(2003) 08 KL CK 0007

In the High Court Of Kerala

Case No : T.R.C. No. 250/97

Deputy Commissioner (Taxes) APPELLANT

Vs

Tips and Toes Cosmetics India Ltd. RESPONDENT

Date of Decision : 22-08-2003

Acts Referred:

Citation : (2003) 08 KL CK 0007

Hon'ble Judges : Kurian Joseph, J;G. Sivarajan, J

Bench : Division Bench

Advocate : Georgekutty Mathew, Govt. Pleader, for the Appellant; S.K. Devi, for the Respondent

Final Decision : Dismissed

Judgement

G. Sivarajan, J.—''Kajal'' a product of Paramount Kumkum Private Limited, Gujarat State--an eye ointment-is an ayurvedic preparation, a drug or a cosmetic is the question raised in this case. A decision is required to be taken for determining the rate of tax on the sales turnover of Kajal. The matter arises under the Kerala General Sales Tax Act, 1963, for short, ''the Act''. State of Kerala is the revision Petitioner. The same Assessee is the Respondent in all the three cases. The assessment years concerned are 1992-93, 1993-94 and 1991-92 respectively. The Respondent Assessee is a dealer in Kajal, a product of Paramount Kumkum Private Limited, Gujarat State. According to the Assessee, Kajal is an ayurvedic preparation falling under Entry 79 of the First Schedule to the Act taxable at the rate of 8 per cent. The assessing authority took the view that Kajal is a cosmetic falling under Entry 127 of the First Schedule taxable at the rate of 20 per cent. This was confirmed by the Deputy Commissioner (Appeals), A.I.T. and S.T., Ernakulam in appeal filed by the Assessee. However, in second appeal filed by the Assessee, the Sales Tax Appellate Tribunal, relying on an order of the Full Bench of the said Tribunal in T.A. No. 156/1985 took the view that Kajal is an ayurvedic preparation falling under Entry 79 of the First Schedule exigible to tax at 8 per cent.

2. Learned Government Pleader appearing for the revision Petitioner submits that the decision of this Court in The Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) Ernakulam v. M.P. Ramachandran (1998) 6 K.T.R. 65 (Ker.), was rendered on the basis of the evidence produced by the Assessee in that case that the item "Ramachandran''s Kannezhuthumachi" is an ointment. The Government Pleader submits that the said decision cannot be applied to the facts of the present case since the Assessee has not produced any evidence to show that Kajal is an ayurvedic preparation other than producing a photocopy of the licence issued to the manufacturer under the Drugs and Cosmetics Act. The Government Pleader further submitted that Kajal is used for beautifying the eyes and therefore, it has to be treated only as a cosmetic. The Government Pleader relied on the decision of the Madhya Pradesh High Court in Commissioner of Sales Tex Vs. Shri Sadhna Aushadhalaya, , and the decision of the West Bengal Taxation Tribunal in Commissioner of Commercial Taxes West Bengal and Anr. v. West Bengal Commercial Taxes Tribunal and Anr. 1989 S.T.C. 355.

3. The learned Counsel appearing for the Assessee on the other hand submitted that the licence issued to the manufacturer of Kajal, namely, Paramount Kumkum Private Limited would clearly show that the said licence was issued for manufacturing of ayurvedic drugs and that one of the items in the list accompanying the licence is Shingar Kajal. The Counsel also submitted that the item Kajal sold by the Assessee is prepared according to the specifications given in ayurvedic texts and its essential ingredients are medical and curative. The Counsel further submitted that it protects from many ailments tending to affect the eyes and that it will come within the meaning of the term ''drugs'' in the Drugs and Cosmetics Act. The Counsel also relied on the decision in Ramachandran''s case (supra). The Counsel further relied on the decision of the Bombay High Court in Commissioner of Sales Tax v. Western India Chemical Co. (1985) 59 S.T.C. 313.

