
(2000) 09 KL CK 0028

In the High Court Of Kerala

Case No : T.R.C. No"s. 103 and 131 of 1999

Chandramani Traders

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-09-2000

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 3

Citation : (2001) 121 STC 604

Hon'ble Judges : G. Sivarajan, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : M.A.T. Pai and Mahesh T. Pai, for the Appellant; V.V. Asokan, Special Government Pleader, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963 (for short, "the Act").

2. These two tax revision cases are filed by the same assessee for two different assessment years 1988-89 and 1989-90 against a common appellate order of the Sales Tax Appellate Tribunal, Additional Bench II, Ernakulam. The short question that arises for consideration is as to whether the sales turnover of bulk drugs and pharmaceutical preparation is liable to be assessed at 6 per cent under entry 116 of the First Schedule to the Act or at 8 per cent under entry 42 of the said Schedule. The assessee contended that the bulk drugs and pharmaceutical preparation sold by it are drugs liable to tax at 6 per cent under entry 116 of the First Schedule to the Act. The assessing authority did not accept the said contention and assessed the said turnover at 8 per cent as chemicals under entry 42 of the First Schedule. In appeal by the assessee the Appellate Assistant Commissioner accepted the contention of the assessee and directed the assessing authority to assess the turnover at 6 per cent. The department took up the matter in appeal before the Tribunal. The Tribunal set aside the finding of the appellate authority and restored the order of the assessing authority in that regard.

3. Learned counsel for the assessee submitted that the bulk drugs sold by the assessee conforms to the standards laid down by the Indian Pharmacopia, British Pharmacopia or United States Pharmacopia. He also submitted that the assessee, in order to deal with the said commodity, was obliged to take out licence under the Drugs and Cosmetics Act, 1940 and that it is doing the business under a drug licence issued under the said Act. He also submitted that the items dealt with by the assessee satisfies the definition of "drugs" in the said Act. He accordingly submitted that the two items are liable to be assessed only at 6 per cent under entry 116. Learned Special Government Pleader appearing for the Revenue, on the other hand, submitted that the two items dealt with by the assessee are not drugs or medicines since it is not directly applied as such. He further submitted that the said two items are only fine chemicals, which is evident from the fact that the assessee has sold the two items to pharmaceutical companies like K.S.D.F., Vysali, Fyza Drugs, T.C. Pharma, etc. He further submitted that the fact that these two items are dealt with under a drug licence is not decisive in the matter of interpreting the entries in the Sales Tax Act. He submitted that the Tribunal has considered the matter and found that it is only a chemical. He, in support of the above, relied on the decision of the Madras High Court in *Hardcastle, Waud & Co. Ltd. v. State of Tamil Nadu* [1993] 89 STC 352(tn). He accordingly submitted that the Tribunal was fully justified in holding that the two items dealt with by the assessee are only fine chemicals liable to be assessed at 8 per cent under entry 42 of the First Schedule.

4. In order to test the merit of the rival contentions, it is necessary to refer to the relevant entries. Entry 116 of the First Schedule to the Act, as it stood at the relevant time reads as follows :

"Sl. No.

Description of goods

Point of levy

Rate of tax (per cent)

1

2

3

4

116

Medicine

(i) Allopathic medicines

At the point of first sale in the State by a dealer who is liable to tax u/s 5.

6

(ii) Other medicines and drugs including Ayurvedic, Homoeopathic, Sidha and Unani preparations

do.

6

(iii) Ayurvedic herbs

do.

6"

Entry 42 of the said Schedule reads as follows :

"42

Chemicals not elsewhere specified in this Schedule.

At the point of first sale in the State by a dealer who is liable to tax u/s 5.

8"

5. The contention of the assessee is that bulk drugs and pharmaceutical preparations sold by it falls under entry 116 whereas the contention of the Revenue is that they fall, under item 42. Admittedly both the items are having chemical contents and therefore chemicals. It must be noted that all chemicals do not fall under entry 42. Only those chemicals which are not specified elsewhere alone fall under entry 42. If the two items dealt with by the assessee are medicines and/or drugs certainly it will fall under entry 116 and consequently fall outside entry 42, for the special excludes the general. So the question to be considered is as to whether the two items dealt with by the assessee can be treated as medicines and/or drugs. Medicines and drugs, as ordinarily understood are items which are directly applied as drugs or medicines. In the instant case, nobody had addressed the question as to whether the said items are directly applied either on human beings or on animals. Admittedly the turnover of these items are sold to Pharmaceuticals such as K.S.D.P., Vysali, Fyza Drugs, T.C. Pharma, etc. The Tribunal has held that these two items are not medicines for the reason that they are not applied to human beings or to animals as drugs or medicines and that they were sold only to Pharmaceuticals for preparation of drugs and medicines.

6. In this context, it is relevant to note that the assessee is selling these items under a licence issued under the Drugs and Cosmetics Act, 1940. Section 3(b) defines "drug" includes, (i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes ; (ii) such substances (other than food)

intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals as may be specified from time to time by the Central Government by notification in the Official Gazette ; (iii) all substances intended for use as components of a drug including empty gelatin capsules ; and (iv) such device intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board.

7. From a reading of Clause (iii) of Section 3(b) of the said Act, it would appear that even the component of a drug will fall under the definition of drug. In the instant case, admittedly, the two items dealt with by the assessee are components of the drugs. The items are also named as "bulk drugs" and pharmaceutical preparations. This is the finding of the Tribunal on the question :

"It is not disputed that the commodity in question were sold by the appellant in bulk manufacturers in pharmaceutical preparations who used the goods in the manufacture of pharmaceutical preparations and medicines. It goes without saying that the commodity sold by the appellant were not directly used for treatment of any diseases or ailments. At the higher concentration sold by the appellant the chemicals in question cannot be normally used as medicine directly. Buyers in appellant's case are mainly pharmaceutical companies which used the commodity purchased as raw materials for the preparations of medicines. So in the commercial sense the fine chemicals sold by the appellant under the head bulk drugs and pharmaceutical formulations are not medicines. In the common parlance also the chemical sold by the assessee are not known as medicine. The finding of the appellate authority is therefore not correct. I hold that the item sold by the assessee can only be treated as chemicals and not as drugs."

8. The Tribunal has stated that in commercial sense the fine chemicals sold by the assessee under the head "bulk drugs" and "pharmaceutical formulations" are not medicines and that in common parlance also the chemicals sold by the assessee are not known as medicines. It must be noted here that the Tribunal did not have any material before it to take the view that in commercial sense the items are not medicines or in common parlance also they are not known as medicines. It may be that the two items dealt with by the assessee may not be available in all medical shops as medicines. However, the relevant matter to be considered is as to whether these two items are understood by those, who are dealing with them, viz., the trader and the consumer as medicines. No attempt has been made by any of the authorities to find out as to whether these two items are understood by those who are dealing with the said items as a drug or only as a chemical. The Tribunal also did not consider this question bearing in mind the definition of "drugs" in the Drugs and Cosmetics Act, 1940 and the fact that the assessee is dealing in the two items under a licence issued under the said Act. In the above circumstances, we are of the view that the matter must go

back to the Tribunal for consideration of the said question afresh. Accordingly we set aside the order of the Tribunal and remit the matter back to the Tribunal for fresh consideration of this question. It is open to the parties to lead further evidence, if any, in the matter.

The tax revision cases are disposed of as above. But in the circumstances of the case, there will be no order as to costs.