

(2014) 03 DEL CK 0076

In the Delhi High Court

Case No : St. Application 5 of 2014

M/s. KBB Nuts Pvt. Ltd.

APPELLANT

Vs

Commissioner of Value Added Tax

RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:

Delhi Value Added Tax Act, 2004 — Section 2(f) 2(ra) 84

Citation : (2014) 209 DLT 676 : (2014) 44 GST 808

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Rajesh Jain, Sh. P.C. Aggarwal and Sh. Virag Tiwari, for the Appellant; Raj. K. Batra, for the Respondent

Judgement

S. Ravindra Bhat, J.—This is an appeal against the order of the learned Member of the Appellate Tribunal, VAT Delhi dated 27.1.2014. The question of law for determination is whether Roasted Dry Fruits come under entry No. 81 of Schedule III of DVAT Act, 2004. The appellant is a registered dealer which trades in various commodities. It contended that roasted dry fruits sold by it had to be classified under entry No. 81 of Schedule III of Delhi Value Added Tax Act 2004 ("DVAT") and preferred an application for such determination u/s 84. The revenue took the position that there is no separate or independent entry for dry fruits in the Act but it has been included as an illustration of kirana items, which were day-to-day necessity items sold by conventional retail stores, for kitchen use as food ingredients and household purposes. It was also further argued that like any other nuts, dry fruits when roasted or fried and after adding salt, become snacks/namkeen. Consequently, roasted and fried dry fruits are not kirana items. The appellant dealer had contended that only ararote is the illustration of a kirana item (in entry 81) and rest of the items including dry fruits are independent items. It also argued that if the article retains its essential character upon some processing, it has to be taxed as such article only and the processing would make no difference. The physical state or even the composition may change but so long as the essential character of the article continues to

remain the same it has to be taken as that commodity itself.

2. The Commissioner, VAT in his determination u/s 84, rejected the dealer's submission, inter alia, reasoning that:

6.....In this case, it is perhaps relevant to refer to a similar entry of the article "Fried and Roasted Grams" at Sl. No. 31, Schedule III of the DVAT Act making it taxable @ 5%. The same article when taken in raw form as "pulses", then it is an exempted article/commodity falling at entry No. 46 of Schedule I of the DVAT Act. The said reference makes amply clear the intent of the legislature, that distinguishes an article from its raw form to its slight changed form brought in by way of processing-frying or roasting.

The specific entry for the article/commodity "Fried and Roasted Dry Fruits " does not find place in any of the Schedule appended to the DVAT Act. If the legislature had the similar intent, they would have clearly specified "Fried and Roasted Dry Fruits" as separate entry in the appropriate schedule. As they have not done so, it clearly means that they had no intent to do so. Therefore "Fried and Roasted Dry Fruits", a distinguishable article from the item "Dry Fruits" will be taken as an unspecified item.

I am therefore of the considered view that the "Roasted Dry Fruits" are not covered by entry No. 81 of Schedule III of Delhi Value Added Tax Act, 2004 or any other entry of any other schedule appended to the said Act and hence is an unspecified item taxable at the rate of 12.50%.

3. The dealer/appellant felt aggrieved by the Commissioner's determination and approached the VAT Tribunal, which, through its impugned order, held that there was no infirmity with the Commissioner's determination and that the goods were classifiable in the residuary entry, not as "kirana".

4. Entry no. 81 of the IIIrd Schedule to the DVAT Act reads as follows:

Kirana items namely ararote, singhara, kuttu & their atta, Kala namak, sendha namak, heeng, aam papar, mushrum khumba and guchchi goley ka burada, til, rai, postdana, mungfali dana, sabudana, roli, mehendi patti, pisi mehendi, dry fruits.

