
(2015) 03 GAU CK 0049

In the Gauhati High Court

Case No : Writ Petition (C) Nos. 3023, 3500, 3599, 4330 and 5622 of 2008

Emami Limited and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 20-03-2015

Acts Referred:

Citation : (2015) 80 VST 249

Hon'ble Judges : K. Sreedhar Rao, A.C.J; Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : Ashok Saraf, Senior Advocate, D. Baruah, N. Hawelia, M.L. Gape, S. Chetia, A. Goyal, M. Khan, O.P. Bhati, M.K. Jain, T.C. Das, R.L. Yadav, K. Yadav, A. Barua, A. Kabra and J. Choudhury, for the Appellant; D. Saikia, Advocates for the Respondent

Judgement

1. Since all these proceedings involve common question of law and facts, we propose to dispose of all these proceedings by a common order. We have heard Dr. A.K. Saraf, learned senior counsel, assisted by Mr. R.L. Yadav learned counsel for the petitioners and also heard Mr. M. Nath, learned standing counsel for the respondents.

2. The facts in W.P. (C) No. 3023 of 2008, in short, are that the petitioner herein, namely, Emami Ltd., is a company incorporated under the provisions of the Companies Act, 1956 (hereinafter referred to as petitioner No. 1) and filed the aforesaid proceeding questioning the order No. CTS-78/2007/137 passed by the Commissioner of Taxes on May 31, 2008 whereby goods, mentioned therein were classified as cosmetics and toilet preparations treating such goods to be goods, not covered under entry 21 of the Fourth Schedule to the Assam Value Added Tax Act, 2003 (in short, "the said Act or the Act of 2003") further holding such goods are liable to be taxed at the rate of 12.5 per cent in terms of entry 1 of the Fifth Schedule to the said Act.

3. Being aggrieved by such classification, the petitioner had approached this court by way of W.P. (C) No. 3023 of 2008 contending that the articles, so

mentioned in the impugned order, being ayurvedic medicines, fall within the purview of entry 21 of the Fourth Schedule to the Act of 2003 and as such, they were to be classified as drugs and medicines and therefore, taxes on such goods are to be collected at four per cent at first point of sale.

4. In support of such contention, it has been contended that the said goods are primarily used as drugs and medicines for preventive and curative purposes. It has also been stated that in common parlance too, such goods are treated as drugs and medicines. When goods are basically used medicines and when in common parlance too, such goods are treated as medicines and drugs, entry 1 of the Fifth Schedule of the said Act cannot be made applicable to those goods to collect tax on such goods at the rate of 12.5 per cent as held by respondent No. 2 in the impugned order.

5. It is also the case of the petitioner that the Explanation to entry 21 of the Fourth Schedule of the Act is designed to exclude goods which are drugs and medicines having characteristics and ingredients of cosmetics and toilet preparations and are also capable of being used as cosmetics and toilet preparations. But then, the said Explanation did not exclude goods which are basically drugs and medicines inasmuch as entry 21 of the Fourth Schedule to the Act of 2003 itself relates to drugs and medicines.

6. In that connection, it has been argued that only for some drugs and medicines capable of being as cosmetics and toilet preparations, it cannot be concluded that such products cease to become drugs and medicines as contemplated under the law since decisive test is what is main use of such products. According to Dr. Saraf, learned senior counsel, the aforesaid articles are basically used for medicinal purpose.

7. In support of such contention, the decision of Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, AIR 2006 SC 1561 : (2006) 196 ELT 3 : (2006) 3 JT 354 : (2006) 3 SCALE 141 : (2006) 3 SCC 266 : (2006) 145 STC 200 : (2006) AIRSCW 1384 : (2006) 2 Supreme 554 as well as the decision of V.C. Ramalingam and Sons and Vicco Products (Bombay) Ltd. Vs. The State of Tamil Nadu, (2002) 127 STC 382 were relied on.

8. It has also been contended that percentage of medicinal components in such drugs and medicines is immaterial. The fact that percentage of medicament in a product is less does not ipso facto mean that the product is not medicament. In support of such contention, the decision of the apex court in the case of Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works, AIR 2003 SC 2448 : (2003) 87 ECC 233 : (2003) 154 ELT 328 : (2003) 4 SCALE 437 : (2003) 5 SCC 60 : (2003) 3 SCR 1027 : (2003) 132 STC 251 : (2003) AIRSCW 2464 : (2003) 3 Supreme 634 is relied on.

