). As far as purchase and sale contracts were concerned, the M.M.T.C. insisted that there should be one contract of sale between the local supplier and the M.M.T.C. and another contract of sale by the M.M.T.C. to the foreign buyer on principal to principal basis. The foreign exchange so generated under this arrangement was the basis for issue of import licences, which were issued in the name of M.M.T.C. with the letter of authority in favour of the bartering firm or the local supplier, as the case may be. This enabled the bartering firm/local supplier to import the approved commodity under its approval barter and thus he in a position to recoup the losses incurred by it in arranging the supply-or in supplying, as the case may be of export commodities to the M.M.T.C. It was agreed and understood that the ferro alloys should intimate the foreign buyer to enter into a direct contract with the M.M.T.C. treating it as the seller. It was also agreed that G. R.I. Form prescribed by the Reserve Bank of India under the Rules framed under the Foreign Exchange Regulation Act (for accounting the receipt of foreign exchange) was to be signed by the M.M.T.C. showing it as the exporter and seller vis-a-vis the foreign buyer. Letters of credit was also to be opened in the name of M.M.T.C.? which was to be assigned to the Ferro-alloys. This was done with a view to enable the Ferro-alloys to receive the payment directly for the goods supplied to M.M.T.C.. The Shipping Bill, which is a document prescribed under the Customs Act, was also to be made out showing M.M.T.C. as the exporter.

The transactions were gone through. Dispute arose between the parties when the question of issuance of a tax credit certificate under Section 280 (Z) (C) of the Income Tax Act arose. Sub-section (1) of section 280 (Z) (C), as in force at the relevant time, read as follows "Tax Credit Certificate in relation to exports (1) Subjects to the provisions of this section. a person who exports any goods or merchandise out of India after the 28th day of February, 1965, and receives the sale proceeds thereof in India in accordance with the Foreign Exchange Regulation Act, 1947 (7 of 1947), and the rules made thereunder, shall be granted a tax credit certificate for an amount calculated at a rate not exceeding fifteen per cent on the amount of such sale proceeds. "

A reading of the sub-section shows that the tax Credit Certificate is issued to the person "who exports any goods or merchandise out of India after the 28th day of February, 1965, and receives the sale proceeds thereof in India in accordance with the Foreign Exchange Regulation Act, 1947 and the Rules made thereunder." Question, therefore, arose who is the person, in the case of this transaction, who can be said to have exported the goods and received the sale proceeds in the shape of foreign exchange. The matter was taken in appeal before the Government of India under paragraph (9) of the Tax Credit Certificate Exports Scheme, 1965. On an elaborate consideration of the bartering scheme and the several documents which came into

existence in connection with the transactions between the parties, the Government of India held that the M.M.T.C. must be held to be the exporter for the purpose of Section.280(Z)(C) and not the Ferro-alloys. This order was challenged by Ferro-alloys by way of a writ petition in the High Court. The High Court allowed the writ petition on the following reasoning:

"While the terms of the scheme of barter and the arrangement between the exporter and the Corporation visualizes in theory that the contracts to be entered into between the exporter and the foreign buyers would be duly substituted by principal to principal contracts between the foreign buyer and the Corporation as well as the Corporation and the Indian supplier of the goods, so that the Corporation virtually gets substituted for the exporter for all external appearance, in actual practice, however, it appears that the substituted contracts are rarely executed and were, in any event, not executed in the present case at either of the two ends although the letter of credits were opened by the foreign buyers in favour of the Corporation and the shipments were made in some cases in the name of the Corporation on account of the exporter while in the others in the name of the exporter on account of the Corporation. No consideration, however, passed between the Corporation and the exporter on account of any sale of the commodity to the Corporation. The letters of credit being transferable are endorsed immediately on receipt in favour of the exporter by the corporation and the sale proceeds are directly realized by the exporters through their bankers and the commission of the Corporation agreed to is paid by the exporter to the Corporation. The declaration under Section 12 of the Foreign Exchange (Regulations) Act in Form GR- I contains the name of the Corporation as the exporter. But the form lists the name of the exporters' banker as the banker concerned."