Appellant's contentions

5. It is argued on behalf of the appellant that the tax authorities and the Tribunal committed a fundamental error in overlooking the fact that dry fruits were included in the description of "kirana" and had to be treated as such, as long as their basic and essential characteristic remained the same. Roasting and salting did not constitute a process as could be termed as "manufacture" because there was no transformation of the goods or articles. Learned counsel relied on the decision of the Constitution Bench of the Supreme Court in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, to emphasize that neither roasting nor salting, nor the subjecting of dry fruits to both processes

results in the creation of a new article or commodity and the essential characteristic of the dry fruits remain the same. Likewise, reliance was placed on Commissioner of Sales Tax Vs. Bombay Traders, -a case where it was held that "7.....fried and salted cashew nuts sold by the assesseees could not be said to be a new or different commercial commodity from the plain cashew-nuts, which had been purchased by the assesseees...".

6. It was argued that the mere processing of an article or commodity for the purposes of packaging etc. would not amount to "manufacture" as to result in that article's transformation. Reliance was placed on Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, V where it was held that:

5....it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity...

7. It was submitted that the roasting or salting in no manner undermined the essential nature of the products, which could still be used for cooking, even though they could be used as snacks. Learned counsel submitted that even without undergoing roasting or salting, dry fruits were used as snacks. In these circumstances, submitted counsel, the Tribunal fell into error in rejecting the dealer/Appellant's contentions.

8. Mr. Raj Batra, counsel for the revenue, argues that the approach and order of the Tribunal does not call for interference. Stressing upon the definition of the expression "manufacture" u/s 2(ra) of the Delhi VAT Act, it was argued that all manner of processing falls within that expression. It was argued, therefore, that roasting or salting of dry fruits results in a change of the article as well as its use. It was argued that whether a process amounts to manufacture or not depends upon the meaning and intent of the statute in question, rather than the common parlance or common understanding of the term. Learned counsel relied on the decisions reported as Commissioner of Customs and Central Excise, Goa Vs. Phil Corporation Ltd., which was followed in SKB Dryfruits Marketing Co. Pvt. Ltd. Vs. Commissioner of Central Excise, New Delhi,

9. The Tribunal rejected the appellant/dealers contentions, inter alia, holding that:

11. The logic assigned by the Ld. Commissioner while passing the determination order which is assailed on the basis of commercial purpose of the goods with a further contention of taking into, consideration the common parlance theory that cashew nut does not cease to be cashew nut after roasting and salting and in roasting and salting no manufacturing process is involved as held by their

Lordship in case of Commissioner of Sales Tax Vs. Bombay Traders (Supra). This Tribunal is of the view that considering the limited scope and the logic assigned by the Ld. Commissioner while, passing the impugned order the submissions as above by Ld. Counsel for the appellant seems to be misplaced as in case of Bombay Traders their Lordship was basically confronted with the manufacturing process of the cashew nuts so as to decide the reference u/s 61(1) of the Bombay Sales Tax Act 1959. The particular entry was not in question in the cited case. As already discussed neither the determination is excessive use of jurisdiction by the respondent nor a case of determination in an arbitrary or illegal manner. Rather determination as sought by the appellant from the Ld. Commissioner has to be answered with a logic so as to visualize the intention of the legislature when he referred to a different entry for fried and roasted grams in Schedule III as entry 31 in addition to entry 46 of Schedule I in respect of the same article i.e., grams. In the present case the legislature has not been deemed it fit to place fried and roasted cashew nuts in a different entry then the entry no. 81 of III Schedule with regard to kirana item including "dry fruits". This Tribunal is of the considered view that there is no fault in the findings by Ld. Commissioner while passing "the impugned orders" with the observations that had similar intention was there of the legislature, they would have clearly specified fried and roasted dry fruits as separate entry in the appropriate schedule which they had not done so and hence "fried and roasted dry fruit" is an distinguished from the item "dry fruit" to be taken as an unspecified item. The respondent has further justified and within his jurisdiction to determine the reference that the "Roasted Dry Fruits" are not covered by Entry No. 81 of Schedule III of Delhi Value Added Tax Act, 2004 or any other entry of any other schedule appended to the said Act and hence an unspecified item taxable at the rate of 12.50%. Before parting it with the subject matter of the appeal, it is made clear that findings in the appeal by this Tribunal are restricted to the determination order only.