4. We have considered the rival submissions and also perused the orders of the three authorities. The only question as already noted is as to whether the Kajal is an ayurvedic preparation--drug or whether it is a cosmetic. The Tribunal had noted the contentions of the Assessee and had also perused the photocopy of the drug licences issued to the manufacturers of Kajal which showed that Shingar Kajal is an ayurvedic preparation. The Tribunal also relied on its earlier decision in Ramachandran''s case (supra) which has been affirmed by this Court. Of course, this Court in Ramachandran''s case (supra) had upheld the finding of the Tribunal based on the drug licence and the affidavits filed by the three medical practitioners to the effect that they used to prescribe the product of the Assessee for illness of eyes. The Division Bench also noted in the said Judgment that no evidence was adduced on the side of the revenue controverting the case put forward by the Assessee regarding the nature of its products. In the present case also, the Assessee had explained the nature of its product and had also produced the drug licence issued under the Drugs and Cosmetics Act to the manufacturers of Kajal which showed that the Shingar Kajal is an ayurvedic medicine. In this

case also, no evidence has been adduced on the side of the revenue controverting the case put forward by the Assessee regarding the nature of its product. The only case put forward by the Department is that Kajal is used for beautifying the eyes and therefore, it has to be treated as a cosmetic. It is not the mere user of the commodity that matters, for, a particular commodity may be used for multipurposes. How the commodity is understood in common parlance is the decisive test though the user of the commodity is also relevant in certain cases. We find that the Division Bench of the Bombay High Court in Western India Chemical Company''s case (supra) has considered the question as to whether "Jai Kajal" can be treated as a cosmetic falling under Entry 19 of Schedule E of the Bombay Sales Tax Act, 1959. The Court noted that a cosmetic is a preparation which is primarily used for the beautification of the body. The Division Bench on the basis of the evidence available on record ultimately took the view that Jai Kajal is not a cosmetic. It is true that in the present case, the Assessee has not produced any evidence other than a photocopy of the licence issued to the manufacturer of Kajal. The Assessee could have produced certificates from the medical practitioners or such other evidence as has been done in Ramachandran''s case (supra) considered by this Court or in the case of Jai Kajal by the Bombay High Court. We find that the Tribunal has decided the issue that Kajal is an ayurvedic medicine solely on the basis of the averments made by the Assessee and the licence issued under the Drugs and Cosmetics Act. In such a situation, we would have thought of remitting the matter to the Tribunal to afford further opportunity to the Assessee to produce other evidences, but we are not inclined to do so for the reason that the Department has not made any effort to controvert the averments made by the Assessee and in view of the licence issued under the Drugs and Cosmetics Act Following the decision of the Division Bench of this Court in Ramachandran''s case (supra), we hold that the item Kajal dealt with by the Assessee is an ayurvedic medicine liable to tax at the rate applicable under Entry 79 of the First Schedule to the Act.

5. The decision of the Supreme Court in Commissioner of Central Excise Calcutta-IV v. Pandit D.P. Sharma JT 2003 (4) S.C. 353, in a way support the above view of ours. In that case, the question arose under the Excise Act regarding classification of the goods and the question was whether Himtaj Oil manufactured by Respondent was ''Ayurvedic Medicine'' under sub-heading 300330. Though this was accepted by the Assistant Collector in appeal the Commissioner (Appeals) held that there was no evidence to show that common man used the product as a medicine. The Assistant Collector relied on the drugs licence issued by the Drugs Controller, letter issued by the Superintendent of Ayurvedic Department, S.S.I. Certificate obtained by the Respondents for manufacturing ayurvedic oil under a drug licence etc. The Supreme Court observed as follows:

In this case the report of the Range Officer shows that dealers, wholesalers, retailers, customers, chemists and druggist all consider ''Himtaj Oil'' to be an ayurvedic medicament. Apart from that the other material relied upon by the

Assistant Collector (which has been set out hereinabove) also clearly shows that ''Himtaj Oil'' is an ayurvedic medicament.

These Tax Revision Cases are accordingly, dismissed. A copy of this Judgment under the seal of this Court with the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, Ernakulam.