In other words, the High Court's approach was that while for external appearances, the corporation was given out as the exporters, Ferro-alloys was the real exporter for all purposes and it was Ferro-alloys which earned and received the foreign exchange. M.M.T.C. got only its commission of 2% and nothing more. Alternatively held the High Court even if it is held that the documents executed between the parties had the legal effect of transferring title in the goods to and in favour of the Corporation, even so Ferro alloys must be deemed to be the real exporter for the purposes of Section 280(Z)(C), having regard to the objective underlying the said section viz., providing an additional incentive to the real exporter. The correctness of the said view is questioned in this appeal. Though the second respondent, Ferro-alloys Corporation Ltd., has been served, no one appears on its behalf. We are, therefore, obliged to dispose of this appeal only with the assistance of the counsel for the M.M.T.C. May be that there are factors in this case supporting the contentions of both the parties. In such a case, we have to decide the question on a totality of relevant factors applying the test of predominance. It is true that there was initially an agreement or contract between Ferro-alloys and the foreign buyer for export of manganese and other goods but that was substituted and superseded by the two contracts entered into with respect to the very same goods. One contract was between Ferro-alloys and M.M.T.C. for sale of the said goods to and in favour of M.M.T.C. and the other was a sale by M.M.T.C. to the foreign buyer. It is significant to notice that

these contracts were on principal to principal basis. Apart from this fact all the statutory documents viz., G. R.I. Form prescribed under the Foreign Exchange Regulation Act, 1947 and the shipping bill prescribed by the Customs Act were made out in the name of M.M.T.C. showing it as the exporter. We have perused the Form-G.R.I.Column-1 pertains to exporter's name. Against this column is shown-Minerals and Metals Trading Corporation of India Limited'. The Form contains a declaration to be signed by the exporter declaring that he is the seller/consignor of goods and a further undertaking that they will deliver to the Bank mentioned in the said Form, the foreign exchange resulting from the export of the goods mentioned therein. It was signed by the M.M.T.C. Letters of credit were opened in the name of M.M.T.C. All this was done as required by the system of barter. Ferro-alloys availed of this system presumably because it was to its advantage. In fact, it appears that it was not able to sell the said goods otherwise. Be that as it may, whether by choice or for lack of alternative, it chose to route its goods through M.M.T.C. Is it open to the Ferro-alloys now to say that all this must be ignored in the name of "external appearances"

and it must be treated as the real exporter for the purposes of Section 280(Z)(C). It wants to be the gainer in both the events. A case of "heads I win, tails you lose." As against the above circumstances, the factors appearing in favour of the Ferro-alloys are the following: The contract between the parties spoke of "commission" of two per cent payable to the M.M.T.C. Use of the expression "commission", it is pointed out, is indicative of the fact that M. M.T.C. was only an agent. For the M.M.T.C., it is explained that it was one way of describing the difference between the export price and the sale price. It is submitted that the said feature must be understood in the context of the totality of the scheme, which was not a mere commercial scheme but a scheme conceived in the interest of foreign trade, economy and balance of payments. Ferro-alloys also relied upon a certificate given by the foreign buyer stating that the goods in question were sold to it by Ferro-alloys. But as rightly pointed out by the Government of India, this certificate was obtained long after the relevant transactions were over and evidently to buttress its case with respect to the tax credit certificate. Not much significance can be attached to it, also because it is in the teeth of the contracts signed by the foreign buyer with the M.M.T.C. with respect to the very same. It is also pointed out that some of the documents required to be executed according to the system of barter were not actually executed between the parties. May be so. The fact yet remains that the entire export was done through M.M.T.C. in accordance with the system of barter. There is no half-way house; either it is no barter system or it is. This is an undisputed fact as are the several statutory documents made out in the name of M.M.T.C., referred to here in before. On a consideration of all the relevant factors and circumstances, we are of the opinion that the M.M.T.C. must be held to be the exporter for the purpose of Section 280(Z)(C). The entire system of barter and the several documents executed in that behalf including those required by statutory provisions cannot be explained away as mere "external appearances". The Ferro-alloys cannot come to M.M.T.C. when it is profitable to it and disavow it when it is not profitable to it. It cannot have it both ways. The title to goods passed to M.M.T.C. by virtue of the several documents executed between the parties. Indeed, that was the fulcrum of the entire scheme of Barter. We are also not convinced with

the alternative reasoning of the High Court that even if it is held that the title to the goods passed to M.M.T.C., even so Ferro-alloys must be held to be the real exporter, in view of the objective underlying Section 280(Z)(C). If M.M.T. C. has acquired the title to the goods and is the exporter for all other purposes it equally the exporter for the purposes Section 280(Z)(C). There can be no dichotomy of the nature propounded by the High Court. We are, therefore of the opinion that the High Court was not right in holding to the contrary. The appeal is allowed. The judgment and order of the High Court of Delhi is set aside and the order of the Government of India dated September 19, 1973 is restored. The writ petition filed by the second respondent in the Delhi High Court is dismissed. No costs.

G. N. Appeal allowed.