10. The revenue's argument that roasted and salted dry fruits are not covered in the entry "kirana" is premised on its submission that they undergo some process, which has been deemed to be manufacture, u/s 2(ra). On this aspect, this Court notices the following observations of the Supreme Court in Union of India (UOI) Vs. Delhi Cloth and General Mills,

14. the word "manufactureis generally understood to mean as bringing into existence a new substance" and does not mean merely "to produce some change in a substance.

"Manufacture " implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive name, character or use.

11. The Constitution Bench, in Tungabhadra (supra) dealt with facts where the assessee purchased groundnuts from which it manufactured groundnut oil; it

also refined the oil and hydrogenated it converting it into Vanaspati and sold the oil in three states. Under the Madras General Sales Tax Act, 1939 and the Rules, to determine "taxable turnover" the appellant was entitled to deduct the purchase price of groundnuts from the proceeds of the sale of all groundnut oil. The High Court held that the deduction in respect of sales of unrefined and refined groundnut oil was admissible but not in respect of the sales of hydrogenated oil as Vanaspati was not "groundnut oil" but a product of groundnut oil. Disagreeing with the High Court's conclusions, the Supreme Court held that:

19. The question that has still to be answered is whether hydrogenated oil continues even after the change to be "groundnut oil". If it is, it would be entitled to the benefit of the deduction from the turnover, or to put it slightly differently, the benefit of, the deduction from the turnover cannot be denied, unless the hydrogenated groundnut oil has ceased to be "groundnut oil ". To be groundnut oil, two conditions have to be satisfied. The oil in question must be from groundnut and secondly the commodity must be "oil " That the hydrogenated oil sold by the appellants was out of groundnut not being in dispute, the only point is whether it continues to be oil even after hydrogenation. Oil is a chemical compound of glycerine with fatty acids or rather a glyceride of a mixture of fatty acids-principally oleic, linoleic, stearic and palmitic, the proportion of the particular fat varying in the case of the oil from different oil-seeds and it remains a glyceride of fatty acids even after the hardening process, though the relative proportion of the different types of fatty acids undergoes a slight change. In its essential nature therefore no change has occurred and it remains an oil a glyceride of fatty acids-that it was when it issued out of the press.

20. In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in the oil. The addition of the hydrogen atoms was effected in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable thus improving its quality and utility. But neither mere absorption of other matter, nor inter-molecular changes necessarily affect the identity of a substance as ordinarily understood. Thus for instance there are absorptions of matter and inter-molecular changes which deteriorate the quality or utility of the oil and it might be interesting to see if such additions and alterations could be taken to render it any the less "oil". Groundnut oil when it issues out of the expeller normally contains a large proportion of unsaturated fatty acids-oleic and linoleic-which with other fatty acids which are saturated are in combination with glycerine to form the glyceride which is oil. The unsaturated fatty acids are unstable, i.e., they are subject to oxidative changes. When raw oil is exposed to air particularly if humid and warm, i.e., in a climate such as obtains in Madras, oxygen from the atmosphere is gradually absorbed by the unsaturated acid to form an unstable peroxide (in other words the change involves the addition of two atoms of oxygen) which in its turn decomposes breaking up into aldehydes. It is this

oxidative change and particularly the conversion into aldehydes that is believed to be responsible for the sharp unpleasant odour, and the characteristic taste of rancid oil. If nothing were done to retard the process the rancidity may increase to such extent as to render it unfit for human consumption. The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil.

