
(1981) 09 AHC CK 0067

In the Allahabad High Court

Case No : Sales Tax Revision No's. 400, 401, 402, and 848 of 1980

Commissioner, Sales Tax

APPELLANT

Vs

Rita Ice Cream

RESPONDENT

Date of Decision : 22-09-1981

Acts Referred:

Citation : (1982) 49 STC 297

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

C.S.P. Singh, J.—These cases have come up on a reference to us made by the Honourable single Judge in view of a conflict of decisions between single Judges in respect of the matter involved in the present revisions. STR Nos. 400, 401 and 402 of 1980 raise the question as to whether ice-cream is entitled to exemption from tax being a milk product, on the strength of notifications issued u/s 4 of the Act, in spite of the notifications issued u/s 3-A from time to time making ice-cream taxable under those notifications. STR No. 848 of 1980 raises the question as to whether lassi is entitled to exemption on the same score.

2. Before we refer to the conflicting decisions of this Court on the two items involved in the revisions, we may refer to the relevant notifications under Sections 4 and 3-A. We propose first to refer to the notifications u/s 4 exempting milk products from tax. The first notification on the subject is Notification No. ST-911/X dated 31st March, 1956. Item No. 10 of this notification is in the following terms :

10. Milk and milk products such as chhena, dahi, khoa, butter and cream but excluding (1) products sold in sealed containers; and (2) sweetmeats.

3. The next notification is ST-3506/X dated 10th May, 1956. This notification amended the earlier entry No. 10 and ran as under :

10. Milk and milk products such as chhena, dahi, khoa, butter and cream but excluding (1) products sold in sealed containers, (2) sweetmeats, and (3) ghee.

4. There was a hiatus of about a decade before the next notification on milk products came. The next notification being Notification No. ST-775/X-900 (16-A)-1964 dated 16th February, 1965, which substituted the existing entries by the following:

Milk and milk products but excluding (1) products sold in sealed containers, (2) sweetmeats, (3) ghee and (4) butter and cream.

5. This notification was followed by two other notifications, one being ST-II-6625 dated 1st December, 1973, and the other being Notification No. ST-II-2686/X dated 21st May, 1974. The notification of 1973 substituted existing entry No. 10 in the notification of 16th February, 1965, by the following :

Milk and milk products but excluding (1) products sold in sealed containers, (2) sweetmeats, (3) ghee and (4) butter, cream and cheese.

6. The notification of 21st May, 1974, again effected a substitution in entry No. 10. The substituted entry as it stood after the amendment effected by the notification of 21st May, 1974, stood :

10. Milk (other than condensed milk, milk powder or baby milk), and milk products excluding (1) products sold in sealed containers, (2) sweetmeats, (3) ghee, and (4) butter, cream and cheese.

7. There is another notification regarding milk products of 30th July, 1981, being Notification No. ST-II-62/X-6(II)-1980 dated 30th July, 1981, which we will refer to after referring to the notification issued u/s 3-A which made ice-cream and lassi taxable under the notification issued under that section.

8. It would be convenient first to refer to Notification No. ST-II-6628/X dated 1st December, 1973, u/s 3-A of the Act. Item No. 17 of this notification, inter alia, made the turnover of ice-cream and lassi liable to tax at all points of sale. Item No. 17 of the notification so far as it is relevant may be extracted :

17. Hot and cold drinks, ice-cream, kulfi, milk shake, lassi, beverages, squashes or sharbat, when served to customers.

9. The next notification regarding ice-cream and lassi is Notification No. ST-II-7768/X dated 4th November, 1974, which only increased the rate of tax on the sale of ice-cream and lassi to customers. Then comes Notification No. ST-II-4949/X dated 30th May, 1975. By this notification ice-cream and lassi were made liable to tax at the point of sale to the consumers, the rate of tax being 3 per cent. The relevant item being item No. 13 of the notification is to the following terms :

13. Hot and cold drinks, ice-cream, kulfi, milk shake, lassi, beverages, squashes or sharbat, when served to customers.

10. As far back as 1971 this Court in the case of Dina Nath Lassiwalla, Bareilly v.

Commissioner of Sales Tax, U.P. 1971 UPTC 131 had held that lassi was a milk product and as such was exempt from sales tax in view of the notification issued u/s 4 of the Act. However, there was no direct decision on the question as to whether ice-cream is a milk product until 1979.

