(2013) 08 MP CK 0214

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1198 of 2004

Marico Industries Ltd. APPELLANT

Vs

State of M.P. and Others RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Citation : (2013) ILR (MP) 2625 : (2013) 66 VST 446

Hon'ble Judges : S.R. Waghmare, J;P.K. Jaiswal, J

Bench : Division Bench

Advocate : H.Y. Mehta, for the Appellant; Mini Ravindran, Deputy Government Advocate, for the Respondent

Judgement

S.R. Waghmare, J.—By this writ petition under articles 226 and 227 of the Constitution of India, the petitioner Marico Industries Ltd., has challenged the order dated January 5, 2004 passed by the Additional Commissioner, Commercial Tax, in Revision Case No. 80/03/Ind/Entry Tax. Brief facts giving rise to the petition are that the petitioner is a manufacturer of hair oil, edible oil, Mediker, starch and other products for sale in M.P. and is the registered dealer under the M.P. Commercial Tax Act, 1994 (Originally M.P.G. Sales Tax Act), and being a dealer is liable to be assessed under the M.P. Entry Tax Act, 1976 (hereinafter called "the E.T. Act") for brevity. The assessment years for the E.T. Act for the products "Mediker" and "starch" in the petition pertains to period April 1, 1999 to March 31, 2000 and for the same relevant period under the Commercial Tax Act, 1994 (hereinafter called "the C.T. Act" for brevity), "Mediker" was an item chargeable (including surcharge) at 6.9 per cent up to December 1999 and at 9.2 per cent from January 2000 onwards, under the item "drugs and medicine" under Schedule II, Part VII. However, if the product is treated as shampoo, i.e., toilet or cosmetics then it is chargeable at 13.08 per cent and counsel urged that such a classification is not all attracted in the present case, since "Mediker" is an anti-lice treatment product.

2. Secondly, "starch" although chargeable under the C.T. Act is not a "chemical".

As per the counsel for the petitioner, chemical is a separate entry under the E.T. Act and starch is not included in Schedule I or Schedule II under the Act.

3. Counsel for the petitioner contented that the petitioner has regularly filed return from time to time under both the Acts and paid the taxes as required and it is also not in dispute that the petitioner is a "dealer" liable to pay tax u/s 3(1)(a) of the E.T. Act only if the goods so brought in are items shown in Schedule I or II of the Act. However under the Schedules I and II of the E.T. Act "medicine and drugs" and "starch" are not mentioned and these products are brought from outside Madhya Pradesh but they are not for sale and also since they do not find mention in the Schedules they do not attract the provisions of the E.T. Act. Hence, the petitioner filed an application for exemption. It was vehemently contended by the counsel for the petitioner also that "Mediker" is the medicine and drug in Commercial Tax Act and "starch" as such is "starch" and not a chemical. In the assessment proceedings by respondent No. 3, Assistant Commercial Tax Officer agreed with the contention of the counsel for the petitioner. However, the contention was not acceptable under the Entry Tax Act and vide annexure P/2 respondent No. 3 has wrongly disallowed the claim for exemption under the E.T. Act. Being aggrieved by the order the petitioner had also filed revision before respondent No. 2, Additional Commissioner, Commercial Tax and respondent No. 2 upheld the order of respondent No. 3 vide annexure P/1. Respondent No. 2, however, treated Mediker as item of "drugs and medicine" chargeable at 6.9 per cent up to December 1999 and at 9.2 per cent for ''starch" as "starch" and not as chemical under the Commercial Tax Act vide annexure P/5 and being aggrieved the petitioner has filed the present petition.

4. The main contention of the counsel for the petitioner is that it is still the question whether the "Mediker" is to be classified under an item "drugs and medicine" under the M.P. Commercial Tax Act also and "starch" is not to be treated as the chemical under the E.T. Act. Counsel stated that once it was accepted in the main case of the Commercial Tax Act that Mediker was under the entry lice medicine although used as shampoo for washing hair it could not be purely treated as shampoo. Moreover under the Commercial Tax Act it would have been assessed at 13.8 per cent instead if at 6.9 per cent or at 9.2 per cent as held by the Commercial Tax Officer. Counsel prayed that the impugned order, annexure P/1 and annexure P/2, including the demand notice be quashed or set aside. To bolster his submissions counsel relied on the matter of 1990 (25) ECC 461 to state that in the said matter, the Collector (Appeals), held that we further observe that the medicinal use of the product is not its subsidiary function but is the only function. Therefore, the classification of the product under 33.05 is ruled out. Since we have already held that the product is classifiable as medicament under 30.03 by virtue of note 1(c) to Chapter 38 the product cannot be classified under Chapter 38. (paras 16, 17, 20 and 21). Counsel relied in the matter of The State of Tamil Nadu Vs. M.K. Kandaswami and Others, to state that whether under the charging section the goods purchased are "goods for sale or purchase" of which is liable to tax under this Act has to be decided first, i.e., the touch

stone is the charging section; and by exclusion or implication; goods, the sale and purchase of which it may be totally exempted from has to be considered in this light.