9. On the other hand, Mr. M. Nath, learned standing counsel for the Tax Department/State respondent submits that by applying two tests, recognised under the law, namely, users test and common parlance test to the items in the

impugned order one would find that the goods in question are not drugs and medicines as contemplated under the law. The fact that those articles are capable of being used as cosmetics and toilet preparations, make such a conclusion inevitable. In support of such contention, the decision in *C.C.E. v. Richardson Hindustan Ltd.* [2004] 9 SCC 156, is relied on. Therefore, the claim of petitioner No. 1 that tax on the items in question are to be collected at four per cent is found to be without any substance . . . argues Standing counsel for the Tax Department.

10. In W.P. (C) No. 3599 of 2008, the petitioners are GD Pharmaceuticals Pvt. Ltd., and its Director, Sri Ambika Prassanna Basu (hereinafter collectively referred to as petitioner No. 2) had questioned the order No. CTS 78/2007/147 passed by the Commissioner of Tax on June 3, 2008 whereby product "Boroline" manufactured by the petitioners-company had been classified as cosmetic falling outside the scope of entry 21 of the Fourth Schedule of the Act of 2003 and is, therefore, liable to be taxed at 12.5 per cent in terms of entry 1 of the Fifth Schedule to the said Act.

11. In W.P. (C) No. 5622 of 2008, the petitioners are M/s. Sharma Ayurvedic Pvt. Ltd., (a Pvt. Ltd. Co.) Ms. M.P. Agencies (a partnership-firm), Ms. Champalal Bhanwarlal (a partnership-firm), (hereinafter collectively referred to as petitioner No. 3) had also questioned the order dated July 3, 2008 passed by the Commissioner of Tax whereby product cool "Banphool Oil" manufactured by the petitioners-company has been classified as cosmetic and as such, fall outside the scope of entry 21 of the Fourth Schedule of the Act of 2003 and is, therefore, liable to be taxed at 12.5 per cent in terms of entry 1 of the Fifth Schedule to the said Act.

12. In W.P. (C) No. 4330 of 2008, the petitioners are Assam Chemical and Pharmaceuticals Pvt. Ltd. and its officer (hereinafter collectively referred to as the petitioner No. 4) questioned the order No. CTS 78/2007/146 passed by the Commissioner of Tax on July 3, 2008 whereby product "Aspoline" manufactured by the petitioners-company had been classified as cosmetic falling outside the scope of entry 21 of the Fourth Schedule to the Act of 2003 and as such, liable to be taxed at 12.5 per cent in terms of entry 1 of Fifth Schedule of the said Act.

13. In W.P. (C) No. 3500 of 2008, the petitioner is Shalimar Chemical Works Pvt. Ltd., (hereinafter referred to as petitioner No. 5), questioned the order dated December 1, 2008, clarification dated May 31, 2008 and July 3, 2007, passed by the Commissioner of Tax whereby product "Navaratna Ayurvedic oil" manufactured by the petitioner-company had been classified as cosmetic falling outside the scope of entry 21 of the Fourth Schedule of the Act of 2003 and as such, is liable to be taxed at 12.5 per cent in terms of entry 1 of the Fifth Schedule to the said Act.

14. Dr. Saraf, learned senior counsel in all those proceeding being a counsel for the petitioners, advanced arguments, similar to the arguments in W.P. (C) No.

3023 of 2008 to contend that the products in all those proceedings cannot be assessed at 12.5 per cent in terms of entry No. 1 of the Fifth Schedule to the Act of 2003. Rather, tax on such goods were to be collected at four per cent in terms of entry 21 of the Fourth Schedule to the Act of 2003 (the goods involved in all those proceedings would be hereinafter referred to as impugned goods.) Being so, the impugned order, letter and clarification in so far they relate to the impugned goods are liable to be quashed and set aside.

15. Such contention was resisted by Mr. M. Nath, contending that Commissioner of Taxes had committed no wrong whatsoever in applying provisions of entry 1 of the Fifth Schedule to the Act so as to collect tax on those goods at 12.5 per cent in terms of entry No. 1 of the Fifth Schedule to the Act of 2003.