11. It was amply clear from the reasons given in the lassi case (Dina Nath Lassiwalla, Bareilly v. Commissioner of Sales Tax, U.P.) 1971 UPTC 131 that ice-cream was a milk product and as such was exempt from tax, in view of the notifications issued u/s 4 of the Act which have been adverted to earlier. However, in spite of these notifications u/s 4, as referred to earlier, the State Government issued the notifications dated 1st December, 1973, 4th November, 1974, and 30th May, 1975, u/s 3-A of the Act specifically referring to ice-cream and lassi and making them taxable under those notifications. Thus, it will be seen, while on the one hand there were existing notifications u/s 4 of the Act exempting milk products, one such notification being of the 1st December, 1973. On this very date, there was a notification u/s 3-A imposing tax on ice-cream and lassi u/s 3-A. The State Government was merrily issuing notifications u/s 3-A making ice-cream and lassi taxable under that provision. It was an oddity, and it appears that State Government has by subsequent notification dated 30th July, 1981, amended the Notification No. ST-911/X dated 31st March, 1956, as amended from time to time relating to milk products and has excluded from its purview of exemption both ice-cream and lassi, the amendment effected is in the following terms :

In List II of the said notification, for the existing entry against item 10, the following entry shall be substituted, namely :-

10. Milk (other than condensed milk, milk powder, or baby milk) and milk products excluding (1) products sold in sealed containers, (2) sweetmeats, (3) ghee, (4) butter, cream and cheese, (5) ice-cream and ice-candy, (6) kulfi, (7) milk shake and (8) lassi.

12. These incongruous notifications issued under Sections 4 and 3-A invited a rift in judicial opinion which did occur.

13. In the case of Milco Ice Cream Co. v. Commissioner of Sales Tax, U.P. 1979 UPTC 1283 a learned single Judge of the Lucknow Bench held that ice-cream was a milk product and its turnover was exempt from sales tax by virtue of Notification No. ST-775/X dated 16th February, 1965. In the case of Kwaliti Ice Cream Co. v. Sales Tax Officer, New Delhi [1974] 34 STC 396(SC) a similar view was taken.

14. We then come to the year 1980 in which the difference of opinion surfaced, on account of the notification of 1st December, 1973, issued u/s 3-A. In the case of Commissioner of Sales Tax v. Quality Ice Cream Co. (page 301 infra) 1980 ATJ 276 one of us took the view that the notification of 1st December, 1973, superseded all earlier notifications and, as such, ice-cream was taxable under the notification u/s 3-A. On the contrary, Prem Prakash, J., in the case of

Commissioner of Sales Tax v. Dayal Singh Kulfiwala 1980 UPTC 360 held that kulfi and lassi being milk products were exempt from tax, notwithstanding the notification issued u/s 3-A making them taxable under that provision. We feel that in case the State Government had been more alert in realising the repercussions of issuing notifications u/s 3-A, while milk products including ice-cream and lassi were exempt under the notification issued u/s 4, the divergence of opinions which has led to this reference would not have occurred.

15. Now, the question is as to whether the notifications u/s 4 prevail over the notifications issued u/s 3-A. We have already adverted to the notifications issued under both these provisions. It is apparent that while on the one hand Section 3-A brings to tax ice-cream and lassi sold to consumers, the notifications issued u/s 4 grant exemptions to milk products which on judicial interpretations include ice-cream and lassi.

16. Now, an exemption can be granted only in respect of a matter which is liable to tax. If milk products were not liable to tax either u/s 3-A or under any other provision, no question of granting an exemption u/s 4 would at all arise. We are enforced in this view by the decision of the Supreme Court in the case of A.V. Fernandez Vs. The State of Kerala, . On page 574 the difference between provisions relating to exemption and non-liability to tax is spelt out. It would be profitable to quote the relevant passage from the decision of Bhagwati, J.:

There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

17. It would, thus, appear that transactions or sales which enjoy exemptions have to be included in the gross turnover, but they are exempted when the net turnover is calculated. In the present case as there are notifications u/s 4 of the Act, even though ice-cream and lassi have been made taxable u/s 3-A, on account of the notifications issued u/s 4, the turnover of these items could not be included in the net taxable turnover. Thus, the view taken by the revising authority that the sale of ice-cream was not taxable in view of the exemption granted under the notification issued u/s 4 in respect of milk products appears to

be correct. The decision of the revising authority holding that lassi was liable to tax does not appear to be justified on the view that we have taken.

18. We accordingly dismiss S.T.R. Nos. 400, 401 and 402 and allow S.T.R. No. 848 of 1980. The parties will bear their own costs.