5. More or less the same principle is enunciated in the matter of Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . Further counsel relied on The Commissioner of Income Tax, Bombay Vs. The Elphinstone Spinning and Weaving Mills Ltd., to state that if the words of a taxing statute fail, then so must the tax. The courts cannot, except rarely and in clear cases, help the draftsmen by a favourable construction. Counsel submitted that an item Mediker was not mentioned any of the Schedules and if we look to the charging section in the tax, i.e., it fails and if the taxing statute fails, then so must the tax. Counsel also relied on the matter of Commissioner of Central Excise, Pondicherry Vs. ACER India Ltd., . Counsel submitted that the apex court has held in the charging section, language according to its natural meaning has to fairly and squarely hit the classification, and is to be considered. They cannot tax by implication; the liability must fall within ambit by clear words. Counsel relied on Grasim Industries Ltd. Vs. Collector of Customs, Bombay, to state that when classification included specified "and the other items" but they do not refer to items of the same genus then the principle of ejusdem generis is not applicable, i.e., words must be enumerated in the statute or words must follow the genus term and the Legislature intent has also to be considered.

6. In the present case counsel submitted that Mediker contains an active ingredient permethrin which is used to paralyse the insect lice, thereby killing it and although it is used in the form of shampoo; it is not purchased for washing hair generally. Besides Mediker is one of the ingredient used in a shampoo and counsel submitted that the genus has to be considered and expressions "other" and "and the like" "other" could not be equated to the words "similarly" as laid down in Grasim Industries Ltd. Vs. Collector of Customs, Bombay, . Counsel submitted that the apex court held in the matter of Tata Sky Ltd. Vs. State of M.P. and Others, that it is well-settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute and submitted that the E.T. Act could not apply beyond verge of the charging section.

7. Counsel for the petitioner submitted that starch as well as Mediker has already been considered as being exempted for the E.T. Act by the Assistant Commercial Tax Officer in the case of the petitioner himself in the subsequent years 2000-01, 2001-02, 2002-03 and 2003-04 and in this light also the two articles are not under the purview of the Schedule II and do not attract the E.T. Act liability as held by the courts below.

8. Per contra, counsel for the respondents/State has fully supported the orders and the judgments of the lower courts and stated that they are based proper classification of the articles stating that the "Mediker" was properly used as shampoo, which is classified under the E.T. Act, Schedule II as "cosmetic" and

was liable to tax. And stating that "starch" has been duly classified by the authority under the head of chemical along with the articles colour fix. Besides the petitioner failed to produce any evidence in the courts below regarding the said articles being otherwise and hence no fault can be found by the classification as accepted by lower courts. Counsel submitted that in the impugned order annexure P/3 in the case of 1989 (19) ECC 306 stated that the evidence laid before the Collector included that publication "manufacture of beauty products" (pages 110 to 112, SBP) and argued that antibacterial and anti-dandruff shampoos were considered as shampoos only. Counsel prayed that the petition was without merit and the same be dismissed as such.

9. Having bestowed of our anxious consideration to the above submissions and to the record and the impugned orders, we find that "Mediker" and "starch" admittedly having not been classified under the Entry Tax Act nor is it covered under Schedules I and II of the said Act. Then undoubtedly the charging section is to be taken into consideration and requires to be interpreted. The apex court held already directed that the goods may be charged under the charging section by exclusion or implication and in the present case it has to be considered on the touch stone of the charging section by implication. "Mediker" is basically a medicinal product but is used as shampoo, however, its period of treatment is four weeks and the shampoo is not used generally for washing hair and, therefore, the principle of ejusdem generis is not applicable (Grasim Industries Ltd. Vs. Collector of Customs, Bombay, relied on) and in this sense, it is not the cosmetic and, therefore, both respondents Nos. 2 and 3, Additional Commissioner of Commercial Taxes and Assistant Commercial Tax Officer have erred in charging Mediker and starch under the Entry Tax Act. Moreover it is also out of the purview Schedule III cannot be taxed since both "Mediker" as well as "starch" are used in the production of further products and not meant for sale as is being projected. In this view of the matter, we find that the interpretation of the charging section by implication also must be followed in the strict sense, if the article is not taxable goods under the statute then the provisions of the Entry Tax Act cannot be attracted. The Writ Petition No. 1198 of 2004 is, therefore, allowed and orders of both the courts below impugned, annexure P/1 and annexure P/2, along with the demand notice are hereby quashed. Counsels fees, if certified.

