
(2007) 03 PAT CK 0076
In the Patna High Court
Case No : C.W.J.C. No. 9739 of 2006

Jain Industries

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-03-2007

Acts Referred:

Citation : (2007) 03 PAT CK 0076

Judgement

1. Heard Mr. N.L. Rastogi, learned Senior Advocate appearing for the petitioner and Mr. Purnendu Singh, JC. to the Advocate General representing the State.

2. The question that falls for consideration in this case is whether Lal Dant Manjan produced for sale by the petitioner would qualify as medicine or it is a toiletry under Entry No. 45 of Schedule III to the Bihar Value Added Tax Act.

3. It may be stated here that drugs and medicines are liable to tax under the Act @ 4% whereas an article of toiletry at the much higher rate of 12.5%. In the assessment order for the assessment period 2005-06 the Assistant Commissioner, Commercial Taxes has taken the petitioner's product, namely, Lal Dant Manjan as an article of toiletry and has subjected the petitioner's gross turn over to tax @ 12.5%.

4. On behalf of the petitioner it is contended that Lal Dant Manjan is an Ayurvedic medicine and the revenue authority was in error in holding that it was an article of toiletry and not a medicine.

5. Before proceeding further it will be useful to take a look at Entry No. 45 under Schedule III to the Act. It reads as follows:

45. Drugs and medicines, whether patent or proprietary, including vaccines, disposable hypodermic syringes, hypodermic needles, catguts, sutures, surgical dressing, medicated ointments produced under the license issued under the Drugs and Cosmetics Act, 1940 but excluding any cosmetics, perfumery, toiletry and hair oil, whether or not such cosmetics, perfumery, toiletry and hair oil is manufactured under any Drug License and whether or not such cosmetics,

perfumery, toiletry and hair oil contains any medicinal properties.

(emphasis added)

6. The petitioner's contention that Lal Dant Manjan is an Ayurvedic medicine is sought to be supported on the basis of the following materials. First, the petitioner has produced a manufacturing licence obtained by it under the Drugs & Cosmetics Act for production of Jain Dant Manjan and Special Jain Lal Dant Manjan, the ingredients of which are enumerated in the licence. A copy of the licence is at Annexure 1. Secondly it is pointed out that Section 3A of the Drugs and Cosmetics Act that defines Ayurvedic medicines refers to a work called Ayurvedic Sar-Sangrah. The relevant extract from Ayurvedic Sar-Sangrah is produced before the court that contains a description of Dant Manjan Lal with substantially the same ingredients as enumerated in the drugs licence taken out by the petitioner under the Drugs & Cosmetics Act. The third and final material relied upon by the petitioner is a certificate issued by one Dr. S.S. Mishra, B.Sc., MU, B.A.M.S. (B.U.). In the certificate it is stated that Jain Dant Lal Manjan produced by the petitioner contained ingredients that were described in the Ayurvedic book Sar Sangrah. It is further stated that for hundreds of years the Senior Vaid of the doctor's family gave it to patients with remarkable result. Apart from dental problems it also cured any oral diseases. On the basis of the aforesaid materials Mr. Rastogi, learned Senior Advocate appearing for the petitioner submitted that the petitioner's product was indisputably an Ayurvedic medicine and the revenue authority had wrongly classified it as an article of toiletry for levying tax at the much higher rate.

7. In support of his submission Mr. Rastogi relied upon a Supreme court decision in B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara, . In this decision the article under consideration was a shampoo called "Selsun" and the question was whether it would qualify as a medicine or it was an article of cosmetics. The Supreme court held and found that "Selsun" was a medicinal preparation and not cosmetics.

8. Mr. Rastogi also relied upon two decisions of different High courts. One is of the Karnataka High Court in United Trading Agency v. Addl. Commissioner of Commercial Taxes, Zone II, Bangalore 104 STC 182. In this case S. Rajendra Babu (as His lordship then was) speaking for the court held that Vicco products; tooth paste, tooth powder and cream were medicinal and pharmaceutical preparations within the meaning of the relevant entries in the Schedule to the Karnataka Sales Tax Act. The other decision is of Orissa High Court in Dabur India Limited v. Commissioner of Sales Tax, Orissa and Ors. 104 STC 198. In this decision A. Pasayat, J (as His Lordship then was) speaking for the court held that Lal Dant Manjan was a drug within the meaning of Orissa Sales Tax Act read with Entry No. 37 of the notification, dated 30.6.1990.

9. The Supreme court decision in B.P.L. Pharmaceuticals Ltd. (supra) undoubtedly lays down some general guide-lines for identifying an article for

determining its place in the proper tariff entry but it dealt with an article quite different than the petitioner's product. The Orissa decision being more direct in that it examined the nature of Lal Dant Manjan under the Orissa Sales Tax Act appears to be more helpful to the petitioner.