21. Both the Tribunal as well as the High Court have pointed out that except for its keeping quality without rancidity and ease of packing and transport without leakage, hydrogenated oil serves the same purpose as a cooking medium and has identical food value as refined groundnut oil. There is no use to which the groundnut oil can be put for which the hydrogenated oil could not be used, nor is there any use to which the hydrogenated oil could be put for which the raw oil could not be used. Similarly we consider that hydrogenated oil still continues to be "groundnut oil" notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desire to consume groundnut oil. In our opinion the assessee-company was entitled to the benefit of the deduction of the purchase price of the kernel-or groundnut, under r. 18(2), which went into the manufacture of the hydrogenated groundnut oil from the sale turnover of such oil.

12. What is meant by "process" was considered in a later decision of the Supreme Court in *Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan*, , in the following words:

14. The natural meaning of the word "process" is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject-matter in order to transform or reduce it to a certain stage. According to Oxford Dictionary one of the meanings of the word "process" is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result." The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to its conversion to some particular stages There is nothing in the natural meanings of the word "process" to exclude its application to handling. There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture.

13. Pertinently, in a later decision, *Collector, Central Excise, Bombay Vs. S.D.*

Fine Chemicals Pvt. Ltd., the Court held that:

13, As has been repeatedly observed by the Court, though the principles enunciated are clear, it is their application that presents difficulties and it does not help to draw "any sharp or intrinsic distinction between "processing" and "manufacture", "which would only result in an oversimplification of both and tends to blur their interdependence in cases such as the present one, (Ujagar Prints). It would also be not right, as pointed out in Ujagar Prints to try to restrict the sweep of the definition with reference to Entry 84 List-I of the seventh Schedule to the Constitution. Since the constitutionality of the said definition has been repeatedly upheld with reference to both Entries 84 and 97 of List-I (Empire Industries and Ujagar Prints), the definition must be understood in terms it is couched. It should also be remembered that the question whether a particular process does or does not amount to "manufacture" as defined u/s 2(f) is always a question of fact to be determined in the facts of a given case applying the principles enunciated by this Court. One of the main tests evolved by this Court is whether on account of the processes employed or applied by the assessee, the commodity so obtained is no longer regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes.

14. The rulings and the views expressed in these decisions show that if an article undergoes some modicum of transformation pursuant to a process, then alone would it be said that a manufacturing activity takes place. Conversely, if the essential characteristic or nature of the article does not change, notwithstanding the use of some process, there is no manufacture. If that test-and a constant one-is applied, it can be seen that the process of roasting or salting does not change the quality or essential nature of the article-its use is the same, i.e. as a dry fruit. It is even described as "dry fruits". That roasted and salted dry fruits can be used as snacks does not detract from their function as dry fruits; some can even continue to be used as cooking ingredients. Therefore, the Court is of the opinion that the article did not undergo any manufacturing process as to transform from the description of "dry fruits" under Entry 81.

15. There is yet another aspect of the matter. The Tribunal had rejected the dealer's argument that Entry 31 (of Schedule III) is indicative of the legislature's consciousness about the process of roasting, etc. and that if it intended that such process was to be excluded from the entry pertaining to dry fruits, it could have expressly said so. Entry 31 specifically stated "fried grams" during the period 10.04.2005 to 10.05.2005. It was subsequently amended with effect from 11-05-2005 to read "Fried and roasted grams "This no doubt suggests that the legislature was aware about the process of roasting and could have provided for it. However, that aspect by itself cannot be conclusive; what is important in the given circumstances is whether the process of salting or roasting changed or transformed dry fruits into something else. In this context, the Court recollects the dicta of the Supreme Court in Dunlop India Ltd. and

Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others, that:

37.When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.....

Here, dry fruits-unprocessed salted or roasted-have equal claim to be classified as kirana items under Entry 81 of Schedule III to the Act. Roasting or salting does not result in the creation of a new article, or a significantly altered one as to amount to "manufacture". Consequently it would be inappropriate to relegate them to the orphanage of the residuary item. The goods are, therefore, held to be classifiable under Entry 81 of the third schedule to the DVAT Act. The question is therefore, answered in favour of the assessee and against the revenue. The appeal is consequently allowed, but without any order as to costs.