16. Before addressing competing arguments, we find it necessary to have a look at the provisions of entry No. 21 of the Fourth Schedule as well as entry No. 1 to the Fifth Schedule of the Act of 2003. For ready reference those provisions are reproduced below:

17. In that connection, we also find it necessary to have a look at the decisions, rendered by the apex court of the country in the case of Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, AIR 2006 SC 1561 : (2006) 196 ELT 3 : (2006) 3 JT 354 : (2006) 3 SCALE 141 : (2006) 3 SCC 266 : (2006) 145 STC 200 : (2006) AIRSCW 1384 : (2006) 2 Supreme 554 . It may be stated that Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, AIR 2006 SC 1561 : (2006) 196 ELT 3 : (2006) 3 JT 354 : (2006) 3 SCALE 141 : (2006) 3 SCC 266 : (2006) 145 STC 200 : (2006) AIRSCW 1384 : (2006) 2 Supreme 554 , was a manufacturer of ayurvedic products. It had licence to manufacture those and other products from the Drugs Controllers under the Drugs and Cosmetics Act. A question had arose whether its products were classifiable under the Central Excise Tariff Act, 1985 as cosmetics under Chapter 33 or as medicaments under section 30 thereof.

18. Relying on the opinion of Directorate of Ayurveda and some other evidence including the licence granted by the Drugs Controller, the Collector of Appeals decided in favour of the aforesaid company. However, CEGAT reversed the decision for which the appellant preferred an appeal before the apex court of the country which is decided in favour of the company in the following manner (pages 208 and 209 in 145 STC):

"19. The word "medicament" is not defined anywhere while the word "cosmetic" is defined in the Drugs and Cosmetics Act, 1940 as under:

"3A. Cosmetic means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic"

20. It will be seen from the above definition of "cosmetic" that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty. Whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. To illustrate, a particular ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness.

21. The extent or the quantity of medicament used in a particular product will also not be a relevant factor. Normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. The medical ingredients are mixed with what is in the trade parlance called fillers or vehicles in order to make the medicament useful. To illustrate an example of Vicks Vaporub is given in which 98 per cent is said to be paraffin wax, while the medicinal part, i.e., menthol is only two per cent. Vicks Vaporub has been held to be medicament by this court in *Collector of Central Excise v. Richardson Hindustan Ltd.* [2004] 9 SCC 156. Therefore, the fact that the use of medicinal element in a product was minimal does not detract from it being classified as a medicament."

19. Similar decision has been rendered in the case of *Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works*, AIR 2003 SC 2448 : (2003) 87 ECC 233 : (2003) 154 ELT 328 : (2003) 4 SCALE 437 : (2003) 5 SCC 60 : (2003) 3 SCR 1027 : (2003) 132 STC 251 : (2003) AIRSCW 2464 : (2003) 3 Supreme 634 as well as *V.C. Ramalingam and Sons and Vicco Products (Bombay) Ltd. Vs. The State of Tamil Nadu*, (2002) 127 STC 382 .

20. On reading of above entry No. 21 alongside the decisions, referred to above, it would appear clear that drugs and medicines clearly falls within the purview of entry 21 of the Fourth Schedule to the Act of 2003 and as such, taxable at four per cent on MRP basis. The Explanation which was added to the aforesaid entry No. 21 by notification dated July 29, 2005 states that expression "drugs and medicines" should not include products capable of being used as cosmetic and toilet preparation including toothpaste, tooth powder, cosmetic and toilet articles and soaps.

21. The said Explanation, however, lays emphasis on the term "shall not include" and the same is designed to exclude the goods which are primarily cosmetic in use but have a subsidiary use as drugs and medicines. However, when some goods which are drugs and medicines in their primary use but have cosmetic use as well cannot be treated as product covered by entry 1 of the Fifth Schedule.

22. We have also found that when a product in common parlance and on user perception is found to be a drug, the same needs to be concluded as drug although it can be used in ancillary measure as cosmetic product as well. The decisions referred to above make such position clear.

23. Coming back to our case, we have found that products which are involved in the proceedings before us are basically treated as drugs and medicines although they have ancillary use as cosmetics and toilet products, and as such, the respondent-authorities herein were not right in treating those articles as cosmetics and toilet products for the purpose of levy of tax at 12.5 per cent in terms of entry No. 1 of the Fifth Schedule to the Act of 2003. Rather, tax on those products was to be levied at per cent in terms of entry No. 21 of the Fourth Schedule to the aforesaid Act.

24. In the result, the notification/letters/orders classification in so far they relate to the impugned goods, so specified in the writ petitions aforesaid are hereby quashed and set aside. Interim order passed earlier is made absolute.