10. But Mr. Purnendu Singh, counsel appearing for the State invited our attention to another decision of the Supreme court in *Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur*, . In this decision a three Judges bench of the apex court affirmed the order passed by the CEGAT holding that Dant Manjan Lal manufactured by the appellant companies did not fall within the meaning of an Ayurvedic medicine to qualify for exemption from payment of excise duty under notification, dated 1.3.1978. The decision noted the relevant part of the notification which was as follows:

all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified.

11. Approving the decision of the CEGAT, the Supreme court, in para 3 of the judgment, held as follows:

3. We have heard the learned Counsel at some length. He also invited our attention to the provisions of the Drugs and Cosmetics Act, 1940, the opinion of the experts, the statements of a few consumers as well as the description given in certain Ayurvedic books and contended that the preparation would fall within the relevant entry in the exemption notification. The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance. That is why the Tribunal observed in para 86 of the judgment as under:

So certificates and affidavits given by the Vaidyas do not advance the case of Shri Baidyanath Ayurved Bhawan Limited in the absence of any evidence on record to show and prove that the common man who uses this Dant Manjan daily to clean his teeth considers this Dant Manjan as a medicine and not a toilet requisite.

It is this line of reason with which we are in agreement. The Tribunal rejected the claim of the appellant holding that ordinarily a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes. We are, therefore, of the opinion that the Tribunal applied the correct principles in concluding that the product in question was not a medicinal preparation ("Ayurvedic") and, therefore, the appellant was not entitled to the benefit of the exemption

notification. Having heard the learned Counsel at length and having perused the line of reasoning adopted by the Tribunal with which we are in general agreement, we see no reason to interfere with the conclusion reached by the Tribunal and, therefore, we dismiss these appeals, but make no order as to costs.

12. Mr. Rastogi fairly admitted that the Supreme court decision in Shree Baidyanath and Dabur went a long way to support the case of the revenue. But he submitted that a later Supreme court decision which also noticed the decision in Shree Baidyanath and Dabur provided some support to the case of the petitioner before us. He relied upon Dabur India Limited Vs. Commissioner of Central Excise, Jamshedpur, . In this case the article under consideration was Lal Tel and not any Manjan or tooth powder. It appears that earlier the Excise authorities treated Lal Tel as a medicinal preparation but after the decision in Shree Biadyanath and Dabur they changed their mind and took the view that Lal Tel was not a medicinal preparation and it fell outside the exemption notification. The latter decision in Dabur India Limited held that the revenue authorities were not entirely correct in their interpretation of the earlier decision in Shree Baidyanath and Dabur. It further held that the mere decision of a court of law without more would not be justification enough for changing the classification without a change in the nature of a product or a change in the use of the product, or a fresh interpretation of the tariff heading by such decision. Mr. Rastogi primarily relied upon para 9 of the decision which is reproduced below:

9. From the abovementioned authorities, it is clear that in classifying a product the scientific and technical meaning is not to be resorted to. The product must be classifiable according to the popular meaning attached to it by those using the product. As stated above, in this case the appellants have shown that all the ingredients in the product are those which are mentioned in Ayurvedic textbooks.

This by itself may not be sufficient but the appellants have shown that they have a Drug Controller's licence for the product and they have also produced evidence by way of prescriptions of Ayurvedic doctors, who have prescribed these for treatment of rickets. As against this, the Revenue has not made any effort and not produced any evidence that in common parlance the product is not understood as a medicament.

13. From the passage quoted above, it would be evident that it supports the petitioner only partly. In this decision too the Supreme court has reiterated the well settled position that in classifying a product the scientific and technical meaning is not to be resorted to. The product must be classified according to the popular meaning attached to it by those using the product.

14. Mr. Rastogi, however, submitted that the three materials relied upon by the petitioner were the same on the basis of which Lal Tel was held to be a medicament. But learned Counsel over looks that in the relevant entry under the Bihar VAT Act it is expressly said that an item of toiletry would not qualify as drug or medicine because it was manufactured under any drug licence and it

contained any medicinal properties. The decision in Dabur India Ltd. (supra) is, therefore, quite distinguishable and does not apply to the present case.

15. In light of the discussions made above and on a careful consideration of the entire materials we are of the opinion that the decision of the Supreme Court that is closest to the facts of the case in hand is the judgment in Shree Baidyanath Ayurved Bhavan Ltd. and Dabur (Dr. S.K. Burman) Pvt. Ltd. and Anr. (supra) and it is that decision that is to be taken as the binding precedent for this case. Relying upon that decision we find and hold that Lal Dant Manjan produced by the petitioner is not a drug or a medicinal product and it was rightly taken by the revenue authority as an article of toiletry.

16. We, therefore, find no merit in this case. It is dismissed but with no other as to costs.